CHAPTER XI

CONCLUSIONS : DO WE SAIL OR SINK?

We need a joint effort to combat maritime fraud, and to this end, it is imperative that we should regard ourselves as part of the emerging world community. We have benefited greatly today by the development of a global system of financial services and the emergence of a sophisticated communication network, both of which are reducing the time and space in the international trade transactions. Fraud requires a clever manipulation of this global network, and because of this, maritime or transnational fraud has paralleled the growth of world trade today.

Given our regard for intelligence and our disapproval of violence, our notion of honesty is blurred very greatly by greed stimulated by commerce, with a result that there is much less outrage against frauds than less social crimes such as rape, murder and robbery. Moreover the victims of frauds are often institutions rather than people, and it is an ironic confirmation of humanity that people have less sympathy for the defrauded corporations. Unlike social crimes, which are more or exclusively national in character, fraud overlaps boundaries and continents and are transnational in character. Moreover, since ordinary criminal jurisdiction is based on the notion of territoriality, it is natural to presume that fraud evokes no public outrage on account of its being transnational in nature.
Today's international trade transactions are both simple and efficient and is derived from the convention of trusts, such as the fact that the seller gets paid before the buyer receives the goods. As long as this is realised by all the contracting principals, all parties derive a benefit. Unfortunately, the simplicity of the system also makes it attractive and vulnerable to forgers, scuttlers and cheats. To offset this, protection and care can be devised along with inquiry and inspection -- a sort of policing -- but it would require too much of the same to make it worthwhile. Besides, this would also raise the cost of transaction. Moreover, clever crooks will always devise a slightly more elaborate scheme as they are always one step ahead. Added to this is the fact that the stakes are high enough to make it economically viable for the criminals to bribe away all obstacles, and this is commonly the way in which important insiders are brought within a criminal enterprise. It is, therefore, felt that the system of policing would not be practical.

Unlike social crimes which are often irrationally motivated, a person who commits an economic crime is capable of rational reasoning and works out his 'trade-offs'. He is guided by the likelihood of his arrest, the efficiency with which the crime can be committed and he may probably even think that a term of imprisonment would justify the crime if the returns are sufficiently high (a la Charles Sobhraj).
The strategy is to make the price of crime prohibitive.

Here we have to look beyond the conventional means of punishment such as imprisonment and fines which do not adequately address the problem of economic crimes. It is in context that the traditional division between a criminal law seeking to punish and the civil law to compensate must be bridged, and an appropriate flexible measure for both compensation and punishment must be adopted to administer justice. Thus a civil claim to restitution may be given a punitive element to ensure strict adherence to certain fiduciary ideals. It may be mentioned here that injunctions derive effectiveness only because they are backed by criminal sanctions such as contempt.

Besides the above, there are jurisdictions which necessitate the implementation of draconian measures. Here a statute like Act No. 646 of 1982 of Italy may be emulated. This Italian Act was enacted to combat organised crime and specifically addresses the problem that criminal enterprises such as 'Mafia' (Silican) and 'Camorra' (Neapolitan) have only one purpose in mind, that is, to make money -- the same motivation as anyone who engages in transnational fraud. This Act provides for administrative measures before trial to freeze all financial assets with a view to their final confiscations. The seizure extends to all the possible criminal gains that can be traced to the criminal enterprise. It appa-
rently exists even when the assets are marked by fraudulent devices such as fictitious corporations and transactions between family members or friendly third parties. If the assets have been genuinely transferred these too can be frozen. It will then be the responsibility of the criminal court to evaluate if these assets amounted to reckless criminal receiving or knowing criminal receiving. In both cases, if this test of knowledge is proved, the assets can be confiscated.

The English Courts have also initiated similar measures for the recovery of property in recent years. The principle in vogue in most countries of impounding the property of the debtor by the creditor at the outset and retained as security for payment after the judgement was examined by Lord Denning, M.R. This process known as 'saisie conservatoire' or conservative sequestration, or 'seizure of assets so as to conserve them for the creditor in case he should afterwards get judgement' was initiated by His Lordship in Nippon Yusan Kaisha vs. Karageorgis¹, and involved a charter-party fraud committed by two Greeks against Japanese shipowners. The charterers after defaulting in paying the hire disappeared but not exactly without a trace as they had funds with a bank in London. The case filed by the shipowners in England

¹. (1975) 1 WLR 1093.
for issue of injunctions to stop the funds being removed outside jurisdiction was granted.

This novel process was followed shortly in a case which gave its name to the procedure — the Mareva injunctions — in *Mareva vs. International Bulkcarriers*, a case also involving a charter-party fraud. In short, such injunctions enable litigants to restrain defendants from disposing of their assets or removing them from the jurisdiction until the conclusion of the trial. Although the issue of such injunctions in a subsequent case involving a scuttling fraud was reversed by the House of Lords, the principle survived. On account of such judicial uncertainties, it is felt that the judiciary should not be viewed as the only acceptable safeguard.

The moral of the story here is that economic crimes must be met with economic measures. If there is a real likelihood that the criminal would lose all the proceeds, this may deter him by reducing the attractiveness of such crimes. Another way of creating disincentives for those contemplating fraud is for the victims wherever possible to pursue the civil remedies vigorously. The commission of a commercial

1. See 'The Due Process of Law', Lord Denning, pp 133 - 136
fraud will invariably involve a series of acts forming the bases of civil liabilities — usually forgotten in the wake of the publicity of the crime. When enforced, such civil claims can indirectly strip the criminal of some, if not all, of the profits of his crime.

Since damages recovered often form only a fraction of the total proceeds of the crime, a restitutionary claim enabling the plaintiff to trace into the proceeds of the crime and subsequent investments on the lines of *Barnes vs. Addy*¹, principle is more effective as it provides a more comprehensive measure for stripping of all his unjust enrichment. In many cases, this would be possible since the insiders who are likely to be fiduciaries may be involved. Similarly bribes and secret commissions can also be recovered.

We have elaborated above the measures to follow up with a view to redressing the grievances of the victims of a maritime fraud. In fact, what we have suggested above is more or less on what to do in the event a fraud has been successfully committed. We shall now try to elaborate a few suggestions on how to *prevent* a maritime fraud from taking place in the first place.

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1. (1874) L.R. 9 Ch. 244.
Since maritime fraud is transnational or international in character, such or any preventive measures can only succeed if all the principals to the transaction, and the affected States at the international level establish a close co-operation between themselves. As our study analyses the utilisation of the flags of convenience in the commission of such crimes, such flag States are also required to extend their help in this matter so that they may at least dispel the fear that these States are indifferent in this respect.

In the sphere of documentary fraud moves can be initiated in the international fora, whereby the international trading community can be persuaded, as specified in the preceding chapter, to allow the paying banks to transfer the payment receivable by the seller into an escrow account. This would be paid to the seller only after the paying bank receives intimation from both the buyer and the issuing bank, that the goods have actually been received in order by the buyer. There is bound to be genuine hardships, if not undue harassment in many cases, but in general such measures will in the long run make life really safe for international trade. This method will have an added advantage in the sense that fraudulent sellers would be easily exposed, as in the case of non-shipment or shipment of substandard goods or plain rubbish in the place of goods, such fraudsters would be the first to do the vanishing trick without being rewarded for their labours or pains.
Regarding charter party fraud, conditions may be prescribed whereby charterers may be required to furnish bank guarantees of an amount equal to the charter freight, so that in the event of charterer defaulting, the shipowner may approach the bank in order that the amount of freight defaulted may be redeemed. This will also eliminate bogus charterers as because the prospect or idea of securing the requisite bank guarantee will in a way give such parties second thoughts on whether the fraud attempted is worth in the first place. As regards frauds involving the disappearance of the shipowners or the charterers, it may be prescribed that the shipowners or charterers should deposit seventy five per cent of the wages and salaries payable to the crew, either in the port of loading or the place of recruitment of the crew before the voyage is made. To safeguard the interests of the shipowners or the charterers from being cheated in turn, this deposit may be partially frozen in the sense, that the banks concerned may be instructed to remit a monthly instalment out of the same to the crew or to their family members for their subsistence. The sad plight of the stranded sailors of M.V. Vali Pero (a Greek ship) abandoned by her Greek Officers in Calcutta on 25th May, 1985, leaving the unpaid non-Greek crew to their fate is to be borne in mind here. (Fortunately a writ was filed on behalf of these sailors by the Seamen's Union before the Hon'ble High Court at Calcutta, which resulted in the issue of arrest warrant against the ship for the default in the matter of payment of the wages to these sailors).
Companies or persons owning single vessel or ship over 15 years of age may be discouraged from registering in flag of convenient States, or alternatively if this is not possible or avoidable, such companies or persons may be asked to mandatorily maintain fixed deposits in the government-owned banks of these States and may also be asked to invest a major portion of their liquid assets in Securities or Bonds issued by these States. In addition to this, a condition prescribing the maintenance of a minimum bank balance in these States may be imposed. These drastic measures would not bother a genuine trader or businessman operating from such States as because he has nothing to hide and he does not intend to cheat anybody. Such measures would, however, definitely affect a potential fraudster as he would be the first person to think about his moneys so locked up by these States. It is needless to mention here that these moneys would be confiscated in the event of a fraud being discovered.

Name-plate companies registered in flag of convenience States may be discouraged either by the method prescribed in the preceding paragraph or by a requirement that such companies possess a minimum number of safe and standard vessels in order to apply for registration in such countries in the first place. Moreover, these countries must adopt a strict stand in the matter of allowing such registration in the first place. It is clear that the intentions behind registering such companies is only to commit a fraud from behind
a corporate entity. It may therefore be provided that such companies cannot be given Post Box number addresses, and that to apply for such registration they must give a real address and any such applications must be introduced by indigenous companies and the applications must be scrutinised by the State Maritime Departments.

Moreover the ships 'disclosed' by such companies as safe and sea-worthy in their applications may be subjected to independent verifications by these States and the certificate of sea-worthiness must conform to international standards as decided by the Lloyd's of London. Further the applications should be subjected to in-depth scrutiny -- with the names of principal directors, directors, shareholders, paid-up capitals, and the audited balance sheets forming the cynosure of such investigations. Undesirable persons can thus be eliminated and with them such companies. The fraud involving the vessel Lord Byron, may be borne in mind here.

Further, if a number of companies registered in flag of convenience States have at least two or more common directors, agents etc., it may be made obligatory, that only one of these companies may be registered in such States. It has been noticed often that having a number of such States provides the fraudsters to jump quickly from one company to another before repeating the procedure, with often the
first company being wound up immediately after the commission of such a crime. Furthermore, when a company is registered in one flag of convenience State, it may be prohibited from registering in any other such State. A close liaison between the flag of convenience States on the lines of Organisation of Petroleum Exporting Countries (OPEC) may be formed to this effect. In the case of a fraud already committed from behind a corporate entity in such a State, the information relating to the directors, agents, shareholders, nationality of the persons involved alongwith the names of such a company and its parent company may be circulated among the flag of convenience States. A readily available data bank and free exchange of such information between the States may be ensured. It is noticed that frauds are repeated often with great success by ships flying the flags of such States only on account of lack of any effective coordination between these States.

These States may also initiate the creation of Maritime Bureaux on the lines of the Liberian Maritime Bureau, whose performance is commendable when it had taken up cases of fraud for investigations. In a group of cases involving fraud committed by ships flying the Liberian flag, it had ordered the withdrawal of the Liberian registration of the vessels. To wit, the following ships involved in some fraud in 1983 viz., M.T. Taxiarhis, M.T. Haralabes, M.T.
Ypanpanti had lost their Liberian registration as a result of the Liberian Maritime Bureau's investigation. Further, the owner of these ships, a Greek, was also forbidden from holding any future Liberian registration in respect of his vessels. A close co-operation between the Maritime Bureaux of these States should be maintained in order that persons found involved in frauds should simultaneously be debarred from holding any future certificates or registrations in any flag of convenience State.

Most of the above suggestions made for the adoption by the flag of convenience States may be adopted by other States mutatis mutandi, as because fraud knows no geographical boundary and is a little respecter of any State, however powerful or weak it may be. Fraud, in order to be successful, seeks a weakness in the State's national system and in most of the cases it finds one. Unfortunately before the defect is remedied by the State, fraud and fraudsters find another alternate method. Thus the battle is a battle royal of the wits and we can successfully repel a fraud like an invasion only if we are one or even half a step ahead of the perpetrators.

Our suggestions made for the flag of convenience States are rather harsh and often borders on the region of interference in the State's national legal system. Flag of
convenience States will have to adopt a stricter stand and a sterner attitude in this respect, if they have to disprove the allegation that they are usually considered to be havens for maritime frauds and also a safe refuge for the fraudsters. Suggestions discussed above will in the long run prove to the fraudsters that they can get no shelter or asylum in these States either as individuals or by hiding behind corporate veil. Our task is to help these States adopt measures which will prove in the long run that these economic crimes would not pay or will cease to be a lucrative business or venture. Sacrifices will have to be made by all, inconvenience tolerated, and avoidable embarrassments or harassments will have to be endured by participating principals, as the price of civilisation to safeguard the interests of international trade transactions, and to this effect no sacrifice should be considered too small or insignificant.

Since the IMCO (Since 1982, IMO) Convention on Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972, envisage penal as well as deterrent action against States engaged in so polluting the seas, and since this Convention specifies that scuttling on its face would be dumping the States concerned whose ships or ships flying whose flags are involved in scuttling frauds, may be penalised or punished, in order that they may, in their national courts, take even sterner steps against the scuttlers. In a similar way, the penal consequences specified in the Prevention of Pollution from
Ships, 1973, (MARPOL), may be thrust upon the errant States so that they may take stricter punitive measures against these categories of fraudsters. In such a way these international conventions can contribute their mite towards measures for the prevention of recurrence of maritime frauds.

The screening procedure adopted by the General Insurance of India (GIC) in respect of vessels coming to the Indian ports in search of export cargo may also be emulated by other States in order to prevent such frauds. The procedure for screening adopted by GIC is novel and is as under.

The shipping agent is required to make an application to the GIC in the prescribed form. The GIC would verify the ownership including the number of vessels owned, flag and tonnage of the vessel, her operation, charter etc. classification certificates are scrutinised and if the vessel is not classified or where the vessel is over 20 years of age a satisfactory survey report by a classification society's surveyor is insisted upon. P & I cover is looked into as to whether full cargo liability including the liability of the charterers is covered or not. The agency appointment of the steamer agent is also verified particularly when the agent signs the bills of lading. A copy of charter party agreement is obtained. GIC also verify the financial standing of the owners, operators, charterers etc. by calling for balance sheets.
and confidential report from the banks. In case of single vessel ownership or where there are other unsatisfactory features, GIC obtain an undertaking from the owners and the steamer agents to withhold 80 per cent of the gross freight earnings in India till the vessel completes discharge of cargo at the destination ports. Reserve Bank of India is duly informed so that they do not allow repatriation of funds. The application for approval is required to be made for each voyage separately except in the case of regular lines or established shipping agents. In case of vessels having doubtful features, the insurers are advised to charge additional premium at the rate of 2 per cent for non-approved vessel. The loading is to discourage the shippers to book cargoes by such vessels.

This screening procedure of the GIC is unique in the world, and has benefited the trading community not only in India but also abroad. It has received recognition abroad as several of the overseas buyers stipulate in their letter of credit a condition that goods should be shipped by vessel approved by the GIC. In fact today, the approval of vessel by the GIC is a publicity for the steamer agent for securing more freight. Further, it is to the record of GIC that so far no maritime fraud has been reported from vessels approved by GIC. Unfortunately, however, similar screening by the GIC is not possible in case of import cargo to India, as time is the essence in this case. Screening of vessels can be done
by an organisation only in the port of loading. Thus for a successful implementation of such measures, similar screening procedures may be adopted globally, at every port by certain international non-governmental bodies such as The International Chamber of Commerce (ICC) or the International Maritime Bureau (IMB) or even Lloyd's Agents. Such screening certificates may then be made one of the documents under the letter of credit. Since this would need statutory backing, the International Shipping Legislation of the UNCTAD may consider the issue and adopt an international convention to be ratified in different countries. Such screening would make the job of the fraudsters difficult if not altogether impossible.

In addition to the above, a maritime fraud should not just be viewed as an economic offence only, but should be equated or treated at par with some of the social crimes like trafficking in drugs etc. and should carry the maximum punishments as under the laws dealing with such activities. In certain countries of the world like Thailand and Turkey trafficking in drugs can earn the culprits the capital punishment. We do not suggest such harsh measures for an offence like fraud involving theft of cargo or charter party, but certainly the fraudsters when facing trial should not be allowed to get away with an imprisonment of only seven to ten years. Let us take the case involving the tanker Salem: the offence was proved, the culprits identified, but the trial took over five years resulting in most of the culprits getting a sentence
of around seven to ten years in jail. Certainly for the offence they committed, they deserved a harsher punishment! Moreover, in most of the countries in the world, there are no separate maritime courts as a result of which the decision is delayed and the proceedings is unduly dragged on. Thus in Greece, a case involving maritime fraud may be cause-listed after a series of insignificant cases like divorce or alimony, with a result that when these cases come up for hearing the fraudsters get a much required breathing gap to prepare for their defences or alibis. It is therefore felt that for a speedy administration of justice in such cases, maritime courts should be created or the High Courts should have an Admiralty Bench to deal with such cases expeditiously.

Further, maritime frauds should not be tried under the existing penal laws of the States. They require new statutes with a stiffer dose of punishment and fines. The onus of proving the guilt should be modified and such statutes should provide for the onus of proving innocence and this should invariably lie on the fraudsters. This would not be violative of the principles of natural justice or contrary to the law of evidence, as they are already in existence in certain countries, laws which provide for the onus of innocence to be established by the defence. To wit, the Income-Tax Act, 1961 of India (Act No. 43 of 1961) provides for the search and seizure operations with a view to unearthing the undisclosed or concealed income, wealth or asset of persons.
Sub-section 4A of section 132 of this Act raises the rebuttable presumption that in the event of finding any gold, jewellery, money, valuables or important papers during the operation of search under sub-section 1 of section 132, these items may be presumed to belong to the person in whose premises they were found. This provision has worked well in practice so much so that in majority of the income-tax proceedings or litigations the decisions regarding the seizures of these items have been upheld.

Lastly, as the root cause of the malady of flag of convenience, Article 5 of the Convention on the High Seas, 1958, Geneva, and Act 91 of the Montego Bay Convention, 1982, may be suitably amended as far as 'genuine link' is concerned. Some suggested alternatives are 'actual link' or 'concrete link'. To this end it may be made obligatory on the flag of convenience States to allow registration of companies in their countries only where a majority of the directors or agents of such companies are their naturalised citizens. This will eliminate the involvement of undesirable persons primarily because these countries could then be in a better position to proceed more strongly against such persons or companies if they are involved in frauds, by virtue of their being the citizens. This principle of 'actual' or 'concrete' link would greatly reduce the embarrassment caused to the flag of convenience States and may in the long run substantially reduce the abuses of such flags, if not stop the same totally.
Finally, it may be mentioned here, that the strict punishments suggested may cause people to react adversely. However, considering the nature and frequency of such offences, it may be remarked here that maritime fraud is not to be treated with a cosmetic therapy, but with a cardiac surgery. The crooks do not need to be reformed and rehabilitated as honest citizens once again, but are to be made to realise that this is indeed an expensive business or venture.