

2008

MARITIME LAW

Teaching Material

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HAILEGABRIEL GEDECHO FEYISSA

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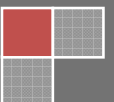


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INTRODUCTION

Maritime law is a distinct body of law that governs private shipping activities. It covers almost the whole of modern shipping law, including ownership and registration of ships, maritime mortgage and maritime liens, maritime employment, shipowner's limitation of liability, carriage of goods by sea (including carriage of goods by multimodal transport system), marine insurance, general average, collision and salvage. These, of course, would be studied in light of Ethiopian maritime legislations. Apart from the 1960 Maritime Code of Ethiopia, recently enacted relevant legislations will be considered. Included are the Multimodal Transport of Goods Proclamation and the Maritime Affairs Administration Proclamation. Wherever appropriate, international maritime conventions would also be considered.

The course is organized into five chapters. Chapter One – the introductory chapter deals with, among other things, the continued importance of Ethiopian maritime legislations. In the second chapter nationality, registration and ownership of ships under Ethiopian laws are dealt together with the rights in rem in the ship. Maritime labour law and shipowner's limitation of liability are studied in chapter three. In the fourth chapter Ethiopian laws on carriage of goods by both unimodal (sea) and multimodal transport are treated. Chapter Five deals with marine insurance and related matters i.e., salvage, general average and marine collisions.

Upon the completion of this course, students are expected to:

- appreciate the relevance of maritime legislation for land-locked shipping countries like Ethiopia,
- understand the nature and scope of maritime law
- comprehend contractual as well as non-contractual principles involved in maritime law
- develop skills needed to solve problems involving maritime matters,
- recognize the universal aspects of laws on international shipping,

- know recent developments in the area of maritime commerce and, in turn, in maritime law.
- develop the required competence in making out rules and their exceptions for the various maritime problems, etc.

CHAPTER ONE

INTRODUCTION TO MARITIME LAW

This chapter deals with (1) the historical development of maritime law, (2) the definition, scope, and nature of maritime law, and (3) the continued importance of Ethiopia's maritime legislations.

At the end of the unit, students should be able to:

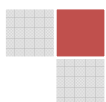
- identify the historical importance of maritime law
- define maritime law and understand its nature
- explain the significance of studying Ethiopia's maritime laws

1.1 DEFINITION, SCOPE, AND CHARACTERISTICS OF MARITIME LAW

Glimore and Black, in their *the Law of Admiralty*, define maritime law as "a corpus of rules, concepts and legal practices governing certain centrally important concerns of the business of carrying goods and passengers by water". On the other hand, William Tetley's *Glossary of Maritime Terms* describes maritime law as "a complete system of law, both public and private, substantive and procedural, national and international". The famous legal dictionary – *Black's Law Dictionary*, in its part, defines maritime law as "the body of law governing marine commerce and navigation, the carriage of persons and property, and marine affairs in general; the rules governing contract, tort and workers' compensation claims or relating to commerce on or over water".

The definitions given above, though comprehensive, are not necessarily inclusive of all matters dealt under this specific area of law. While Tetley's definition emphasises how broad maritime law can be, the two other definitions concentrate on the central aspects of the law. A rather simpler but broad definition of maritime law would be: the branch of jurisprudence that governs *ships and shipping*. As the law of ships, it regulates the nationality, ownership and registration of vessels. As the law of shipping, it governs the relationship between private entities which operate vessels on the oceans. In other words, it governs maritime questions such as sea carriage, contract of affreightment, marine insurance, maritime lien and the like. It is distinguished from another etymologically identical area of law – the *law of the sea*. The law of the sea is a

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branch of public international law which aims to regulate the relationship between states in respect of those areas of the sea and seabed subject to coastal state jurisdiction and beyond. Whereas, maritime law/admiralty law is a body of private law that govern the legal relationships arising from the transportation of passengers and cargoes on the high seas and other navigable waters. The principal parties affected by maritime law are the crew, the shipowner, the cargo owner, the charterer and the marine insurer. Generally, maritime law could be understood as a body of domestic law governing the relationships between parties engaged in maritime commerce.

In most jurisdictions, maritime law applies to seawater only. Shipping activities in interior waterways are usually governed by a separate set of rules. There are, however, some countries that extend the scope of their maritime law to shipping activities in interior water bodies. In Scandinavian countries, for example, maritime law applies to shipping activities in all water bodies, including lakes, rivers, and canals.

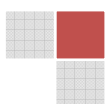
The scope of application of our Maritime Code is, like in most of the shipping nations, limited to shipping activities on seawaters only. These could be inferred from the general framework of the Code, particularly the preface. In the Preface to the 1960 Maritime Code of Ethiopia, it is stated that the codification of the Code was felt imperative with *the return of Ethiopia's ancient sea coast on the Red Sea and the subsequent expansion of Ethiopia's maritime power*.

The definition given to "ships" is also of some help in determining the scope of our Maritime Code. For the purpose of this Code, provides Art. 1, "a ship is ...any seagoing vessel..." This definition is not inclusive of any other watercraft used as a means of transportation in any other water body. Thus, our Maritime Code is not the pertinent legislation that governs shipping activities of non-seagoing vessels.

Legislative provisions, other than that of the Maritime Code, are also indicative of this fact. For example, Art.563 of the Commercial Code excludes carriage of goods/persons in inland waterways from the ambit of carriage by sea, which is the concern of the Maritime Code (See Art.565 of Com.Code).

From the foregoing discussion it is clear that maritime law is a domestic private law that, in most cases, aims to regulate shipping activities on seas. Though each

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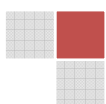
nation's maritime legislations have their own distinct features, the following remarks could be made on maritime laws in general:

1. International Nature

Although regulated to a large extent by national legislation, maritime law in almost all jurisdictions is clearly shaped by international influences, in particular international conventions. This is due to the fact that shipping by its very nature involves international relations. The ocean-going vessels flying the flag of a state operate in all waters throughout the world and sail from country to country. Vessels often are supplied and repaired in foreign ports. Cargo may be damaged or lost while at sea in the course of an international voyage or in a foreign port, and likewise seamen may be injured on the high seas or in the waters of foreign countries. Such background facilitated the development of common international usage and practice since antiquity. The common universal usage and practices were subsequently adopted by national laws. Maritime law is thus a specialized domestic law that cannot avoid international influences. This may in part be the reason why judges and lawyers who deal with maritime law consider themselves as specialists with an international background.

2. Comprehensiveness

The second important characteristic of maritime law is its breadth. Maritime law is a complete legal system, just as the civil law and the common law are complete legal systems. Maritime law, incidentally, is much older than the common law and probably contemporaneous with the advent of the civil law. That maritime law is a complete legal system can be readily seen from its component parts. As noted by William Tetley, maritime law has had its own law of contract-- of sale (of ships), of service (towage), of lease (chartering), of carriage (of goods by sea), of insurance (marine insurance being the precursor of insurance ashore), of agency (ship chandlers), of pledge (bottomry and respondentia), of hire (of masters and seamen), of compensation for sickness and personal injury (maintenance and cure) and risk distribution (general average). It is and has been a national and an international law (probably the first private international law). It also has had its own public law and public international law. Maritime law has and has had, as well, its own courts and procedures from earliest times.



As will be seen in due time, maritime law seeks to regulate personal and property relationships as well as contractual and tortious relationships. The comprehensiveness of the law can also be seen in its administrative and few criminal provisions. In short, maritime law is a comprehensive system of law concerning maritime matters – both public and private, with the later forming the major part.

3. Special Legal Jargons

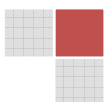
The study of maritime law usually employs the use of complex jargons which, in most cases, are alien to other areas of law. Understanding the subject matter without first knowing such shipping terms may often be difficult. The presence of different jargons peculiar to this area of law may well be attributable to its unique development. Early maritime law –the basis of modern maritime law –is distinguishable from the development of other areas of law. Though first developed in continental Europe, the law relating to shipping was, in origin, based on customs only- “custom and usage of the sea” .(See the next section for details)

Though the forthcoming discussions reveal many of these special jergons, we may tentatively note some of them here: charterparty, maritime lien, general average, and salvage.

Charterparty: A charterparty is a contract of lease of a ship in whole or in part for a long or short period of time or for a particular voyage (William Tetley’s *Glossary of Maritime Law Terms*, 2nd Ed., 2004).

Maritime lien: A secured claim against a ship (and sometimes against cargo or bunkers) in respect of services provided to the vessel or damages done by it (*Glossary of Maritime Law Terms*, 2nd Ed., 2004).

General average: The monetary contribution required of shipowners and cargo owners (or their respective insurers) in respect of general average expenditures and general average sacrifices. Cargo's claim for general average contributions against the ship is secured by either a maritime lein or a statutory right *in rem* depending on the jurisdiction concerned (*Glossary of Maritime Law Terms*, 2nd Ed., 2004).



Salvage: Rendering assistance to ships at distress. Rules awarding such assistance have long been prescribed in various maritime nations.

Review Questions 1

1. What is maritime law? Are there different conceptions of maritime law?
2. How do you explain the comprehensiveness of maritime law?
3. What factors contributed to the development of unique legal jargons in maritime law?
4. Is Ethiopia's Maritime Code applicable to carriage of goods on Lake Tana? Why?
5. State the possible reasons for the existence of international influence on domestic maritime laws.

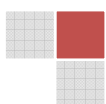
1.2 HISTORICAL DEVELOPMENT OF MARITIME LAW

Transportation of goods and passengers by water is one of the most ancient channels of commerce on record. This mode of transportation was and still is indispensable for international trade since ships are capable of carrying bulky goods which otherwise would not be carried. Rules governing relationships among participants of sea-transport have also been known since c.1st millennium BC.

Ancient maritime rules derived from the customs of the early Egyptians, Phoenicians and the Greeks who carried an extensive commerce in the Mediterranean Sea. The earliest maritime code is credited to the island of Rhodes which is said to have influenced Roman law. It is generally accepted that the earliest maritime laws were the Rhodian Sea Laws, which have been claimed to date from 900 B.C., but which more likely appeared in the form recognized today during the period from 500 to 300 B.C. These laws were recognized in the Mediterranean world as a method of providing predictable treatment of merchants and their vessels. The complexity and attention to detail found in the Rhodian Sea Laws demonstrated the sophistication of commerce and trade of Ancient Greece – a world of commerce, the center of which, Rhodes, was in a position to dictate terms for trade.

Although the decline of Greece and the rise of the Roman Empire did alter the influence of the Rhodian Sea Law, a uniform code based on the Rhodian Law

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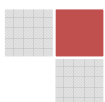
remained and was recognized as essential to peaceful and profitable Mediterranean trade: the Mediterranean Sea was for more than one thousand years [300 B.C. to 1200 A.D.] only ruled by the Rhodian Law, although augmented with some additions by the Romans. Thus, the Digest of Justinian, dated 533 A.D., states the following regarding any controversy arising in the Mediterranean Sea: "This matter must be decided by the maritime law of the Rhodians, provided that no law of ours is opposed to it."

These laws which derived their essential elements from Rhodian customs were afterwards leveled up by Romans. There was a great enlargement of the application of the principles of the Roman law in the revival of commerce consequent upon the growth of the Italian republics and the great free cities of the Rhine and the Baltic Sea. Special tribunals were set up in the Mediterranean port towns to judge disputes arising among seafarers. This activity eventually led to the recording of individual judgments and the codification of customary rules by which courts become bound. Three noted codes of maritime law –whose principles were found in the Roman law, were formulated in Europe during the three centuries between A.D. 1000 and A.D. 1300. One, *Libre del Consolat de mar of Barcellona* was adopted by the cities on the Mediterranean; the second, the *Laws of Oleron* prevailed in France and England; and the third, *Laws of Wisby* governed the great free cities of the Hanseatic League on the Baltic.

The oldest of these codes was *Consolato del Mare*, or Regulation of the Sea, prepared at Barcelona. It was a compilation of comprehensive rules for all maritime subjects. It, for example, dealt with ownership of vessels, the duties and responsibilities of the masters or captains thereof, duties of seamen and their wages, freight, salvage, jettison, average contribution, and the like. *Libre del Consolat de mar of Barcellona* and the *Tablets of Amalfi*, one prepared at the famous of Italian seaports, enjoyed authority far beyond the ports where they were promulgated. In essence, until the rise of modern nations, maritime law did not derive its force from territorial sovereigns but represented what was already conceived to be the customary law of the sea.

Eventually, as commerce from the Mediterranean moved northward and westward, sea codes developed in northern European ports. Among the important medieval sea codes were the *Laws of Wisby* (a Baltic port), the *Laws of Hansa Towns* (a Germanic league), and the *Laws of Oleron* (a French island). The *Consolato del Mare* was inspirational in the preparation of these later codes. In

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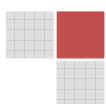
particular, the *Laws of Oleron*, the second great code of maritime regulation, was inspired by the *Consolato del Mare*. These three codes are called the three arches upon which rests modern admiralty structure.

As could be understood from the discussion above, the earliest developments relating to maritime law occurred in areas belonging to what is now known as the Continental legal tradition. These developments contributed to the early admiralty law of England –the origin of the common law legal tradition and one of the major maritime states with rich tradition in shipping. The European admiralty doctrines were carried to the USA –another important shipping nation – through the English system of admiralty law, which initially was inspired by what have been termed the three arches of modern admiralty law –the *Laws of Wisby*, the *Laws of Hansa Towns*, and the *Laws of Oleron*.

Contemporary maritime law is a mixture of ancient doctrines and new at laws both national and international. Among the traditional principles of admiralty still in use are marine insurance, general average and salvage. The welfare of the seaman, the ancient concept of "maintenance and cure" are also still in use today. The main reason for the continuous use of ancient principles of law is the unchanging nature of basic hazards of seafaring. Since at least the end of the 19th century, however, naval architecture and cargo handling have changed in significant ways. The extensive use of crude oil carriers as well as carriers of liquefied natural gas has, for example, posed new hazards and questions of liability for oil pollution and damage to the marine ecology and the shorelines. As a result of this, modern maritime law consists of laws that are of historic origin and of recent development. Note also that not all of the original principles of maritime law still apply.

The earliest known maritime laws were uniform. According to one historian, the great value of the rules which had been developed for maritime trade lay in the fact that they had been "found by practice to be suitable to the needs of a community which knows no national boundaries –the international community of seafarers." This historical uniformity of early maritime laws declined with the growth of nationalism. However, maritime transactions have always been international in nature which most of the time involve individuals from different jurisdictions. International shipping is "a complex business, and its activities are conducted in a manner that often implicates the interest of several countries." The complex international aspect of the transaction, on the one hand, and the fact that maritime law is national (than international), on the other, present different

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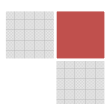
problems. The difference in domestic maritime legislations may, for example, make the outcome of the “international” transaction unpredictable to participants. Moreover, jurisdictional, choice-of-law, and *forum non conveniens* issues would be there.

Making the rules of maritime law universally uniform, once again understood, would alleviate most of the problems related to unpredictability and *conflict of laws*. This understanding has led to the revival in the nineteenth century of the ancient tendency to make rules relating to maritime transaction uniform globally. This effort was first started at the instigation of lawyers and commercial men such as those who founded the Comité Maritime International (CMI) and the national maritime law associations; and continues to grow under the aegis of the Intergovernmental Maritime Organization (IMO) and other United Nations affiliated organizations with the cooperation of experts in the private sector.

Founded in 1897, the International Maritime Committee or CMI initiated uniformity among national maritime legislations of member countries. Among the conventions drafted by CMI were the Hague Rules (International Convention on Bill of Lading), and the Visby Amendments (amending the Hague Rules), the Salvage Convention and many others. Since 1958, many of CMI’s functions have been taken by the *International Maritime Organization* of the UNO. This organization has also continued the move towards uniform maritime laws. Many states adhered to this rules either by incorporation of the provisions in domestic laws or by implication of treaty obligations. Thus, now, we can speak of the relative uniformity of national maritime laws of different shipping states which may not be matched by the degree of uniformity attained in some other areas of law. The degree of harmonisation so far attained is not, however, satisfactory in so far as some areas are concerned. For example, there still exists differences in assessment of maritime claims.

The history of maritime law in Ethiopia had not been clear until the enactment of the 1960 Maritime Code. Though Ethiopia’s maritime history dates as far back as the times of Axum, a parallel development of the laws relating to maritime trade was absent. It is only since 1960’s that Ethiopia witnessed a development of a comprehensive maritime legislation coupled with the resurgence of shipping trade after the establishment of the Ethiopian Shipping Lines SC (ESLSC). The 1960 Maritime Code is still the most important piece of legislation in the area.

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The legislative history of the code, along with its continued relevance, is further dealt under 1.3. (See below).

Review Questions 2

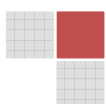
1. What is the oldest maritime “code” in record?
2. What distinguishes the development of maritime law from other areas of law?
3. What circumstances did lead to the decline of uniform maritime laws?
4. Which codes of the medieval Europe are said to be the pillars of modern maritime law?
5. Why is uniformity sought among national maritime laws?
6. Which maritime code of medieval Europe was inspirational in the preparation of subsequent maritime codes of the same period?
7. Which codes are considered, in England, as the three arches of modern admiralty law?

1.3. ETHIOPIA’S MARITIME LEGISLATIONS: A LOOK AT THEIR CONTINUED RELEVANCE

The relevance of maritime law to land-locked countries like Ethiopia has frequently been misunderstood. Some think the Maritime Code of 1960 is no more important since Ethiopia became a country without sea ports in the early 1990s. The myth underlying this misconception is that land-locked countries could not possibly engage in maritime transaction of any sort. A highlight on some core principles of the *law of the sea* –a branch of public international law –is crucial to understand that it is still legally possible for landlocked states to engage in sea trade. The most serious limitation has been economic incapacity, not legal incapacity as such.

As a matter of principle of international law, every nation has *freedom of the high seas* (a bundle of freedoms including freedom of navigation, freedom of overflight, fishing, scientific research and freedom to construct artificial islands, lay submarine cables, and pipelines). Apparently, these freedoms are not limited to coastal states. Land-locked states like ours are equally entitled to these freedoms. The question is how could land-locked states, which are not in principle precluded from the enjoyment of rights pertaining to the use of sea and

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sea resources, practically benefit from the universally recognized freedoms without access to outlets?

Traditionally, states without access (SWA) have endeavored to obtain the right of free access to the sea in order to practically enjoy freedom of the high seas and most importantly to participate in international trade. With this aim, many multilateral and bilateral agreements have been signed guaranteeing the right of transit of SWA through neighboring territories. There are many documents of public and private international law which guarantee access rights to landlocked states. Such documents include the United Nations Convention on the Law of the Sea (UNCLOS III), of 1982 (entered into force in 1994). UNCLOS grants right of access of landlocked countries to and from the sea and the freedom of transit. Article 3 of UNCLOS, for example, provides as follows:

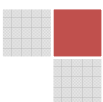
Article 3

1. In order to enjoy the freedom of the seas on equal terms with coastal States, States having no seacoast should have free access to the sea. To this end States situated between the sea and a State having no seacoast shall by common agreement with the latter and in conformity with existing international conventions accord:
 - (a) To the state having no seacoast, on a basis of reciprocity, free transit through their territory and
 - (b) To ships flying the flag of that state treatment equal to that accorded to their own ships, or to the ship of any other states, as regards access to seaports and the use of such ports.

In addition, the 1965 United Nations Convention on the Transit Trade of Land-Locked Countries and the General Agreement on Tariffs and Trade (in its Article V) and African Maritime Transport Charter of 1993, to which Ethiopia is a party, recognize the right of free access to the sea for landlocked Member States with, however, the proviso that they comply with the laws and regulations of the transit States.

Such international conventions have little effect on those nations that would have to grant the rights sought, i.e., transit right. As a result, the problem of access to sea has usually been solved through bilateral treaties between the individual nations concerned. Incidentally, it is also advisable for states without access to maintain smooth relations with neighbors over whose territory its goods must traverse.

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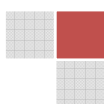
As far as sea access to Ethiopian ships is concerned, Ethiopia has concluded *Port Utilization Agreement* with Djibouti and Sudan. Since road transport plays a significant role in the transit transport, Ethiopia has also concluded *Road Transport Agreements* with the above-mentioned neighboring states. However, currently Ethiopia mainly uses the Port of Djibouti.

Agreement on Port Utilization and the Transit of Goods towards Ethiopia, signed in April 2002, and subsequently ratified by both Ethiopian and Djiboutian parliaments, is based on the major United Nations conventions and the principles of free sea access (and transit) to the sea for landlocked countries. The agreement covers the various aspects of transit transport: port entry, customs, documentation, land transport, security along the corridor, facilities maintenance, approval procedures for public and private operators of both states that use the corridor, etc.

Djibouti International Autonomous Port (PAID) handles millions of tonnes annually, well over 50 per cent on behalf of Ethiopia. Since Djibouti does not have a merchant fleet, the PAID gives priority to berthing ships transporting goods to Ethiopia. Since 2000, the Ethiopian customs has had an office within the port of Djibouti in order to carry out formalities for goods in transit to Ethiopia. In addition, more favourable terms, for length of storage and rates, are granted to Ethiopians for operations in the port of Djibouti. Ethiopian Shipping Lines, the only national flag carrier established in 1964, has had a monopoly of transport of goods coming from or going to Ethiopia. For goods in transit to Ethiopia (an average of 100,000 containers each year), over 70 per cent of handling is carried out by the Maritime Transit Services Enterprise (MTSE). As to the road transport –connecting Ethiopia’s inland to the Port of Djibouti –it is almost all undertaken by Ethiopian operators. Some 100,000 vehicles use the corridor from the port of Djibouti to Ethiopia annually since Ethiopia’s traffic moved from Eritrea to Djibouti in 1998.

The major piece of Ethiopia’s maritime legislation is the 1960 Maritime Code. With 371 articles, the code deals with many aspects of maritime affairs including contract of carriage under (1) charterparty and (2) bill of lading, maritime labour law, nationality and registration of ships, limitation of liability, marine insurance, general average, collisions, salvage and assistance, and also ship mortgage and maritime lien. The material sources of the law, according to Tsehai Wada, is “less known.” But, he remarks that the Code is substantially drawn from international

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conventions of maritime importance. Another writer, however, is of the opinion that the code is inspired by Continental (Civil Law) sources. In his article *the Civil Law and Common Law Influences on the Developing Law of Ethiopia*, J. Vanderlinden incidentally mentions the following: "The Commercial and Maritime Codes were drafted by ...French Professors, Professor Escarra, and after his death, Professor Jauffret. They [the codes] are representative of the most recent developments in French commercial legal thought." Despite divergent views, one can safely argue that the Maritime Code's provisions bear similarity, in many instances, with the provisions of the then prominent conventions, including the Hague Rules on Bill of Lading of 1924, and hence, the later are the likely major material sources of the former.

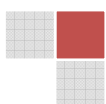
In sum, the unavailability of a seaport – though the most evident disadvantage for inland countries – has not completely dissuaded landlocked nations from taking to the sea. This is particularly the case with Ethiopia. Though landlocked, Ethiopia continues to own ships and engage in international maritime commerce. Hence, it is not odd for land-locked states to legislate a body of law concerning ships flying their flag and transactions involving them. Undeniably, however, there is some decline in importance of some of the provisions of our maritime legislation, particularly those provisions which assume the existence of sea port. None the less, this area of law has still a major role to play in the landlocked state owning merchant ships and handling 90 per cent of its import-export trade through sea transport.

In the forthcoming chapter, principles of maritime law relating to nationality, registration, and ownership of ships are studied. As could be noted from the discussions in this chapter, this aspect of maritime law is what makes maritime law *the law of ships*.

Review Questions 3

1. What are the international legal regimes enabling landlocked states to engage in international maritime trade?
2. Does the absence of sea coast persuade states not to engage in maritime trade and subsequently not to enact maritime laws?
3. Do you think principles of maritime legislation in landlocked countries differ, in a way, from that of coastal states? Why?
- 4.

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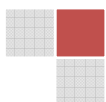


SUMMARY

Maritime law is a body of private international law governing relationships between individuals involved in shipping. Rules governing relationships among participants of sea-transport have also been known since c.1st millennium BC. It is generally accepted that the earliest laws of maritime jurisdiction were the Rhodian Sea Laws, which have been claimed to date from 900 B.C. The Mediterranean Sea was for above one thousand years only ruled by the Rhodian Law, although augmented with some additions by the Romans.

Eventually, three noted codes of maritime law –whose principles were found in the Roman law, were formulated in Europe. These three codes- the *Laws of Wisby*, the *Laws of Hansa Towns*, and the *Laws of Oleron* – termed the three arches of modern admiralty law.

Maritime law – characterized by universal principles, comprehensiveness, and unique legal jargons – is a domestic law that is equally important to landlocked shipping countries like Ethiopia. Ethiopia, though a landlocked, has along maritime tradition. It did not stop taking to the sea even after becoming an inland state in the 1990s. Though there is some decline in importance of some of the provisions of its maritime legislations, its continued importance is still justified since Ethiopia owns ships engaged in international maritime trade. Moreover, more than 90% of Ethiopia's foreign trade benefit from sea transport. Thus, maritime law which governs the relationship between participants of this mode of transport is indispensable for a country whose foreign trade is almost entirely dependant on sea transport.



CHAPTER TWO

NATIONALITY, REGISTRATION AND OWNERSHIP OF SHIPS UNDER ETHIOPIAN LAW

This chapter discusses, the issue of nationality and registration of vessels/ships at the end of the chapter, students are expected to understand/develop:

- tell importance of nationality of ships;
- Identify the different international and national requirements for owning an Ethiopian ships;
- describe the legal effects of nationality and absence of nationality;
- describe the registration and enforcement of rights in rem relating to the ship;
- Identify the skills to apply the different rules studied to practical situations.

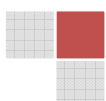
2.1 OWNERSHIP AND NATIONALITY OF SHIPS

A ship is a special movable property (Art.3, Mar. Code) with peculiar features. The right of ownership of a ship is equivalent to ownership of movable goods (chattels) of a *special* character. Accordingly, delivery of a ship is not necessary, as it is of other goods or chattels, in order to pass ownership to the purchaser (see Arts.45 ff. of the Maritime Code).

Ships need to have nationality. This distinguishes them from other special moveable properties. One may ask why ships need to be registered. Christopher Hill, in his *Maritime Law*, gives the following reasons why ships, unlike other movable things, are subjected to the requirement of nationality. Excerpts:

Hill C., 1985, Maritime Law, 2nd ed., London: Lloyd's of London Press Ltd, pp. 6-7.

Ships...being large and valuable asset, are regrettably unique, and can disappear from one side of the world to another, escaping jurisdictions. Also, they are potentially the means by which their owners can incur liabilities to third parties –sometimes of catastrophic proportions. It is, therefore, logical that ships should be given a nationality so



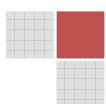
that their owner's obligations, duties, rights, liabilities, immunities, etc., can the more easily be regulated and recognized.

The term 'nationality' describes *the legal relationship between a state and a ship authorized by the state to fly its flag*. In other words, the nationality of a ship refers to the state which has authority and responsibility over the ship as symbolized in the flying of a national flag. The ascription of nationality to a ship is one of the most important means by which public order is maintained at sea.

States usually grant their nationality to vessels by means of registration and by authorizing vessels to fly their flag. Though each nation has the right to confer its nationality on a ship and to prescribe the rules governing such grants, international law has developed certain limitations. One of such limitations is the principle of "genuine link". The principle of genuine link prohibits states from granting nationality to ships lacking "genuine link" to the state. The elements of genuine link vary among nations, but often include: ownership by nationals, national officers, national crew, and national built.

Though international instruments like the United Convention on the Law of the Sea – UNCLOS (Art.91) –mention the requirement of genuine link, it remains uncertain what the consequences are if there is no genuine link between a vessel and the State whose nationality it purports to bear. According to a widely held view, the role of the principle of "genuine link", as incorporated under UNCLOS, is to impose upon every State the obligation and the responsibility to exert effective jurisdiction, so that ships flying its flag comply with international treaties or agreements such as IMO (International Maritime Organisation), ILO (International Labour Organisation) and FAO (Food and Agriculture Organisation). UNCLOS, as the universal law of the sea "framework treaty", accepts that conditions for the granting of nationality are clearly within the domain of domestic law: "Every State shall fix the conditions for the grant of its nationality, registration of ships and right to fly its flag." This means that requirements to register a ship, such as ownership, nationality of crew, or domicile of the shipowner, should not, according to UNCLOS, be regulated internationally.

Thus, it is clear that each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship. In other words, each state under international law may determine for itself the conditions



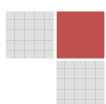
on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. No one is in power to question the regularity and validity of a registration except the flag state itself. This loophole is, however, manipulated by some states that are later named *flag of convenience* or *open registries*. Over the past few decades, the use of flag of convenience has grown from a small proportion to account for a large percentage of shipping worldwide, over half.

Shipowners in traditional maritime nations opt for flag of convenience to avoid the stringent safety and labour regulations in home country and to benefit from easy access to registry and low tax schemes. Whereas, host countries are motivated by the financial advantages the practice generate to their economy. None the less, the bad sides of the practice are more evident than its good sides.

One of the problems of flag of convenience registrations is that the host countries are normally unable or unwilling to provide enforcement mechanisms for safety and social regulations. In fact, it is frequently stated that flags of convenience include a large proportion of low quality vessels operating under minimum maritime safety conditions. Moreover, the personnel of flag of convenience vessels have in various instances been given lower than average standards.

International measures to counter registration under flags of convenience have not been that much successful. Nonetheless, there are genuine flag states that insist, in line with UN rules, there must be a genuine link between the ship owner and the flag state. These countries therefore, put restrictions on foreign ownership and apply national laws, including labour laws, on board unlike the flag of convenience system –which places a large part of the industry beyond the influence of government control. Ethiopia is one of the maritime nations that do not favor flag of convenience

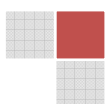
The Ethiopian concept of genuine link has been incorporated under Art. 4 of Mar. Code. Accordingly, ownership of Ethiopian ship is restricted to (1) Ethiopian subjects, (2) Bodies Corporate established as per Ethiopian law, (3) foreigners domiciled in Ethiopia and having their principal place of business in Ethiopia. Thus, the nationality of a ship under Ethiopian law depends on its ownership by these persons. Ethiopia accords nationality to a ship only if it is owned by Ethiopian natural and/or juristic person and foreigners, their principal place of business being here, domiciled in Ethiopia.



In order to acquire the Ethiopian nationality, i.e. flag, the shipowner has to register the vessel at Addis Ababa or other Ethiopian towns designated by the appropriate body (Maritime Affairs Authority) as a place/s port/s of registration. The Maritime Affairs Authority, established by Maritime Sector Administration Proclamation, Procl. No. 549/2007, is now the registrar for this purpose. It registers Ethiopian ships thereby authorizing the same to fly Ethiopian flag upon fulfilling the required formalities. Before entering any vessel in the register, the Authority will make sure that it is owned by persons qualified for owning Ethiopian ship as per Article 4 of the Maritime Code.

Apart from being owned by qualified persons, the vessel is expected to have the technical competence to provide the intended services (See *Transport Procl. No 468/2005*). Most importantly, the shipowner has to complete the vessel crew in conformity with relevant national and international standards. The Transport Proclamation, under Article 23, provides: “no person shall be engaged as seafarer unless he has obtained a permit granted by the Authority.” Though the effect of hiring crews without a permit is provided nowhere in the proclamation, the Authority who also has the power to issue and renew certificate of seaworthiness is expected to deny the same for vessels failing to hire only seafarers with certificate of competence and seaman’s book. Incidentally, it is worthnoting that the Maritime Sector Administration Proclamation repealed some provisions of the Transport Proclamation (Procl. No. 468/2005) and the incompatible provisions of the 1960 Maritime Code dealing with registration. The repealed provisions of the Code envision a registry kept at “home ports,” which is the case in many coastal shipping nations.

Nationality and registration might not be required for all vessels. Some jurisdictions do not require registration for small vessels. The English Merchant Shipping Act of 1894 exempt [from the obligation to register] ships not exceeding 15 tons burden employed solely in navigation on the rivers and or coasts of the United Kingdom. Sweden, on the other hand, has a ship register for Swedish vessels over twelve meters long and over four meters wide. Similarly, the possibility for small Ethiopian boats to avoid the legal and administrative requirements of registration is not closed. Article 15 of the Maritime Sector Administration Proclamation states the following: “the Minister [of Transport and Communication], by directives, may waive the application in whole or in part of this proclamation to small vessels.”

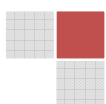


Incidentally, it should be noted that registration under Ethiopian law concerns vessels as defined under Article 1 of the Maritime Code as well as ships and motor boats used for inland water transport. *Registration of Ships Council of Ministers Regulations No. 1/1996* requires the registration of both seagoing vessels and watercrafts used for inland water transport.

Dear Students, what do you think would the effect of nationality of ship be? In the forgoing discussion, the different legal effects of nationality of ships have incidentally been mentioned. The legal effects of *nationality of ship* pertain primarily to the assumption by the flag state of jurisdiction in matters relating primarily to the *internal affairs* of the ship.

Some of the foundational issues in the development of maritime law were the questions of: (1) which law applies to a seagoing vessel?; (2) which law governs the rights of crew members (including matters of working conditions, health and safety)?; (3) which law regulates the construction and structure of a vessel to ensure seaworthiness?; (4) which law applies to the commission of a tort or crime aboard a vessel? The response to these questions gave rise to the principle of the “law of the flag state.” In its simplest form, the law of the flag has been described as the notion that seagoing vessels are like floating bits of territory of the sovereign whose flag it flies, with the law of the sovereign governing the vessel and those on board. This, however, does not exclude any other states from assuming jurisdiction where appropriate. Shipping states do not always assume jurisdiction in matters involving ships flying their flag. The history of maritime law demonstrates that other factors than the principle of “the law of the flag” were applied by courts in states (other than the “flag state”) to either assume jurisdiction on matters involving ships flying other nation’s flag or decline on the applicability of the law of the flag state by the same. Other factors include: (1) place of the wrongful act; (2) allegiance or domicile of the injured; (3) allegiance of the defendant shipowner; (4) place of contract; (5) inaccessibility of the foreign forum; and (6) the law of the forum. For instance, an Ethiopian ship may serve in international carriage between ports in the Middle East and Europe; and almost all transactions regarding this part of the Ethiopian merchant fleet may likely be governed by the law of any concerned Middle East or European states where, for example, the transaction is entered into. Moreover, resort to international commercial arbitral tribunals is frequent in maritime transactions; and hence, the application of international principles of maritime law, in place of the law of the flag, is frequent.

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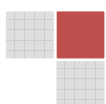


According to Article 6 of the Maritime Code, vessels that have acquired the nationality of Ethiopia are entitled to the right of navigation under the flag of Ethiopia. This is particularly important for absence of nationality [flag], under international law, precludes a ship from engaging in international trade or navigation of any sort in the high seas, let alone in territorial seas of any particular coastal state. Moreover, benefits from treaties on which rights to enter foreign ports are based are unavailable to stateless ships. Any state can exercise jurisdiction over stateless ships. Finally, coastal maritime nations limit coastal maritime business to national ships. Such privilege to national ships is also recognized under Article 6(2) of our Maritime Code, enacted during the time when Ethiopia was a coastal state.

Review Questions 1

1. Why do ships need to have nationality?
2. What are the reasons for the present international efforts to curb the practice of open registries?
3. Registries in some landlocked countries like Mongolia are attractive to foreign vessel owners. Do you think Ethiopia is as such attractive? If not, is it because there is, in Ethiopia, no legal means for foreigners to own Ethiopian ships?
4. What are the effects of nationality under (1) international and (2) national laws?
5. A foreign shipping company who sees the increasing demand for sea carriage in Ethiopia wants to break into the relatively uncompetitive market for sea carriage in Ethiopia. And, it particularly, wants to benefit from the lack of alternative sea carrier to Ethiopian exporters who usually complain the high freight price charged by the only national sea carrier who is the enjoys monopoly status. What do you think this foreign company need to do?[Hint: Consult the rules relating to ownership of Ethiopian ship in the Maritime Code *vis-a-vis* the pertinent Investment Proclamation and Regulation provisions dealing with investment areas reserved solely to either the government or domestic investors]
6. A ship was owned by a company duly registered in Ethiopia but was in fact controlled from Kenya by the chairman of directors who held the majority of shares and resided there. Do you think such a ship would forfeit its Ethiopian nationality?[Hint: in a 1916 case, an English court rules that "the principal place of business" is from where "effective control is maintained".]

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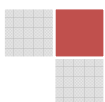


2.2 REGISTRATION OF VESSEL AND RIGHTS IN REM RELATING THERETO

Ordinarily, a state confers its nationality on a ship by registering the ship and issuing documents evidencing the ship's nationality. For this purpose, registries are kept at suitable places, usually at home ports. The same was envisioned under Article 45 of the Maritime Code.

For Ethiopia was a coastal state at the time of the enactment of the Code, the Code provided the keeping of registries in every port designated by the Government of Ethiopia. The impracticability of this provision of the Code has been obvious since 1991. Accordingly, a 1996 Council of Ministers Regulation put things right. Under Article 4 of *Registration of Ships Council of Ministers Regulations No 1/1996* the following is provided: "Addis Ababa or other towns designated by the appropriate body shall serve as a place(s) port(s) of registration." Also, the same Regulation empowers the Ministry of Transport and Communications to carry out the registration of ships and other related activities. Now, it is the Maritime Affairs Authority (answerable to the Ministry of Transport and Communications) that registers all vessels and any rights relating thereto. The Authority also issues registration marks to vessels; approve vessel christening; inspect and issue seaworthiness certificates; specify the type of services for which vessels are to be used; preserve and regulate conditions as to the construction, assignment, maintenance and repair of vessels. Apart from these, the administrative tasks of the Authority include licensing and control of seafarers, pilots and other persons working on board a vessel.

All Ethiopian ships shall be registered at the time and in the manner prescribed (Art.47, Mar. Code). At this point, one may ask what the particulars of registration are and why they are needed. The policy underlying the registration of ships is comparable with that of the registration of real properties. Primarily, the registration provides prima facie, if not conclusive, evidence of title to the vessel in disputes as to title. Accordingly, the documents required and kept by the registrar, in most cases, include title documents. In connection with this, the registrar verifies the eligibility of a ship to be Ethiopian. i.e., it inquires into who actually owns the ship. Apart from this, since most maritime nations stipulate seaworthiness of the ship at the time of registration [and periodically after that], documents evidencing the time and place of building of the vessel are required. Finally, the marks of the ship –the names and official number and tonnage –are entered into the register. In short, documents evidencing title to the vessel,



statements as to the time and place of building of the ship, and shipping marks are the major contents the registration.

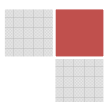
Once the ship is duly registered, a certificate of registry is issued which is usually kept on board ship. Any vessel registered by the Authority has to pay to it (1) annual charges levied by the Authority, (2) service fees, and (3) vessel registration fees (Art.13, *Maritime Sector Administration Proclamation*).

A vessel is removed from the Register of Ethiopian vessels if the ship is sold to a foreigner, or has been lost (Art. 48, Mar. Code). In contrast, in flag of convenience states, a vessel is removed from registers even when the owner has requested so. Under our law, registration seems to be an obligation, not a right. An owner who intentionally avoids registration of a ship which is subject to registration will be guilty of a criminal offence (Art. 49(2) of Mar. Code *cum* Art. 434 of FDRE Criminal Code).

Will a ship be written off the registry if, for example, the owner fails to pay annual charges for more than, say, six years? In some jurisdictions, in particular in flag of convenience countries, a vessel will be written off the register if it fails to pay such charges. The law in Ethiopia does not attach such a penalty for failure to obey the provisions of pertinent maritime legislations. However, the Maritime Sector Administration Proclamation stipulates: *"any person who violates the provisions of this Proclamation...shall be punishable in accordance with the Penal Code."*

Review Questions 2

1. What purposes are expected to be served by registration of ships?
2. What documents must be produced in support of an application for registration?
3. Do you think a ship gets nationality without being registered? [Hint: though the question who may own Ethiopian nationality is solely determined by the ownership (by persons qualified under Art. 4, Mar. Code) of the ship, it seems that ships need to first be registered before any authorization to fly Ethiopian flag.]
4. A murder took place on the high seas on a merchant ship whose registration was Ethiopian. Despite this, a foreign court assumed jurisdiction on the criminal matter. Nonetheless, the defendants allege the



court cannot assume jurisdiction for the mere fact that it was registered Ethiopian. The court, however, established its jurisdiction stating that *though the registration is Ethiopian, this only prima facie evidence of the ship's nationality; and this apparent Ethiopian nationality of the owners could be displaced by evidence showing that the owner was in fact not an Ethiopian but rather the national of the state where the court presides*. Comment on the court's reasoning and the implication its holding on cases involving ships flying *flag of convenience*.

5. As would be seen in the forthcoming chapters, shipowners' liability is sometimes limited to a certain amount calculated taking into account the tonnage of the ship. And, registration entries in most jurisdictions include particulars relating to the carrying capacity and the net tonnage of the ship. Do you think shipowners may conclusively rely on the tonnage on the registration certificate against third parties who may want to otherwise prove the actual tonnage of the ship?

2.3 RIGHTS IN REM RELATING TO THE SHIP AND THEIR ENFORCEMENT

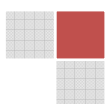
Apart from the ship, rights in rem related to the ship have to be entered into a registry. Such right in rem include agreements inter vivos, voluntary acts (gratuitous or for consideration), judgments which are final. In general, all acts having as their object to set up, transfer, declare, modify or extinguish a right in rem in a registered ship shall be registered. Such acts take effect only as of the date of entry into the Register (Art. 50, Mar. Code).

2.3.1 MARITIME LIENS AND MORTGAGES

Both maritime lien and ship mortgage are security rights over things (e.g. ships, freight and cargo), although the former is created by law. Mortgage is created by a written contract which must be *registered* before it takes effect. The enforcement of these two security rights is discussed following a look at the details of (1) maritime lien and (2) ship mortgage.

A. Maritime Liens

The expression "maritime lien" has been used in Common Law countries, in particular in England, since 19th century and is expressly or implicitly recognized by legislation in most maritime nations. It is also recognized by international



treaties: for example, the 1952 International Convention Relating to the Arrest of Seagoing Ships and the 1967 International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages. Before embarking on the Ethiopian laws on maritime liens, let's first direct our attention to the definition, nature and characteristic of maritime lien in general.

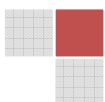
Though widely utilized and recognized, maritime lien's definition can hardly be traced in either international laws or domestic legislations of maritime nations. Judicial and scholarly definitions of maritime lien in common law countries place too much emphasis on procedure. In the USA and Civil Law countries, however, maritime liens have long been regarded as substantive right rather than as procedural remedies. Accordingly, R. Force and A. Yiannopoulos, authors of *Admiralty and Maritime Law*, define maritime lien as:

“...a secured right peculiar to maritime law. A lien is a charge on property for the payment of a debt, and a maritime lien is a special property right in a vessel given to a creditor by law as security for a debt or claim arising from some service rendered to the ship to facilitate her use in navigation or from an injury caused by the vessel in ...waters.”

This formulation embodies that maritime lien is a right. It is created to protect the interests of the creditor/lienholder and is thus essentially a right or interest. More specifically, it is a right in *rem* – in a thing. The maritime lien is, as a right, held by a creditor and established in a vessel. So it is a kind of “property right.” The subject matter of such a property right is, however, specified and is limited only to maritime property. “Maritime property” refers to a ship, its appurtenances, the cargo on the ship and/or freight. Finally, the definition also reflects maritime lien is something more than a mere right in *rem* – a right of property serving as a security for a maritime claim.

One fact the definition does not take into account is that maritime lien is a right which can be executed only by judicial process. It is not self-executing. In order to satisfy his claim, the only thing a lien holder can do is bring a lawsuit before a court. The court may then arrest and subsequently sell the arrested ship to enforce the maritime lien when the owner of the ship concerned refuses to furnish sufficient bail or other dependable security. Thus, a maritime lien is *not* actually a lien (i.e. a right of detention) in the sense of either the Common Law or

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the civil law parallel. The major characteristics of maritime lien are further discussed by Wu Huanning in his article *China and Maritime Law*. Excerpts:

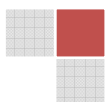
Wu Huanning, *China and Maritime Law*, 5 *MLAANZ Journal* (1988), pp.19 ff.

As a property, a maritime lien has retroactivity. It is not influenced by transfer of title or possession. No matter how many times the property may change hands, the maritime liens remains in the hands of the lienholder.

As a property right, a maritime lien may generally be assigned, although some early American cases denied such an assignment.... [A] maritime lien is secret in nature. A maritime lien comes into existence automatically without antecedent formality. It is created only by statute or by historically acknowledged situation in the general maritime law. No maritime lien can be conferred on a claim by agreement between parties concerned, nor by a court, even one having admiralty jurisdiction. No record and no registration of it is required. It exists only at law. Therefore, a maritime lien may well be unknown to creditors other than the lienholder. Thus the maritime lien may operate to the prejudice of such creditors including mortgagees and every innocent purchasers without notice of the lien. So, one who wants to buy a second-hand vessel must be very careful to find out whether there is a maritime lien attached to the vessel....A maritime lien is an "accessory" or "secondary" right or interest. A maritime lien is not independent, but secondary and subordinate, in nature. Because it is created to provide a security for a principal claim (credit), it belongs to the realm of accessory rights. In other words, a maritime lien created secondary to the creation of a principal maritime claim and it is extinguished when the maritime claim secured by such a lien is extinguished (say, when the claim is satisfied)...A maritime lien is a "preferential" right. The creditor who is entitled to a maritime lien on the vessel of the debtor enjoys a higher priority than other creditors in receiving payment. The priority, however, is relative in nature. It arises only in the case where the proceeds of the sale of an arrested vessel are insufficient to satisfy all maritime claims made on the same debtor, specifically, on the shipowner, including those secured by various other competing liens. Only in this situation will the holder of a maritime lien enjoy priority over other claimants, even over the claimant under a secured mortgage. Otherwise, the priority of a maritime lien will not assume crucial importance.

A maritime lien is an "inedible" right. By virtue of the fact that a maritime lien travels with the property into whoever's hands the property may pass, the right in the nature of a maritime lien is frequently described as an indelible right...Here the word "inedible" is

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used in a relative. I mean that a maritime lien cannot be expunged until the original debt is cleared up or the period stipulated by law has expired, or the arrested vessel has been sold an Admiralty Court.

To sum up, it can safely be said that the maritime lien is assort of special, extraordinary legal system peculiar to maritime law.

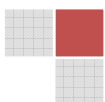
Laws relating to maritime lien are an area where uniformity is sought. The need for uniformity and the unsatisfactory results so far achieved were noticed by M. Huang:

M. Huang, Maritime Liens in the Republic of China, 8 J.Mar.L. & Com. (1976-77)

Cases involving maritime liens...are apt to posses more international elements than most other maritime disputes. With respect to one and the same ship, the lienors...may each have a different natonality. Liekewise, liens may each have accrued in a different country. The Comite' Maritime International, therefore, attempted to promote international uniformity by drafting model rules which resulted in the Brussels Convention of 1926 for the Unification of Certain Rules of Law Relating to Mortgages and Liens. A new Convention was also concluded in 1967. Unfortunately these Conventions failed to achieve ratification by the signatory nations required to accomplish the desired result. Chance continues to play a very important role in determining rights in a vessel, whether arising out of contract claims, tort claims, or security interests. With laws of nations differing so widely on the creation and enforcement of maritime liens, a lienor may have his claim substantially satisfied or entirely shut out, depending upon the jurisdiction in which the vessel is attempted to be seized and sold.

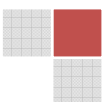
Maritime lien – “special legal system peculiar to maritime law” –is made part of Maritime Code of 1960. In regard to the types of transactions giving rise to a lien, it is provided by Article 15 of the Code that the preferential claims listed below are entitled to maritime lien right in the order stated:

- Legal costs and other expenses incurred in the common interest of the creditors, in order to preserve the ship and to procure her sale; tonnage, dues, light or harbour dues and other public taxes and charges of the same nature; pilotage dues and the cost of watching and preservation from time of entry of the ship into her last port;



- Claims arising out of the articles of agreement of the master, the crew and other persons engaged in the service of the ship;
- Remuneration due for assistance and salvage and the contribution of the ship in general average;
- Indemnities in respect of collision and other accidents of navigation, as well as for damage caused to works forming part of harbours, docks and navigable waterways, and the cost of removal of objects obstructing navigation, due to the acts of the ship, indemnities for bodily injury to passengers and crew and indemnities for loss of or damage to cargo and baggage;
- Claims arising out of contracts entered into or acts done by the master outside the home port within the scope of his authority where such contracts or acts are necessary for the preservation of the ship or the continuation of the voyage, whether or not the master is at the same time owner of the ship and whether or not the claim is his or that of the chandlers, repairers, lenders or other contractual creditors;
- Resulting damages due to charterers;
- The amounts of premium for insurance taken out on the hull of the ship and the fittings and equipment of the ship due for the last voyage insured in the case of a voyage policy or for the last period insured in the case of a time policy, but not exceeding one year's premium in both events;
- Any claim based upon an inaccurate or incomplete statement in a bill of lading.

Under Ethiopian law, it is only the above enumerated claims that are secured by lien in their order of priority. One should note that the order is of importance *only* when competing liens claims are not satisfied by the total assets of the ship to which the liens is attached. The sale of the ship generates a fund out of which claimants share. Where this fund, or a comparable security posted by the shipowner to secure the vessel's release (Art. 54(2)), is insufficient to satisfy all valid liens and claims, the priority of the different categories of claims plays a role in specifying who first enjoys the share from the insufficient fund. The

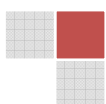


ranking of maritime lien claims depends upon whether there is more than one voyage. As per Art. 17, claims arising out of the same voyage rank in the order listed above. However, if claims arise out of different voyages, claims secured by lien in the last voyage of *whatever priority* shall be preferred to those of previous voyages except when they relate to crew's articles (Art.16, Mar. Code). Thus under Ethiopian law, like in many other maritime nations and the 1926 Brussels Convention, time is the governing consideration. The liens should be arrayed according to voyages, and class rank would then operate only within each voyage. Maritime liens pertaining to the same voyage rank according to the order set forth in Article 15. The maritime liens from classes (1) to (5) inclusive take precedence over ship mortgages (Art. 20) which will be further treated in the forthcoming sub-heading. In the event that there are several claims within the same group, they are indemnified concurrently and rateably (Art. 17 (2)). However, in the event that under sub-paragraph 3(i.e. assistance) or sub-paragraph 5(i.e. ship's stores and repairs) of Article 15, there are two or more claims pertaining to one and the same kind, the one arising later is to be paid in priority order (Art.17 (3)).

There might arise several claims from a single accident. For instance, collision, salvage and general average may take place simultaneously at a time. But, it is sometimes, quite hard to prove timing in such an emergency. In order to avoid the difficulty of proof, therefore, Article 18 provides that: "Claims arising out of the same maritime incident shall be deemed to have come into being at the same time." Thus, they are paid *pro rata* without precedence.

Properties to which maritime liens attach are provided in Article 21. Accordingly, the ship, the freight and ship's accessories are properties to which lien right attach. For this purpose, the Code defines ship's accessories and freight under Article 22-23. Lien rights attached to the hull of the ship follow the ship into whatever hands she may pass (Art. 25, Mar. Code) unlike liens on freight and ship's accessories which subsist only for so long as the freight/accessories has not been paid or so long as the amount thereof is held by the master or by the owner's agent.

Maritime liens may be extinguished in several ways. The following modes of extinction are common to all liens, maritime and non-maritime, as well as mortgages: payment of the debt, renunciation, acquisition of ownership of the property by the claimant/s, total destruction of the property, and waiver of lien



right. Apart from these, period of limitation plays an important role. According to Article 26 of the Maritime Code, maritime liens shall cease to exist at the expiration of one year; provided that the lien referred to in Art.15 (5) cease at the expiration of six months. It is desirable, in order to protect the third party, to prevent a secret accumulation of privileges on the vessel by providing for the rapid extinction of the right of preference. The law does not prefer those “who sleep on their rights”. The period of limitation reduces the status those favored but dilatory claimants to the rank of an ordinary claimant.

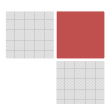
The dates starting from which the period of limitation run for different claims secured by lien are provided under sub articles 2 and 3. Though the duration of maritime lien is, in principle, limited to one year, sub-article 5 provides for the suspension of the period of limitation in the event it “has not been possible to arrest the ship in the territorial waters of [Ethiopia]... provided the period of limitation shall not in such event exceed three years from the time when the claim originated. This seems a very good compromise for the interests of lienors who might have been prevented from arresting the vessel by circumstances beyond their control and might have suffered extinction of their liens on the one hand and the certainty that would be brought for third parties and owners by the definite period of limitation on the other.

B. Ships Mortgages

Ships of two tonnages and above may be mortgaged under an agreement between parties (the mortgagor/shipowner and the mortgagee/creditor). Unlike mortgage of immovables (see Art. 3041 ff., Civil Code), ship mortgages may not result from the law (Art. 30, Mar. Code).

A ship under construction can be the object of a mortgage as can be a ship which is complete (Art. 33, Mar. Code). Ship mortgages may be created only by the shipowner or by the person who is specially authorized by the shipowner (Art. 31, Mar. Code).

Ship mortgages attach principally to the hull of the ship. It is not attached, unlike maritime liens, to the freight. Nor is it attached to Government bounties and insurance compensation (See Art. 32, Mar. Code). In addition, ship mortgages, to get effect, have to be created by a written contract which must be registered in the Register at the port office where the ship is registered. Registration preserves



the mortgage for a period of five years from the date thereof (Compare this with effect of registration of a mortgage on immovables under Art. 3058, Civil Code). The mortgage cease to have effect where not renewed before the expiry of five years (Art. 37 (1), Mar. Code).

In the event a mortgagor defaults on its obligation secured by a ship mortgage, the mortgagee may enforce the mortgage through a court action. If two mortgage rights co-exist, their relative priority becomes relevant. The Maritime Code, under Art. 38 (1), spells out the respective priority between plural mortgagees. The article states: “Claims secured by registered mortgage of a ship or a share thereof may follow the ship into whatever hands she may pass in order to be classed and *paid in the order of registration.*” This is comparable with the rules relating to “plurality of mortgagees” in the Civil Code.

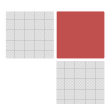
In connection with our discussion on maritime lien priorities, we did see that maritime liens from classes (1) to (5) inclusive (of Art. 15, Mar. Code) take precedence over ship mortgages. The respective priority between the lien for damages caused to charterers (Art. 15 (6)) and the ship mortgage is, however, unclear. The scholarly views in other maritime nations vary. These views include:

1. Both are paid pro rata without precedence.
2. First in time, first in right.
3. Ship mortgage is paid first.

The third view has gained the sympathy of those scholars who consider the secretiveness of maritime lien as inequitable and those who believe maritime law should provide mortgages with protection sufficient to insure the viability of this important financing device.

Finally, a mortgagee’s rights in the vessel are protected against seizure in a foreign port. A valid mortgage encumbering an Ethiopian vessel which is arrested and sold at auction in a foreign port survives the foreign sale as well unless the mortgagee has been duly notified of the foreign proceeding and been given an opportunity to exercise his rights in the proceeds of sale (Art. 44, Mar. Code).*

* Note that the term “mortgagor” is incorrectly employed under Article 44 of the Maritime Code.



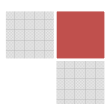
Review Questions 2

1. In some jurisdictions such as Indonesia and China, the Civil Code provisions governing mortgage of immovables are applicable as well to ships mortgages. Do you see any rationales that justify the inappropriateness of reference to the provisions of the Civil Code dealing with mortgage in general to, for example, fill gaps of the Maritime Code provisions dealing with ship mortgage?
2. Are formalities required before maritime liens take effect?
3. What factors distinguish maritime liens from liens in general (or liens in civil law)?
4. Remuneration due for (1) assistance and salvage and (2) the contribution of the ship in general average are ranked third for the purpose of maritime lien. Which one are you going to give precedence if the fund is short and if the claims in competition are remuneration due for assistance and salvage on the one hand and remuneration for the contribution of the ship in general average?
5. Why do you think the claims enumerated under Art.15 are granted preference over other claims not secured by maritime lien?
6. A vessel was in distress. Salvage service was rendered to her by X, and she was ultimately placed in a shiprepairers' yard. The vessel was sold, and the proceeds of sale were insufficient to pay the claims of the salvors and the cost of the repairs. The repairers, in possession of the ship, claim that their lien had priority over the maritime lien in respect of salvage. How do you, as a maritime lawyer, respond to this?

2.3.2 Enforcement of Maritime Liens and Ship Mortgages[†]

Maritime liens and ship mortgages are enforced by arresting the vessel by filing a petition to a court of law. Ship's arrest is the procedure that provides pre-judgment security for claims as well as post-judgment execution by way of judicial sale of the arrested ship. There is divergence, among Common Law and Civil Law countries, in procedures relating to arrest. The following excerpts from W.Tetley's article elaborate this divergence and also examine the characteristics of arrest and related procedural matters in common law and Continental legal traditions.

[†] This part could be taught after, for example, students study the different substantive aspects of maritime law; ideally, at the end of chapter five.



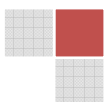
William Tetley, Arrest, Attachment, and Related Maritime Law Procedures, Tulane Law Review (June 1999).

Essential to the practice of maritime law in any country is a knowledge of the procedures that provide pre-judgment security for claims, as well as post-judgment execution if a suit is allowed. Pre-judgment security is of the highest importance to the maritime creditor, who always faces the threat of being unable to recover his debt from an impecunious or unscrupulous debtor, if the debtor's ship--the main asset on which so many maritime creditors depend in extending credit--should sail away without the debt having been paid. Similarly, the possibility of post-judgment execution, by way of the judicial sale of the arrested ship, is a key consideration for maritime creditors concerned about the solvency of their debtors.

In common-law countries ... the action in rem is the basic procedure on which creditors rely for pre-judgment security and post-judgment enforcement. The arrest of the ship or other res (for example, cargo or freight) in the action in rem places the res under judicial detention pending adjudication of the claim. It usually also secures the appearance in the action of the defendant shipowner and it establishes the jurisdiction of the court. If the court subsequently allows the claim, the judgment is then enforceable against the arrested res (by judicial sale) or the security given to take its place.

In civil law jurisdictions, where no action in rem exists, the action in personam may be combined with a "saisie conservatoire," or conservatory attachment. The saisie permits any property of the debtor (including ships) to be seized and detained under judicial authority pending judgment. The subsequent judgment, if favourable to the plaintiff, may then be enforced against the attached property or the security replacing it.

The United States, in a sense, has the best of both worlds, because U.S. maritime law affords the creditor both the arrest in rem and the maritime attachment...On the international plane, more than seventy nations are party to the Arrest Convention 1952. The Convention provides a legal regime covering all aspects of arrest and attachment of seagoing ships before judgment, but has undergone a major review and has been replaced as of March 12, 1999 by a new convention...



United Kingdom

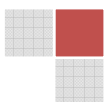
1. Arrest In Rem –the Characteristic Admiralty Proceeding

In the United Kingdom, the action in rem is the characteristic Admiralty proceeding to enforce all types of maritime claims. It tends to be regarded primarily as a procedural device to secure the defendant's personal appearance in the suit, rather than as an action against the "wrongdoing ship" seen as a person. It differs from an action in personam, in that the ship (and, in some cases, the cargo, bunkers and freight, or the proceeds of the judicial sale) is the defendant, together with the shipowner. The availability of the action in rem to enforce maritime liens, statutory rights in rem, and other maritime claims in England is governed by the Supreme Court Act, 1981, at sections 21(2)-(4), providing for the exercise in rem of the Admiralty jurisdiction of the Queen's Bench Division of the High Court of Justice against the ship or property concerned by the claim, or, in some cases, against a sister ship. The action in rem provides pre-judgment security for the claim, founds the jurisdiction of the court, and usually secures the appearance of the shipowner. It typically is enforced by the arrest of the res.

Arrest in rem is not permitted, however, in respect of Crown ships or a ship belonging to a foreign State, unless it was in use or intended for use for commercial purposes when the cause of action arose. In general, however, the flag, registry, ship ownership, or the place where the claim arose do not restrict Admiralty jurisdiction.

2. In Rem Process in a Nutshell

In brief, the action begins with the issuance of the writ in rem by the Admiralty and Commercial Registry in London or one of the District Registries elsewhere in the United Kingdom. The arrest warrant, obtained on motion to the High Court supported by the "affidavit to lead warrant" of the claimant, is valid for twelve months. It is ordinarily served with the writ in rem, and may only be served where the ship or other res is within the jurisdiction. When the action is served or where service is deemed to have occurred by virtue of the shipowner's acknowledgment of the issue of the writ before service (the modern equivalent of the appearance in the action by the defendant), the proceeding continues as a joint action in rem and in personam, so that the eventual judgment is enforceable against both the arrested res and the debtor's other property. The ship is usually released from arrest (or its arrest is prevented) by the issuance of a bail bond or a letter of undertaking from the protection and indemnity club of the shipowner. Following the trial of the suit, if the claim is allowed and the plaintiff remains unpaid, the ship or



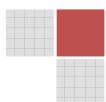
other arrested res may be sold by judicial sale, or the judgment may be executed against the security that has been given to prevent the arrest or to release the res following its arrest. Judicial sale conveys a title free and clear of liens. The proceeds are then distributed to the plaintiff and any other claimants who may have intervened in the action, according to the order of priorities established by law, with equity also playing an important role in the ranking.

3. Closed List of Maritime Claims

The Supreme Court Act, 1981, at section 20(2), presents a closed list of maritime claims... The list reflects the provisions of article 1(1) of the Arrest Convention 1952...The maritime claims listed in section 20(2) of the Supreme Court Act, 1981 may generally be enforced in personam, under section 21(1). Under section 20(2), in rem enforcement is permitted with respect to claims relating to ownership and possession of a ship or any of its shares; claims and questions relating to possession, employment, or earnings of a ship; claims in respect of mortgages or charges on a ship or any share in it; and claims for the forfeiture and condemnation of a ship or goods. A great many maritime claims enforceable in rem, however, fall under either of two other categories: Maritime liens and statutory rights in rem...

Following its arrest, the ship is usually released from arrest after security has been provided by the shipowner for the claim. The security may be in the form of a bail bond, a payment of money into court, a bank guarantee or a letter of undertaking from the shipowner's protection and indemnity club (P & I club). The security is seen as replacing the arrested res, thereby precluding re-arrest in most cases. The amount of the security is set by the court in its discretion, but the general principle is a sum sufficient to cover the claimant's "reasonably arguable best case," together with interest and costs, not exceeding the value of the arrested vessel. A final judgment in the claimant's favour may be enforced against the substituted security, just as it could have been against the arrested ship.

Although the arrest of his ship may have grave effects on the shipowner's business, it is not usual for the courts to impose any requirement on the claimant to put up countersecurity to guarantee the defendant against losses that the latter may incur as a result of the arrest, although countersecurity is sometimes ordered in the court's discretion. Defendants can, however, be held liable in damages for having demanded excessive security ... Wrongful arrest in the United Kingdom may result in a condemnation of the claimant for damages only where the court is satisfied that the arrest



was motivated by mala fides (bad faith) or crassa negligentia (gross negligence). Merely unjustified (in other words, erroneous) arrest would not normally entitle the defendant to claim damages, although he might then be able to recover costs... Where a foreign ship registered in a port of a state having a consulate in London is to be arrested in the United Kingdom in an action in rem for wages, prior notice of the arrest must be given to the consul concerned. Similar notification rules exist where the United Kingdom has undertaken by treaty or convention to minimize the possibility of arrest of ships of another state.

Admiralty Practice Direction No. 3 provides procedures to protect the rights of owners of arrested cargo to secure its discharge from a ship not under arrest, as well as the rights of owners of cargo not under arrest to secure its discharge from a ship that is under arrest.

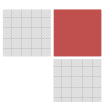
Such procedures provide significant protections for private property rights, although a general rule would appear desirable...The action in rem and the arrest of ships, as developed over the centuries by English Admiralty judges, provide an effective means of enforcing maritime claims falling within the categories enumerated today in the United Kingdom's Supreme Court Act, 1981. England, through its ancient admiralty law, has also provided the basis for the arrest in rem in other common-law countries, particularly Commonwealth countries such as Canada. It is particularly important that the right to arrest in the United Kingdom is limited to a "closed list" maritime claims...

The United States

Because the United States broke away from the British Empire at the end of the eighteenth century, it retained the Admiralty attachment, as well as arrest in rem, as procedures for the enforcement of maritime claims. Today, the specific rules on both procedures are found in the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure, at Supplemental Rules B (attachment) and C (arrest). In consequence, a maritime claimant in the United States may choose to take: (1) an action in personam, (2) an action in personam with attachment under Supplemental Rule B, or (3) an action in rem, with arrest under Supplemental Rule C...Both the preferred ship mortgagee and the maritime lienor, under U.S. law, have a lien enforceable by a civil action in rem.

Enforcement in rem is possible against both U.S. and foreign ships. As in most other countries, however, no lien may be asserted in the United States against a "public vessel." Arrest or seizure of any vessel owned, demise chartered, or operated by the U.S. government, as well as the creation of any lien against a public vessel, are prohibited by

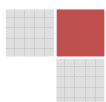
Maritime Law



the Public Vessels Act and the Suits in Admiralty Act. Ships owned and operated by foreign states or their "agencies or instrumentalities" are also exempt from pre-judgment arrest or seizure, under the Foreign Sovereign Immunities Act, but only in respect of their governmental, noncommercial activities. Nevertheless, arrest is permitted, even against a state-owned foreign ship, to enforce a preferred ship mortgage... The action in rem in the United States, under Supplemental Rule C, permits the arrest of any ship or other maritime property to enforce a maritime lien, provided that the res is within the territorial jurisdiction of the federal district court concerned at the time the suit is filed or during the pendency of the action. Arrest perfects the lien, obtains jurisdiction, and procures pre-judgment security for the claim. Under Rule C, arrest is obtained by the filing of a complaint, verified on oath or solemn affirmation, accompanied by an affidavit. Judicial review is required before a warrant of arrest may issue (Rule C(3)), unless "exigent circumstances" make the review "impracticable." The warrant of arrest, accompanied by a summons to the defendant, are issued by the clerk, on the order of the court, and the Marshal arrests the vessel by posting the notice of arrest aboard the ship and serving a copy of the complaint and warrant upon the master or person in charge. Any person claiming an interest in the property arrested is entitled to a prompt post-arrest hearing, also compulsory under Rule E(4)(f). The vessel may be sold to satisfy the lien claim, but if the sale proceeds are insufficient to cover the claim, the owner is not liable for the balance, because the action in rem is directed exclusively against the ship or other res that has been arrested... Supplemental Rule B(1) permits a claimant having an in personam claim against a defendant that is cognizable in admiralty to attach the goods or chattels of the defendant, or the latter's credits or effects in the hands of garnishees, within the district, when the defendant cannot be found in the district. The attachment thus permits the assertion of jurisdiction over a defendant's property located within the district even though the court has no in personam jurisdiction over the defendant. Derived from the general maritime law, with its civilian antecedents, maritime attachment in the United States resembles the saisie conservatoire, or conservatory attachment, of the civil law. The attachment ensures the defendant's appearance and satisfaction in the event the suit succeeds.

Attachment is not dependent, as is arrest in rem, on the existence of a maritime lien or preferred mortgage lien, but necessitates merely an in personam claim against the defendant that falls within U.S. admiralty jurisdiction. The attachment is not restricted, as is arrest in rem, to maritime property (ships, cargo, freight, bunkers), but may be taken against any goods or chattels of the defendant located within the jurisdiction of the federal district court seized of the claim, as well as the credits or effects of the defendant in the

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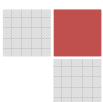


hands of third parties. Hence, it is used to seize both tangible and intangible assets, including, notably, bank accounts.

Because the United States has the attachment, sister ship arrest in rem is unnecessary. A sister vessel may be attached as security for the claim in the same way as any other goods or chattels of the defendant, if it is within the district and the defendant cannot be found there... The attachment may be combined with the action in rem, the advantage of such joinder being that if the value of the ship or other arrested property is insufficient to satisfy the judgment, the balance of the damages awarded may be recovered from the defendant found personally liable on the claim. Joinder of arrest and attachment is also useful if the claimant is uncertain whether he has a valid maritime lien to assert in rem...The vessel may be released from arrest or attachment on the filing of sufficient security, under Supplemental Rule E(5). The security then replaces the res and normally precludes re-arrest for the same claim...In addition, the claimant may be ordered to give countersecurity in respect of counterclaims arising out of the same transaction, where the defendant has given security in the claimant's action, unless the court directs otherwise for "cause shown". Countersecurity has also been required of the plaintiff where the claim and the defendant's posted security greatly exceeded the amount of the actual loss.

If the claim succeeds, the res may be sold in a judicial sale or the judgment may be enforced against the substituted security. The judicial sale terminates all claims existing on the date it occurs, and the vessel is then sold free of all such claims. The proceeds are then distributed according to the U.S. order of ranking... United States courts have not hesitated to grant damages for wrongful arrest or attachment in maritime cases... [D]amages are only granted where the arrest or attachment is found to have been motivated by bad faith, malice or gross negligence... Where the arrest or attachment is merely erroneous, costs may sometimes be awarded, but not damages. U.S. courts may also condemn a party in damages for demanding excessive security...

In addition to recognizing a larger number of maritime liens than any other nation, U.S. maritime law is uniquely rich in affording admiralty claimants both the attachment and arrest in rem as mechanisms for asserting their claims and obtaining pre-judgment security. The United States has also led the world in developing and implementing effective constitutional protections of the private property rights of shipowners with respect to both attachment and arrest. In that domain in particular, U.S. maritime law can well serve as a model for other nations... [T]he claims permitting ship arrest and attachment in the United States are contained in an "open list."

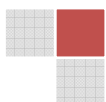


The Saisie Conservatoire--France

Civilian countries such as France never experienced the conflict between admiralty and common-law courts that plagued the English judiciary for centuries. Pre-judgment seizure of any property of a debtor therefore was never "lost," as it supposedly was in England. Nor was there ever in civilian jurisdictions a separate in rem proceeding, with the ship a notional defendant. Rather, civilian countries to this day have but a single action, the action in personam, which may, however, be combined with a saisie conservatoire, or conservatory attachment, in order to give the claimant security for his claim before judgment. In addition, France at least appears to have been untroubled by the risk of maritime attachment without prior notice or hearing infringing on "due process" rights of defendants... There are two regimes of ship attachment in France: the "international" regime, based on the Arrest Convention 1952 to which France is party, and the "domestic," or "residuary," regime governed by the 1967/1971 Decrees. The international regime governs the attachment of seagoing ships flying the flag of a state that is party to the Arrest Convention 1952, as required by article 8(1) of the Convention. The domestic regime applies to the attachment of French vessels in French ports by French residents.

Under article 8(2) of the Arrest Convention 1952, where the ship attached is not a French vessel and does not fly the flag of any other state party to the Convention, it may be attached for a maritime claim recognized under article 1(1) of the Convention or for any claim permitting attachment under the law of the contracting state concerned (France, in this case). France's domestic regime may be applied in this case, because article 8(3) permits a state party like France to exclude from the benefits of the Convention any noncontracting state or any person who, at the time of the arrest or attachment, has no habitual residence or principal place of business in a contracting state... Ships under the international regime may be attached in France only for "maritime claims" listed in article 1(1) of the Arrest Convention 1952, that "closed list" being interpreted restrictively. The judge merely verifies that the claim alleged falls into one of the categories on the list.

Under France's residuary regime, ships may be attached for any claim whatsoever, whether maritime or not, provided that the claim appears "founded in principle." The judge must, however, be satisfied that the claim is "certain and serious" before authorizing the vessel's attachment.

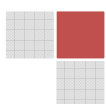


In consequence, neither regime restricts attachment to claims giving rise to a maritime lien (a "privilège maritime")...The ship concerned by the claim may be attached under both the internal regime and article 3(1) and (4) of the Convention. Both regimes also permit sister ship attachment where the owner is liable on the claim. Where a charterer is liable on the claim, article 3(4) of the Convention permits the attachment of either the "offending ship" or another ship owned by the charterer. Only one ship may be seized. Under the domestic regime, there is authority for the view that only a ship owned by the charterer may be seized, although a privilège maritime (maritime lien) will enable a chartered ship to be attached... Application for the saisie conservatoire is made by motion to the president of the Tribunal de commerce or, if he is unavailable, to a judge of the Cour d'instance (a lower court). The order of seizure is served on the debtor by a bailiff, generally in the presence of the master of the vessel. The bailiff appoints a guardian. The ship may be attached even where it is preparing to set sail. Attachment prohibits the ship from leaving port, but does not otherwise affect the rights of the owner.

As a result of a 1995 decision of the Cour de Cassation, it is now uncertain whether attachment in France in itself suffices to found the international jurisdiction of the French court to adjudicate the claim. The decision reversed what had been thought of as a settled rule supporting the international jurisdiction of the forum arresti. The Cour de Cassation now requires some connecting factor recognized by French rules of private international law, apart from the place of seizure, in order to confer jurisdiction over the merits of the claim.

France, in common with other countries, does not permit the attachment of ships belonging to the French Government, because French law absolutely prohibits all measures of execution and all forms of seizure against any property of "public persons." Similarly, France subscribes to the principle of restrictive foreign sovereign immunity enshrined in the Immunity of State-Owned Ships Convention 1926 and its Additional Protocol 1934, under which immunity from seizure, arrest and detention of foreign state-owned and state-operated vessels is recognized, but only in respect of such vessels engaged exclusively in governmental, noncommercial service when the cause of action arises. Because many vessels today that in fact belong to states are formally owned and operated by state agencies or state corporations, French courts, applying the "théorie de l'émanation" (theory of emanation), have at times denied immunity where foreign governments, operating through such allegedly "independent" bodies, have attempted to avoid their debts. As with the théorie de l'apparence in sister ship attachment, however, a more conservative approach to the "émanation" doctrine is now being taken by French judges and legal scholars...

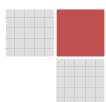
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French law provides two modes of lifting the saisie conservatoire. The shipowner may seek release of the ship, by motion to the Tribunal de grande instance. If release is granted, the seizing creditor loses all preference for his claim and will normally be condemned to pay damages occasioned by the seizure, notably, the costs of the release. Because release procedures in France tend to be protracted, however, shipowners often prefer the second option for lifting the saisie, which is a motion to the president of the Tribunal de grande instance seeking an order authorizing the vessel to leave the port of attachment for one or more determined voyages, in return for the giving of adequate security by the shipowner. The president must set a deadline for the vessel's return to the port of seizure. Should the deadline be missed, the creditors are entitled to the security...As in other countries, judicial sale of the ship remains the final mode of exercise of maritime enforcement jurisdiction...[J]urisprudence shows that ... some French courts are prepared to grant damages for the wrongful seizure of ships, where it appears to have been motivated by malice or gross negligence. Where the attachment is merely unfounded in law (in other words, erroneous, as opposed to malicious), the seizing creditor has been held liable to compensate the shipowner for the expenses of maintaining the vessel during its period of attachment...

In maritime law, as in all law generally, there can be no right without some effective procedure to enforce it...[C]ountries, ever conscious of the mobility of ships and the resulting risk on nonrecovery of maritime claims by creditors, have been creative in developing prejudgment security procedures suited to the demands of justice and of international seagoing commerce. The general lex maritima of medieval Europe gave birth to a form of enforcement process for maritime claims, which slowly took on distinct features in England and on the Continent. Continental countries maintained their saisie conservatoire, or conservatory attachment, for use in conjunction with the action in personam, their single form of action for any claim. England, by comparison, under the pressure of changing legal concepts and the conflict between the civilian Admiralty Court and the common-law bench, was making an ever sharper distinction, by the late seventeenth century, between the action in rem and the action in personam and was restricting the Admiralty judges almost exclusively to in rem enforcement. The decline of in personam litigation led to the "withering" of the Admiralty attachment as well... Meanwhile, the United States, breaking its political ties with England before 1800, retained both the attachment and the action in rem in a uniquely rich maritime law, while Commonwealth countries such as Canada inherited and adapted English admiralty law and procedure. Procedures governing arrest, attachment, saisie conservatoire... injunctions are now subject to detailed rules and regulations in every country...

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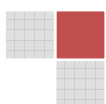
As could be appreciated from the excerpts above, in Common Law countries, maritime lien, ship mortgages, and any other maritime claims are executed through an action in rem, which is peculiar to the admiralty jurisdiction in those countries. In Continental legal tradition, however, an action in rem never goes before courts of law. Accordingly, a ship is not treated as a real person whose acts and omission are personal. So the ship cannot be held legally responsible.

However, a lienor or a mortgagee wishing to execute his lien or mortgage may bring an action *in personam* against the debtor. For convenience of the plaintiff, jurisdiction over an action of debt incurred by a ship or secured on it is usually exercised by the court at the place where the ship is floating. Even though the Continental action is *in personam*, a creditor showing good reason to believe that, if he is compelled to wait until judgment is pronounced, his lien may be lost or impaired, may by order of the court cause the arrest of *res*. It is also worth noting that in an action to enforce the lien or ship mortgage, the plaintiff must ask the court not only to give judgment against the owner for the amount of the claim but also to grant execution against the ship; because action analogous to the common law action *in rem* is absent in the civil law.

The Maritime Code of Ethiopia also recognizes arrest as a legal process to enforce maritime liens, ship mortgages, and other rights secured on a vessel. Article 53(1) provides: Detention of a ship may be ordered by the court on grounds of debt due by the ship. The warrant of arrest shall, according to Article 56, contain a summons to the master to appear before a court having jurisdiction. In addition, it is stated under Article 54 that the *owner* may apply for the release of the ship by securing proper and sufficient security.

If the claim succeeds, the ship may be sold (Art. 57 *et seq.*) in a judicial sale or the judgment may be enforced against the substituted security (Art. 54). The judicial sale terminates all claims existing on the date it occurs, and the vessel is then sold free of all such claims (Art. 76). The proceeds are then distributed according to their order of ranking. Incidentally, the court also may require the claimant to give security in order to meet the possible costs or damages arising out of arrest.

Usually, courts assume jurisdiction in cases involving arrest provided the ship to be arrested is within the territorial jurisdiction of the court concerned at the time the suit is filed or during the pendency of the action. As per Article of 55(2) of Maritime Code, warrant of arrest has to be served to the port manager as well,



with the view to order the same to hold the ship under arrest. A practical problem to Ethiopian maritime lienors or mortgagees is, therefore, that how could they secure the enforcement of their claims secured on a ship (berthing at, for example, the Port of Djibouti) by filing their claim to an Ethiopian court? This is one of the areas where the practical enforcement of our maritime code is undeniably limited for Ethiopia has no jurisdictional competence over the nearest seaport at which Ethiopia's ships come in. Though lack of jurisdiction over ships moored in foreign ports is not unusual, it seems that Ethiopian courts can never order arrest against even Ethiopian ships that are harbored at the nearest seaport to Ethiopia.

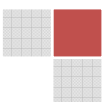
In sum, maritime liens and ship mortgages are enforced, in almost all jurisdictions, by arrest. Though the procedures may differ from jurisdiction to jurisdiction, they all recognize the importance of prejudgment security procedures suited to the demands of justice and of international seagoing commerce. Ethiopia is not exception to this though its rules relating to the enforcement of maritime liens and ship mortgages seem handicapped for Ethiopian courts cannot be competent enough to enforce maritime claims secured on a ship for the sea-going vessel is always outside the territorial jurisdiction of the court. It is also unlikely that the enforcement of Ethiopian court's arrest order, which may be characterised as non-final decision, would be enforced by foreign courts who may rightly be jealous of their competence. Thus, a possible option for lien holders on Ethiopian ships or Ethiopian lienholder/shipmortgagees would be to approach the court of the place where the ship is anchored. This court will most likely assume jurisdiction over foreign ships anchored off the coast of the territory where it takes chair.

In the following chapter, maritime labour law along with the shipowners' liability and limitations thereof in tort cases are dealt. Before that, work on the following review questions.

Review Questions 3

1. There is an argument in favor of international uniformity of arrest laws. Accordingly, arrest conventions are prepared to be either acceded to or given effect through national laws. Do you think harmonisation in this area of maritime law is essential? [Hint: look the different approaches and procedures relating to enforcement of maritime claims in common law

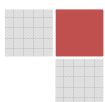
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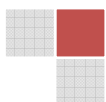
countries and civil law countries (from excerpts from Tetley's article reproduced above) and deduct its effect on international shipping transaction.

2. What is the most important difference between the civilian and the common law arrest laws?
3. Is Ethiopia's arrest law closer to the French *saisie conservatoire* than the English *action in rem*? Why / why not?
4. In almost all maritime nations arrest is effected only when the ship is at a port situated in the territory where the court to whom the claim is brought takes the chair. How could one then practically secure the enforcement of his lien rights against an Ethiopian ship that cannot in any way berth in Ethiopia – a landlocked shipping nation without a port of its own? Is there a chance for an Ethiopian court to arrest ships to enforce maritime liens and ship mortgages? How? Also, are there any legislative alternatives to arrest of the ship to enforce maritime claims? [Hint: consider the concept of attachment]
5. *In the American theory of maritime lien, personified, is itself the defendant in a proceeding in rem to enforce a lien. The ship is "the offending thing". The English theory of lien, on the other hand, is said to be merely procedural: the process in rem against the ship is in the nature of attachment to compel the owner's appearance by subjecting to the court's control property within its territorial jurisdiction.* The above statement in italics is taken from Gilmore & Black, the Law of Admiralty, 2nd ed., pp. 589-590. What do you think of the Ethiopian theory of maritime lien? To which one of the dominant theories [American or England] ours belong? Assuming that ours belong to the later, i.e., English one, does it matter if the ship is not arrested for the purpose of enforcing one's maritime lien?
6. In a 19th century case –*the Two Ellens* –the Judicial Committee of the Privy Council held that mortgage had priority over claims of persons who supplied necessities to the ship. Would the result be any different if decided as per Ethiopian law?
7. "Maritime liens and ship mortgages are not the only claims that give rise to a right to arrest a vessel." How do you respond to the assertion in quotation? [Hint: pay a close attention to the provisions of the Mar.Code dealing with Arrest].
8. On May 12, 2000, Abyssinia Shipping Lines mortgaged one of its vessels to a finance company –Wabishebele Bank –as security for a loan. Monthly instalments of the sums due under the mortgage were punctually repaid

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until a while, when Abyssinia defaulted. Subsequently, Wabishebele Bank wrote to Abyssinia Shipping Lines they are intending take court action unless it immediately pays the outstanding balance. Meanwhile, the bank is more concerned about the whereabouts of the court which can effectively enforce its rights of mortgage over the vessel Abyssinia, if action is taken against the defaulted shipping company. What would be your advice, if you are approached by the bank?

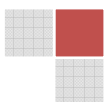


SUMMARY

The ascription of nationality to a ship is one of the most important means by which public order is maintained at sea. The term 'nationality' describes the legal relationship between a state and a ship authorized by the state to fly its flag. Each nation has the right to confer its nationality on a ship and to prescribe the rules governing such grants. However, international law has developed certain limitations. One of such limitations is the principle of genuine link which prohibits states from granting nationality to ships lacking "genuine link" to the state.

States usually grant their nationality to vessels by means of registration and by authorizing vessels to fly their flag. The Maritime Affairs Authority, established by Maritime Sector Administration Proclamation, Procl.No.549/2007, registers Ethiopian ships thereby authorizing the same to fly Ethiopian flag upon fulfilling the required formalities. Ethiopia accords nationality to a ship only if it is owned by Ethiopian natural and/or juristic person and foreigners, their principal place of business being here, domiciled in Ethiopia. Apart from this, the vessel is expected to have the technical competence to provide the intended services. Most importantly, the shipowner has to complete the vessel crew in conformity with relevant national and international standards.

Maritime claims are secured by either maritime liens or ship mortgages. Both maritime lien and ship mortgage are security rights over e.g. ships, freight and cargo, although the former is created by laws. Mortgage is created by a written contract which must be registered before it takes effect. Maritime liens and ship mortgages are enforced by arresting the vessel by filing a petition to a court of law.



CHAPTER THREE

LABOUR AND OTHER RELATIONSHIPS OF THE SHIPOWNER

This chapter presents the relationship between shipowners and captains and seamen. It also discusses the shipowner's liability for both his employees and other "nonmaritime" At the end of this chapter, students are expected to understand:

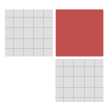
- the labour aspect of maritime law;
- the different international and national maritime employment standards;
- the status of the Captain and the Crew vis-à-vis the Shipowner;
- shipowner's responsibility for injury and death claims and limitation of shipowner's liability;
- the skills to apply the rules on maritime employment and tort to practical situations.

3.1 MARITIME LABOUR LAW

In chapter one dealt with the universally recognized responsibility of the flag state to exercise jurisdiction over the "internal affairs" of the ship flying its flag. The flag state's obligations and responsibilities towards ships carrying its flag are contained in international instruments such as the UN Law of the Sea Convention. One such duty of the flag state is to assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship. Hence, statements under international instruments traditionally recognize the competence of the flag state to define the employment and social-welfare regulations applicable to crews working on board ships sailing under their flag.

The employment relationship of the crew and the shipowner has long been governed by national maritime employment laws of the flag state. Even in some jurisdictions such as France the maritime employment law is older than the terrestrial employment law. Owing to the peculiarity of maritime employment situation, distinct rules of maritime labour are developed independently of the general labour law. Maritime nations, protecting their own interest as well as seafarers, have required the fulfillment of certain labour standards such as proper employment contracts, safety and health measures, medical care at sea

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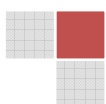
and social security. The once national effort is also now addressed through international “minimum requirements” of the International Maritime Organisation (IMO) and International Labour Organisation (ILO). In this respect, the 1978 ILO Convention 147, which sets standards for the minimum age of employment, medical examinations, wages, food, and accommodation along with the newly adopted consolidated maritime labour Convention (2006) are worth mentioning.

Under Title III of the Maritime Code of Ethiopia (Arts. 111-125), some special provisions governing the employment relations of seamen and shipowners are prescribed. Apart from this, international instruments to which Ethiopia is a party (e.g. the African Maritime Transport Charter) require compliance with international regulations relating to training and qualification of seafarers.

For the purpose of maritime employment, our Maritime Code defines *seamen* as including every person employed or engaged in any capacity on board any ship, *except* masters, pilots, and apprentices. Consequently, all men working on board ships may not fall within the definition of “seamen.” The employment situation and protection available to workers not “seamen” is thus less clear. In contrast, international maritime labour conventions employ the term “seafarer” which refers to any person working or employed on board in any capacity thereby making the protections (under the conventions) available to all of the workers on board.

Seamen are laborers of special class whose relationship with the shipowner is principally governed by *Seamen’s Article of Agreement* (which could be taken as the maritime equivalent of *Employment Contract*). The articles of agreement contains particulars indicating (1) whether the employment is for a definite/indefinite period or for a voyage; (2) the capacity in which the seaman is to be employed; (3) the date on which the employment commences; (4) the place at which and the date on which the employment agreement was concluded; (5) the method of remuneration; and (6) the amount of wages or the basis of determination of profit if remuneration is out of profit or freight.

Today’s world shipping industry is a sophisticated and complex operation requiring highly trained seafarers to operate state-of-the-art equipment. The fact that most of the accidents that happen at sea are due to human error has forced many maritime nations to think of legislative conditions that govern seafarer’s



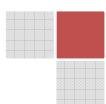
training and certification. Internationally, the IMO adopted, in 1978, Seafarer's Training, Certification and Watchkeeping (STCW) Code. This code was later amended in 1995 and is now known as STCW 95. The STCW seeks to establish a common base for the training and education of seafarers throughout the world, and places the emphasis on competence than knowledge. Its purpose is to establish a quality controlled structure that "will ensure that not only are required standards met but that they are seen to be met." Many states, including Ethiopia, are implementing STCW Code by endorsing the regulations of STCW 95.

The exercise of a mariner's duty on Ethiopian merchant vessels is not allowed, unless certain statutory conditions are complied with. Art. 14, Maritime Sector Administration Proclamation (Procl. No. 549/2007) prohibits persons from engaging in as seafarer on board any marine vessel unless he/she has obtained an authorization granted by the Maritime Affairs Authority. The statutory condition concerns all mariners including seamen, pilots, and masters as well. The authority licenses seafarers upon ascertaining their qualification. The adequacy of standards set and certificates of qualifications awarded by Ethiopia is demonstrated by the ability of Ethiopia to meet the requirements for the acceptance into the IMO "white list" of nations, which have complied with the STCW' 95 Convention. Ethiopian Shipping Lines –the only national flag carrier – owns vessels crewed by International Convention on Standards of Training Certification and Watching for Seafarers (STCW) Code.

Life at sea is less pretty. Moreover, seafarers are one of the main victims of labour exploitation. Though under reported, inhuman conditions on merchant ships such as physical and mental abuse and even murder or mysterious disappearance of crew are plenty. Pay and employment conditions have remained unsatisfactory despite the fact that sea transport represents for many countries the most important mode of transport for trade. Studies show that many shipping companies do not obey labour laws and governments are not interested in enforcing them. The flag of convenience phenomenon has also played its role in aggravating the situation. The personnel of flag of convenience vessels have in various instances been given lower than average standards. Even worse, there were instances of abandonment of seafarers on flag of convenience vessels.

Ensuring respect for basic labour rights and decent working conditions for all world's seafarers (which at the moment are estimated over 1.2 million) has long

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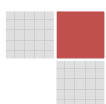
been a universal agenda. With the view to influence both the terms of collective agreements and national maritime labour legislation, the International Labour Organisation has, since 1920, adopted over 60 maritime labour standards. These standards include a multitude of questions including minimum age of entry to employment, recruitment and placement, medical examination, articles of agreement, repatriations, holidays with pay, social security, hours of work and rest periods, crew accommodation, identity documents, occupational safety and health, welfare at sea and in ports, continuity of employment and vocational training and certificates of competency. The Merchant Shipping (Minimum Standards) Convention, 1976 is an important international maritime labour instrument which sets out the minimum internationally acceptable standards for living and working conditions on board ships. Unfortunately, many shipping nations including Ethiopia are not party to this and any of the other international maritime labour conventions. Neither most of the standards set in the instruments have been domesticated.

The Maritime Code's Title dealing with maritime employment gives particular emphasis to seamen's right to home remittances (Art. 119), right to maintenance and cure when the seamen fall sick or injured while in ship's service (Art. 123 ff.), and right of repatriation when the seamen landed for any reason (Art. 125).

In many jurisdictions, seamen who suffer injuries or become ill while in the service of the ship are entitled to the remedy of maintenance and cure. The doctrine of maintenance and cure is rooted in the Rules of Oleron [see chapter one] promulgated in about 1160 A.D. and now encompasses three distinct remedies: (1) maintenance; (2) cure; and (3) wages. The obligation of "maintenance" requires the shipowner to provide a seaman with his basic living expenses while he is convalescing. The obligation to "cure", on the other hand, requires a shipowner to provide medical care, free of charge, to a seamen injured in the service of the ship. In addition to providing maintenance and cure, an employer must also pay to the seaman wages that would have been earned during the time of illness or injury.

Aspects of this doctrine are incorporated under our law. Art. 123 (1) provides: medical treatment shall be afforded to seamen injured in the service of the ship or who become ill during the voyage at the owner's expense. This is, of course, the reduction of the obligation to "cure" – a major aspect of the doctrine of maintenance and cure. The shipowner is not, however, always obliged to afford medical treatment. In particular, where the injury or sickness is due to

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indiscipline, misconduct, drunkenness or in the case of congenital disease such as insanity or epilepsy, or in the case of disease of venereal origin sickness expenses advanced by the shipowner are chargeable to the account of the injured or sick seaman. Moreover, the cost of treatment will no longer be due if the injury or sickness has become incurable (Art. 123 (2)).

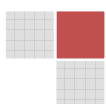
A sick or injured seaman is also personally entitled to wages or allowances (Art. 124). For so long as he remains on board, the sick or injured seaman is entitled to wages. And after landing, he is entitled to an allowance equivalent to wages for a period of four months. The only aspect of the doctrine of maintenance and cure which is not expressly recognized under our law is the obligation of the shipowner to “maintain” a sick or injured seaman. It may be that maintenance is understood available to all seafarers whether they are sick/injured or not.

Incidentally, it is worth noting that the employment income accruing to *seafarers* engaged on board seagoing regular marine transport service vessel registered in Ethiopia is exempt from taxes (Art. 13(2), Maritime Sector Administration Proclamation). This benefit is not confined to only seamen (as defined under Art. 111, Mar. Code). For the purpose of the Maritime Sector Administration Proclamation, seafarers mean any person, including masters and apprentices, employed or assigned to work on board a vessel.

Apart from aspects of the right to maintenance and cure [seen above], our Maritime Code recognizes only the right to costs of burial where a sick or injured seaman dies. Does this mean that seamen or their dependents do not in anyway enjoy remedies to work-related injuries, disabilities, or death?

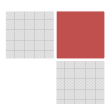
As could be seen from the discussion so far, the Maritime Code’s provisions on maritime employment are far from complete in so far as addressing, let alone all, even some major potential labour disputes involving seamen and shipowner are concerned. It seems, however, that we may supplement the incompleteness of the Maritime Code’s Title on maritime employment with provisions incorporated in the general labour law [Labour Proclamation 377/2003]. Though the Labour Proclamation does not apply to all employment relations, the scope of our labour law is not expressly limited to only a terrestrial context. Rather, employment in shipping industry decently falls within the scope of the labour proclamation for neither the outright nor the conditional exclusions under Arts. 3 (2) and 3(3) of the Proclamation prevent the application of the same in maritime settings. Hence, the rights and remedies, under legislations other than maritime ones, are

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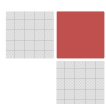
equally available to maritime employees. As a result, they may, for example, claim for work-related injuries, disabilities and death as per the general labour law.

Generally, it is agreed that seafarers, like any other workers, are entitled to decent working conditions and to the protection of their basic rights. Nonetheless, countries vary in the level of labour standards they comply with and enforce. Observance of maritime labour standards is further eroded as a result of flag of convenience practices. Also, since primacy has traditionally been accorded to the law of the flag state the application of labour standards of the port state has always been limited. Legal obligations under different international maritime labour instruments concern seafarers on ships flying the flag of member states for which the convention has entered into force after ratification. It is ,however, now widely urged to force ships putting at a state's port, whatever flag they are sailing under, to comply with national labour regulations so that controls on seafarers' working, living and welfare conditions is strengthened. Thus, the principle of no more favourable treatment is developed. Accordingly, the authorities of countries that have ratified international labour instruments such as the 2006 consolidated maritime labour law may require all ships that visit their ports to respect many of the standards of the instrument/s regardless of whether or not the country whose flag the ships fly is bound by the instrument/s. Most ships trading internationally will not, therefore, be able to ignore the requirements of the instruments. Hence, the extension of reach of port-state control is vital to greater protection for seafarers' basic labour rights. Such extension of control is also important to ensure maritime safety, environmental protection, and fair competition.



Review Questions 1

1. Why is certification of seamen required?
2. Do you think port state control will help fair maritime labour practice? How?
3. What do you think would the rationale justifying the exemption of seafarers' income from taxes be? Why is this benefit not available for terrestrial employees?
4. How is marine environment and safety protected through legislative requirements that concern labourers?
5. What does working environment at sea make different from the conditions on any terrestrial setting?
6. Our Maritime Code's provisions dealing with maritime employment concern seaman but not all seafarers. Agreeing on the application of our labour law to maritime settings, what would be the fate of seafarers who are not seamen? Would they not be entitled to the range of benefits and privileges that are recognized for employees in general?
7. An Ethiopian shipping line wants to hire qualified seamen from Europe. They want to know whether the employment of such foreign nationals is allowed as per the laws of Ethiopia. Moreover, the European seamen want to know whether they will be permitted to work on board Ethiopian merchant ship. What would be your advice if approached by both the shipping line and the foreign seamen?
8. In a 1989 scholarly article appeared in a foreign journal, Ibrahim Idris contend that *in matters of employment relations of seamen, Ethiopians or foreign nationals on ships flying the flag of Ethiopia, the law of Ethiopia must apply*. How do you see the application of *the law of the flag state*, against the freedom of contract, in employment relations of foreign seamen and Ethiopian shipowners? What if, for example, in the above question [at 7], the foreigners want to contract out the application of Ethiopian laws?
9. Unpaid seamen sought the enforcement of their maritime lien [see the previous chapter]. But, another mortgagee claims he has already got judgment in respect of the ship to which the lien attaches. How do you, as a judge, rule on the issue?



3.2 THE CAPTAIN/MASTER AND THE SHIPOWNER

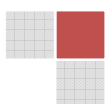
Traditionally, captains were general agents of the shipowners as well as the shippers. During the voyage captains were entitled to enter into any contract whatsoever if they thought that such contracts would be pursuant to the interest of the shipowners or shippers.

At present, however, maritime legislations have deprived the captain of commercial management and entrusted him only with the technical management of the ship. Owing to the quickness and facility of modern means of communication, the commercial management is carried out by the shipowner himself or by his agents, like *ship-brokers* and *ship's husbands*.

The relationship between the owner and the captain is an agent – principal one. The agency power of the master is provided under Art. 97, Mar. Code. Accordingly, the master/captain carries out day to day acts of management of the ship. He may also dismiss members of the crew. The traditionally broad power of captain has been narrowed, and he may only carry out *acts of management*. Acts of management includes acts done for the preservation or maintenance of property, leases for terms not exceeding three years, the collection of debts, the investment of income and the discharge of debts (Art. 2204, Civil Code). Exceptionally –when, for example, the manager is not present or represented by another agent, the power of attorney of the captain extends to all acts necessary in respect of the ship and the adventure. Also, in the event of unseaworthiness of the ship, the master may sell the ship. The sell of the ship by the master in any other circumstances require special power of attorney (See Art. 108, Mar. Code).

The master is liable for his default (Art. 98, Mar. Code). Unlike the shipowner, however, he can limit his fault based liabilities as per Art. 92 of the Maritime Code.

Though they are excluded from the definition of seaman who has employment relationship with the shipowner, captains are seafarers for the purpose of different national and international laws. Thus, they benefit from the different entitlements and privileges accorded to seafarers including entitlements to decent working conditions and protection of basic rights. Moreover, requirements of training and certification concern the captain (who is seafarer for



the purpose of different international maritime labour conventions) as well. Also, the exemption from taxes on employment income accruing to seafarers in general benefits the master too (Art. 14, Maritime Sector Administration Proclamation No. 549/2007).

Review Questions 2

1. What are the reasons for the decline in the scope of the hitherto broad agency power of the captain?
2. What would, again, be the fate of this particular seafarer if he is injured while on his marine duty? Or if he becomes permanently disabled?

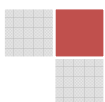
3.3 SHIPOWNER'S LIMITATION OF LIABILITY

One of the distinctive aspects of maritime law is the ability of shipowner to limit his liability. The principle of limitation of liability has been a part of maritime law for a long time. And, it is now a universal principle in the sense that it has been used in one form or another in practically every ship-owning country including Ethiopia. In Ethiopia and most other countries the shipowners' liability in tort and sometimes in contract is subject to some limitation. Why is such a privilege for shipowners sought? The following excerpts from an article by C. Popp give the answer from an historical perspective:

Popp, Q.C., Limitation of Liability in Maritime Law- An Assessment of its Viability from a Canadian Perspective, 24 J. Mar. L. & Com. (1993)

The concept of limitation of liability represents an exception to the general principle that if one causes injury or loss to another by his negligent conduct or by that of his agent or servant, that person is liable to pay damages to the other sufficient to restore him to his former position. For reasons of public policy, the ordinary operation of the law, requiring full restoration, has been suspended.

At first sight this appears to be a startling proposition. Viewed in its historical context, however, it becomes clear why it was considered necessary to give shipowners this privilege. Moreover, the notion is no longer confined to maritime transport. What is unique to maritime law is the overall limit that shipowners enjoy, sometimes referred to as "global limitation," over and above any other limitation that may apply, for example, the per package limitation in respect of compensation in the carriage of goods by sea or



the limits imposed in some jurisdictions respecting compensation payable to passengers for loss or injury suffered in the course of carriage by sea... [L]imitation of liability in English law dates backs to the early part of the 18th century, to a time when sailing ships spent many months, sometimes years, away from their home ports, out of touch with the shipowner. Under these circumstances, shipowners had very limited control over the master and the crew of their ships.

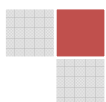
To make shipowners liable to the full extent of their assets for the acts and omissions of their masters and crews in the operation of their ships, on the basis of the principle of respondeat superior, seemed unjust in the circumstances where they could exercise very little real control. More important, it was thought that it might discourage business men who would be reluctant to invest their money in maritime adventures...

As could be appreciated from the foregoing excerpts, the philosophy of limited liability aims to encourage and protect the shipowners' investment in risky maritime ventures. The recognition of the risk involved in maritime adventure was of particular importance in those days when insurance was unavailable. Though limitation of liability in common law dates backs to the early part of the 18th century, in civil law jurisdictions the principle was in use as far back as the eleventh century.

Since nations provide different regimes of limits of liability, there is great potential for conflicts of laws. As was the case in relation to other areas of maritime law, there has been a universal effort to make the differing national limitation of liability regimes universally uniform for they are undesirable to the essentially international business of shipping. In this respect, the 1957 Brussels Convention on the subject is worth mentioning. This convention is the model for a sizable number of national laws on limitation of shipowners' liability.

The Ethiopian principle of limitation of shipowners' liability is incorporated in our Maritime Code, Title II, Chapter One. Other limitation regime for shipowners' contractual (carriage) liabilities is provided in Art. 198. Here, attention is given to the rules set in Arts. 80 and the following.

Acts resulting in the liability of the shipowner is contained in Art. 79 of Maritime Code. As per this article, the shipowner is vicariously liable for the default (in the discharge of their duties) of the master, the crew, and others in the service of the ship. He is also liable for in respect of the obligations undertaken by the master



in matters relating to the ship and the maritime adventure. Yet, the owner is entitled to limit his vicarious liabilities (Art. 80 (1) (b)). The owner is also entitled to limit his liabilities by reason of ownership, possession, custody or control of the ship, i.e. *strict liabilities*. One may, however, question that “are shipowners strictly liable after all?”

It is generally accepted that no one would be held strictly liable unless there is an express legislative provision to that effect. Neither the Civil Code’s Arts. 2077 ff. (the proper law of strict liability in Ethiopia) nor the Maritime Code expressly provide for strict liability of shipowner. Article 81 of our Maritime Code mentions the strict liability of the shipowner only for the purpose of limitation of the same. This could not be taken as an express statement of the law for the purpose of liability. Thus, the issue of *limiting* shipowners’ strict liability is hardly realistic unless there is first a law making the shipowner strictly *liable*. And, there seems to be only some instances of strict liability under Maritime Code such as contributions in general average. However, contributions in general average cannot be limited (see Art.82, Mar. Code).

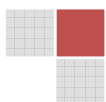
Seen from a global perspective as well, the presence of a law on strict liability of the shipowner is doubtful for there has historically been a legal trend to ease the financial ruin of the shipowner –who invest and engage in a relatively risky maritime venture –as a result of damages for various claims. Thus, strict liability of the shipowner is alien to the law of maritime torts in many jurisdictions. Owing to different reasons, however, courts in some jurisdictions have begun imposing strict liability on shipowners despite the historical absence of such a liability in respect of the shipowner. See the excerpts below:

Erling Selvig, Towards Strict Shipowner Liability: Recent Trends in Norwegian Law on Maritime Torts, 2 J. Mar. L & Com. 33 1970-1971

In the law of maritime torts and contracts one rarely meets with rules imposing strict liability upon shipowners, carriers or others participating in the activities connected with modern sea transportation.

In Norwegian maritime law most statutory rules of liability are based on the fault or culpa principle; only a few provisions of rather limited scope impose strict liability...The same situation apparently also prevails in foreign maritime law where one rarely meets with rules of strict liability. In Danish, Finnish, German and Swedish law this is a

Maritime Law

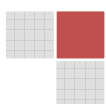


consequence of a general principle of the law of tort that strict liability cannot be imposed unless warranted by statute. The position is the same in American law where the federal maritime law and its culpa principle normally determine the shipowner's liability for damage resulting from the operation of the ship. In those legal systems, however, courts have been able to impose liability by stretching the concept of fault, for instance, by holding that one who undertakes a certain activity involving risks of damage to third parties, has the duty to take the safety measures necessary to prevent accidents from occurring. In English law the situation is largely the same...In French law, on the other hand,...[t]he law on maritime torts, which is based on a culpa principle, has been supplemented by the quasi strict rules on civil liability in general. Of greatest importance in this context is art. 1384 of the Code Civile... which provides that a person is responsible for damage caused by the action of the things in his custody unless he proves that the damage resulted from circumstances beyond his control (force majeure). This article has been used in a number of situations to impose on shipowners an extended liability for damage caused by a ship.

*In [many] countries the shipowners' liability in tort is subject to some limitation ... These limits of liability apply whether the shipowner's liability is strict or based on culpa-owner's privity excepted... The culpa principle of Norwegian maritime law means that for all practical purposes the extent of shipowners' liability has been determined by the general rule on vicarious liability in [Maritime Code]... In recent years, however, the courts have frequently used this provision to extend this liability by holding the shipowner responsible for damage caused by fault or neglect of an independent contractor... employed to perform work in the service of the ship. Such liability has become a type of extended liability of far greater importance in maritime law than in the law of torts in general, where the doctrine of strict ... liability holds the dominant position. With *Baltic SS Line v. Michaelson* however, the Supreme Court has probably brought about a basic change in the law of maritime torts. The court there imposed strict liability on a shipowner for damage caused by technical shortcomings in the ship's loading gear.*

Exceptions to the principle of limitation of liability are provided under Art. 82, Mar. Code. Accordingly, the principle of shipowner's limitation of liability does not apply to (1) claims for salvage, (2) claims for contribution in general average, (3) claims by the master and any servants of the shipowner, including the claims of their heirs, personal representatives or dependants; and most importantly (4) claims resulted from the actual fault or privity of the owner. Hence, shipowners cannot limit fault-based liabilities.

Maritime Law



The Limitation Fund: The shipowner's total liability for damage to persons or property arising on any distinct occasion shall not exceed certain maximum amounts termed "limitation fund". The limitation fund is constituted when the aggregate claims which arise on any distinct occasion exceeds the limits of liability prescribed in law. Though limitation of liability is a universal principle amongst shipping nations, the way the limitation fund is calculated varies from jurisdiction to jurisdiction. In civil law jurisdictions and USA, the limitation fund is based on the value of the ship after the incident which brought about liability. Common law systems, with the exception of that of the USA, are characterized by a limit based on (a) the tonnage of a ship and (b) the value of the ship before the liability-producing event occurred. The latter is the case under Ethiopian law. The limitation fund is calculated in relation to the tonnage of the ship causing the damage (Art. 86, Mar. Code). In cases of personal injury the amount is Ethiopian birr 516 for each ton of the ship's ton. The same is true when the claim involves only property claims. When, however, the occurrence has given rise to both personal and property claims the amount is Eth. Birr 516, of which a portion amounting to Eth. Birr 356 per ton is to be exclusively appropriated to the payment of personal claims; the remaining Eth. Birr 160 per ton being appropriated to the payment of property claims. In cases where the portion fixed for personal claims (Eth. Birr 356 per ton) is insufficient to pay the personal claims in full, the unpaid balance of such claims shall rank rateably with the property claims for payment against the other portion of the fund (Eth. Birr 160 per ton).

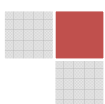
For the purpose of calculating limitation fund, the Maritime Code provides that the tonnage shall be calculated as follows:

1. In case of mechanically propelled ships (e.g. steamship), the net tonnage shall be increased by the amount deducted from the gross tonnage on account of the engine-room space in ascertaining the net tonnage;
2. In case of all other ships, the net tonnage shall be used (Art. 88, Mar. Code).

In case of the vessel with less than 300 tons, the limitation fund may optionally be limited to the value of the ship at the time of the occurrence giving rise to the claim (Art. 93. Mar. Code).

Once the limitation fund is constituted, the claimants share from the fund in proportion to the amounts of their established claims (Art. 86 (2), Mar. Code).

Maritime Law

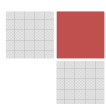


As is the case in many other jurisdictions, our Maritime Code explicitly permits not only shipowners, but also charterers, managers or operators of the ship, the master and members of the crew and other servants of the owner, charterer, manager or operator acting in the course of their employment to seek limitation of their respective liabilities(Art. 91. Mar. Code). The justification for this extension is, in part, identical to the one rationalizing the limitation of shipowners' liability. It is designed to promote the involvement of these individuals in the perilous shipping activity. What distinguishes the masters' and the crews' limitation of liability from that of the shipowner is that the former can (as per Art. 93) limit even fault based liabilities. Masters and members of the crew are entitled to limit their liability even if the occurrence which gives rise to the claims resulted from their actual fault or privity (Art. 92, Mar. Code). If, however, the master or member of the crew is at the same time the owner, co-owner, manager or operator of the ship, this privilege only applies where the act, neglect or default in question is an act, neglect or default committed in his capacity as master of or member of the crew.

The viability of the limitation of shipowner's liability has been attacked from various directions. In particular, the adequacy of compensation in cases involving, for example, oil pollution, is being thought more important than the financial interests of the shipowner. Excerpts from Q. Popp's article further illustrate the challenges to this ancient maritime law principle:

Popp, Q.C., Limitation of Liability in Maritime Law- An Assessment of its Viability from a Canadian Perspective, 24 J. Mar. L. & Com. (1993)

[M]uch of the litigation concerning whether the shipowner in any given case may limit liability has focused on the meaning of the words "actual fault or privity," i.e., what conduct on the shipowner's part justifies the withdrawal of the privilege and thus makes his liability unlimited, or to put in another...[I]t has become plain over the years that it is no longer acceptable for shipowners to confine themselves merely to supplying a safe ship and a competent crew, and, thereafter, to leave all questions of safe navigation to the master and the crew...It is clear from the jurisprudence that the courts are increasingly strict in dealing with the shipowners' privilege of limiting liability. Two reasons are suggested for the increasing severity of the courts in judging the conduct of shipowners. First, with modern means of communications, shipowners have a degree of control over their ships that was not available in the day of the sailing ship. The provision of a well



found, well equipped ship and the appointment of a competent master and crew is not enough. It is now safe to assume that it is necessary to demonstrate a close involvement of management in the running of ships, including in the practices and procedures to be observed and followed on board ship.

A further reason that may be advanced for the reluctance of the courts to allow limitation is the growing recognition that the level at which limits are set...is clearly unsatisfactory in providing adequate compensation , especially in those instances where personal injuries are involved.

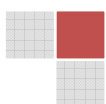
By the late 1960s it was clear that in many jurisdictions limitation of liability was becoming a fiction, since courts were routinely breaking it. Shipowning interests realized that something had to be done. The inadequacy of general limits was further highlighted by well publicized pollution incidents, such as the Torrey Canyon incident in 1967 which resulted in a special regime...for oil tankers causing pollution damage.

In recognition that global limitation was under increasing pressure legally and politically, the International Maritime Organisation in the early '70s commenced a review of the 1957 Convention...[and] a new convention was adopted, the 1976 Convention on the Limitation of Liability for Maritime Claims...Briefly put, the changes introduced by the new convention can be characterized as follows:

In exchange for a much higher limitation fund, claimants accept extremely limited opportunities to break the shipowner's right to limit liability.

Dear students, what do you think of such a trend? Do you think it is worth adopting nationally?

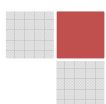
Assuming that students are well acquainted with aspects of maritime law so far dealt, we will, in the next chapter, resort to the somewhat lengthy part of the material dealing with the law on sea carriage. Once again, students are reminded to review the questions below.



Review Questions 3

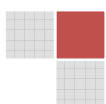
1. Limitation of liability is not unique to maritime law. Why is it, then, some writers speak of the uniqueness of limitation of liability in maritime law?
2. Sometimes, limitation of shipowner's liability is justified in terms of the need to make national flag carriers competitive in international shipping. How do you think the privilege of limitation would make the shipping companies competitive?
3. What is the limitation fund?
4. Does Ethiopian law on strict liability recognize shipowners' strict liability? If not, is there a need to recognize the same?
5. What are the relative merits/demerits of the calculation of limitation fund by (1) taking into account the ton of the ship (the common law way) and (2) the value of the ship after a major accident (the Civil Law way)?
6. The shipowner's right to limit his liability has been under attack from different circles. The traditionally valid justifications underlying the principle have now been seen less convincing in the advent of environmental and other concerns. What is your reflection on the dilemma to do away or not with this historic maritime law institution?
7. On the of 14 April 1912, during her voyage from England to the USA, *Titanic* [then the largest passenger steamship in the world] hit an iceberg, and sank two hours and forty minutes later, early on 15 April 1912. The sinking resulted in the deaths of 1,517 people, making it one of the deadliest peacetime maritime disasters in history. The high casualty rate was due in part to the fact that she did not carry enough lifeboats for all passengers and crew on board, even though this satisfied the regulations in force at that time. A disproportionate number of men died also, due to the women and children first protocol which was followed.

After the *Titanic* sank, the only portion of the ship remaining were the 14 life boats, which had a collective value of about \$3000, and the "pending freight" bringing the total to about \$91,000. The owners of the *Titanic* were successful in showing that the sinking occurred without their privity and knowledge, and therefore, the families of the deceased passengers, as well as the surviving passengers who lost their personal belongings, were entitled to split the \$91,000 value of the remaining lifeboats and pending freight.



Now, was it an English or USA court which entertained the case? Why? Do you think the outcome would be different if the case is settled according to the Maritime Code of Ethiopia?

8. *Tsehay*, a modern vessel of an Ethiopian sea carrier, collided with a British liner *the Queen*, and the later sank with her cargo. *Tsehay* was considered to entirely blame for the collision. Upon court litigation, the owner of *Tsehay* sought limitation of liability. Assuming that you are the judge, how would you settle the issue as per the Maritime Code of Ethiopia?



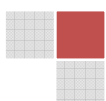
SUMMARY

The employment relationship of the crew and the shipowner has long been governed by national maritime employment laws of the flag state. Maritime nations, protecting their own interest as well as seafarers, have required the fulfillment of certain labour standards such as proper employment contracts, safety and health measures, medical care at sea and social security. Internationally, different conventions were adopted with the aim of ensuring respect for basic labour rights and decent working conditions for seafarers.

Our Maritime Code does have few provisions dealing with aspects of maritime labour law. The provisions give particular emphasis to seamen's right to home remittances, right to maintenance and cure when the seamen fall sick or injured while in ship's service and right of repatriation when the seamen landed for any reason.

Captains –who are excluded from the definition of seaman – primarily maintain an agent-principal relation with the shipowner. Despite this, some labour instruments extend the protection accorded to maritime employees to all seafarers including master. As a result, they are entitled to decent working conditions and basic labour rights.

The shipowner's liability to damages to goods and persons has long been limited under different national maritime legislations. The overall limits shipowners enjoy are unique as compared to other transport operators. The philosophy of limited liability aims to encourage and protect the shipowners' investment in risky maritime ventures. Except in few instances, the shipowner under Ethiopian law is entitled to limit his liabilities to an amount not more than 516 Eth. Birr for each ton of the ships tonnage. This privilege has also been extended to charterers, managers or operators of the ship, the master and members of the crew and other servants of the owner, charterer, manager or operator. Lately, however, this institution has been under attack from different angles.



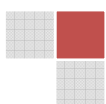
CHAPTER FOUR

THE LAW ON CARRIAGE OF GOODS BY SEA

Transportation of goods and passengers by water is one of the most ancient channels of commerce on record. This mode of transportation is still indispensable for international trade since ships are capable of carrying bulky goods which otherwise would not be carried. Rules governing relationships among participants of sea-transport have also been known since the Rhodian civilization (c.1st millennium BC). This chapter, deals with aspects of the law on sea carriage are dealt of also present, laws relating to multimodal transport- a relatively new mode of transport combining sea and other unimodal transport systems. After studying this chapter, students are expected to understand/develop:

- Identify the different types of contracts of affreightment;
- Identify the different maritime contract principles of sea carriage;
- Describe the duties and rights of shipowners and charterers in charterparties ;and carriers and consignees in contract of carriage supported by bill of lading;
- Identify shipowner's/carrier's responsibility for claims for damaged or lost goods and limitation of shipowner's/carrier's liability;
- explain, also principles of law relating to multimodal transport;
- Grasp the skills to apply the principles to practical situations.

Contracts relating to sea transportation are divided into three general classes: (1) charter parties; (2) contracts of carriage supported by bills of lading and ;(3) passenger contracts. Charter parties are used when the whole vessel with or without its crew is engaged for a voyage or on a time basis, whereas bills of lading and passenger contract or coupon tickets are contracts issued by a carrier to the respective shippers or passengers. Since the relative importance of laws relating to passenger contracts is in decline in the jet era, it is laws relating to transportation of goods that attracted the attention of lawyers in many jurisdictions. Therefore, we will concentrate only on charterparties and contracts of carriage supported by bill of lading.



4.1 CHARTERPARTIES

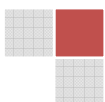
A charterparty is simply a contract by which an entire ship, or some part, thereof, is let for the specified purpose of the charterer during a specified term, or a specified voyage, in consideration of a certain sum of money per month, or per ton, or both, or for the whole period or adventure described. The party hiring the vessel is usually referred to as the **charterer**, and the one letting the vessel is called the **owner**.

Charterparties fall broadly into two groups, those under which the owner parts with control of the vessel for the period of the charter, and thus has no responsibility for the carriage of goods on the vessel, and those under which the vessel remains in the control of the owner and the charterer merely has the right to direct for what period of time or what voyages the vessel is to be used and what cargo is to be carried. The former are known as '**bareboat**' **charters**, or **charters by demise**, and do not constitute contracts of carriage of goods at all. The latter divide primarily into **time charters**, where the ship is chartered for a specified period of time, and **voyage charters**, where it is chartered for a designated voyage. Under a time charter, the hire is fixed by reference to the capacity of the vessel, irrespective of whether this is fully used by the charterer. Under a voyage charter, freight is calculated according to the tonnage actually shipped, unless there is stipulation to the effect that the charterer has to load a full cargo, in which case he has to pay compensation (**dead freight**) for the space not used. It should be noted that there are also hybrid charterparty agreements which combine elements of voyage and time charterparties.

Charter by Demise

As has been pointed out earlier, charterparty agreements are generally classified into charter by demise and charter without demise. The latter can further be classified into time charter and voyage charter.

Under Article 126 of the Maritime Code, charter by demise is defined as a contract whereby one party (the owner) undertakes to procure to the other party (the charterer) the possession of a ship for a definite period, subject to payment of rent. Unlike in the case of charters without demise, the owner relinquishes possession, command and navigation of the vessel to the charterer or demisee for a certain period of time. For this reason, charter by demise or bareboat charter is



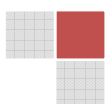
not viewed as contract of affreightment. Though it literally means “the hiring of a vessel or ship”, a contract of affreightment is understood, in some jurisdictions, as a contract of carriage and not as contract of rent. The distinction between contract of affreightment and contract of rent/demise were some time ago described by the US Supreme Court in the following manner:

“Affreightment contracts are of two kinds, and they differ from each other very widely in their nature as well as in their terms and legal effect. Charterers... may become the owners for the voyage without any sale or purchase of the ship, as in cases where they hire the ship and have by the terms of the contract, and assume in fact, the exclusive possession, command, and navigation of the vessel for the stipulated voyage. But where the general owner retains the possession, and command, and navigation of the ship and contracts for a specified voyage, as, for example, to carry a cargo from one port to another, the arrangement in contemplation of law is a mere affreightment sounding in contract and not a demise of the vessel...”

Our law also seems to distinguish between contracts of affreightment and charter by demise (See the headings of Chapter I and II of Title IV of the Maritime Code).

In many jurisdictions, the legal relationship between the owner and the demisee is significantly different from that created by a time or voyage charter. According to the American jurisprudence, for example, the bareboat charterer is owner *pro hac vice*. As owner “*pro hac vice*,” the demise charterer assumes most if not all of the burdens usually assumed by the actual owner. Because a demise charter transfers the possession and control of the vessel to the charterer, one who takes a vessel on demise is responsible for maintenance, repairs, or damages caused to third parties by the crew’s negligent navigation of the vessel. Thus, the owner who has demised its vessel will generally not be liable *in personam* for the fault or negligence of the crew –the charterer will be primarily liable. Also, demise charterers usually are responsible for the vessel’s operating expenses.

The situation under Ethiopian law is somewhat different. Apart from delivering the ship in a seaworthy condition, it is the legal duty of the owner to execute repairs required as a result of *force majeure* or normal wear and tear (Art. 128, Mar. Code). Moreover, there is no express provision in the Maritime Code

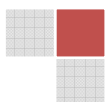


stating transfer of personal liability (from the owner to the demisee) for the mere fact of bareboat charter. Nonetheless, it could be argued that the provisions of the Civil Code and the special provisions of the Maritime Code to which charter by demise is subject to (see Art. 126 (3)) are indicative that the owner may not assume tortious liabilities as a result of his ownership while the ship is demised (see, for example, the discussions on page 55 *et seq.*).

One of the legally implied duties of the shipowner in demise charter is the duty to provide a seaworthy vessel. The owner is liable for damages resulting from unseaworthiness except when the unseaworthiness was caused by a latent defect that cannot be detected (Art. 129, Mar. Code). The *a contrario* reading of this same article implies the owner may be held liable for patent defects! In contrast, in jurisdictions like the USA, there is no legally implied warranty of unseaworthiness when a “bareboat” charter is involved. The jurisprudence is that where a demise charter is involved, the charterer takes *caveat emptor*. Consequently, a patent defect which the charterer has had an opportunity to discover by inspecting the vessel will not render the owner liable, as in the case of the sale of chattels. However, where the defects are not discoverable by inspection, liability will attach. Dear students, don’t you think our law’s position on this point is somewhat unpalatable?

Under a demise charter, the charterer has the obligation to pay the agreed hire (rent) for the vessel’s use. So long as the charterer retains control of the vessel, he is liable for hire. This seems so even when the charterer is justified in canceling the charter because of a breach of contract on the part of the owner. As in the case of real property, the only method of avoiding payment is to surrender the use of the hired property. Even if the vessel was useless for the charterer’s purposes, he is still the lessee in control of the vessel and bound to pay hire. Whereas, under a non-demise charter (or general carrier-shipper relationship), the payment due for the carriage and delivery of goods is called “freight.” No freight, for example, is earned if the goods are lost, or not carried because of impossibility unless the contract or the law provides otherwise.

Apart from the obligation to pay rent, the charterer is also duty bound to use the ship in accordance with the specifications in the certificate of seaworthiness and in accordance with the charter party (Art. 130, Mar. Code). Moreover, returning the ship to the owner after the expiry of the period is required by law. In case of *delay caused by the charterer* in returning the ship to the owner, the owner may



claim an amount of rent double that agreed upon in respect of the period of time exceeding the agreed period (Art. 131(2), Mar. Code).

Finally, it should be noted that the Maritime Code's chapter dealing with charter by demise is supplemented by the provisions of the law of obligation and hire (under the Civil Code) and that of contract of affreightment (Arts. 133 *et. seq.*). Put in other words, bareboat charter parties are subject not only to the provisions of Arts. 126 *et. seq.* but also to other pertinent provisions of the Civil Code and Maritime Code. Consequently, the following discussions on charter without demise may *mutatis mutandis* concern charters by demise as well.

Charter without Demise/ Contract of Affreightment

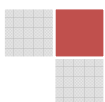
A charterparty is without a demise or lease of the ship where, like a simple contract of carriage, the charterer only gets the right to have his goods conveyed by the ship and the captain and the crews do not become his servants and the possession and control of the ship remain with the shipowner. The definitional article – Art. 133(1) reads:

“ a contract of affreightment is a contract whereby the shipowner undertakes , subject to payment of *freight*, to proceed with a particular ship on one or more voyages (*voyage charter*) or, during the period agreed upon, on the voyage required by the charter under the terms of the contract or as determined by custom (*time charter*).”

As could be deduced from the provision, the object of the contract is not to transfer possession of the ship to the charterer. It is rather to make the owner proceed with the ship for a particular voyage or time while he still retains the possession for himself. The owner undertakes to proceed with his ship subject to payment of freight, not rent.

The law distinguishes two types of charter without demise. Hence, there are three basic types of charter parties: (1) demise charter (for details, see the discussion in the previous section), (2) a time charter, and (3) a voyage charter. The following excerpts from Robert Force's *Admiralty and Maritime Law* elaborate on the distinction between a voyage and time charter:

Maritime Law



Robert Force, 2004, Admiralty and Maritime Law (Federal Judicial Center Publication) pp.42 et. seq.

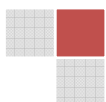
Under a voyage charter, the owner of the vessel agrees to carry cargo from one port to another on a particular voyage or voyages. The vessel is manned and navigated by the owner's crew...To the extent that a voyage charterer obtains only the carrying capacity of a particular vessel, the charterer is not responsible for maintenance, repairs to the vessel, or injuries to third parties arising from the crew's operational negligence. A voyage charterer usually is not liable for expenses such as bunkers (fuel).

A time charter is a contract for the use of the carrying capacity of a particular vessel for a specified period of time (months, years, or a period of time between specified dates). As with a voyage charter, the vessel owner under a time charter is responsible for the navigation and management of the vessel, subject to conditions set out in the charterparty. The vessel's carrying capacity is leased to the charterer for the time period fixed by the charterparty, allowing for unlimited voyages within the charter period. Therefore, the vessel is under the charterer's orders as to the ports of call, cargo carried, and other matters related to the charterer's business. The master and crew remain employees of owner and are subject to the owner's orders with regard to the navigation and management of the vessel. Because a time charterer obtains only the carrying capacity of a particular vessel, the charterer is not responsible for maintenance, repairs to the vessel or injuries to third parties arising from the crew's operational negligence. Times charterers usually are responsible for expenses of operating the vessel.

Implied Warranties[‡] in Charterparties

Certain warranties or undertakings of the owner are implied by law in charter agreements. One of such warranties is the seaworthiness warranty. Seaworthiness relates to the fitness of the vessel to carry out the intended function. According to an Indian law, a ship is seaworthy "when the materials of which she is made, her construction, the qualifications of the master, the number, description and qualifications of the crew including officers, the weight, description and stowage of the cargo and ballast, the condition of her hull and

[‡] Warranty is a common law term that is unfamiliar in civil law countries. Under English law, warranty, as distinguished from conditions and innominate terms, is a contractual statement about fact the breach of which entitles the other party to claim damage. For the purpose of our discussion, it is no problem to consider warranty as conceived under common law.



equipment, boilers and machinery are such to render her in every respect fit for the proposed voyage or service.”[the Indian Merchant Shipping Act, 1958]. A more or less similar test is employed by the US Supreme Court:

“‘The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport.’... “[The Silvia Case]

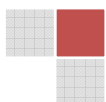
Though our Maritime Code does not elaborate on what constitutes seaworthiness or unseaworthiness, the warranty of seaworthiness, as enshrined under Art. 138, is believed to be in accordance with the jurisprudence in other maritime nations.

Samuel Williston compares the basis of the implied warranty of seaworthiness with that underlying the doctrine of warranty in the sale of goods. Like a seller in sales contract, the owner in a charterparty is in a position to know the condition of his property, i.e., the ship, and the charterer justifiably relies upon his judgment.

The concept of seaworthiness is a relative one. The fitness of a vessel is decided on its own peculiar facts, and our judgment vary according to the vessel, the voyage and the nature of the cargo carried. Moreover, the scope of the warranty is proved extremely broad in some jurisdictions. The absence of (1) a competent crew and an adequate number to man the vessel, (2) proper equipment to load and to provide storage for the cargo, (3) proper ballast and the ability of the vessel to carry its stated capacity, and (4) sufficient fuel and supplies for the contracted voyage(s) may render the ship unseaworthy.

Our Maritime Code reduces the warranty of seaworthiness to that of a warranty against failure to exercise due diligence in providing a seaworthy vessel. The owner is bound only *to exercise due diligence* to make the ship seaworthy. Even more, the exercise of due diligence is required *before and at the beginning* of the voyage (see Art. 138). Put in other words, the warranty does not relate to an unseaworthy condition arising after departure and beyond the owner’s control.

Nonetheless, there appears to be authority that the owner has a continuous obligation to keep the vessel in proper repair (see Art. 128 and Art. 171(2)) irrespective of his duty to exercise due diligence is required *before* and at the beginning of the voyage. Incidentally, note that that in some maritime nations

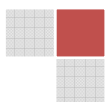


there is no implied warranty of seaworthiness in case of demise charter. In those countries the principle of *caveat emptor* applies where a demise charter is involved.

Article 138 enumerates three separate duties of the owner: (a) the duty to exercise due diligence to make the ship seaworthy; (b) the duty to exercise due diligence to properly man, equip and supply the ship; (c) the duty to exercise due diligence to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation. The duty to exercise due diligence to properly man, equip and supply the ship and the duty to exercise due diligence to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation seem to be outside the scope of the broad duty to exercise due diligence to make the ship seaworthy. The jurisprudence in some jurisdictions, however, considers the two separately stated duties as part of the somewhat broad and inclusive duty to make the ship seaworthy.

In principle, the shipowner is liable for damages resulting from his failure to exercise due diligence in discharging his duties relating to making the ship fit for the intended sea voyage. According to Art. 139, unseaworthiness renders the owner liable when it results from (1) his failure to carry out his duties under Art.138 or (2) a latent defect which a prudent shipowner could not have discovered. To benefit from the exemption under Art.139, the shipowner has to prove that the unseaworthiness is not attributable to his fault. Hence, the occurrence of damages, as a result of the ship's unfitness, seems to raise a presumption (regarding the fault of the owner in discharging its legal duties) which the owner has to rebut.

The warranty against unseaworthiness – which under Ethiopian law is general to all types of charterparties – is not the only legally implied duty of the shipowner. Other legally implied duties of the owner include the duty to place the ship at the disposal of the charterer as agreed (Art. 142) and the duty to proceed to the agreed port (Art. 141). Where the ship is not placed at the disposal of the charterer at the time and place agreed upon, the charterer may terminate the contract by giving notice in writing to the owner. The charterer is also entitled to compensation unless the shipowner shows the delay is not due to his fault. Whereas, if the ship is unable to reach the designated port of destination, it



proceeds to the port nearest to the place of destination and the shipowner bears the expenses of forwarding the goods unless the failure to reach the designated port is the result of *force majeure*, in which case the expenses are borne by the charterer.

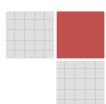
Certain duties of the charterer are also legally implied. The duty to pay freight concerns both time and voyage charterers. Whereas, the duty to load full and complete cargo (Art. 153, Mar. Code) and the duty to load and unload the cargo vary in the two different maritime charter party agreements. Note also that, the contract of charterparty gives birth to different rights and duties of each party.

The Duty to Load Full and Complete Cargo: It is only the voyage charterer who has the duty to load full and complete cargo. This is because freight, under a voyage charter, is calculated according to the tonnage *actually* shipped. In contrast, freight, under a time charter, is calculated by reference to the capacity of the vessel, notwithstanding this is not fully used by the charterer. Hence, there is no need to duty bound time charterer to load full and complete cargo.

The duty to load full and complete cargo, therefore, concerns only the voyage charterer who usually pays freight for goods actually shipped. Accordingly, the liability for failure to load full and complete cargo (Art. 153) does not concern the time charterer. Where a voyage charterer fails to load full and complete cargo, he pays not only the whole freight but also such expenses as result to the ship therefrom. Such charges are generally known as “dead freight”. He is, however, entitled to an allowance in respect of any saving to the ship in expenses and in respect of the three quarters of the freight of goods loaded by way of replacement.

The Duty to Load and Unload the Cargo: Apart from the charterer’s obligation to furnish a full cargo, the duty to load/unload seems to be implied into a voyage charterparty agreement. Again, the effects of failure to timely load/unload vary with type of charterparty agreements.

Under a time charter, the vessel owner has little concern for the time spent in loading and unloading. Here the charterer is the one that is interested in completing as fast as possible in the time allotted; and hence, he wants assurance that adequate loading facilities are available. Often clauses designed to facilitate this are inserted in the contract. The position of the owner and the charterer are,



however, reversed under voyage charters. Since a vessel owner, under a voyage charter is concerned with completing one venture as soon as possible, so as to embark on another, it is in his interest to provide penalties for delay and rewards for speed in loading and unloading. Thus, the special provisions of Section 3, Chapter 2, Title IV of the Maritime Code concern voyage charters only.

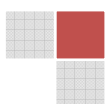
Arts. 158 *et. seq.* (Section 3, Chapter 2, Title IV) of the Maritime Code deals with lay days and demurrage. Lay days are the days fixed for loading and unloading of the cargo by the voyage charterer (Art. 158 (1)). And, it can be determined by either agreement or custom in the port (Art. 158 (2)). Whereas, demurrage refers to the days running after the lay days (Art. 159).[§] Maritime laws in many jurisdictions employ *demurrage* as a means to realize the prompt performance of the voyage charterer's duty to load and unload. Likewise, our Maritime Code's Art.159 entitles the shipowner to claim liquidated damages as of right during the time running after the lay days (i.e. demurrage).

The time allotted for demurrage may not exceed the time allotted for that of lay days. Time running after lay days and, in particular, demurrage renders the charterer liable for *damages for detention*. This amount –which is due after the expiry of demurrage– includes the liquidated damage payable during demurrage increased by half plus compensation for damages due to the fault of the charterer, if any (Art. 160).

Lay days start running from the time when the master has given notice that the ship is ready to load and unload (Art. 162(1)). More specifically, it is calculated starting from the time of the resumption of work following the master's notice (Art. 162 (2)). The running of lay days is suspended on holidays and other days of rest unless loading/unloading has actually taken place on such days. It is also suspended in cases of *force majeure* (Art. 165). In contrast, the running of time for *demurrage* and *damage for detention* continues irrespective of the occurrence of *force majeure*. Nonetheless, courts may reduce the amount due for demurrage where the hindrance is prolonged.

Notwithstanding the owner's right to claim demurrage and damage for detention, the master has the power to unload the cargo at the risk of the charterer once the lay days have expired. In so doing, the master has, however, to

[§] Demurrage does also refer to the penalty charge against charterers for delaying the loading/unloading of the cargo beyond the allowed time, i.e., lay days.



take care of the preservation of the cargo. Incidentally, it should be noted that where a charterer completes loading or unloading in a period of time less than that specified as lay time, the charterer has conferred a benefit on the owner and may be entitled to financial allowance referred to as *bonus for dispatch* (Art. 166).

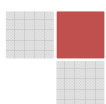
Freight

Charterparties without demise are considered as contracts of affreightment for the very object of such contacts are the carriage of goods. As such, the charges assessed for carriage of the cargo is not rent as in the case of charter by demise. Under a non-demise charter, the charge assessed for carriage of the cargo is rather known as freight.

In principle, freight is due when goods are delivered to the consignee or placed at his disposal at the port of destination (Art. 147). This is particularly the case in voyage charter.

The law requires the owner to deliver the goods at their destination. Also, the goods have to be delivered in good condition. Exceptionally, however, freight is due even in respect of goods which are not delivered at the port of destination and in respect of goods which are not delivered in good condition. If the acts of the charterer prevent the owner from making delivery at the port of destination, then he will be entitled to full freight nevertheless (Art. 148 (1)). Freight is also due where (1) the goods have perished through inherent vice; and (2) dangerous, harmful or prohibited goods, the nature of which has not been declared to the shipowner at the time of loading, have been destroyed. The shipowner earns his freight even where (1) perishable goods perish during the voyage; and (2) carried live animals die in transit for any cause other than the fault of the owner (Art. 149).

Sometimes parties may agree to the payment of *advance freight*. Where advance freight is made and the goods are not delivered, then that freight must be repaid to the charterer (Art. 150). On this point, the Ethiopian law is different from that of the Anglo-American one where recovery is impossible or possible subject to several important qualifications. In common law, advance freight is generally understood as “irrevocable payment at the risk of the shipper of the goods.”

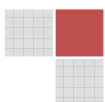


Another type of freight is *freight pro rata* which usually is payable where (a) the goods are not delivered up at the agreed port but at another port or (b) where a shipowner loads/delivers only part of a cargo. It is implicit in the provisions of Art.147 that there will be entitlement to freight *pro rata* if it is expressly agreed by the parties. Incidentally, freight is due where a charterer wishes to take delivery of goods before arrival at their destination.

Under time charter, freight is due for the time the ship is at the disposal of the time charterer (Art. 173) except in case of embargo, seizure, condemnation or loss of the ship. In the later situations, freight is due up to the date of the occurrence of the events. Unlike in the case of voyage charter, time runs against the charterer, and hence, he cannot avoid payment of freight unless he returns the ship to the owner. Delay for navigational reasons does not excuse the payment of freight unless such delays are attributable to the ships unseaworthiness, embargo or the acts of the crew, in which case no freight is due for the delay (Art. 175). In the event presumptive loss, freight is due up to the date of the last news of the ship, and for one half of the time which has elapsed since that date and the date on which the voyage should have been accomplished.

Penalties for inability to return the ship at the expiry of the charter are prescribed under Art.177. It seems there is a possibility for automatic extension of the contract by the charterer who is unable to return the ship (the ship being on voyage) at the time agreed. The reading of the provisions of Art.177 implies the entitlement of the charterer, during the fifteen days following the expiry of the charter, for the extension of the charter subject to payment of freight for the extension. [Compare this with the stipulation under Art.131 as per which the demise charter is not automatically renewed in the absence of express agreement.] For any period of extension exceeding the fifteen days, the law prescribes the additional payment of compensation for damages, if any.

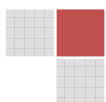
An unpaid shipowner has a lien right for his freight (Art. 176 (2) cum. Art. 155 *et seq.*). Where freight is unpaid, the shipowner may, according to Art.156, detain the cargo at the port of destination if the owner is not given sufficient security. Shipowner's lien for freight is only a possessory lien; therefore, whilst he can keep hold of cargo on which he has earned freight, he cannot sell it. It is only the court that orders the sale of the goods up to the amount of the claim for freight (Art. 156(2)).



Review Questions 1

1. Define charterparty and elaborate the different types of charterparties.
2. A shipowner entered a charterparty agreement with a charterer who, after enjoying the use of the ship, failed to make the ship available for the owner's subsequent dealing. What would be the legal effect of the charterer's failure to make the ship at the owner's disposal in due time? Would the outcome vary with the type of the charterparty agreement entered into?
3. Mr. X, a shipowner sold his ship while the ship is on a voyage charter. Would the transfer of ownership affect the voyage charterparty entered into previously? [Hint: see Art. 145]
4. In the above question, assume that the shipowner sold the ship to a foreigner who subsequently changed the flag of the ship. But, the time charterer –whose interest may be jeopardized as a result of the change in the vessels flag – protest that the flag of the ship cannot be changed for it is an essential aspect of the charterparty contract. will his argument be upheld if he goes to court?
5. Do you think parties to a charterparty may, for example, stipulate that there is no warranty of seaworthiness?
6. As a result of a mechanical malfunction, a chartered vessel has been rendered temporarily unusable. The frustrated charterer wants to terminate the contract. Is it legally feasible for the charterer to *as of right* terminate the contract? [Hint: see Art. 144]
7. "Though freight is payable in both voyage and time charterparties, the provisions of Section 2, Chapter 2, Title IV of the Maritime Code seems to only envisage a voyage charter situation. " Do you share this view? Why?
8. Why are the rules on lay days and demurrage irrelevant in time charterparties?
9. In a 1971 case, an English court held that where the charterer redelivers a vessel to the shipowner after the date stipulated in the charter-party, hire may sometimes be payable at the contractual rate until the date of delivery. Would the same be held by an Ethiopian court? See the facts of the case below:

A vessel was chartered "for 12 months 15 days more or less for in charterers'option" from Dec.29, 1967. Discharge of her cargo was delayed by reason of strikes and she was not redelivered to the shipowners until Apr.24,



1969. The charterers contended that damages were the only remedy available to the shipowners, and should be assessed on the basis of the current market rate.[Note also that the English court held that the charterers were liable to pay the contractual rate of hire from Dec.29, 1969, until Apr.24, 1969.
10. The warranty of seaworthiness is legally implied into charterparties. In some jurisdictions, including Ethiopia, the warranty is reduced to only a guarantee to exercise due diligence to make the ship seaworthy. Does it matter whether the warranty is against unseaworthiness or against failure to exercise due diligence to make the ship seaworthy? How?
 11. "In case of a charter party by demise, the master is the agent of the charterer and not of the shipowner." How do you see the contention in quotation in light of the Maritime Code's provisions?
 12. A certain day in early 1990s, a vessel was in her voyage from Calcutta, India to Assab, Ethiopia. Before reaching the port of Assab, she was warned not to go an Ethiopian port as the war between government forces and rebel groups escalated to the port area. As it was impossible for her to go to Assab, she discharged the cargo at the port of Djibouti. Now, the shipowners are claiming freight for the delivery of the goods at the port of Djibouti. Do you think their claim would be successful?
 13. The following is an excerpt from English court decision in a case involving Ethiopian Shipping Lines. The case (famously known as *the Saga Cob*) is of academic importance for it once (in the early 1990s) drew the attentions of scholars. Once you have gone through it, develop a paper on such issues as (1) what the out come would be if the case was entertained in Ethiopia, (2) if the outcomes are different, discuss the merits of the respective outcomes. Excerpts:

*K/s Penta Shipping A/S v. Ethiopian Shipping Lines Corporation, (The
'Saga Cob')*

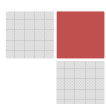
Court of Appeal

June 23, 24 and 25, 1992; July 26, 1992

Before Lord Justice Parker, Lord Justice Balcombe And Lord Justice Woolf

Charter-party (Time) - Safe port - Vessel traded between Assab and Massawa - Charterers ordered vessel to Massawa - Vessel attacked by Eritrean guerillas - Owners claimed loss suffered by them as a result of casualty - Whether Massawa a safe port.

Maritime Law



By a charter-party dated Feb. 15, 1988 the plaintiff disponent owners let their vessel Saga Cob to the defendant charterers. The charter ...provided inter alia:[under clause 3 that] Charterers shall exercise due diligence to ensure that the vessel is only employed between and at safe ports...where she can always lie safely afloat but...Charterers shall not be deemed to warrant the safety of any port...and shall be under no liability in respect thereof save for loss or damage caused by their failure to exercise due diligence...

The charter further provided that the vessel was to be employed in the Red Sea, the Gulf of Aden and East Africa and was to carry clean petroleum products. In the course of performing the charter the vessel called about 20 times at Massawa between January and August, 1988 without any untoward consequences.

On Aug. 26, 1988 the charterers ordered the vessel to carry a cargo consisting of 500 tonnes Jet A1, 400 tonnes of TS-1 and 200 tonnes of MGR from Assab to Massawa.

When the vessel was anchored there, at about 02 55 hours on Sept. 7, 1988 the vessel being in a position of about four to five miles north east of the harbour entrance, the vessel was attacked by Eritrean guerillas. The master was wounded and substantial damage was caused to the vessel especially to her superstructure, hull, engine room, radar electrical installation and steering gear. As a result of the damage sustained the vessel did not resume her service under the charter and eventually major repairs were effected at Lisbon between Oct. 31 and Dec. 9, 1988. The owners brought an action against the charterers claiming damages for breach of [clause] 3 of the charter-party.

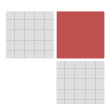
The charterers denied that they committed any breach of cl.3 and they counterclaimed a balance of \$88,093.32 in respect of a final hire account.

The issue for decision was whether in principle the charterers were liable to the owners for the loss sustained by them as a result of the attack on the vessel on Sept. 7, 1988.

Held, by Q.B. (Com. Ct.) (HIS HONOUR JUDGE DIAMOND, Q.C.), that

(1) the primary task was to ascertain whether a particular source of danger could properly be described as a characteristic of the port and if so whether that danger rendered the port prospectively unsafe;

(2) the correct approach in this case was to ask the question: was there a foreseeable risk



on Aug. 26, 1988, the date on which the vessel was ordered to Massawa, that the vessel might be exposed to attack by elements of EPLF (the Eritrean Peoples Liberation Front) while proceeding by sea to the port, while staying at the anchorage outside the port or while departing by sea from the port; if that risk was foreseeable then such risk was a characteristic of Massawa at the relevant time and Massawa was prospectively unsafe by virtue of that risk;

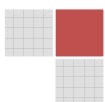
(3) the Court ought to look primarily at the risk of a seaborne attack on the vessel and on the facts in August and September, 1988 the approaches by sea to and from Massawa had a propensity to the risk of seaborne attacks by units of EPLF;

(4) by Aug. 26, 1988 it was a characteristic of the port of Massawa that vessels proceeding to and from the port or lying at anchor outside the port could be subject to seaborne attack by the EPLF; although the characteristic might not have involved a high degree of risk such risk could not properly be regarded as negligible; by reason of this characteristic the port of Massawa was prospectively unsafe and it was this sort of unsafety that resulted in damage to the vessel;

(5) the facts known to the charterers should have led them to conclude that there was a small risk that a vessel ordered to Massawa in August 1988 might be the subject of a seaborne attack by the EPLF, and this being so the charterers failed to exercise due diligence to ensure that the vessel was only employed between and at safe ports, places, berths; the charterers in ordering the vessel to discharge at Massawa committed a breach of cl. 3 and the damages caused by such breach included any loss sustained by the owners as a result of the attack on the vessel at the anchorage on Sept. 7, 1988.

The charterers appealed, the issues for decision being (1) whether at Aug. 26, 1988 when the order was given to proceed to Massawa that port was a safe port and (2) if it was not whether the charterers exercised due diligence to ensure that the vessel was only employed at or between safe ports as required by cl. 3.

The appellate court reviewed the discussion of the facts of the case done by the lower court before deciding to allow the appeal. The facts of the case, as reviewed by the appellate court, are also reproduced below to help you analyse the case by yourself in light of Ethiopian law.



The Facts

By Aug. 26, 1988 hostilities between Ethiopian Government forces and the forces of two rival organizations, the Eritrean Liberation Front (ELF) and the Eritrean Peoples' Liberation Front (EPLF) had been in progress for many years. In March, 1988 a rather indeterminate front line between the government forces and the EPLF had been established some 40-50 kilometres north west of Massawa. Both before and after that time however, mobile guerilla attacks behind the government's lines had been carried out by EPLF units. Such attacks had been on inland targets although in 1986 an attack had been made on oil storage facilities at Massawa. At Massawa there is both a naval base and a commercial port. In addition there are two oil storage facilities. Massawa was used by the Ethiopian Government to supply its forces in Eritrea and for the supply of food and other necessities to the population of the territory which it held to the south of the front line.

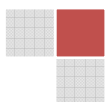
In May, 1988 the government declared a state of emergency in Eritrea and Tigre and established certain prohibited areas. These however did not include the port or town of Massawa.

Sporadic EPLF artillery attacks were made by EPLF mobile units on the town of Massawa every few weeks in the period from April to August, 1988. The Deputy Judge, in our view rightly, did not consider that any of this general activity constituted Massawa an unsafe port, although it was relevant background. We do not therefore propose to give any further detail.

There are in essence only a very few incidents from which it could, even possibly, be concluded that on Aug. 26, the port was prospectively unsafe.

First, on Apr. 23, 1988 an EPLF guerilla force made an attack on the oil refinery at Assab. As to this the Deputy Judge said:

According to newspaper reports the guerillas fired shells at the refinery from a boat anchored at a nearby island. There is no doubt that the attack occurred but it is not known what, if any, damage was caused to the refinery. The claims and cross claims made by the opposing side in relation to incidents such as these tend to be hugely exaggerated for publicity purposes so that all one can say is that some kind of attack took place on a particular place on a particular day. The main significance of this event is that a boat or boats were involved.



Secondly, prior to May 31, 1988 the Ethiopian naval authorities had instituted a convoy system for some vessels proceeding to or from Assab particularly vessels carrying overtly military cargoes. Of this the Judge said:

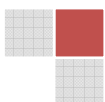
This no doubt was because the coastline of Eritrea and the islands off it, such as the Dahlack archipelago, provided an ideal hiding place for the small boats known to be operated by units of the EPLF. Such boats had been used to mount the attack on the oil refinery at Assab in April 1988.

Thirdly, on May 31, 1988, the vessel Omo Wonz was attacked by a guerilla force using three speed boats while at sea some 65 nautical miles south of Massawa. She was followed by a frigate of the Ethiopian Navy which in turn was followed by Saga Cob. One of the attacking boats was sunk. Omo Wonz suffered minor damage and two of her crew were injured.

Fourthly, in the immediate aftermath of the attack last mentioned Saga Cob was ordered to proceed in convoy but on June 14, at a meeting between the Ethiopian Naval authorities, the Ministry of Transport and the charterers it was decided that there would be no obligation on charterers' vessels to sail in convoy but that the Ethiopian navy would supervise clear and patrol the coastal waters as they thought necessary and if circumstances should arise where the authorities considered an escort necessary they would provide one. At the same time vessels proceeding between Massawa and Assab were instructed that they should in no circumstances approach nearer than five miles to the coast and were in no circumstances to sail nearer than five miles to the coast of certain specified islands. Of these instructions the Judge said:

. . . I think it is reasonable to suppose that the instruction was given so as to counter the risk that guerilla forces situated on the coast might use rockets or shells to fire on shipping and to counter the further risk that if small boats used by the EPLF were hiding close to the coast or on islands off it they might emerge without warning and attack passing ships before they were observed and before counter measures could be taken. After these new instructions were given it would seem that naval escorts were provided only sporadically for the Saga Cob as and when the authorities thought fit. The Master did not specifically request such an escort, having been told by his owners to judge the situation for himself.

Between the attack on May 31, and Aug. 26, no further relevant incident occurred. There was no incident between Aug. 26 and the attack on Sept. 7. Furthermore there was no



further attack of any kind on shipping thereafter until January/February, 1990 and it was not until January, 1990 that war risk underwriters required additional premiums in respect of vessels operating off the coast of Ethiopia.

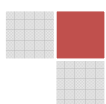
So much for the incidents. We must however mention a further matter upon which the Deputy Judge placed some reliance. That was that immediately after the attack on Omo Wonz her master wrote in a letter:

The voyage Assab/Massawa and vice versa is getting dangerous. It is quite unsafe for the ship and her crew. Even though vessels do not ask for escort port authority instruct to join the convoy for security.

What then does all this amount to? There was known guerilla activity on land and in April there had been a guerilla attack on the refinery at Assab in which a boat had been used. Taken alone this is in our judgment of no significance. Next the naval authorities had both prior to and after the Omo Wonz incident considered there was sufficient risk to take precautions. This cannot in our view be significant. What would be significant is the adequacy or inadequacy of the precautions. If a port authority appreciates that there is some navigational hazard in the port which creates a risk and takes precautions which will result in a properly handled vessel being able to avoid the risk, the taking of precautions cannot be relied on to show that the port was unsafe. Furthermore, if a hazard is, for example, properly lighted but for some extraneous reason e.g. because the power supply was suddenly cut by guerilla action the lights fail, it cannot in our judgment be said that the port was prospectively unsafe or that the unlighted hazard was a normal characteristic of the port.

What then of the precautions? Those in force prior to the Omo Wonz attack did not prevent it. From the evidence it appears that this was because the escort frigate and Omo Wonz had got too far apart. This however cannot in our judgment demonstrate the inadequacy of the precautions. Just as charterers are entitled to assume that vessels entering a port will be properly handled so also it appears to us they must be entitled to assume that a safety system will be properly carried out.

Be that as it may, there is no evidence whatever that the system introduced after the Omo Wonz had any defects until the attack on Saga Cob itself when at anchor four or five miles outside the port. This cannot in our judgment be regarded as other than an abnormal and unexpected event unless it is to be said that as from the Omo Wonz incident, any vessel proceeding to or from Assab or Massawa was proceeding to an unsafe port. This in our judgment is untenable. The situation in this case was drastically



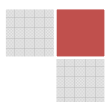
different from that in The Lucille when the Shatt-al-Arab had become the centre of hostilities. All that can be said in this case is that since a guerilla attack may take place anywhere at any time and by any means, that the guerillas had two boats and that they had made one seaborne attack 65 miles away, it was foreseeable that there could be a seaborne attack either en route from Assab to Massawa or in the anchorage at Massawa. If this were enough it would seem to follow that, if there were a seaborne guerilla or terrorist attack in two small boats in the coastal waters of a country in which there had been sporadic guerilla or terrorist activity on land and which had many ports, it would become a normal characteristic of every port in that country that such an attack in the port or whilst proceeding to it or departing from it was sufficiently likely to render the port unsafe. This we cannot accept. Omo Wonz was itself clearly an isolated abnormal incident and, until the order to proceed to Massawa almost three months later, nothing further had occurred to suggest that the risk of further attack on the Assab/Massawa voyage or in the anchorage at Massawa had not been contained. In such circumstances, to say that such an attack or even the risk of such an attack was a normal characteristic of the port, is in our view impossible.

As to the letter of the master immediately after the Omo Wonz incident we do not consider that it can be regarded as of any importance. The master was no doubt at the time alarmed but thereafter he visited Massawa on several occasions despite the provisions of the charter-party entitling him to refuse. The charterers expressly disclaim any arguments that by entering into the charter-party the owners accepted the risks but it appears to us that the master's actions indicate clearly that whatever he may have thought immediately after the Omo Wonz incident he, like every one else, considered that Massawa was a safe port.

We further consider that what occurred subsequently is relevant on the question whether Massawa was a safe port.

We accordingly hold that on the Aug. 26, 1988 Massawa was a safe port.

This makes it unnecessary to consider the second issue. It was submitted that if contrary to our view Massawa was then unsafe it must follow that since charterers knew all the facts they had failed to exercise due diligence. We do not accept that this necessarily follows. In our view if a charterer knows all the facts and orders the vessel to a port which is regarded generally by owners of vessels to be safe, he might well be protected. Suppose a charterer was uncertain of the position and enquired of a number of owners who used the port whether it was in their view safe and received replies from all of them 'We regard it as safe; of course it is possible that a guerilla attack could happen but we

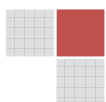


pay no attention to it'. Could it be said the charterer had failed to exercise due diligence? We doubt it. Due diligence is the same as reasonable care and in such circumstances we would find it hard to accept that the charterer had not exercised reasonable care. There is, moreover, a difference between physical danger, such as a sand bank or reef, and political danger where what has to be assessed is necessarily subjective. In such case, if a charterer comes to a reasonable conclusion as to the safety of the port, why should he be said to have failed to exercise due diligence? We make no decision on the point and make the above observations in case it should be said in the future that we have by silence accepted the Deputy Judge's conclusions that on the facts known the charterers should have concluded that there was small but nevertheless appreciable risk that a vessel might be subject to seaborne attack and had therefore failed to exercise due diligence. There is in our judgment at least a strong argument that the test should be expressed thus - 'if a reasonably careful charterer would on the facts known have concluded that the port was prospectively unsafe'.

In the present case even after the attack on Sept. 7, Massawa continued to be regularly used by shipping for another year and a half without incident. This is in our view relevant on the question of exercise of due diligence.

*We conclude by saying that, with respect to the learned Deputy Judge, he failed in our judgment to distinguish between the situation where, as in *The Lucille*, a port is admittedly unsafe at the time of the order and the question is whether that unsafety was the cause of the damage, and a case such as the present, where the question is whether the port is prospectively unsafe. In the former case one is dealing with ordinary principles of remoteness and causation. In the latter one is considering whether the port should be regarded as unsafe by owners, charterers or masters of vessels. It is accepted that this does not mean that it is unsafe unless shown to be absolutely safe. It will not, in circumstances such as the present, be regarded as unsafe unless the 'political' risk is sufficient for a reasonable shipowner or master to decline to send or sail his vessel there. There is no evidence in the present case that this was so and subsequent history shows that Massawa was on Aug. 26, 1988 and for a long time thereafter not regarded as presenting any such risk.*

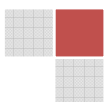
The appeal will be allowed, the judgment below set aside and a declaration made that the charterers were not in breach of their obligation under cl. 3.



4.2 CARRIAGE OF GOODS BY SEA UNDER BILLS OF LADING

A large percentage of international trade is undertaken by way of cargo carried under bills of lading. Contracts of carriage under bills of lading are distinguishable from contracts of charterparties. Especially in common law countries, there is a tradition of distinguishing between a charterparty and contract of carriage by sea under bills of lading. In contrast, maritime laws of Continental Europe do not allow a great difference between the two forms of contracts. As pointed out in the previous section, charterparties (except bareboat charters) can be considered as simple contracts of carriage. For that matter, affreightment by charterparty is subject to the same conditions as contract of carriage of goods by sea in codifications of Europe. In many jurisdictions [including ours], however, contract of affreightment by charterparty is distinguished from a contract of carriage of goods under a bill of lading. The most visible distinction is the manner in which the ship has been employed. A bill of lading is “a contract in relation to the goods, where as a charterparty is a contract in relation to the ship.”

Contract of sea carriage is usually entered into when a seller performs his obligation to ship the goods to the buyer abroad. The seller does not need to hire (charter) the vessel under a charterparty to perform his obligation to ship. He may merely book shipping space so that his goods will be shipped with consignments from other shippers on the same vessel. Once the goods have been shipped, the shipowner/carrier would issue the seller-shipper with a bill of lading covering his goods only. Such a bill of lading is of central importance in contract of sea carriage for it performs different functions. [See below]. Most importantly, it supports the underlying contract of carriage between the carrier and the shipper; and governs the relationship between the carrier and the consignee who is not a principal party to the contract of carriage. Hence, we do have three concerned parties in contract of carriage under bills of lading – the **shipper** (also called consignor), the **carrier** and the **consignee**. The first two are parties to the contract of carriage. And, the consignee is the one to whom the goods are shipped (who most of the time has a sales contract relationship with the shipper). Note that bills of lading are not themselves contract of carriage; they are rather supporting documents issued afterward to help the consignee conveniently receive delivery from the carrier. The following excerpts elaborate



on the different commercial and legal functions of bills of lading in light of the leading international conventions relating to bills of lading.

Karen Troy-Davies, 1999, *An Introduction to Bills of Lading (Unpublished)*.

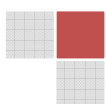
Bills of lading can appear daunting both to practitioners who are new to shipping law and to practitioners who specialise in other areas but need sometimes to refer to reported cases involving bills of lading. It is hoped that the following overview, by relating the content and some of the principal legal rules governing bills of lading to the commercial functions of bills of lading, will provide a helpful introduction to this area.

Range of Commercial and Legal Functions of Bills of Lading

Evidence of Receipt of Cargo

Bills of lading originated as no more than documents issued to merchants by carriers to evidence receipt by the carriers, in good condition, of cargoes shipped on board their vessels. Bills of lading thus enabled the shippers or the receivers of the cargo to establish that cargo that either was not delivered at all or was delivered in damaged condition at the discharge port had been loaded on a vessel in good condition and, thus, must have been damaged whilst in the care of the carrier. This receipt function remains a primary function of the “face” of most bills of lading (i.e. the side of the bill of lading in which information specific to particular cargoes, such as the description and weight or volume of bulk cargoes or the dimensions, number and seal numbers of containers in the case of containerised cargoes, is entered, generally in numbered boxes). The words “shipped on board in apparent good order and condition” remain, by virtue of Article III, rule 3 of the Hague and Hague-Visby Rules (and, similarly, Article 15(1)(b) of the Hamburg Rules), the most common form of words used to evidence receipt on board a vessel, in good condition, of a shipper’s cargo.

Bills of lading often are prepared by shippers and carriers, if they prepare bills of lading, must rely principally on information supplied by shippers. Carriers often will have little opportunity, in the course of loading, independently to confirm all that is said by shippers as to the nature, condition and quantity of their cargoes, e.g. because cargo is concealed within packaging. Nonetheless, because the bill of lading is a receipt issued by the carrier, it is the carrier and not the shipper that will be liable to the receiver for any discrepancies between the quantity and apparent order and condition of the cargo on shipment, as acknowledged in the bill of lading, and of the cargo as delivered to the receiver. The bill of lading can be treated as conclusive evidence as between the carrier

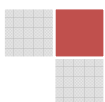


and a receiver and as at least prima facie evidence as between the carrier and the shipper, as to the number, weight or quantity and apparent order and condition of the cargo on loading; see ... Hague and Hague-Visby Rules, Article III, rule 4; the Hamburg Rules, Article 16(3)...[T]he information inserted on the face of the bill of lading generally will be stated or deemed to have been supplied and warranted by the shipper, which will be required to indemnify the carrier against inaccuracies in the information provided for inclusion in the bill of lading; see, Hague and Hague-Visby Rules, Article III, rule 5 and Article IV, rule 5(h); Hamburg Rules, Article 17(1); the Carriage of Goods by Sea Act 1992, section 3(3).

The information set out on the face of a bill of lading often is expressed in qualified terms. The common use of words "said to" in relation to the description, contents or weight or other measure of a cargo supplied by the shipper and entered on the face of the bill of lading might not operate, at least alone, to qualify, as between the carrier and a consignee, the accuracy of factual statements to which they relate...A bill of lading issued by a carrier to a charterer that is also named as the shipper of the cargo covered by the bill of lading generally will be characterised as no more than a receipt for cargo... There is a strong presumption that the contract for carriage of that cargo, as between the carrier and the charterer shipper, is contained in the charter alone. However, bills of lading otherwise now perform other equally important commercial and legal functions.

Evidence of a Contract of Carriage

Gradually, the terms on which received cargo was to be carried came to be set out (in ever greater detail and ever smaller print) on the "reverse" side of bills of lading. However, the manner in which bills of lading are issued has dictated their characterisation, generally, as documents that contain or evidence, rather than constitute, contracts of carriage. Save for a "received for shipment" bill of lading, a bill of lading will not or, at least, should not, be issued until after all of the cargo covered by that bill of lading has been shipped on board the carrying vessel...and, indeed, might not be issued until after the carrying vessel has sailed from the loadport. However, it would be commercial nonsense to assume that shippers would load their cargoes onto vessels, and that carriers would accept those cargoes for carriage on board their vessels, regardless of the terms on which those cargoes were to be carried. Consequently, it is reasonable to assume... that a contract of carriage must have been concluded before or as cargo is tendered and accepted for shipment on board a vessel, e.g. on completion of a booking note by a shipper or upon the shipper tendering cargo for loading pursuant to the advertised terms of a liner service, and thus prior to issue of a bill of lading... Often... once a bill of lading has been

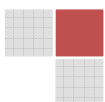


issued it will be both sufficient evidence, and the only available evidence, of the terms of the contract for carriage of the cargo that it covers.

In practice, because bills of lading often are transferred, by indorsement and delivery or mere delivery, not only from shippers to consignees (i.e. the persons to whom the cargo is consigned or sent and, thus, the intended receivers of the cargo) but also by shippers or consignees to banks or onward to subsequent purchasers, a bill of lading will be the only evidence of the terms of the contract for carriage of the cargo that it covers that is available to a consignee or other transferee of the bill of lading. Thus, bills of lading in the hands of consignees or other, intermediate or subsequent, transferees often have to be assumed to contain all of the terms of the contract of carriage...

The commercial requirement that a bill of lading contain or evidence the contract for the carriage of cargo that it covers dictates that it will contain detailed terms on matters such as the scope of the duties accepted by the carrier in relation to the carriage and discharge of the cargo, the duties of the person entitled to the cargo in relation to the payment of freight and the rights and duties of the person entitled to the cargo in relation to the discharge and delivery of the cargo. It is in this connection that the Hague, Hague-Visby and Hamburg Rules have assumed such importance in the law governing bill of lading contracts. These Rules were developed in response to the adoption by carriers of bill of lading clauses that increasingly purported either to avoid altogether or drastically to reduce the obligations and liabilities that were imposed on carriers at ... law.

Charterers historically have had sufficient commercial power to be able to negotiate fair and reasonable commercial terms of carriage with shipowners. However, because a contract of carriage generally is concluded prior to the issue of a bill of lading, bill of lading holders other than original shippers never in fact have a chance to negotiate at all with carriers, let alone to negotiate with carriers on an equal commercial footing. It thus was deemed desirable, in the face of the increasing restrictions that were being introduced into bill of lading contracts by carriers, that international standards should be developed to ensure that bills of lading should contain contracts of carriage on essentially fair and reasonable commercial terms. The Hague Rules were the first attempt at such international standards. Deficiencies over time in the operation of the Hague Rules, e.g. as to the application of the package or unit limitation to containerised cargo, were intended to be rectified, but have not in all instances been overcome, in the Hague-Visby Rules. The Hamburg Rules represent an attempt not only to rectify remaining operational deficiencies in the Hague-Visby Rules but also to alter the commercial balance reflected in the earlier Rules, by increasing the protection offered to bill of lading holders

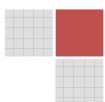


and reducing that afforded to carriers. There is now wide acceptance in practice, by ocean carriers, of the Hague or Hague-Visby Rules, or of statutory variants on those Rules, as part of the terms of their standard bill of lading contracts but there has been only limited adoption to date by ocean carriers of the Hamburg Rules.

Document of Title to Cargo

Cargo often is intended to be sold, or sold on, after it has been consigned to a carrier and the consignee thus either might not be identified when a bill of lading is issued or might thereafter alter. The shipper or consignee of a cargo sold, or sold on, after consignment to the carrier but not immediately paid for will require some assurance that the cargo will not be delivered to the purchaser or end purchaser before the price has been paid. Conversely, if the cargo is sold or sold on and paid for immediately after consignment to the carrier, the purchaser or end purchaser will require some assurance that the cargo will be delivered to it, and not to the order of either the shipper or the original consignee. Similarly, a bank might have advanced funds for the purchase of the cargo either to the original shipper, or to the consignee, or to a subsequent purchaser and will require some assurance that the cargo cannot be disposed of before the bank is reimbursed. It is not feasible for intermediate or subsequent transferees, or transferees for limited purposes, of a cargo that is dealt with afloat each to take physical possession of that cargo for the duration of their interest. However, it is both feasible and desirable for each of those transferees to control disposition of the cargo for a period of time, or to an appropriate degree, through control of a document representing an entitlement to the cargo. Thus, by mercantile custom, both "received for shipment" and "shipped on board" bills of lading have come to be treated as documents of title to cargo.

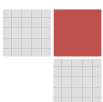
Bills of lading made out to a consignee whose name is left blank or to "bearer" or to "order" or to "assigns" are transferable (as opposed to truly negotiable) instruments the delivery or indorsement and delivery of which can transfer property in or rights and liabilities concerning the cargo covered. Mere delivery of a blank or bearer bill of lading, or of a bill of lading "indorsed in blank", can transfer property in or rights and liabilities concerning the cargo covered by that bill of lading whereas both indorsement and delivery are required to transfer property in or rights and liabilities concerning the cargo covered by a bill of lading made out to a named consignee or "indorsed in full". A bill of lading is "indorsed in blank" simply by insertion of the name of the shipper or consignee on the reverse of the bill. A bill of lading is "indorsed in full" by the shipper or consignee signing on the reverse of the bill an order to "deliver to X or order". Transfer of a blank or bearer bill of lading can be restricted simply by filling in the blank or adding a full



indorsement. Conversely, transfer of a bill made out to a named consignee or to order or assigns can be facilitated by adding an indorsement in blank.

Meanwhile, the carrier, which generally will have had no involvement at all in sales or onward sales of cargo whilst afloat, nor in any delivery or indorsement and delivery of the bills of lading covering such cargo, will be concerned on arrival at the discharge port to deliver the cargo to the proper person without being put to undue enquiry or delay. If there were only one original bill of lading issued, those commercial concerns could readily be met by a rule that simply required delivery to be made only against production of that single original bill of lading. However, bills of lading traditionally have been issued in sets of 3 originals; one to be retained on the vessel, one to be retained by the shipper and one to be sent to the consignee. There still are good commercial reasons for splitting a set of 3 original bills of lading, e.g. to ensure that at least one original bill of lading arrives at the discharge port ahead of the vessel, and this practice would create no difficulty if bills of lading still were treated as no more than receipts for cargo. (The former practice of retaining an original bill of lading on board the vessel, otherwise generally discontinued, has been revived on oil tankers, but for the purpose of delivery of one original to the receiver at the discharge port, because the original bills of lading, which often have to be "negotiated" through banks under numerous back-to-back sales afloat, otherwise often would reach the discharge port long after the vessel.) However, because bills of lading have come to be treated also as documents of title to the cargo covered, the use of sets of original bills of lading now provides substantial scope for fraudulent dealings... The rules that have been developed to govern the exhaustion of bills of lading as documents of title thus have had to reflect both a balance between the commercial interests of merchants in retaining freedom to deal with their goods after shipment on board ocean vessels and those of carriers in being able to identify, both with certainty and without incurring undue delay, the persons entitled to delivery of cargo at a discharge port and the oddity that ocean bills of lading continue to be issued in sets of up to 3 originals.

Absent notice of any conflicting claim to the cargo, or knowledge of circumstances that ought to raise a reasonable suspicion that the holder is not entitled to the cargo, the carrier is entitled and, indeed, obliged to deliver the cargo to the first holder who presents one of a set of original bills of lading that makes that cargo deliverable to him and is thereby discharged from any further delivery obligation under the bill of lading... Thus, even though the original bills of lading as issued named X as consignee, if Y presents to the carrier one of the set of original bills of lading that appears to have been duly indorsed in blank by X, the carrier can and should deliver the cargo to Y and not to X... Conversely, regardless of whether it might in good faith do so, the carrier is neither

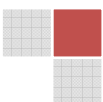


obliged nor entitled to deliver the cargo to a person who appears to be entitled to it, unless that person can produce to the carrier an original bill of lading... Thus, even though the original bills of lading as issued named X as consignee, if X cannot present to the carrier one of the original set of bills of lading, the carrier is neither obliged nor entitled to deliver the cargo to X.

In practice, because inability to produce an original bill of lading at the discharge port most often is the result of unavoidable delays in the processing or transmission of bills of lading and not of dishonest dealings, carriers usually will be prepared to deliver cargo against either adequate security or an indemnity against potential adverse claims offered by a named consignee or other person who appears to have a good claim to cargo for which he cannot produce an original bill of lading.

Review Questions 2

1. What was the original commercial function of bills of lading?
2. What are the three important international conventions relating to bills of lading?
3. "The bill of lading can be treated as conclusive evidence as between the carrier and a consignee and as at least prima facie evidence as between the carrier and the shipper, as to the number, weight or quantity and apparent order and condition of the cargo on loading." Why do you think it is not conclusive evidence as between the carrier and the shipper?
4. What are the importance of the information contained in (1) the face and (2) reverse side of bills of lading?
5. What did particularly necessitate the enactment of rules governing bill of lading contracts?
6. "As a document of title to the goods, a bill of lading enables the holder to obtain delivery of goods. Its possession in law is equivalent to the possession of goods and therefore its transfer is symbolically a transfer of the goods themselves. In property law, the term 'document of title' is used to denote that delivery of the document with any necessary indorsement transferred ownership of the goods where so intended. The focus on title is therefore misleading, for the transfer of title is an aspect of the relationship between seller and buyer, whereas the bill of lading concerns the relationship between the holder and carrier. The bill of lading should therefore be seen as a control document by which constructive possession is transferred rather than a document by which



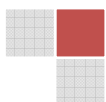
- title is passed. Accordingly, the bill of lading constitutes an acknowledgment by the carrier that the goods will be for whoever is the current holder of the bill of lading.” How do you see this argument in light of the third commercial/legal function of bills of lading depicted in the excerpts reproduced above?
7. Do you think bills of lading can be *conclusive* evidence of the terms of the contract of carriage as per which it is issued?

Dear Students, I hope you are by now well introduced with bills of lading – the vital supporting documents in contract of sea carriage. Following is a discussion of Ethiopian law relating to contract of sea carriage supported by bills of lading.

A contract of carriage, as defined under Art.561 of Commercial Code, is “a contract whereby a carrier undertakes for reward to carry persons...or goods and to convey them to a specified place.” This carriage could be by land, air, or sea. The carriage of goods or passengers and goods by the three modes of transport are governed by their respective pieces of legislations. As far as sea carriage is concerned, the relevant provision of the Maritime Code applies.

The Maritime Code defines contract of sea carriage “a contract of carriage covered by a bill of lading or any similar document of title to goods (Art.133 (2)). Such contracts are distinguished from other contracts of affreightment embodied in charterparties; and are subjected to special provisions laid down in Section 5, Chapter 2, Title IV of the Code. Contracts of carriage of passengers are subjected to the provisions of Arts. 210 *et.seq.* Since, in the “jet-age,” the passenger-carrying segment of the shipping industry has lost much of its former importance, the practical importance of these provisions has declined.

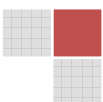
Parties to a contract of carriage by sea are known respectively as the shipper and the carrier. The term carrier includes the shipowner or a person managing the ship, or the charterer who enters into a contract of carriage with a shipper (Art. 180 (5)). The shipper is the person to whom the carrier undertakes the duty of transporting the goods. He may be the seller or buyer under a contract of sale, a freight forwarder or any other consignor. The bill of lading issued by the carrier principally governs the relation between himself and the consignee, not that of the carrier and the shipper as such.



The source of Ethiopian law on contract of carriage under bill of lading (Arts. 180-209, Mar. Code) is almost certainly the 1924 Hague Rules (International Convention for the Unification of Certain Rules Relating to Bills of Lading). The Maritime Code enacted in 1960, some eight years before the Hague Rules were amended and replaced by the new Hague-Visby Rules. It is the opinion of some scholars that the drafters of the Maritime Code took into consideration the provisions of the Hague Rules –which in the 1960s was the only prominent international convention on bills of lading. Furthermore, it is noted that numerous provisions of the Code are very similar to that of the Rules and other national legislations adopting the rules.

The application of the special provisions (Arts. 180-209, Mar. Code) is limited to only contracts of carriage of goods supported by bill of lading or any other documents of a similar nature(e.g. delivery warrants). They do not apply to charterparties unless the bill of lading issued pursuant to a charterparty regulates the relations between a carrier and a holder of the same (Art. 180 (2)). This provision is of practical significance. The relations of charterparties to bills of lading raise several questions where the terms of the bill differ from those of the charterparty. Of particular importance is the fact that the owner may find himself subject to two contracts regarding the same cargo yet containing different terms. For instance, the vessel owner who usually has a lien right on the cargo shipped as his security for payment of freight and other amounts due under the charter, must, under a bill of lading issued without reference to the charter, surrender the cargo to the holder of the bill for he cannot assert his lien right against the holder of the bill. So as not to make the shipowner subject to two different contractual regimes in respect of the same shipped goods, the law intervened by providing a provision which clearly favors the terms of the charter against the terms of the bill issued under the charter (Art. 194). Hence, it is important to note that a bill of lading issued under a charterparty is quite different from a bill of lading issued in case of contract of carriage of goods by sea. A bill of lading issued to the charterer by the owner of a vessel is regarded as a mere receipt while in the possession of the charterer. However, where such a bill of lading is transferred to a third party, such as the consignee of the goods, under circumstances that confer rights in the third party with respect to delivery of goods, the bill of lading is then subject to the special provisions of Arts.180-209, Mar. Code. In such situations, the charterparty controls the legal relations between owner and charterer, and the bill of lading controls the legal relations between the carrier and consignee.

Maritime Law



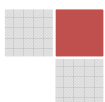
The special provisions do not also apply to transport of live animals and goods carried on deck (Art.180 (4)). In so far as the duration of application is concerned, Art. 180 (3) provides that the special provisions apply only from the time goods are loaded to the time when they are discharged from it.

A bill of lading is issued by the carrier or his agent in exchange of Mate's Receipt after the goods have been placed on board the ship for being carried to a specific destination (Art.181 cum. Art. 186). When goods are delivered to a ship for carriage, a receipt is issued by the Mate of the ship, who is an officer under the Captain, acknowledging that he has received the goods specified therein. The Mate's Receipt is either known as "received for shipment of bill of lading". It is usually used when the goods form only part of the cargo of a ship. And, the "received for shipment of bill of lading" is later exchanged for **shipped** or **onboard bill of lading** – a bill containing an acknowledgment by the carrier that the cargo covered has been loaded on board a vessel. According to Art.186, the receipt before shipment is proof of the delivery of goods to the carrier. Whereas, the shipped bill of lading is proof of the shipment of the goods.

The bill of lading shall show the shipping marks, including the number of packages, and objects, or the quantity or weight of goods, in accordance with the particulars given by the shipper in writing before shipment (Art. 183(1)). As such, it is described by many as "the symbol of the goods described in it." And hence, it evidences the apparent condition of the goods as prescribed in the bill.

The shipping marks are entered in accordance with the particulars given by the shipper. The carrier may, however, refuse to enter in the bill of lading such particulars where he has reasonable grounds for suspecting their accuracy or where he has had no reasonable means of checking their accuracy. Usually, qualifications such as "said to contain" and "condition, weight, etc. unknown" are used to indicate the carrier's reservations. The qualifications distinguish between *clean bills of lading* and *qualified (claused) bills of lading*.

Bills of lading are drawn up in two originals, of which one is delivered to the shipper and the other retained by the carrier (Art. 187 (1)). The original in the hands of the carrier is not transferable (Art. 187 (2)). In contrast, the original in the hands of the shipper can be made transferable. A negotiable bill of lading fulfils in relation to the goods specified in it much the same functions, and is

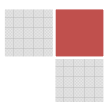


transferred in much the same way, as a negotiable instrument in relation to a stated money obligation. If the bill of lading is made non-negotiable, it does not function as a transferable document of title to goods. It only performs the other two function of bills of lading, i.e., as evidence for delivery/shipment of goods and as evidence of a contract of carriage.

Marek Dubovec, the Problems and Possibilities for Using Electronic Bills of Lading as Collateral, 23 Ariz. J.Int.& Comp. Law(2006),pp. 437 and ff.

Bills of lading may either be made out in a negotiable or a nonnegotiable form. A nonnegotiable bill of lading provides for delivery to a named consignee without the need to present the bill of lading itself, while a negotiable bill of lading provides that the carrier must deliver the goods to the named consignee or his order upon the presentation of the bill...There are two characteristic features of negotiable instruments. First, that the rights embodied in the instrument are transferable by delivery if payable to the bearer, or by endorsement and delivery if payable to order. These features are retained at least until the transport of goods is completed by delivery against the presentation of the bill. Second, a bona fide transferee who takes the instrument in good faith and for value acquires a good and complete title to the instrument and the rights it embodies, even if the transferor had a defective title or no title to it all.

The negotiable bill of lading, as used in international trade, is indispensable to the conduct and financing of businesses involving the sale and transportation of goods between parties located at a distance from one another. Negotiability and the "document of title" feature of bills of lading give banks a document that they could accept as security for payment under a letter of credit or provide loans on a secured basis. A negotiable document of title is valuable collateral, as it allows quick, easy and inexpensive access to the goods. It should be pointed out that currently, few banks rely primarily on the collateral value of the bills of lading when deciding to issue or confirm a letter of credit. They rely more on the applicant's creditworthiness and cash collateral than on the cargo's market value. One of the reasons for doing so is questionable clauses introduced by some major shipping lines entitling carriers to delivery without the presentation of the bill of lading. The carrier who delivers without production of a document title is liable to the person holding the document, whether it is the bank or a third party transferee...Bills of lading are not useful in cases where the goods are not intended to be resold during transit or if there are no problems regarding payment, for example, in sales between branches of a single company. However, a bill of lading is necessary when a number of re-sales [are] contemplated, when payment is by documentary credit, or when the seller needs the



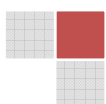
security of a document of title. The question of the need for a bill of lading is particularly important in the case where it will not reach the consignee before the goods arrive at their destination. In these cases, merchants frequently resort to letters of indemnity as a temporary substitute for the missing bill of lading. Delays occur as result of the practice of issuing the bill of lading only once the cargo has been loaded on board the ship, making it the last document to be issued in the export transaction, while it is the first document required in the import transaction.

The Ethiopian law on negotiability of bills of lading is not alien to the features elaborated in the excerpts above. Bills of lading, be it negotiable or non-negotiable, entitle a holder in due course to procure delivery from the carrier. This right of holders of bills of lading is recognized under Art.187 (3), Mar. Code. Depending on the forms of bills of lading – to named, to order, to bearer –the circulation of the same varies. A bill of lading to a named person may be assigned (but not negotiated); and the carrier may only deliver the goods to the person named (Art. 190(1)). A bill of lading to bearer or a bill of lading to order endorsed in blank is negotiable by simple *delivery*. Whereas, a bill of lading to order is negotiable by endorsement; and the carrier delivers the goods to the beneficiary under the endorsement. (See generally Art. 190, Mar. Code).

As indicated in the excerpts from Marek Dubovec’s article, the original of the bill of lading in the hands of the shipper may be drawn in sets of three or more parts. According to Art. 188, Mar. Code, each part confers the same rights. The delivery of the cargo to a holder of one of the sets makes the other sets of no value (Art.188 (2)). Where a dispute arises between holders of several negotiable parts of a single bill of lading to order, *before* any delivery of the goods, preference shall be given to the holder of the part bearing the earliest endorsement (Art.192). However, a holder of a bill of lading under an earlier endorsement may not be preferred against a holder in good faith after delivery of the goods to the later (Art. 193).

Delivery Warrants (Orders) - Art. 195, Mar. Code

For different reasons, shippers may want to consolidate consignments destined to different receivers under a single bill of lading. One of such reasons could be financial. By consolidating cargos destined to different consignees under a single bill of lading, the shipper secures reduced freight in respect of goods that might otherwise be split under their respective bills of lading. In such cases, delivery



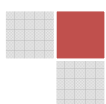
warrants are usually issued to facilitate the easy delivery of goods to respective consignees of goods under the *groupage bill of lading*. They are generally issued because the shipper of a bulk cargo covered by a single bill of lading wishes to split the bulk cargo and to deliver separate batches of the goods represented by the bill of lading to a number of consignees. Delivery warrants (orders) are an undertaking given by the carrier, pursuant to a contract for the carriage by sea of the cargo to which the undertaking relates, to the person so identified, to deliver that cargo to a person identified therein without the need to produce the bill of lading. Delivery warrants avoid problems potentially faced in procuring the surrender of the initial original bill of lading and issuing a number of different original bills of lading in substitution. Delivery warrants confer the same rights that bills of lading confer in relation to the goods described in it. And, like bills of lading, they can be drawn to a named person, to order or to bearer.

Through Bill of Lading –Art. 204, Mar. Code

Through bill of lading is a document covering more than one stage (or sometimes, more than one form) of carriage. A carrier who issues a through bill of lading assumes liabilities arising out of the various stages of transit until the completion of the carriage. Successive carriers appointed by the principal carrier are liable only for damages occurring during the time they are responsible for the goods.

Carrier's Duties and Liabilities

After a carrier receives goods, and upon demand of the shipper, he must issue a bill of lading. Such bills of lading must be dated and signed by the carrier or his representative; and it must also contain the particulars provided under Art. 182, Mar. Code. Apart from the particulars related to the names and addresses/nationality of the carrier, the shipper, and the ship, the bill of lading has to contain details on the amount of freight, the place and date of loading, and the goods delivered to the carrier (Art. 182). Of particular importance is the particulars showing the quantity, weight, or number of packages or pieces, and the apparent conditions of the goods, provided that the carrier is not obliged to show or state markings, numbers, quantity, or weight reasonably believed to be inaccurate or of which it has no reasonable means of checking(Art. 183(3)). As pointed out earlier, a carrier may also protect itself by inserting qualifying



clauses into a bill of lading stating, for example, that it has not been able to verify certain particulars regarding the cargo.

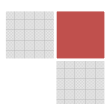
The carrier's legally implied duties are not confined only to issuing a bill of lading. He is also under obligation to deliver the goods to the holder of the bill of lading (see generally Art. 189). Also, Art. 196 provides two broad duties of the carrier. The first sub-article cross-refers to Art. 138 – the article stating the duties of the shipowner in charterparty contracts. Accordingly, the carrier is bound, before and at the beginning of the voyage, to exercise due diligence to (1) make the ship seaworthy [See the discussions on pp. 61 *et. seq.* for details on the warranty of seaworthiness]; (2) to properly equip, man, and supply the ship; and (3) to make the holds, refrigeration and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

Art. 196(2) requires that the carrier “properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.” While the carrier's duty under Art. 196(1) relates to the fitness of the vessel, his duties under sub-article two relates to the cargo. The carrier is liable for damages resulting from his failure to discharge these duties. And, any exculpatory clauses, which directly or indirectly relieve a carrier from the legally imposed liabilities, are null and void (Art. 205).

Following the Hague Rules, the Maritime Code incorporates fault-based liability regime as far as the carrier's liability in contract of carriage is concerned. The carrier is not strictly liable for damages for goods even when it is resulted from unseaworthiness. Moreover, the carrier is immune if loss or damage results from:

1. Act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship ;
2. Fire, unless caused by the actual fault or privity of the carrier;
3. Perils, dangers, and accidents of the sea or other navigable waters;
4. Acts of God;
5. Acts of war;
6. Acts of public enemies;
7. Arrest or restraint of princes, rulers, or people, or seizure under legal process;
8. Quarantine restrictions;

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9. Act or omission of the shipper or owner of the goods, his agent or representative;
10. Strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general;
11. Riots and civil commotions;
12. Saving or attempting to save life or property at sea;
13. Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;
14. Insufficiency of package;
15. Insufficiency or inadequacy of marks;
16. Latent defects not discoverable by due diligence;
17. Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof being on the carrier to show this.

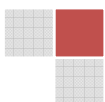
These defenses of the carrier, as recognised under Art.197 of the Maritime Code, are most likely taken from the Hague Rules. The apparent verbatim similarity of the provisions of Art. 197 with the equivalent provisions of the Hague Rules and the American Carriage of Goods by Sea Act –the US enactment of the Hague Rules – tells everything about the material source of the former.

Robert Force groups these immunities of the carrier into five categories depending on the basis of the excuse:

Robert Force, 2004, Admiralty and Maritime Law (Federal Judicial Centre Publication) pp.65 -66.

Carrier immunities (defenses) can be grouped into five categories. First, some immunities excuse a carrier notwithstanding the loss or damage to cargo resulting from the negligence of its employees. The defense based on errors in navigation of the vessel [Art.197 (1) (a)], the defense based on errors in the management of the vessel [Art.197 (1) (a)], and the fire defense [Art.197 (1) (b)] fall into this category. Second, there are defenses based on overwhelming outside forces, such as acts of war [Art.197 (1) (e)], acts of public enemies [Art.197 (1) (f)], arrest or restraints of ...governments [Art.197 (1) (g)], quarantines [Art.197 (1) (h)], strikes or lockouts [Art.197 (1) (j)], and riots or civil commotions [Art.197 (1) (k)]. The third category includes loss or damage caused by overwhelming natural forces, including perils of the sea [Art.197 (1) (c)] and acts of God [Art.197 (1) (d)]. The fourth group deals loss or damage attributable to faults of the

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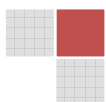


shipper, which include acts or omissions of the shipper or its agents [Art.197 (1) (i)], wastage in bulk or weight, losses resulting from inherent vice [Art.197 (1) (m)], and insufficiency of packaging [Art.197 (1) (n)] or marking [Art.197 (1) (o)]. Finally the fifth category includes loss or damage that occurs despite a carrier's exercise of due care. This include the loss or damage resulting from an unseaworthy condition not discoverable through the exercise of due care, from latent defects [Art.197 (1) (p)], and from situations where a carrier can establish that it and its servants and agents exercised due care and that loss or damage was occasioned through the conduct of others or circumstances for which it is not responsible [Art.197 (1) (q)].

The meanings of each of the exemptions have been established, most importantly through court decisions, in leading maritime nations as USA and England. Following is a discussion of the meanings of carrier's immunities in light of established jurisprudence from countries adopting the Hague Rules –which is the most likely source of Ethiopian laws on sea carriage.

Errors in Navigation and Management: Under the Maritime Code, the carrier is not responsible for cargo loss or damage that results from his employees' fault in the navigation or in the management of the ship. One may appropriately question what faults/neglects/acts of the master or the crew, for example, constitute fault in either navigation or the management of the ship.

In USA, "navigation" and "management" of a vessel have been defined as including "the control during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroads of the seas." Moreover, the navigation and management exemption is distinguished from the duty to provide a seaworthy vessel by employing the "primary nature and object of the acts/faults which cause the loss." The owner who equipped the vessel with the appropriate facilities to control the vessel from the "inroads of the seas" is not responsible if, for example, the vessel collided because of poor judgment by the master or the crew who could have averted the danger with the things the vessel is equipped with. Another example: the shipowner/carrier may be held liable if he failed to supply the vessel with charts or other publications giving information required for the proper navigation of her; but he may not be held responsible if damage occur for mariners failed to correctly read the charts – which failure could be regarded as an error in navigation or management. One should, however, note that the exemption does not absolve the carrier for damage caused by its own personal fault. For example, if a shipowner knew or in



the exercise of due care should have known that the master or the seamen were incompetent, and this incompetence was a cause of a damage, the carrier will be held liable for breaching its duty under Art. 196(1) cum. 138(b).

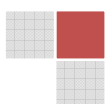
The need to clear the haze between negligent loading, stowage and discharging of the cargo [which makes the carrier liable under Art.196], and errors in management or navigation has been widely discussed in the USA. The distinction is of practical importance for carriers may sometimes tempt to escape liability for failure to properly load, stow and discharge the goods shipped via the error in navigation and management exemption. R. Force discusses the “primary nature and object of the acts which cause the loss” criterion employed by American courts:

Robert Force, 2004, Admiralty and Maritime Law (Federal Judicial Centre Publication) p.68.

A distinction must be made between those situations where the actions of the master or the crew are simply errors in the navigation or management of the vessel and those that constitute a breach of the duty to properly care for the cargo. In a sense, any decision or action that places a vessel at risk also places the cargo at risk. Master or crew negligence that places the vessel at risk of sustaining damage will usually fall within the defense because that risk was caused by poor navigation or poor management. In such situations, the risk to the cargo is secondary in that it was derived from the risk to the vessel.

Conversely, an error that primarily puts the cargo at risk constitutes a failure to properly care for the cargo, notwithstanding that the error involves a decision relating to the management of the vessel. It also appears that if a negligent management decision and its implementation imperil cargo operations, such as loading or discharge of cargo, the error will not be within the error of the management defense.

Fire: Compared to the error in navigation and management, this exemption is relatively self-explanatory. The only thing that may need explanation is the proviso “actual privity or fault of the carrier” in causing the fire – which qualifies the fire exemption. According to the English jurisprudence, the condition as to “actual privity or fault of the carrier” requires a connection between the activities or knowledge of the carrier and the fire. An English court once held a shipowning company responsible for damages resulting from fire that was



caused as a direct result of the failure of the managing director the company to give instructions on defective boilers of which he had knowledge.

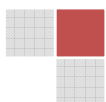
Perils, dangers, and accidents of the sea: This exemption is described by some as “incapable of precise definition.” In the US, it has long been described as “those perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertion of human skill and prudence.” The following excerpts elaborate on what is considered, under English law, as perils of the sea and what is not:

J. Evans (ed.), Law of International Trade, 3rd ed. (London: Old Bailey Press, 2001), pp.242-3

It is not every action of the wind and the waves which constitute a peril of the sea within this exception...The ordinary action of the wind and waves are not included. Only the unforeseen action of the sea which could not be protected against will constitute a peril of the sea. Therefore, the normal wear and tear which is expected from the journey will not be covered...It is not impossible to devise an absolute test which can be applied in order to determine what is, and what is not a peril of the sea. Simply because the damage is caused by seawater does not make the cause a peril of the sea...It is clear from decided authorities that the types of perils covered are those which are peculiar to the sea and could not have occurred on land: stranding, listing, collision, severe storms and seawater. Therefore, perils which cause damage whilst the ship is at sea but are not, in fact, peculiar to the sea, will not be covered, e.g. rainwater.

Act of God: This exemption is somewhat similar with acts of the sea/perils of the sea for both are caused without human intervention. Its direct and exclusive causes need to be *natural*. In addition, the natural phenomena have to be one that could not have been prevented by any amount of foresight and reasonable care.

Act of war, of public enemies, arrest and quarantine restrictions, riots and civil commotions: These exemptions have long been recognised in the common law of the Anglo-American legal system. “Public enemies” is understood as enemies of the country. Whereas, arrest or restraint does not necessarily mean actual interference; it only requires a “reasonable apprehension of governmental intervention.” These acts are attributable neither to the carrier not to the shipper. Yet all, unlike acts of God and acts of the sea, are man-made.

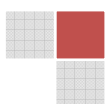


Faults attributable to the shipper and Inherent vices: The exemptions under Art.197 (1) (i), (m), (n), (o) are generally justified in terms of the shipper's act/failure. It is not unusual for carriers to rely on the instructions or information given to them by the shipper of the goods. If the instructions/information, in fact, result in the damage to the cargo, the carrier is exempt from liability. Art.184 states: where a shipper has not accurately described the marks, number, quantity, nature and weight of the goods, he shall be liable to the carrier for all loss, damages, and expenses resulting therefrom. Moreover, it provides "an inaccurate statement has effect only against the shipper." Does this mean the carrier is still liable for the consignee? Think about it, dear students!

Voluntary false statements by the shipper seem to have a much wider legal effect than inaccurate statements of the same. Under Art.185, the carrier is totally insulated from liability if loss of, or damage to, goods result from intentional false statement, by the shipper, regarding the nature, quantity or value of the goods. Moreover, the master has the power to (1) unload or (2) charge for the highest payable freight goods *not declared* or *misdeclared*, notwithstanding the right to claim for further damages (Art. 199). If the goods are dangerous (e.g. explosive) to the shipment and are shipped without the knowledge and consent of the carrier, the carrier may land, destroy or render the goods innocuous (harmless) without compensation and the shipper remains liable for all damages and expenses incurred directly or indirectly as a result of that shipment (Art. 200(1)). Again, under Art.200 (2), the carrier may take the same actions in respect of goods that become dangerous, even if shipped with his knowledge and consent, without liability except to general average, if any.

A shipper also bears the risks inherent in the goods it ships. When foodstuffs perish, metals rust, chemicals lose their potency through the mere passage of time, the burden is on the shipper to show that the causes are not internal conditions but external circumstances.

Deviation: It seems that carrier's liability for unreasonable deviation is implicitly incorporated under our Maritime Code. Deviation is *justified* (reasonable) if it is to save or it is an attempt to save life, property at sea (Art.197 (1) (l)). In other jurisdictions, it is expressly established that "an intentional and unreasonable change in the geographic route of the voyage as contracted for" deprives the carrier of both the immunities and the right to limit its liability provided in law.



Latent unseaworthiness: The exemption for latent defects that cannot be detected no matter how diligent a carrier might be is incorporated under (p). Exoneration from liability for latent unseaworthy conditions are implicit in the carrier duty to exercise due diligence to make the ship seaworthy. Understandably, what is expected of the carrier is to exercise *due diligence*. He is not expected to do more than what is reasonably expected of a diligent carrier. And hence, latent defects that cannot be detected after reasonable check up of the vessel may not show absence prudence on the part of the carrier. Note that the same privilege is available for shipowners in charterparty contracts.

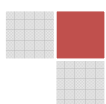
The Q clause-"Any other cause": This is the widest of all the exemptions discussed so far. This general exemption absolves the carrier from liability when he shows the loss or damage to cargo was not caused by its negligence or that of its agents or servants. For this defense is contained under "q" in both section 1304(2) of COGSA of USA and Art.2 of the Hague Rules, they are referred, by some, as the "Q" clause. The same "q" contains the rules under Art.197 (1) of the Ethiopian Maritime Code.

The scope of the words "any other cause" has been a matter of debate among maritime scholars in different jurisdictions. Some argue the Q clause obviates the need to exactly define some or all of the exemptions from (a)-(p). Whereas others contend it should be interpreted *ejusdem generis* **with the exceptions from (a)-(p):

J. Evans (ed.), Law of International Trade, 3rd ed. (London: Old Bailey Press, 2001), pp.244

As the words 'any other causes' are used and not 'any other cause whatsoever', the exceptions in ... (q) should be interpreted as being ejusdem generis with the exceptions from (a) to (p), provided there is any genus which would embrace them all, and therefore

** Latin for "of the same kind," used to interpret loosely written statutes. Where a law lists specific classes of persons or things and then refers to them in general, the general statements only apply to the same kind of persons or things specifically listed. Example: if a law refers to automobiles, trucks, tractors, motorcycles and other motor-powered vehicles, "vehicles" would not include airplanes, since the list was of land-based transportation. In the context above, it is used to refer arguments that the exemptions listed, including the one at 'q', should be read as forming part of a single *ejusdem generis* which would embrace them all. But, as you see from the excerpts reproduced above, those who argue in that direction are not sure whether an embracing term would at all exist.



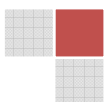
it seems necessary to give these words the wider interpretation and thus to exclude the responsibility of the carrier in all cases where neither he nor his servants are at fault.

Limitation of Carrier's Liability

Traditionally, carrier's liability for damage is limited according to a formula known as *global statutory limitation* or *package limitation*. The rationale behind limitation regime is promoting shipping by protecting investors from incapacitating liabilities for damage or loss of goods carried in a comparatively risky mode of transport. According to one commentator, the cost of freight and insurance would be very expensive and shipping would no longer be the cheapest mode of transporting goods had it not been for the limitation of carrier's liability. This limitation of liability regime has been universally applied since at least the first half of the 20th century. The Hague Rules (the International Convention for the Unification of Certain Rules of Law Relating to the Bills of Lading, Brussels, 1924), the Hague-Visby Rules (the Hague Rules as amended by the Brussels Protocol 1968, also amended later by the 1979 Protocol), and the Hamburg Rules (the United Nations Convention on the Carriage of Goods by Sea, Hamburg, 1978) are the three international "standard" conventions from which many maritime nations have enacted their respective legislations limiting the amount of damages recoverable for the loss or damage to cargo. Ethiopian Maritime Code seems to adopt the Hague Rules limitation.

Art.198 of the Maritime Code states:

- (1) In respect of loss of or damage to goods, the liability on the carrier shall not exceed [five hundred] Ethiopian dollars.
- (2) The statutory limitation shall be determined by package, and in respect of goods loaded in bulk, on the basis of the unit normally serving for the calculation of the freight.
- (3) The statutory limitation may not be set up against the shipper where the nature and value of the goods have been declared by the shipper before shipment, and such declaration has been inserted in the bill of lading.



The way these provisions are stated is somewhat similar with comparable provisions of the Hague Rules and the American Carriage of Goods by Sea Act (COGSA). Tsehai Wada, who wrote an interesting and probably the only article on package limitation under Ethiopian law, is a witness for this.

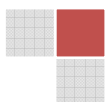
Tsehai Wada, Package Limitation under International Convention and Maritime Code of Ethiopia: an Overview, 21JethL (2007), p.130

The provisions of the Hague Rules and the [Maritime] Code...are more or less similar except for minor differences. Accordingly, apart from the difference in the amount of package limitation...the Hague Rules provide that the sum shall be calculated in terms of packages or "units" while the Code provides that the sum fixed should be calculated in terms of packages or "in respect of goods loaded in bulk, on the basis of the unit normally serving for the calculation of freight." Given these differences and in particular the difference in the amount of money provided under the two laws, it appears that Art. 198 of the Code is much closer to the ...COGSA of the USA than the Hague Rules.

When shipped goods are damaged or lost under situations that do not fall within the exemptions enumerated in Art.197, the shipper/consignee is generally entitled to recover damage from the carrier. Nonetheless, Art. 198(1) limits carrier's liability for goods lost or damaged to 500.00 Ethiopian birr per *package*. If the goods are not shipped in packages, its liability is limited to 500.00 Eth. Birr per "*the unit normally serving for the calculation of the freight*".

Art. 198(1) could be regarded as providing both a minimum and maximum level of liability. It is a minimum because it is a lower limit which the carrier cannot reduce. According to the provisions of Art. 205, a provision in the bill of lading that sets a lower limit is null and void. It is a maximum level because the carrier cannot be liable for more than 500.00 Eth. Birr per package, save in certain specified cases (e.g. where the nature and value of the goods have been declared by the shipper before shipment, and such declaration has been inserted in the bill of lading). In this connection, note that the carrier may increase his liabilities in whole or in part (Art. 206).

Problems have been encountered in many countries in interpreting the term "package" and "unit" as used in formula. In particular, after the emergence of containerised shipping, courts in different jurisdictions are dazed whether containers are packages or not. The following excerpts demonstrate how US and



English courts attempted to solve the problems of interpretation of “package” or “unit” stored in a container.

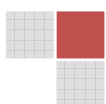
J. Evans (ed.), Law of International Trade, 3rd ed. (London: Old Bailey Press, 2001), pp.244

In the event of loss or damage to the goods, it becomes necessary to determine what the ‘package’ or ‘unit’ is. For goods shipped in containers this gives rise to the question of whether it is the container itself that is the package or unit or whether it is the ‘packages’ within the container. This becomes important where there is a ‘package limitation’ in the contract, for example, a limitation of £ 500 ‘per package’ where there are 20 individual ‘packages’ in the container would be a wholly different compensation figure if calculated on the basis of those 20 packages than if it were to be applied as £ 500 for the container itself.

Where the container is shipped under the Hague-Visby Rules, Art IV r5(c) applies and provides that the ‘package’ is determined by ‘the number of packages or units enumerated in the bill of lading as packed in [the container]’. Thus, provided that the number of goods packed within the container are ‘enumerated’ it will be these and not the container itself that constitute the package. By this means, the intention of the parties as concerns the ‘package’ for the purpose of their limitation clause can be indicated by the way in which the ‘goods’ are described on the bill of lading, i.e., an ‘enumeration’ or description of the contents of the container serves to make the contents the ‘packages’.

A carrier who ships a container packed by the shipper will usually clause the bill ‘said to contain’ which raises the question of whether this effects the ‘enumeration’ rule. It was held at first instance in The River Gurara [case]...for a bill of lading falling under the Hague Rules, that ‘said to contain’ did not effect the indication that the parties’ intention as concerns package limitation was that it should be the packages within the container...

In The River Gurara a clause in the bill of lading attempted to strike the difference between a container packed by the shipper and one packed by the carrier by stating that the container was to be regarded as the ‘package’ where the goods were packed by the shipper. This was held to be rendered void by Art III r8. In the USA for the purpose of Art III of the Hague Rules, it has been held that a container packed by the carrier is analogous to a detachable stowage compartment of the ship in which shipper’s packages are literally ‘stowed’ in much the same way as traditional stowage. Thus, for the purposes of package limitation, it was the cartons stowed in the container that were the package



and not the container itself...In respect of the application of financial limits to containers, a commonsense approach based on 'functional' packages was taken in The Kulmerland ...There is a presumption that the shippers own functional packing units are not 'packages' unless there is evidence that the parties intend to treat them as that. That burden of proof lies with the carrier but it will shift to the shipper to show why a container should not be treated as a package if he has chosen units that are not functional or usable for overseas shipment.

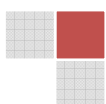
The importance of intent of the parties, as evidenced in the bill of lading, in determining whether a container is a package is underlined in the excerpts above. It now seems that courts in those leading maritime nations opted to consider inappropriate the argument that the carrier's liability should be limited to a certain amount (say £ 500) for each container unless the bill of lading describes the cargo as, for example, "one container of electrical equipment."

Exceptionally, the global statutory limitation of liability will not be set up against the shipper whose express declaration of the value and nature of the goods has been inserted in the bill of lading. In such situations, a higher freight is usually incurred in exchange for unlimited liability of the carrier if goods are subsequently damaged or lost.

A maximum of 500.00 Eth. birr may not always be granted to a shipper/consignee who suffered economic loss as a result of damage or loss to carried goods. He is not entitled to recover more than its actual damages. And, if the damages sustained, for example, worth only 400.00 Eth. birr per package, he only recovers that amount and not more.

Notice of loss or damage must be given to the carrier promptly, i.e., prior to, or at the time of the removal of the goods into the consignee's custody (Art. 201, Mar. Code). In the event of loss or damage which is not apparent, notice may be given within three days after delivery (Art. 201 (2)). The legal effect of the absence of notice is: "the goods shall be deemed to have been delivered by the carrier as described in the bill of lading."

Moreover, a suit for damages must be brought within a year of the date of delivery of the goods (Art. 203). Delivery is not defined for both the purpose of notice and/or time bar (period of limitation). As per the American jurisprudence, a carrier effects delivery when "it unloads the cargo onto a dock, segregates it by



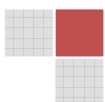
bill of lading and count, puts it in a place of rest on the pier so that it is accessible to the consignee, and affords the consignee a reasonable opportunity to come and get it.” Also, delivering the goods to a proper authority according to either the law or the custom of the port is regarded as “proper delivery”. When the goods are lost or not delivered, the period of limitation begins to run from the time when they should have been delivered.

The issue of burden of proof is worth considering. In light of the broad exemptions and limitation of liability the carrier enjoys, the Hague Rules and different national laws stipulate that whenever loss or damage have resulted from, for example, unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption. This serves the interest of cargo owners who may be irritated by the range of privileges the carrier enjoys. The evidentiary role of bills of lading has already been discussed. Depending on the situation, the issuance of bills of lading gives rise to presumption on the reception or shipment of the goods. This, however, does not mean the shipper/consignee is relieved of the onus of proof where appropriate. Robert Force shows how the burden of proof shifts from one side to the other and ultimately rests on the cargo owners (as plaintiffs):

Robert Force, 2004, Admiralty and Maritime Law (Federal Judicial Centre Publication) p.68.

[The burden of proof] is likely to operate as follows: (1) the cargo interest makes its prima facie case by producing a clean bill of lading and by showing that the goods were delivered to the consignee in a damaged condition (or that they were not delivered at all); (2) the carrier responds by either (a) showing that the loss or damage was caused by unseaworthiness despite its exercise of due diligence, or (b) showing that cargo loss or damage was attributable to circumstances that fall within at least one of the immunities provided by[law]; (3) the shipper tries to rebut the carrier’s defense by showing facts that establish (a) a lack of due diligence, (b)the inapplicability if the immunities claimed, or (c)negligence on the part of the carrier, unless [legally] exempted. Ultimately, the “cargo interest,” has the burden of proving that the carrier is liable for the damage or loss.

Before closing on the discussion of this part, it is felt appropriate to see whether the benefits of the carrier (the exemptions and the limitation of liability) are applicable to independent contractors (such as freight forwarders and ship agents) whose involvement in the preloading and post-discharge stages is very crucial.

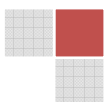


The possibility of extending the application of the rules on carriage of goods by sea is established in leading maritime nations including USA and England. More interestingly, the parties, under American case law, are allowed to extend, by clear and express stipulation in a bill of lading, the benefits under the law to other parties involved in the transaction, such as stevedores and terminal operators. The express provisions inserted into a bill of lading to extend the carrier's defenses and limitations to third parties (e.g. stevedores) are usually known as the Himalaya clause after the decision of the English Court of Appeal in the case of *Adler v. Dickson* (The Himalaya). Apart from USA and England, the Himalaya clause has now gained judicial acceptance in most commonwealth jurisdictions. In civil law jurisdictions, too, there is, it is argued, no problem in contracting for the benefit of a third party. Dear students, do you think the provisions of the Civil Code on stipulations concerning third parties (Arts. 1957 *et. seq.*) are of any help in this respect?

In principle, the Maritime Code's rules on sea carriage (Arts. 180-209) do not apply during the preloading and post-discharge (Art.180 (3)). But, this does imply that the carrier who may not, for example, assume liabilities for loss or damage to or in connection with the custody and care and handling of goods[which are in his possession] prior to the loading on and subsequent to the discharge from the ship. Carriers could not thus limit their liability as per the rules of Arts.180 *et.seq.* when goods received [but not yet shipped] are damaged. Hence, issues of liability during the preloading and post-discharge may still be governed by other provisions of law.

Coming to the specific Ethiopian law on the duties and liabilities of parties involved in the preloading and post-discharge stages, one may notice that detailed exemption from liability and limitation of liability (like the ones enjoyed by the carrier) are absent for ship agents and freight forwarders. As per Art. 12 of Freight Forwarding and Ship Agency License Issuance Regulation No. 37/1998, freight forwarders or shipping agents have to carry out their duties with *due diligence*; and failure to exercise due diligence makes them liable. In particular, they are liable for loss of shortage of or damage to the goods or delay in delivery of the goods.^{††}

^{††} Incidentally, freight forwarders are persons undertaking, on behalf of consignor/consignee different important customs, port and other formalities including transportation of goods and delivery of the same. Whereas, ship agents are defined as one undertaking, on behalf of shipowners/charterers/operators, canvassing and booking cargo or passenger and providing

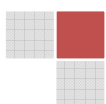


Review Questions 3

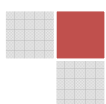
1. How do you distinguish between charterparties (without demise) from bills of lading?
2. What are the likely material sources of Ethiopian sea carriage law?
3. Is it possible for a shipowner to issue a bill of lading to a charterer? If yes, what are the legal effects of the stipulations in the bill of lading on the charterparty agreement?
4. Assume that a time charterer entered contract of carriage with a shipper. The master of the ship, who is the agent of the owner, issued a bill of lading for the shipper. The shipped goods are not delivered at the port of destination. The consignee is not sure whom to sue for damage. Is it the owner of the ship (whose agent acknowledged the reception of the goods on board and their subsequent shipment) or the charterer who is the party to the contract of carriage whom he should sue?
5. Art.180(4) excludes the application of the rules on sea carriage to transportation of live animals and goods carried on deck. What do you think are the rationale behind this?
6. How do you explain the importance of negotiable bills of lading in the international trade of goods?
7. What are groupage bills of lading? Why cannot they be transferred to consignees?
8. "The rights conferred by a *mate's receipt* are more limited than those conferred by a bill of lading." Comment the validity or otherwise of the sentence in quotation.
9. In a contract of carriage, the ship was proceeding from Shanghai, China to Port of Djibouti, Djibouti. Instead of proceeding direct to the Port of Djibouti from Shanghai, the ship went first to Calcutta, India. When she arrived in Djibouti, the shipper had to pay a higher import duty since they had arrived after the proper time. The consignee now wants to sue the owner for damages on the basis of the bill of lading. Would the claim be successful?
10. Who [the carrier or the endorsee in the bill of lading] would assume the burden of proof in the following cases:

services to the ship inland and at port as necessary including the coordination of stevedoring and shore handling services. (See generally Freight Forwarding and Ship Agency License Issuance Regulation No. 37/1998).

Maritime Law



- a. A bill of lading contains the words “weight and quantity unknown”; and the goods are not delivered. The consignee took an action for non-delivery.
 - b. A bill of lading signed by the master stated that 1,000 barrels of oil had been shipped on board. When the goods were delivered to the consignees of the bill of lading, there was found to be a short delivery of 12 barrels.
 - c. A bill of lading states that the goods have been “in apparent good order and condition”. However, some of the damages were found to be in a damaged condition. Indorsees claim for damage.
11. Abebe, who was expecting delivery of a shipped car, sold the car, before delivery, to a certain Gizachew. Also, he tendered the bill of lading to the buyer, Ato Gizachew. Ato Gizachew, however, did not effect payment for he has not yet actually been delivered the car. Enraged by the refusal of Ato Gizachew to effect payment of the price, Abebe has gone to court claiming the immediate payment of the price along with interest. Do you think he would succeed?
 12. “In case of through carriage (Art.204, Mar.Code), the parties enter into a contract differentiating between the scope of the responsibility of the carrier and the scope of the ‘documentary cover’ of the bill of lading because through bill of lading controls the delivery of the goods at the final destination, but the carrier is not prepared to perform or to assume responsibility for the performance of such additional carriage by others.” Do you agree with this view? Also, do you think the Maritime Code’s exemption clause under Art.197 regarding loss or damage to goods are applicable while the goods are in the custody of other carriers than the sea carrier?
 13. What can a consignee do about delay in delivery by the sea carrier?
 14. In certain cases, shipowners –who are also carriers – may wish to limit their liability in accordance with the tonnage limitation (See Art. 80 *et seq.*, Mar.Code) rather than the limits provided under Art. 198. Will that be nonsense?
 15. Would extracontractual law be of any help for a consignee who failed to establish his case against a carrier who insulated himself off liability for the fault of his master in management?
 16. Is inserting Himalaya clauses in bills of lading permissible under Ethiopian law?



17. Go through the following case decided by the Central Arbitration Committee, the Council of Ministers, PMAC, some two decades back; and reflect on the questions that follow.

- a. In the following case, Ethiopian Insurance Company SC (EIC) who paid the insured amount [Eth. birr 3804.61] for its customers subrogated in its customers place to claim damages from Ethiopian Shipping Lines (ESLSC). *Inter alia*, the issues involved whether the insurance company would have claimed more than what is stated in the bill of lading. Interestingly, the insurance company tried to use a relatively wider provision in the bill of lading so as to persuade the arbitrators undermine the very specific stipulation of the bill dealin with limitation of liability.

**በኅብረተሰብአዊት ኢትዮጵያ
ጊዜያዊ ወታደራዊ መንግሥት
በሚኒስትሮች ምክር ቤት ሰብሳቢ ጽ/ቤት
የሚወሰድ አስታራቂ ኮሚቴ^{ፊፊ}**

አመልካች:- የኢትዮጵያ መድን ድርጅት
ተጠሪ:- የኢትዮጵያ ንግድ መርከብ ድርጅት

የሚ አ.ኮ.መ.ቁ.71/77

የኮሚቴ አባላት

1. አቶ ሥዩም ተሰማ	ሰብሳቢ
2. አቶ ረዳ ከሊል	አባል
3. አቶ ደበበ ሞገስ	አባል
4. አቶ አብዱራሂም አህመድ	ፀሐፊ

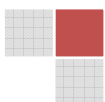
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ውሳኔ

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- ተጠሪው ዕቃዎቹን በባሕር አንገዝ ለባለንብረቱ ለማስረከብ የውል ግዴታ መግባቱን፤
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^{፡፡} Taken from Journal of Ethiopian Law, vol. 23, pp.28-33



- ተጠሪው ዕቃዎቹ ከላይ በተገለጸው መሠረት መጥፋታቸውን አምኖ ለእያንዳንዱ ጥቅል እስከ 100 ፓውንድ ለመክፈል መተማመኛ መስጠቱን፤
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 - ሐ. ዕቃው በሚጫንበት አገር ያስገዳጅነት ኃይል ያለው ሕግ ከሌለ ደግሞ ከላይ የተጠቀሰው የሔግ ሩልስ ስምምነት ተፈጻሚ እንደሚሆን መጻፉን፤
- ለአሁኑ ክስ ምክንያት የሆኑት የጠፋት ዕቃዎች የተጫኑት ሁለቱ ከእንግሊዝ አገር አንዱ ደግሞ ከምዕራብ ጀርመን ሲሆን በጉዞ ላይ እንዳለ ለጠፋ ዕቃ ለእያንዳንዱ ጥቅል በእንግሊዝ አገር 471.96 ፓውንድ በምዕራብ ጀርመን 1250 ዶላር ማርክ እንደሚከፈል፤

ገልጾ ተጠሪው በገባው የውል ግዴታ መሠረት ክፍያውን መፈጸም ስላለበት በክሱ የተመለከተውን ገንዘብ መክፈል ከሚገባው ቀን ጀምሮ ከሚታሰብ ህጋዊ ወለድና ኪሣራ ጭምር እንዲከፈል ይደረግ ዘንድ አመልክቷል፡፡

የማዕከላዊ አስታራቂ ኮሚቴም ይህ የአመልካች አቤቱታ እንደቀረበለት በቅድሚያ ግራ ቀኙ ተገናኝተው ለጉዳዩ አንድ የጋራ መፍትሔ እንዲሹለት በማለት መመሪያ ሰጥቶ ነበር በዚህም መሠረት ሁለቱም ተገናኝተው ውይይት ካካሄዱ በኋላ ባቀረቡት ቃለ ጉባዔ ሊሰማሙ ያለመቻላቸውን ገልፀው ጉዳዩን ለኮሚቴው ስለመለሱለት በቀጥታ ወደ ክርክር እንዲገቡ ተደርጓል፡፡

በዚህ መሠረት ተጠሪው ሚያዚያ 7 ቀን 1977 ዓ.ም በተባፈ መልሱ፤

- አመልካች ክሱን መሠረት በማድረግ ያቀረበው የማስጫኛ ሰነድ /ቢል ኦፍ ሌዲንግ/ አንቀጽ 23 ሁለተኛው ፓራግራፍ በአንድ ዓመት ጊዜ ውስጥ ክስ ካልቀረበ አንጓገፍ ወይም መርከቡ ከማናቸውም ኃላፊነት ነጻ እንደሚሆን ስለሚደነግግና ይህም ክስ የቀረበው ከአንድ ዓመት በላይ ቆይቶ ስለሆነ ክሱ ከኪሣራ ጋር እንዲዘጋለት፤
- ይህ ቢታለፍ ግን አመልካች እንዳለው በማስጫኛው ውል ቁጥር 2/ለ/ የሔግ ቪዝቢ ስምምነት ያለመጠቀሱና የተጠቀሰው የሔግ ሩልስ መሆኑን፤ የሔግ ሩልስንም በሚመለከት እነዚህ ደንቦችም ሆኑ በማስጫኛው ሰነድ በአንቀጽ 29 ላይ የተጠቀሰው የኢትዮጵያ ሕጎች አግባብነትና ተፈጻሚነት የሚኖራቸው በማስጫኛ ሰነድ ላይ በግልጽ ላልተመለከቱት ጉዳዮች በማሟያነት ብቻ መሆኑን እና በማስጫኛው ሰነድ ላይ በግልጽ ዕልባት ለተበጀላቸው ጉዳዮች፤ ውል በተዋዋሩት

መካከል ሕግ ስለሆነ /1731/ አግባብነትና ተፈጻሚነት የሚኖረው በውሉ ስምምነት ላይ የሰፈሩት ድንጋጌዎች መሆናቸውንና ዳኞች እንኳን በትርጉም ሳቢያ ለተዋዋዮች አዲስ የውል ቃል ሊፈጥሩ እንደማይችሉ፤

- አንዳንድ /ተጠሪ/ ኃላፊ ለሚሆንባቸው ጉዳዮች ስለሚከፈለው የጉዳት ካሳ መጠን በአንቀጽ 24 ላይ በግልጽ የተመለከተ ሲሆን አመልካች ግልጽ የሆነን ድንጋጌ /የፍ.ሕ.ቁ 1733/ በመዝለል ያቀረበው ክስ ተቀባይነት ሊኖረው እንደማይገባ፤
- አመልካች የማስጫኛ ሰነድን አንቀጽ 2/ለ/ “Paramount Clause” ነው በማለት የራሱን አስተያየት ካከለበት በኋላ አንቀጽ 2/ለ/ በማስጫኛው ሰነድ ላይ በግልጽ ያሰፈሩትን የውል ቃሎች ሁሉ ይሸራል ከሚል የተዛባ መደምደሚያ ላይ ቢደርስም አንቀጽ 2/ለ/ ወይም አንቀጽ 29 በማስጫኛ ሰነድ ላይ ያልተመለከቱ ሁኔታዎች ቢያጋጥሙ ተፈጻሚ ስለሚሆኑት ድንጋጌዎች የሚናገር ሲሆን ይህም ያልተለመደ አሰራር መሆኑን፤ ከሁሉም በላይ ግን፤

ሀ. ስለሚከፈለው የጉዳት ካሳ በአንቀጽ 24 ላይ በግልጽ የተደነገገ ሲሆን ትርጓሜ ሳያሻው ተፈጻሚ መሆን ስለሚገባው፤

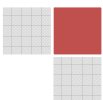
ለ. አንቀጽ 2/ለ/ እና አንቀጽ 24 አይጋጩም እንጂ ቢጋጩም እንኳን ውጤት ያለው ትርጓሜ ሊሰጣቸው ስለሚገባ /1737/፤

ሐ. አንቀጽ 24 ልዩ ድንጋጌ አንቀጽ 2/ለ/ ግን አጠቃላይ ድንጋጌ ሲሆን በሕግ አተረጓጎም ደንብ ልዩው ድንጋጌ አጠቃላዩን ድንጋጌ የሚሸር ስለሆነ፤

መ. ተጠሪ ሲከፍል የቆየው በጥቅል የእንግሊዝ ፓውንድ 100 ስለሆነ አመልካች አስጫኞች ከነበራቸው የተሻለ መብት ስለሌለው በቢል አፎ ሌዲንጉ አንቀጽ 24 ከተመለከተው የክፍያ መጠን ከፍ እንዲልለት መጠየቅ እንደማይችል እና የኢትዮጵያ ፍርድ ቤቶችም ሆኑ የመዳኘት ሥልጣን የተሰጣቸው አካሎች አመልካች በጠቀሳቸው የውጭ አገር ሕጎች እንዲፈረድ የቀረበው ጥያቄ ተቀባይነት ሊኖረው እንደማይገባ በመግለጽ ክስ የቀረበው በጊዜው ነው ተብሎ የሚበየን ቢሆን ለእያንዳንዱ ጥቅል የሚከፈለው በአንቀጽ 24 መሠረት የእንግሊዝ ፓውንድ 100 ነው ተብሎ እንዲወሰንና የኪሣራ መብቱም እንዲጠበቅ አመልክቷል፡፡

የግራ ቀኙ ክርክር አጠቃላይ ገጽታ ከላይ እንደተመለከተው ሲሆን ጭብጡም ተፈጻሚነት ሊኖረው የሚገባው በማስጫኛ ሰነዱ የተጠቀሰው አንቀጽ 2/ለ/ ወይስ አንቀጽ 24 የሚለው ይሆናል፡፡

በመሠረቱ በሁለት ተዋዋይ ወገኖች መካከል ውል በሚደረግበት ጊዜ ተዋዋዮች መብትና ግዴታቸውን በውሉ ውስጥ እንደሚያሰፍሩ ግልጽ ሲሆን በዚህ በተያዘው ጉዳይ ላይም ይህንኑ በሚገባ ያሰፈሩ መሆኑ ይታያል፡፡ ሆኖም አንዳንድ የውል ቃሎች አልፎ አልፎ በተዋዋይ ወገኖች መካከል የተለያየ ትርጉም እየተሰጣቸው አከራካሪ ሆነው ይቀርባሉ፡፡ በዚህ ጉዳይ ላይ አከራካሪ ሆነው ከቀረቡት ነጥቦች መካከል በማስጫኛው ሰነድ አንቀጽ 2/ለ/ የተጠቀሰው ነው፡፡ የዚህ አንቀጽ ድንጋጌም ዕቃው በሚጫንበት አገር ያስገዳጅነት ጠባይ ያለው ሕግ ከሌለ ደግሞ የሔግ ሩልስ ስምምነት ተፈጻሚነት እንዳለው የሚገልጽ ነው፡፡ ሌላው አከራካሪ ነጥብ ደግሞ የዚሁ የማስጫኛ ሰነድ አንቀጽ 24 ሲሆን የዚህም ድንጋጌ አንገፍ ለጠ

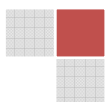


ፋ ወይም ለጎደለ ዕቃ ኃላፊ በሚሆንበት ጊዜ ሊከፈል የሚገባው የካሣ መጠን 100 ፓውንድ መሆኑን የሚገልጽ ነው። እንግዲህ ሁለቱም በተናጠል ሲታዩ የመጀመሪያው የማስጫኛ ሰነዱን በሚመለከት ተፈጻሚ መሆን ያለባቸውን ሕጎች ሲገለጽ ሁለተኛው የካሣውን ክፍያ መጠን የሚገልጽ ነው። በዚህም ረገድ ምንም እንኳን በማስጫኛ ሰነዱ ለሚነሱ ክርክሮች ተፈጻሚነት ያላቸውን ሕጎች አንቀጽ 2/ለ/ ቢገልጽም በአንቀጽ 24 የካሣውን ክፍያ መጠን በሚመለከት ግልጽ ባለ ሁኔታ አንገዢ ለአንድ ጥቅል ከ100 ፓውንድ በላይ የመክፈል ኃላፊነት እንደሌለበት ገልጾታል። ከዚህም ለመረዳት እንደሚቻለው የማስጫኛው ሰነድ አንቀጽ 2/ለ/ አጠቃላይ ድንጋጌ መሆኑንና አንቀጽ 24 ደግሞ ልዩ ድንጋጌ መሆኑን ሲሆን ይህም የተባለበት ምክንያት አንቀጽ 24 በተለይ የካሣ ክፍያውን መጠን በሚመለከት በግልጽ የሚደነግግ በመሆኑ ነው። አመልካች በሚለው ዓይነት አንቀጽ 2/ለ/ “Paramount Clause” ስለሆነ በማስጫኛ ሰነዱ በግልጽ የተጻፉትን ሁሉ ይሸራል በማለት የሚከራከረው አግባብነት የለውም። ክምንያቱም አንቀጽ 2/ለ/ በአንገዢና በአስጫኝ መካከል ላለው ውል ብቸኛ ተፈጻሚ ነው የሚባል ከሆነ በማስጫኛ ሰነዱ የሰፈሩትን የውል ቃሎች በሙሉ አስፈላጊ ያልሆኑና በወረቀት ላይ በደፈናው ተፈጻሚነት ሳይኖራቸው የሰፈሩ ስለሚያደርጋቸው ነው። ስለዚህም ተዋዋይ ወገኖች ውሉን በሚያሰፍሩበት ጊዜ እያንዳንዱን የውል ቃሎች የራሳቸው ተፈጻሚነት እንደሚኖራቸው በመገንዘብ የሚያስገቧቸው በመሆኑ የአንቀጽ 2/ለ/ም ተፈጻሚነት እንደ አንቀጽ 29 በማስጫኛ ሰነዱ ያልተጠቀሱ ቢኖሩ በማሟያነት የገባ ነው ከማለት በስተቀር ሌላ ትርጉም የሚሰጠው አይሆንም። በዚህም ረገድ በማስጫኛ ሰነዱ አንቀጽ 24 የሰፈረው ድንጋጌ ግልጽ በመሆኑ ለትርጉም የሚጋብዝ ሳይሆን ኮሚቴው እንዳለ የወሰደው ግንዛቤ ነው።

ስለዚህም አመልካች የማስጫኛ ሰነዱ አንቀጽ 2ለን ተመርኩዞ ያቀረበው ክስ አግባብ የሌለው ስለሆነ ክሱን ውድቅ አድርገን ተጠሪም ለእያንዳንዱ ጥቅል ከ100 ፓውንድ በላይ የመክፈል ኃላፊነት እንደሌለበት ወስነናል።

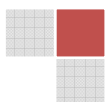
14. Do you agree with the committee’s holding that the £ 100.00 limitation in the bill of lading is the maximum that the insurance company should get?
15. How do you see the legality of excluding the applicability of the Mar. Code by mere stipulation in the bill of lading? What if the *choice of laws clause* in the bill of lading, reduce the liability of the carrier as prescribed under the Maritime Code of Ethiopia?

In the forthcoming case, the Addis Ababa High Court entertained issues of liability in case of non-delivery of goods enumerated in the bill of lading. The claimant who was not sure of the ultimate liable person joined the sea carrier – the Ethiopian Shipping Lines –with Maritime Transit Services Enterprises who was supposed to be in charge of the goods at transit. In one of the rarest occasions, the court was invited to rule on such issues as *what are the extent of*



liabilities for damages to goods carried on deck and what are the effects of failure to notify defects to the carrier in due time.

Dear students read the excerpts of the case reproduced below and try to work out the questions that follow.



የኢትዮጵያ ሕዝፎዊ ዲሞክራሲያዊ ሪፐብሊክየአዲስ አበባ ከፍተኛው ፍርድ ቤት^{ss}

ከሣሽ :-

ግርማ ከበደ

ተከላሾች :-

1. የኢትዮጵያ ንግድ መርከብ ድርጅት
2. የባሕርና ትራንዚት አገልግሎት ኮርፖሬሽን

የፍ.መ.ቁ. 689/79

ፍርድ

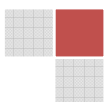
ዳኞች :- ኃይሉ አስምር፣ ረዳኢ ባራኪ፣ አብደላ አሊ።

ከሣሽ ከውጭ የገዛኋቸውን የግል መኪናና ልዩ ልዩ ዕቃዎች ወደ አገር ውስጥ ለማስገባት የኢትዮጵያ ንግድ መርከብ ድርጅት ንብረት በሆነች መርከብ ተጭኖ እንዲላክልኝ የ5 ካርቶን ልዩ ልዩ ዕቃዎች በአንድ ቶሮታ ኮሮላ ስቴሽንዋገን መኪና ውስጥ እና አንድ ካርቶን ከመኪና ውጭ ሆነው ለአመላላሹ ወኪል ከባንያ መስከረም 7 ቀን 1977 ዓ.ም አስረክብኩ። እንዲላክልኝ ለከባንያው ያስረክብኩት ዕቃ መኪናውና በውስጡ ያሉት ልዩ ልዩ ዕቃዎች ጭምር በሙሉ ለኢትዮጵያ ንግድ መርከብ ድርጅት ደርሰውት የተረከበ ለመሆኑ ቁጥር 001 የሆነ የጭነት ማስታወቂያ ደረሰኝ /ቢል ኦፍ ሌዲንግ/ ሰጥቶኛል። በመኪናው ውስጥ ሆነውና ዝርዝራቸው በቢል ኦፍ ሌዲንግ ላይ የተመለከቱት ዕቃዎች አሰብ ወደብ ደርሰው ሲራገፉ 5 ካርቶን ዕቃዎች ጎድለው ተገኙ። ዕቃዎቹ መጉደላቸው በጉምሩክ ዲክለራሲዮን ቁ. 001608 ስለተገለጸ በተገኙት ከፊል ዕቃዎች ላይ የትራንዚትና የመርከብ ውክልና ሥራ በሚሰራው በሁለተኛ ተከላሽ በኩል ማናቸውም ቀረጥና ግብር በመክፈል ከፊሎቹን ዕቃዎች ተረክብኩ።

በመኪናው ውስጥ ከነበሩት ዕቃዎች መካከል የሚከተሉት አልደረሱኝም። አንድ ጂ.ቪ.ሲ መልታይ ሲስተም ቪዲዮ ካሴት ዋጋው ብር 6000.00/ስድስት ሺህ/፣ አንድ አካይ ራክማውንት ኮ.ኢ.ቲ ከ1 ኤልተርነር ፊዲዮ፣ ከኪ.ኤ.ፒ 1ሲ ተርንቲብል፣ ከኤች ኤክስ ካሴት ሪከርደር፣ ከኤች 41 አምፕሊፋየር ጋር ዋጋው ብር 6000.00/ስድስት ሺህ/፣ በድምሩ ብር 12000.00/አሥራ ሁለት ሺህ/ የሚያወጡ ናቸው።

ስለዚህ አንደኛ ተከላሽ ለዕቃዎቹ ጉዞ የሚገባውን ጥንቃቄ ባለማድረጉና የጠፉትን ዕቃዎች ፈልጎ ለመመለስ ጥረት ባለማድረጉ ለደረሰብኝ ጉዳት ኃላፊ ሲሆን፣ ሁለተኛው ተከላሽ ደግሞ የትራንዚትና የመርከብ ሥራ ወኪል በመሆኑ ለሚሰጠው አገልግሎት ኮሚሽኑን በቅድሚያ ከተቀበለ በኋላ ዕቃዎቹ ወደብ ሲደርሱ ከወደብ አንስቶ ለእኔ ለባለንብረቱ የማስረክብ ግዴታ አለበት፣ ዕቃዎቹም ሲጠፉ

^{ss} Taken from Journal of Ethiopian Law, Vol.23, pp.34-41.



ተከታትሎና የጠፋውን ዕቃ ፈልጎ ለማግኘት ያደረገው ሙከራ ባለመኖሩና ይህን ኃላፊነቱን ባለመወጣቱ ለደረሰብኝ ጉዳት ተጠያቂ ነው።

ስለዚህ ሁለቱም ተከላሾች ለጥፋቱ ኃላፊ ሲሆኑ፣ የመጨረሻ ኃላፊ ግን ማን እንደሆነ ለመለየት ባለመቻሌ ፍርድ ቤቱ አጣርቶ ዕቃዎቹ እንዲተኩልኝ ወይም የዕቃዎቹ ዋጋ ብር 12000.00 /አሥራ ሁለት ሺህ/ ክስ ከቀረበበት ጊዜ ጀምሮ ከሚታሰብ ሕጋዊ ወለድ ጋር እንዲሁም ወጭና ኪሣራ ጭምር እንዲከፍሉ ይፈረድልኝ በማለት ፍርድ ቤቱን ጠይቋል። ከክስ ማመልከቻውም ጋር የተለያዩ የጽሁፍ ማስረጃዎች ቀርበው ከመዝገቡ ጋር ተያይዘዋል።

የክሱ ማመልከቻ ለተከላሾች ደርሷቸው መጋቢት 9 ቀን 1978 ዓ.ም በተጻፈ ማመልከቻ የየራሳቸውን መልስ አቅርበዋል።

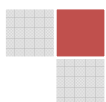
አንደኛ ተከላሽ ባቀረበው ተቃውሞ በመጫኛ ሰነዱ አንቀጽ 23 መሠረት ከላሽ ጠፋብኝ የሚሉትን ዕቃ በ3 ቀናት ውስጥ ማስታወቅ ነበረባቸው ካለ በኋላ ይህ ቢታለፍ በማለት የሚከተለውን ሙሉ መልስ አቅርቧል።

1. በመኪና ውስጥ የተቀመጡትን ዕቃዎች በሚመለከት አንጓዢ ወይም መርከቡ ኃላፊነት የሌለበት መሆኑ በመጫኛ ሰነዱ ማለትም በቢል አፍ ሌዲንግ ፊት ለፊት ላይ ተገልጿል።
2. በመርከቡ ደጅ /ዴክ/ ላይ ለሚጫኑ ዕቃዎች መርከቡ ኃላፊነት የለበትም፤ በዚህም ጉዳይ ቁ 001 በሆነው የመጫኛ ሰነድ ላይ በመርከቡ ዴክ ላይ የተጫኑ ዕቃዎች ቢጠፉ ወይም ጉዳት ቢደርስባቸው አንጓዢ ወይም መርከቡ ኃላፊነት የሌለበት መሆኑ ተገልጿል። አስጫኝ እንደዚህ ዓይነት ዕቃዎች ቢጠፉና ጉዳት ቢደርስባቸው በግሉ የመድን ዋስትና ከመግባት በስተቀር ከመርከቡ ሊጠይቅ አይችልም።
3. ተከላሾች ኃላፊ ነው ቢባል እንኳ በውልና በሕግ ኃላፊ ለሚሆንባቸው ለሚጠፉና ጉዳት ለሚደርስባቸው ዕቃዎች ስለሚከፍለው የካሳ መጠን በመጫኛ ሰነዱ ቁ. 24 ላይ እንደተገለጸው ተከላሽ ሊከፍል የሚገባው ቢበዛ ብር 200.00/ሁለት መቶ/ የእንግሊዝ ፓውንድ ብቻ ነው።
4. የከላሽና የተከላሽ ግንኙነት በውል ላይ የተመሠረተ ስለሆነ ሊከፈለው የሚገባው የጉዳት ካሳ መጠን በደንበኛው የኪሣራ አቆራረጥ /ኖርማል ዳሚጅ/ መሠረት ስለሆነ በከላሽ በኩል የቀረበው የዋጋ ማቅረቢያ ደረሰኝ ተቀባይነት ሊያገኝ አይገባውም በማለት መልስ ሰጥቷል።

ኘ

ፍርድ ቤቱም የግራ ቀኙን የጽሁፍ ክርክር በመመርመር በየደረጃው አስፈላጊ የሆኑ የጽሁፍ ማብራሪያዎች እንዲያቀርቡ ጠይቆ አግባብነት አላቸው የተባሉ የጭነት ማስታወቂያ ደረሰኝ /ቢል አፍ ሌዲንግ/ እና ዓለም አቀፍ የባሕር ደንብ ተገልብጠው እንዲያያዙ ተደርጓል።

ከተደረጉት ማጣሪያዎች ባሻገር መዝገቡን አግባብነት ካላቸው ድንጋጌዎች ጋር አገናዝበን የፍርድ ቤቱን ምላሽ የሚጠይቁት የክርክር ነጥቦች፤



በከላሽ የክስ አመሰራረት ተጠያቂ የሚሆነው ማነው? በመርከብ ደጅ ተጭነው የጠፉ ዕቃዎችን በተመለከተ በማስረጃነት የተጠቀሱት ድንጋጌዎች ኃላፊ ነው በሚባለው ወገን ያላቸው ተፈጻሚነት እስከምን ድረስ ነው? የሚሉትንና ክሱ በጭነት ማስታወቂያው ቁ. 23 መሠረት በሶስት ቀን ጊዜ ውስጥ ባለመቅረቡ ከላሽ ውጤቱን ያጣል አያጣም? የሚሉትን በየተራ እንመልከታለን።

በባሕር ሕግ ቁ. 205 ላይ የተከላሽን ኃላፊነት በሕግ ከተመለከቱት ባነስ ሁኔታ የሚቀጥሉ ሁኔታዎች ሁሉ ተፈጻሚነት እንደሌላቸው ተጠቅሷል። ከዚህ ድንጋጌ አገላለጽ በጭነት ማስታወቂያ ቁ.23 ላይ ከላሽ ክሱን በሶስት ቀን ጊዜ ውስጥ ማቅረብ ሲችል ካላቀረበ ክሱን ይለቃል በሚለው ተጠቃሚ ነኝ በማለት ያቀረበው መከራከሪያ ነጥብ በባሕር ሕጉ በቁ. 203 ላይ የተጠቀሰውን የአንድ ዓመት የይርጋ ጊዜ የሚቀንስ ስለሆነ የተከላሽ መከራከሪያ የሕግ ድጋፍ የሌለው ነው።

ሯ

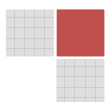
የባሕር ሕግ ቁ. 180/4/ አንገፍ ለጫናቸው ዕቃዎች ከተጫኑበት እስከሚረገፉበት ጊዜ ድረስ ኃላፊ ቢሆንም በመርከቡ ደጅ ላይ ስለተጫኑት እንስሶች ኃላፊነት እንደማይኖርበት የአማርኛው ሕግ ሲጠቅስ የእንግሊዝኛው ደግሞ ዕቃዎችንም ይጨምራል። በዚህ ሕግ ክፍል በግራ ቀኙ የተነሳው ክርክር ተከላሽ በመርከቡ ደጅ ላይ ለተጫኑ ማንኛውም ዕቃ ኃላፊነት የለብኝም ባይ ሲሆን ከላሽ ደግሞ የአማርኛው ትርጉም በእንግሊዝኛው ላይ የበላይነት ስላለውና የተከላሽን ኃላፊነት በዴክ በተጫኑ እንስሶች ብቻ ነፃ ስለሚያደርገው በዕቃዎች አደራረስ ለሚያደርሰው ጉድለት ነፃ አያደርገውም ባይ ነው።

ስለ ቁጥር 180/4/ ጥቂት ማለት በማስፈለጉ በሚከተለው ሁኔታ ተገንዝበነዋል። በመሠረቱ በባሕር ሕጉ ላይ የአመላላሽ /የአንገፍ/ ኃላፊነት በመርከብ የውስጥ ክፍል እና የውጭ /ዴክ/ ክፍል በሚጫኑ ንብረቶች ላይ የአንገፍን ኃላፊነት ሲያበላጥ ሕግ አውጭው መመዘኛ አድርጎ የወሰደው ነጥብ ምንድነው የሚለውን ለይቶ ለማስቀመጥ መዋከር እንጂ የአማርኛው ትርጉም ዕቃን አልጨመረም ወይም በትርጉም መጨመር አለበት የሚለው አከራካሪ ነጥብ አይደለም።

የመርከብ ደጅ /ዴክ/ ምንድነው? ከመርከቡ የውስጥ ክፍል የሚለይበት አመላላሹ በዴክ ላይ ለተጫኑ ዕቃዎች ለሚደርስ ጉዳት ኃላፊነት የለበትም ሲባል የሚጠፉትንም ይጨምራል አይጨምርም? ስለሚሉት ነጥቦች ከሕጉ ጋር በተገናዘበ ሁኔታ ጥቂት ማለት አስፈላጊ ይሆናል።

መርከብ የውስጥና የውጭ ክፍሎች አሉት። የውስጥ ክፍል የሚባለው የጭነት ዕቃዎችን ከዝናብና ከሞቃት አየር፣ ከዕቃዎች ተፈጥሮአዊ ፀባይ አኳያ በተመጣጠነ ሙቀት የሚቆዩበት ለዚሁ ዓላማ ተለይቶ የተዘጋጀ ቦታ ሲሆን፣ የመርከብ ደጅ /ዴክ/ የሚባለው ከ1ኛ ተከላሽ ወኪል በቃል ማጣሪያ ባገኘው ምላሽ መሠረት ለተለዋዋጭ የአየር ፀባይም ሆነ ለውቅያኖስ ጨዋማ ውሃ ዕቃው ተጋልጦ የሚገኝበት ክፍት የሆነ የመርከብ ክፍል መሆኑን፣ ግዙፍና በቀላሉ የማይበላሹ ዕቃዎች የሚጫኑትም በዚሁ የመርከብ ውጭአዊ ክፍል /ዴክ/ ስለሆነ ከተጫኑበት እስከሚረገፉበት ቦታ ድረስ የወራት ጊዜ ስለሚወስድ ዕቃው ጥራቱን ከሚቀንሱ ነገሮች፣ በመነካካት ለሚደርስበት የዋጋ ማሽቆልቆል ሙሉ ለሙሉ ከአገልግሎት ውጭ የመሆን ጉዳት ሊኖር እንደሚችል በመታሰቡ አመላላሹን ከእንዲህ ዓይነቱ ታላቢ ይጉዳት ኃላፊነት ሕጉ ነፃ ያደርገዋል።

Maritime Law



የቁጥር 180/4 ትኩረት በከፊል ወይም ሙሉ ለሙሉ ጉዳት ለደረሰበት ዕቃ አመላላችኑ ነፃ የሚያደርገው ሲሆን፤ የጭነት ማስታወቂያ ደረሰኝ ቁጥር 12 ይህንኑ በጭነት ላይ ከተፈጥሮአዊ ፀባዮቸው የተነሳ ሙሉ ለሙሉ ወይም ከፊል ጉዳት ላገኛቸው ዕቃዎች አመላላችኑ ኃላፊ እንደማይሆን ነው።

የከላሽ ጥያቄ አመራራት ግን በዴክ በመጫኑ ጉዳት ለደረሰበት ዕቃ ካሳ ይከፈለኝ ሳይሆን ከመነሻ እስከ መድረሻ በጥንቃቄ ተከላሹ ሊያደርስ ኃላፊነት ወስዶ ከጫናቸው ዝርዝር ዕቃዎች በክሱ ላይ የተገለጹት ያልደረሱኝ ስለሆነ /በመጥፋታቸው/ ግምቱን አለያም ዕቃው ይከፈለኝ ነው። በሕጉም ላይ የተመለከተው “ከፊል ወይም ሙሉ ጉዳት” የተሰወረ /የጠፋ/ ዕቃ ይጨምራል አይጨምርም የሚለው ነጥብ የሚነሳውም በዚህ ደረጃ ነው።

በሕጉ አገላለጽም ቢሆን ቀደም ሲል ለማሳየት እንደተሞከረው አመላላችኑ በዴክ ላይ የጫናቸው ዕቃዎች ከባሕር ላይ ጉዞ ፀባይ የተነሳ ዓይነታቸው በመቀነሱ ለሚደርስባቸው ጉዳት ከኃላፊነት ውጭ መሆኑ እንደተጠበቀ ሆኖ ከቦታው ሙሉ ለሙሉ ተንቀሳቅሰው ለተሰወሩ ዕቃዎች ግን ተከላሽን ከኃላፊነት ነፃ ለማድረግ ታስቦ የተቀረጸ ነው ማለት ጨርሶ የሚታሰብ አይሆንም። ተከላሹ ባቀረበው ክርክር ይዘት ሕጉ የሚተረጎም ቢሆን የአመላላችኑ ሠራተኞች ያለገደብ ለምግባረ ብልሹነት ስለሚያጋልጣቸውና ለአስጫኝ አንዳችም የሕግ ጥበቃ አልተደረገለትም ስለሚያሰኝ አተረጓጎሙን የተዛባ ያደርገዋል። ወደተዛባ ትርጉም የሚያደርስን ስለሚሆን የተከላሽ ጥያቄ የሕግ ድጋፍ የሌለው ነው። አመላላችኑ የአገልግሎት ዋጋውን ተቀብሎ ከማድረሻው ድረስ ለማድረስ የተረከበውን ዕቃ በአመላላችኑ ሠራተኞች አንቀሳቃሽነት ወይም በሌላ በግልጽ በማይታወቅ ምክንያት ቢሰወር ተከላሽ ነፃ የሚሆንበት ሕጋዊ ምክንያት አይኖርም። በመሆኑም 1ኛ ተከላሽ ከሮተርዳም አሰብ ድረስ ለማድረስ በጭነት ማስታወቂያው ደረሰኝ መጠኑና ዓይነቱ በዝርዝር ተገልጾ የተረከበውን ከጉድለት ነፃ አድርጎ ለከላሹ ያሳስረከበው ስለሆነ በጉድለቱ መጠን ሙሉ ለሙሉ ኃላፊነት አለበት።

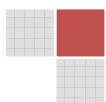
የጉድለቱ መጠን ሲባል የዕቃው ግምት ወይም በዓይነት ዕቃውን ለማለት እንዳልሆነ ለማሳየት እንሞክራለን።

ተከላሽ ኃላፊ ነው የተባለበት ዕቃ አምስት ጥቅል መሆኑ በከላሽ የተገለጸ ሲሆን በተከላሽ በኩል የጥቅሉ ብዛት የተለየ ባለመሆኑ አከራካሪ አይሆንም። የኃላፊነቱን መጠን በተመለከተ ግን ከሕጉ ጋር ሲገናዘብ የሚከተለውን እናገኛለን።

ከላሽ ዕቃውን ከማስጫኑ በፊት በጭነት ማረጋገጫው ደረሰኝ ላይ የዕቃውን ዓይነትና ብዛት ከመግለጽ ጋር የእያንዳንዱ ዕቃ ግምት ተመልክቶ ቢሆን ይህን ግምት የማግኘት መብት የነበረው ሲሆን ግምቱ ባለመመልከቱ ግን ተከላሽ ኃላፊ ሊሆንበት የሚገደድበት በዕቃዎች ጥቅል ቁጥር ተስልቶ እስከ ብረ 500.00/አምስት መቶ/ የኢትዮጵያ ብር ድረስ እንደሆነ በመመልከት የኃላፊነቱ መጠን ዕቃው በገበያ ዋጋም ሆኖ ከአምራቹ ድርጅት የሚሸጥበት የጅምላ ዋጋ ከግምት ውስጥ ሳይገባ በሕግ ተወስኗል። ቁጥር 198 ይመለከታል። በኃላፊነቱ መጠን ላይ ሕጉ ያስቀመጠው መጠን ግልጽ በመሆኑና ከላሽ ያቀረበውን

የግምት ማስረጃ ሳንቀበል ካሳው አነሰ በዛ ወደሚል አስተያየት የሚጋብዝ ባለመሆኑ የምንለው ተጨማሪ አስተያየት አይኖረንም። በመሆኑም 1ኛ ተከላሽ ክስ በቀረበበት አምስት ጥቅል ዕቃ በእያንዳንዱ ጥቅል ብር 500.00/አምስት መቶ/ በድምሩ ብር 2500.00/ሁለት ሺህ አምስት መቶ/ ክስ ከቀረበበት ተከፍሎ እስካለቀ ድረስ 9% ወለድ በተፈረደው ላይ እየታሰበ፣ እና ወጭና ኪሳራ ክርክሩ ከፈጀበት ጊዜ አኳያ ተመዝኖ ብር 500.00/አምስት መቶ/ ጨምሮ ለከላሽ ይከፈላል ብለን በሙሉ ድምጽ ወስነናል።

1. Citing Art. 205 of the Mar. Code, the court challenged the defendant's assertion that the claimant should have given notice within three days. Wouldn't it have been appropriate to approach the issue in light of the provisions of Art. 201 than the provisions of Art. 205?
2. The court reasoned that provisions of Art. 180(4) are there primarily to benefit the carrier. Nonetheless, these provisions obviate the application of the provisions of Art. 180 *et. seq.*, including the range of carrier's benefit under Art.197 and 198. How is then, the provisions could possibly be regarded as being there to benefit the carrier? Does the inapplicability of the rules in Art. 180 *et. seq.* imply the total insulation of the carrier from liability? [Hint: the original law developed in relation to deck cargo was designed to cover the increased risk of loss or damage to goods carried on deck. Accordingly, carriers were held strictly liable, both under the Hague Rules and different national legislations, for loss resulting solely from the unauthorized carriage of cargo on deck. Since the beginning of the second half of the 20th century, the issue, however, has been the drawback of such laws to take into account the substantial reduction of the risks of damage to goods carried on deck within containers. Recent legislations remedied this drawback. For instance, under the 1978 Hamburg Rules, a carrier who could show that carriage on deck was the customary practice for shipment in question would not be strictly liable and the liability would fall to be determined on the actual cause of the loss for which [the Rules] provide the defence of 'took all measures that could reasonably be required to avoid the occurrence and its consequences'.]
3. In deciding the liabilities of the carrier per package, the court did not look into the merits of the provisions of bills of lading relating to the extent of liability of the carrier in case of loss or damage. How do you see the relevance, in this respect, of Art. 24 of the bill of lading and Art. 205 of the Mar. Code?



4. How do you see the court's ruling on the discrepancy between the Amharic and the English versions of Art.180(4) that "...በባሕር ሕጉ ላይ የአመላላሽ /የአንገድ/ ኃላፊነት በመርከብ የውስጥ ክፍል እና የውጭ /ደብ/ ክፍል በሚጫኑ ንብረቶች ላይ የአንገድን ኃላፊነት ሲያበላልጥ ሕግ አውጭው መመዘኛ አድርጎ የወሰደው ነጥብ ምንድነው የሚለውን ለይቶ ለማስቀመጥ መሞከር እንጂ የአማርኛው ትርጉም ዕቃን አልጨመረም ወይም በትርጉም መጨመር አለበት የሚለው አከራካሪ ነጥብ አይደለም፡፡" [Hint: the English version is consistent with the equivalent provisions of, for example, American COGSA and the Hague Rules.]

The last case, reproduced below, primarily involves issues of *package limitation of liability* and *acts of war defense*. Like in you did in the above cases, go through the excerpts of the case below and work out the following questions.

የፍ/ብ/ይ/መ/ቁ.1172/88

ሰኔ 8 ቀን 1992 ዓ.ም

ጸኞች፡- አሰግድ ጋሻው

ሆሣዕና ነጋሽ

ጌታቸው ምህረቱ

ይግባይ ፡- አቶ መለስ አስፋው

መስ/ሰጭ፡- የኢትዮጵያ ንግድ መርከብ ድርጅት

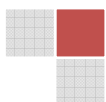
መዝገቡ ተመርምሮ የሚከተለው ውሣኔ ተሰጥቷል፡፡

ው ሣ ኔ ፤

ይግባኝ የቀረበው የቀድሞው ዞን ፍ/ቤት በፍ/መ/ቁ.1709/84 ሐምሌ 30 ቀን 1985 ዓ.ም በሰጠው ውሣኔ ቅር በመሰኘት ነው፡፡ በዞን ፍ/ቤት የአሁን ይግባይ ከሣሽ መልስ ሰጪ ደግሞ ተከሣሽ በመሆን ተከራክረዋል፡፡

ይግባይ በከሣሽነት በስር ፍ/ቤት ግንቦት 3 ቀን 1984 ዓ.ም በተጻፈ የክስ ማመልከቻ የመሰረተው ክስ ባጭሩ በጠቅላላው ብር 40,000 ወጪ ያደረሱበትን መኪና ከሳውዲ ዓረቢያ ገዝቼ በአንድ ዕቃ አስጫኝ ድርጅት አማካይነት ከጂዳ ወደብ እስከ አሰብ ድረስ እንዲጓዝልኝ ለተከሣሽ ድርጅት ጅዳ ላይ አስረክቤአለሁ፡፡ ተከሣሽ ከከሣሽ ጋር በገባው የማንጓዝ ውል መሰረት መኪናውን አሰብ ወደብ ሳያደርስ ለባለቤቱ ሳያስረክብ ቀርቶአል፡፡ ይህም የተከሣሽ አድራጊነት አንጓዥ በባሕር ሕግ አንቀጽ 196/2/

Maritime Law



በተገለፀው መሰረት በመርከብ ላይ ለተጫኑ ዕቃዎች ስለ ገዛቸው ስለጥበቃቸው ስለመልካም አያያዛቸውና ስለ ማራገፍ መልካም አፈጻጸም/ለባለቤቱ ለማስረከብ/ ያለበትን ግዴታ በአለመፈጸም ውል ስለአፈረሰ ክስ የቀረበበት ገንዘብ ለከሣሽ የመክፈል ህጋዊ ኃላፊነት አለበት። ስለዚህ ክስ የቀረበበትን ገንዘብ ክስ ከቀረበበት ዕለት ጀምሮ ውሣኔ በሚያርፍበት ገንዘብ ላይ ክፍያው እስኪፈጸም ድረስ ተከሣሽ ሕጋዊ ወለድ ጭምር እንዲከፍል በማለት ነው።

መል/ሰጪም ለዞን ፍ/ቤት ሐምሌ 9 ቀን 1984 ዓ.ም. በተፃፈ መልስ በሰፊው የተከራከረ ሲሆን መልሱ ሲጠቃለል ክስ የቀረበበትን መኪና “መስከረም” የተባለችው የተከሣሽ መርከብ አሰብ ወደብ ማራገፊያን የመርከቧ ካፒቴን/ዋና አዛዥ/ አረጋግጠዋል፤ በኢትዮጵያ የባሕር ሕግ፣ ዜሔን ሩልስ በተባለው የዓለም አቀፍ ስምምነት በከሣሽና በተከሣሽ መካከል በተደረገው የማስጫኛ ስምምነት/ቢል አፍ ሌዲንግ/ መሰረት ዕቃው ከመርከብ ከተራገፈ በኋላ በወደብ ላይ ለሚደርስ መጥፋት ወይም መበላሸት የመርከቡ ባለቤት በኃላፊነት ሊጠየቅ አይችልም፤ መኪናዋ አሰብ ወደብ የተራገፈችበት ጊዜ የኤርትራ ነጻ አውጭ ግምባር /ኢ.ፒ.ኤል.ኤፍ/ የአሰብን ወደብ የተቆጣጠረበት ጊዜ እንደመሆኑ ወቅቱ ያልታሰበ አጋጣሚ ጦርነት፣ ከአቅም በላይ የሆነ ሀይለኛ ሁከት የተከሰተበት በመሆኑና ለመኪናዋም መጥፋት የተከሣሽ ቸልተኝነት ወይም ጥፋት አስተዋጽኦ ያሳደረገ በመሆኑ በዚህ ሁኔታ ውስጥ ለጠፋ ዕቃ የመርከቡ ባለቤት በኃላፊነት ሊጠየቅ እንደማይችል በኢትዮጵያ የባሕር ሕግ በሔን ሩልስ ተደንግጓል፤ ከባለመርከቡ ቁጥጥር ውጭ በሆኑ ምክንያቶች ወይም ከባለመርከቡ ቸልተኝነት ወይም ጥፋት ውጭ በሆኑ ምክንያቶች የጠፋ ወይም የተበላሸ ዕቃ መተካት ያለበት በመድን ዋስትና እንጂ በተከሣሽ አይደለም፤ በኢትዮ የባሕር ሕግ፣ በሔን ሩልስና በማስጫኛው ሰነድ መሰረት ዕቃው መርከቡ ላይ ከመጫኑ በፊት የዕቃው ባለቤት በሰነድ የተደገፈ የዕቃውን ትክክለኛ ዋጋ ገልጾ በማስጫኛ ሰነድ ላይ እንዲመዘገብ ካልተደረገ በቀር ዕቃው ቢጠፋ ወይም ቢበላሽ የባለመርከቡ ሀላፊነት ከብር 500 ወይም ከ100 የእንግሊዝ ፓውንድ አይበልጥም፤ ከሣሽ የመኪናውን ዋጋም ሆነ መኪናውን ለማፈላለግ አወጣሁ ለሚሉት ወጭ ያቀረቡት ማስረጃ ከጉዳዩ ጋር አግባብነትና ተቀባይነት የሌለው ስለሆነ ማስረጃ ሊቀርብ አይችልም። ስለዚህ ክስ ተሰርዞ ልሰናበት የሚል ነው።

ዞን ፍ/ቤትም የማራ ቀኝን ክርክር መርምሮ ግንቦት 9 ቀን 1985 ዓ.ም ኃላፊነትን በተመለከተ . . . “በአጠቃላይ ተከሣሹ የኢትዮጵያ ንግድ መርከብ ድርጅት ከከሣሹ ጋር ባደረገው የማስጫኛ ውልም ሆነ ሕጉና ሌሎች ዓለም አቀፍ ስምምነቶች መሰረት ለከሣሽ ለማንኛውም ተረክቦ የጫነውን መኪና አግባብ ባለው መንገድ ቦታው ድረስ በማድረስ ለከሣሽ ሊደርሳቸው በሚችል አኳኝን አራግፏል የሚያሰኝ ሆኖ ስላልተገኘ ለጠፋው የከሣሽ መኪና ኃላፊነት አለበት በማለት ውሣኔ የሰጠ ሲሆን የሀላፊነት መጠኑን በተመለከተ፣ . . . “ለማጠቃለል በኢትዮጵያ የባህር ሕግ አንቀጽ 198 መሰረት የኢትዮጵያ ንግድ መርከብ ኮርፖሬሽን የከሣሽ መኪና በመጥፋቷ ምክንያት ከኢትዮጵያ 500 በላይ ተጠያቂ ሊሆን የሚችለው የመኪናዋን ዓይነትና ዋጋ ከሣሹ አሳውቀውት ይህም በማስጫኛ ሰነድ ላይ ተመልክቶ ቢሆን ኖሮ ሲሆን በቀረበልን ጉዳይ ግን ከሣሹ መኪናዋን ከጅዳ ወደብ ሲያስጭኑ ለተከሣሽ ገልፀውና በማስጫኛ ሰነዱ ላይ የተመለከተው የመኪናዋ ዓይነት ብቻ ሲሆን የመኪናዋን ዋጋ በተመለከተ ግን ለተከሣሹ ስለማሳወቃቸው የቀረበ ማስረጃ ካለመኖሩም በላይ በማስጫኛ ሰነዱ ላይ አልተመለከተም። ከሣሹ

የመኪናዋን ዓይነትና ዋጋ ለኢትዮጵያ ንግድ መርከብ አሳውቀው ካላስጫኑ የተከሣሹ ኃላፊነት በኢትዮጵያ ባሕር ሕግ አንቀጽ 198/1/ ላይ ከተመለከተው ሊበልጥ የሚችልበት ሁኔታ የለም። ስለዚህ ተከሣሹ ያለበት ሀላፊነት ብር 500 ብቻ ነው በማለት ወስኗል።

ይግ/ባይ ጥቅምት 23 ቀን 1986 ዓ.ም. በተጻፈ የይግባኝ ቅሬታ ይግባኝ የቀረበው በኃላፊነት መጠን የተሰጠውን ውሣኔ በመቃወም ነው። ፍሬ ቃሉም፤

- ሯ በባሕር ሕግ አንቀጽ 198 ሯ እንዳልቀመጠው የሀላፊነት መጠን ለአንዳንድ ጥቅም ሲባል ገደብ የተበጀለት በጥቅል ወይም በእሽግ ለመጫኑ ዐይነታቸው በግልጽ ለአልታወቁ ዕቃዎች ነው እንጅ ይግ/ባይ የክፍያ ጥያቄ ለአቀረቡበትና የዕቃው ዐይነት በግልፅ በማስጫኛ ሰነዱ ላይ የመኪናው ዐይነት ሞዴሉ የተሠራበት ዓመት እንደሸሱ(?) ቁጥር ከአለው ልዩ መታወቂያው ጋር ለታወቀውና ዋጋውንም ከዚሁ ላይ ለመገንዘብ ለሚቻለው ዕቃ የባሕር ሕግ አንቀጽ 198 በመከላከያነት ፈጽሞ ሊያገለግል አለመቻሉን አንቀጽ ራሱ በጥቅል ወይም በጅምላ በሚጫኑ ዕቃዎች ላይ ብቻ የሀላፊነት መጠን ገደብ የተበጀለት መሆኑን በግልጽ እያስረዳ ፍ/ቤቱ በአንቀፁ ላይ ስለሀላፊነት መጠኑ የወሰደው ግንዛቤ ትክክል አለመሆኑን ይግባኝ ሰሚው ፍ/ቤት የበኩሉን ትኩረት እንዲሰጥበት እየጠየቅሁ ይህንም ግንዛቤ የዞን ፍ/ቤት በይበልጥ ስለቀረበለት የሀላፊነትና የመጠን ጥያቄ በግልፅ የሚረዳበትን ዕድል ለማረጋገጥ ይግባኝ ባይ ከክስ ማመልከቻው ጋር በማስረጃ ዝርዝር በ “ሀ” 1.5 እና 1.6 እንዲሁም “ለ” ውስጥ የጠቀሱአቸውን የሰነድና የሰው /በበሰል – experts - ደረጃ/ ማስረጃዎቹን በቅድሚያ ሳይሰማ ከውሣኔ ላይ መድረሱ የብር 40,000.00 ጥያቄ በብር 500 /አምስት መቶ/ ብቻ ሊቀጭ በመቻሉ የውሣኔውን ተገቢ አለመሆኑን ይግባኝ ሰሚው ፍ/ቤት ተገንዝቦ አሁን የተሰጠውን ውሣኔ በመሻር በማስረጃ ላይ የተደገፈ ውሣኔ የሚሰጥበትን ሁኔታ ይግባኝ ሰሚው ፍ/ቤት እንደገና እንዲቀይስልን አበክረን እንለምናለን።
- መልስ ሰጭ ድርጅቱ የይግባኝ ባይን መኪና ለማንኛውም በሰጠው የጭነት ማስታወቂያ/ቤል – አፍ – ሌዲንግ/ ሰነድ ላይ የመኪናው ዋጋ አልተጠቀሰም መባሉ ይህን በመሰለው እቃ ላይ የባሕር ንግድ እንቅስቃሴ ልምድ/Customs/ የሌለው መሆኑን ሁኔታው በሚፈቅደው መ[ንገድ] ዝርዝሩን በበሰል /Experts/ ምስክሮች ለፍ/ቤቱ ማስረዳት የምንችል መሆናችንን እየገለፅን መልስ ሰጭ በመከላከያ ማስረጃነት ከአቀረበውና ሌሎች የ98 መኪናዎች የጭነት ማስታወቂያ / ቤል – አፍ – ሌዲንግ/ ሰነዶች ውስጥ በማናቸውም አስጫኝ በኩል የተጫነው መኪና ዋጋ ተጠቅሶ ሲሆን መልስ ሰጭ አቋሙን ለማጠናከር በማስረጃነት አቅርቦ ሊጠቀምበት በቻለ ነበር። ሐቁ ግን ከላይ እንደገለፀው ሆኖ መኪና አስጫኞቹ የመኪናቸውን ዋጋ አይገለፁም እውነቱን ለመረዳት ከፈለገ ፍ/ቤቱ የበኩሉን ማጣራት ሊፈጽም መቻሉንም በዚህ አጋጣሚ እንጠቅሳለን።

- መልስ ሰጪ ለይግባኝ ባይ የሰጠው የጭነት ማስታወቂያ ሰነድ /ቢል- አፍ-ሌዲንግ/ ዐይነቱና መኪናው በመርከብ ላይ የተጫነበት ሁኔታ በመሰረቱ በአንጓዝ ድርጅት ሀላፊነት የመድን ዋስትና የሚገባለትና የተገባለትም መሆኑን አለም አቀፍ የባሕር ንግድ አሰራር የሚያረጋግጠው ጉዳይ መሆኑን፤ ይግባይና መልስ ሰጭ የክፍያ ጥያቄው ለፍ/ቤት ከመቅረቡ በፊት ችግሩን በውይይት ለመፍታ በጋራ በነበረው ፍላጎት መጋቢት 8 ቀን፤ ሚያዝያ 2፤ እና ሚያዝያ 20 ቀን 84 ዓ.ም. በጽሑፍ የተለዋወጡአቸውና የይግባኝ ባይ ማስረጃ ሆነው በቀረቡት ጽሑፎችና በመካከሉም በውይይት ወቅት በተንፀባረቁት ሀሳቦች አማካይነት የተነሣው ችግር በመሰረቱ በመድን ዋስትና አማካይነት የተሸፈነ እንደመሆኑ መጠን በዚያው መልኩ መፍትሔ ሊገኝለት የሚገባው መሆኑን ይግባኝ ባይ ለመልስ ሰጭ አበክረው የአሳሰቡ ቢሆንም መልስ ሰጭ ራሱ ብቻ በሚያውቀው ምክንያት ጥያቄውን በዚህ መልኩ ማስተናገድ ባለመፍቀዱ ምክንያት ጉዳዩ ለፍ/ቤት መቅረቡን ነገር ግን መልስ ሰጭ ድርጅት ይህን ለመሰለው አጋጣሚ /የባህር ላይ ጉዳት/ በአገር ውስጥና ከአገር ውጭ በየፈርጁ በውጭ ምንዛሪና በአገር ውስጥ ገንዘብ የመድን ዋስትና ወጭ እያደረገ ... ከደንበኞቹ ጋር የባሕር ሕግን አንቀጽ 198 እና የመሳሰሉትን ሕጎች መሰረት እያደረገ የሙግት መድረኩን ለማስፋት የመጣሩን ሁኔታ ከተገቢው የንግድ ሥርዓት አንጻር በግልፅ ለመረዳት ቢያዳግትም መልስ ሰጭ ይህን ለመሰለው አጋጣሚ የመድን ሽፋን ያለው መሆኑንና የሙግት አቋሙም ተገቢ እለመሆኑን ይግባኝ ባይ አሁንም ለፍ/ቤቱ በበሰለ /EXPERTS/ ምስክሮች አማካይነት ለማረጋገጥ ይችላሉ፡፡

- ከዚህ በላይ በይግባኝ ቅሬታችን አማካይነት እንደተገለፀው ተገቢ ማስረጃዎች ከመሰማታቸው በፊት ተገቢ ባልሆነ የሕግ አንቀጽ ላይ ብቻ ተመስርቶ የተወሰነው ውሳኔ ተገቢ ያልሆነው ውጤት ይግባኝ ባይን ብቻ ሳይሆን በብቸኛነት ሀገሪቱን አገለግላለሁ ብሎ በተነሣው የባሕር አንጓዥ ድርጅት ደንቦች ሁሉ ላይ የተቃጣ መሆኑና በእውነተኛ መልኩም ቢሆን መልስ ሰጭውን ድርጅት/ሊገዜው ይመስለው እንደሆነ እንጂ/ በመጨረሻ ድርጅቱን ሆነ በዘርፉ የሚገኘውን ጠቅላላ የሀገሪቱን ኢኮኖሚ በይበልጥ የሚጉዳው መሆኑን ይግባኝ ሰሚው ፍ/ቤት ተገንዝቦ፤ ውሳኔውን የፍ/ሥ/ሥ/ሕግ/ቁ.348/1/ በሚፈቅደው መሰረት በመሻር በማስረጃ ላይ የተመሰረተ ውሳኔ በጉዳዩ ላይ የሚሰጥበትን መንገድ ይግባኝ ሰሚው ፍ/ቤት እንዲያስታወቅልን በአክብሮት እንጠይቃለን የሚል ነው፡፡

ይግባኝ መልስ ሰጪ ባለበት መጣራት አለበት ተብሎ መልስ ሰጪ መልስ እንዲሰጥበት በታዘዘው መሠረት በ3/5/86 ዓ.ም የተጻፈ መልስ አቅርቧል፡፡ ፍሬ ክርክሩም፤

- ይግባኝ ባይ የመኪናዋ ዋጋ ብር 35,000 ነው በማለት ክስ ያቅርቡ እንጂ የመጀመሪያ ደረጃ ፍርድ ቤት የፈረደላቸው ግን ብር 500 ብቻ ነው፡፡ ፍርድ ቤቱ ይህንን ያደረገው መልስ ሰጪ የሀላፊነቱን መጠን ለመወሰን በኢትዮጵያ የባሕር ሕግ አንቀጽ 198/1/ ያለውን መብት በማረጋገጥ ነው፡፡ የዚህ አንቀጽ ንዑስ አንቀጽ/1/ የመርከቡ ሀላፊነት “በማናቸውም ሁኔታ ሲሆን ከአምስት መቶ የኢትዮጵያ ብር ሊበልጥ አይችልም ሲል ንዑስ ቁጥር /3/ ደግሞ የመርከቡ Maritime Law

- ኃላፊነት ከብር 500 መብለጥ የሚችለው ዕቃ አስጫኝ መኪናዋን በመርከቧ ላይ ከማስፈሩ በፊት የመኪናዋን ዋጋ አስታውቆ ከሆነ ይህም ዋጋ በማስጫኛ ሰነድ ላይ ተጽፎ ከሆነ ብቻ መሆኑን በግልፅ አሻሚ ባልሆነ ቋንቋ ደንግጓል። ይግባይ ይህ ሕግ በሚጠይቀው መሰረት የመኪናዋን ዋጋ አላስታወቀም በማስጫኛ ሰነዱም ላይ አልተመለከተም። ስለዚህ የመጀመሪያ ደረጃ ፍርድ ቤት በአንቀጽ 198/3/ መሰረት የመልስ ሰጪ ሀላፊነት ከብር 500 አይበልጥም በማለት የወሰነው በአግባቡ ነው።
- በንግድ እንቅስቃሴ ልምድ አስጫኞች የዕቃቸውን ዋጋ አይገልፁም በማለት ይግባኝ ባይ ለጠቀሱት ትክክል ነው። ዋጋውን ቢጠቅሱ የማስጫኛ ዋጋ ይጨምራል ሌሎችም የየራሳቸው ብዙ ምክንያቶች አሏቸው። ዳሩ ግን የባሕር ሕግ የአንቀጽ 198 ይዘትን አይለውጠውም። ነጥቡም የሕግ ክርክር አይደለም።
 - ይግባኝ ባይ ማስረጃ ካላቸው ይህንኑ አንቀጽ 198/3/ የሚጠይቀውን ማሟላታቸውን ብቻ ማስረዳት ሲገባቸው እርሳቸው ግን የክርክራቸውን አቅጣጫ ያመሩት በአንቀጽ 198 አስፈላጊነት ፍልስፍና ላይ ነው። የዚህ አንቀጽ ፍልስፍና መዘርዘር ለቀረበው ክርክር አግባብነት ባይኖረውም ይግባኝ ባይ ያቀረቡት ፍልስፍና እርስ በርስም የሚጋጭ ከመሆኑም በላይ ለፍርድ ቤቱ ትክክለኛውን ሁኔታ ለማሳወቅ በጥቂት ማስረዳት አስፈላጊ ይሆናል።
 - የኃላፊነት መጠንን የመወሰን መብት ለመርከቡ መስጠት ለምን አስፈላጊ እንደሆነ ይግባኝ ባይ በይግባኝ ማመልከቻቸው ላይ ሲገልጡ በተራ ቁጥር 2.4 ላይ “ለባህር ላይ ንግድ ጤናማ እንቅስቃሴን እድገት ሲባል ብቻ ነው ይሉና በተራ ቁጥር 4.1 ደግሞ ዕቃ አስጫኝ ብረት አስጭኖ በቃል ወርቅ ነበር ያስጫንኩት እንዳይል ነው ብለዋል። ዳሩ ግን ብር 100,000 የሚያወጣ ብረት ወይም ብር 50,000 የሚያወጣ ወርቅ ቢያስጭንም ዋጋውን አስቀድሞ እስካላሳወቁ ድረስ በአንቀጽ 198 መሰረት የሚገኘው ካሳ ከብር 500 የማይበልጥ በመሆኑ የተጠቀሰውን አንቀጽ ፍልስፍና ይግባኝ ባይ ያላብራሩ መሆኑን ይኸው ብቻ ያስረዳል።
 - በባሕር ሕግ አንቀጽ 198 እንዲሁም ለሌሎች ሁኔታዎች አንቀጽ 80 እና 81 የሀላፊነትን መጠን የመወሰን መብት ለመረከባችን እንዲሰጣቸው መሰረት የሆነው ምክንያት እቃን በባሕር ላይ በመርከብ የማጓጓዝ ሥራ ዘወትር ለአደጋ ስጋት የተጋለጠ መሆኑ ነው። በአለም ላይ ከመቶ ዘጠና የሚሆነው የንግድ ዕቃ የሚጓጓዘው በመርከቦች ሲሆን በዚህ ሰፊ የአደጋ ሥጋት ባለበት ሁኔታ ለዚህ ሁሉ እቃ መርከቦች ብቻ፣ ሀላፊነቱን ይውሰዱ ቢባል በአንድ ጉዞ ብቻ ኪሣራ በኪሣራ ሆነው በዓለም ላይ የመርከብ አገልግሎት አቅርቦት ሊቋረጥ ይችላል። ስለዚህ ይህ ሁኔታ ሳይፈጠር የአለምን የንግድ ዕቃ ልውውጥን በጤናማ ሁኔታ ለማካሄድ ይህን የአደጋ ስጋት መርከቦችና ኢንሹራንሶች እንዲካፈሉት /SHARE OF RISK/ ማድረጉ ፍቱን ዘዴ ሆኖ ተገኘ። በዚህም መሰረት በባሕር ሕግ አንቀጽ 197 መርከቦች ሙሉ በሙሉ የማይጠየቁበት ሁኔታ የተዘረዘረ ሲሆን ለሌሎች ሁኔታዎች ደግሞ በአንቀጽ 198 መሰረት የኃላፊነታቸው መጠን

ን እንዲወሰን ተደርጓል። ዕቃ አስጫኝ የእቃውን ሙሉ ዋጋ ወይም ልዩነቱን ማግኘት ያለበት ከኢንሹራንስ ነው። ስለዚህ ነው ማንኛውም በመርከብ ዕቃ የሚያስጭን ሰው ኢንሹራንስ ቢገባ የሚመረጠው “ያወጣ ያውጣው” ብሎ ኢንሹራንስ ሳያስገባ ቢያስጭነው በአጋጣሚ እንዳሁኑ ባዶውን ይቀራል።

- ይግ/ባይ በይግባኝ ማመልከቻ ተራ ቁጥር 4.3 ላይ መልስ ሰጭው ለዕቃው የመድን ዋስትና የመግባት ግዴታ ያለበት አስመስለው ያቀረቡት ትክክል አይደለም። ለዕቃው ኢንሹራንስ የሚገባው ከፈለገ ራሱ የዕቃው ባለቤት ነው። እውነታው ይህ ባይሆን ኖሮ በአለም አቀፍ የንግዱ ልውውጥ በሻጭና በገዢ መካከል ኢንሹራንሱን ማንኛቸው እንደሚችሉ ለመለየት ሲፍ /C.I.F/ ወይም ፎብ /F.O.B/ የተባሉት አጠራሮች ባላስፈለጉ ነበር።

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- ይግባኝ ባይ በይግባኝ ማመልከቻቸው ተራ ቁጥር 4.1 ውስጥ አንቀጽ 198 የሚያገለግለው በጥቅል ወይም በጅምላ በሚጫኑ ዕቃዎች ላይ ብቻ ነው ብለዋል። ይህ አባባል ትክክል አይደለም። ንዑስ አንቀጽ 1/ ኃላፊነቱ ከብር 500 የማይበልጠው በማናቸውም ሁኔታ መሆኑን ይገልጻል። በንኡስ ቁጥር 2/ ላይ ጥቅል የሚለው ቃል የተጠቀሰው ለኪሣራው አወሳሰን አንደ አንድ መለኪያነት እንጂ ለሌሎች እቃዎች ለጭነት ዋጋ መወሰኛ በሆነው ልክ መሰረት /ON THE BASIS OF UNIT/ መሆኑን ይገልጻል። አሁን ክስ የቀረበበት ጉዳይ የሚመለከተው የማስጫኛ ሰነድ ደግሞ በላዩ ላይ ያሰፈረው /ONE UNIT DATSUN NISSAN SUNNY/ ብሎ ስለሆነ የይግባኝ ባይ አባባል ተቀባይነት የለውም።

- በአሁኑ የዓለም ንግድ እንቅስቃሴ በደረሰበት ደረጃ “ጥቅል” የሚለውም ቃል እንኳ በሆነ ኩነቱነሮችም፣ ፓሌቶችንና ሌሎች ዕቃዎችን ሁሉ የሚጨምር ስለመሆኑ ብዙ ሊትሬቸርና ጂሪስፓሩደንስ ተፅዕኖታል። ክቡር ፍ/ቤቱ ካስፈለገው ማቅረብ ይችላል።

ኛ

- ከላይ በዝርዝር የቀረቡትን የመልስ ሰጪን በኢትዮጵያ የባሕር ሕግ፣ በአለም አቀፍ ስምምነቶች በመልስ ሰጪና በይግባኝ ባይ መካከል የተደረገውን የማስጫኛ ውል መሰረት አድርገው የቀረቡትን የመልስ ሰጪን የክርክር ነጥቦች የተከበረው ፍርድ ቤት አንድ በአንድ መርምሮ በነጻ እንዲያሰናብተው መልስ ሰጪ በትህትና ይለምናል የሚል ነው።

In the mean time, the respondent (Ethiopian Shipping Lines) cross-appealed. In its appeal, the carrier argued that it should not be liable for the following reasons: (1) the court shall take judicial notice of the fact that the port of Assab was unsafe during the time *Meskerem* unloaded the goods (on 17 May, 1983 E.C) and hence, it shall exempt it from liability as per Art.197, Mar. Code; and (2) though *turn-over report* by the stevedoring company [which, according to port practice, is certificate of delivery] cannot be produced as a result of the state of war at the port of Assab[as a result of which the stevedoring company was

Maritime Law

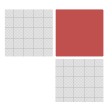
closed down], the declaration by the captain of *Meskerem* stating that the good had been unloaded from the ship should be considered as equally probative. The court decided the case in the following manner, after it finally heard the responses of the appellant to the cross appeal:

የክርክሩ አመጣጥ ከላይ እንደተመዘገበው ነው። ይህ ፍ/ቤትም ከይግባኝና ከመስቀለኛ ይግባኝ በመነሳት የሚከተሉትን ጭብጦች ይዞ ጉዳዩን ከየስር ፍ/ቤት የመዝገብ ግልባጭና ለጉዳዩ አግባብነት ካላቸው ሕጎች ጋር በማበናበብ በሚከተለው አኳኋን መርምራል።

ጭብጦችም ፡- 1ኛ. መልስ ሰጪ ሀላፊነት አለበት ወይ?

2ኛ. ሀላፊነት አለበት ከተባለ መጠኑ ምን ያህል መሆን ይገባዋል? የሚሉት ናቸው።

መልስ ሰጪ ሀላፊነት አለበት ወይ? የሚለውን የመጀመርያ ጭብጥ ስንመለከት መልስ ሰጪ ክስ የቀረበበትን መኪና አሰብ ድረስ ለማድረስ ከጂዳ ከይግ/ባይ የተረከበ መሆኑን አይክድም። የሚከራከረው ግን ከላይ በዝርዝር እንደተመዘገበው በባህር ህግ በይግባኝ ባይና በመልስ ሰጭ በተደረገ የማስጫኛ ሰነድና በዓለም አቀፍ ሕግ የመርከቧ ሀላፊነት ዕቃው ከመርከቡ ላይ ከተጫነበት ጊዜ አንስቶ እስከሚራገፍበት ጊዜ ብቻ ሲሆን፤ እንዲሁም ዕቃው የጠፋው መርከቧ ላይ ከመጫኑ በፊት ወይም ከመርከቧ ከተራገፈ በኋላ ከሆነ ግን መርከቧ ሀላፊነት የለባትም። በዚህ ጉዳይ ክስ ያቀረበበትን መኪና አሰብ ወደብ የተራገፈች ለመሆኑ መኪናዋ ተጭናበት የነበረችው መስከረም የተባለችው መርከብ ዋና አዛዥ አረጋግጦታል በመሆኑም ሀላፊነት የለብኝም በማለት ነው። በርግጥ ከላይ በተጠቀሱት ህጎች መሰረት የመልስ ሰጭ ሀላፊነት ዕቃው ከተጫነበት እስከተራገፈበት ጊዜ ለሚደርስ ጥፋት ነው። ሆኖም ከዚህ ጋር አብሮ መታየት ያለበት ዋና ነጥብ አንድ ባለመርከብ ግዴታውን ተወጥቷል ማለት በውል የተረከበውን እቃ ለአስጫኝ በሚደርሰው ሁኔታ ማራገፉ የሚረጋገጠው እንዴት ነው የሚለው ነው። ይግባኝ ባይ አንድ ዕቃ ተራግፏል የሚባለው በ3ኛ ወገን በሚሰጥ አውት ተርን ሪፖርት እንደሆነ በመግለፅ የተከራከረ ሲሆን ለዚህም መልስ ሰጪ ጥር 6 ቀን 1986 ዓ.ም. ለዚህ ፍ/ቤት ለይግባኝ ቅሬታው በሰጠው መልስ በግልጽ “በባህር ወደቦች መደበኛ አሰራር አንድ መርከብ ዕቃውን ያራገፈች ለመሆኑ የሚያስረዳለት ስለባለዕቃው ሆነው ከሚረከቡት ከወደቡ አስተዳደር ባለሥልጣን ወይም በወደቡ ዕቃን የማራገፍና የመጫን ሥራ ከሚሰራው ከባንያ የሚሰጠው አውት ተርን ሪፖርት የተባለ ሰነድ እንደሆነ መልስ ሰጭም ያምንበታል በማለት አምኗል። ከዚህ መረዳት የሚቻለው በባህር ወደቦች አሰራር አንድ ባለመርከብ የተረከበውን ዕቃ በማስረከብ ሀላፊነቱን ተወጥቷል የሚባለው በተጠቀሰው ሰነድ መሠረት ማራገፉ ሲረጋገጥ ነው። መልስ ሰጪ ግን መኪናዋን ለማራገፍ ያስረዳልኛል በማለት ያቀረበው ማስረጃ የይግባኝ ባይ መኪና የተጫነችበት መርከብ ካፒቴን የሰጠው ማረጋገጫ ነው። ሌላው ከዚህ ጋር አብሮ መታየት ያለበት ነጥብ መልስ ሰጪ አውት ተርን ሪፖርት ማቅረብ የሚቻለው ሰላም ባለበት ጊዜ ነው፤ የይግባኝ ባይን መኪና የጫነችው መርከብ በወደቡ በደረሰች ጊዜ ግን በአካባቢው ሰላም ስላልነበር ሰነዱን

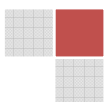


ማቅረብ አልቻልንም፤ ይህም ጦርነት የታወቀ በመሆኑ ፍ/ቤቱ ግንዛቤ ሊወስድልን ይገባል በማለት የሚያቀርበው ክርክር ነው። በርግጥ መልስ ሰጪው እንደሚለው የይግባኝ ባይን መኪና የጫነችው መርከብ አሰብ ደርሳለች በተባለበት ጊዜ የአሰብ ወደብ አካባቢ በመንግስት ለውጥ ምክንያት ሰላም እንዳልነበር የሚታወቅ ነው። ሆኖም በመጀመርያውኑ የአካባቢውን ሰላምና መረጋጋት በበቂ መረጃ በመከታተል ዕቃውን ከማውረድ መቆጠብ የመልስ ሰጪው ኃላፊነት ነው። በአካባቢው እንዲህ ዓይነት ሁኔታ ሊኖር እንደሚችል ከሁኔታዎች አስቀድሞም የመገመትምና ተገቢውን ጥንቃቄ የማድረግ ኃላፊነት የመልስ ሰጪው ነው።

ስለሆነም በአጠቃላይ መልስ ሰጪ እቃውን ማራገፉ የሚረጋገጠው እንደሚተማመኑት በአውት ተርን ሪፖርት በመሆኑ፤ ይህን አውት ተርን ሪፖርት መልስ ሰጭ ያላቀረበ በመሆኑ ላለማቅረቡም የሰጠው ምክንያት ከላይ በተጠቀሰው ምክንያት ተቀባይነት የሌለው በመሆኑ መኪናውን ለማራገፊያ ያስረዳልኛል በማለት ያቀረበው የካፒቴኑ ማረጋገጫ ደግሞ ከተለመደው አሰራር ውጪ በመሆኑ በቂ ማስረጃ ባለመሆኑ ኃላፊነትን በተመለከተ የቀረበውን መስቀለኛ ይግባኝ ባለማቅረብ ለጠፋችው ለይግባኝ ባይ መኪና ኃላፊ ነው ብለናል።

መልስ ሰጪ ኃላፊ ነው ከተባለ በመቀጠል መታየት ያለበት ነጥብ የኃላፊነቱ መጠን ምን ያህል ነው የሚለው ነው። ይህን ነጥብ በማስመልከት ግራ ቀኙ ያደረጉት ክርክር በሰፊው ከላይ የተመዘገበ ሲሆን ባጭሩ ግን ይግባኝ ባይ የሚከራከረው በባህር ህግ አንቀጽ 198 መሠረት የኃላፊነቱ መጠን ከብር 500.00 መብለጥ የማይኖርበት በጥቅል ወይም በእሽግ ለሚጫኑ ዓይነታቸው በግልጽ ለማይታወቅ እቃዎች እንጂ ይግባኝ ባይ የክፍያ ጥያቄ ላቀረቡበትና የእቃው አይነት በግልጽ በማስጫኛ ሰነዱ ለተጠቀሰው መኪና አይነት እቃ አይደለም በማለት ሲሆን መልስ ሰጪ ደግሞ የሚከራከረው ይግባኝ ባይ የባህር ህግ ቁ. 198 በሚጠይቀው መሠረት የመኪናዋን ዋጋ አላስታወቀም፤ በማስጫኛ ሰነዱም አልተመለከተም። ስለዚህ በአንቀጽ 198/1/ መሠረት ኃላፊነታቸውን ከብር 500.00 አይበልጥም በማለት ነው።

የግራ ቀኙን ክርክር ከተጠቀሰው ህግ ጋር በማገናኘብ መርምረናል። እንደመረመርነውም ከላይ በተጠቀሰው ህግ ንዑስ ቁጥር 1 መሠረት የንግድ ዕቃዎች ለሚደርስባቸው ጉዳትና ጥፋት አመላሽ በኃላፊነት የሚጠየቅበት ሂሳብ በማናቸውም ሁኔታ ቢሆን ከአምስት መቶ የኢትዮጵያ ብር የበለጠ ሲሆን እንደማይችል የተደነገገ ሲሆን በንዑስ ቁጥር 3 ደግሞ የንዑስ ቁጥር 1ን ልዩ ሁኔታ ይደነግጋል። ይኸውም ዕቃ አስጫኝ የንግድ ዕቃዎችን በመርከቡ ላይ ከማስፈሩ በፊት የእቃዎቹን ዓይነትና የዋጋቸውን ልክ ካስታወቀና ይህም መግለጫ በጭነት ማስታወቂው ደረሰኝ ላይ ተጽፎ እንደሆነ ነው። እዚህ ላይ መታየት ያለበት ነጥብ ይህ የተገለጸው የ 500.00 ብር ካሳ መጠን ገደብ ለሁሉም ዓይነት እቃዎች ተፈጻሚነት አለው ወይ የሚለው ነው። ከዚህ ህግ ንዑስ ቁጥር 2 ድንጋጌ መረዳት የሚቻለው ይህ ዓይነት የካሳ ገደብ ተፈጻሚ የሚሆነው በጥቅል ላሉ እቃዎች እንጂ የእቃው ዓይነት በግልጽ



ለሚታይና ለሚታወቅ ንብረት መሆኑን አይደለም። የዞን ፍ/ቤትም በዚህ ረገድ የሰጠው ትችት አግባብ አይደለም።

በሌላ በኩል ግን ይግባኝ ባይ የመኪናዋን ዋጋ ለማስረዳት በስር ፍ/ቤት ያቀረበው ማስረጃ እ.ኤ.አ ህዳር 23 ቀን 1990 ዓ.ም የተጻፈ ሲሆን ይዘቱም አሊ.ኢ.አብ መቅብ የተባለ ሰው ከይግባኝ ባይ ላይ ብር 35,000.00 የተበደረ መሆኑንና ይህንኑ ገንዘብ ለመክፈል በተመጣጣኝ ዋጋ አንድ ዳትሰን ኒሳን ሰኒ መኪና ገዝቶ ከርያድ ጅዳ ከጅዳ አሰብ ድረስ የሚያስከፍለውን የመንጓዝ ወጪ ለመክፈል ቃል የገባ መሆኑን የሚያረጋግጥ ነው። ይህ ሰነድ በግልጽ እንደሚነበበው መኪናው የተገዛበት ሰነድ አይደለም። ስለሆነም የመኪናዋን ትክክለኛ ዋጋ አያስረዳም። ይግባኝ ባይ መኪናዋን የገዛበትን ውልም አላቀረበም ወይም የመኪናዋን አይነት በመንተራስ ዋጋን በማጣራት አልገለፀም ወይም እንዲጣራለት አላመለከተም። ስለዚህ ይግባኝ ባይ በትክክል ክስ የቀረበበት መኪና ዋጋ ብር 35,000.00 ለመሆኑ የሚያስረዳ በቂ ማስረጃ ስላላቀረበ የክፍያው ጥያቄ ተቀባይነት የለውም።

ይግባኝ ባይ የጠፋችውን መኪና ለማፈላለግ የአወጣሁት ብር 5,000.00 ይክፈለኝ ሲል ያቀረበው ማስረጃ አቶ ዮሐንስ ወ/ሰላሴ የተባለ ሰው ለዚህ ሥራ ከይግባኝ ባይ ብር 5,000.00 ተቀብያለሁ በማለት የሰጠውን ደረሰኝ ነው። ሆኖም ግን ይግባኝ ባይ እንደሚለው በርግጥ ይህ ገንዘብ የተክፈለው የጠፋውን ንብረት ለማፈላለግ ይሁን አይሁን በሚገባ የሚያስረዳ ካለመሆኑም በላይ የተቀባዩን ማንነትና ህጋዊነት በሚገባ አያረጋግጥም ስለሆነም...ጥያቄው ተቀባይነት የለውም።

በአጠቃላይ ይግባኝ ባይ ብር 40,000.00 እንዲከፈለው የጠየቀው በማስረጃ የተደገፈ ስላልሆነ ተቀባይነት የለውም በማለት ይግባኝንም ሆነ መስቀለኛ ይግባኝን ከላይ በተገለጸው ምክንያት ባለመቀበል የዞን ፍ/ቤት ውሳኔ በማጽናት... ወስነናል።

1. Incidentally, the court reasoned: “በ... ህጎች መሰረት የመልስ ሰጭ ኃላፊነት ዕቃው ከተጫነበት እስከተራገፈበት ጊዜ ለሚደርስ ጥፋት ነው።” Does the reading of Art. 180(3) necessarily affirm that the carrier is not always liable for damages sustained before loading and after discharge while the goods are in his custody. Take, for example, cases where the carrier issued a *received for shipment of bill of lading* for goods that are yet to be loaded, and hence kept in a warehouse. Is it not possible to, for example, argue that “Art.180 (3) only states the inapplicability of the rules of the particular section dealing with carriage under bill of lading; and it does not have any implication of insulating the carrier from liability. To the contrary, the non application of the rules jeopardizes the position of the

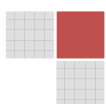
carrier who otherwise would benefit from the immunities and limitation of liability under Arts. 197 and 198”?

2. An additional inquiry into the court’s ruling concerns: “ይህ ዓይነት የካሳ ገደብ [Global statutory limitation of liability] ተፋጻሚ የሚሆነው በጥቅል ላሉ እቃዎች እንጂ የእቃው ዓይነት በግልጽ ለሚታይና ለሚታወቅ ንብረት አይደለም::” How do you see the court’s edict in light of the provisions of Art. 198(2) which reads: the statutory limitation shall be determined by package, and in respect of goods loaded in bulk, on the basis of the unit normally serving for the calculation of the freight. (Emphasis added)?
3. Comment on the court’s acknowledgment of the relevance of such international conventions as the Hague Rules.
4. Do you think the court erred in affirming the judgment of the lower court after it disapproved of the later’s appreciation of the meanings of Art. 198(2)?

Last Words on the Ethiopian Law of Sea Carriage

It is high time our legislator had responded to the dynamism in the international sea carriage business. The limitations of the current law does not only relate to the discrepancies between the two versions of the Maritime Code. Rather, it mainly relates to the outdated rules that do not take the changes brought to the sector since the start of the second half of the 20th century.

One of the crucial points calling for revision is the principle of package limitation of liability. The basis for this principle is the need to protect cargo owners from widespread exclusion of liability by sea carriers who, in the 19th century, exploited their commercial position by inserting clauses in the bill of lading exonerating them from liability for cargo damage caused even by their negligence. Put in other words, the package limitation is a give and take reached in, for example, the 1924 Hague Rules that carrier’s right to limit liability became subject to its obligation to exercise due diligence to make the vessel seaworthy, but having done so, it was entitled to the defence of negligent management and navigation. At first, it looked perfect. But, continuous dissatisfaction gathered up by 1950s and onwards. Containerization, inflation (reducing the recovery possibilities of the cargo owners), the method of determining the unit of



limitation (being subject to different interpretation) are the major challenges to the traditional formula under earlier laws like the Hague.^{***}

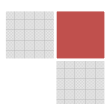
The Ethiopian Maritime Code, unamended for the last four/five decades, faces the same challenge. As could be evident from the case laws discussed above, the principle of package limitation works too much in favor of carriers; while the further possibility of total exoneration of carrier from liability under Art.197 makes things unbearable to the shipper. Ethiopia (as an importing poor landlocked country) could have, for example, adopted the Hamburg Rules of 1978 (entered into force in 1992) which is described by many as a pro-shipper. The Hamburg Rules⁺⁺⁺ prescribe a 835 SDRs per package or a 2.5 SDRs per kilogram (whichever is higher) liability limits –this is the highest(the shipper will get) as compared to what is stipulated in the 1924 Hague Rules and its Visby amendment. The limits of liability under the Hague Rules and the Hague-Visby Rules are £ 100.00 and 666.67 SDRs per package, respectively.

The other points that need legislative attention include the issue of jurisdiction, choice of law, electronic bills of lading, and defining what delivery is for the purpose of liability. The international nature of maritime transaction led, in many jurisdictions, to the corresponding development of choice of law rules. Also, the legal effects of electronic bills of lading –which currently are being used by many shippinglines, should be prescribed. The determination of as to when the carrier is said to deliver and the liabilities for delay in delivery are other points the law should respond to.

This appreciation of the problems related to the current Ethiopian law on sea carriage is not complete. Some problems raised above are only meant to approve the need to update the Maritime Code in light of the dynamism that occurred in the business ever since the Code was enacted.

^{***} Accordingly, attempts were made to remedy the frustration over the rules. The Hague Rules were supplemented by the Visby amendment. Also, the United Nation sponsored a new convention, known as the Hamburg Rules. These newer international “standard” sea carriage laws took steps in modifying the extent of limitation (in favor of the cargo interests), the methods of determining the units/packages, and other problematic areas.

⁺⁺⁺ Cargo importing and exporting African landlocked countries including Botswana, Burkina Faso, Burundi, Lesotho, Malawi, Uganda and Zambia are members of the Hamburg Rules – United Nations Conventions on the Carriage of Goods by Sea, 1978. Though the Maritime Code bears some similarity with the Hague Rules of 1924, Ethiopia is not a party to any of the three prominent international conventions on sea carriage adopted to date.



4.3 THE ETHIOPIAN LAW ON MULTIMODAL TRANSPORT

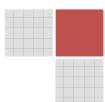
In this closing section of the chapter, the recently enacted Multimodal Transport of Goods Proclamation (Procl. No. 548/2007) is discussed. Laws on multimodal transport are needed because of the different developments in various unimodal modes of transport, particularly sea transport. As pointed out in the previous section, containerized shipment of goods has already undermined the traditional assumptions underlying principles of maritime law. It, for example, invited judicial entertainment of the question of whether containers are “packages” or “unit” for the purpose of limitation of carrier’s liability.

The comparative advantage of containers in the international trade of goods is understandable when seen in light of the possibilities for “door-to-door” service. In particular, consignees in landlocked states like Ethiopia benefit from the option to take delivery in places other than seaports. This commercial advantage of containerized shipment, however, suffers from the legal uncertainties shippers usually face. The basic aim of multimodal laws, both at national and universal level, is to clear the legal uncertainties so that the commercial expediency of multimodal transport facilitates international trade. Kurosh Nasseri takes us through the background to the 1980 UN Convention on International Multimodal Transport of Goods –which is the material source for many national laws including ours:

Nasseri K., The Multimodal Convention, 19 J.Mar.L & Com (1988), pp.231-234

The international transportation of cargo by various modes of transportation (air, ocean, rail, and road) is governed by national laws and international conventions designed to regulate unimodal transportation, i.e the carriage of goods by one particular mode of transportation. Within each mode, the international carriage of goods has been governed increasingly by international conventions. These conventions are aimed at facilitating international trade by increasing uniformity in international transportation law.

As a result, a unimodal international transportation regime has been created under which transportation on each mode is governed by a separate convention...Unimodal conventions are premised on the assumption that international carriage of goods occurs primarily on a single mode of transportation, while the use of other transportation modes for that carriage is incidental and therefore involves a different and separate legal



relationship. Thus, uniformity of law –but only within each transportation mode –was thought to suffice for the achievement of trade facilitation objectives.

In the 1950's, however, shippers began to use containers because of their economic and operational advantages. This development became known as the "container revolution". The container revolution triggered further technological innovations that greatly facilitated international carriage of goods...Most importantly, the container proved to be the means by which the same cargo can be transported on all modes during the same shipment, with minimal adaptation of carrier technology. Suddenly it became possible to transfer cargo –quickly, safely, and cheaply –from one mode of transportation to another, between air or ocean and overland portions of a door-to-door international shipment.

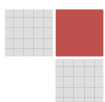
Unfortunately, the container revolution and the increase in door-to-door shipments created problems with respect to the uniformity of laws in international transportation. In particular, the fact that every portion of an intermodal route was traditionally governed by a different set of national laws and international conventions exposed intermodal shippers to substantial uncertainty with respect to the laws governing the carriage in general, and particularly with respect to limitation of liability...

The fate of an intermodal shipper often depends on the portion of the intermodal route on which the damage or loss occurred. Moreover, if the shipper or consignee cannot prove on what portion of the intermodal carriage the damage occurred, the cargo interests have to absorb the loss unless there is a contractual arrangement with the freight forwarder or the carrier covering such an event.

This element of uncertainty is a significant impediment to further growth in intermodal carriage and thus to further growth in trade. Specifically, the typical small business with export or import aspirations often is primarily interested in concluding a contract for door-to-door carriage...However, when the conclusion of a contract for international intermodal carriage is attempted, a small business often will be overwhelmed by the complexity of the necessary documents. Just as often, lawyers or additional insurance needed to resolve these complexities may cost enough to make the shipment uneconomical.

As a result, intermodal carriage under the unimodal transportation regime became complex and unpredictable, so that the need for an international legal regime for intermodal carriage was recognized. Various international bodies started to discuss such a legal regime for intermodal transportation in order to introduce some measure of

Maritime Law



uniformity and predictability into international intermodal transportation. The objective was to facilitate trade by removing [legal] impediments to the growth of intermodal transportation.

The backgrounds (discussed in the excerpts above) finally led to the adoption of the UN Multimodal Convention in 1980. How does this convention remedy the uncertainty? Once again, students are invited to go through K. Nasseri's general appraisal of the Convention's major achievement.

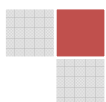
Nasseri K., *The Multimodal Convention*, 19 J.Mar.L & Com (1988), pp.236-237

The major achievement of the Multimodal Convention is that it divides intermodal carriage into two levels of legal relationships: one between the shipper and the multimodal transport operator (MTO), the other between the MTO and the underlying carrier. As a result, the unimodal liability regime remains unaffected, as it still governs the relationship between the MTO and the underlying carrier, while the relationship between the MTO and the shipper is significantly simplified and modernized.

Hence, the intermodal shipper deals only with the MTO, who remains liable for damage throughout the intermodal carriage, while the vagaries of intermodal carriage under the unimodal transportation regime are left to experts who are professionally engaged in intermodal transportation and therefore sufficiently familiar and able to cope with the mentioned problems of intermodal carriage under unimodal conventions.

Under the Multimodal Convention, intermodal carriage is governed by a single contract of carriage. This contract is between the MTO and the shipper; in case of loss or damage, the MTO is liable to the shipper. The MTO either may perform the various portions of the intermodal carriage itself or may subcontract with unimodal carrier for the various legs of the route. Most importantly, the MTO is liable to the shipper for loss or damage occurring any time between taking charge of the goods and delivery regardless of which mode of transportation is involved at the time of loss. Instead of having to go after the particular unimodal carrier involved under whichever statute or convention applies to that mode, under the Multimodal Convention the shipper merely needs to claim against the MTO. If any of the subcontracted unimodal carriers is responsible, the MTO (and not the shipper) may seek recovery under the pertinent unimodal conventions.

In addition to this simplification of intermodal transportation for all parties, and especially for the shipper, the Convention has the further advantage of being limited and specific in scope. Thus, the Convention applies only to international multimodal carriage



as defined, that is, only to “true” intermodal carriage under a single contract of carriage. For example, if one leg of the transportation is merely for purposes of pick-up and delivery of cargo to be transported under a unimodal contract of carriage, the Convention does not apply. Thus, the validity and applicability of all previous unimodal conventions and national laws is preserved under the Convention. Unimodal carriage continuous to be governed by existing laws and convention, while the Multimodal Convention governs only the relationship between the intermodal shipper and the MTO.

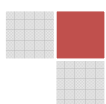
Unfortunately, this modern convention has not yet entered into force. As of 30 September 2007, it is only Burundi, Chile, Georgia, Lebanon, Liberia, Malawi, Mexico, Morocco, Rwanda, Senegal, and Zambia that ratified the Conventions. Though not party to the Convention, Ethiopia adopted it through legislative enactment.

The Importance of Multimodal Transport Legal Regime for Ethiopia

The importance of multimodal transport for landlocked developing countries like Ethiopia could be approached from the perspective of costs related to transit transport. The major transit transport system between Ethiopia and Djibouti is unimodal. This unimodal system suffers from different constraints that are common to transit trade existing between other landlocked states and their transit neighbours. Trade is hampered due to the adverse effects of unimodal transit transport system such as port congestion, long transit time for import cargoes, unavailability of empty containers for export shipment in due time.

Lengthy time in completing administrative procedures for border crossing have a significant negative impact on trade. A 2004 study by Nordås and Piermartini confirm this. Using the estimation of a gravity equation model augmented by a variable measuring the median number of days required for customs clearance, the researchers demonstrate how the increase in the number of days required for customs clearance from, for example, five to seven reduces trade by more than 40%. The study labels states as most efficient where customs clearance procedures only require one day. Interestingly, the study puts Ethiopia, where customs clearance procedures require an average of 30 days, the least efficient country.

Seen in light of the above stated facts, the importance of cost and time efficient mode of transport system for landlocked developing Ethiopia is understandable.



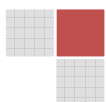
The government of Ethiopia has been working on the replacement of the unimodal transit transport system (between Djibouti and Ethiopia) with a multimodal one. Djibouti, who at first refused the introduction of a multimodal transit regime in fear of monopoly (over all the modes of transport involved) by such Ethiopian companies as the Ethiopian Shipping Lines (ESL), finally agreed with Ethiopia to implement through bill of lading arrangement along the corridor. Thus, it now seems the time has finally come for the Port of Djibouti to be used only as a gateway (not always as a point of destination) to Ethiopian transit cargoes.

Following the agreement with Djibouti, Ethiopia enacted a new law to regulate the relationship between participants in the multimodal transport system. The preamble of the Multimodal Transport of Goods Proclamation is expressive of the legislative recognition of the importance this particular mode of transport. The need to reduce cost related to transit transport of import/export goods, shore handling, storage, procedures in port and customs clearance and other related time consuming documentation processes is underscored in the preamble. Obviously, reducing such costs, in turn, benefits the country's international trade.

Major Aspect of the Law

The Multimodal Proclamation, whose contents are more or less taken from the 1980 UN Multimodal Convention, has six parts. In Part One, important terms are defined along with the scope of application of the proclamation. The legal aspect of multimodal transport document (combined transport bill of lading) is dealt under Part Two. Part Three is about the responsibility and liability of the multimodal transport operator (MTO). In the remaining parts, liability of the shipper, some procedural issues, and supplementary matters are treated.

The meaning of multimodal transport is provided under Art. 2(1). Accordingly, international multimodal transport is the carriage of goods by at least two different *modes of transport* [see Art. 2(14)] on the basis of a *multimodal transport contract* [see Art. 2(3)] from a place at which the goods are taken in charge by the *multimodal transport operator* [see Art. 2(2)] to a place designated for delivery. The operation of pick-up and delivery of goods carried out in the performance of a unimodal transport contract is excluded from the definition of multimodal

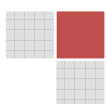


transport. Thus, a distinction is made between *through transport* and *multimodal transport*.

Though through bill of lading is much similar with the multimodal transport document (or combined transport bill of lading) in that they cover the carriage of goods in at least two modes of transport, it differs from the latter in that the separate stages and/or forms of carriage, including distinct stages of ocean carriage, generally are *intended to be undertaken by two or more successive carriers as primary carrier*. Unlike a through carrier, the issuer of a combined transport bill of lading generally accepts *primary responsibility as carrier for all stages and forms of carriage*. The claim of cargo owners is more secured in the case of a multimodal transport document. (Compare the provisions of Art. 204, Mar. Code with Art. 2 (2) cum. Art. 14 *et seq.*, the Multimodal Proclamation.).

The proclamation is very specific in scope. It applies only to international multimodal carriage under a single contract of carriage, i.e., multimodal transport contract as defined under Art. 2(3). When an international multimodal transport operator undertakes, against payment of freight, to perform a multimodal transport, the provisions of the proclamation apply mandatorily. As pointed out earlier, if one leg of the transportation is merely for purposes of pick-up and delivery of cargo to be transported under a unimodal contract of carriage, the proclamation does not apply. While the Multimodal Proclamation governs only the relationship between the intermodal shipper and the multimodal transport operator (MTO), existing unimodal carriage laws govern the relationship between the MTO and unimodal carriers acting on behalf of the MTO. Thus, the applicability of unimodal carriage laws (e.g. the Maritime Code) is preserved.

When the goods are *taken in charge* (handed over to and accepted for carriage by the MTO), the MTO must issue a *multimodal transport document* [a document evidencing (1) a multimodal transport contract, (2) the taking in charge of the goods by the MTO, and (3) undertaking by MTO to deliver the goods in accordance with the terms of the contract] to the consignor. The document may be in either a negotiable (Art. 6) or a non-negotiable form (Art. 5). The multimodal transport document fulfils in relation to the goods specified in it much the same functions as a bill of lading in a sea carriage. The document must include the information required under Art. 8 of the Proclamation. Interestingly, the Hamburg Rules –the latest universal convention on sea carriage– requires the



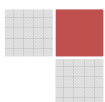
same contents for a bill of lading (Compare Art. 15, Hamburg Rules with Art. 8, the Proclamation/Art. 5, UN Multimodal Convention). One should also note that the issue of the multimodal transport document does not preclude the issue, if necessary, of other documents relating to transport or other services involved in the multimodal transport, in accordance with, for example, the Maritime Code (Art.13, Multimodal Proclamation).

The provisions of Art. 15, Multimodal Proclamation, make the MTO responsible for the goods “from the time he takes the goods in his charge to the time of their delivery”. The basis of the liability, as stated under Art.17, are loss of or damage to goods, as well as delay in delivery. The same article also states that the MTO may off set his liability if he can prove that “he, his servants or agents or any other person referred to in Art. 16 took all measures that could reasonably be required to avoid the occurrence and its consequences”.

The liability of the MTO for his servants, agents and other persons is given in Art.16. The MTO is liable for the acts and omissions of servants and agents who are acting within the scope of their employment and for those “of any other person of whose services he makes use for the performance of multimodal transport contract, when such a person is acting in the performance of the contract”. The provision clearly states that this is “as if such acts and omissions were his own”. (Contrast this with the provisions of Art. 197 (1) (a), Mar. Code)

The proclamation does not impose liability on the MTO for loss, damage or delay caused “by the wrongful act or neglect of the claimant, by the instructions of the claimant, by inherent vice of the goods through *force majeure*”(Art.18, Multimodal Proclamation). The shipper is liable for the loss resulting from inaccuracies in or inadequacies of the particulars relating to the general nature of the goods , their marks, number, weight and quantity and, if applicable, to the dangerous character of the goods, as furnished by him for insertion in the multimodal transport document (Art. 12 cum. Arts. 28-31, the Proclamation).

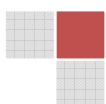
Unlike the Maritime Code, the Proclamation prescribes penalty for delay in delivery. Delivery is delayed when the goods have not been delivered within the time expressly agreed upon or, in the absence of the same, within the time which it would be reasonable to require of a diligent MTO, having regard to the circumstances of the case. Furthermore, if the goods have not been delivered



within 90 consecutive days following the date of delivery, the claimant may treat the goods as lost.

The limitation of liability regime of the Proclamation is set out in Arts. 20 *et. seq.* Following the 1980 UN Multimodal Convention, the proclamation provides two different rules for “localized” and “concealed” damage. If a claim can be localized in any unimodal portion of the carriage to which a mandatory national law or international convention is applicable, and if the applicable law *provides a higher limit* of liability than the limit stipulated under Art. 20 (1), then the limit of the MTO’s liability for such loss or damage is determined in accordance with the provisions of the relevant unimodal laws. This ensures that the MTO will not be exposed to the risk of incurring a greater liability than that can be recovered under the laws governing the unimodal carriage involved. Take, for instance, our Maritime Code that provides a 500.00 birr per package limitation of liability. An MTO, after satisfying a claimant as per the Multimodal Proclamation, will resort to a unimodal carrier who is responsible for loss or damage. If he, for example, proves the sea carrier involved is ultimately liable for lost or damaged goods, he might have recovered only 500.00 Eth. Birr per package had it not been for the provisions of Art.20(3). In the absence of the provisions of Art.20(3), the MTO only recovers a 500.00 birr per package as opposed to SDR 835 per package.

If a claim cannot be traced to a particular leg of the multimodal transport under a unimodal contract of carriage, the Proclamation’s limits apply. As per Art.20(1) of the Multimodal Proclamation, the liability of the MTO to pay compensation shall not exceed special drawing rights (SDR) 835 per package or other shipping unit, or SDR 2.5 per kilogram of gross weight of the goods lost or damaged, whichever is *higher*. In contrast, the liability of the MTO for loss resulting from delay in delivery is limited to an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the multimodal transport contract (Art.21, the Proclamation). The aggregate liability of the MTO may, however, be extended and fixed in the multimodal transport document by agreement between the MTO and the consignor (Art. 23 cum. Art. 43). Nonetheless, any stipulation [in the multimodal transport contract or document] that derogates, directly or indirectly, from the provisions of the Multimodal Transport Proclamation is null and void (Art. 42). For instance, any stipulation that set down a lower than SDR 835 limitation figure.

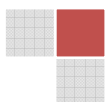


Figures of the limitation are expressed in terms of Special Drawing Rights (SDR). An SDR is a unit of account defined by the International Monetary Fund (IMF) which is converted into the appropriate national currency according to the rules of IMF and not by what the state determines. The 835 SDR limit, as provided under Art.20, is the same as the limits provided in the UN Convention for Carriage of Goods by Sea (Hamburg Rules of 1978). The UN Multimodal Convention provides a higher limit –a 920 SDR per package or unit.

Containers, along with pallets or similar article of transport used to consolidate goods, are deemed packages or shipping units –that are employed in determining the actual limited liability in terms of the SDR.

The defenses and the privilege to limit liability are extended to servants and agents if they prove that they acted within the scope of their employment. In addition, any person other than employees and agents of the MTO can avail themselves of the defenses and the limits of liability which the MTO is entitled to invoke, *if* they prove they acted within the performance of the contract (Art. 25, the Multimodal Procl.) However, one should note that both the MTO and these persons enjoying the same entitlements as the MTO may lose the right to limit their liability if it is proved that the loss, damage or delay in delivery resulted from an act or omission done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result (Art.27)

As pointed out earlier, the MTO is liable to the shipper whenever loss or damage to the goods occurs while the goods were in his charge unless the MTO or his employees/agents took all measures that could reasonably be required to avoid the occurrence and its consequences. The occurrence of loss or damage must be notified by the shipper/consignee to the MTO within one working day if the loss or damage is *apparent* (Art.32). Non-apparent loss or damage must be notified within six days. Failure to notify the MTO within these time limits imply the handing over by the MTO of the goods as described in the multimodal transport document. In other words, it is *prima facie* evidence of delivery of the goods as described in the multimodal transport document. This shifts the burden of persuasion from the MTO to the consignee. Meanwhile, failure to notify claim within six months will result in loss of right to sue (Art. 40 (2)) regardless of the *prima facie* rule under Art.32. Notice is not required where the state of the goods



has been determined by joint survey or inspection. Lastly, the limitation of period for actions against the MTO is two years.

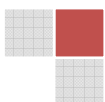
The legal effects of failure to notify, in due time, loss resulting from delay in delivery is different from the legal effects of failure to notify loss or damage to cargos. Unless a written notice is given to the MTO within 60 consecutive days after the goods were delivered, no payment is made for loss resulting from delay in delivery (Art. 34, the Procl.).

Notice is also required of an MTO who sustained loss or damage due to the fault or neglect of the consignor, his servants or agents. Unless a written notice of loss or damage is given to the consignor not later than 90 consecutive days after the occurrence of the loss/damage or after the delivery of the goods, whichever is later, it is deemed that the MTO has sustained no loss or damage (Art.35, Multimodal Transport Procl.).

An MTO has a comparable lien right as a shipowner has in contract of affreightment (Art. 39, Multimodal Transport Procl., comp. Art. 155, Mar. Code).

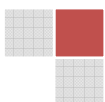
List of places where judicial proceedings relating to multimodal transport may be instituted is provided under Art.41. Accordingly, the plaintiff, at his option, may institute an action in a court located in (a) the principal place of business/ the habitual residence of the defendant, (b) place where the multimodal contract was made, (c) place of delivery or place of taking the goods in charge, (d) any other place designated for this purpose in the multimodal transport contract.

Dear students, we know come to the end of the chapter in which you have studied the different aspects of the law of sea carriage. In the next chapter – which is the final one –you will be studying the law of marine insurance along with that of salvage, collision, and general average. As usual, never carry on without working on the next review questions.



Review Questions 4

1. What are the historical occurrences that led to legislations governing multimodal transport regime?
2. What particular importances does multimodal transport have for Ethiopia?
3. What would be the fate of live animals carried under a multimodal transport contract? [Hint: Art.2 (7), Multimodal Transport Procl.]
4. Do we need witnesses to attest a multimodal transport contract/document? [Hint: Art. 4(4), Multimodal Transport Procl.]
5. Would the MTO be liable in cases where causes other than his fault resulted in loss or damage to goods? [Hint: Art.19, Multimodal Transport Procl.]
6. Will an action in tort, against the MTO, obviate the defenses and limits of liability available for the MTO under the Multimodal Transport Proclamation? [Hint: Art.24, Multimodal Transport Procl.]
7. Compare/contrast the relative strength of the protection given to carriers/shippers in (a) multimodal transport and (b) sea carriage.
8. There is an arguement that the UN Multimodal Convention is a pro-developing country treaty. How do you see it?



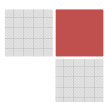
SUMMARY

Transportation of goods and passengers by water is one of the most ancient channels of commerce on record. This mode of transportation is still indispensable for international trade since it is the cheapest of all means of transport and since ships are capable of carrying bulky goods which otherwise would not be carried.

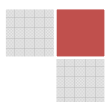
Rules governing relationships among participants of sea-transport have also been known since the Rhodian civilization (c.1st millennium BC). And now, rules relating to charterparties and contracts of carriage supported by bill of lading are universal among maritime nations.

Charter parties are used when the whole vessel with or without its crew is engaged for a voyage or on a time basis. Charterparties fall broadly into two groups, (1) those under which the owner parts with control of the vessel for the period of the charter (charters by demise), and thus has no responsibility for the carriage of goods on the vessel, and (2) those under which the vessel remains in the control of the owner and the charterer merely has the right to direct for what period of time or what voyages the vessel is to be used and what cargo is to be carried(charter without demise). The latter divide further into time charters, where the ship is chartered for a specified period of time, and voyage charters, where it is chartered for a designated voyage.

A bill of lading is a contract in relation to the goods – and not the ship as such. In contract of carriage under bills of lading, we do have three concerned parties – the shipper (consignor), the carrier and the consignee. The first two are parties to the contract of carriage. And, the consignee is the one to whom the goods are shipped. Bills of lading are not themselves contract of carriage; they are rather supporting documents issued afterward to help the consignee conveniently receive delivery from the carrier. The Maritime Code prescribes different legal regimes for contract of charterparties and contract of sea carriage under bill of lading. While freedom of contract is given priority in the laws of charterparties, protecting carriers from incapacitating liability and consignees from uncertainty is at the centre of the laws of sea carriage.



Finally, since very recently, there has been advocacy for a legal regime governing aspects of combined transport services rendered by some carriers. The new Ethiopian law on multimodal transport is an attempt to bring legal certainty for relationships among participants of this new but efficient mode of transport.



CHAPTER FIVE

MARINE INSURANCE & OTHER MARITIME MATTERS

Sea transport involves risk –including perils that might not be encountered in any other modes of transport. Attempts to ease the burden of loss as a result of marine accidents were observed as far far back as the Middle Ages. Such attempts do not only relate to marine insurance, which is the “oldest version of insurance”. Directly or indirectly, the rules on collision, general average, and salvage are developed to ease the otherwise devastating effects of marine accidents on shipping industry. This particular chapter deals with aspects of the maritime law relating to insurance, general average, salvage, and collision. Students, after studying this chapter, are expected to understand/develop:

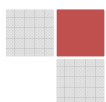
- principles of marine insurance;
- the duties and rights of assured and underwriters in contract of marine insurance;
- the rules governing collision and salvage;
- and, also principles of law relating to general average;
- the skill to apply the principles to practical situations.

5.1 MARINE INSURANCE

A mention has already been made as to the comprehensiveness of maritime law. Some say maritime law is a “legal system” of its own. This may, in part, be explained in terms of the fact that maritime law has its own rules on, for example, contract, employment, and *insurance*. Marine insurance principles are predecessors to the general insurance law. Though lessons on the general insurance law are by and large relevant in marine context as well, marine insurance deserves separate treatment for it still keeps some peculiarities.

Historically, European merchants of the Middle Ages take the praise for first considering the importance of covering their risks when selling goods and shipping them by sea. The then informally arranged marine insurance was gradually formalized and subsequently led to the development of laws governing the same. Today, all countries of the world have some form of marine insurance regulations. However, the bulk of modern marine insurance, according

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to some scholars, is the English Marine Insurance Act 1906 – drafted by Sir Mackenzie Chalmers.

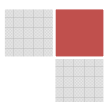
Why is marine insurance needed? Agreeable reasons, from the perspective of traders, are enumerated by Judith Evans:

J. Evans (ed.), Law of International Trade, 3rd ed. (London: Old Bailey Press, 2001), pp.269

One of the most important reasons is simply that a trader could not afford to bear frequent losses of his good. Whether he is a rich man or not, a trader necessarily has to deal in goods that are worth far more than he is. This is usually done by borrowing money, arranging finance with other participants, or generally extending his credit to cover the deal in question. If a deal went wrong, so that goods were lost, a merchant would then have to pay his bills without the prospect of selling goods to recover his outlay and make a profit. Most merchants would be unable to survive such a loss, and would, therefore, go out of business. The fact that they had gone out of business would lead to consequent difficulties for all the people to whom they owed money, and everybody in the mercantile community would be adversely affected. Of course, nobody is going to take on the risks of merchants willingly and gratuitously, therefore, merchants developed a system whereby they would pay to somebody prepared to underwrite the risk a small premium in relation to the value of the goods. The person taking on the risk would amass all those premiums and put them in a fund so that he could use the money from that fund to pay any losses...Consequently, marine insurance passes the risk of loss from the owner of the goods to a professional risk underwriter.

This was how marine insurance first developed. Now, marine insurance does not only relate to cargos but also covers ships, collisions and liabilities for third parties.

Marine insurance, though legally undefined, could generally be understood as insurance aiming to guarantee a maritime risk. Depending on the types of coverage or the subject matter insured, marine insurance can be categorized into hull insurance, cargo insurance, freight insurance, and liability insurance. It should also be noted that there are numerous special coverages, such as pollution insurance and protection and indemnity (P&I) coverage.



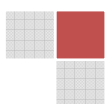
The purpose of a *hull policy* is to cover damage to or loss of a vessel sustained by shipowners. *Cargo insurance* policies often cover, for the shipper/consignee, the goods from maritime risks. *Freight insurance* comforts the loss of freight by shipowners or any other managers. *Liability insurance*, on the other hand, indemnifies a vessel owner for liabilities incurred to third persons – these liabilities include personal injury and death, property damage and damage to cargo.

According to Art.288, Mar. Code, any insurance policy guaranteeing a maritime risk, including collateral risks, are subject to the provisions of Title VII (Arts. 288-356) of the Code. The application of the general insurance law (Title III, Book III, Commercial Code) is expressly excluded. In stating the scope of application of the general insurance law, Art. 655(2) of the Com. Code states: “[the provisions of Art 654 *et. seq*] shall *not* apply to marine insurance which are subject to the relevant provisions of the Maritime Code”. Hence, it seems the Maritime Code is the only authoritative legislation in marine insurance cases.

Cover Notes and Policies

The marine insurance business functions as follows. The main features of the marine adventure for which the proposer seeks insurance are noted in a document what is usually known as *the slip* – a memorandum of the cover requested. If an underwriter agrees to accept the risk, a cover is normally sent to the assured. The *cover note* is a memorandum to the effect that insurance has been arranged. The cover note is binding between the parties (Art.290). Our Mar. Code is, however, silent about the legal status of the slip. Under English law, the slip [the contract of marine insurance] is admissible in evidence once embodied in a marine policy.

Brokers who usually work as intermediary between the underwriter and the insured prepare the policy from the details on the slip completed by the underwriter. The policy, according to Art.289 cum. Art.291 of the Mar. Code, needs to be (1) written and (2) specify such particulars as the place, date, and time of the conclusion of the policy; the subject matter insured and the maritime risks insured against; the names and addresses of the parties; the voyage or period of time or both, as the case may be, covered by the insurance; the sum(s) insured; the amount of premium; and the clause to order or to bearer, where



agreed upon. Besides, the policy must be *signed* by the underwriter (Art.292 (2)). Then, a true copy of the policy must be issued to the assured.

Voyage Policies, Time Policies, and Mixed Policies

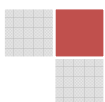
Insurance policies may be classified into voyage, time, and mixed policies depending on the time during which the maritime risks are covered. In a voyage policy, the subject matter of the insurance is covered during a voyage (voyages) from a designated place to another. Insurance obtained to cover risks from one date to another is called a time policy. Under a mixed policy, the insurance is taken out for certain period of time during a particular journey.

The commencement of risk varies with the type of policies issued. In case of time policies, we need not worry about as to when risk starts running and comes to an end. Consequently, the law does not prescribe any rule relating to the beginning of risk for time policies. The dates set in the policy are more than enough in telling the time when risk starts running and comes to an end.

Rules relating to the commencement of risk for voyage and mixed policies are, however, provided in the Maritime Code. If hull insurance is taken out for a voyage, the risk runs from the time when *the shipment of cargo* commences and ends at *the termination of unloading* provided that the duration of risk may not exceed a period of 15 days after arrival at the destination, nor go beyond the time when goods are shipped at the destination for further voyage (Art. 295 (1)). Accordingly, risks occurring 15 days after the arrival of the ship at the port of destination may not be covered notwithstanding the prolongation of unloading. Also, the assured may not cry for indemnity for risks occurring well before the 15 days after arrival at the port of destination, but after the commencement of shipment for another voyage –which has to have its own policy.

When the hull insurance is for a ship in ballast, the risks of the voyage runs from the time the vessel is shipped anchor until she is again tied up at the place of destination (Art. 295(2)).

In case of cargo insurance taken out for a particular voyage, the risk runs from the date when the goods are *delivered to the carrier* until the time when the goods are *delivered to the consignee* at the last place of arrival. (Art.298). For the purpose of coverage of risks, delivery must be effected within 30 days of unloading. Put



in other words, maritime or collateral risks occurring 30 days after unloading are not covered.

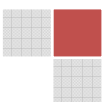
In case of hull insurance taken out for a limited period of time where the ship is under voyage at the date fixed for the beginning or termination of the risks (*a mixed policy*), the risks run as from (1) the end of the voyage or (2) extends until the end of the voyage. In the first case, the premium shall be refunded in proportion to the period not having run (e.g. take instances where the policy is taken out for 15 days while the actual voyage takes only 10 days). Whereas, in the second case, the premium is collected in proportion to the additional duration of the risk. (See generally Art.296, Mar. Code).

Valued Policies vs. Unvalued Policies

Marine insurance policies may be issued valued or unvalued. The amount an insured recovers from the underwriter in a particular situation depends, in part, on whether the policy is valued or unvalued. The following excerpts elaborates on the jurisprudence related to valued and unvalued policies as established in England –who is famous for its marine insurance business, and in return for regulations relating to the same:

J. Evans (ed.), Law of International Trade, 3rd ed. (London: Old Bailey Press, 2001), pp.302-3

A valued policy is one which specifies the agreed value of the subject matter insured ...This does not mean that the assured will always recover the value stated in the policy whether the loss be total or partial. It simply means that in the event of loss, it is not open to the insurer to contend that the goods were not worth the value stated in the policy save where there has been fraud...A valued policy will usually express the subject matter as being 'valued at', whereas unvalued policy will more commonly talk of the 'sum insured'. The different expressions are taken as being indicative of the parties' intentions. If the precise words 'valued at' are not employed, the intention of the parties must be clear that there is a specified agreed value, proposed by the assured and accepted by the underwriter...The advantage of having a valued policy, as opposed to an unvalued policy, is that it is permissible to include as part of the declared value of the goods a percentage mark-up for the expected profits from the adventure. This may explain why unvalued policies are rarely used.



An unvalued policy does not specify the value of the goods insured but, subject to the limit of the sum insured, leaves the value to be determined in accordance with [the law]. An unvalued policy merely states the maximum amount which the assured would be able to recover but, subject to that limit, what he actually recovers is determined later.

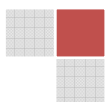
In case of an unvalued policy, the insurable value of the goods is the prime cost of the goods, plus expenses ... incidental to shipping and the charges of insurance upon the whole... This insurable value, as with the value declared in a valued policy, is the starting point in calculating the indemnity due to assured under the policy. In calculating the insurable interest... the invoice value of the goods is prima facie the 'prime cost' of the goods. By the time the goods have been shipped their value may, however, have changed as the market for those goods may have moved. Thus evidence is admissible as to the value of the goods at the time of shipment so that their 'prime cost' may be ascertained.

Art.297 of the Maritime Code provides certain rules on the determination of the value of the goods insured in cases of *unvalued*, and perhaps valued, policies. Accordingly, where the value of the goods is not fixed in the marine insurance contract or policy, it is determined on (1) the basis of the purchase price or (2) on the basis of the price current at the date and place of loading and on the basis of the charges paid and costs incurred up to the time of loading, freight pro rata, the cost of insurance and, where appropriate, the anticipated profits. As is the case under English law, the prime cost of the goods is not the sole basis for determining the insurable value in cases of unvalued policies. The possibility that the price of the goods insured differs, on the event of shipment, from the initial purchase price is taken into account.

Lost or Not Lost Policies

Sometimes marine insurance is taken out irrespective of the fact whether the insured things are lost or not lost. This is what usually known as "lost or not lost" policy. In principle, contract of marine insurance concluded after the loss of the goods insured is *known* is of no effect. Exceptionally, however, such contracts may not be cancelled where a *lost or not lost* policy is issued, unless it is proved the assured was personally aware of the loss (Art.317 (2), Mar. Code).

The Maritime Code's rule on insurance contract concluded after the loss of the thing insured (under Art.317) is in accordance with the most widely known insurance law principle *uberrimae fidei* (utmost good faith) and is an exception to



the principle of *insurable interest at the time of loss* (see below). An insured who have acted in bad faith pays to the underwriter twice the amount of the agreed premium as compensation (Art. 317 (3)).

Floating Policies

Floating policy is a policy that only mentions the amount for which the insurance is taken out, and leaves the name of the ship/cargo to be identified by subsequent declaration by the assured when the risk is actually run. It is a common form of insurance policy used in the export trade. Here is how floating policies work:

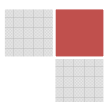
J. Evans (ed.), Law of International Trade, 3rd ed. (London: Old Bailey Press, 2001), pp.285

[A floating] policy sets out the general conditions of the insurance but not the particulars of the individual consignments to be covered. These particulars are provided by the assured by way of a 'declaration' to the insurer...These declarations may be made by endorsement on the policy or in some other customary manner.

The floating policy will cover consignments up to a certain aggregate value. As each consignment is declared, the balance of the available cover under the...policy is reduced by the value of consignment. Consignments are declared until there is no more available cover under the policy at which point it is written off.

All consignments within the terms of the policy must be declared and the value of the goods must be honestly stated...Declarations should be made at the time of the dispatch or shipment for, unless the policy otherwise provides. Where a declaration is not made until after notice of loss or arrival, the policy must be treated as an unvalued policy as regards those goods...This may have the effect of the reducing the amount recoverable by the assured under the policy and is intended to encourage prompt declarations.

Rules relating to floating policies are prescribed under Arts.324 - 325, Mar. Code. The primary rule is that the assured shall declare in interest [or the commencement of risk]. Upon such declaration, the risk insured begins to run, even in respect to causalities of which the assured is aware of before the declaration of the interest/risk, provided that declaration was made within eight days from receipt by the assured of the notices concerning the consignment. The insurance takes effect *only* from the date of the declaration where the declaration



is made after the end of the eight-day period. If the declaration is deliberately kept back, the provisions of Art.317 and Art.318 apply. (See generally Art.324, Mar. Code). Furthermore, failure to make declaration of consignments within the eight-day period entitles the underwriter to the premium and compensation equivalent thereto for the consignment not declared. The underwriter may also request cancellation together with additional compensation if failure was *intentional* (Art.325).

Insurable Interest in Marine Insurance

One of the cardinal principles of insurance law is *insurable interest*. As insurance is a contract of indemnity, it is always undertaken on the assumption that the assured has some interest to lose on the event of loss or damage to things insured. Insurance legislations, including marine insurance ones, require an insurable interest for a valid contract of insurance.

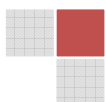
Though one cannot find an express Maritime Code provision requiring insurable interest, the reading of some provisions imply the recognition of insurable interest as a basis for the contract of marine insurance. In this respect, Art.292 and Art.324 are worth noting.

In spelling out subject matters which may be insured, Art. 292 stipulates: "[a]nything which can be valued in money's worth and which is exposed to maritime risk *for lawful purpose may be insured*". A legal prohibition against contracts of insurance in general by way of gambling and wagering (e.g. Art.713, Com. Code) is common. Taking out insurance by way of gambling and wagering is not *lawful* as there is no legally recognized insurable interest. Hence, it may be argued that the principle of insurable interest is spelt out in Art.292 when it states "anything...exposed to maritime risk *for lawful purpose may be insured*".

Another indicative provision is found in Art.324 of the Mar. Code. The rules on floating policies, under Art.324, are not needed unless it is primarily assumed *interest* (which is insurable) is mandatory for a valid contract of marine insurance. A further pinpointing stipulation is found in Art. 324 (1):

In case of insurance upon goods subscribed by "floating" policies or "as interest may arise," the assured shall declare in interest, and the underwriter shall, accept...all goods consigned on behalf of the assured or on behalf of third parties who have required the insurance of the

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goods, provided that such parties have an interest in the consignment.
[Emphasis added].

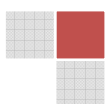
What is then this “insurable interest” thing in insurance contract? There is no legal definition of insurable interest under Ethiopian law that shapes our conception of the term. Hence, conventional understanding of the term may be looked from foreign jurisprudence. The Anglo-American jurisprudence recognizes a person as having an insurable interest “where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss or by any damage thereto, or by detention thereof, or may incur liability in respect thereof.” The excerpts from J. Bockrath’s article help students identify potential parties having insurable interest in various marine insurance contracts.

Bockrath J., Insurable Interest in Maritime Law, 8 J. Mar. L. & Com. (1976-77), pp.247 et. seq.

The truth of the statement that, “[i]n the law of marine insurance, insurable interests are multiform and very numerous,” cannot be doubted. The very nature and complexity of the maritime industry and the wide array of persons who have some contact with a given maritime enterprise mandates the conclusion. Not only a quantified property interest in the thing insured is adequate, but also any “reasonable expectation of legitimate profit or advantage to spring therefrom.”...No citation of authority is required for the proposition that a shipowner has an insurable interest in his vessel... [A] lienholder on cargo has an insurable interest in that cargo, as does an assignee for the benefit of creditors.

Maritime liens against a vessel are created in favor of a wide variety of persons who render the ship service. The interests thus acquired are generally insurable...There can be little doubt that a carrier may insure cargo in order to protect himself against possible liability in case of loss. Although the rationale may depend much on convenience of commercial practice, or as one court phrased it, “to avoid chaos,” the carrier has an insurable interest in the cargo in his charge even if the cargo owner had previously insured the cargo...The insurable interest of maritime carriers may be limited to some degree by protections and exemptions granted to them by [law]... [T]he carrier also has an insurable interest where the bill of lading has waived the [law’s] protections...The relationship of a consignee of goods shipped by sea to the goods may vary with the terms of the bill of lading but in the ordinary case the relationship would seem to be one of expectation based upon a contract right. Thus, if an insured has a contract under which

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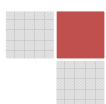
the title to a cargo would accrue to him upon delivery and he would suffer from loss of the goods prior to delivery, an insurable interest exists...F.O.B. purchases clearly have an insurable interest after delivery f.o.b. has been completed because they have title and not merely risk of loss even in a situation where the bill of lading was drawn to the seller's order and a firm price was not fixed... One who charters a vessel may find himself with liability exposure to each of the other principals in a maritime enterprise...Even though the charter was not a demise and no property interest in the ship was created, [a] court noted the existence of a right in the return voyage, and that such right was dependent on the continued existence of the ship which was at risk with her hull...A charterer may also have a insurable interest in the cargo he carries...The same [is true] in the case of freight.

Trustees...were [also] included in the expansive list of holders of insurable interests in maritime law.

Causation in Marine Insurance

The doctrine of *causa proxima* is another important principle common to all branches of the law of insurance. Under Art.292 (2) of the Maritime Code, it is stated: [n]o person may claim under the policy unless he has suffered damage as a result of *casualty*. The causality must occur during the time where the insurance policy is in force. The underwriter is not liable for casualties occurring before the signature of the contract unless the assured did not have presumptive or material knowledge of thereof (Art.318).

The level of casualty required, in many jurisdictions, is a proximate one; hence the doctrine of *causa proxima*. It is generally presumed that the intention of the parties entering insurance contract is to cover any loss that can reasonably be attributed to the operation of a covered peril. How should then one test the reasonableness of a particular causation? Once again, a look into established overseas jurisprudence is of help in examining whether a particular loss was caused by a maritime peril insured against.



Wan Talaat W., Causa Proxima Non Remota Spectatur: The Doctrine of Causation in the Law of Marine Insurance, 34 J.Mar.L & Com. (2003), pp.495-96

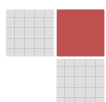
*[T]he courts have attempted, on countless occasions, to fix the most acceptable meaning of [proximate cause]. Starting with "immediate," various alternatives have been used to imply the proximity of a cause. Eventually, it was settled that a proximate cause must also be both **dominant** and **efficient**. This is so without regard to whether a cause in question is the last cause in time or whether other causes compete or intervene. The contemporary interpretation does not disqualify a cause that is immediate; an immediate cause may be proximate, so long as it is also dominant and efficient.*

J. Evans (ed.), Law of International Trade, 3rd ed. (London: Old Bailey Press, 2001), pp.291-92

The question of causation is particularly important and the assured...must prove that the loss was proximately caused by a peril insured against...The test of proximity was discussed in Canada Rice Mills v Union Marine[1941]...A cargo of rice was being shipped from one port to another. During the course of its transit there was extremely bad weather and so the hatches to the hold were closed. The cargo was then damaged by heat due to lack of ventilation following the closing of the hatches. The Privy Council held that the proximate cause of the loss was not the closing of the hatches but the perils of the sea and that the assured could recover on the policy...The proximate cause would, therefore, appear to be no more than the real or effective or dominant cause...It is, however, not always easy to apply the test of proximity, especially in circumstances where it appears that several causes have co-operated to produce the loss or damage in question. Where the loss or damage is the result of two or more equally effective dominant causes it should be enough that the loss be partly caused by a risk insured against. On the other hand, if the other dominant cause is not merely a risk which is not insured against but a risk which is excluded it is thought that the insured will not be able to recover.

The Relationship between the Assured and the Underwriter

The relationship between the insured and the underwriter is based on utmost good faith. This is why insurance contract in general, marine insurance in particular, is said to be a contract *uberrima fidei*. According to the doctrine of utmost good faith, an underwriter is presumed to act on the belief that the party who has applied for insurance has disclosed all facts material to the risk.



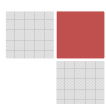
Under Art.300, the policy is cancelled, even in the absence of fraud, due to concealment or misrepresentation by the assured as a result of which the risk insured has been underestimated. The policy is cancelled irrespective of the fact that the concealment or misrepresentation does not relate to the damage or loss of the thing insured. Moreover, the insurer is entitled to the whole of the premium in the event of fraud and to half of the same in the absence of fraud.

The obligation of good faith does not only exist before the conclusion of the contract. It continues to exist even after the conclusion of the contract. Apart from the implied warranty against non-disclosure and misrepresentation (under Art.300), there is a duty on the part of the assured to notify *increase of risk* in the course of insurance to the underwriter at the time the former becomes aware of the increase of risk. As is the case with concealment or misrepresentation, failure to notify increase of risk results in the cancellation of the policy (Art. 301).

Aspect of the relationship between the insured and the underwriter could be approached in terms of the liability of the latter to damage and loss as a result of the maritime risks insured. Damage to and loss of things insured arising in general out of all perils of the sea (including the loss of the thing in general average contribution) and force majeure are, according to the provision of Art.303 *cum*. Art.304, at the risk of the underwriter unless the risks are expressly excluded from insurance. The underwriter cannot invoke deviation [which is obligatory] to avoid payment of indemnity to the insured. He is also liable in respect of casualties proved to have occurred in the course of the agreed route where the voyage is shortened voluntarily. In all other cases of deviations, the insurer is not liable (Arts.305-308).

The underwriter is not liable for the acts or faults of the assured, or of the servants and agents of, or persons claiming through the assured (Art.309) except within the context of obligatory deviation, wherein the underwriter is liable for the fault of the master and the crew. Otherwise stipulations are, however, possible. But such stipulations do not imply protection for loss or damage as a result of fraud and willful misrepresentation.

Patent inherent vices of the goods insured do not make the underwriter liable (Art.310). Also, the underwriter is not liable for loss or damage caused by (1) war and (2) by the very property insured unless otherwise agreed (Arts.311-312).



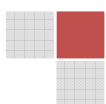
It has already been pointed out that insurance is a contract of indemnity as per which the assured is compensated to the extent of the loss or damage suffered. The assured is not compensated for more than what he actually suffered. The provisions of Arts.313-316, Mar. Code, insist on this theory. Where insurance policy is taken out for an amount exceeding the value of the things insured, the contract remains valid [save in cases of fraud and wilful misrepresentation] upto the amount of the value of the things insured and the insurer is entitled to half the premium for the amount of the excess valuation (See Art.313). In contrast, the assured remains his own insurer in respect of the difference where policy is taken out for an amount below the full value of the goods (Art.314). If a single risk is insured by several underwriters, each will be liable in proportion to the amount for which they have given cover. But such underwriters are not jointly and severally liable. (Art.315). One who satisfies the claim in full may exercise his rights against the several underwriters in proportion to the capital value insured by each and within the limits of the damage incurred(Art.315) unless willful misrepresentation is involved in which case each contract may be canceled at the demand of the underwriter(s).

Upon occurrences likely to give rise to insurance claims, the assured has to give notice to the underwriter within three working days of his becoming aware of the occurrence (Art.320). Apart from the assured's duty to give notice, the law requires the assured to take conservatory measures (Art.321). Though the extent of liabilities is not prescribed, the law makes the assured liable for failure to fulfil these obligations (Art.322).

Settlement of Damage

Insurance compensation is due 30 days after the production to the underwriter of the claim together with documentary evidence or 30 days after the act of abandonment (Art.329) –where abandonment is appropriate. Court proceedings may be instituted only after the expiry of the 30-days period.

Even when proceeding is instituted, the insured has the burden of proving that a covered peril was the proximate cause of its loss or damage. The insurer has, on the other hand, the burden of showing the loss or damage was excluded from coverage (See generally Art.328).

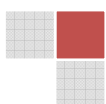


If the insured is adjudged responsible, the extent of liability in no case exceeds the amount insured (Art.327) or the amount of damage proved by the assured to be sustained. Apart from settlement in average (Arts.330 ff.), damages may be settled through abandonment (Arts.336 ff.) depending on the type of loss the assured suffers.

Literatures distinguish three types of loss which the assured may suffer –actual total loss, a constructive total loss or a partial loss. Actual loss is a total loss in *law* as well as in *fact* as in case where, for instance, a vessel sinks in very deep waters and is not recoverable. While, constructive loss is “something of legal fiction”. Put in other words, constructive loss is a “total loss in law but not necessarily in fact”. A further dissimilarity between an actual total loss and a constructive total loss is given by J. Evans. Accordingly, the essential distinction between an actual total loss and a constructive total loss is that in the former case the goods have been *irretrievably* lost while in the later case they are merely a ‘commercial write-off’. Any loss short of total loss (actual or constructive) is partial.

Marine insurance laws require notice of abandonment (by the assured) in cases of constructive loss. Abandonment of the actually or constructively lost things is a way –unique to maritime law – of settling insurance damages. Abandonment could be understood as the voluntary cession by the assured to the insurer of the remains of the goods insured, together with all the residual rights and remedies attached thereto. It should, however, be noted that abandonment can also take place by operation of the law independent of a voluntary cession. Hence, conceiving abandonment as “voluntary giving up” of the thing insured and the rights attached thereto concerns constructive total loss.

Cases where abandonment is allowed and prohibited are set forth in Arts.337-347. *Inter alia*, total loss of a vessel insured, total loss of the goods insured and freight due give rise to abandonment. Abandonment may not be partial or conditional (Art.345). The law requires *notice of abandonment* in some cases (e.g. see Art.339). The legal effects of abandonment are provided under Art.345. Accordingly, abandonment (provided it is adjudged proper or accepted) results in, (1) the transfer to the underwriter of the property in the things insured and (2) the payment by the underwriter of the amount insured. In all other cases where abandonment is not adjudged proper or accepted, damage is settled in average (በደረሱ ጉዳዮች መጠን).



Students may ask why abandonment is important if it is still possible for insurance claims to be settled in average. The question is appropriate as the answer is practical one. Suppose, a ship has collided with an iceberg. Though it is possible to repair the ship, the costs of repair are so high that it exceeds the insured value. Hence, it would be easier for the insured to simply claim the insured amount instead of investing on the repair of a *constructively* lost ship. But, this would be possible only if we, at least in such cases, set aside the principle of *settlement in average* –the stubborn principle of insurance settlement. This is what the rules of abandonment do in marine insurance. After a careful enumeration of the situations under which abandonment is possible, marine insurance laws almost everywhere tolerate departure from the principle of settlement in average. In return for his payment to the insured the amount insured, the underwriter gets the rights over the remains of the property insured.

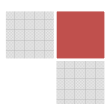
General average loss (see the discussions in the section below for details) is indemnified according to the provisions of Art.335. Where the assured has suffered a general average loss, he is entitled for a sum in proportion to the value insured minus the particular average that might have been borne. In any case, the total amount recoverable in a general average case does not exceed the contributions made by the assured.

To prevent the assured from “making a windfall profit out of his loss”, an underwriter who has indemnified the insured’s loss or damage is entitled for subrogation in the rights and actions of the later against third parties (Art.323).

Actions arising out of an insurance policy are generally barred after two years (Art. 348). The dates starting from which the the period of limitation runs vary with the specific types of actions involved (see generally Arts. 349-354).

Review Question 1

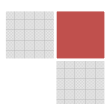
1. Define marine insurance.
2. What distinguishes marine insurance from the general insurance law?
3. Is it possible for parties to issue a marine insurance policy for the benefit of third party?
4. Who has insurable interest on a vessel? Can anyone other than the vessel owner have insurable interest on the vessel?



5. Some developing countries, including Ethiopia, insist that insurance on goods imported into the countries should be taken out with domestic insurance firms. What do you think is the purpose of such a bar on obtaining marine insurance wherever the owner of the goods wishes to buy it?
6. How is damage in marine insurance settled? When is settlement by way of abandonment possible? Is it possible to settle damages by abandonment in insurance contracts other than marine ones?
7. An Ethiopian shipping line has concluded a shipbuilding and purchase contract with a Chinese shipbuilding company. According to the contract, the risk was on the Chinese company until the newly built ships arrived in Djibouti. Meanwhile, the Ethiopian shipping line effected a policy in respect of the ship from a domestic underwriter. As the ship was attacked and destroyed by pirates in the Red Sea before reaching the port of delivery, the assured claimed the insured amount. But, the insurance company refused to effect payment on the ground that the shipping lines did not have insurable interest. How do you rule on the issue, if you were the presiding judge in the case involving the assured and the insured?
8. Go back to page 114 and look into aspects of the case between Ethiopian Insurance Company and Ethiopian Shipping Line. As you could see, EIC paid a total of 3804.61 birr to its customers and wanted to recover the same amount from the shipping line. But the shipping line argued he would only be liable for an amount £ 100.00 per package which he would have paid the owners of the goods lost and which anyway was below the sum EIC paid to the assured. How do you see this argument in light of Art.323 of the Mar. Code? Assuming that this was the only issue presented before the court, how do you think would the court have ruled on the issue?

5.2 MARITIME COLLISIONS, SALVAGE AND GENERAL AVERAGE

Before closing on the discussion of this chapter in particular and of maritime law in general, a look at the rules relating to maritime collisions, salvage, and finally general average is believed appropriate. The discussion in this section completes our appreciation of maritime law rules relating to allocation of maritime risks among different participants in the maritime business.



5.2.1 Collisions

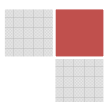
Accidents, be it marine or terrestrial, cannot always be avoided no matter how diligent and sophisticated one might be. Even after human beings achieved an advanced level of maritime skill and knowledge, maritime collisions today could be as inescapable as they used to be in the age of steamship.

This being the case, sets of laws is prescribed to allocate the encumbrance of some mirine accidents such as collision. Rules relating to collision liability in numerous maritime nations are derived from the 1910 Brussles Collision Convention (International Convention for the Unification of Certain Rules of Law in Regard to Collisions). The Ethiopian law on collision liability, embodied in the Maritime Code [Arts.229 -238], is comparable with this basic international law on collision liability at least in one respect –it adopted the *proportionate fault principle*.

In Ethiopia, a collision of vessels is settled in accordance with the provisions of Chapter I, Title V of the Maritime Code. Ethiopian courts may assume jurisdiction in collision cases where (1) the defendant has his domicile in Ethiopia, and (2) the defendant's ship is registered in Ethiopia (Art. 237, Mar. Code). Art.237 also fixes other grounds of assumption of jurisdiction by Ethiopian courts. But, the assumption of jurisdiction on such grouds as prescribed under Art.237 (d) and 237(a) is unlikely ever since Ethiopia has become an inland nation.

The right to sue for the recovery of damges resulting from a collision is not dependent upon the fulfillment of any formality. Notice of damages is not, for example, required. Also, there are no, under Ethiopian law, legal presumptions of fault as regards liability for collision (see Art. 236). In contrast, in some maritime nations like the USA, there are certain presumptions of fault in cases involving collisions. For instance, when a vessel violates a safety standard established by law, it is presumed the vessel is at fault. Hence, the vessel violating a safety law has the burden of proving that its violaton of the law could not have caused the collision.

Coming to the specific provisions dealing with liability issues, if the collision is accidental or if it cannot be shown that any of the parties are at fault, the damage



rests where it falls (Art. 230). Put in other words, the injured party may not claim compensation if the collision is the result of fortuitous accident. If, however, the collision is caused by the fault of one of the vessels, liability to make good the damages shall attach to the one which has committed the fault (Art. 231). If the collision is attributed to the fault of two or more ships, the liability of each vessel shall be in proportion to the respective faults committed. If there is no way of deciding it the degree of the respective faults of the vessels involved, the liability is shared by each of the parties on an equal basis(Art. 232(1)). In respect of damages caused by death or personal injuries, the ships at fault are jointly and severally liable to third parties (Art. 232 (3)). The rules [Arts. 230-232] remain unaffected even if the collision is caused by fault of the pilot, even where pilotage is compulsory (Art. 233).^{###}

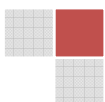
Interestingly, the rules embodied in Arts. 230-233 apply in certain cases where no collision has taken place. These, for example, include cases where damages are occasioned as a result of a vessel's failure to observe prescribed regulations regarding prevention of collisions at sea (Art. 234).

The right of claim arising out of collision and acts referred to in the above paragraph are extinguished by prescription if not exercised within two years from the date of the collision or occurrence of the event (Art. 238). Finally, note also that collision claims are secured by maritime lien (Art. 15 (4)).

5.2.2 Salvage

Rendering assistance to ships at distress is rewarded at law. Rules relating to salvage awards have long been prescribed in various maritime nations. Also, attempts were made to bring uniformity to national laws on salvage remuneration. In this respect, the 1910 Brussels Salvage Convention (International Convention for the Unification of Certain Rules Relating to the Salvage of Vessels at Sea) and the 1989 Salvage Convention (International

^{###} Incidentally, a *compulsory* pilot, unlike a *voluntary* pilot, is not an agent or servant of the vessel owner; and a pilot is characterized as a "compulsory" pilot if there is a law requiring the use of a pilot in a particular situation that imposes a criminal sanction on a vessel owner who violates the requirement. Traditionally, compulsory pilotage is required for national security reasons and the protection of life and property in harbor and port areas. When a pilot is taken in, a practical legal issue would be the relations of the master and the pilot.



Convention on Salvage) are worth mentioning. While the former is the first effort to attain universal uniformity which has subsequently been endorsed by major maritime nations, the later is an attempt to introduce innovative rules, especially in regard to salvage efforts that protect against environmental damage.

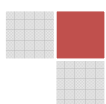
The Ethiopian law on salvage and assistance is embodied in Arts. 239 - 250, Maritime Code. Like the other specific parts of the Code, the part dealing with salvage remuneration seems to follow the major universal laws thereof – although Ethiopia is not a signatory of any of them.

In cases where a salvor has rendered any assistance or salvage to the ship or the property on board, which has had a successful result, he may claim equitable remuneration – which cannot in anyway exceed the value of the property salvaged – assessed on the basis of such result (Art. 241 cum. Art. 247). The rule applies irrespective of the fact that the salvaged and the salvaging ships belong to the same shipowner (Art. 242).

There is a legal duty to render assistance to save lives at sea (Art. 248 (1)). Thus, compensation for “pure life salvage” is precluded (Art. 244 (1)). However, under Art. 244 (2), a party who provides services that result in the saving of lives is entitled to share in any salvage remuneration granted to any other persons who saved the vessel or cargo where both were engaged in a common salvage operation.

Persons who have taken part in salvage operations, notwithstanding the express and proper (just) refusal of the person in command of the salvaged ship, are not entitled to demand any remuneration (Art. 241).

Writers distinguish between *pure salvage* and *contractual salvage*. Primarily, pure salvage is differentiated from contract salvage in that the salvor, in the first case, renders salvage service without being under pre-existing duty to render the service. The law mandates award for pure salvage because the laborious, and sometimes risky, efforts to provide maritime assistance deserve it. Whereas contractual salvage is a salvage service rendered on the basis of a salvage contract. Courts are expected to enforce salvage contracts unless (1) the contract is entered into at the moment and under the influence of the danger, (2) fraud or concealment is involved, and/or (3) the remuneration contractually fixed is disproportionate to the services rendered (Art. 246). So long as the contract



covers the salvage reward, the legally prescribed rules on salvage award do not apply in cases of contractual salvage (Art. 243).

If the court finds salvage service is rendered, it will then determine the amount of remuneration. In principle, the amount is determined by agreement between the parties (the salvors and the interest groups of the salvaged ship and cargoes). Failing such agreement, the court of law decides on the matter having regard to certain prescribed considerations (Art. 245(1) cum. Art.247).

Usually, salvage service involves different persons engaged in different capacities. Thus, the amount of remuneration to be allotted to each of such persons may pose problem. Hence, Art.245 (2) lays down the rule on how remuneration is distributed among the salvors (the owner, the master, and the crew of salvaging ships). The amount is first determined by agreement among the salvors and, failing this, by the court who again takes the parameters set in Art.247 (see Art.245 (2) cum. Art.247 (3)). There is also a room for application of foreign law where the salvaging ship is registered in a foreign country (Art.245 (3)).

Among the set of factors that should be considered in determining a salvage award are included:

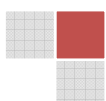
- The measure of success of the salvage service;
- The competence and the skills of the salvor;
- The danger to which the salvaged ship and its cargo were exposed;
- The danger to which the salvors were exposed ;
- And, the risks and liabilities suffered by the salvors.

Claims for payment of assistance or salvage remuneration are barred after two years from the day on which assistance has been completed. In addition, salvage claims are secured by maritime lien (Art. 15(3)). Note, however, that for the purpose of lien right, pure salvage and contractual salvage are ranked in different class.

5.2.3 General Average

An “average” is a partial loss. In maritime law, there are two types of general average: general average and particular average. Particular average is a loss due to purely accidental causes, and the loss is borne wholly by the owners of the property damaged. A general average act, however, occurs when and only when

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any *extraordinary sacrifice* or expenditure is *intentionally* and *reasonably* made or incurred for *the common safety* or for the purpose of preserving from peril the property involved in the common maritime adventure (Art. 251).

The theory of general average is an ancient one and is based on the premise that the carriage of goods by sea is a common adventure made up of three interests which are exposed to the same risks, those interests being the ship, the cargo, and the freight. A party whose interest, e.g. cargo, has been sacrificed is as, a matter of law, entitled to share of loss or expense that occur during a voyage. The next excerpts explain how the principle of general average works in maritime law:

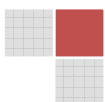
Robert Force, 2004, Admiralty and Maritime Law (Federal Judicial Centre Publication) pp.195.

The usual rule in maritime law is that a loss falls on the party that suffers it. Of course, fault on the part of another person who causes a loss may change this. "General average" is another exception to the usual rule. General average is a means of equitable sharing, between shipowner and cargo interests, of certain losses and expenses that occur during a certain voyage. Its origins are rooted in the notion that a voyage is a common adventure between the vessel owner and the cargo owners. As an equitable doctrine, the law of average holds that some parties to the joint venture should not benefit from the misfortune of the other parties to the venture. For example, the master of a vessel confronting a storm may decide that some cargo must be jettisoned to lighten the vessel, thereby giving her a better chance to avoid sinking. If some cargo is sacrificed and the vessel and remaining cargo survive the storm, the later will have benefited at the expense of the sacrificed cargo. Under the rules of general average, all parties to the venture, including the shipowner and all owners of cargo, must absorb a proportionate share of the loss suffered by the owners of the sacrificed cargo.

As could be clear from the discussion so far, the term "general average" means damage and expenses which have arisen directly (Art. 253) out of any disposition by the master of a vessel in order to preserve the ship and the cargo from a common peril during a sea voyage. And, in some jurisdictions, it is also required that the voluntary act must be *successful*.

In order to be considered a general average loss, (1) there must be extraordinary sacrifice or expenditure for the purpose of preserving from peril the ship and the property involved in the common maritime adventure and, (2) the act must be

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made intentionally and reasonably. A general average loss is, according to Art.252, borne by the different contributing interests.

The Maritime Code prescribes cases which *do* and *do not* constitute general average. It is only losses that are the direct consequence of the general average act that are allowed as general average loss (Art. 253). An indirect loss, whatsoever is not admitted as general average (Art. 254). The causes of the general average loss, whether it is the fault of one party or not, are irrelevant for the purpose of contributions in general average (Art. 255). Other specific cases that are or are not made good as general average are provided in Arts. 259-273. Included are the traditional cases that give rise to participation in general average. For instance, jettison of cargo (Art. 259), expenses at the port of refuge (Arts.268-269), extinguishing fire on shipboard (Art. 261) are some of them.

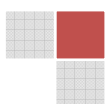
General average is calculated on the basis of the value at the time and place of the completion of the voyage (Art. 258 cum. Art. 274). And, a statement – *the general average statement* – of the estimation of losses admitted in general average and contributions is prepared by agents of shipowners referred to as *average adjusters* (Arts. 284-285). If agreement is not reached over the statement, it shall be submitted to the Court for ratification (Art. 285 (2)).

The burden of proving the existence of situations entitling a party for contribution in general average is upon the party claiming in general average (Art. 257). Claims of obligations arising from general average are extinguished by prescription if not exercised within two years from the arrival of the ship at her destination or from the day when she was to arrive (Art. 287). Finally, it should be noted that claims in general average are secured by lien on the property salvaged up to the amount of the contribution due in respect of such item (Arts. 283 cum. 15(3)).

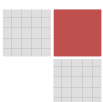
Review Question 2

1. Why do we need laws on salvage?
2. Compare and contrast the merits of the laws on collision, salvage and general average.
3. Could a general average loss be secured by insurance?
4. What are the basic principles of the laws on (1) collision and (2) general average? Can we take one of them as an exception to another?

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5. Claims involving collision, salvage and general average are all secured by maritime liens. What are the respective ranks of claims involving collision, salvage and general average? Could you reason out why one is prioritized than the other?
6. Do you think the shipowner may limit his liabilities against claims in collision, general average, and salvage?[Hint: See Art.82 of the Mar. Code]
7. A vessel stranded on a sandbank, and eventually got off by the use of her own engines. In doing so additional had to be used. The shipowner is now claiming a general average contribution in respect of the consumption of the coal since, according to the owners, there had been an extraordinary use of her engines and the use of the coal was abnormal. How do you see this in light of the provisions of Art.251 *et seq*?
8. X and Y collided in the Red Sea on while crossing courses. X was the stand-on vessel .They were in sight of one another before approaching each other. Y did not take timely action to keep clear for it did not understand the intentions of X who failed to sound any warning signal. Whom would you blame for the collision?
9. X and Y collided while on the high seas. As a result of the collision, Y sustained damage below the waterline. Her master refuses assistance from X. Then after, Y proceeded her voyage. A noise was heard on boarded her as water began to pour in via the damaged part. Z, another vessel, offered to pump out the water. Pumps were started, but 50 minutes later when Y cast off from the buoy and prepared to beach, she sank. Her owners claimed damages from owners of X. But the owners of X refused to pay a penny for the damage was not the direct result of X's fault. Do you think it is the fault of X? Why?
10. In the above example, Z who extended assistance to X in pumping out the water claimed salvage reward. Would the claim would be successful?



SUMMARY

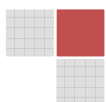
In this chapter, basic principles of marine insurance, collision, salvage and general average are studied. Directly or indirectly, the rules on marine insurance, collision, general average, and salvage are developed to ease the otherwise devastating effects of marine accidents on shipping industry.

Marine insurance, though legally undefined, could generally be understood as insurance aiming to guarantee a maritime risk. It is credited for being the pioneer of insurance ashore. The law of marine insurance is distinguished from the general insurance law in some aspects. For instance, the law of marine insurance gives recognition to different policies that may not be so recognized in the general insurance law. Also, unique way of settling damages –e.g. abandonment –is employed in marine insurance. Generally, the law of marine insurance is developed to regulate the relationship between marine underwriters and participants in the risky maritime venture. And, this is done, in part, in a way different from the general law of insurance.

The law on collision is another set of rules prescribed to allocate the encumbrance of marine accidents. Like collision laws elsewhere, the Ethiopian law on collision is based on the principle of proportionate fault. The loss or damage resulting from collision is, accordingly, settled based on fault-based liability principle.

Meanwhile, efforts to assist ships at distress are rewarded at law. The law on salvage is based on the principle that the laborious, and sometimes dangerous, efforts to provide maritime assistance deserve award. Entitling salvors to awards is, in a way, helping lessen the encumbrance of maritime risks.

Finally, the law of general average –another branch of maritime law– regulates the issue of sacrificing some properties to the common benefit of interests involved in a particular maritime adventure. The law of general average is based on the premise that shipping is a common adventure made up of various interests which are exposed to the same risks; and some parties to the joint venture should not benefit from the misfortune of the other parties to the particular venture.



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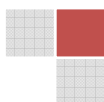
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