PART I

INTERNATIONAL LAW IN GENERAL

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THE ESCHERSHEIM
THE JADE

England, House of Lords. 31 *March* 1976

(Lords Diplock, Simon of Glaisdale, Kilbrandon, Salmon and Edmund-Davies)

SUMMARY: *The facts:*—The Convention Relating to the Arrest of Seagoing Ships, 1952, provided an exhaustive list of claims in respect of which ships within the jurisdiction of Contracting States could be arrested. The Administration of Justice Act 1956 was passed to enable the United Kingdom to comply with the Convention. However, the Act differed from the terms of the Convention. Furthermore, the Act itself made no reference to the Convention. The case concerned the claims of the master and crew of a ship against the salvors for allegedly negligent salvage. The salvors challenged the High Court's jurisdiction under the Administration of Justice Act. Their application on the issue of jurisdiction was dismissed and their appeal was dismissed by the Court of Appeal. They appealed to the House of Lords.

Held:—The appeal was dismissed.

It was an established principle of construction that where an Act was passed to enable the ratification and incorporation into domestic law of an international treaty a court, in construing such domestic legislation, must have regard to the treaty provisions in the event of ambiguity. If the language of the legislation differed from that of the treaty but was capable of having more than one meaning, it was to be accorded whichever meaning approximated most to that of the treaty. The purpose of the 1952 Convention was to provide uniform rules as to the right to arrest seagoing ships by judicial process to secure a maritime claim against the owner of the ship. Therefore, there was a presumption that the Act was intended to have the same consequences as respects the right of arrest of ships in Scotland as it had in England.

The following is the text of the opinions delivered in the House of Lords:

March 31, 1976. LORD DIPLOCK. My Lords, in these conjoined [433
appeals the owners of the ship *Jade* seek to set aside writs issued in actions in rem against that vessel, on the ground that by reason of their subject matter the claims in the actions lie outside that part of the jurisdiction of the High Court that may be invoked by an action in rem.

There are two actions: in one of them, the owners of the ship *Erkowit* (" the shipowners ") are the plaintiffs; in the other, the owners of the cargo on the *Erkowit* (" the cargo owners "). The facts that are relevant to the question of jurisdiction are set out in the judgment of Brandon J. [434
and call for no more than a brief summary here.

On October 30, 1970, the *Erkowit*, a vessel on the Sudanese registry, was involved in a collision with a German vessel and was badly holed. This happened in the Bay of Biscay some 50 miles from La Coruña. Some three hours later in response to a summons a salvage tug the *Rotesand* arrived on the scene from La Coruña and a salvage agreement in Lloyd's open form (" the salvage agreement ") was entered into by the master of the *Erkowit* on behalf of the shipowners and the cargo owners and by the tugmaster on behalf of the appellants in these appeals (" the salvors ") who are professional salvors. The salvage agreement was signed on the *Rotesand*, the master and crew of the *Erkowit* having by this time abandoned ship. Pursuant to the salvage agreement the *Rotesand* took the *Erkowit* in tow and made for the port of La Coruña. The tugmaster decided to beach the *Erkowit* on an open beach before reaching the entrance to the harbour and to patch the hole in her before proceeding further. The *Erkowit* was accordingly beached by the tug. Subsequently, while she remained on the beach exposed to the weather the salvors attempted to patch her with canvas and wood. The patches proved ineffective; the vessel was broken up by the waves and her cargo swept away. Both the vessel and her cargo became a total loss. Some of the cargo consisted of drums of insecticide which is alleged to have caused pollution of the coastal fisheries in the area. In respect of this alleged

pollution a suit claiming very substantial damages has been brought in Spain by the Spanish Government against the owners of the *Erkowit*.

The claims of the shipowners and the cargo owners against the salvors are for negligent performance of the salvage agreement. The negligence alleged is (1) beaching the *Erkowit* in a place exposed to wind and waves; (2) patching her with wood and canvas instead of with steel and (3) delay in carrying out the operation, sc. after the beaching. The damages claimed by the shipowners include an indemnity against any liability to the Spanish government.

The salvors have no place of business in England where they could be served with a writ in an action in personam. The *Jade* is a vessel belonging to the salvors; while within the jurisdiction she was arrested in actions in rem commenced by writs issued in purported pursuance of section 3 (4) of the Administration of Justice Act 1956. The question in these appeals is whether any of the claims of the shipowners and the cargo owners respectively against the salvors are claims in connection with the *Rotesand* which fall within that subsection. If any of them does the High Court has jurisdiction to entertain an action in rem against the *Jade* and this appeal must accordingly fail.

The Admiralty jurisdiction of the High Court and the mode in which it can be exercised, i.e. in actions in rem and actions in personam, is regulated by Part I of the Administration of Justice Act 1956. Like Part V, which deals with "Admiralty Jurisdiction and Arrestment of Ships in Scotland" and Schedule II, which contains similar provisions for Northern Ireland, Part I of the Act was passed for the purpose, among others, of enabling the United Kingdom to ratify and to comply with the international obligations accepted by States which become parties to the International Convention Relating to the Arrest of Seagoing Ships which had been signed on behalf of the United Kingdom in 1952.

The purpose of that Convention was to provide uniform rules as to the right to arrest seagoing ships by judicial process to secure a maritime
435] claim against the owner of the ship. Article 1 defined by reference to their subject matter various classes of maritime claim in respect of which alone a right of arrest was to be exercisable; while articles 2 and 3 granted and confined the right of arrest to either (*a*) the particular ship in respect of which a maritime claim falling within one or more of those classes arose or (*b*) any other ship owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship.

The provisions of article 3 represented a compromise between the wide powers of arrest available in some of the civil law countries (including for this purpose Scotland) in which jurisdiction to entertain claims against a defendant could be based on the presence within the territorial jurisdiction of any property belonging to him, and the limited powers of arrest available in England and other common law jurisdictions, where the power to arrest was exercisable only in respect of claims falling within the Admiralty jurisdiction of the court and based upon a supposed maritime lien over the particular ship in respect of which the claim arose.

The Admiralty jurisdiction of the High Court of England has always been statutory. In 1875 the newly-created High Court of Justice had inherited the jurisdiction previously vested in the High Court of Admiralty. Its Admiralty jurisdiction was subsequently added to piecemeal by statute. Immediately before the passing of Part I of the Act of 1956 the claims and questions which fell within Admiralty jurisdiction of the High Court were listed by reference to their subject matter in section 22 of the Supreme Court of Judicature (Consolidation) Act 1925, and by section 33 (2) this jurisdiction was stated to be exercisable "either in proceedings in rem or in proceedings in personam." What distinguished the Admiralty jurisdiction from the other civil jurisdiction of the High Court was that it was exercisable in proceedings in rem.

The claims listed as falling within the Admiralty jurisdiction of the High Court under section 22 of the Supreme Court of Judicature (Consolidation) Act 1925 were substantially the same as the maritime claims listed in article 1 of the 1952 Convention, though with some variation in language which is readily accounted for by the fact that the Convention was drawn up in the English and French languages, both texts being equally authentic.

The way in which the draftsman of Part I of the Administration of Justice Act 1956 set about his task of bringing the right of arrest of a ship in an action in rem in English courts into conformity with article 3 of the Convention was (*a*) by section 1 of the Act, to substitute a fresh list of claims falling within the Admiralty jurisdiction of the High Court, and (*b*) by section 3, to regulate the right to bring an action in rem against a ship by reference to the claims so listed. Sections 22 and 33 of the Supreme Court of Judicature (Consolidation) Act was repealed.

Apart from the addition of claims in respect of salvage, towage and pilotage of aircraft (which in any event are not subject to the Convention) there is again no significant difference between what is contained in the new list and what was contained in the 1925 list, except that the language is rather more succinct and a little closer to the language of article 1 of the Convention. In contrast to what the English draftsman did, the draftsman of Part V of the Act of 1956, which deals with the Scots courts, was content merely to list in section 47 (2) the claims in respect of which a warrant might be issued for the arrest of a ship; and in doing so he followed much more closely than his English counterpart the language and order of article 1 of the Convention.

One is thus confronted with three lists of claims by reference to which [436
a right of arrest of a ship in an action in rem may be regulated: (1) the English list in section 1 of the Act; (2) the Scottish list in section 47 of the Act; and (3) the international list in article 1 of the Convention. Except that both English and Scottish lists refer to claims for "damage received by a ship" as well as for damage done by one and the English list includes some services rendered to aircraft, whereas the international list does not, all three lists cover the same ground though with some variations in language and in order.

As the Act was passed to enable Her Majesty's Government to give effect to the obligations in international law which it would assume on ratifying the Convention to which it was a signatory, the rule of statutory construction laid down in *Salomon* v. *Customs and Excise Commissioners* [1] [1967] 2 Q.B. 116 and *Post Office* v. *Estuary Radio Ltd.* [1968] 2 Q.B. [2] 740 is applicable. If there be any difference between the language of the statutory provision and that of the corresponding provision of the Convention, the statutory language should be construed in the same sense as that of the Convention if the words of the statute are reasonably capable of bearing that meaning.

In the instant case the obligation assumed by Her Majesty's Government under the Convention was to give effect to it in all three jurisdictions of the United Kingdom. So there is also a presumption that the Act was intended to have the same consequences as respects the right of arrest of ships in Scotland as it has in England. Accordingly if the language used in the English list is capable of more than one meaning that meaning is to be preferred that is consistent with the language used to describe the corresponding claim in the Scottish list.

Similar considerations apply to the provisions of the Act and the Convention which provide for the right of arrest of a ship. By article 1 (2) of the Convention "arrest" is defined as "the detention of a ship by judicial process to secure a maritime claim" and by article 2 of the Convention the right is confined to securing those maritime claims only that are listed in article 1. By article 3 the subject of the arrest is "the particular ship in respect of which the maritime claim arose" or one of its sister ships. The corresponding reference in section 47 (1) of the Act to the subject of the arrest in Scotland is "the ship with which the action is concerned."

In England the matter is governed by section 3 (4) of the Act which reads as follows:

> "In the case of any such claim as is mentioned in paragraphs (*d*) to (*r*) of subsection (1) of section one of this Act, being a claim arising in connection with a ship, where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, the Admiralty jurisdiction of the High Court . . . may (whether the claim gives rise to a maritime lien on the ship or not) be invoked by an action in rem against—(*a*) that ship, if at the time when the action is brought it is beneficially owned as respects all the shares therein by that person; or (*b*) any other ship which, at the time when the action is brought, is beneficially owned as aforesaid."

It is clear that to be liable to arrest a ship must not only be the property of the defendant to the action but must also be identifiable as the ship in connection with which the claim made in the action arose (or a sister ship

[1 41 *I.L.R.* 1.]
[2 43 *I.L.R.* 114.]

of that ship). The nature of the "connection" between the ship and the [437
claim must have been intended to be the same as is expressed in the corresponding phrase in the Convention "the particular ship in respect of which the maritime claim arose." One must therefore look at the description of each of the maritime claims included in the list in order to identify the particular ship in respect of which a claim of that description could arise.

The claims described in the separate paragraphs in the lists in section 1 (1) and section 47 (2) of the Act and article 1 (1) of the Convention are not mutually exclusive. As article 1 (1) of the Convention explicitly recognises, a claim may well fall under two or more of them. The shipowners have sought to classify their claim under paragraphs (*d*), (*e*) and (*h*) of section 1 (1) of the Act; the cargo owners have relied on (*d*), (*g*) and (*h*).

As it is sufficient to dispose of this appeal that the claims should fall within any of these paragraphs, I propose first to deal with (*h*). In the English list in section 1 (1) of the Act this reads: "(*h*) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship."

The corresponding provision in article 1 (1) of the Convention is split into two paragraphs:

> "... a claim arising out of ... (*d*) agreement relating to the use or hire of any ship whether by charterparty or otherwise; (*e*) agreement relating to the carriage of goods in any ship whether by charterparty or otherwise."

The Scottish list in section 47 (2) of the Act follows the same wording as the Convention.

My Lords, neither Brandon J. nor any of the members of the Court of Appeal had any doubt that both the shipowners' and the cargo owners' claims fell within paragraph (*h*) as being a claim arising out of an agreement relating to the use of a ship, the *Rotesand*.

The salvage agreement was entered into by the master of the *Erkowit* on behalf of the cargo owners as well as the shipowners. The primary contractual obligation of the salvor under the agreement in Lloyd's open form is to use his best endeavours to bring the vessel and her cargo to a place of safety, providing at his own risk, in the time-honoured phrase, "all proper steam and other assistance and labour." The only possible way in which the salvors could perform their contract was by taking the *Erkowit* in tow and using the tug that had been sent to the scene of the casualty for that very purpose— the *Rotesand*.

I agree that in any ordinary meaning of those words the salvage agreement was "an agreement relating to the use of a ship," the *Rotesand*, for the purpose of salving the *Erkowit* and her cargo and bringing them to a place of safety, which it was contemplated by the parties would be La Coruña. The shipowners' and cargo owners' claims are claims for damages for negligent performance of that agreement and so far as the negligence

alleged includes an averment that the *Erkowit* was towed by the *Rotesand* on a course which beached her on a dangerous shore the claim arises out of the negligent performance of that part of the agreement for which a ship was to be used.

On behalf of the salvors it has been submitted that the words "agreement relating to the use or hire of any ship" should be understood in a very restricted meaning. The ground of this submission is that very similar
438] words "any claim arising out of any agreement made in relation to the use or hire of any ship" appeared in section 2 (1) of the County Courts (Admiralty Jurisdiction) Act (1868) Amendment Act 1869, as one of three subject matters in respect of which that Act conferred upon county courts jurisdiction exercisable in an action in rem. No similar jurisdiction was exercisable in rem at that date by the High Court of Admiralty or after 1875 until 1920 by the High Court of Justice. In *Reg.* v. *City of London Court Judge* [1892] 1 Q.B. 273 Lord Esher M.R. in the Court of Appeal expressed the view that Parliament should be presumed not to have intended to confer upon a county court a jurisdiction exercisable in rem which was wider than the corresponding jurisdiction in rem of the High Court and that though the court was bound by a previous decision (*The Alina* (1880) 5 Ex.D. 227) to accept that a claim arising out of a charterparty was within the section although it did not give rise to an action in rem in the High Court, the words should so far as possible be construed so as to confine the jurisdiction of the county court to subject matters in respect of which jurisdiction in an action in rem was exercisable by the High Court.

My Lords, this was not a decision which ascribed a specific and precise meaning to the words "an agreement relating to the use or hire of a ship." The reasons given in the judgment for giving a restricted meaning to words conferring Admiralty jurisdiction on county courts, in the context in which they appeared in the Act of 1869, have no application in the context of Part I of the Administration of Justice Act 1956, which is dealing with the jurisdiction of the High Court itself. I see no reason in that context for not giving to them their ordinary wide meaning. That would include the salvage agreement in the instant case.

I would therefore hold that the claims of both shipowners and cargo owners fall within paragraph (*h*) of section 1 (1); that they are claims in connection with the *Rotesand*; and that they are enforceable under section 3 (4) by an action in rem against the *Rotesand* or any of her sister ships.

Strictly speaking this makes it unnecessary to decide whether the shipowners' and cargo owners' claims also came within paragraph (*d*), viz. "damage done by a ship" or, as it is phrased in article 1 of the Convention "damage caused by any ship either in collision or otherwise"; but as this was a matter on which the Court of Appeal differed from Brandon J. I will express my views upon it briefly. The figurative phrase "damage done by a ship" is a term of art in maritime law whose meaning is well settled by authority. (*The Vera Cruz* (*No. 2*) (1884) 9 P.D. 96; *Currie* v. *M'Knight* [1897] A.C. 97.) To fall within the phrase not only must the

damage be the direct result or natural consequence of something done by those engaged in the navigation of the ship but the ship itself must be the actual instrument by which the damage was done. The commonest case is that of collision, which is specifically mentioned in the Convention: but physical contact between the ship and whatever object sustains the damage is not essential—a ship may negligently cause a wash by which some other vessel or some property on shore is damaged.

In the instant case the act of casting off the *Erkowit* in such a way as to beach her upon an exposed shore was something done by those engaged in the navigation of the *Rotesand*, as a result of which the *Erkowit* and her cargo were left exposed to the risk of being damaged by wind and wave if the weather worsened before she could be removed to a more sheltered position.

I do not understand it to be claimed that the actual beaching caused [439] any physical damage to ship or cargo, but for the purposes of this appeal it must be assumed that the chain of causation is unbroken between the beaching of the *Erkowit* and her subsequent breaking-up by wind and wave. Had the damage been caused by the beaching, there could in my view have been no question but that the *Rotesand* could properly be regarded as the actual instrument by which that damage was done. Although for my part I find this a borderline case, I do not think that the intervening failure of the appellants to take steps to avert the risk of damage, which forms the subject of the alternative grounds of negligence, prevents the *Rotesand* from remaining the actual instrument by which the damage subsequent to the beaching was done. I accordingly agree with the Court of Appeal that the shipowners' and cargo owners' claims also fall under paragraph (*d*) of section 1 (1).

Before concluding I should deal with the suggestions (i) that the cargo owners' claims fell also under paragraph (*g*) of section 1 (1) as being a "claim for loss or damage to goods carried in a ship," and (ii) that the shipowners' claim fell also under paragraph (*e*) as being a claim for "damage received by a ship." These were both matters of concession by the salvors before Brandon J. where the argument was confined to the exclusion from paragraph (*e*) of so much of the shipowners' claim as related to an indemnity in respect of any liability of the shipowners to the Spanish Government for pollution of the fisheries. The concessions were, however, withdrawn when the case reached the Court of Appeal.

The cargo owners' claim clearly falls within the description in paragraph (*g*) which reproduces in terms that are practically identical paragraph (*f*) of article 1 (1) of the Convention: but, as I have already pointed out, the right of arrest conferred by section 3 (4) is confined to the ship in connection with which the claim arose (or a sister ship). The claims to which the right of arrest is confined are those mentioned in paragraphs (*d*) to (*r*) of section 1 (1). With three exceptions, each of those paragraphs contains an express reference to "a ship." The ship referred to in each of these paragraphs is the ship in connection with which a claim under

that paragraph arises. The three exceptions relate to claims in respect of salvage, general average and bottomry where there can be no doubt as to the ship in connection with which claims of that nature arise. Paragraph (*g*) therefore permits the arrest of the ship in which the goods which have been lost or damaged were carried, in an action in rem by cargo owners against the owner of the carrying vessel. It does not authorise the arrest of any other ship: authority for that must be found under some other paragraph. So the arrest of the *Rotesand* as security for the cargo owners' claim was not authorised under paragraph (*g*) of section 1 (1).

Paragraph (*e*) has no counterpart in article 1 (1) of the Convention. "Damage received by a ship" if it gives rise to any claim against a ship at all gives rise to a claim against the ship that caused the damage and not the ship that received it. So any right of arrest under the Convention could not arise in respect of a claim of this description. In so far as section 1 (1) of the Act defines the Admiralty jurisdiction of the High Court, by reference to which a similar jurisdiction is by section 2 conferred upon the Liverpool Court of Passage and county courts, the inclusion of paragraph (*e*) is not inappropriate. "Damage received by [a] ship" is a time-honoured phrase that was first used in section 6 of the Admiralty Court Act 1840 to extend the jurisdiction of the High Court of Admiralty to claims for damage
[440] received by a ship when within the body of a country. Such jurisdiction had been previously confined to damage received by a ship while on the high seas. This section was narrowly construed by Dr. Lushington in *The Bilbao* (1860) Lush. 149 so as to exclude damage done *by* a ship—a lacuna that was promptly filled by section 7 of the Admiralty Court Act 1861. These two sections regulated the Admiralty jurisdiction of the High Court until 1925, when the expressions "damage received by a ship" and "damage done by a ship" were reproduced in section 22 of the Supreme Court of Judicature (Consolidation) Act 1925 to describe a part of its Admiralty jurisdiction.

The description "any claim for any damage received by a ship" describes a claim arising "in connection with" the ship that receives the damage. In such a claim the owners of the ship that receives the damage would be plaintiffs. They cannot invoke the Admiralty jurisdiction by an action in rem against their own ship; and any claim to arrest some other ship must be founded upon some paragraph other than (*e*). Had the draftsman of section 3 (4) been meticulous he would have omitted any reference to paragraph (*e*) of section 1 (1); but the other requirements of the subsection prevent any right of arrest arising under that paragraph.

I would dismiss this appeal.

LORD SIMON OF GLAISDALE. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Diplock. I agree with it, and I would therefore dismiss the appeal.

LORD KILBRANDON. My Lords, I have had the advantage of reading the speech prepared by my noble and learned friend, Lord Diplock. I agree with it and I too would dismiss this appeal.

LORD SALMON. My Lords, I have had the advantage of reading the speech prepared by my noble and learned friend Lord Diplock.
For the reasons given by him, I would dismiss this appeal.

LORD EDMUND-DAVIES. My Lords, for the reasons appearing in the printed speech of my noble and learned friend, Lord Diplock, I concur in holding that the appeal should be dismissed.

Appeal dismissed.

[Report: [1976] 1 W.L.R. 430.]

International law in general—Relation to municipal law—Treaties —Publication in official journal—Whether sufficient for incorporation into municipal law — Whether treaty given an authority superior to municipal law—The law of France

See p. 191 (*Klarsfeld* v. *Office Franco-Allemand pour la Jeunesse*).

International law in general—Relation to municipal law—Treaties —European Convention on Human Rights, 1950—Whether directly applicable under municipal law—The law of the Federal Republic of Germany

See p. 295 (*Basic Right to Marry Case*).

International law in general—Relation to municipal law—Conflict between international convention and subsequently enacted municipal law—Primacy of international convention—The law of Switzerland

See p. 78 (*Librairie Hachette SA and Others* v. *Société Coopérative d'Achat et de Distribution and Others*).