

THE SHIPPING LAW REVIEW

THIRD EDITION

EDITOR

JAMES GOSLING AND TESSA JONES HUZARSKI

LAW BUSINESS RESEARCH

THE SHIPPING LAW REVIEW

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Editors

JAMES GOSLING AND TESSA JONES HUZARSKI

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EDITOR'S PREFACE

This book aims to provide those involved in handling wet and dry shipping disputes in multiple jurisdictions with an overview of the key issues relevant to each jurisdiction. We have sought contributions on the law of leading maritime nations, including both major flag states and the countries in which most shipping companies are located. We also include chapters on the law of the major shipbuilding centres and a range of other jurisdictions.

As with previous editions, we begin with cross-jurisdictional chapters looking at the latest developments in important areas for the shipping industry internationally: competition and regulatory law, marine insurance, ocean logistics, piracy, shipbuilding, ports and terminals and environmental issues. We have also included a new chapter regarding international trade sanctions, which is an increasingly important area.

Each jurisdictional chapter then gives an overview of the procedures for handling shipping disputes in each country, including arbitration, court litigation and any alternative dispute resolution mechanisms. Jurisdiction, enforcement and limitation periods are all covered. Contributors have summarised the key provisions of local law in relation to shipbuilding contracts, contracts of carriage and cargo claims. We have also asked each author to address limitation of liability, including which parties can limit, which claims are subject to limitation and the circumstances in which the limits can be broken. Ship arrest procedure, which ships may be arrested, any security or counter-security requirements and the potential for wrongful arrest claims are also included.

The authors review the vessel safety regime in force in each country, along with port state control and the operation of both registration and classification locally. The applicable environmental legislation in each jurisdiction is explained, along with the local rules in respect of collisions, wreck removal, salvage and recycling.

Following the entry into force of the 2002 Protocol to the 1974 Athens Convention and the Maritime Labour Convention in 2013, passenger and seafarer rights are also examined, and contributors set out the current position in each jurisdiction. The authors have then looked forward and have commented on what they believe are likely to be the most important forthcoming developments in their jurisdictions over the coming year.

The shipping industry continues to be one of the most significant sectors worldwide, with the United Nations estimating that commercial shipping represents around

US\$380 billion in terms of global freight rates, amounting to around 5 per cent of global trade overall. More than 90 per cent of the world's freight is still transported by sea. The law of shipping remains as interesting as the sector itself and the contributions to this book reflect that.

Last year, a key issue within the shipping industry was environmental regulation, which is becoming ever more stringent. As from January 2015, the limit for sulphur content had fallen to 0.1 per cent (down from 1.0 per cent previously). Tier II limits on nitrogen oxides emissions have been in place globally since 2011. Tier III, which represents a significantly more stringent regime than Tier II limits, is being implemented in emissions control areas from 2016. Furthermore, also from 2016, the United States Clean Air Act is introducing a target of an 80 per cent reduction in nitrogen oxides emissions from vessels by 2030.

The International Maritime Organisation (IMO) has so far not introduced similar limits on the emission of greenhouse gases, such as carbon dioxide, although it is generally perceived that the IMO is in the future likely to further regulate global carbon dioxide emissions from vessels. Outside of the IMO, the EU and individual countries are focusing on greenhouse gas reduction policies. In particular, the European Commission's current proposal is that, from 2018, vessels calling at ports in the EU should be expected to monitor, report and verify carbon dioxide emissions. The strategy is intended to evolve into carbon dioxide reduction targets and market-based measures in the longer term, in line with the EU's approach to land-based greenhouse gas emissions.

Another challenge facing the shipping industry relates to the handling of ever-larger casualties. The most recent high-profile container ship casualties, such as the MSC Napoli or the Rena, involved relatively small vessels with a maximum capacity of up to 4,688 containers; however, the latest mega-containerships can carry up to 15,000 containers. It is likely that at some stage there will be a casualty involving one of these new larger vessels and this may prove a major test for the industry. It has been suggested that the current salvage industry may find it difficult to deal with the scale of any wreckage. The regulatory environment is becoming increasingly stringent, with far stricter controls on both clean-up and wreck removal, which will also make handling any mega-container ship casualty more challenging. The London underwriting community has responded to concerns about the general average implications by evolving a new insurance product, which, it is suggested, could replace the traditional approach to general average for large container ships. It remains to be seen whether this will be accepted by the market.

Piracy remains a considerable issue for the shipping industry worldwide. There has been a decline in the number of incidents off Somalia since the peak in 2010/11, but an increase in West Africa and (to an extent) elsewhere. Although the use of armed guards and increased naval policing in recent years have undoubtedly contributed to the decline, challenges remain and the shipping industry must continue to be alive to the threat.

We would like to thank all the contributors for their assistance with producing this edition of *The Shipping Law Review*. We hope that this volume will provide a useful source of information for those in the industry handling cross-jurisdictional shipping disputes.

James Gosling and Tessa Jones Huzarski

Holman Fenwick Willan LLP

London

June 2015

Chapter 1

COMPETITION AND REGULATORY LAW

*Anthony Woolich and Daniel Martin*¹

I INTRODUCTION

Parties' freedom to contract may be restricted by a number of factors, the most significant of which for the maritime sector are likely to be regulatory controls relating to competition law, anti-bribery legislation and international trade sanctions. The first two categories of restrictions are considered below and the third is considered in the next chapter.

II COMPETITION LAW

Historically, the global shipping industry has been exempt from many of the requirements of competition law; however, recent developments within the EU, especially the repeal of the block exemption for liner conferences in October 2008,² and the lapsing of the industry-specific guidance on anticompetitive practices,³ have made an awareness of competition law a priority within the industry. Given that EU competition law, administered by the European Commission (the Commission) places the most stringent competition restrictions on the shipping industry of any jurisdiction, this section will focus on EU law.

There are three 'pillars' of EU competition law, which replicate the three main concerns of competition law worldwide. These are:

- a* the prohibition of anticompetitive agreements (especially cartels between competitors);
- b* the prohibition of abusing a dominant market position; and
- c* the merger control regime.

1 Anthony Woolich and Daniel Martin are partners at Holman Fenwick Willan LLP.

2 http://europa.eu/rapid/press-release_IP-13-122_en.htm.

3 Ibid.

The Commission has wide powers to investigate breaches of competition law, including the right to search premises and interview personnel. It may also impose fines of up to 10 per cent of worldwide annual turnover on companies for the breach of a prohibition; for these reasons compliance is important.

i The prohibition of anticompetitive practices between competitors

This prohibition appears at Article 101(1) of the Treaty on the Functioning of the European Union (TFEU). It applies to all agreements, decisions and concerted practices between companies that may affect trade between EU Member States, and that have the object or effect of negatively affecting competition within the EU's internal market. It potentially applies both to anticompetitive practices between direct competitors (horizontal agreements, for example, through a liner consortium) and companies at different levels of the supply chain (vertical agreements, for example, between a liner company and a shipper). Examples of anticompetitive practices include price fixing, an agreement to divide markets or customers or an agreement to place limits on production. Any agreement that contravenes the prohibition will be automatically void and unenforceable,⁴ subject to the possibility of being able to sever non-infringing aspects of the agreement. In addition, the parties may be subject to heavy fines (up to 10 per cent of group worldwide turnover) and third parties who can show loss may sue for damages. Some practices may also be criminal offences.

The anticompetitive practices must have the object or effect of preventing, restricting or distorting competition within a particular market. Hard-core cartels, including agreements for the exchange of information on prices, will be deemed as having the object of restricting competition. When assessing the relevant market both the relevant product market (RPM) and relevant geographical market (RGM) should be identified. The key consideration when analysing the applicable market will be substitutability: would a consumer of goods or services buy different ones for the same needs if the goods or services they currently bought became a little more expensive?

Industry-specific advice on markets was set out in the Maritime Transport Guidelines (MTG).⁵ While no longer in operation, the definition of the relevant market in the MTG is still likely to be instructive, as it reflects previous European jurisprudence. Containerised liner shipping services will probably be the RPM for liner shipping services,⁶ however, when goods must be carried in a certain way; for instance, perishables in a reefer container, the RPM may be limited to transportation in that manner.⁷ The MTG identified two RGMs in relation to liner transport – northern Europe and the Mediterranean – in line with industry practice.⁸ For tramp services, the definitions of the RPM and RGM will be less clear-cut, but may be analysed according to industry practice and the principle of substitutability. For instance, the RPM for the carriage of liquefied natural gas (LNG) will involve LNG charter services, as LNG cannot be transported by sea otherwise, and the RGM for ships with a large draft will be limited to the ports at which they are able to call.

4 Article 101(2) of the TFEU.

5 OJ 2008 C245.

6 *Ibid.*, paragraph 18.

7 *Ibid.*, paragraph 19.

8 *Ibid.*, paragraph 20.

It is not necessary to find written evidence of anticompetitive practices for a determination that a contravention of Article 101 has occurred; consistent market behaviour between companies may be enough to evidence a breach of Article 101. For example, a number of liner companies have recently come under investigation for price signalling, which the Commission suspected could have been a covert method of fixing prices between competitors.⁹

Article 101(3) of the TFEU accepts, however, that some practices that appear on their face to be anticompetitive, and therefore a breach of Article 101(1), are good for competition if they allow greater efficiency and technical progress to be made, providing customers will be able to benefit from these improvements to a fair extent; for example, through lower prices or more regular services, and any restrictions are indispensable to achieve the benefits, while not eliminating competition. Due to the large economies of scale that exist within the liner shipping industry, a special Block Exemption Regulation (BER)¹⁰ applies to liner shipping consortia, which allows them to pool resources and certain information, allowing for greater efficiency. The BER does not, as its name might suggest, exclude shipping consortia from the scope of Article 101 – rather, it details what types of agreements shipping consortia may make that will satisfy the Article 101(3) exemption criteria. It allows practices such as the joint operation of port facilities, fixing timetables and calling points, and obliging members of the consortium only to charter space on vessels owned by the consortium in certain circumstances. However, ‘hard-core restrictions’ such as price fixing, market allocation, or capacity limitation that is not in line with market demand are still prohibited. Additionally, the BER is only available to consortia whose members have a share of 30 per cent or less of the market,¹¹ and that do not impose penalties on members that wish to withdraw from the consortium.

The Commission has extended the application of the BER until April 2020. The Commission did not object to the creation of the proposed P3 container shipping alliance between Maersk, CMA CGM and MSC. Similarly, the Commission has not objected to the creation of the vessel-sharing alliances between the G6 (NYK, OOCL, NOL/APL, Hapag-Lloyd, Hyundai Merchant Marine and MOL), Ocean 3 (CMA CGM, UASC, CSCL) and CKYHE (Cosco, K-Line, Yang Ming, Hanjin and Evergreen). Although the US Federal Maritime Commission approved these alliances, in 2014 the Chinese Ministry of Commerce regarded the proposed P3 alliance as a merger and prohibited it under Chinese merger control rules. In contrast, while there have been proposals, such as the US Shipping Act of 2010, to reduce the liner market’s immunity from US competition rules it appears unlikely that any significant reforms will be enacted in the near future.

9 http://europa.eu/rapid/press-release_IP-13-1144_en.htm and IP-16-317.

10 Commission Regulation (EC) 906/2009 OJ L256/31 28 September 2009.

11 Calculated by reference to the total volume of goods carried in freight tonnes or 20-foot equivalent units. Article 5(1) of Commission Regulation (EC) 906/2009 OJ L256/31, 28 September 2009.

ii Abuse of a dominant market position

This prohibition, which appears in Article 102 of the TFEU, is aimed at outlawing unilateral behaviour by a company holding a dominant position in a market that has anticompetitive effects. Examples of such behaviour include predatory pricing, applying dissimilar conditions to equivalent transactions with other parties, or ‘bundling’ of products.

Where a company (including a group of companies) holds a stable share of 50 per cent or more of a relevant market, there is a rebuttable presumption that it holds a dominant position,¹² although a market share of 39.7 per cent has been found to constitute a dominant market position.¹³

A particular concern for the shipping industry is that Article 102 applies to collective abuse of a dominant market position as well as such abuse by an individual company. While this would seem to replicate the position under Article 101, EU jurisprudence has stressed that the two Articles address different situations.¹⁴ In *TACA*,¹⁵ a case involving a liner conference, the EU courts found that the level of integration between companies in a liner conference was such that the conference was able to act as an independent single entity on the market. Liner consortia with large market shares should be aware of the risks of potentially infringing both Article 101 and Article 102.

iii Merger control

Many states in the world have some form of merger control procedure whereby government agencies may review the potential effects on competition of a merger or acquisition within that state and, if necessary, prohibit mergers that have the potential to significantly reduce competition within a market.

The EU Regulation, which operates in addition to, and potentially to the exclusion of, the individual merger control regimes of EU Member States, will apply where two or more previously independent companies merge, where a company acquires control of a whole or part of another company on a lasting basis, or where a ‘full-function’ joint venture is formed. A full-function joint venture is defined as one that has resources to act as an autonomous market player, is not set up as temporary, and has functional autonomy from its parent companies. The Regulation will only apply to mergers involving companies with turnovers that exceed certain global and EU-wide thresholds, and have a significant amount of business in more than one EU Member State.

Mergers that meet the thresholds should be notified to the Commission before implementation, as the EU has the power to fine the parties up to 10 per cent of their aggregate worldwide turnover if they do not do so. Parties should be aware that merger clearance can be an expensive and lengthy procedure. Further information on the EU merger control process, including the current turnover thresholds, may be found at <http://ec.europa.eu/competition/mergers/legislation/legislation.html>.

On 29 April 2016, the European Commission announced that it had decided, in accordance with Article 6(2) of the EU Merger Regulation, to grant conditional approval to

12 Case C-62/86 *AKZO v. Commission* [1991] ECR I-3359, [1993] 5 CMLR 215.

13 *Virgin/British Airways OJ* [2000] L 30/1.

14 Case T-51/89 *Tetra Pak v. Commission* [1990] ECR II-309, [1991] 4 CMLR 334.

15 Case T-191/98 *Atlantic Container Line v. Commission (TACA)* 2003 ECR II-3275, [2005] 4 CMLR 1283.

the acquisition of Neptune Oriental Lines (NOL) by CMA CGM. The transaction would lead to the combination of two competitors in the container liner shipping business. CMA CGM and NOL offer their services on many trade routes mainly through consortia, and as part of alliances of consortia. CMA CGM is a member of the Ocean Three Alliance and NOL a member of the G6 Alliance. The Commission found that the merger would have created new links between previously unconnected consortia in these two alliances, and had concerns that these potential new links would have resulted in anticompetitive effects on two trade routes between Northern Europe and North America and between Northern Europe and the Middle East.

To address these concerns, the parties offered to make the transaction contingent upon the removal of the link that would have been created between CMA CGM's Ocean 3 Alliance and NOL's G6 Alliance. NOL will exit from the G6 Alliance on 31 March 2017.

The United States has a complex merger control regime administered by the Federal Trade Commission and the Department of Justice's antitrust division. It will also be applicable to joint ventures in certain situations. Parties should pre-notify a merger in the United States if they meet the applicable thresholds using the procedure set out in the Hart-Scott-Rodino Antitrust Improvements Act.

When considering any merger or joint venture the parties should analyse in which jurisdictions they may need competition approval.

III ANTI-BRIBERY CONTROLS

Recent years have seen a substantial increase in international cooperation and harmonisation to combat bribery and corruption. These have been largely led by the efforts of two organisations, the OECD,¹⁶ whose Anti-Bribery Convention has now been adopted by the 34 OECD Member States¹⁷ and seven non-member countries,¹⁸ and Transparency International, which publishes the hugely influential annual Corruption Perceptions Index (a survey that in 2015 rated perception of public sector corruption in 168 countries and territories).

The global efforts of these organisations are supported by national bodies and also by industry groups, such as the Extractive Industries Transparency Initiative and, in the marine sector, the Maritime Anti-Corruption Network.

Enforcement is handled by national authorities such as the Serious Fraud Office (SFO) in the UK and the Department of Justice (DoJ) in the United States.

i OECD Anti-Bribery Convention

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (commonly known as the OECD Anti-Bribery Convention) (the Convention) was signed in 1997 and came into force in February 1999.

16 Organisation for Economic Co-operation and Development.

17 Australia, Austria, Belgium, Canada, Chile, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.

18 Argentina, Brazil, Bulgaria, Colombia, Latvia, Russia and South Africa.

The countries which have signed up to the Convention must adopt national legislation that makes it a criminal offence for the individuals and companies that are subject to their jurisdiction to pay a foreign public official to act improperly. Convention parties must also impose and enforce effective, proportionate and dissuasive criminal penalties for bribing foreign officials.

As well as the commitment to adopt national laws, the Convention parties have agreed to offer each other mutual legal assistance in identifying and investigating allegations of bribery, and also to cooperate in monitoring and reviewing the implementation of the Convention into national law (see Section III, vii *infra*).

ii Legislation in the UK and the US

Two pieces of legislation have arguably had the greatest impact in terms of raising the profile of anti-corruption efforts and changing industry practices.

The US Foreign Corrupt Practices Act (FCPA) was the trail-blazing legislation, enacted in 1977 and making it unlawful for US persons and entities to make payments to foreign government officials to assist in obtaining or retaining business.

The UK Bribery Act (UKBA) was passed on 8 April 2010, following criticism of the UK legislation by the OECD, and entered into force on 1 July 2011. The UKBA had two main objectives: to codify and consolidate existing UK legislation and to create a new offence, directed at commercial organisations that fail to prevent bribery being carried out by their agents. As a result, it is now a criminal offence to pay a bribe,¹⁹ to receive a bribe,²⁰ or to bribe a foreign public official.²¹ It is also an offence for a company to fail to prevent others paying a bribe on its behalf²² and this is considered in more detail in Section III, iv *infra*.

iii Comparison between the FCPA and UKBA

The UKBA goes further than the FCPA in a number of key respects. In particular, while the FCPA criminalises only bribery of foreign public officials, the UKBA outlaws private (i.e., business-to-business) bribery. The UKBA criminalises not only the person paying the bribe (who would be caught by the FCPA) but also the person receiving the bribe (who would not be caught by the FCPA).

The other differences that are highly relevant in the maritime sector are the treatment of facilitation payments (granted an exemption under the FCPA but prohibited under the UKBA) and failure to prevent bribery (an offence under only the UKBA).

iv Facilitation payments and failure to prevent bribery

Facilitation payments are typically small, unofficial payments (sometimes called ‘grease payments’) made to secure or expedite a routine or necessary government action by a government official. In the maritime context, these might include gifts of cartons of cigarettes to pilots, cash given to inspectors to issue a certificate that holds are clean, and payments to

19 Section 1 of the UKBA.

20 Section 2 of the UKBA.

21 Section 6 of the UKBA.

22 Section 7 of the UKBA

officials to ensure that ships are called to berth in sequence, rather than being sent to the back of the queue. The UK authorities have repeatedly stressed that facilitation payments are bribes and are therefore illegal.

The corporate offence of failure to prevent bribery²³ is a new offence, created by the UKBA. In essence, a company (A) will have strict liability where a person (B) associated with A bribes another person (C) intending to obtain or retain business or an advantage in the conduct of business for A. There is a defence under which A can show that it had in place adequate procedures designed to prevent persons associated with it from paying bribes.

In assessing whether procedures are 'adequate', the courts will have regard to six guiding principles:

- a* proportionate procedures;
- b* top-level commitment;
- c* risk assessment;
- d* due diligence;
- e* communication (including training); and
- f* monitoring and review.

v Compliance with the UKBA

Businesses that are subject to the UKBA need to carry out a risk assessment to determine the locations, business partners and transactions that give rise to a corruption risk, and then implement policies and procedures to mitigate those risks.

Those procedures are likely to involve, as a minimum, due diligence on counterparties and agents together with staff training and the adoption of suitable contract terms.

vi OECD Monitoring

One of the key provisions of the OECD Anti-Bribery Convention is the agreement by the Convention parties to cooperate in monitoring and reviewing the implementation of the Convention into national law. This has led to a peer-monitoring programme by which OECD Member States will look at each other's national legislation and enforcement activities, in essence to check that all nations are doing their utmost to fight bribery and create a level playing field.

On 16 March 2016 the OECD published a Ministerial Declaration formally announcing the fourth phase of country evaluations (an earlier phase of country evaluations was a key driver in the adoption of the UKBA). This fourth phase will focus on national enforcement and this may indicate that the OECD considers that, while national anti-bribery legislation is broadly in place, not enough is being done by Convention countries to enforce it.

vii UK enforcement

Since the UKBA was enacted, we have only seen a relatively small number of prosecutions under the UKBA (and under older legislation for offences committed before the UKBA came into effect).

23 Section 7 of the UKBA.

In December 2014 the UK Serious Fraud Office reported on successful prosecutions of two individuals under the UKBA²⁴ and one corporate under older legislation.²⁵ At the end of 2015 we saw the first court-approved deferred prosecution agreement (DPA) and in the first quarter of 2016 two corporates, Smith & Ouzman Ltd and Sweett Group plc (which is the first company to have been convicted under Section 7 of the UKBA), were sentenced.

These enforcement actions do not provide the detailed judicial precedent on the precise scope of application of Section 7 of the UKBA which practitioners and others have been looking for, but they do at least demonstrate that the UKBA has ‘teeth’.

Standard Bank plc agreed a DPA in respect of an indictment alleging failure to prevent bribery (i.e., a breach of Section 7 of the UKBA) and this was approved by the Crown Court on 30 November 2015.²⁶ The charge (which has been suspended pursuant to the DPA) related to a US\$6 million payment by a former sister company (Stanbic Bank Tanzania) to a partner in Tanzania that the SFO alleged was intended to induce local politicians to show favour to Stanbic Bank Tanzania and Standard Bank’s proposal for a US\$600 million private placement to be carried out on behalf of the government of Tanzania. Under the DPA Standard Bank plc agreed to pay a US\$16.8 million financial penalty, a US\$8.4 million disgorgement of profits, a further US\$7 million in compensation and the SFO’s costs.

Smith & Ouzman Ltd was sentenced in January 2016²⁷ for conduct that took place between November 2006 and December 2010 (i.e., before the UKBA came into effect). A confiscation order of almost £900,000 was made against the company, representing the gross benefit that accrued to the company as a result of the bribes that were paid to public officials in Kenya and Mauritania to secure contracts for the provision of ballot papers for elections.

In addition, the company was fined a little over £1.3 million. The fine was calculated in accordance with the UK’s Definitive Guidelines on Sentencing for Fraud, Bribery and Money Laundering. These guidelines provide that the fine should be calculated by multiplying the gross profits for the contracts obtained by bribing the foreign official by a multiplier (ranging from 20 to 400 per cent depending on the facts).

In the case of *Smith & Ouzman*,²⁸ which fought and lost the case, the multiplier was 300 per cent, reflecting the high degree of culpability on the part of the company, which used its dominant market position to bribe foreign public officials for substantial gain over a sustained period.

Sweett Group plc was sentenced in March 2016, having pleaded guilty in the Magistrates’ Court. A subsidiary of Sweett Group plc in the United Arab Emirates had paid bribes to secure a contract to provide project management and cost consultancy services on a hotel construction project.

24 SFO, ‘City directors sentenced to 28 years in total for £23m green biofuel fraud’, www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/city-directors-sentenced-to-28-years-in-total-for-23m-green-biofuel-fraud.aspx.

25 SFO, ‘UK printing company and two men found guilty in corruption trial’, www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/uk-printing-company-and-two-men-found-guilty-in-corruption-trial.aspx.

26 SFO, Case Information > Standard Bank plc <https://www.sfo.gov.uk/cases/standard-bank-plc/>

27 SFO, Case Information > Smith and Ouzman Ltd <https://www.sfo.gov.uk/cases/smith-ouzman-ltd/>.

28 SFO, Case Information > <https://www.sfo.gov.uk/cases/sweett-group/>.

A confiscation order of more than £850,000 was made (representing the gross profit deriving from the corrupt contract). Sweett Group plc was also fined £1.4 million, calculated by taking the gross profits for the contracts, multiplying them by 250 per cent to reflect Sweett's culpability and then applying a one-third discount for the early plea in the Magistrates' Court.

Chapter 2

MARINE INSURANCE

*Jonathan Bruce and Alex Kemp*¹

I INTRODUCTION

Marine insurance was surely one of the first insurances contemplated by merchants when international trade first began. As a hub for international trade across the globe since the 1600s, England has a long and distinguished history as a centre for insurance excellence. Since that time, various new classes of insurance have arisen, but marine insurance, from an English law perspective, still maintains its pre-eminence and historical importance in giving us many of the principles that guide insurance law today.

While the beginnings of a marine insurance market in London can be traced back to the late 1600s, it was not until the 1720s that the institution of Lloyd's became a significant influence on the insurance market as we would recognise it today. Synonymous with insurance of all classes, the Lloyd's brand has permeated every corner of the globe. When considering the role that Lloyd's plays in the global marine insurance market, it is important to remember that Lloyd's itself is not a company: it is a market in which members join together as syndicates to insure risk.²

Lloyd's can then be considered as consisting of two parts: the market (which in 2015 was home to 62 managing agents and 94 syndicates) and the Corporation of Lloyd's. The Lloyd's market effectively provides a place at which underwriters (acting together in syndicates) can sell their insurance products to those wishing to buy them. It is a very dynamic and commercial environment whereby those looking for insurance are able to talk directly to the decision makers at each syndicate, and negotiate with them as to the premium that will be paid for the risk in question. Competing quotes can easily be obtained from competing syndicates by crossing the floor and talking to another underwriter.

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2 www.lloyds.com.

Those looking to place risk at the Lloyd's market need to do so via a broker. The broker acts as the customer's agent and is the main source for much of the business placed in the Lloyd's market. The broker has experience dealing with a multitude of different underwriters and can use that experience to place a client's risk at an underwriter best suited to write it, and on the best terms. They play an integral part in the way in which the Lloyd's market provides a competitive environment for the placing of risk. The Corporation of Lloyd's provides support to the Lloyd's market by regulating and maintaining standards of those who operate within it.

However, the marine insurance market in London does not stop with Lloyd's. There are many corporate underwriters who do not necessarily write their risk through the Lloyd's market. These are stand-alone companies that will write risk either with other companies or in conjunction with Lloyd's syndicates.

Lloyd's syndicates and company insurers can group together to write particular 'lines' on an insurance policy. By this, it is meant that a variety of insurers and syndicates can each agree to underwrite a proportion of the risk being insured in return for a proportion of the premium. Those insurers who have subscribed to the policy will then agree between them who will lead the policy in terms of claims management.

Given the extensive history of the English marine insurance market, there is a long history of marine insurance case law dating back several hundred years. While England is still a common law legal system (i.e., the law is applied and developed by the courts via a binding system of precedent), the law of marine insurance was codified in 1906 by the Marine Insurance Act. The Marine Insurance Act lays out many basic principles of not only marine insurance but of insurance law in general. It has substantial influence internationally and has been adopted in several Commonwealth Member States. This does not mean that there is no good reason to consider case law dating from before 1906 – some case law before this time allows the identification of the principles behind the Act or deals with elements that have not yet been codified. Since 1906, case law has continued to arise from the Act and other issues of relevance, and the highly experienced Commercial Court in London continues to issue judgments on marine insurance.

The English marine insurance market has also been an international leader in producing standard form terms for the provision of marine insurance. The International Underwriting Association (previously the Institute of London Underwriters) has been instrumental in producing terms and conditions for many different types of marine insurance; the most famous of these are the Institute Time and Voyage Clauses, which are in wide usage around the world. The most popular iteration of the Institute Time Clauses is the 1983 revision (they were subsequently revised in 1995). The Institute Time Clauses are used around the world in many jurisdictions, regardless of the domicile of the underwriters. Crucially, the Institute Time Clauses apply English law and jurisdiction.

The Institute Time Clauses included precedent wordings for several different classes of marine insurance. The most common form of marine insurance placed in the London market is hull and machinery insurance. The Institute Time Clauses – Hulls 1983 (the 1983 Clauses) adopt a named perils approach that is usual under English law (though we note that Institute Cargo Clauses A (but not B and C) do operate an 'all-risks' approach). The perils that are covered by the policy are listed in Clause 6 and are broadly split into two categories: the first allows recovery simply where the loss is caused by one of the specified insured perils, and the second limits recovery where the loss is caused by a specified peril and where the loss or damage has not resulted from want of due diligence by the assured, owners or managers. This latter aspect is known as the '*Inchmaree*' Clause and was included in the 1983 Clauses

as a result of a judgment in a case of the same name.³ The Clause seeks to widen the cover to include risks that are not caused by a peril of the sea. The 1983 Clauses then seek to subject the enumerated cover to various exclusions, in Clauses 8, 23, 24, 25 and 26. The 1995 revision to the Institute Time Clauses – Hulls introduced a widening of the ‘Inchmaree’ Clause such that the want of due diligence was extended to cover acts by the ‘Superintendents or any of their onshore management’, as well as the assured, owners or managers.

The position under the Institute War and Strikes Clause (Hulls-Time) is designed so that it interacts with that under the 1983 Clauses. They widen the enumerated perils at Clause 6 of the 1983 Clauses to include the war perils and amend the exceptions in the 1983 Clauses so that they now exclude the same. This still does not result in an all-risks policy, but one with named perils.

An assured may also wish to take out insurance for other potential losses that it may suffer. The Institute Time Clauses – Hulls, Disbursements and Increased Value 1983 provide cover for an insured party in the event that its hull and machinery insurance does not adequately compensate for the loss of a vessel at market rates in the event of a total loss.

As matters stand an assured would not usually be indemnified by his insurer for any loss of hire or freight that he suffers as a result of an insured loss. On large modern vessels, such losses can be extensive and bespoke loss of hire insurance is often attractive.

Finally, a recent phenomenon has been the uptake in kidnap and ransom insurance in response to incidents of piracy. Such policies pay out the costs of securing a vessel’s release from detention by pirates in priority to any claims being made on other policies.

II CLAIMS

A marine insurance policy will start by an assured instructing its broker to secure cover for a particular class of risk. It may be that there are several brokers in the chain. A local broker in a jurisdiction where the assured is based may need to refer the work to a London broker for placement at Lloyd’s. It should always be recalled that the broker is the agent of the assured to whom he or she owes both contractual and fiduciary duties under English law.

When the broker is first approached by the client, he or she will need to consider the precise insurance needs of that client before approaching insurers either in the Lloyd’s market or the companies market to ascertain upon what price, terms and conditions that cover can be procured. In weighing up a choice between competing insurers, the broker will consider their claims-handling expertise and who the ‘following’ subscribers to the policy will be. Once the broker has identified the best compromise between price, terms, and expertise of underwriters, he or she will confirm the policy in writing to the assured.

Brokers are crucial cogs in the wheel of a marine insurance policy, both in terms of placing the risk and managing claims. It is likely that a broker will have the closest relationship with the assured and will be the assured’s first point of contact should a claim ever arise. He or she will be able to provide immediate advice in the event of a claim, and guide the assured on the best way to present that claim to the insurers. He or she will provide reassurance to insured parties that their claims are being managed correctly and will also ensure that underwriters receive all the information they need to pay any claims. This is where the Lloyd’s

3 *Thames & Mersey Mar Ins Co Ltd v. Hamilton, Fraser & Co (The ‘Inchmaree’)* (1887) 12 App Cas 484.

Market comes into its own, and the face-to-face interaction between the decision makers at the insurer and the brokers can be hugely important. This personal interaction is a feature unique to the Lloyd's Market.

In the event of a serious marine casualty, the broker's role can become even more important. He or she can provide the assured with assistance in appointing experts, appointing suitable lawyers, and even possibly dealing with issues of security for claims that may be brought against the owners. An owner is unlikely to have had a large number of casualties and therefore the broker's experience can prove very useful.

Problems can arise with issues of coverage, such as when an assured tries to recover certain losses under its policy that are refused by the underwriters on the basis that they are not claims for which they have agreed to indemnify the assured. The broker will work hard to try and avoid these scenarios ever arising, but unfortunately, they do occasionally happen. If such coverage disputes do arise, the broker has to recall his or her role as the agent of the assured and will provide support to the owner in pursuing the insurers for the claim.

III KEY LEGAL PRINCIPLES OF ENGLISH MARINE INSURANCE

i Utmost duty of good faith

The concept of the utmost duty of good faith is one that pervades English marine insurance law. The general principle is laid out in Section 17 of the Marine Insurance Act 1906, which provides that: 'A contract of marine insurance is a contract based upon utmost good faith and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.' This is a reciprocal obligation but is often less relevant to the insurer than the assured.

Section 18(1) goes on to provide that:

Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance known to the assured, and the assured is deemed to know every circumstance, which in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

This places a positive duty on the assured to disclose information to the insurer prior to the contract being concluded. This is a reflection of the asymmetry of information between the insurer and the would-be assured; however, under Section 18(3) the following matters need not be disclosed:

- a* any circumstance that diminishes the risk;
- b* any circumstance that is known or presumed to be known to the insurer;⁴
- c* any circumstance in which information is waived by the insurer; and
- d* any circumstance that it is superfluous to disclose by reason of express or implied warranty.

When an assured does make a representation to its insurer the information provided must comply with Section 20 of the Marine Insurance Act. This provides that any material

⁴ The insurer is presumed to know matters of common notoriety and knowledge, and matters that an insurer in the ordinary course of its business, as such, ought to know.

representation made by the assured or its agent to the insurer during negotiations for the contract, and before the contract is concluded, must be true. If it is untrue the insurer may avoid the contract. This has the same practical effect as rescinding the contract (i.e., the aggrieved party can nullify the contract so everything done is liable to be undone, so no losses are paid by the insurer and the premium is returned to the assured). A representation is material when it would influence the judgment of a prudent insurer in fixing the premium, or determining whether it will take the risk.

Misrepresentation must involve a statement of fact but may also include opinion if it is made by someone who holds out expertise in the matter. This representation must be false and it must have induced the resulting transaction. Misrepresentation during a negotiation process can result in rescission (the unwinding of the contract), regardless of whether it is fraudulent, or negligent or innocent misrepresentation.

Non-disclosure is essentially a lack of good faith through inaction and applies before the contract comes into effect. Failure to disclose a material circumstance known to the assured allows the insurer to avoid the policy.

ii Warranties

When coupled with the principle of utmost good faith, warranties are onerous obligations on the assured of a marine insurance policy. Section 33 of the Marine Insurance Act 1906 states that a warranty means a promissory warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negates the existence of a particular state of facts.

Under Section 34 it is no defence that a warranty that has not been complied with is subsequently remedied before the loss in question has occurred.

In the event that a warranty is not complied with the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred before that date.⁵ The effect of Section 33(3) is strict and applies irrespective of whether the breach of the warranty in question was the cause of the loss being claimed.⁶

While the parties are free to narrow the scope and application of warranties by amending the wording in the policy, in the absence of such steps having been taken the insurer is entitled to construe warranties strictly. If the insurer wishes to allege breach of a warranty, the burden is on the insurer to demonstrate that the warranty has in fact been breached.⁷

The Marine Insurance Act 1906 implies warranties into policies. The most important of these warranties are to be found in Section 39, which states that in a voyage policy there is an implied warranty that at the commencement of the voyage the ship should be seaworthy for the purpose of the particular adventure. This can be contrasted with the position under a time policy (which the majority of modern insurance policies are), which is outlined in Section 39(5). In a time policy there is no implied warranty that the ship should be seaworthy at any stage; however, if, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness. It should be noted

5 See Section 33(3) of the Marine Insurance Act 1906.

6 *De Hahn v. Hartley* (1786) 1 Term Rep 343 99 ER 1130; the Insurance Conduct of Business rules do provide special exceptions for consumer insurance.

7 *Bond Air Services v. Hill* [1955] 2 QB 417.

that Section 39(5) is not a warranty but acts as a defence for the insurer if it can be proven. As such, if the proximate cause of the loss is found to be any of the specified perils in the policy, it is arguable that the Section 39(5) defence cannot arise.⁸

On first review, Section 39(5) seems to be a very useful warranty for insurers to rely upon. The difficulty, however, from an insurer's point of view, is demonstrating that the assured did in fact have knowledge of the vessel's lack of seaworthiness and that the loss in question was attributable to that deficiency. As far as we are aware, there have been no cases in which the defence has been successfully invoked in the past 100 years.

iii Constructive total loss and notice of abandonment

English law has often been a source of confusion in respect of its provisions for losses that can be considered total. Section 56 of the Marine Insurance Act 1906 states that a loss may either be partial or total. Where there is a total loss, it may be either actual or constructive. The Marine Insurance Act 1906 then goes on to define both types of total loss:

Section 57(1): Where the subject matter is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.

Section 60(1): Subject to any express provision in the policy, there is a constructive total loss where the subject matter is reasonably abandoned on account of its total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

In essence, if the subject of the contract description is no longer available to the assured, there is an actual total loss, whereas if this is not the case, but avoidance of total loss appears impossible or is only achievable by expense exceeding the subject's value, then there is a constructive total loss.⁹

In the event that the assured wishes to claim for a constructive total loss (but not an actual total loss) it must give notice of abandonment to its insurer whereby it abandons all interest in whatever is left of the insured subject to payment for a constructive total loss. In the event that the assured does not accede to such abandonment, its claim may be treated as a partial loss rather than a total loss, which may result in a considerably lower payment.¹⁰

There is no particular form of words that must be used for a notice of abandonment, although standard practice has arisen via brokers. Section 62(2) of the Marine Insurance Act 1906 simply states that:

Notice of abandonment may be given in writing, or by word of mouth, or partly in writing and partly by word of mouth, and may be given in any terms which indicate the intention of the assured to abandon his insured interest in the subject-matter insured unconditionally to the insurer.

8 *Versloot Dredging v. HDI-Gerling, The 'DC Merwestone'* [2013] 2 Lloyd's 131.

9 Rose, *Marine Insurance Law and Practice* (Second Edition, 2012, Informa, London) p. 447.

10 Section 62 of the Marine Insurance Act 1906.

It is standard practice for insurers to reject such notices of abandonment as they tend to have little interest in owning, running and managing ships. Instead, the insurer will agree with the assured to treat them as though they had issued proceedings in the applicable jurisdiction as at the date of the notice of abandonment.¹¹

What is important from an owner's perspective is that once the notice of abandonment has been issued and regardless of whether it has been rejected, it must not do anything that is inconsistent with the intention to continually and unconditionally abandon the insured property to the insurers. Therefore, for example, it is arguable that continuing to crew, manage, commercially operate a vessel or indeed selling a vessel¹² could be taken as contrary to the intention to abandon, and thus relegate the assured to claiming for a partial loss rather than a constructive total loss. One way around this may be for the insurer and assured to enter into a temporary agreement with each other whereby the assured continues to operate the vessel to the benefit and order of the insurers and without prejudice to its right to claim for a constructive total loss.

IV CURRENT ISSUES

In January 2006 the Law Commission and the Scottish Law Commission conducted a joint review of insurance contract law. They issued a scoping paper inviting views on which areas of insurance contract law were in need of reform. As a result of the consultations, the Consumer Insurance (Disclosure and Representations) Bill was introduced into the House of Lords under the Special Bills procedure in May 2011. The Bill received Royal Assent on 8 March 2012, and came into force on 6 April 2013. At that time, the intention of the Law Commission was to draft a second Bill to cover disclosure and misrepresentation in non-consumer insurance contracts, the law of warranties, damages for late payment of claims and insurers' remedies in the event of fraud. This Bill received Royal Assent on 12 February 2015 as the Insurance Act 2015. The Act will come into force on 12 August 2016.

The provisions of the Insurance Act 2015 reflect the feeling that the law of marine insurance does not always mesh with the practice in other classes of business, and that modernisation of the laws would bring UK practice into line with other jurisdictions. Of most interest are the changes in the areas of disclosure, misrepresentation and warranties.

The Act has the effect of diluting the duty of utmost good faith so that an assured only needs to volunteer a 'fair presentation of the risk' before the contract is entered into. This will replace the duties regarding disclosure and representations that are contained in Sections 18, 19 and 20 of the Marine Insurance Act 1906 and will introduce new legal and factual tests for determining the attribution of knowledge for the purposes of the duty of fair presentation. There is now an alternative way for the assured to satisfy that duty, which is to provide sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing material circumstances. In practice this will mean that the obligation will be on the insurer to ask any further questions it wishes to see answers to before accepting the risk. The hope is that such changes will be more proportionate than the current regime as described above, which allows the insurer to avoid the policy in

11 There have been recent variations to this wording used by certain underwriters that may or may not have the same effect.

12 *Dornoch Ltd v. Westminster International BV* [2009] EWHC 889.

its entirety in the event of a material non-disclosure. Instead, the insurer will be permitted to reduce claims proportionately where the assured's non-disclosure or misrepresentation was not deliberate or reckless.

The Act similarly has the effect of moderating warranties. It repeals the second sentence of Section 33(3) and all of Section 34 of the Marine Insurance Act 1906 which conclusively discharge an insurer's liability following a breach of warranty. Instead, a breach of a warranty will suspend an insurer's liability from the time of the breach until the breach is remedied. Again, it is felt by the Law Commission that the current practice of allowing the insurer to be discharged from liability as from the date of the breach is a disproportionate remedy in circumstances, where, for example, the breach of warranty may not have caused the loss in question.

The Insurance Act 2015 will also change the law regarding fraudulent claims. The Act improves the position for assureds. It removes avoidance as a remedy by repealing Section 17 of the Marine Insurance Act 1906, and now states if a fraudulent claim is made the insurer is not liable for it, and the assured can then terminate the contract and refuse liability for any subsequent claim but it will not affect any previous claims, regardless of whether they have been paid. However, it deliberately does not deal with the definition of a fraudulent claim, nor refer at all to fraudulent devices, as the Law Commission did not consider its definition was clear cut, and that it should be determined by the courts.

Fraudulent devices, used in connection with presentation of an insurance claim, were considered by the Commercial Court in the case of *Versloot Dredging BV v. HDI Gerling Industrie Verischerung*¹³, and upheld in the Court of Appeal.¹⁴ In this case, the insurers argued for a fraudulent device defence in that a crew member had deliberately or recklessly given a false account of the casualty in a letter to the insurers' solicitors. The account was to the effect that the crew had not investigated the bilge alarm that had sounded shortly after the ingress of water because the vessel was rolling in heavy weather at the time. It later emerged that the bilge alarm had not sounded and therefore the explanation as to why the alarm had not been investigated was false. The Court found that this evidence was false and misleading and that the crew member in question had no reason to believe it was true, and that he was reckless in his actions. The Court also found that the false account was intended to promote the claim.

Accordingly, the judges at first instance and in the Court of Appeal, rejected the owners' claim. Although the Act does not provide a definition of a fraudulent claim, and this has led to a somewhat harsh interpretation of the law, it is clear an important reason for both decisions was the public policy justification of dissuading fraud by assureds. It is noteworthy that the judge at first instance had expressed regret at having to do so since he considered that the owners' fraudulent conduct was only mildly culpable. It was not a carefully orchestrated deceit, but rather a reckless untruth told on one occasion only and abandoned well before the case went to trial. The judge in this case considered that the forfeiture of the claim was disproportionately harsh in the circumstances and expressed the view that a more flexible test of materiality should be adopted, which would permit the courts to consider whether it was

13 *Versloot Dredging BV v. HDI Gerling Industrie Verischerung AG and others* [2013] EWHC 1666 (Comm).

14 *Versloot Dredging BV v. HDI Gerling Industrie Verischerung AG and others* [2014] EWHC Civ 1349. Note that the outcome of the appeal to the Supreme Court is currently pending (expected later this year).

just and proportionate to deprive an assured of its substantive rights in light of all of the circumstances of the case. Whether the rule for fraudulent insurance claims should apply to fraudulent devices has not yet been settled, as this was one of the points successfully appealed to the Supreme Court, which was heard in April 2016. The outcome of the appeal is due later this year.

Under Section 11, the Act will also limit an insurer's remedy for a breach of a term where the term is not relevant to the actual loss suffered. This clause limits an insurer's remedy for a breach of a contractual term (such as a warranty) by the assured to circumstances where the loss suffered by the assured is of the kind contemplated by the term, or at the time or place contemplated by the term. If an assured that is in breach of a term can show that its non-compliance with the term could not have increased the risk of the loss that actually occurred, and in the circumstances in which it occurred, the insurer cannot rely on this breach to exclude, limit or discharge its liability.

Finally, the Insurance Act 2015 also introduces a prohibition on 'basis of contract clauses', at Section 9. It is possible for the parties to a non-consumer policy to contract out of all the material provisions of the Act (save for Section 9) if sufficient steps have been taken by the insurer to draw the disadvantageous term to the assured before the contract is entered into or the variation agreed.

Certain proposals, such as a reform of Section 53 of the Marine Insurance Act 1906 creating a right to damages for late payment and changing the nature of a warranty, proved too controversial among stakeholders or failed to produce consensus, and were not included in the Act.

V CONCLUSION

The English marine insurance market has been at the heart of international insurance since its inception several hundred years ago. It has been central in developing an extensive canon of case law and has led the way in developing a statutory code for insurance. Even today, it is leading the way in refining and updating the law in terms of business insurance. The introduction of the Insurance Act 2015 will bring some significant changes to marine policies, part of the effect of which will be to make English-law policies more attractive and competitive in the international market.

The London courts have unparalleled expertise not only in matters of marine insurance but in wider shipping, trade and commodities disputes, giving them a depth of knowledge unmatched in other jurisdictions.

Chapter 3

OCEAN LOGISTICS

Catherine Emsellem-Rope and Tessa Jones Huzarski¹

I INTRODUCTION

At its simplest, logistics is about getting the right goods to the right place at the right time and managing the information and documentation flow to facilitate this task. Whether a company is a supermarket moving goods in containers, a contractor building a new facility and moving materials and equipment to the project site, an energy company moving oil in bulk or a trading house moving coal, some logistics will be involved in one form or another. In this chapter we focus on the carriage of goods by sea, but other modes of transportation (inland waterways, air, road, rail), multimodal transport, warehousing and storage and value-added services (such as consolidation, co-packing and supply-chain management), which are ancillary to these activities, are all encompassed by the term 'logistics'.

The transportation of goods by sea involves numerous different parties operating at all different levels of the supply chain. This inevitably gives rise to a number of different contractual arrangements and relationships. Broadly speaking, where goods are transported by sea, the transportation contract governing the carriage is known as a contract of affreightment. Such contracts appear in several different forms, however, they are generally divided into two categories: the charterparty and the bill of lading. In this chapter we will examine both the charterparty and the bill of lading, however, the focus will be on the latter.

I CHARTERPARTIES

In broad terms, a charterparty is an agreement under which a shipowner agrees to make available the entire carrying capacity of his vessel for either a particular voyage (or voyages) or for a defined period. This arrangement is known as chartering and the person to whom the vessel is made available is known as the charterer.

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There are several different types of charterparty, the most common of which are:

- a* The demise (or bareboat) charter: this operates as a lease of the vessel itself for an agreed period of time in exchange for the payment of hire. With a demise charter, the charterer will usually provide the crew and operate the vessel technically and commercially.
- b* The second type is a time charter: this is a contract for the use of the ship and her crew for a specified period in exchange for the payment of hire during the period of use. Hire is usually calculated according to the vessel type on a daily or monthly basis. It is not therefore affected by the number of voyages during the period of hire, or the amount of cargo transported. Such types of charterparty are often used by carriers seeking to increase their fleet for a certain period of time.
- c* The final most common type is a voyage charter: this is a contract for the use of the vessel and her crew to carry an agreed cargo on an agreed voyage in consideration of the payment of freight. Freight is calculated in accordance with the amount of tonnes or cubic metres carried, or on a lump sum basis.

In addition to the above, there are several hybrid forms of charterparty, which are a combination of a voyage and a time charterparty. One such hybrid is the trip charter, under which a vessel is time chartered for a specific cargo voyage. A further type of hybrid is the slot charter, according to which the charterer charts a fixed number of container spaces on a voyage basis and pays a set price per slot. Finally, under a consecutive voyage charter, a charterer may charter a vessel for a specific period of time, however, the vessel is required to fulfil a number of voyages between fixed ports during the period of hire.

The key difference between the time and voyage charterparty is that while a time charterparty permits the charterer a certain degree of flexibility (subject to the terms of the charterparty itself) to employ the vessel however he so chooses, under a voyage charter, the charterer is required to carry a specific cargo from a specific place at a specific time to a specific place. The time charterer therefore controls the commercial operation of the vessel and, as a result, usually bears the costs arising out of his employment of the vessel (the cost of fuel, port charges, the cost of loading and unloading the cargo, etc). The voyage charterer, in contrast, is much less involved in the commercial function of the vessel and does not therefore bear these costs. The voyage charterer's key responsibility is to ensure that the cargo is loaded and discharged at the agreed time. He or she may, therefore, be required to take responsibility for the cost of any time incurred in loading or discharging cargo that is outside the permitted number of days for doing so.

Over the years, a number of standard-form charterparties have been developed by various organisations and are commonly used throughout the shipping industry. In particular, BIMCO² has developed a number of well-known standard forms such as the Standard Bareboat Charter (Barecon 2001) for demise charters and the Standard Time Charter Party for Container Vessels (Boxtime 2004). For voyage charters, the BIMCO Uniform Charter (revised 1922, 1976 and 1994) (Gencon) is commonly used for all types of goods. There is also the New York Produce Exchange Time Charter (NYPE 46) for time charters and the

2 BIMCO is a shipping association providing a wide range of services to its global membership of stakeholders who have vested interests in the shipping industry, including shipowners, operators, managers, brokers and agents.

Shellvoy (Shell's standard form tanker voyage charterparty), which has also been adopted by the market.³ BIMCO also created Slothire (1993) as a standard form to be used for slot chartering.

It is important to note that there may develop a long chain of different charterparties. This will arise in circumstances where a shipowner charters his vessel to a charterer who in turn sub-charters the vessel to another charterer and so on. The terms of the charterparties running up and down the chain may be 'back-to-back' (i.e., materially the same), or they may be different. In the case of a charterparty dispute, careful attention will need to be paid to the terms of the charterparty and consideration will need to be given to the question as to whether it is possible to pass the claim up or down the contractual chain.

II BILLS OF LADING AND WAYBILLS

i Overview

A bill of lading is the transport document that will be issued in relation to liner shipping, where the vessel is used to carry the goods of any person. It is an important commercial document and it plays a pivotal role in international trade, as will be illustrated below. In broad terms, the bill of lading serves three functions within the context of international trade. First, it acts as evidence of the contract of carriage. The bill of lading is not the actual contract of carriage since the contract is usually made before the bill of lading was signed and delivered, however, it provides evidence of the terms of the contract of carriage. Second, the bill of lading acts as a receipt for the goods received or shipped. Bills of lading usually contain statements as to the description, quantity, nature, of the goods received into the carrier's care and similar matters. By signing the bill of lading (which is often completed by the shipper) the carrier acknowledges receipt of the goods so described. It constitutes *prima facie*⁴ evidence of the goods so described. Finally, the bill of lading acts as a document of title. This means that the bill may be made deliverable to a named person or to their order or 'to order'. Bills of lading making goods deliverable to order are negotiable⁵ instruments. If a bill is negotiable, it will allow transfer of title, which will be effected by endorsement. Order bills will entitle any lawful holder of the bill to possession of the goods. Bills of lading that are not negotiable instruments are sometimes known as 'straight bills'. Although not negotiable, a straight bill of lading is, as a matter of English law, a document of title. Under a straight bill of lading, cargo is only deliverable to the named consignee. The fact that the bill of lading is a document of title differentiates it from other transport documents that may also be issued, such as waybills or forwarder's certificates of receipt (FCRs), neither of which are documents of title but may appear to be so on their face.

3 This list is not exhaustive: there are many more different standard forms that have been developed by BIMCO and others.

4 It is, however, open for the carrier to adduce evidence that the goods shipped were not as described (except where the bill of lading has been transferred to a third party in good faith, in which case the bill of lading will be conclusive evidence that the goods shipped were as described).

5 The term 'negotiable' is used by most in the industry, however, the correct term is 'transferable'.

The bill of lading will be issued when the cargo has been loaded on board the vessel. The front of the bill of lading includes all of the relevant details regarding the shipment (the name of the shipper, carrier or owner, the consignee, the description of the cargo etc). The reverse of the bill contains the detailed terms and conditions governing the carriage. It is also important to note that the Hague Rules or the Hague-Visby Rules will often apply to contracts of carriage covered by a bill of lading, or any similar document of title. These rules provide the carrier under the bill of lading with a number of important defences and limitations when faced with a cargo claim under the bill. The Hague and Hague-Visby rules are examined in more detail in subsequent chapters.

ii Different types of bills of lading

There are a number of different types of bills of lading, the most important of which are:

Liner bills and charter bills

Liner bills are issued by shipping lines and contain very detailed, densely typed terms and conditions on their reverse face. Charter bills (those issued in relation to goods on a chartered vessel, for example, the Congenbill 1994, which would be issued in relation to Gencon charterparties), contain only a small number of conditions, but should incorporate the terms of the charterparty into the bill of lading.

Received bills of lading and shipped bills of lading

Where the goods have been received into the carrier's charge at the quay or in the warehouse and are not loaded, a document called a received for shipment bill will be issued. Once the goods have been loaded on board the ship, the received bill may be exchanged⁶ or converted into a shipped bill containing the same representations. In order to obtain documentary credit, banks will only accept shipped bills of lading (not received bills of lading).

Multimodal or combined transport bills of lading and port-to-port bills

Multimodal transport combines at least two types of transport, without the need for the transport unit to be changed (e.g., when goods are transported in containers first by road, then by sea, then by road). If the place of receipt and place of delivery boxes are completed on the front face of the bill, then it is a multimodal bill. There are two main types of multimodal bill:⁷

- a* through-transport bills, in which the named carrier contracts as principal for the stage during which it is the performing carrier but as cargo interests' agent for the other legs. This will be expressly stated on the reverse small print of the bill of lading; and
- b* combined-transport bills, in which the named carrier contracts as principal for all stages of the movement, regardless of whether it is the performing carrier. This inevitably leads to subcontracting.

In the event that the goods are to be carried from one port to another, a direct bill of lading or port-to-port bill of lading will be issued. On the front face of such a bill, only the port of loading and the port of discharge boxes are completed.

6 Against surrender of the received bill.

7 There are various definitions used within the industry to make this distinction.

A combined-transport bill needs to address the liability of the carrier in relation to the different modes of transport which will be used in connection with the carriage of the goods covered by the bill of lading. This is because there is no single international convention applicable to multimodal transport. The Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules) was adopted in December 2008 by the UN General Assembly and was designed to regulate multimodal transport. However, very few countries have ratified the Rotterdam Rules and therefore they seem unlikely to enter into force internationally in the near future.⁸

In the absence of an international convention providing a liability regime for multimodal transport, the terms and conditions on the reverse side of a combined-transport bill of lading usually include very detailed and complicated cargo liability provisions (often referred to as network liability regimes). Network liability regimes set out how the liability of the carrier should be determined depending on where the loss or damage to cargo happened (i.e., whether it happened during the port-to-port element of the carriage or during any other part of the carriage not involving carriage of goods by sea). In addition, as multimodal carriage involves more than one mode of transportation, the terms and conditions will also include various provisions designed to protect the various subcontractors (e.g., stevedores or road hauliers). For example, there will usually be a clause which seeks to prevent the person entitled to make a claim against the carrier for loss or damage to cargo from making a claim against such subcontractors, and where such claim is nevertheless made, under the clause the subcontractors can usually avail themselves of the defences, exemption and limitations clauses contained in such terms and conditions (such a clause is referred to as a '*Himalaya*' clause).

iii Contracting directly with shipping lines

In certain circumstances, a company needing to move goods by sea (a shipper) may decide to contract directly with a shipping line.

In terms of contractual arrangements between shippers and shipping lines, traditionally there would only be the bill of lading issued by the shipping line in respect of each shipment. Recent years, however, have seen the emergence of framework agreements used for ocean freight services. Shippers who want to enter into long-term relationships to secure services and rates enter into these master agreements, usually with a small number of shipping lines. In the event a shipper and a shipping line enter into such an agreement, the relationship between them will potentially be governed by two sets of terms and conditions: the terms and conditions of the master agreement and, in relation to each shipment in respect of which a bill of lading is issued, the terms and conditions contained or evidenced in such bill of lading. It is always best to expressly clarify in the master agreement the relationship between the terms and conditions of the master agreement and those contained or evidenced in any bill of lading issued, and which should take precedence in the event of conflict.

⁸ As of January 2015, only three countries (Spain, Togo and the Congo) have ratified the Rotterdam Rules; the convention will not come into effect until at least 20 countries have ratified it.

It is also important to note that the shipping line may not own the vessel – it may charter the vessel from a shipowner (under a time charter), or it may have agreed to share space with another shipping line (under a vessel-sharing agreement), which adds another layer of complexity when it comes to potential claims.

iv Buying from freight forwarders/NVOCs

The shipper may, alternatively, decide that it wishes to use a freight forwarder when buying ocean freight.

The term freight forwarder has several meanings. A freight forwarder in the traditional sense was someone who was employed by the shipper to enter into contracts of carriage with shipowners, but as agent only (i.e., on behalf of the shipper), without liability as a carrier. The role of the freight forwarder was limited to booking space on behalf of the shipper, preparing the bill of lading, arranging for the goods to be brought alongside and generally acting as a point of contact in relation to the goods.

The role of freight forwarders has evolved and they now undertake additional activities, such as consolidation and value-added services, and they may undertake the carriage services as a principal, taking responsibility as a carrier.

The concept of the non-vessel operating carrier (NVOC), which stems from the US concept of the non-vessel operating common carrier, is used in relation to freight forwarders involved in sea carriage and who undertake the responsibility as carrier but who do not own the ship. Quite a few of the large freight forwarders have created their own NVOC businesses, which sometimes trade under different names.⁹

Freight forwarders, and especially those who have established their own NVOC businesses, will often issue their own bills of lading, usually referred to as house bills of lading. In doing so, the freight forwarder almost certainly takes on the role of a principal with the greater liability that this entails, as explained below. However, the issuance of a house bill of lading by the freight forwarder will enable the forwarder to control the movement of the goods and the delivery of the goods (which will only be possible through itself or through its agent), which is one of the reasons freight forwarders issue house bills of lading.

Contractual capacity of freight forwarders

The issue of the contracting capacity of the freight forwarder (i.e., whether it is an agent or a principal) is an important one as it will affect the freight forwarder's liability in the event of loss or damage to cargo, or delay.

A freight forwarder acting as agent will, in common law countries such as the United Kingdom, have very limited liability. Generally speaking, a freight forwarder acting as agent will have no liability to its customer for cargo loss or damage, or delay. A freight forwarder will still, however, have obligations and potential liabilities. For instance, a freight forwarder acting as an agent has a duty to use reasonable care in employing the carrier, and may be liable for delay due to its negligence or for failing to pass on instructions concerning the goods to the carrier.

⁹ For example, Blue Anchor Line (Kuehne + Nagel's in-house NVOC), the Danmar Lines (DHL Global Forwarding's NVOC) and Pantainer Express Line (Panalpina's in-house NVOC).

A freight forwarder acting as a principal will have much greater liability, as it will have the responsibility of a carrier. This means that a freight forwarder acting as a principal will be liable for loss or damage to cargo, for misdelivery and for delay in delivery.

It is not always easy to determine whether a freight forwarder is acting as an agent or as principal. The contracting capacity of a freight forwarder will hinge on the construction of the contract with the shipper and the surrounding circumstances. The fact that a freight forwarder describes itself as an agent will not mean that the freight forwarder cannot be treated in law as a principal with the liability of a carrier.

Factors taken into consideration when determining the contractual capacity of the freight forwarder include the method of charging. The fact that a freight forwarder charges an all-in rate, rather than charges for the freight at cost together with a commission, can be evidence that the parties did not intend for the freight forwarder to be merely an agent; however, this is not conclusive evidence as it is possible, at least under English law, for the parties to agree that the agent should be remunerated on the basis of the profit the agent makes on the all-in rate (in practice, a lot of freight forwarders trade on that basis).

The fact that a freight forwarder issues a house bill of lading will also point towards the freight forwarder being a principal. Also, if a freight forwarder names itself as shipper on the bill of lading issued by the shipping line (master bill of lading), this may be taken as a strong indication that the freight forwarder intends to subcontract the sea carriage (i.e., as principal), rather than make arrangements for the sea carriage as agent.

The naming of the freight forwarder on the master bill of lading is an important point, not only in relation to the contractual capacity of the freight forwarder, but also in relation to whom may have title to sue the shipping line in the event of cargo loss or damage. In certain jurisdictions, only a party named on the master bill of lading will be able to sue the shipping line.

When a freight forwarder acts as an agent, the actual shipper should be named on the master bill of lading and no house bill of lading should be issued. This should avoid any issue regarding title to sue.

Standard terms used by freight forwarders

Most freight forwarders trade under standard terms of business (STCs), and very often the STCs will have been developed by trade associations representing the interests of freight forwarders.¹⁰

When a freight forwarder acting as a carrier or NVOCC also issues a house bill of lading, there may again be two sets of terms and conditions that apply to the same shipment.

10 UK-based freight forwarders generally trade on the terms of the British International Freight Association or the Conditions For Use by Freight Forwarders, Series 400, developed by the Through Transport Club. Other examples are the Netherlands Association for Forwarding & Logistics Forwarding Conditions used by Dutch-based freight forwarders, the National Association of Freight & Logistics Standard Trading Conditions used by many UAE freight forwarders, the Singapore Logistics Association Standard Trading Conditions used by Singapore freight forwarders and the Hong Kong Association of Freight Forwarding & Logistics Trading Conditions 2008 used by Hong Kong-based freight forwarders.

Ideally, the STCs should make it clear which terms and conditions will prevail; absence of an express statement to that effect will cause difficulties as the courts will then need to decide on this matter.

III CONCLUSION

Although predicting the future is difficult, commercial and consumer demand is likely to lead to further growth in containerisation and an increased use of multimodal or combined transport. It is unlikely that the existing general structure of contractual relationships will dramatically change but there will likely be a continued growth in the use of framework agreements. As the participants in the supply chain move increasingly towards more formal types of arrangements, it will be interesting to see what contractual liability regimes are agreed. It is also interesting to note that in the event that the Rotterdam Rules should come into effect, it is probable that the majority of contracts will need to be revisited and rewritten.

Chapter 4

PIRACY

*Michael Ritter and William MacLachlan*¹

I INTRODUCTION

At the time of writing piracy in the Indian Ocean remains in decline, though piracy globally remains a major source of concern for shipowners and of day-to-day relevance to the shipping industry. Piracy is defined in Article 101 of UNCLOS as ‘any illegal act of violence or detention [...] committed for private ends by the crew [...] of a private ship [...] directed [...] against another ship [...] or against persons or property on board such ship’ on the high seas or in a place outside the jurisdiction of any state. This leaves open the issue as to whether incidents such as the hijack of *The ‘Fairchem Bogey’* from off the Salalah breakwater, or of tankers from West African anchorages are piracy incidents under UNCLOS. As a matter of English law, *The ‘Andreas Lemos’*,² there is ‘no reason to limit piracy to acts outside territorial waters’. It appears apt therefore that ‘piracy’ is used as an overarching label covering Somali or Gulf of Aden attacks, West African and South-East Asian incidents, albeit that they are different in nature, and that the legal definition of piracy may depend on the insurance policy or contract in question.

At the time of writing, the last successful hijack of a major commercial vessel off the Somali coast was the *Smyrni* on 10 May 2012. A combination of armed guards, increased naval presence and adherence to best management practices (BMP) are often cited as the chief drivers behind the drop in the number of incidents, together with some improvement in stability and capacity building onshore in Somalia. The continued decline of the piracy threat in this region prompted the co-sponsors of the BMP to reduce the boundary of the high risk area (HRA) to longitude 065°E latitude 5°S.³ This reduction was mirrored in part by the Joint War Committee in December 2015 when it adjusted its HRA to longitude

1 Michael Ritter (associate) and William MacLachlan (senior associate) at Holman Fenwick Willan LLP.

2 [1982] 2 Lloyd’s Rep 48.

3 www.hfw.com/Somali-piracy-reduction-to-high-risk-area-October-2015.

065°E latitude 12°S.⁴ That is not to say that Somali piracy is no longer a concern: the costs in terms of routing, additional premiums, hardening measures and who – the owners or the charterers – pays for these is an item of daily debate. Further attacks off Somalia and in the Indian Ocean (albeit unsuccessful) continue to be reported and, of course, the industry should not forget the 26 seafarers from the *Naham 3* who remain captive ashore in Somalia. There have been recent reports of attacks off of the Yemeni coast including against the *Fair Apollon* in April 2016, although the identity of those carrying out these attacks is unknown.

In contrast, there have been numerous successful attacks in the Gulf of Guinea since January 2016.⁵ One involved an attempted cargo theft, with the remainder involving the kidnap of crew members from all classes of vessel who are then taken ashore and held for ransom. Precise figures are unclear; however, we are aware of at least 26 incidents between January and April 2016 including the kidnap of 33 crew members from vessels in the region. This situation is aided by the lack of a coherent regional or international naval force, coupled with the fierce opposition by the littoral states of the Gulf of Guinea to any encroachment by foreign navies of their respective maritime boundaries, alongside their inability to offer comprehensive protection against the pirate threat within their territorial waters (although, arguably, this is improving). Additionally, the prohibition on the use of foreign armed guards, the unsuitability of certain aspects of BMP in this region and the lack of prosecutions contribute to favourable conditions in which pirates can prosper – albeit that Nigeria has detained a number of pirates involved in the *Maximus* incident.

The third ‘hotspot’ remains South-East Asian piracy where mainly small tankers and fishing vessels are targeted, and those boarding vessels either steal possessions, cargo or kidnap the crew in conditions where the pirates appear to go relatively unchecked. Worryingly, the period March–April 2016 saw three crews reportedly kidnapped by Abu Sayyaf (an ISIS affiliate) bringing with it many more issues than a standard ‘criminal’ kidnap.

II PRACTICAL RESPONSE

For those owners unfortunate enough to have their vessels taken by pirates, there are several immediate practical steps to be taken, always keeping in mind the need to avoid any steps that might put the crew in jeopardy.

A crisis management team should be established and, where a marine kidnap-for-ransom negotiation ensues, the assistance of a professional response consultant sought. Insurers should be alerted and the families appropriately informed. Press comment should be kept to a minimum. In cargo theft cases, up-to-date vessel positions and the close monitoring of any other vessels in the vicinity might also prove important. To this end, and with a view to future prosecutions, there is additional benefit in maintaining links with various international organisations and law enforcement agencies.

Once a deal is reached in principle, the cashing and transportation of any ransom is a complicated operation, as is the resupply and recovery operation in situations where a vessel has been held for a long period. Both require careful planning, operational security and, often, bespoke contracts.

4 www.lmalloyds.com/lma/jointwar.

5 <https://oceanuslive.smugmug.com/Gulf-of-Guinea/i-qmL3CKQ>.

III COMPLIANCE AND LEGAL

As a matter of English law, the payment of ransom to pirates is not unlawful. This has been affirmed by the Court of Appeal in *Masefield AG v. Amlin*,⁶ where Rix LJ held: ‘there is no legislation against the payment of ransoms, which is therefore not illegal’ nor is there any ‘universal morality against the payment of ransom, the act not of the aggressor but of the victim of piratical threats, performed in order to save property and the liberty or life of hostages’. It is also widely accepted that ‘if the crews of the vessels are to be taken out of harm’s way, the only option is to pay the ransom’ Steel J (at first instance).⁷ Unfortunately, the payment of ransom is invariably the only viable option to secure the safe release of vessel, cargo and crew; however, as the judgment acknowledges, the position may be different in relation to terrorism and there are also sanction regimes in place that can have an effect on this issue.

Under Sections 15 to 18 of the Terrorism Act 2000 it is illegal to cause money to be paid to any person if there is ‘reasonable cause to suspect’ that the payment will or may be used for the purposes of terrorism, or to become concerned in an arrangement where such money is paid. There are certain defences available, including that of authorised disclosure; this is a complex area in which specific advice should be sought.

Despite rhetoric from certain quarters, no substantiated link between Somali pirates and Al-Shabaab has been made. Indeed, Dr Campbell McCafferty⁸ confirmed in June 2011, when Somali piracy and ransom payments were at their peak, ‘there has not been any evidence of a link between the pirates and al-Shabaab, the terrorists in Somalia’.⁹ Owners considering paying a ransom must; however, carry out due diligence on a case-by-case basis to ensure that they have no reasonable cause to suspect terrorist involvement.

The Proceeds of Crime Act 2002 also falls for consideration under this head; however, in our view, the narrow definition of ‘criminal property’ under Section 340 means it is likely to be of very limited application.

Additionally, the Counter Terrorism and Security Act 2015, which came into force on 16 February 2015, makes it an explicit offence (as Section 17A Terrorism Act 2000) for insurers to reimburse a payment made by the assured to a person where they have as reasonable cause to suspect that the money paid by the assured was handed over in response to a demand made wholly or partly for the purposes of terrorism. This makes it even more important for the assured to ensure they carry out appropriate due diligence on any hostage taker.¹⁰ As noted above, the incidents off Yemen and in South-East Asia involving Abu Sayyaf mean such due diligence is as important as ever where there is an English nexus. However, even for Nigerian incidents this should be carried out to avoid contravention of English law.

One must also be mindful of other relevant legal regimes, including any jurisdiction the ransom might pass through, and also the United States. President Obama issued Executive Order 13536 on 12 April 2010 addressing the deterioration of the security situation and the persistence of violence in Somalia, and acts of piracy and armed robbery at sea off the

6 [2011] EWCA Civ 24.

7 [2010] 1 Lloyd’s Rep 509.

8 Then Head of Counter-Terrorism and UK Operational Policy, Ministry of Defence.

9 www.publications.parliament.uk/pa/cm201012/cmselect/cmcaff/1318/11062902.htm.

10 www.legislation.gov.uk/ukpga/2015/6/section/42/enacted.

coast of Somalia. As amended, this Order names various individuals and one organisation (Al-Shabaab). By a notice of 4 April 2016, President Obama extended Executive Order 13536 for a further year.

IV SHIPPING OPERATIONS

Piracy does not just affect those unfortunate enough to be hijacked, but the daily operations of all owners and charterers transiting areas with a risk of piracy. Questions of responsibility for costs arising from piracy will usually depend on the wording of the charterparty.

At the most basic level, these costs take the form of increased insurance premiums and, as with most issues, the question is 'who pays?'. London Arbitration 4/13 considered the wording of the BIMCO Piracy Clause for Time Charter Parties 2009, which reads 'If the underwriters of the owners' insurances require additional premiums or additional insurance cover is necessary because the Vessel proceeds to or through an Area exposed to risk of Piracy, then such additional insurance costs shall be reimbursed by the charterers.' Contrary to the brokers' position and market interpretation, the tribunal held that kidnap and ransom, and loss of hire insurance was not 'necessary' and so charterers were not required to reimburse the cost of the premium to the owners. In response, BIMCO amended the 2009 clause in 2013 and placed these costs specifically on charterers.

In order to avoid the areas of highest risk, vessels will often change their route, whether by way of slight alterations, or in the most extreme cases by passing via the Cape of Good Hope as opposed to the Suez Canal. This raises the issue of whether the vessel has deviated, and who pays for the additional time and bunkers.

In the absence of any specific contractual right, the owners are obliged to proceed via the quickest or shortest route unless they can demonstrate that the charterers' orders would jeopardise the safety of the vessel in accordance with the common law principles set out in *The 'Hill Harmony'*.¹¹ Otherwise, it is likely that the owners will be found to have breached their duty to proceed with utmost despatch and so be liable for damages.

In a piracy context, the High Court offered guidance on the Conwartime 1993 clause in *The 'Triton Lark'*,¹² holding that the owners could refuse such an order only if there was a real risk of a piracy event occurring in respect of that specific vessel. Before refusing such an order, the owners are required to carry out an assessment of the risk to the vessel and whether this risk could be mitigated by adopting suitable anti-piracy measures. If a real likelihood of a risk of a piracy event occurring is established, the owners are entitled to take an alternative route at the charterers' expense. This will not amount to a deviation.

*The 'Paiwan Wisdom'*¹³ considered the more recent Conwartime 2004 clause. The Court held that there was no requirement that the level of piracy or war risk escalate between the date of execution of the charterparty and the voyage orders being issued before the owners are entitled to refuse a routing order. Further, while naming the Gulf of Aden committed the owners to proceeding via the Gulf, it did not automatically commit them to calling at unnamed ports in the region, in that case Mombasa.

11 [2001] 1 Lloyd's Rep 147].

12 [2011] EWHC 2862 (Comm) and [2012] EWHC 70 (Comm).

13 [2012] EWHC 1888 (Comm).

Whether a vessel is on or off hire has also been the subject of litigation. Again this depends on the terms of the charterparty. To claim that the vessel is off hire, the burden is on the charterer to show they come within the listed events. As a result of *The 'Saldanha'*,¹⁴ piracy is not an off-hire event under an unamended NYPE 1946 Clause 15, although the addition of 'whatsoever' to the clause may lead to a different result. However, following *The 'Captain Stefanos'*,¹⁵ it is clear piracy is highly likely to be caught by a 'capture/seizure' provision under an amended NYPE 1946.

The leading 2014 piracy case was *The 'Longchamp'*,¹⁶ where Stephen Hofmeyr QC sitting as a Deputy High Court Judge held that various expenses, including crew wages and bunkers consumed during the period of the hijacking, were recoverable as part of an owner's general average claim. This was a departure from average adjusting practice and the decision is currently pending appeal (being heard on 28 June 2016).

V RECOVERY

Obtaining clear and comprehensive evidence immediately following the release of the vessel and crew is vital to ensuring any future recovery or defending any claim, as well as bringing pirates to justice. For this reason, we usually advise that a lawyer or master mariner (or both) attend the port of refuge to debrief the crew and collect evidence relevant to any future legal action. We also recommend that appropriate law enforcement agencies be invited by the owners to attend the vessel at the port of refuge.

Where a ransom has been paid to secure the release of a vessel, cargo and crew, the owners will often seek to recover this and their associated release expenses in general average (GA) from cargo interests. Case precedent stretching back to *Hicks v. Pallington* in 1590, confirms that ransom payments can be the subject of GA. Further, the Court of Appeal, in *The 'Lehmann Timber'*,¹⁷ held that an owner is entitled to require a GA bond and GA guarantee before releasing the cargo, and further (overturning the first instance decision) that they can recover their reasonable costs of exercising a lien until security is provided, including the cost of storage. The arbitration award (as referenced in the first instance judgment) also allowed the cost of the tow to Salalah, in addition to the ransom, in GA.

In the West African cargo theft context, it is unclear whether a cargo owner could declare GA in respect of the stolen cargo and whether this could amount to a GA sacrifice. It is likely the key battleground will be in arguing that the 'sacrifice' was voluntary and, second, whether any property other than the cargo was at risk. In the event that a ransom is paid in respect only of kidnapped crew members who have been taken ashore, this will usually not be a GA event.

Cargo interests will often allege that the owners failed to exercise due diligence to make the vessel seaworthy (e.g., by effecting appropriate training and vessel hardening), and that therefore the hijack was a result of actionable fault by the owners. As a result, they argue

14 [2010] EWHC 1340.

15 [2012] EWHC 571 (Comm).

16 [2014] EWHC 3445 (Comm).

17 [2013] EWCA Civ 650.

no GA contribution is payable. For this reason, it is important for the owners to secure evidence of the measures in place at the start of the voyage and the witness evidence above. This unseaworthiness argument is yet to succeed before the English courts.

In the West Africa context, under their cargo insurance policies, cargo owners, as the assured, will also have various sue and labour obligations that may extend to taking reasonable steps to try to recover the cargo. In many cases, it is difficult to identify or locate the cargo or the vessels involved in the ship-to-ship transfers; however, in some cases the crew will be able to identify the lightering vessels, and in some cases the stolen cargo has been successfully located.

One difficult issue that owners face where there is no K&R policy in place is which if any of their insurances will respond to a 'crew kidnap'. Unlike Somalia, in such cases there is no property at risk and any ransom paid will be in respect of individuals only. This often leads to a debate between P&I insurers and war or hull underwriters as to who, if either, should reimburse an owner in respect of the ransom and associated expenses.

Perhaps the most interesting of all of the potential recovery avenues is offered by the detention of various pirates. To the extent it is possible to piggyback the criminal prosecution with a civil claim, this may offer the owners and insurers a chance of recovery, particularly if it can be proven that money used to pay a ransom was paid into a particular bank account.

VI ARMED GUARDS

The use of armed guards (or privately contracted armed maritime security personnel/maritime security officers) on board merchant vessels has undoubtedly played a key role in reducing the number of attacks off Somalia and in the Indian Ocean. The apparent improvement in the security situation off Somalia has, however, prompted some owners to question whether they still need to incur the expense and administrative burden of carrying armed guards or whether they can at least carry smaller teams. Such questions must be decided on a case-by-case basis and, as long as the risk remains, it is up to each owner to conduct its own risk assessment on a case by case basis and secure its vessel in ways it deems appropriate.

With fierce competition and falling demand driving down rates off East Africa, many private maritime security companies (PMSCs) have looked to provide services in the Gulf of Guinea. However, the successful East African model cannot simply be transferred to West Africa, and the operational difficulties and risks faced by PMSCs in the Gulf of Guinea are much greater. In West Africa, where only local constabulary and military forces¹⁸ are permitted to carry weapons, the model commonly adopted is for a PMSC to procure the deployment of: (1) a vessel protection detachment (VPD) from the applicable local force either on board the merchant vessel or alongside in an escort vessel; and (2) a western security officer to act as a liaison officer. While the security officer will have no formal control over the local VPD (who will operate in accordance with their own command structure and their own rules of engagement) he or she can assist the owners in communication with the VPD and the local authorities. Recent detentions in Nigeria have shown that extreme caution should be exercised when taking on board VPDs and deploying security officers and there should be no suggestion that they are mentoring or training the VPD. Close attention should also be paid to the visas used by any security officer. The owner or PMSC, as applicable, should

18 Exactly who is allowed to carry firearms, how and where differs between each littoral state.

ensure that the VPD is drawn from the constabulary or military authority with jurisdiction over the waters in which the vessel is to pass and that all permits and permissions have been obtained and remain up to date. Even if the owners believe they have the correct permits and permissions in place for the carriage of a VPD, matters can be further complicated by competing governmental agencies and officials, as was demonstrated by the arrest of the crew and armed guards of the *Myre Seadiver* for alleged arms smuggling and more recently the detention by Nigerian authorities of certain vessels and arrest of private security personnel for alleged illegal activity (in particular in February 2015).

The territorial waters of the littoral states extend to 12 nautical miles from their respective base lines and their exclusive economic zones to 200 nautical miles; however, anyone operating in the region must be alive to how these states, particularly Nigeria, interpret their territorial waters (as covering territory in excess of 12 nautical miles).

Those owners operating solely in international waters off West Africa cannot ignore the prohibition on non-local armed guards. At the time of writing, the United Kingdom does not allow armed guards on UK-flagged ships in international waters off West Africa, although it will respect the laws of the coastal states and, if local military or constabulary forces can be deployed from those states in accordance with their laws, they may be deployed on a UK vessel. In addition, the United Kingdom does not issue export control licences to UK PMSCs for the deployment of armed guards anywhere other than the high risk area of the Indian Ocean and, while non-UK PMSCs are not restricted in the same way in international waters, they still do not have the logistical support of a network of 'floating armouries' that they enjoy in East Africa and they run the risk of arrest for infringement of local laws in much the same way as was demonstrated off India by the detention of the *Seaman Guard Ohio*.

In response to the rapid growth in the numbers of guards deployed BIMCO in March 2012 launched its Standard Contract for the Employment of Security Guards on Vessels, known as GUARDCON. GUARDCON quickly became the third most-used BIMCO form after Gencon and Supplytime, and has set a benchmark against which security services should be provided, which was rapidly adopted by the shipping industry, but it is unsuitable for use in West Africa without considerable amendment. BIMCO declined requests to produce a revised standard contract and instead issued, by Special Circular (No. 1) on 20 February 2014, a set of guidelines for owners contemplating using GUARDCON for the provision of PMSC services in the Gulf of Guinea.

In preparing the guidelines the drafting subcommittee considered a number of issues fundamental to which was the structured knock-for-knock liability regime and corresponding PMSC insurance provisions of GUARDCON. The key issue was whether GUARDCON could cover the liabilities and indemnities for the actions of the local forces as the need arose by means of the PMSCs' cover for liabilities and contractual indemnities under their own contracts. While some owners may prefer to go directly to a local agent to procure local guards, the advantage of using a PMSC is that it is likely the PMSC can take on some of the shipowner's risk by including local forces as part of its group for the purposes of the knock-for-knock regime and for the purposes of the PMSC's insurances. In addition, they can assist with the owners' due diligence and further 'de-risk' the situation by sourcing the local personnel themselves using their expertise and contacts.

As a final note, a recurring question for the industry has been the use of floating armouries in East Africa (they are not currently an option in West Africa). While the UK Department for Business, Innovation & Skills began approving floating armouries for use by licensed PMSCs in 2013 on a case-by-case basis, there remains little clarity on the approval

process and it is up to the PMSC to ensure that it has done its due diligence and that the floating armoury is operated in compliance with all applicable laws, including those of its flag state. It is worth noting that many flag states do not allow vessels registered with them to be used as floating armouries.

The industry response to piracy continues on an almost daily basis. One such advance is the issuance of Admiralty Security Chart for West Africa (Q6114), which was released on 14 April 2014. This provides details for the Maritime Trade Information Sharing Center – Gulf of Guinea piracy reporting centre (based in Ghana), which also commenced operations in April, providing 24-hour watchkeeping services, together with an incident-reporting form, and their website went live in 2014. The MTISC-GoG reporting centre did, however, close on 20 June 2016 to be replaced with a Anglo-French reporting programme – MDAT-GoG (watchkeepers@mdat-gog.org / +33(0)2 98 22 88 88).

Chapter 5

PORTS AND TERMINALS

*Matthew Wilmshurst*¹

I INTRODUCTION

i Historical and economic context

The UK was once a manufacturing powerhouse, exporting goods across the globe. The advent of containerisation in the middle of the last century led to a significant change in the UK economy, and the UK has become a net importer of manufactured products, bringing in US\$655 billion of physical goods annually.²

Being an island nation, terminals are a vital cog in the UK's economy – 95 per cent of UK imports and exports arrive by sea and in 2013 UK ports handled 503 million tonnes of cargo with approximately 65 per cent of that being inbound traffic,³ a significant proportion of which would have been manufactured goods destined for the shelves of UK retailers.

As the manufacturing base has changed and the economy developed, so too has the ownership and operational structure of UK ports and terminals. Over the past 25 years, UK ports have gone from being largely state-owned enterprises to adopting the privatisation model of port and terminal operation, with transfer of the ports' regular functions to private enterprise and wholesale disposal of physical assets. Most of the UK's largest ports are now in private-sector ownership.

The change in the ownership and operational structure in the UK has been mirrored across the world, with most developed and developing nations recognising that terminals are an important driver of national economies and looking to the private sector to provide funds for infrastructure development to facilitate cross-border trade; whether through the full privatisation model adopted by the UK, or the Landlord Port Authority model where states retain control of waterways and grant concessions to international operators to run and

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2 United Nations Commodity Trade Statistics Database, May 2014.

3 UK Port Freight Statistics: 2013, Department of Transport.

grow the terminals. This has led to the globalisation of terminals, with a small number of big players; in 2005 the top three international terminal operators handled nearly 2 per cent of global throughput.⁴

ii Terminal operator's liability

The globalisation of terminal operators has led to an increase in the standardisation of the terms upon which cargo is handled at ports – international operators will seek to have consistent liability regimes across the global for reasons of risk and insurance management.

There is no international convention that governs the liability of terminal operators. This can give terminal operators some flexibility when it comes to how their liability is determined. Parties contracting under English law – which is not always possible – can, to some extent, provide for their own defences and limits of liability. On a global scale, however, the lack of an overarching international convention and the impact of local law and regulations can cause difficulties for the large international terminal operators as this can prevent them from being able to adopt 'one size fits all' standard terms and conditions across all their terminals.

The nature of their business can also make it difficult for terminal operators to effectively manage their liability. Terminals come into contact with a large number of parties, many of whom will not have a contractual relationship with a terminal. This means that, in addition to facing claims from their customers for breach of contract, terminal operators will often face claims in tort and bailment from third parties – it is perhaps these claims that can cause the most difficulties.

II CONTRACTUAL CLAIMS AGAINST TERMINAL OPERATORS

UK terminal operators will commonly seek to impose their terms and conditions on the users of their terminals, and there are a number of ways in which they seek to do this. Regular users of a terminal are likely to be asked to sign up to a terminal service agreement (TSA), which will contain the commercial terms between the parties (services provided, tariffs, key performance indicators, etc.) but will also include provisions designed to protect the terminal operator. Terminal operators will normally look to incorporate similar terms into their dealings with *ad hoc* users of their terminals by reference to published standard trading conditions (STCs).

TSAs and STCs will typically include defences to, and limits of, the liability of the terminal for cargo claims, such as loss or damage, misdirection and delay. In addition to the provisions to protect against incoming claims, TSAs will often include provisions to benefit a terminal operator that wishes to pursue a damages claim against its own customer, for example, relating to dangerous or prohibited cargoes.

English law restricts the extent to which a party can exclude or limit its liability under its written standard terms of business – clauses seeking to do so will be subject to the test of reasonableness contained in the Unfair Contract Terms Act 1997. Failure to comply with this legislation can result in the entirety of an exclusion or limitation clause being struck out by the court. Terminal operators therefore usually include in their TSAs and STCs defences

4 Drewry Shipping Consultants, 'Annual Review of Global Terminal Operators, 2006'.

and limits of liability that are similar to those found in international shipping conventions or other industry-standard conditions, which have previously been held to be reasonable by the English courts.

III NON-CONTRACTUAL CLAIMS AGAINST TERMINAL OPERATORS

Terminal operators commonly face claims from cargo interests with whom they do not have a direct contractual relationship. These claims can be brought in tort or in bailment but are often pursued as both. Non-contractual claims against a terminal operator can be attractive to a cargo interest because they often offer an opportunity to recover more against a carrier than may be possible under the terms provided for in its standard trading conditions or a bill of lading (although note that there is no recovery for pure economic loss when bringing a claim in tort, whereas in contract, loss of the bargain or the expectation interest can be recoverable).

i Claims in tort (negligence)

A cargo interest bringing its claim in negligence must show that: (1) it was owed a duty of care by the terminal operator; (2) that there was a failure on the part of the terminal operator to exercise that duty of care; and (3) that the terminal operator's breach of that duty of care caused the loss complained of.⁵ The burden of proof is on the cargo claimant to demonstrate that it has fulfilled these requirements (and the existence of at least a duty of care is normally fairly easy to establish in the context of loss or damage occasioned by a terminal operator). Of more difficulty to the cargo interest bringing a claim in negligence is the requirement that it either owned the goods at the time of the breach, or had possessory title to them.⁶

ii Bailment

Bailment arises when possession of goods is entrusted by one party (the bailor) to another (the bailee). When a bailment is created, the bailee has a duty to take proper care of the goods. A sub-bailment arises whenever a bailee of goods transfers possession to a third party (the sub-bailee). A sub-bailee will owe the same duty of care to both the original bailor and the principal bailee. A terminal operator will often be a bailee or a sub-bailee.

In contrast to the requirements to establish negligence a bailor must only establish receipt by the carrier of goods in good order and condition and subsequent damage to the goods on delivery by the carrier so as to establish the basis for a claim in bailment.

iii Defeating non-contractual claims through contract

Although the enterprising cargo claimant may be able to bring a non-contractual claim against a terminal operator in the hope of avoiding defences, exclusions and limits of liability, a terminal operator facing such claims may find assistance in the terms of its contract with

5 For a detailed analysis of the tort of negligence see *M Jones, Clerk & Lindsell on Torts* (Sweet & Maxwell, 21st Edition, 2014), Chapter 8.

6 See *The 'Aliakmon'* [1986] AC 785 where the claimant had acquired risk but not the property in the goods and its action in negligence failed.

its contractual counterparty. There are three clauses that are commonly used by a terminal operator to defeat or limit non-contractual claims: the 'Himalaya' clause, the liberty to subcontract clause and the circular indemnity clause.

The 'Himalaya' clause

A 'Himalaya' clause is a clause that allows a subcontracted terminal operator to rely on the defences, limitation and exclusions in a carrier's bill of lading,⁷ despite the fact that the terminal operator is not a party to that bill of lading contract.

For a 'Himalaya' clause to be enforceable it must satisfy the four-part test laid down by Lord Reid in *Midland Silicones*⁸ in that it must be clear that: (1) the subcontractor is intended to be protected by the clause; (2) the carrier contracted as agent for the subcontractor; and (3) the carrier has authority from the subcontractor to enter into the 'Himalaya' clause (although later ratification would suffice). Further, (4) difficulties regarding consideration moving from the stevedore must be overcome. A 'Himalaya' clause typically reads as follows: 'every such person [subcontractor] or vessel shall have the benefit of every right, defence, limitation and liberty of whatsoever nature [...] as if such provisions were expressly for his own benefit and in entering into this contract, the carrier [...] does so not only on his own behalf but also as agent [...] for such person or vessel.'

A 'Himalaya' clause will not necessarily offer complete protection to the terminal operator acting as the subcontractor of a bill of lading issuing carrier. In circumstances where the services provided by the terminal operator were not contemplated by the bill of lading then the 'Himalaya' clause will not come into operation. This issue was considered in *The 'Rigoletto'*⁹ where the defendant stevedoring company sought to rely on a clause in a carrier's bill of lading providing that the 'carrier or its agents shall not be liable for loss of or damage to the goods during the period before loading or after discharge howsoever such loss or damage arises'. At first instance Judge Hallgarten found that the carrier would not have been able to rely on the exclusion clause because the services provided were outside of the scope of the bill of lading, and therefore the stevedoring company was similarly unable to obtain the benefit of the exclusion by virtue of the 'Himalaya' clause.¹⁰

The liberty to subcontract clause

When a sub-bailee receives goods from a bailee pursuant to a contract between those two parties, it is in certain circumstances entitled to rely on the terms of that contract when facing a claim in bailment from the original bailor of the goods, through the doctrine of sub-bailment on terms. The leading case on sub-bailment on terms is often cited as *The 'KH Enterprise'*¹¹ where the Privy Council held that a subcontracted carrier could rely on the terms and conditions in its own bill of lading in a claim for bailment because, through a liberty to subcontract clause in the contract of carriage between the owner of lost goods and the first

7 Typically in the form of a 'network liability regime' – see further P Bugden and S Lamont-Black, *Goods in Transit* (Sweet & Maxwell, 3rd Edition, 2013), paragraph 17-048.

8 *Scruttons Ltd v. Midland Silicones Ltd* [1962] AC 446.

9 *Lotus Cars Limited v. Southampton Cargo Handling Plc* [2000] 2 All ER (Comm) 705.

10 See also *Raymond Burke Motors v. Mersey Docks & Harbour Co* [1986] 1 Lloyd's Rep 155.

11 [1994] 2 AC 324 (aka *The 'Pioneer Container'* or *Owners of Cargo Lately Laden on Board the 'KH Enterprise' v. Owners of the 'Pioneer Container'*).

carrier, the owner of the goods had consented to subcontracting on any terms.¹² The clause typically reads: ‘The carrier shall be entitled to subcontract on any terms the whole or any part of the [...] carriage.’

Although the liberty to subcontract clause gives useful protection, it is not always required for a terminal operator to argue that its sub-bailment was on terms – authority to subcontract can be implied as well as express.¹³

The circular indemnity clause

A circular indemnity clause prevents cargo claimants from bringing a claim against a bill of lading issuing a carrier’s subcontractors for more than would be recoverable from against the carrier itself. The clause typically reads as follows: ‘The merchant undertakes that no claim or allegation shall be made against any person whomsoever by whom the carriage is performed [...] other than the carrier [...] and if any such claim or allegation should nevertheless be made, the merchant will indemnify the carrier against all the consequences thereof.’

The circular indemnity clause works by providing that the cargo claimant (the merchant, which is typically defined very widely to cover all parties that may have a right to make a claim in respect of goods) is not entitled to sue anyone other than the carrier, thus preventing a claim from being made against its subcontractors. If the cargo claimant does so, it will be in breach of this undertaking and the carrier can sue him or her in damages for losses flowing from the breach. The clause then provides that if the carrier ends up paying more in respect of a loss than its limitation regime provides, the cargo claimant will have to indemnify the carrier for any such amounts. Providing that the terminal operator, as the carrier’s subcontractor, has included provisions in its contract with the carrier limiting its own liability, it can sue the carrier for an indemnity under that subcontract, which the carrier will then pass onto the cargo claimant under the circular indemnity.

Election of terms

It will commonly occur that a terminal operator may have been given the benefit of defences and limits in a carrier’s bill of lading through the existence of a ‘Himalaya’ clause but may also have the benefit of its own terms and conditions through the doctrine of sub-bailment on terms. Following *The ‘KH Enterprise’* it could have been argued that a terminal operator could choose between its own terms, or those of its instructing carrier. In that case, Lord Goff of Chieveley, in response to an argument by the claimants that the existence of a ‘Himalaya’ clause gave adequate effect to the intentions of the parties and that allowing a sub-bailee to rely on its own terms was unnecessary and would have created potential inconsistency, said that:

[T]he mere fact that such a [Himalaya] clause is applicable cannot, in their Lordships’ opinion, be effective to oust the sub-bailee’s right to rely on the terms of the sub-bailment as against the owner of the goods. If it should transpire that there are in consequence two alternative regimes which the sub-bailee may invoke, it does not necessarily follow that they will be inconsistent; nor

12 The *KH Enterprise* did not create the doctrine of sub-bailment on terms, see, for example, *Morris v. CW Martin & Sons Ltd* [1966] 1 QB 716.

13 See *Singer Co (UK) Ltd v. Tees and Hartlepool Port Authority* [1988] 2 Lloyd’s Rep 164; and *Sonicare International Ltd v. East Anglia Freight Terminals Ltd* [1997] 2 Lloyd’s Rep 48.

does it follow, if they are inconsistent, that the sub-bailee should not be entitled to choose to rely upon one or other of them as against the owner of the goods: see Mr AP Bell's 'Sub-Bailment on Terms', ch. 6, pp. 178–180, of Palmer and McKendrick, Interest in Goods (1993). Their Lordships are therefore satisfied that the mere fact that a Himalaya clause is applicable does not of itself defeat the shipowners' argument on this point.

However, this was considered by Rix LJ in *The 'Rigoletto'*, where the defendant stevedoring company had accepted goods against a receipt note that read 'To the receiving authority – Please receive for shipment the goods described below subject to your published regulations and conditions (including those as to liability).' Rix LJ stated that where a sub-bailee seeks to speak for itself by setting out the terms on which it wishes to conduct business, he will be taken to have made a choice between those terms, and 'any inconsistency within another regime brought about indirectly through a contract primarily made between other parties' [to which the terminal operator could benefit by way of a 'Himalaya' clause].

IV CLAIMS IN OTHER JURISDICTIONS

Freedom of contract is by no means unique to English law. However, as implied above, there are many jurisdictions where it is not possible to include contractual provisions that determine a terminal operator's liability, or provide for disputes to be governed by English law. Codified legal systems will often have provisions dealing with the liability of a terminal operator or warehouse keeper, from which it is not possible to derogate, and often provide for a form of strict liability.

Chapter 6

INTERNATIONAL TRADE SANCTIONS

*Daniel Martin*¹

Ten years ago, international trade sanctions was a niche area, of limited interest to the great majority of commercial organisations. Fast forward to today, and they have become a board-level issue for almost every company engaged in international commerce, because of the number of countries targeted by sanctions, the breadth of the restrictions and the consequences if they are breached. We have seen a number of high-profile enforcement actions over the past few years, with fines running into millions and billions of US dollars.

Given the progress with respect to Iran, where sanctions have been seen as a key factor in bringing about an agreement to resolve the issues surrounding Iran's nuclear programme, the use of sanctions as a diplomatic tool is likely to continue, with new sanctions likely to be imposed in response to other diplomatic issues and increased enforcement of the sanctions which are in place.

I BASIS FOR INTERNATIONAL TRADE SANCTIONS

Trade sanctions are commonly imposed by a multitude of authorities, including the United Nations, the European Union and national governments (including the United States, Switzerland, Australia and Canada).

The UN Charter gives the Security Council 'primary responsibility for the maintenance of international peace and security'² and requires UN Members to 'accept and carry out the decisions of the Security Council in accordance with the Charter'.³ Article 41 gives the Security Council authority to impose measures including 'complete or partial interruption of economic relations'.

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2 Article 24 of the UN Charter.

3 Article 25 of the UN Charter.

The EU adopts sanctions and other restrictive measures pursuant to Common Foreign and Security Policy and, in particular, Article 25 of the Treaty on the European Union and Article 215 of the Treaty on the Functioning of the European Union. National legislation sets the penalties for breaching sanctions and, in the case of the United Kingdom, can include up to two years' imprisonment and unlimited fines.⁴

If the UK Crime and Policing Bill is passed in its current form, these penalties will increase to up to seven years' imprisonment, and there will also be scope for civil monetary penalties (of up to £1 million or 50 per cent of the estimated value of the funds that breach the sanctions) to be imposed. Deferred prosecution agreements (DPAs) will also be available in respect of sanctions breaches.

On 31 March 2016 the UK's Office of Financial Sanctions Implementation (OFSI) was established. OFSI has a two-pronged mandate: to help ensure that financial sanctions are properly understood, but also to ensure that the sanctions are properly implemented and enforced. There is more information about enforcement in Section V, *infra*.

II EXTENT OF INTERNATIONAL TRADE SANCTIONS

As of April 2016, there are EU restrictions in place against companies and individuals in or connected with more than 20 countries (including Belarus, Libya and North Korea). The restrictions that are likely to have most impact on businesses engaged in shipping and international commerce are those restrictions imposed pursuant to the sanctions relating to Iran, Syria and Ukraine (including measures affecting trade with Russia).

In January 2016, in a hugely significant development, a large number of the restrictions affecting Iran were suspended, pursuant to the Joint Comprehensive Plan of Action (JCPOA). The JCPOA, commonly referred to as the Iran Deal, was the culmination of many months of negotiation between Iran on the one hand and the P5+1⁵ on the other, and is considered in more detail below, in Section VI, *infra*.

III SCOPE OF APPLICATION OF INTERNATIONAL TRADE SANCTIONS

UN sanctions do not apply directly to companies or individuals, whereas EU sanctions have direct effect on EU companies and individuals, as well as applying to any legal person, entity or body in respect of any business done in whole or in part within the EU.

US sanctions can be split into two broad categories, namely domestic measures that apply to all US nationals and entities (including banks in US whose only role in a transaction is to clear US dollar payments) and measures that seek to have extraterritorial effect, by empowering US agencies to impose penalties against non-US companies, such as complete exclusion from the US banking system.

4 For example, Regulation 12 of the Ukraine (European Union Financial Sanctions)(No. 2) Regulations 2014.

5 The five permanent members of the United Nations Security Council (China, France, Russia, the United Kingdom and the United States) plus Germany.

IV NATURE OF RESTRICTIONS

Virtually every sanctions programme includes an asset freeze, the effects of which are twofold: first, the funds and economic resources⁶ of the designated individuals and entities are frozen, meaning that they cannot deal with their own assets; second, it is prohibited to make funds and economic resources available, directly or indirectly to or for the benefit of the designated individuals and entities. The US refers to the designated individuals and entities as Specially Designated Nationals (SDNs), and publishes the SDN List of designated individuals and entities.

In addition, many of the programmes include bans on the trade in specific items. Some bans are common to many programmes (such as the prohibition on the supply to the sanctioned country of military and dual-use equipment, as well as equipment for internal repression), but other bans are specific to the sanctions programme and demonstrate a more targeted approach.

By way of example, as of 1 April 2016 it is prohibited to sell, supply, transfer or export to Syria identified equipment, technology or software that may be used for the monitoring or interception of internet or telephone communications.⁷ Likewise, licences are required for the sale, supply, transfer or export to Russia of listed oil and gas equipment, and no licences may be granted in respect of new contracts for supply to Russian Arctic, deep water or shale projects, other than in the event of an emergency.⁸

Sanctions imposed against North Korea in April and May 2016 in response to the nuclear test conducted by North Korea on 6 January 2016 and the rocket launch conducted on 7 February 2016 specifically targeted shipping. In particular, they restricted the provision of vessels and crew to North Korea, restricted access by Korean vessels to EU ports and restricted the supply of insurance, vessel registration and vessel classification services to North Korean vessels.

Finally, the sanctions against Syria include wide-ranging restrictions on the availability of finance and insurance, and the sanctions relating to Ukraine include restrictions on certain Russian entities' access to debt, equity and capital markets, as well as new loans and credit.

V ENFORCEMENT OF SANCTIONS

As of 1 April 2016, the majority of high-profile international sanctions enforcement has been by US authorities and particularly the Office of Foreign Asset Controls (OFAC) within the US Treasury. Notable examples include fines imposed or penalties agreed with a host

6 Both of these terms are defined very broadly in the sanctions legislation (e.g., in Article 1 of Regulation 267/2012 relating to Iran) and will include virtually any asset that has any economic value.

7 Article 4 of Council Regulation (EU) No. 36/2012.

8 Article 3 of Council Regulation (EU) No. 833/2014 (as amended by Council Regulation (EU) No. 1290/2014).

of international banks, including BNP Paribas,⁹ HSBC,¹⁰ Commerzbank,¹¹ ING,¹² Credit Suisse¹³ and Barclays.¹⁴ In addition, penalties were imposed against businesses involved in shipping and international trade, including PDVSA,¹⁵ the American P&I Club¹⁶ and Dr. Cambis/Impire Shipping.¹⁷

The enforcement actions against banks generally relate to their involvement in processing payments in breach of US sanctions against the likes of Iran, Sudan and Cuba. By way of example, according to the settlement agreement that Commerzbank reached with OFAC in March 2015 and pursuant to which Commerzbank agreed to pay US\$259 million to OFAC to settle its potential civil liability for apparent violations of US sanctions regulations, the bank processed thousands of transactions through US financial institutions that involved countries, entities, or individuals subject to the sanctions programmes administered by OFAC, the bank engaged in payment practices that removed, omitted, obscured, or otherwise failed to include references to US-sanctioned persons in SWIFT payment messages sent to US financial institutions and bank employees deleted or omitted references to Iranian financial institutions, replaced the originating bank information with Commerzbank's name, and later created a process to route payments involving Iranian counterparties to a payment queue requiring manual processing by bank employees rather than routine, automated processing.

In June 2014 BNP Paribas entered into a plea agreement with the US Department of Justice pursuant to which BNP Paribas agreed to pay total financial penalties of US\$8.9736 billion, including forfeiture of US\$8.8336 billion and a fine of US\$140 million. As part of the plea agreement BNP Paribas acknowledged that, from at least 2004 until 2012, it knowingly and wilfully moved over US\$8.8 billion through the US financial system on behalf of Sudanese, Iranian and Cuban sanctioned entities, in violation of US economic sanctions. The conduct also led to penalties being imposed by other US regulators, including the New York State Department of Financial Services, which announced at the time that BNP Paribas had agreed to, among other things, terminate or separate from the bank 13 employees, including the Group Chief Operating Officer and other senior executives and suspend US dollar clearing operations through its New York branch and other affiliates for one year for business lines on which the misconduct centred.

PDVSA was penalised for supplying two cargoes of reformat to Iran between December 2010 and March 2011. The penalties imposed on PDVSA prohibited the company from competing for US government procurement contracts, from securing financing from

9 <https://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial>.

10 <https://www.treasury.gov/press-center/press-releases/Pages/tg1799.aspx>.

11 <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20150312.aspx>.

12 <https://www.treasury.gov/press-center/press-releases/Pages/tg1612.aspx>.

13 <https://www.treasury.gov/press-center/press-releases/Pages/tg452.aspx>.

14 <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20100818.shtml.aspx>

15 www.state.gov/r/pa/prs/ps/2011/05/164132.htm.

16 https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20130509_american_club.pdf.

17 www.state.gov/r/pa/prs/ps/2013/03/206268.htm.

the Export-Import Bank of the United States, and from obtaining US export licences. These penalties did not apply to PDVSA subsidiaries and did not prohibit the export of crude oil to the US by PDVSA.

The American P&I Club agreed to pay US authorities around US\$350,000 in May 2013 to settle potential liability for 55 apparent violations of US sanctions against Cuba, Sudan and Iran. The violations related to settling P&I claims and providing security by way of letters of undertaking and letters of indemnity. The penalty could have been as high as US\$1.7 million, but was reduced because of various mitigating factors.

Dr Dimitri Cambis was added to the SDN List in March 2013 on the basis that he helped the National Iranian Tanker Company (NITC) obtain eight tankers in late 2012 in a manner that concealed the Iranian origin of crude oil by obscuring or concealing the ownership, operation, or control of the vessels by NITC. While the vessels were purchased and seemingly controlled by Dr Cambis and his company Impire Shipping, they were in fact said to be operated on behalf of NITC, which at the time was on the US SDN List.

On 31 March 2016 the UK's Office of Financial Sanctions Implementation (OFSI) was established. Part of OFSI's mandate is to ensure that the sanctions are properly implemented and enforced. The March 2015 Budget¹⁸ referred to the government's intention to create OFSI and included the following indication of the direction this might take: 'The government will review the structures within HM Treasury for the implementation of financial sanctions and its work with the law enforcement community to ensure these sanctions are fully enforced, with significant penalties for those who circumvent them. This review will take into account lessons from structures in other countries, including the US Treasury Office of Foreign Assets Control.'

VI IRAN SANCTIONS – IMPACT OF SANCTIONS RELIEF

The full details of the Iran Deal under the JCPOA are outside the scope of this short chapter, but in essence the deal provides Iran with staged relief from the sanctions imposed by the UN and the EU, and many of the sanctions imposed by the US, in return for ongoing commitments from Iran in respect of its nuclear programme.

The JCPOA envisages a 10-year time frame, with the agreement not fully performed until 2025. There are two main phases of sanctions relief, the first occurring on Implementation Day, which was 16 January 2016, and the second not occurring until Transition Day, which is in October 2023.

The first phase of sanctions relief was triggered by verification by the International Atomic Energy Authority that Iran had complied with its JCPOA commitments. This resulted in the suspension of those EU restrictions that had been characterised as being 'nuclear-related' (as opposed to 'proliferation-related') as well as equivalent US extraterritorial sanctions. It did not significantly impact on the US sanctions that apply to US persons.

Some of the most significant changes from an EU perspective were the delisting of numerous individuals and entities, including Islamic Republic of Iran Shipping Lines (IRISL), National Iranian Tanker Company (NITC) and Iran Insurance Company, and the suspension of prohibitions relating to the purchase, import or transport of crude oil, petroleum products, petrochemical products and natural gas of Iranian origin.

18 <https://www.gov.uk/government/publications/budget-2015-documents>.

There will be further de-listings on Transition Day, as well as further lifting of trade restrictions. The final stage under the JCPOA is UNSCR Termination Day, in October 2025, when, to quote the JCPOA, the ‘UN Security Council [will] no longer be seized of the Iran Nuclear Issue’.

A number of difficult challenges continue to arise even after Implementation Day. These include the risk of sanctions ‘snapping back’ (i.e., being reintroduced) in the event that Iran does not comply with its JCPOA commitments, and the fact that the US domestic sanctions (i.e., those that apply to US persons – and therefore US banks processing US dollar transactions) are largely unaffected by the JCPOA, with the result that US persons are still largely prohibited from trading with Iran.

In addition, the fact that certain restrictions remain in place, and there are still individuals and entities on sanctions lists means that it is important that businesses are aware of the remaining restrictions on trade with Iran, and take careful steps to ensure compliance, including detailed due diligence, and the use of appropriate contractual language.

VI COMPLIANCE WITH INTERNATIONAL TRADE SANCTIONS

Companies that are at risk of infringing sanctions by reason of the areas in the world where they trade and operate need to have processes in place to screen counterparties and other parties involved in the transaction (including banks) to check that they are not included on any sanctions list. They also need to review the products that are being traded and be aware of any relevant restrictions.

Finally, they need to work closely with their banks and insurers, to check that those institutions can support the trade, and they need to think carefully about contractual protections to deal with existing and future sanctions risks.

Chapter 7

SHIPBUILDING

Simon Blows and Vanessa Tattersall¹

I OVERVIEW

Shipbuilding is a cyclical business, with its own patterns of boom and bust. These patterns have been illustrated vividly in the past decade. In the heady days before the 2008 crash the upward march of newbuilding prices looked unstoppable as shipyards struggled to meet the seemingly insatiable appetite of shipowners for new tonnage, fuelled by the boom in world trade and soaring commodity prices. Many new shipyards sprang up, particularly in China and elsewhere in Asia. The crash of 2008 produced a sobering market adjustment as the freight market collapsed, leading to some high-profile insolvencies and inevitably reduced demand for new tonnage. Since then, the market has moved into a period of shipyard overcapacity characterised by defaults, deferrals and renegotiations following the sharp fall in demand from shipowners. Weaker shipyards have fallen by the wayside and shipbuilders have found it hard to replenish their order books. Prices have adjusted downwards and the balance of commercial advantage has generally shifted from the shipyards to the buyers.

Asia continues to dominate shipbuilding. According to statistics for the first six months of 2015, published by the Shipbuilders' Association of Japan, of the 916 worldwide recorded orders for new ships of over 100 GT in this period, 641 or almost 70 per cent were placed with the big-three Asian shipbuilding nations: Japan, South Korea and China. China alone accounted for 288 of those orders, about one-third of the world total. To put this into context, all the European nations together accounted for just 56 orders, and of the other shipbuilding nations only Turkey (44), Vietnam (38) and the Philippines (33) had substantial recorded numbers of individual orders. When these statistics are analysed in terms of gross tonnage, the imbalance towards Asia is even more striking. Of the world total of 36.7 million GT ordered, about 33 million GT was with shipyards in the big-three Asian shipbuilding nations, of which 13.35 million GT (about 36 per cent) was to be built in Korea.

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These statistics do not mean that the Far East shipyards are not under pressure. There have been consolidation pressures on Chinese yards and at the time of writing reports are circulating of a possible merger between two of the largest Korean shipbuilders, SHI and DSME.

Despite this shift to the East, English law and London arbitration remain crucially important for shipbuilding. International buyers are understandably reluctant to experiment with Chinese law and Chinese arbitration for contracts involving Chinese shipyards. Other key interests in Asia and elsewhere remain happy to use English law and London arbitration. This no doubt reflects the continuing strength in depth of the London legal market for maritime law. Of the emerging jurisdictions only Singapore has made inroads as a serious alternative to London as a centre for dispute resolution.

II SHIPBUILDING CONTRACTS

There are a number of standard shipbuilding contracts. The most widely used remains the Shipbuilders' Association of Japan Form (SAJ), which is used not just in Japan but throughout Asia, including in Korea and China. It is frequently adapted, and the versions used by the Chinese shipyards are developing a particular character. Amended SAJs are still used by Chinese shipyards despite the publication of the new Chinese Maritime Arbitration Commission Form in 2011.²

The SAJ form was drafted by an influential trade association for shipbuilders so it is hardly surprising that in its unamended form it is thought to favour the shipyard. Many of the amendments that are most frequently seen are made by buyers to redress this perceived imbalance. The Baltic and International Maritime Council (BIMCO) has in recent years produced its own form of shipbuilding contract, the Newbuildcon. BIMCO is a shipping industry trade association with many shipowner members, so it is perhaps unsurprising that the Newbuildcon is a much more buyer-friendly contract. Although it is a more modern contract, the Newbuildcon does not seem to have caught on and it is not often encountered in practice.

For high-value and complex projects in the offshore industry, such as for FPSOs and FSOs, EPC (engineering, procurement and construction) contract forms are increasingly seen, often but not invariably with the shipyard acting as the EPC contractor. These types of contract originate from the engineering industry rather than shipbuilding and differ in a number of respects from the mainstream shipbuilding contract forms.

In the difficult recent commercial landscape, cancellations and refund guarantee claims have been an important legal focus from an English law perspective, with at least one landmark legal decision of very wide application arising from a refund guarantor bank disputing its obligation to make refunds to a buyer following a shipyard default. Disputes of this nature remain significant, particularly as the pressures on the shipbuilding sector lead to problems and insolvencies at the weaker shipyards.

2 The Chinese Maritime Arbitration Commission Form is designed for use in international sales by Chinese shipyards.

III RECENT SHIPBUILDING DECISIONS

There have been many disputed shipbuilding contract cancellations in recent years as the collapse in asset values and chartering revenues have forced buyers to reassess their order books and shipyards have sought to hold reluctant buyers to their contracts. But because arbitration (often under the rules of the London Maritime Arbitrators Association) rather than court jurisdiction is the almost universal choice for dispute resolution under shipbuilding contracts, the details of the disputes are largely confidential. In England there is no system for publishing arbitration awards, unlike in the United States where Society of Maritime Arbitrators awards are regularly reported. However, a number of important cases have come before the Courts, some as appeals from Arbitration Awards (which English law permits in some circumstances).

*Adyard Abu Dhabi v. SD Marine Services Limited*³ involved a disputed cancellation and has clarified some issues concerning the relationship between claims by a shipbuilder for extensions of time under contractual force majeure provisions and claims for extensions of time based on allegations that delay has been caused by the buyer's breaches – the so-called 'prevention principle'. In *Adyard* the buyer cancelled for delay, following (among other things) a dispute during construction about the terms for making compulsory modifications. *Adyard* did not give notices claiming an extension of time under the contract force majeure provisions, which contained general words allowing extensions for 'any other delays of a nature which under this contract permits postponement of the Delivery Date'. Instead, it sought to rely on the prevention principle, claiming that the buyers' failure to agree terms for the modifications was a breach of the contract that prevented the completion of the ship.

Hamblen J found for the buyers and upheld their cancellation. He decided that *Adyard's* failure to give force majeure notices disqualified them from claiming an extension to the delivery date to which they would otherwise have been entitled. His decision seems to reflect a concern to keep the parties within the four corners of the contractual regime for claiming extensions of time, so that where a claim for an extension to the delivery date can be made under the contract's force majeure provisions those provisions must be used.

This approach should benefit buyers: it makes it more difficult for shipyards to raise generalised buyer-delay claims for the first time long after the particular events said to have caused them have occurred. Requiring shipyards to use force majeure provisions (which almost invariably require notices specifying details of the delays and the events said to have caused them) ensures that the parties know where they stand about claimed extensions to the delivery date at the time they have to take difficult decisions about termination.

The *Adyard* approach has been followed recently in *Zhoushan Jinhaiwan Shipyard Co v. Golden Exquisite & ors*,⁴ an appeal from an arbitration award in the buyers' favour that was said to affect a number of other arbitrations. This decision analyses in more detail the issues that are likely to arise under SAJ-type contracts.

A Chinese shipyard disputed the buyers' cancellation by alleging that delays had been caused by the buyers' breaches of the inspection and supervision regime under Article IV of the shipbuilding contract. The substance of their allegations seems to be that the buyers' supervisors worked unreasonably short hours so were not available to attend tests or

3 [2011] EWHC 848 (Comm).

4 [2014] EWHC 4050 (Comm).

inspections promptly. The shipyard claimed that the resulting delays should be taken into account in determining whether the buyers were entitled to cancel for excessive delay, citing the principle that a party should not profit from its own breach.

The judge (like the arbitrators) disagreed. The contract did not say that delays caused by breach of Article IV postponed the delivery date or gave rise to permissible delays; by contrast breach of other provisions was expressly said to create permissible delay which could postpone the delivery date. On the judge's analysis Article IV gave the buyers' supervisors the right to attend tests and inspections, but conferred no power on them to delay delivery because it allowed tests and inspections to be conducted in their absence. He was also troubled that the shipyard's arguments, if correct, would allow them to claim for delays without giving notice to the buyer at the time the events occurred. The judge thought these matters outweighed the general principle against construing the contract in a way that enabled the buyers to profit by their own breach, and for those reasons upheld the buyers' cancellation.

The *Zhoushan* decision indicates that the application of the prevention principle will be influenced by the terms of the shipbuilding contract and the specific facts giving rise to the disputed delays. Nonetheless, there are now several decisions of London arbitrators in shipbuilding cases where there has been a marked reluctance to allow shipyards to rely on prevention including an anonymised award reported in summary form in 2013⁵ where London arbitrators took the view that a shipyard's attempts to step outside the notice provisions of a shipbuilding contract to claim extensions for delayed approval of construction drawings by the buyer would produce uncommercial and unworkable results. The tribunal observed that doing this would deprive the parties of the information needed to make an informed evaluation of their respective positions, and the buyer might be unaware that delay was being claimed at all until much later.

The tension between the application of the express scheme of the shipbuilding contract and common law principles was also a factor in *Stocznia Gdynia SA v. Gearbulk Holdings Ltd*,⁶ a decision of the Court of Appeal in 2009. In that case, the buyers terminated shipbuilding contracts for delay, exercising express contractual provisions entitling them to rescind. Buyers demanded and received refunds of instalments under refund guarantees given on behalf of the shipyard. The buyers did not, however, limit their claims to contractual termination and refund of the instalments. They also sought to treat the shipyard's conduct as a repudiatory breach and claimed damages. In response, the shipyard argued what was then a widely held view of many practitioners and commentators – that the termination and refund provisions of the shipbuilding contracts amounted to a comprehensive code so that the buyers' exercise of these rights amounted to a waiver of their rights to treat the shipyard as being in repudiatory breach and to claim damages for loss of bargain at common law.

The Court of Appeal found in favour of the buyers, deciding that the contracts did not clearly exclude their common law rights and that the buyers' words and conduct when terminating the contracts did not amount to a binding election to exercise only their contractual rights, leaving them free to exercise their common law rights. The familiar provisions in shipbuilding contracts for liquidated damages to be paid by the shipyard in the

5 London Arbitration 9/13, reported in Lloyd's Maritime Newsletter, 29 May 2013.

6 [2009] EWCA Civ 75, CA. This was an appeal from an arbitration award on a number of preliminary issues.

event of delay and specified shortfalls in performance by the ship as built, which only came into effect if the ship was delivered, did not exclude the buyers' right to claim damages if the ship was never delivered.

Although the decision of the Court of Appeal gives some buyers potentially valuable additional rights against shipyards, in practice its scope may be limited. This is because, unlike the contract in *Stocznia Gdynia*, many shipbuilding contracts including the SAJ Form contain an express stipulation that refund of instalments discharges all the parties' obligations.⁷ A clause of this kind should prevent a claim for damages for repudiation.

It is not unknown for shipbuilding contracts or for events occurring under them⁸ to be backdated to avoid the effect (and cost) of new regulatory requirements. One of the issues in *Crescendo Maritime Co and others v. Bank of Communications Company Ltd & ors; Alpha bank AE v. Bank of Communications Company Ltd & ors*⁹ was that the underlying shipbuilding contract was backdated, in the words of the judge 'to circumvent the application of certain amendments to the SOLAS Convention concerning tank coatings which [...] applied to vessels built pursuant to shipbuilding contracts signed after 8th December 2006'. The shipbuilding contract was cancelled and there was a demand under the refund guarantees. In concurrent London arbitrations under the shipbuilding contract and the refund guarantee Bank of Communications Company (BOCC), the respondent refund guarantors, alleged that the backdating of the shipbuilding contract was a fraud on them, and that the fraud had induced them to issue the refund guarantees. After a procedural decision by the London tribunal¹⁰ BOCC stopped its participation in the arbitrations and commenced proceedings in China in which they sought declarations that the conduct of the other parties to the arbitrations had been fraudulent. The buyers won the arbitrations and applied to the London Court for anti-suit injunctions restraining the claimants in China from pursuing the proceedings there. These complicated circumstances gave rise to a number of legal and procedural issues on which the buyers and Alpha broadly succeeded. Although the judge was not able to grant Alpha the anti-suit injunction it sought he did make a declaration of non-liability in Alpha's favour.

Both the London Arbitrators and the judge found that BOCC was aware of the backdating of the shipbuilding contract, and the judge also found that there was no concealment or non-disclosure of its true date by Alpha Bank to BOCC. So the question of whether this kind of backdating gives rise to rights to avoid a contract or a refund guarantee must wait for another day.

IV REFUND GUARANTEES

Commercial shipbuilding contracts generally require the shipyard to procure refund guarantees for the buyer. These guarantees are usually provided by banks and ensure that

7 Article X 3 of the SAJ form provides: 'Upon such refund by the builder to the buyer, all obligations, duties and liabilities of each of the parties hereto to the other under this Contract shall be forthwith completely discharged.'

8 For example, the date of keel laying.

9 [2015] EWHC 3364 (Comm).

10 To allow Alpha Bank, who had a security assignment of the shipbuilding contract from the buyer, to join the arbitration.

if the buyer becomes entitled to terminate there is a solvent guarantor from whom he can recover refunds of instalments paid to the shipyard. Given the concerns about many shipyards' solvency and the difficulties and delays encountered in enforcing awards and judgments in some jurisdictions refund guarantees are an important element in the shipbuilding contract package, and invariably are required by the providers of pre-delivery finance to buyers.

There were virtually no reported decisions involving shipbuilding contract refund guarantees until 2002 when the English Court of Appeal considered whether refund guarantees given on behalf of a Spanish shipyard were payable on demand or only after the shipyard's liability (if any) had been decided in arbitration under the shipbuilding contract.¹¹ In contrast, the past few years have thrown up a number of important decisions concerning refund guarantees, which could reflect the fact that buyers are having to claim under them more frequently (or that banks are more willing to take points to resist demands).

An extreme example is the case of *Sea Emerald SA v. Prominvestmentbank*,¹² where the buyers paid some US\$17 million to a Ukrainian shipyard in respect of one of a number of ships being built there. The Ukrainian government eventually withdrew financial support to the shipyard, the shipbuilding contract was rescinded and the buyers claimed a refund of instalments under the refund guarantee. The Ukrainian refund guarantor bank alleged that as a matter of Ukrainian law the bank official who signed the refund guarantee lacked authority to do so, that the bank had not subsequently ratified the refund guarantee, and was not bound by it so had no liability to pay. The Commercial Court in London (reluctantly) agreed with them, and the buyer was left with no remedy.

The most significant of the recent refund guarantee cases is *Rainy Sky SA and others v. Kookmin Bank*,¹³ a decision of the United Kingdom Supreme Court that also has broad general significance for English law principles of contract interpretation.

Most shipbuilding contracts give buyers the express right to terminate and to a refund of instalments on the happening of defined events, almost invariably including excessive delay in construction and specified shortfalls in performance (for example, if the ship's speed measured on sea trials falls below a set minimum). The buyer usually also negotiates a right to cancel and receive a refund if there is an insolvency event affecting the shipyard (for example, if it goes into liquidation). The refund guarantees should of course correspond with the shipbuilding contract and respond to all contractual termination events and refund rights (although refund guarantees very rarely extend to the exercise of buyers' common law rights).

Rainy Sky concerned the interpretation of refund guarantees¹⁴ given in respect of six shipbuilding contracts and whether an insolvency event affecting a shipyard entitled the buyer to refunds under them. The shipbuilding contracts permitted the buyers to terminate and to recover refunds of instalments for delay and for specified shortfalls in performance. They also provided that the buyers were entitled to refunds on an insolvency event although – curiously

11 *Caja de Ahorros del Mediterraneo and others v. Gold Coast Limited* [2002] 1 LLR 617 – in the event, the Court of Appeal determined that the guarantees were payable on demand.

12 [2008] EWCH 1979 (Comm).

13 [2011] UKSC 50.

14 Described in the judgment as advance payment bonds, although nothing seems to turn on this distinction.

– the buyer had no right to terminate the contracts for insolvency. The buyers contended that an insolvency event had occurred and demanded refunds of instalments under the guarantee, but the bank refused to pay.

The refund guarantees promised to pay on demand ‘all such sums due to [the buyer] under the contract’. The question the Court had to decide was what the words ‘such sums’ meant. The arguments turned on the construction of the unusually worded guarantees and the parties’ contentions boiled down to this. Based on Paragraph 2 of the guarantees the buyers argued that all pre-delivery instalments were covered. But based on Paragraph 3, the bank argued that these words were to be construed more narrowly and covered only refunds payable following a termination, not refunds triggered by insolvency (for which the contracts gave the buyers no termination rights).

The guarantees were ambiguous and both constructions were arguable. The Supreme Court decided that when the commercial purpose of the guarantees was taken into account the buyers’ construction was correct. It concluded that there were no credible commercial reasons for the bank’s narrow and restrictive analysis of the scope of the guarantees, and gave judgment for the buyers.

Many commercially minded people would agree with the Supreme Court’s conclusion. The bank had the opportunity to adduce evidence of any commercial rationale for the refund guarantee wording (for example, if they had intended to exclude insolvency-related refunds because the shipyard was not prepared to pay any extra costs involved) but did not do so. The Court seemed happy to infer from this that no such rationale existed and in this case the inference was probably well-founded. But there are obvious dangers in judges seeking to apply their own (necessarily subjective) ‘commercial common sense’ to resolve questions of this kind, except perhaps in those very rare occasions where the tools of black-letter law analysis cannot provide the answer.

We have already seen an example of refund guarantors commencing defensive proceedings in their home jurisdiction, notwithstanding English law and London arbitration provisions in the refund guarantee itself in the *Crescendo Maritime Co* case mentioned above. Similar events occurred in *Spliethoff’s Bevrachtingskantoor BV v. Bank of China Limited*,¹⁵ another anti-suit injunction case involving ships being built in China and a Chinese refund guarantor bank.

In this case buyers cancelled two shipbuilding contracts for delay, won the resulting London arbitrations and claimed under refund guarantees. The bank resisted the demands for payment, relying on judgments obtained in China by the shipyard and later the sellers of the ships restraining payment under the refund guarantees based on allegations that the buyers and the engine manufacturers had fraudulently combined to supply defective second-hand engines to the shipyard and had concealed from the shipyard that the engines were not new.¹⁶ The Chinese judgments were enforceable in China.¹⁷

The refund guarantor bank was in a difficult position. It had never been a party to the Chinese proceedings, but orders had been made against it in them restraining payment of the refunds buyers were demanding. The Chinese judgment had been obtained in breach of

15 [2015] EWHC 999 (Comm).

16 The buyers unsuccessfully challenged Chinese jurisdiction, citing the shipbuilding contract arbitration clause.

17 This was common ground, although an application for a retrial was under way in China.

English law/London arbitration provisions in the shipbuilding contracts and in breach of an anti-suit injunction granted by the English court restraining the sellers from continuing with the proceedings in China, but nonetheless the refund guarantor was, of course, a Chinese bank. At the same time the refund guarantor bank was being sued to judgment in London under the express terms of its refund guarantees based on London arbitration awards obtained under the arbitration clauses in the shipbuilding contracts.

The Court of Appeal gave judgment for the buyer requiring payment under the refund guarantees, and refused the bank's application to enforce in England the Chinese judgment restraining payment. The Court plainly wished to give effect to the contract jurisdiction provisions and took full account of the breaches of the London anti-suit injunction. It also doubted that the bank was at any real risk of criminal prosecution in China, and reasoned that its judgment, compelling the bank to pay would protect it because it would not be making payment under compulsion, so would not be acting voluntarily contrary to the Chinese judgment.

Chinese shipyards frequently require the buyers' payment of future instalments to be secured by a performance guarantee. A dispute under a payment guarantee of this kind following cancellation of a shipbuilding contract has recently been before the English courts,¹⁸ which first had to decide whether the guarantee was payable on demand or only after the buyers' liability had been determined in arbitration. The payment guarantee had similar features to the wording of the refund guarantees in *Caja de Ahorros* and although the first instance judge found for the guarantor bank, the Court of Appeal determined that it was payable on demand.

The potentially far-reaching consequences of on-demand guarantees are illustrated by the subsequent decision of the Court of Appeal in the same case.¹⁹ The shipyard was entitled to retain substantial sums paid under the payment guarantee even though the arbitration tribunal appointed under the shipbuilding contract subsequently ruled that the shipyard had no right to receive the instalment in respect of which it had made its demand. This was because the demand was made in good faith and was valid when made, and there were no grounds to say that the payment was subject to a trust in favour of the guarantor bank if the instalment was found later not to be due.

This decision is consistent with well-established authorities concerning payment under performance bonds. However, the dangers it illustrates should alert parties negotiating refund and performance guarantee wordings under shipbuilding contracts to the consequences that may flow from what they agree.

18 *Wuhan Guoyu Logistics Group & anr v. Emporiki Bank of Greece SA* [2012] EWCA Civ 1692.

19 *Wuhan Guoyu Logistics Group & anr v. Emporiki Bank of Greece SA* [2013] EWCA Civ 1679.

Chapter 8

SHIPPING AND THE ENVIRONMENT

Tessa Jones Huzarski and Matthew Dow¹

I ENVIRONMENTAL AWARENESS

The environmental impact of modern shipping has long been acknowledged to be a negative externality of the industry. However, it is only in relatively recent times that efforts – both state-driven and voluntary – have been focused on actively mitigating or reducing these negative effects. New regulations, primarily emanating from the United Nations’ International Maritime Organization (IMO), have been introduced to address aspects such as oil pollution risk, waste disposal and emissions. The rise of environmental regulation has highlighted the need for operators to maximise efficiency to maintain competitiveness. Although compliance is an administrative and financial burden, the received wisdom is that regulations are a necessary step towards the long-term sustainability of the industry.

II MARPOL

In 1973, the IMO established the International Convention for the Prevention of Pollution from Ships 1973 (MARPOL). MARPOL, currently formed of six Annexes, attempts to address major environmental issues that affect shipping, with a view to improving safety at sea and the protection of the marine environment. The Annexes specify operational restrictions with the responsibility of enforcement falling to individual Member States. Disciplinary measures for infringements vary widely from Member State to Member State.

i Annex I – oil

Following the wreck of the *Torrey Canyon* off the coast of the United Kingdom in 1967, the international shipping community recognised the need to regulate shipping to reduce the incidence of oil pollution, both in frequency and in scale. The primary legislative reaction was

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to allocate the responsibility to owners, using the rationale of the 'polluter pays' principle (see Section III, *infra*). However, it was soon apparent that the liability regime did not sufficiently promote preventive action.

The IMO's response to tackling incidents of oil pollution (both accidental and operational) has been the formulation of MARPOL Annex I, which purports to improve tanker safety. Annex I entered into force in 1983, encapsulating provisions relating to the monitoring and handling of oily water, the segregation of ballast tanks as well as crude oil washing systems.

After the *Exxon Valdez* casualty and the ensuing public scrutiny, the IMO amended Annex I to require double hulls for tankers over 5,000 DWT ordered after 6 July 1993.² The implementation of the double-hull requirement was initially envisaged as a gradual phasing out of the single-hulled fleet, with the inspection of old tonnage and the progressive adoption of new measures. However, these plans were accelerated after the *Erika* casualty of 2001. A new schedule brought measures prohibiting the carriage of heavy-grade oil by single-hull tankers into effect as of 5 April 2006.

ii Annex II – noxious liquids in bulk

The carriage of noxious liquids by sea poses a substantial environmental risk, addressed by MARPOL Annex II.³ This contains provisions attempting to reduce the likelihood of damage to the marine environment by accidents arising out of the transport of prescribed chemicals. It sets out restrictions and conditions relating to the design, construction, equipment and operation of chemical tankers.

Annex II compels operators of chemical tankers to record all operations in connection with noxious liquids being carried in a cargo record book. There are also various mandatory conditions that must be followed ensuring that the designated liquids are contained safely and received into certain reception facilities, that discharges are diluted and that these discharges are limited. There is a general prohibition of discharges within 12 nautical miles of nearest land. The Antarctic is designated a special area of protection under MARPOL Annex II.

iii Annex III – harmful substances in packaged form

The IMO's Marine Environment Protection Committee (MEPC) adopted a revised MARPOL Annex III in October 2006. Annex III requires the identification of harmful substances as marine pollutants, to ensure they are packed, and in a manner appropriate to minimise accidental pollution. There is an obligation to use clear marks to distinguish these from less harmful substances.

Annex III prohibits jettisoning cargo that has been identified as harmful, other than in circumstances where it is necessary to do so for the purpose of securing the safety of the ship or life at sea. In addition, owners have to take appropriate measures based on the physical, chemical and biological properties of harmful substances to regulate the washing of leakages overboard, provided that compliance with such measures does not impair the safety of the ship or the persons on board.⁴

2 Regulation 19, MARPOL Annex I.

3 Entered into force on 6 April 1987.

4 Regulation 7(1) MARPOL Annex III.

A harmful substance for the purposes of the provision is defined as being a substance that was identified as a marine pollutant in the International Maritime Dangerous Goods Code.⁵

iv Annex IV – sewage

MARPOL Annex IV requires ships to have systems and controls in place to deal with human sewage,⁶ for governments to have port reception facilities⁷ and a requirement for survey and certification.⁸

Every ship is required to have a sewage system up to an approved standard with a comminuting and disinfecting system, and a temporary storage tank and holding tank of an appropriate capacity.⁹

Annex IV prohibits the discharge of sewage into the sea except at a distance of no less than 3 nautical miles from the nearest land (when the ship is discharging comminuted and disinfected sewage using an approved system) and no less than 12 nautical miles from the nearest land where the sewage has not been comminuted and disinfected.¹⁰ Furthermore, untreated sewage must not be discharged instantaneously, but instead should be moderately released during the course of the vessel's voyage at a rate of not less than 4 knots,¹¹ while not producing any visible floating solids or discolouration in the surrounding water.¹²

More recently, the MEPC has designated a zone of enhanced limitation in the Baltic Sea (the Special Area).¹³ These amendments established additional requirements for passenger ships operating within the Special Area. The discharge of sewage from passenger ships within the Special Area is generally prohibited other than when it has been appropriately treated,¹⁴ with the additional requirement that a vessel's sewage treatment equipment must meet certain nitrogen and phosphorus-removal standards¹⁵ when tested for its certificate-of-type approval.¹⁶

v Annex V – garbage disposal

MARPOL Annex V entered into force on 1 January 2013 in an attempt to revolutionise the way in which the shipping industry regarded its waste disposal management. Annex V sets out obligations as to crew training and vessel garbage management plans on board, as well

5 Regulation 1 MARPOL Annex III.

6 Regulation 8(1)(a) MARPOL Annex IV.

7 Regulation 10 MARPOL Annex IV.

8 Regulation 4 MARPOL Annex IV.

9 Regulation 9 MARPOL Annex IV.

10 Regulation 8 MARPOL Annex IV.

11 Discharge rate is calculated by the terms of paragraph 3 of Resolution MEPC 157(55).

12 Regulation 11 MARPOL Annex IV (see Resolution MEPC 157(55)).

13 In July 2011, MEPC 62 adopted new amendments by way of Resolution MEPC 200(62), which entered into force 1 January 2013.

14 See Resolution MEPC 227(64).

15 See paragraph 4(2) of Resolution MEPC 227(64).

16 www.imo.org/OurWork/Environment/PollutionPrevention/Sewage/Pages/Default.aspx.

as vessel garbage record books.¹⁷ There is a general prohibition on the discharge of garbage into the sea except in some limited circumstances. Annex V imposes a complete ban on the disposal at sea of plastics, domestic waste and cooking oil, as well as other operational waste.

The scope of MARPOL's definition of garbage includes cargo residues.¹⁸ Shipowners accordingly face responsibility for treatment and disposal of residues while hold washing, which cannot be done at sea. The additional time and expense of doing so can be accounted for with appropriate charterparty wording, such as the owner-friendly BIMCO Hold Cleaning/Residue Disposal Clause. Special areas of enforcement are designated in the Mediterranean Sea, the Baltic Sea, the Black Sea, the Red Sea, the Gulf region, the North Sea, the Antarctic, and the Caribbean and Gulf of Mexico.

vi Annex VI – prevention of air pollution from ships

On 10 October 2008, the IMO adopted the revised Annex VI, which sets out the framework limiting nitrogen oxide (NO_x), sulphur oxide (SO_x) and particulate matter emissions from ship exhausts. The framework provides for zones of enhanced limits, 'emission control areas' (ECAs), which can be designated for SO_x, NO_x or both emissions.¹⁹ The implementation of the limits has been on a graduated basis since 2012.

The rules in force at the time of writing require owners to reduce SO_x emissions and particulate matter to 0.10 per cent m/m²⁰ inside SO_x ECAs, with levels of 3.5 per cent m/m outside ECAs. The global limit outside ECAs is set to fall to 0.5 per cent by 2020 (although the IMO has reserved the right to delay implementation until 2025, pending findings of its fuel-availability study). The IMO will issue its fuel-availability study in 2018.

Options for emissions compliance fall under fuel-based and technology-based solutions. Low and ultra-low distillates are available on the market, although these are more expensive than conventional heavy fuel oil and questions have been raised regarding reliability and their impact on fuel systems more suited to conventional fuels. Alternative fuels are also being actively investigated in the market, including liquid natural gas and biofuels. Operators are also investing time and resources into investigating the viability of emissions abatement technology, otherwise known as scrubbers, which allow vessels to burn conventional fuel by cleaning exhaust gases.

European Union Member States have, following the Sulphur Directive,²¹ applied MARPOL Annex VI in a more stringent form, including the commitment to fuel content of 0.5 per cent m/m by 2020, regardless of the IMO's decision to postpone these limits until 2025.

Aside from the EU Sulphur Directive, other coastal states are beginning to introduce their own emissions standards. In March 2015, the Hong Kong Air Pollution Control (Ocean Going Vessels) (Fuel at Berth) Regulation was accepted, aiming to reduce the emission of air pollutants from ocean-going vessels using high-sulphur fuel while in berth in Hong Kong. The

17 See paragraph 10 of Resolution MEPC 62/24.

18 See paragraph 1 (9) of Resolution MEPC 62/24.

19 SO_x and NO_x ECAs are currently in place on the North American Coastline and US Caribbean, and SO_x ECAs are in place in the North Sea and Baltic Sea.

20 On or after 1 January 2015.

21 Directive 2012/33/EU amending Council Directive 1999/32/EC as regards the sulphur content of marine fuels.

penalties for breaching the new rules include a fine of up to HK\$200,000 and imprisonment for six months for burning non-compliant fuel, and a fine of HK\$50,000 and imprisonment for three months for failing to record the required particulars without reasonable excuse.

MARPOL Annex VI also imposes NO_x emission limits for diesel engines. The limits depend on the engine's maximum operating speed and are categorised into three levels of acceptable NO_x emissions depending on the vessel's age or the engine installation date.²² The emission levels are Tier I (applicable from 1 January 2000), Tier II (applicable from 1 January 2011) and Tier III (which are intended to apply from 1 January 2016, in NO_x ECAs only). In November 2014, reversing its previous decision for a five-year postponement, the IMO's MEPC 66 affirmed the 2016 implementation date for Tier III. The Tier III levels will be enforced in the North American ECA, US Caribbean ECA and any subsequently designated NO_x ECAs.

Ships built on or after 1 January, 2016 will now have to comply with more stringent Tier III standards if operating within the North American and US Caribbean ECA-NO_x.²³

There is a general prohibition under MARPOL Annex VI on the emission of ozone-depleting substances from vessels, although installations that specifically contain hydro-chlorofluorocarbons shall not be subject to the prohibition until 1 January 2020.²⁴

vii Annex VI – vessel efficiency

MARPOL Annex VI also introduced industry-wide efficiency standards in an effort to reduce greenhouse gas emissions (including carbon dioxide). Since 2013, vessel operators have been obliged to comply with the Energy Efficiency Design Index (EEDI) and Ship Energy Efficient Management Plan (SEEMP) rules. The EEDI requires all newbuilds to achieve efficiency greater than an industry average reference line calculated on a five-year basis. The SEEMP requires all vessels to hold an on-board energy efficiency plan. The rise of imposed efficiency standards has led to increased scrutiny of vessel design and technological innovation in order to not only achieve compliance but save operational costs.

The IMO's ultimate objective is believed to be an industry-wide 'market-based mechanism' of tradable carbon credits. Investigations are currently being undertaken as regards the implementation of this strategy, including the effects of the projected costs. As of June 2015, the European Union is expected to introduce its own rules in furtherance of this objective under its 'Monitor, Report, Verify' policy, which will enter into force in 2019.

Notwithstanding the regulations above, ports have played an active role in improving energy efficiency and making efforts to reduce pollution. These include variously tax and fee incentives and the rise of shore-side electrical power sources ('cold ironing').

In light of historically high fuel costs, operators have been able to reduce their fuel expenditure and consequent emissions by 'slow steaming'. By proceeding at a slower or 'eco' rate, there are significant fuel savings to be made.²⁵

22 Regulation 13 MARPOL Annex VI.

23 Lloyd's Register Marine, www.lr.org/en/_images/213-35826_Your_options_for_emissions_compliance.pdf.

24 Regulation 12 MARPOL Annex VI.

25 Brodie, 'Congestion', *Commercial Shipping Handbook* (Third Edition, 13 August 2014).

III OIL POLLUTION LIABILITY REGIMES

i The Civil Liability Convention

The primary international liability framework for oil pollution can be found in the Civil Liability Convention 1969, as amended by the 1992 Protocol (CLC 1992).²⁶ The Convention was formulated following the *Torrey Canyon incident* in 1967 and imposes strict liability on seagoing vessels constructed or adapted for the carriage of oil as cargo,²⁷ if involved in an incident where there is a discharge of oil within the territorial sea,²⁸ the exclusive economic zone (EEZ) or a similar area declared by a contracting state.²⁹ The CLC 1992 is implemented in the majority of coastal states, although the United States remains a notable non-signatory.

Under the CLC 1992, a shipowner³⁰ is permitted to limit the level of their liability for oil pollution incidents on the basis of a reference to the tonnage of the vessel. The Convention furthermore obliges owners of ships covered by the Convention to maintain insurance equivalent to their maximum liability for one incident.

The 2000 Amendments to the CLC 1992 (which entered into force on 1 November 2003) provide for limits of liability as follows:

- a* for a ship not exceeding 5,000 GT, liability is limited to 4.51 million special drawing rights (SDR);
- b* for a ship of 5,000–140,000 GT, liability is limited to 4.51 million SDR plus 631 SDR for every additional gross tonne over 5,000; and
- c* for a ship over 140,000 GT, liability is limited to 89.77 million SDR.

ii The US Oil Pollution Act 1990 (OPA 1990)³¹

The oil pollution liability regime in the United States is set out in the Oil Pollution Act 1990 (OPA 1990). Liability will attach to a ‘responsible party’ of a vessel or facility when there is a substantial threat, or actual discharges of oil into or upon the navigable waters and shoreline of the US.³² For the purposes of OPA 1990, the responsible party of a vessel can be the operator, owners or demise charterer of the vessel, excluding any federal or state governmental bodies. A manager of everyday activities will also most likely be considered to be an operator, and therefore a responsible party within the scope of the Act.³³

26 International Maritime Organization Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969.

27 Article I 1 CLC 1992.

28 Article I 5 CLC 1992.

29 Article II CLC 1992.

30 Article III(1) CLC 1992, the MSA 1995 refers to ‘owner’ at Section 153 of MSA 1995, defined as ‘registered owner’ under Section 170(1) MSA 1995.

31 Pub L No. 101-380 Section 1, 104 Stat 484 (18 August 1990) Title I, Oil Pollution Liability and Compensation, Sections 1001–1020, codified at 33 USC Sections 2701–2761.

32 Section 1002 OPA 1990.

33 De La Rue and Anderson, *Shipping and the Environment* (Second Edition, Informa, 2009), p. 656 (for the further categorisation of ‘manager’).

OPA 1990 extends to all oil pollution in the US, including incidents occurring within its territorial sea³⁴ and EEZ,³⁵ as per the US admiralty jurisdiction.

It imposes strict liability for the discharge of oil upon the responsible parties, with no *de minimis* principle³⁶ and as such, any oil spill can result in liability.³⁷ There is no provision for joint and several liability in the OPA 1990, but in light of judicial interpretation of the Clean Water Act 1972, this principle is likely to apply.³⁸

- OPA 1990 allows damages to be recovered from the responsible parties in relation to:
- a compensation and loss resulting from the loss of natural resources;
 - b damages for injury to and economic loss arising from destruction of real or personal property;
 - c damage for loss of subsistence use of natural resources (available to all who use the natural resources, regardless of ownership);
 - d loss in revenue from loss of property;
 - e loss of profit or earning capacity due to the injury or destruction of real property, personal property or natural resources; and
 - f damage for the increased net costs of providing increased and additional public services during or after removal activities.

In addition, punitive damages for maritime claims are also applicable under OPA 1990, with a cap on punitive damages placed at a 1:1 punitive-to-compulsory ratio.³⁹

IV BALLAST WATER MANAGEMENT

The unregulated discharge of ballast water has been recognised as enabling the transfer of potentially invasive foreign species between marine environments and consequently posing significant environmental harm. The discharge's effect can harm localised food webs, as well as resulting in the potential extinction of indigenous organisms. In an attempt to minimise these environmental effects, the IMO has formulated the Ballast Water Management Convention (BWMC).⁴⁰ At the time of writing, 48 countries representing 34.82 per cent of the world's tonnage have signed the BWMC. The BWMC will commence the ratification process after the signature of 35 per cent of the world's tonnage, a threshold that is expected to be reached during the course of 2016.

In accordance with the implementation schedule in action at the time of writing, if the BWMC comes into force before 1 January 2018, vessels will be required to:

34 Section 1002 OPA 1990, 33 USC Section 2701(8).

35 *The International Marine Carriers v. The Oil Spill Liability Trust Fund* 1995 AMC 2072, United States District Court, Southern District of Texas (Houston Division).

36 *In re 'Jahre Spray II'* 1996 W.L. 451315 (D.N.J.); 1997 NMC 845 (D.N.J.1996),

37 LN 51 of 2015, at www.legco.gov.hk/yr14-15/english/subleg/negative/ln051-2015-e.pdf; and *In re 'Jahre Spray II'* (footnote 35, *supra*).

38 De La Rue and Anderson (footnote 32, *supra*), p. 197.

39 This is to be applied in circumstances when it is found that 'the tortious action [...] is worse than negligent but less than malicious'.

40 The International Convention for the Control and Management of Ships' Ballast Water and Sediments.

- a* hold a ballast water management plan;
- b* keep a ballast water record book and a ballast water management certificate on board;
- c* conduct any permissible ballast water exchange in line with D-1 IMO standards; and
- d* have on board an approved ballast water treatment system in line with D-2 IMO standards.

Failure to comply with these requirements will likely result in port state detention, fines, and the possibility of criminal prosecution.

For an indication of how these provisions will be implemented, the industry can look to the United States, where ballast water management legislation is already in force. The United States Coast Guard Final Rule dated 23 March 2012 on ‘Standards for Living Organisms in Ships’ Ballast Water Discharged in US Waters’ (the US Rules) require vessels calling at US ports to treat ballast water when operating within US territorial waters, or alternatively to carry out an exchange of ballast waters before entering the US EEZ. In addition to the federal US Rules, which came into force in June 2012, individual states have also passed legislation, which has proven in places to be more onerous than the federal framework.

V LOOKING TO THE FUTURE

With a heightened public focus on the importance of environmental issues, the regulatory framework for the shipping industry is projected to become more restrictive with time. The expectation is for international bodies such as the IMO and European Union to take a firmer view at regulating the operation of vessels through port state inspections and an increased use of maritime spatial planning (such as the MARPOL special areas and ECAs).

Nowhere will this be more apparent than in the regulation of operations in polar areas. With the opening up of new polar shipping routes and with considerable mineral deposits and oil and gas reserves being found within the polar territories, investment in these regions is likely to be extensive. However, the high level of care required in these waters is likely to be reflected in a correspondingly in-depth regulatory regime. The IMO is in the process of drafting the International Code for Ships Operating in Polar Water (the Polar Code). It is anticipated that the Polar Code will cover a full range of requirements, including but not limited to, ship structure, machine integrity, voyage planning, prevention of oil pollution, prevention of noxious liquid substances from ships and prevention of sewage from ships.

Chapter 9

AUSTRALIA

Gavin Vallely, Simon Shaddick and Simon Gamboni¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

In terms of its ocean freight requirement, Australia has the ‘fifth-largest shipping task in the world – a task that is forecast to double over the next 15 years’.² Notwithstanding the recent downturn in the energy and mining resources sector, the growth predictions principally to service the export of mining and agricultural commodities still hold. In addition, LNG export terminals in Queensland have come on stream and Australia has ‘the world’s fastest growing cruise industry’,³ which is increasing the volume of traffic in Great Barrier Reef shipping lanes. However, due to the economics of operating Australian-flagged tonnage, the national fleet has only a small number of large cargo vessels, the majority of which are employed on Australian coastal trading services, access to which is largely restricted by federal cabotage legislation.⁴

1 Gavin Vallely is a partner, Simon Shaddick is a senior associate and Simon Gamboni is an associate at Holman Fenwick Willan.

2 Angela Gillham, Acting Executive Director of the Australian Shipowners Association, 8 April 2014.

3 PricewaterhouseCoopers Australia, ‘The economic contribution of the Australian maritime industry’, prepared under instruction for the Australian Shipowners Association, February 2015.

4 On 8 April 2014 the Hon Warren Truss, in his former capacity as Minister for Infrastructure and Regional Development, announced the release of an Options Paper on approaches to regulating coastal shipping in Australia. On 25 June 2015 the Shipping Legislation Amendment Bill 2015 was introduced to the House of Representatives, however, the Bill was rejected by the Senate on 26 November 2015 after attracting only two of the five crossbench votes required to ensure its passage.

i Vessels registered on Australian shipping registers

As of 8 March 2016 a total of 11,726⁵ vessels were listed as being entered on the Australian shipping registers.⁶ In terms of vessel types, these vessels can be grouped generally as follows: 349 cargo vessels, 1,285 passenger-carrying vessels, 7,526 pleasure craft, 2,073 fishing vessels and 493⁷ specific purpose-type vessels.

Of those vessels, only 669 hold IMO numbers,⁸ with the composition being approximately 129 cargo vessels,⁹ 78 passenger carrying vessels, 18 pleasure craft, 170 fishing vessels and 274¹⁰ specific purpose type vessels.

ii Australian coastal trading

Australia has a substantial coastal sea freight task, which in 2013–14 was reported to be 104.3 million tonnes.¹¹ Petroleum and dry bulk products remain the largest tonnage component of coastal freight. As of February 2016, 479 vessels have been licensed to engage in the Australian coastal trade, comprising the following:

a Forty-nine general licensed vessels:¹² the recorded vessel types of general licensed vessels consist of 17 landing craft, nine general cargo ships, three bulk carriers, three Ro-Ro vessels, eight barges, four passenger ships, two passenger Ro-Ro ships, one supply vessel, one research/supply vessel and one freighter.

5 Australian Maritime Safety Authority (AMSA), 'AMSA Aboard', 'Message from the CEO – 2013 in review' (December 2013). AMSA indicates that due to the change in marine safety regulation structures that occurred on 1 July 2013, the actual vessel number it is now responsible for is approximately 40,000. This figure appears to include those vessels on the Australian shipping registers and commercial vessels registered with the Australian state and territory governments.

6 AMSA, 'List of Registered Ships', <https://www.amsa.gov.au/vessels/shipping-registration/list-of-registered-ships/>. All are on the Australian General Shipping Register, there are no vessels listed on the Australian International Shipping Register.

7 Note that approximately 294 of these vessels are tugs.

8 Indicating that these vessels have in the past or are capable of being employed on international voyages.

9 Of these, eight are dry bulk carriers, 10 are tankers, 46 are cargo (not dry bulk or tankers), two are bunker vessels, 40 are landing craft and 23 are barges.

10 Of these, seven are floating production storage and offloading (FPSO) vessels, 238 are tugs and nine are dredgers.

11 Bureau of Infrastructure, Transport and Regional Economics, 'Australian sea freight 2013–14' (2015), p. vii, available at http://bitre.gov.au/publications/2015/files/asf_2013_14.pdf.

12 Department of Infrastructure and Regional Development, 'Coastal Trading Licensing and Publications', 'General Licences Granted', at www.infrastructure.gov.au/maritime/business/coastal_trading/licencing/index.aspx.

- b* Seven transitional general licensed vessels:¹³ almost all of these are foreign-registered vessels.¹⁴ The recorded vessel types of transitional general licensed vessels consist of one chemical/oil tanker, four bulk carriers, one product tanker and one barge.
- c* Vessels operating under a temporary licence: approximately 458 foreign-registered vessels have been employed in the 12 months to April 2016 to carry 2,112 cargo parcels on the Australian coastal trade under temporary licences.¹⁵ In descending order, most voyages performed under temporary licences were containers followed by bulk cargo and general cargo and, in terms of weight, dry bulk followed by bulk liquids (hydrocarbon and chemical products) and containers.

iii Foreign-registered vessels in the offshore oil and gas industry

The safety of marine operations in the immediate vicinity of Australian offshore oil and gas facilities is regulated through the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA).

A substantial number of offshore facilities and vessels including foreign-registered FPSOs, floating storage units, accommodation vessels, drilling vessels, construction vessels and pipe-laying vessels also form part of the Australian shipping industry and are regulated by NOPSEMA.

NOPSEMA reported that in 2014–2015 there were 176 offshore facilities in Australia.¹⁶

iv Foreign-registered vessel calls to Australia

Data in relation to the exact number of foreign ships visiting Australia is limited; however, the Australian Maritime Safety Authority (AMSA) indicates that in 2014, 5,674 foreign-registered vessels called at Australian ports.¹⁷

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

An important characteristic of the Australian legal system is the distinction between federal and state or territory laws, both of which are relevant to shipping. From a constitutional perspective, the Commonwealth (i.e., the federal level of Australian government) has the power to make laws with respect to ‘trade and commerce’, which extends to laws relating

13 Department of Infrastructure and Regional Development, ‘Coastal Trading Licensing and Publications’, ‘Transitional General Licences Granted’ at: www.infrastructure.gov.au/maritime/business/coastal_trading/licencing/index.aspx.

14 Foreign-registered transitional general licensed vessels have commenced but not completed the Australian registration process. They are listed in the Australian shipping registers as ‘Not Yet Registered’.

15 Department of Infrastructure and Regional Development, ‘Coastal Trading Licensing and Publications’, ‘Temporary Licence Voyage Reports’ at www.infrastructure.gov.au/maritime/business/coastal_trading/licencing/index.aspx.

16 NOPSEMA, ‘Annual Report 2014–2015’ (2015), p. 19.

17 AMSA, ‘Port State Control 2014 Report Australia’, pp. 2.

to 'navigation and shipping'.¹⁸ This does not, however, preclude the six states¹⁹ and two territories²⁰ from also making laws relating to shipping; the primary constraint is that, in the event of inconsistency between Commonwealth and state or territory law, Commonwealth law prevails to the extent of the inconsistency.²¹

From a territorial perspective, Australia has ratified UNCLOS, and the Commonwealth exercises sovereign jurisdiction with respect to the territorial sea (i.e., 12 nautical miles seaward of the low-water mark or any proclaimed territorial sea baseline).²² Again, this does not preclude the states and territories from legislating with respect to their coastal waters²³ and adjacent territorial sea provided there is no inconsistency with Commonwealth law. The Commonwealth also exercises jurisdiction with respect to Australia's Exclusive Economic Zone.²⁴

At the Commonwealth level, the primary legislation regulating shipping in Australia is the Navigation Act 2012 (Cth), which was redrafted and re-enacted in place of the predecessor 1912 Act. One of the main functions of the 2012 Act is the restructuring of the regulation of Australian vessels and seafarers, and accommodating the removal into new legislation of the overhauled cabotage scheme for coastal trades in Australia.²⁵ The Navigation Act 2012 and other Commonwealth legislation also give effect to a wide range of international maritime conventions and treaties to which Australia is party. State and territory laws typically regulate recreational vessels, ports and harbours, and other maritime infrastructure located within state boundaries.

III FORUM AND JURISDICTION

i Courts

As with federal and state and territory legislation, there is also a distinction between courts exercising jurisdiction at the federal level, and at the state and territory level. In broad terms, federal courts exercise jurisdiction in relation to Commonwealth legislation, whereas state and territory courts exercise plenary jurisdiction with respect to persons and other subject matter situated within their territorial boundaries, as well as in relation to state and territory legislation. State and territory courts have primary jurisdiction with respect to common law proceedings (both civil and criminal), and may also exercise federal jurisdiction in some circumstances.

In practice, however, most shipping and maritime disputes are litigated in the Federal Court of Australia. One of the main reasons for this is that the Federal Court has jurisdiction with respect to much of the shipping-related legislation in Australia, such as the Navigation Act 2012, and other Commonwealth legislation giving effect to international

18 Sections 51(i) and 98 of Commonwealth of Australia Constitution Act.

19 Victoria, New South Wales, Queensland, Tasmania, Western Australia and South Australia.

20 The Northern Territory and the Australian Capital Territory.

21 Section 109 of the Commonwealth of Australia Constitution Act.

22 See further the Seas and Submerged Lands Act 1973 (Cth).

23 Being the area within three nautical miles of the declared Territorial Sea Baseline.

24 Ibid.

25 The Coastal Trading (Revitalising Australian Shipping) Act 2012 (Cth).

conventions.²⁶ The Federal Court also frequently exercises jurisdiction in admiralty, pursuant to the Admiralty Act 1988 (Cth). That Act provides for the commencement of proceedings in personam and *in rem* with respect to a wide range of categories of 'maritime claim'.²⁷ It is also fair to note respectfully that the Federal Court has developed greater experience in dealing with maritime litigation.

With regard to choice of law and jurisdiction, it is important to appreciate that there is no single common law of Australia, rather a separate common law in each state and territory. Accordingly, it is not appropriate for parties to stipulate that an agreement is governed by 'Australian law' and the law of a particular state or territory should be selected. Similarly, should contracting parties wish to submit to the jurisdiction of Australian courts, they should specify the courts of a particular state or territory. Finally, it should be noted that two recent shipping cases have confirmed that Australian courts will exercise jurisdiction over appropriate subject matter unless a party can positively establish that Australia is a 'clearly inappropriate forum'.²⁸

ii Arbitration and ADR

Contracting parties are at liberty to agree to resolve their disputes by arbitration or other means of alternative dispute resolution, and Australian courts will give effect to such agreements. In particular, there is comprehensive legislation at both the Commonwealth and state or territory levels aimed at encouraging and facilitating the arbitration of commercial disputes. These laws regulate matters such as the commencement of arbitration, composition of tribunals, arbitral procedure, awards, appeals and enforcement. The legislation also addresses the extent to which Australian courts may intervene in the arbitral process, including an obligation to stay court proceedings in favour of arbitration in certain circumstances.²⁹

Maritime arbitration in Australia is usually conducted pursuant to the International Arbitration Act 1974 (Cth), which regulates commercial arbitration in Australia between parties with places of business in different states. That Act was amended in order to, *inter alia*, give effect to the most recent version of the UNCITRAL Model Law on International Commercial Arbitration.³⁰ While there is no provision for maritime-specific arbitration under Australian law, parties may agree to resolve their disputes pursuant to the arbitration rules and procedures of the Australian Maritime and Transport Arbitration Commission (AMTAC).³¹ Those rules are intended to supplement the UNCITRAL Model Law.

26 For example, the Limitation of Liability for Maritime Claims Act 1989 (Cth).

27 Section 4 of the Admiralty Act 1988 (Cth). Admiralty jurisdiction is discussed further in Section V, *infra*.

28 See *CMA CGM SA v. The Ship 'Chou Shan'* (2014) 311 ALR 234 and *Atlasnavios Navegacao, LDA v. The Ship 'Xin Tai Hai'* (No. 2) (2012) 301 ALR 357.

29 See, for example, Section 7(2) of the International Arbitration Act 1974 (Cth).

30 As adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985, and amended on 7 July 2006.

31 AMTAC is an industry association affiliated with the Australian Centre for International Commercial Arbitration; see further www.amtac.org.au.

There is also legislative provision for domestic arbitration in Australia, that is, arbitration between parties that have their place of business within Australia.³² However, due to the large number of foreign participants in the Australian shipping industry, there is unlikely to be any significant amount of domestic maritime arbitration. It should also be noted that mediation is frequently used as a means of alternative dispute resolution in Australia, including in shipping cases, and court case-management procedures often require parties to mediate before the hearing of a dispute.

iii Enforcement of foreign judgments and arbitral awards

Certain foreign judgments may be enforced in Australia pursuant to the Foreign Judgments Act 1991 (Cth). A judgment creditor must apply to court to have a foreign judgment registered and the requirements for registration include that the judgment is 'final and conclusive' and, generally, that it is a money judgment and not for payment of foreign taxes, fines or penalties.³³ Registration is usually available in respect of judgments made in the countries listed in the Foreign Judgments Regulations 1992 (Cth), which include, for example, the United Kingdom but not the United States.

With regard to foreign arbitral awards, the Australian courts will generally recognise such awards and do so without significant delay. Australia is a signatory to the New York Convention, which is given local effect in the International Arbitration Act 1974 (Cth). Accordingly, foreign awards to which the New York Convention applies are generally recognised by and enforceable in Australian courts. The court may refuse to enforce a foreign award in certain circumstances, including the usual reasons, for example, relating to a defect in the composition of the tribunal,³⁴ as well as where an award concerns a dispute that would not be capable of resolution by arbitration under Australian law or where enforcement of the award would be contrary to public policy.³⁵

In particular, it is to be noted that an Australian court may refuse to enforce a foreign arbitral award where the award itself, or the underlying contractual agreement, is considered invalid under Australian law, notwithstanding that it is valid under the law governing the substantive dispute. This was the case in a first instance decision of the Federal Court of Australia, which refused to enforce a London arbitration award on a claim under a voyage charterparty on the basis that the charterparty in respect of which the award had been obtained was subject to mandatory Australian choice-of-law and jurisdiction provisions under federal legislation that rendered the award otiose in Australia.³⁶

32 Uniform Commercial Arbitration Act legislation was recently enacted in each state and territory.

33 Section 5 of the Foreign Judgments Act 1991 (Cth).

34 Section 8(5) of the International Arbitration Act 1974 (Cth).

35 Ibid., Section 8(7).

36 This was on the basis that the underlying arbitration clause was found to be in contravention of the Carriage of Goods by Sea Act 1991 (Cth). The decision in *Dampskibsselskabet Norden A/S v. Beach Building & Civil Group* (2012) 292 ALR 161 was later reversed on appeal on a separate point; see [2013] FCAFC 107. The relevant federal legislation is discussed in Section IV.ii, *infra*.

IV SHIPPING CONTRACTS

i Shipbuilding

There is no substantial shipbuilding industry in Australia. There are some small and medium-sized shipyards in the jurisdiction that are predominantly involved in the construction and repair of naval, high-speed aluminium-hull passenger and Ro-Ro vessels and recreational vessels. Accordingly, there is no significant local jurisprudence, specific local laws or regulations concerning shipbuilding contracts.

ii Contracts of carriage

The Carriage of Goods by Sea Act 1991 (Cth) (COGSA) contains important, mandatory provisions concerning choice of law and jurisdiction in relation to contracts of carriage. Certain contracts for the carriage of goods from places in Australia to places outside of Australia (outbound carriage), are deemed subject to Australian law (i.e., that of the state of the port of shipment). Any agreement to the contrary is invalid, as is any agreement that seeks to restrict the jurisdiction of Australian courts with respect to such contracts.³⁷ COGSA also invalidates any agreement that seeks to restrict jurisdiction with respect to carriage from places outside Australia to places in Australia (inbound carriage).³⁸

The purpose of these provisions is to give local cargo interests the protection of Australia's laws and judicial system. The provisions are regularly relied upon by parties who may otherwise have to pursue a carrier in a less favourable jurisdiction or under a less favourable cargo liability regime. As discussed in Section III.iii, *supra*, they can also be relied upon, for example, to resist local enforcement of a foreign judgment or arbitration award obtained pursuant to an agreement that contravenes the mandatory provisions.³⁹

An important consequence of these mandatory provisions is that, where a contract of carriage is subject to Australian law through the operation of COGSA and in certain other cases in which an Australian court has jurisdiction, cargo liability may be regulated by a modified version of the Hague-Visby Rules (the Modified Rules).⁴⁰ These rules primarily apply to contracts for outbound carriage.⁴¹ They also apply in respect of sea carriage between Australian ports, except where carriage is between ports within the same state or territory.⁴² Further, the Modified Rules apply in respect of inbound carriage if another international cargo liability regime does not otherwise apply by agreement or law.⁴³

The Modified Rules regulate cargo liabilities in respect of 'sea carriage documents'. These are defined as including bills of lading and certain types of consignment note, sea waybill and ship's delivery orders,⁴⁴ which need not necessarily be documents of title. The Modified Rules therefore apply to a broader range of shipping documents than the

37 Section 11(2)(a)-(b) of the Carriage of Goods by Sea Act 1991 (Cth).

38 *Ibid.*, Section 11(2)(c).

39 See, for example, the recent decisions referred to in footnote 35, *supra*.

40 Section 8 of the Carriage of Goods by Sea Act 1991 (Cth). The un-amended Hague-Visby Rules appear in Schedule 1 of the Act. The Modified Rules appear in Schedule 1A of the Act.

41 *Ibid.*, Section 10, and Schedule 1A, Article 10(1).

42 *Ibid.*, Section 10, and Schedule 1A, Article 10(4).

43 *Ibid.*, Schedule 1A, Article 10(2).

44 *Ibid.*, Schedule 1A, Article 1(1)(g).

Hague-Visby Rules. A decision of the Full Court of the Federal Court of Australia, however, has held that a voyage charterparty is not a 'sea carriage document', thereby largely resolving a point of law that had given rise to considerable uncertainty in Australian maritime law.⁴⁵

The Modified Rules adopt the basic cargo liability regime of the Hague-Visby Rules. There are, however, a number of important differences in the Modified Rules, some of which are explained in the context of cargo claims in the following Section.

iii Cargo claims

The question of title to sue under bills of lading, sea waybills and ship delivery orders is the subject of uniform legislation in each Australian state and territory⁴⁶ based on the Bills of Lading Act 1855 (UK). In the case of a bill of lading, for example, a cargo interest will need to prove that it is the 'lawful holder' of the bill in order to have title to sue the carrier under the contract of carriage evidenced by the bill.⁴⁷

A cargo interest with title to sue must establish, based on the proper construction of the contract of carriage and the mandatory provisions of COGSA, which cargo liability regime regulates its claim. This can be a complex inquiry that will depend on the circumstances of each case. However, there is a range of scenarios in which the Modified Rules will apply to a cargo claim brought in Australia.⁴⁸

The obligations and immunities of the carrier under the Modified Rules are generally consistent with the Hague-Visby Rules, with three important qualifications. First, the period of the carrier's responsibility under the Modified Rules commences when goods are delivered to the carrier within a port, and ends upon delivery to the consignee within the destination port.⁴⁹ This extension is most relevant to containerised cargo, which is generally delivered to and by the carrier at the container terminal. Where cargo is shipped on a free in/free out basis, delivery to and by the carrier at both ends occurs on board, in which case the mandatory period of responsibility is limited to the 'tackle-to-tackle' period. Second, the Modified Rules apply generally to the carriage of goods on or above deck.⁵⁰ Third, the Modified Rules contain additional provisions that render the carrier liable for delay in certain situations.⁵¹

With regard to the carrier's right to limit liability, the Modified Rules incorporate the amendments to the Hague-Visby rules effected by the SDR Protocol of 1979. Accordingly, the carrier is generally entitled to limit its liability to the greater of 666.67 SDRs per unit or 2 SDRs per kilogram, unless the nature and value of the goods is declared.⁵² As with the

45 *Dampskibsselskabet Norden A/S v. Beach Building & Civil Group* [2013] FCAFC 107.

46 For example, the Sea-Carriage Documents Act 1997 (NSW). In the State of Victoria, the legislation is now contained in Part IVA of the Goods Act 1958 (Vic).

47 Section 8(1)-(2) of the Sea-Carriage Documents Act 1997 (NSW). Section 5 sets out a detailed definition of 'lawful holder'.

48 The application of the Modified Rules is discussed generally in Section IV.ii, *supra*.

49 Schedule 1A, Article 1(3)-(6) of the Carriage of Goods by Sea Act 1991 (Cth).

50 *Ibid.*, Schedule 1A, Article 2(2). However, in some cases the shipper and carrier may agree to contract out of this: see Article 6A.

51 *Ibid.*, Schedule 1A, Article 4A.

52 *Ibid.*, Schedule 1A, Article 4(5).

Hague-Visby Rules, the Modified Rules incorporate a one-year time bar for bringing suit against the carrier.⁵³ Finally, it should be noted that in the event that the Modified Rules apply, the carrier is not usually permitted to contract out.⁵⁴

iv Limitation of liability

Australia is party to, and has incorporated into domestic legislation, the LLMC Convention 1976 together with the LLMC Protocol of 1996 (the Limitation Convention).⁵⁵ The 2012 Amendment to the Protocol of 1996 (which increases the limits of liability) entered into force in Australia on 8 June 2015.⁵⁶

Accordingly, an owner, charterer, manager, operator and salvor of a ship are entitled to limit liability with respect to certain maritime claims in accordance with the Limitation Convention, including the increased limits of liability in the amended Protocol of 1996. Australia is also party to, and has incorporated domestically, the Bunker Convention,⁵⁷ which preserves the right to limit liability under the Limitation Convention with respect to certain claims relating to bunker oil pollution damage.⁵⁸

There have been a number of Australian court decisions concerning the application and interpretation of the Limitation Convention. In one decision, for example, the Federal Court of Australia decided (apparently, for the first time in relation to the Limitation Convention) that claims for pure economic loss are subject to limitation.⁵⁹ In another decision, that Court determined that the facts of a marine casualty gave rise to two ‘distinct occasions’ with the result that a shipowner was required to constitute two limitation funds in respect of the casualty.⁶⁰ It should be added that recent shipping incidents have generated some controversy surrounding a shipowner’s right to limit liability, and the issue may be the subject of further political and media attention in the event of a serious casualty in Australian waters.⁶¹

It should be also noted that where a claimant seeks to argue that a shipowner is guilty of conduct barring limitation under Article 4 of the Limitation Convention, the shipowner may be required to provide security for claims in excess of the limitation amount, even if the claimant’s argument is very unlikely to succeed.⁶²

Australia is also party to, and has incorporated into domestic legislation, the CLC Convention together with the Protocol of 1992 and the further amendments of 2000 (the

53 Ibid., Schedule 1A, Article 3(6).

54 Ibid., Schedule 1A, Article 3(8). See, however, Articles 6 and 6A.

55 See the Limitation of Liability for Maritime Claims Act 1989 (Cth).

56 See the Limitation of Liability for Maritime Claims Amendment Bill 2015 (Cth).

57 See the Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008 (Cth).

58 Article 6 of the Bunker Convention.

59 *Qenos Pty Ltd v. The Ship ‘APL Sydney’* (2009) 260 ALR 692. Claims for pure economic loss are *prima facie* recoverable in tort in Australia.

60 *Strong Wise Ltd v. Esso Australia Resources Pty Ltd* (2010) 267 ALR 259.

61 As with, for example, the case of *The ‘Pacific Adventurer’* in the State of Queensland in 2009. See further: www.amsa.gov.au/forms-and-publications/Publications/Final_Strategic_Report.pdf.

62 See *Barde AS v. ABB Power Systems* (1995) 69 FCR 277.

Civil Liability Convention).⁶³ A shipowner is therefore entitled to limit liability with respect to certain claims for oil pollution damage in accordance with the Civil Liability Convention, including the increased limits of liability under the 2000 amendments.⁶⁴

An important issue arising under both the Limitation Convention and the Civil Liability Convention concerns the application of these conventions to a 'ship'. The former contains no definition of ship, and the latter contains a definition that is often regarded as convoluted and ambiguous.⁶⁵ The vexed question of exactly what amounts to a ship in these conventions is especially relevant in Australian waters, where a range of unique offshore craft is engaged in the exploration and production of oil and gas. The issue creates considerable uncertainty for many participants in the offshore marine sector, and remains the subject of ongoing debate.⁶⁶

V REMEDIES

i Ship arrest

Australia is an 'arrest-friendly' jurisdiction, where ships can be arrested quickly and efficiently. While Australia is not a signatory to the international conventions on ship arrest, the Admiralty Act 1988 (Cth) largely gives effect to the regime of the Brussels Convention. The Act also provides for the admiralty jurisdiction of certain Australian courts, and sets out other rules for arrests and *in rem* proceedings. It is widely accepted, however, that the Act does not permit the arrest of bunkers separately from the ship on which they are loaded.⁶⁷

The Admiralty Act permits the arrest of a ship in three different types of case:

- a* in the case of a common law maritime lien in respect of the ship;⁶⁸
- b* in the case of a defined 'proprietary maritime claim' concerning the ship, which includes claims relating to possession, title, ownership and mortgage;⁶⁹ and
- c* in the case of a defined 'general maritime claim', where, in most cases, the owner of the ship must be the same when the claim arises and when *in rem* proceedings are commenced.⁷⁰

The 'general maritime claims' listed in the Admiralty Act are broader in scope than the claims set out in the Arrest Convention 1952. For example, the Admiralty Act permits arrest for claims in relation to services supplied to a ship,⁷¹ and claims for insurance premiums or P&I

63 See the Protection of the Sea (Civil Liability) Act 1981 (Cth).

64 IMO resolution LEG.1(82) adopted on 18 October 2000.

65 See Article 2(1) of the Protocol of 1992 to the Civil Liability Convention.

66 See further www.hfw.com/FPSO-legal-and-regulatory-issues-Sept-2012.

67 See *Scandinavian Bunkering AS v. Bunkers on board the ship 'FV Taruman'* (2006) 151 FCR 126.

68 Section 15 of the Admiralty Act 1988 (Cth). These include liens for salvage, damage done by a ship, wages of the master or crew, and master's disbursements, but not for bunkers supplied to a ship.

69 *Ibid.*, Sections 4(2) and 16.

70 *Ibid.*, Sections 4(3) and 17.

71 *Ibid.*, Section 4(3)(m).

club calls in relation to a ship.⁷² The Federal Court of Australia, however, has decided that a claim under a forward freight agreement was insufficiently connected to the carriage of goods to permit an arrest.⁷³

Further, while a claim in respect of bunkers supplied to a ship would fall within the definition of ‘general maritime claim’,⁷⁴ it would be necessary for the claimant to establish a cause of action directly against the shipowner (rather than against a time charterer). In light of a recent decision of the Federal Court, it may be possible for a claimant to establish such a cause of action based on a maritime lien that exists under foreign law but which does not exist under Australian law.⁷⁵ That decision is currently under appeal.

The Admiralty Act also provides for the arrest of a sister ship in the event of a ‘general maritime claim’.⁷⁶ To proceed against a sister ship, a claimant must establish that the interest in the ship on which the claim arises is also the owner of the sister ship at the time of arrest. While ‘owner’ is not defined, it has been decided that the term is not restricted to the registered owner and may extend to a beneficial owner.⁷⁷ Beneficial ownership cannot, however, be established simply by reason of a company being a subsidiary or related company of another, and accordingly the concept of ‘associated ship arrest’ that exists in some jurisdictions does not apply in Australia.⁷⁸

An arresting party is not required to pursue its substantive claim in Australia, and so an arrest can be effected purely to obtain security for a claim.⁷⁹ However, an arresting party must give full and frank disclosure of all known facts material to the arrest,⁸⁰ and provide an up-front deposit and give an undertaking in respect of the Admiralty Marshal’s costs and expenses relating to the arrest.⁸¹ The level of deposit to be provided depends on the place of arrest, but is usually in the region of A\$5,000 to A\$10,000. Finally, it should be noted that an arresting party may be liable in damages for ‘unreasonably and without good cause’ demanding excessive arrest security, obtaining an arrest, or failing to consent to release from arrest.⁸²

ii Court orders for sale of a vessel

The Admiralty Rules 1988 (Cth) empower the court, at any stage during *in rem* proceedings, to order that an arrested ship be valued or sold (or both).⁸³ Usually, such an order is made

72 Ibid., Section 4(3)(s).

73 *Transfield ER Futures Ltd v. The Ship ‘Giovanna Iuliano’* (2012) 292 ALR 17.

74 Admiralty Act 1988 (Cth), Section 4(3)(m).

75 *Reiter Petroleum Inc v. The Ship ‘Sam Hawk’* [2015] FCA 1005.

76 Section 19 of the Admiralty Act 1988 (Cth), where the term ‘surrogate ship’ rather than ‘sister ship’ is used.

77 *Malaysia Shipyards v. Iron Shortland as surrogate for the ‘Newcastle Pride’* (1995) 131 ALR 738.

78 The court will only pierce the corporate veil where there is evidence of fraud. See further *Comandate Marine Corp v. The Ship ‘Boomerang I’* (2006) 234 ALR 169, and *Safezone Pty Ltd v. The Ship ‘Island Sun’* (2004) 215 ALR 690.

79 Section 29 of the Admiralty Act 1988 (Cth).

80 See *Atlasnavios Navegacao, LDA v. The Ship ‘Xin Tai Hai’* (No. 2) (2012) 301 ALR 357.

81 Rule 41 of the Admiralty Rules 1988 (Cth).

82 Section 34 of the Admiralty Act 1988 (Cth).

83 Rule 69 of the Admiralty Rules 1988 (Cth).

on the application of a party to the proceeding; however, the Admiralty Rules also provide that the court may, *ex officio*, order the sale of an arrested ship that is ‘deteriorating in value’.⁸⁴ Experience suggests that the Federal Court, which most frequently exercises *in rem* jurisdiction, is generally amenable to granting prompt orders for the valuation and sale of an arrested ship.⁸⁵

The court has a wide general discretion to make an order for valuation or sale,⁸⁶ and may order a sale by auction, public tender or any other method, in each case to be conducted by the Admiralty Marshal.⁸⁷ To obtain an order for valuation or sale, the applicant must give an undertaking in respect of the Admiralty Marshal’s costs and expenses relating to the order made.⁸⁸

VI REGULATION

i Safety

The marine safety regulation regime in Australia is based upon SOLAS,⁸⁹ and other international conventions that adopt various international maritime safety standards.⁹⁰ Australia’s obligations under SOLAS extend to the new ‘verified gross mass’ regulations.

In particular, Australia’s marine safety regime incorporates IMO codes,⁹¹ industry-recognised codes⁹² and other relevant marine safety convention requirements. In some cases, however, a higher degree of safety regulation compliance is required under Australian law and those requirements are expressly implemented by way of specific regulations.

In 2013, the marine safety regulatory regime in Australia was restructured.⁹³ AMSA at that point became the national marine safety regulator for all commercial vessels and now regulates a much greater number of coastal vessels than previously.⁹⁴ The state and territory marine regulators have retained responsibility for marine safety regulation of recreational vessels only.

84 Ibid., Rule 69(5).

85 See, for example, *Bank of China Ltd v. The Ship ‘Hai Shi’* (No 2) [2013] FCA 225.

86 *Marinis Ship Suppliers Pty Ltd v. The Ship ‘Ionian Mariner’* (1995) 59 FCR 245.

87 Rule 70 of the Admiralty Rules 1988 (Cth).

88 Ibid., Rule 69(4).

89 Australia’s obligations under SOLAS extend to the new ‘verified gross mass’ regulations which will enter force on 1 July 2016 through the new Marine Order 42.

90 See, for example, the International Convention on Tonnage Measurement of Ships and the International Convention on Load Lines.

91 Examples include the IMDG Code; the IMSBC Code; Code of Safety for Special Purpose Ships; ISM Code and the International Code of Signals.

92 See, for example, the ICS Guide to Helicopter/Ship Operations.

93 Previously, due to the federal structure of Australia’s states and territories, there was a risk that marine safety regulations for commercial vessels could be inconsistently implemented across the various state and territory marine authorities and AMSA.

94 Before the reorganisation, AMSA only regulated: vessels travelling to (or from) Australia from (or to) a place outside of Australia; non-SOLAS trading vessels on interstate coastal voyages; SOLAS-certificated ships on interstate coastal voyages; and all other ships that were not excluded by the Act.

The Acts implementing the new marine safety regulation structure are the Navigation Act 2012 (Cth) and the Marine Safety (Domestic Commercial Vessel) National Laws Act 2012 (Cth).

This legislation enables marine safety regulations and marine orders⁹⁵ to be created for regulatory purposes. Although marine safety compliance provisions can be found in both Acts and their associated regulations, specific safety compliance details are generally prescribed by way of marine orders.

The definitions of ‘regulated Australian vessel’ and ‘foreign vessel’ under the Navigation Act 2012 (Cth) are fundamental to determining which Act or safety regime applies to any particular vessel.

ii Port state control

AMSA is the authorised Australian authority responsible for performing port state control inspections under Chapter 1, Part B, Regulation 19 and Chapter 11-1, Regulation 4 of SOLAS.

The legislative provisions empowering AMSA to inspect foreign ships, issue notices for deficiencies and detain foreign vessels as a result of marine safety issues are found in Chapter 8, Part 4 of the Navigation Act 2012 (Cth).⁹⁶

Australia has a rigorous system of port state control. In 2014, of the 26,936 foreign ship visits to Australia (by 5,674 foreign-flagged vessels), AMSA performed 3,742 port state control inspections.⁹⁷ In that period 10,892 deficiencies were found, with 269 vessels being detained because of the severity of those deficiencies.⁹⁸ Deficiencies on detained vessels generally related to international safety management, fire safety, life-saving appliances and pollution prevention.⁹⁹

AMSA also publishes monthly detention lists on its website.¹⁰⁰ The detention lists identify the particulars of the detained vessel; its registered owner; the ISM manager and classification society; and a description of the deficiencies found. In some cases, images of deficiencies are provided.

Australia has entered into port state control memoranda with the Indian Ocean MoU and the Tokyo MoU.¹⁰¹

In maintaining its rigorous port state control inspection strategies, AMSA also participates in ‘focused inspection campaigns’ in cooperation with port state control MoU groups. Industry is advised publicly of any planned focused inspection campaigns one month before it commences through the issuance of an Australian notice to mariners.¹⁰²

95 Section 163 of Marine Safety (Domestic Commercial Vessel) National Laws Act 2012 (Cth) and Section 342 of Navigation Act 2012 (Cth).

96 Environmental enforcement powers are dealt with separately.

97 AMSA, ‘Port State Control 2014 Report Australia’, pp. 2 and 3.

98 *Ibid.*

99 *Ibid.*, p. 5.

100 www.amsa.gov.au.

101 See www.amsa.gov.au/vessels/ship-safety/port-state-control/.

102 Notices to mariners are available on the AMSA website.

Figures currently available indicate that in January 2016, 289 foreign ships were inspected, 746 deficiencies were found and 23 foreign ships were detained.¹⁰³

iii Registration and classification

The primary legislation governing ship registration in Australia is the Shipping Registration Act 1981 (Cth) (SRA), together with its associated regulations.¹⁰⁴ The SRA sets out the conditions for ship registration and the granting of Australian nationality to ships. Once registered, the SRA also imposes obligations on the owner or registered agent to ensure the Register remains current.

The SRA also established the Australian Shipping Registration Office (located within the Canberra office of AMSA) whose responsibilities include the establishment of the ownership of ships, the granting of certificates, the issue of continuous synopsis records to ships required to carry them and providing public access to the information held in Australia's ship registries.¹⁰⁵

Australia has two registers: the Australian General Register (AGR); and the Australian International Shipping Register (AISR).

The AGR is primarily used for domestic vessels and internationally certified Australian vessels. The AISR is intended to record international trading ships that meet specific criteria.

A guide to registering ships in Australia can be found on the AMSA website.¹⁰⁶ All Australian-owned commercial ships 24 metres and over in tonnage length capable of navigating the high seas must be registered.¹⁰⁷ All other craft, including government ships, fishing and pleasure craft need not be registered, but may be if the owners desire.¹⁰⁸

Any ship demise chartered to an Australian-based operator, or any craft under 12 metres in length, owned or operated by Australian residents, nationals or both, can be registered if the owner or operator wishes.¹⁰⁹

It is important to note that the Australian registers of ships only contain matters required or permitted by the SRA to be entered in the register. Registers no longer include details regarding mortgages, liens and other financial or security interests in a vessel. Any financial or security interests must be registered on the Personal Property Securities Register (PPSR), which is an entirely separate register operated by a separate government body.¹¹⁰ The interest of an owner or bareboat charterer may also be registered on the PPSR.¹¹¹

103 AMSA, 'AMSA detention List – January 2016', www.amsa.gov.au/vessels/ship-safety/port-state-control/ship-detention/index.asp.

104 The Australian Shipping Registration Regulations 1981 (Cth).

105 Extract from the AMSA website: www.amsa.gov.au/vessels/shipping-registration/.

106 www.amsa.gov.au/vessels/shipping-registration/australian-general-register/guide-to-registering-a-ship/index.asp; see also: www.amsa.gov.au/vessels/shipping-registration/australian-international-shipping-register/.

107 Sections 12 and 13 of the Shipping Registration Act 1981 (Cth).

108 *Ibid.*, Sections 13 and 14.

109 *Ibid.*, Sections 9 and 14.

110 The Personal Property Securities Act 2009 (Cth) is the relevant legislation governing the PPSR and the handling of security interests in Australia.

111 See Section 13 of the Personal Property Securities Act 2009 (Cth) relating to a 'PPS Lease'.

The classification societies that operate in Australia are listed on the AMSA website and are International Association of Classification Society (IACS) members. Not all classifications societies have offices in Australia.

iv Environmental regulation

Regulation of environmental matters in the context of shipping is extensive, and at times complex due to the interplay between Commonwealth and state or territory jurisdictions within Australia. Depending on the location of the vessel and any pollution originating from the vessel within Australian waters, Commonwealth or state or territory marine environmental legislation (or both) may be applicable.

The principal marine environmental convention enacted into Australian law is MARPOL 73/78. Other relevant environmental legislation includes legislation prohibiting pollution by ship anti-fouling paint¹¹² and legislation prohibiting the introduction of invasive marine species from contaminated ballast water.¹¹³

Ship operational pollution prevention obligations under MARPOL are enacted in Australia under the Navigation Act 2012 (Cth) and Marine Orders.¹¹⁴ These obligations are applicable to Australian vessels anywhere in the world, as well as foreign vessels within Australian waters. The federal enforcement legislation relevant to pollution events is the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 (Cth) (MARPOL legislation).

Each state or territory also has its own applicable enforcement legislation used for ship operational pollution events.¹¹⁵

In its 2014–2015 annual report, AMSA indicated that within the reporting year it had secured two successful prosecutions for breaches of the MARPOL legislation.¹¹⁶

Similarly, state and territory prosecutions have been few in number in recent years. Marine pollution prosecutions under the aforementioned acts are generally commenced in inferior courts and information about successful prosecution proceedings is limited. However, some recent prosecutions include:

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- 112 Protection of the Sea (Harmful Anti-fouling Systems) Act 2006 (Cth) and Marine Order 98, which give effect to the International Convention on the Control of Harmful Anti-fouling Systems on Ships, 2001.
- 113 Quarantine Act 1908 (Cth). The 'Australian Ballast Water Management Requirements' information is available from the Department of Agriculture.
- 114 Marine Order 91 – Oil; Marine Order 93 – Noxious liquids substances; Marine Order 94 – Packaged hazardous substances; Marine Order 95 – Garbage; Marine Order 96 – Sewage; and Marine Order 97 – Air pollution.
- 115 Legislation includes: the Marine Pollution Act 2012 (NSW), Protection of Marine Waters (Prevention of Pollution from Ships) Act 1987 (SA), Pollution of Waters by Oil and Noxious Substances Act 1987 (WA & Tas), Pollution of Waters by Oil and Noxious Substances Act 1986 (VIC), Environment Protection Act 1970 (VIC), Transport Operations (Marine Pollution) Act 1995 (QLD) and Marine Pollution Act 1999 (NT).
- 116 AMSA, 'Annual Report 2014–2015, Vessel and Seafarer Safety' (2015), p. 36. The prosecutions were in relation to the *Morning Midas* for pollution in Port Phillip Heads, August 2013, and the *Xin Tai Hai*, for illegal disposal of garbage near Gladstone, June 2014.

- a* the bulk carrier *Meratus Sangatta*, prosecuted under the MARPOL legislation for offences concerning disposal of rubbish on the Queensland coast;¹¹⁷
- b* the bulk carrier *Magdalene*, prosecuted under the Marine Pollution Act 1987 (NSW) for oil pollution in the port of Newcastle; and¹¹⁸
- c* the dredger *Brage R*, prosecuted under the Marine Pollution Act 1987 (NSW) for oil pollution in the port of Newcastle.¹¹⁹

v Collisions, salvage and wrecks

Collisions

Australian Commonwealth and state or territory maritime legislation give effect to the Colregs.

A peculiarity that arises from Australia's federal legal system is that the Commonwealth application of the Colregs is restricted on the high seas¹²⁰ to regulated Australian vessels,¹²¹ domestic commercial vessels¹²² and recreational craft¹²³ (collectively, 'Australian vessels'), and Australian vessels and foreign vessels¹²⁴ in:

- a* the Australian Exclusive Economic Zone;¹²⁵
- b* Australian Territorial Sea;¹²⁶ and
- c* internal waters.¹²⁷

Domestic commercial vessels and recreational craft must comply with the Colregs that apply to them through state or territorial legislation when a vessel is within the legislative jurisdiction¹²⁸ of that state or territory.¹²⁹

117 See <https://www.amsa.gov.au/environment/legislation-and-prevention/prosecutions/oil/index.asp>, prosecuted in the Brisbane Magistrates Court.

118 [2013] NSWLEC 210.

119 [2013] NSWLEC 217.

120 As defined in the Law of the Sea Convention.

121 As defined in Section 15 of the Navigation Act 2012 (Cth).

122 As defined in the Marine Safety (Domestic Commercial Vessel) National Laws Act 2012 (Cth).

123 As defined in Section 14 of the Navigation Act 2012 (Cth).

124 Ibid.

125 As defined in the Law of the Sea Convention.

126 Ibid.

127 Ibid.

128 Note that this is to be distinguished from the geographical (maritime) state limit.

129 By way of example, Colregs in Queensland are applied to ships 'connected with Queensland', wherever they are (including overseas and outside of Queensland waters) pursuant to Section 11 of the Transport Operations (Marine Safety) Act 1994 (Qld) and Transport Operations (Marine Safety) Regulation 2004 (Qld). By way of further example, in Victoria the Colregs are enacted through the Marine Safety Act 2010 (Vic) and Part 6, Division 5 of the Marine Safety Regulations 2012 (Vic), with the regulations disapplying Colregs in limited circumstances.

Wrecks

Legislation relating to wrecks and salvage is located in Chapter 7 of the Navigation Act 2012 (Cth), as well as in various pieces of state or territory legislation that confer miscellaneous powers on port authorities and harbour masters in relation to wrecks and salvage. Part 2 of Chapter 7 of the Navigation Act 2012 (Cth)¹³⁰ only applies to regulated Australian vessels and foreign vessels, and places a mandatory obligation on the owner and master to notify AMSA of a wreck.¹³¹

For domestic commercial vessels, the Marine Safety (Domestic Commercial Vessel) National Laws Act 2012 (Cth) does not contain a provision expressly for wrecks but confirms the continuing application of state or territory laws on this issue.¹³²

Salvage

Australia has adopted the Salvage Convention 1989 into Australian law but not all of its articles. At present, only certain articles are adopted through marine regulations permitted by Part 3 of the Navigation Act 2012 (Cth). The adopted Convention articles are listed in Regulation 17 of the Navigation Regulation 2013 (Cth), which also adopts the Convention's common understanding for Articles 13 and 14.¹³³

vi Passengers' rights

Australia is not a party to the Athens Convention

A shipowner is obliged to report to AMSA any incident that involves the death or serious injury of a person, including a passenger, and failure to do so is an offence.¹³⁴

A passenger's passage money is treated as equivalent to freight. Therefore, the master has a lien on the passenger's luggage for unpaid passage money. If the ship is lost before the contracted voyage commences, the passage money is returnable. Once a voyage has commenced, passage money is generally not returnable. If the voyage is a pleasure cruise, however, the loss of a ship may give rise to a claim in breach of contract on the basis of the distress and disappointment caused by the loss.

Claims for death or personal injury sustained in consequence of a defect in a ship or its equipment, or arising out of an act or omission of the shipowner (or any person for whose actions the shipowner or charterer is vicariously liable) are general maritime claims for the purposes of federal jurisdiction.

Alternatively, claims for loss of life or personal injury may be brought in the Australian state courts. These claims are generally claims in contract or in tort in favour of the affected passenger or his or her estate. The carrier owes a duty to passengers to take reasonable care in respect of their safety.

130 Relating to wrecks.

131 Section 232 of the Navigation Act 2012 (Cth).

132 Section 6(2)(b)(viii) of the Marine Safety (Domestic Commercial Vessel) National Laws Act 2012 (Cth).

133 Schedule 1 of the Navigation Regulation 2013 (Cth) – the tribunal is under no obligation to fix a reward up to the maximum value of the saved vessel or property.

134 Section 185(2) of the Navigation Act 2012 (Cth).

Passenger claims for loss of life or personal injury brought by a person carried in a ship under a contract of passenger carriage,¹³⁵ are subject to a limitation of liability in the amount of 175,000 units of account multiplied by the number of passengers the ship's certificate authorises it to carry.¹³⁶

vii Seafarers' rights

The Maritime Labour Convention 2006 (MLC) came into force in Australia on 20 August 2013, having been ratified by Australia on 21 December 2011.

To give legal effect to the MLC in Australia, the Australian government is required to use its external affairs power under Australia's Constitution to enact legislation that gives effect to any and all obligations imposed by the MLC.

In this regard, the Navigation Act (Cth) 2012, Marine Order 11 (among other Marine Orders, which are legislation instruments under the Navigation Act) and the Marine Safety (Domestic Commercial Vessel) National Law Act 2012 (Cth) have now rendered many aspects of the MLC mandatory for any regulated Australian vessels.¹³⁷

The MLC applies to all seafarers with few exceptions.¹³⁸ Where the MLC is not applicable, the provisions of the Fair Work Act 2009 (Cth) operate to apply minimum terms and conditions for seafarers.

AMSA is the relevant authority responsible for enforcement of the MLC. AMSA surveyors are empowered to inspect most ships at Australian ports to ensure they comply with the MLC. All foreign-flagged vessels within Australian waters may be subject to Australian port state control inspections by AMSA, which will include checks to ensure that MLC requirements for working and living conditions are being met.

AMSA has the power to detain vessels for failure to comply with the MLC and has done so as recently as 19 January 2016 in Melbourne.¹³⁹

VII OUTLOOK

In light of the recent restructuring of Australian maritime safety legislation it is not anticipated that there will be any significant changes in this area for the foreseeable future.

On 8 April 2014 the Minister for Infrastructure and Regional Development announced the release of an options paper to review the approach to regulating coastal shipping in Australia. As a result of the subsequent review, the federal government introduced the Shipping Legislation Amendment Bill 2015 (Cth) which was designed to streamline the current regulatory system that was introduced by the previous Labor government with

135 Article 7(2)(a) of the LLMC Convention. Or who, with the consent of the carrier, is accompanying a vehicle or live animals covered by a contract for the carriage of goods (Article 7(2)(b) of the LLMC Convention).

136 Article 7(1) of the LLMC Convention (as varied by Article 4 of the 1996 Protocol). See also www.infrastructure.gov.au/maritime/business/liability/claims.aspx.

137 As defined by Section 15 of the Navigation Act 2012 (Cth).

138 As defined by Section 14 of the Navigation Act 2012 (Cth).

139 A list of all vessels detained by AMSA is available at <https://www.amsa.gov.au/vessels/ship-safety/port-state-control/ship-detention/index.asp>. See also the Notice to Mariners 16/2013.

reference being made to replacing the existing three-tiered licence system with a single permit for all ships (Australian and foreign), which operates to grant unrestricted access to coastal shipping, as well as reducing reporting requirements. Among other things, the proposed reforms were directed at achieving equal treatment of Australian and foreign ships for the carriage of Australian coastal cargo. The rationale provided by the government for the proposed reform was that, since it came into force in 2012, the cabotage regime (as revised under the Coastal Trading (Revitalising Australian Shipping) Act (CTA)) has acted as a barrier to competition and market entry by foreign ships resulting in a substantial increase in the cost of coastal shipping services which, in turn, has had negative effects on Australian business and led to a high level of uncertainty and red tape without achieving any of the objects of the CTA. However, as the government did not have control of the Senate, the Bill was rejected on 26 November 2015 by the Labor opposition in conjunction with minor parties with which they can form a majority in the upper house. Concern for job safety within the Australian shipping industry has been cited as a major reason for the defeat of the Bill in this instance, however, the federal government has stated that it intends to continue with its efforts to introduce changes in the near future.

Export volumes of dry bulk cargo and bulk liquids are expected to increase with increased port logistics capacities, with offshore construction vessels likely to reposition to projects without a significant increase in vessel numbers.

As a result of the Senate's rejection of the Shipping Legislation Amendment Bill 2015, it is unlikely that the projected increase in coastal freight will be as strong as expected,¹⁴⁰ with several businesses likely to source raw material from overseas or to become purely import/export traders where this is possible due to the high freight rates of Australian-flagged ships. New shipping technology is due to arrive in Australian waters in the near future with the introduction of floating liquefied natural gas (FLNG) units. While the safety regulation of FLNG units is not expected to be under general shipping regulations when they are operating as a 'facility', the extent to which shipping legislation and regulations will be applied has yet to be clarified.

In relation to monitoring vessel safety, AMSA has demonstrated recently that it intends to be stricter than ever in exercising its responsibilities. For the first time since the introduction of the Navigation Act 2012, AMSA has exercised its powers to ban vessels that experience repeated breaches resulting in detentions, from Australian ports, on the basis that they pose an increased risk to seafarers, vessels or the environment.¹⁴¹ We expect this practice to continue and foreign flagged vessels will need to ensure that they remain in compliance with all relevant regulations to avoid significant delays and the associated costs implications.

140 See Bureau of Infrastructure, Transport and Regional Economics, 'Interstate Freight Australia' (2010), p.43.

141 AMSA, 'Annual Report 2014–2015, Vessel and Seafarer Safety' (2015), p.36. AMSA banned four vessels for periods of three or 12 months; namely, the *Vega Aurgia*, *Territory Trader*, *Meratus Sangatta* and *Red Rover*.

Chapter 10

BRAZIL

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I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The total quantity of cargo handling in Brazilian port facilities in 2015 was 1,006 billion tons, 3.9 per cent more than 2014, representing a constant increase over the previous years.

The volume of shipping trade has increased in recent years, but for a country with continental dimensions these numbers could be even higher. Brazilian authorities have recognised that the ports are a bottleneck for Brazilian development. To face this challenge, Brazil has enacted a new Ports Act, and has been carrying out bids to stimulate private investments in ports and terminals to meet current and future demand.

The Brazilian shipping industry is today much more focused on port and offshore support than cabotage and ocean navigation. To give an idea of the extent of this split, offshore and port support vessels make up 90 per cent of all vessels registered with the Brazilian National Agency for Waterway Transportation (ANTAQ), according to the Waterway Statistical Yearbook of 2015.

Notwithstanding the recent decrease in demand due to the oil prices and Brazilian major oil company cash flow issues, there are still foreign vessels operating the offshore support. Currently, although Brazilian-flagged vessels have legal priority over foreign-flagged vessels, still not enough to meet demand and foreign vessels still have an important role in the sector.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Shipping in Brazil is regulated by many different statutes and by a complex legislative framework, including regulations from different periods and with differing authority.

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The Commercial Code in force in Brazil dates from 1850. Although part of the Commercial Code has been revoked by the Brazilian Civil Code of 2002, some of its regulations are still in force, especially those related to maritime commerce, shipping contracts, insurance, losses and general average.

In addition, there are several other regulations regarding carriage of goods by sea and respective liabilities, such as the Federal Decree 116/67, the Civil Code of 2002, and the Brazilian Law of Multimodal Transport, Law No. 9,611/98.

Besides the above, Law No. 2,180/1954 regulates the activities and jurisdiction of the Admiralty Court, which is the administrative body responsible for adjudicating on accidents and navigation incidents in order to attribute liability and apply penalties. Law No. 9,537/1997 and Decree No. 2,596/1998 rule on safety in maritime traffic in Brazilian waters.

There are also some administrative rules issued by public agencies, such as ANTAQ, the Brazilian Health Surveillance Agency, the Brazilian National Agency of Petroleum, Natural Gas and Biofuels, and the Directorate of Ports and Coastlines (DPC).

One of the main statutes in terms of regulation of shipping activity in Brazil is Law No. 9,432/97, which regulates the ordering of waterway transportation. According to Law No. 9,432/97, cabotage, port and maritime support navigations are restricted to Brazilian shipping companies, which are Brazilian companies licensed by ANTAQ to operate in navigation activities. Foreign companies are therefore not allowed to operate in Brazil in these three types of navigation. Ocean navigation is open to foreign shipping companies and foreign vessels, except for restricted cargo under Decree 666 and for exportation of oil and its by-products, pursuant to Ordinance 170/02 of the Brazilian National Agency of Petroleum, Natural Gas and Biofuels.

Moreover, priority is granted to Brazilian-flagged vessels for operating in Brazilian waters. As a general rule, Brazilian shipping companies are only allowed to charter foreign vessels if there are no Brazilian-flagged vessels available in the market. As a consequence, the charter of foreign vessels is subject to prior approval by ANTAQ through a circularisation procedure, which is a consultation of the market on the availability of Brazilian-flagged vessels.

To fly the Brazilian flag, vessels must be owned by Brazilian companies or bareboat chartered to a Brazilian shipping company and registered with the Brazilian Special Registry (REB) with suspension of the flag of origin. In this last case, the bareboat is limited to a certain tonnage depending on the tonnage under construction in a shipyard located in Brazil and the tonnage of the Brazilian vessels already owned by the charterer. The bareboat under these conditions is not subject to prior market consultation.

Another important aspect related to the operation of foreign vessels in Brazil regards labour requirements. Normative Instruction 72 of the Labour Ministry demands that a certain proportion of the crew must be Brazilian citizens. The proportion will depend on the time the foreign vessel remains in Brazil and its activity.

Finally, some of the main conventions ratified by Brazil are: the Collision Convention, enacted by Decree No. 10,773/1914; the Convention on Private International Law (Bustamante Code) of 1929 on the Flag State Law, enacted by Decree No. 18,871/1929; the 1924 International Convention for the Unification of Certain Rules relating to the Limitation of Liability of Owners of Sea-going Ships (Brussels), enacted by Decree No. 350/1935; the International Convention for the Unification of Certain Rules of Law relating to Maritime

Liens and Mortgages, enacted by Decree No. 351/1935; MARPOL, enacted by Decree No. 2508/1998; the Colregs, enacted by Decree No. 80,068, of 2 August 1977; and the Salvage Convention 1989, transposed into Brazilian law by Legislative Decree No. 263/2009.

III VENUE AND JURISDICTION

i Courts

In Brazil, trials between private litigants are heard in the local state justice system, following the procedures established by the Code of Civil Procedure.

The federal courts are only competent to rule on maritime issues in the event that a Brazilian navy vessel or a federal public entity is involved.

The judicial system is organised on different levels. At the first instance the claims are decided by a single judge. Subsequently, the courts of appeal act as courts of second instance, where the appeals are judged by a group of three judges.

Judgments rendered by the second-instance courts may be subject to a subsequent appeal to the Superior Court of Justice (STJ) or the Federal Supreme Court (STF).

The STJ judges the legality of rulings by state courts of appeal, in accordance with the federal laws, while the primary role of the STF is to rule on issues concerning the Federal Constitution.

In addition to the judicial system, navigational facts and incidents are subject to administrative proceedings, since it is mandatory for the local port captain to carry out an inquiry to determine the causes of any incident. The results of this inquiry will be sent to the Admiralty Court for judgment.

The Admiralty Court is an administrative court, subordinated to the Ministry of Defence, that rules on navigation accidents and shipping matters, issuing penalties to the liable officers, crew members or companies, as regulated by Law No. 2.180/54.

ii Arbitration and ADR

There are domestic arbitration institutions and chambers that may judge specialised matters. However, this method of conflict resolution is not yet widely practised in Brazil despite the existence of an arbitration law (Law No. 9,307/96).

It is worth mentioning that in 2015 there were some relevant changes in the arbitration law in order to provide more strength to arbitration in Brazil and gain prominence as a form of dispute resolution in the country. Law 13,129/2015 brought relevant changes in the Arbitration Law 9,307/96 in order to expressly allow arbitration in the contracts entered with public entities and governmental bodies, as well as to regulate the possibility of urgency measures and other matters.

Further to that, a New Code of Civil Procedure (Law 13,105/2015) recently entered into force on 18 March 2016. Among other important procedural changes, the New Code expressly stimulates the use of ADR methods, especially mediation and conciliation in order to try to reduce the number of judicial cases. Thus, in most judicial claims the parties, prior to presenting a defence, shall be summoned to preliminary hearings in the presence of a conciliator, a mediator, chambers of conciliators or mediators, or even the judge, which will give advice on the risks of the dispute or foster dialogue between parties in order to provide guidance towards an amicable resolution. Conciliation and mediation may be applied at any time during the course of the proceedings and are subject to confidentiality, except when disclosure is expressly authorised.

Also, a Mediation Law has recently been published (Law 13,140/2015) setting out rules for out-of-court mediation between private parties. In this case, the award shall be ratified by court.

iii Enforcement of foreign judgments and arbitral awards

Foreign judgments and awards will only be valid and effective for enforcement in Brazil after being ratified by the STJ.

For the enforcement of a foreign judgment in Brazil, the creditor will have to file a request for the enforcement and demonstrate to the court that the following requirements have been met:

- a the judgment was rendered and issued by a competent judge;
- b the defendant was duly summoned or its default legally ascertained;
- c the decision became final in compliance with the formalities necessary to be enforced in the place where it was rendered; and
- d the decision was legalised by the Brazilian consulate and accompanied by a sworn translation.

The final requirement can be dismissed in some cases, especially when there is a bilateral treaty for judicial cooperation between Brazil and the country where the decision was rendered.

The STJ will not review the facts and merits of the foreign judgment. If such formal requirements are present, the *exequatur* will be granted and the proceedings will be forwarded to the federal court of the state in which the debtor is domiciled, so that it can be enforced against debtor's assets.

The STJ will not ratify a foreign judgment that is contrary to Brazilian public policy, national sovereignty or the dignity of the human person.

IV SHIPPING CONTRACTS

i Shipbuilding

A shipbuilding contract must be registered at the Maritime Notary and Admiralty Court for the transfer of the ownership of the vessel by the shipyard to the contracting party.

Also, to be entitled to tax benefits on the acquisition of materials for the construction of the vessel and also on the definitive sale of the vessel by the yard, the buyer must register the hull under construction before the Admiralty Court with the REB.

Additionally, a classification society duly approved by the Brazilian navy must approve the project and follow up construction to allow the issuance of the construction licence.

As established in Law No. 7,652/1998, transfer of title of the vessel to the buyer will only be effective upon the registration of the vessel with the Admiralty Court or relevant port captain (as the case may be). Such registration must be requested by the buyer within 15 days from the delivery of the vessel by the builder. Nevertheless, the parties may agree on the stage of construction at which the ownership of the vessel or hull will be transferred to the buyer.

If there is a default or an unlawful refusal to deliver the vessel by the shipyard, and the shipowner is capable of evidencing that it is in compliance with its contractual obligations and has acquired ownership of the vessel or hull under construction, it is possible to pursue an *in limine* decision before the competent civil court to obtain the immediate possession of the vessel and move it out of the shipyard.

ii Contracts of carriage

The bill of lading is normally seen as a contract of adhesion in Brazil, inasmuch as the clauses and conditions provided therein are not freely negotiated by both parties. Thus, clauses that tend to exclude or minimise the carrier's liability or limit the rights of the cargo owner may be considered null and void by the Brazilian courts, including when jurisdiction is concerned.

Another relevant point is that under Brazilian law, the carrier bears a strict liability. The main duty of the carrier is to deliver the cargo at its destination to the holder of the original bill of lading in the same condition in which the cargo was received on board. In the event of any damages, the carrier may be held liable irrespective of fault.

Consequently, carriers will bear the burden of proving any cause for the exclusion of their liability and may be relieved by establishing that the cargo damages were caused by the inherent vice of the good, by force majeure or fortuity or, in some cases, by a third-party act or fault.

iii Cargo claims

Carriers' liability starts at the time when the goods are received from the shipper or a person acting on its behalf, lasting until the time of delivery of the merchandise to the addressee, as per the terms of the contract.

In the event of any losses or damages during carriage, both the cargo owner or the subrogated insurer will have title to claim against the carrier.

In addition to the comments made in subsection ii, *supra*, pursuant to the law, liabilities in a Brazilian lawsuit regarding a contract of carriage will be analysed under a joint and strict liability regime between all the parties involved in the carriage.

iv Limitation of liability

Brazil is not a signatory to the main international conventions that exclude or minimise the liability of the carriers, such as the Hague Rules, the Hague-Visby Rules, the Hamburg Rules or the LLMC Convention 1976.

Under a tort claim, the general rule of the Brazilian Civil Code may prevail, thus regulating that the party responsible for the damage is liable to fully compensate the losses caused. In a contractual dispute, however, the Brazilian Civil Code provides that carrier's liability will be limited to the value of the cargo.

Carriers may try to invoke the limitation clause provided in the bill of lading, even though this can be disregarded in the event of a great discrepancy between the amount of the loss and the limitation value and in the event the contract is deemed an instrument of adhesion that was not freely negotiated by the parties.

V REMEDIES

i Ship arrest

The arrest of a vessel or the attachment of goods in Brazil consists of a preliminary or incident procedure for a recovery claim (the main lawsuit) to which Brazilian jurisdiction should also apply.

To this end, pursuant to Articles 21 and 22 of the New Code of Civil Procedure, enacted in 2015, to invoke the Brazilian jurisdiction, one of the circumstances below must be present:

- a* the defendant, whatever its nationality, is domiciled in Brazil;
- b* the obligation is to be performed in Brazil;
- c* the motive is a fact occurred or an act performed in Brazil;
- d* in cases referring to alimony, when the plaintiff has domicile or residency in Brazil or when the defendant maintains ties in Brazil, such as possession or ownership of assets, perception of income, or obtainment of financial benefits;
- e* in cases arising from consumer transactions, when the consumer is domiciled or residing in Brazil; or
- f* when the parties, expressly or implicitly, submit to the Brazilian jurisdiction.

The sources of procedural law relating to arrest of vessels and maritime liens currently in force in Brazil are basically the Brazilian Commercial Code, the Brussels Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1926 and the Code of Civil Procedure.

Brazil has not ratified the Arrest Conventions, thus impeding the security in Brazil of a claim to be submitted to the jurisdiction of another country.

Once Brazilian jurisdiction can be established, the arresting party may seek the arrest of a vessel as security for an indemnity claim that will have to be sought before the same court and jurisdiction. The presence of the following basic legal requirements must be demonstrated:

- a* the *fumus boni iuris*, being the existence of a *prima facie* claim; and
- b* the *periculum in mora*, being the justifiable concern that the credit will be lost or will be difficult to enforce should the guarantee not be obtained through the arrest.

It is also worth mentioning that a Brazilian judge may request a counter-security from the arresting party in order to cover eventual losses caused by the arrest should it be deemed wrongful.

The judge may also order foreign claimants without assets in Brazil to post a security at court – as established by the Civil Procedure Code – to cover the defendant's costs and fees in the event the claim ends up being rejected.

Finally, it is worth commenting that the arrest can be sought *in rem*, in the case of a lien over the vessel, or in personam, in the event that it arises out of a debt of the owner of the vessel.

The ranking of maritime liens is based on the harmonious application of the rules of the Brazilian Commercial Code and the Brussels Convention of 1926, including federal taxes; legal costs and expenses; claims resulting from the employment of the master, crew and ship personnel; indemnities due for salvage; general average contributions; obligations undertaken by the master outside the port of registry for maintenance needs or continuation of the voyage; indemnities due as a result of collisions, or any other maritime accident; ship mortgages; port dues, other than taxes; outstanding payments due depositaries, storage and warehouse rentals, ship equipment; expenditure for the upkeep of the ship and her appurtenances, maintenance expenses at the port of sale; short delivery and cargo losses; debts arising out of the construction of the vessel; expenses incurred for repairs of the vessel and her appurtenances; and the outstanding price of the vessel.

There are no provisions dealing with the arrest of sister ships in Brazilian law. If the claim is based on privileged creditors with effects *in rem* over the vessel, the claimant would be unlikely to obtain the arrest of another vessel of the debtor's fleet. However, if the arrest is

in personam, it may be possible to file a precautionary lawsuit against the shipowner in order to detain a sister ship and request security, even if the obligations are not directly related to such vessel.

ii Court orders for sale of a vessel

The judicial sale of vessels in Brazil follows the same general rules of asset bidding. Auctions are conducted by the public auctioneer in the course of a judicial proceeding, who will adopt all necessary formalities to conduct the auction and sell the vessel under a commission that may vary between 2 and 5 per cent of the sale price.

The auction is usually held in the hall of the court room or at the auctioneer's offices. Before the auction, however, the judge will appoint an accounting expert to appraise the value of the asset. A minimum initial bid will be indicated by the judge based on the accounting report and the vessel will not be sold at the first auction in the event that the minimum price is not reached; however, in a second auction, which will take place 10 to 20 days after the first one, the vessel may be sold for any price provided it is not considered unacceptable by the court.

Once the sale is duly performed, the judge will release an order of sale and the bidder will register ownership of the vessel at the Maritime Court, free of any encumbrances.

The judicial sale in Brazil extinguishes any claim on the vessel existing on the date of sale, pursuant to Section 477 of the Brazilian Commercial Code.

VI REGULATION

i Safety

The safety of maritime traffic in Brazilian waters is ruled by Law No. 9,537/1997 (LESTA), Decree No. 2,596/1998 and Navy Ordinance No. 07, issued by the DPC, which have the purpose of ensuring the safety of life and safety of navigation on the open sea and inland waterways, as well as the prevention of environmental pollution caused by vessels, platforms and their supporting facilities.

Article 4 of LESTA establishes the duty of the maritime authority to determine the equipment and supplies that must be approved for use on board ships and platforms; establish a minimum allocation of safety equipment for vessels and platforms; establish the requirements concerning safety, liveability and prevention of pollution by vessels, platforms, or their supporting facilities; and perform surveys, directly or through delegation to specialised agencies.

Brazilian internal regulations embrace several international conventions on the subject of safety regime, such as the CLC Convention, and the LLMC Convention (see subsections iv and v, *infra*).

ii Port state control

All foreign vessels entering Brazilian ports are subject to port state control.

Port state control in Brazil is performed by qualified naval inspectors accredited by the DPC, in accordance with Navy Ordinance 4. The DPC has, *inter alia*, the authority to contribute to:

- a the guidance and control of the merchant marine and related activities in the interests of national defence;

- b* the safety of waterway traffic;
- c* the prevention of pollution by vessels, platforms and the support stations thereof;
- d* the formulation and enforcement of national policies relating to the sea;
- e* the implementation and inspection of laws and regulations at sea and in inland waterways; and
- f* the qualification and certification of personnel for the merchant marine and related activities.

For the attainment of its purposes, the DPC may also prepare regulations for qualification and registration of professional and amateur seamen; passage and stopovers by vessels in waters under national jurisdiction; naval inspections and surveys; classification of vessels; vessel registry and inspections; registry and certification of helipads on vessels and platforms; execution of works, dredging, research and exploration of minerals under or on the shores of waters under Brazilian jurisdiction; registry of shipping companies, experts and class societies; regulate pilotage services; establish the safety crew of vessels; establish the minimum requirements for safety equipment and accessories for vessels and platforms; establish the requirements referent to safety and for pollution prevention of vessels, platform or support installations thereof; support the Admiralty Court and the Special Navy Prosecutor's Office regarding inquiries into navigational accidents or facts; organise and maintain the Maritime Professional Education System; and represent the navy at gatherings related to matters under its responsibility.

In addition to the internal regulations on port state control, Brazil is a member of the Viña del Mar MoU.

iii Registration and classification

The registration of vessels in Brazil is made at the Admiralty Court and before the port captain, the Admiralty Court being responsible for the following types of maritime records: (1) registration of maritime ownership of vessels over 100 GT and smaller encumbered vessels; (2) registration of security interest and encumbrances on other vessels; (3) shipowners registration; and (4) registration in the REB.

The REB was created as a second registry (in addition to registration with the Admiralty Court) to give to Brazilian shipowners additional benefits. All Brazilian vessels and some foreign vessels are entitled to be registered under the REB. There are two requirements for a foreign vessel chartered to a Brazilian shipping company to be registered in REB. Namely, the suspension of the original flag (see Section II, *supra*) and that the Brazilian shipping company must have the required tonnage.

To register vessels before the Admiralty Court, the applicant must gather all required documentation, pay the corresponding fees, and submit the application to the port captaincy of the jurisdiction where the shipowner is domiciled or is operating the vessel. These port authorities will provide the registration of the vessel in order to keep their respective records duly updated with all relevant information on the Brazilian vessels for the purposes of waterway traffic surveillance, as provided for in Law No. 7,652/88, and submit the documentation to the Admiralty Court for obtaining the intended vessel registration.

As regards classification societies in Brazil, it is important to highlight that their authority to act on behalf of the Brazilian government is established pursuant to the Maritime Authority Rules (Normam 06), which set out provisions on the rules for implementing and

monitoring the accurate application of the international codes and conventions ratified by Brazil, as well as the relevant domestic standards relative to the safety of navigation, safety of human life at sea and prevention of environmental pollution.

In general, the classification societies are not responsible for vessels certified by them and there is no specific regulation in relation to their responsibility towards third parties. Nevertheless, if it is proven that a classification society acted with gross negligence or wilful misconduct, it would be possible to take action against it in the courts pursuant to the Civil Code.

iv Environmental regulation

Brazilian internal regulations embrace several international conventions on the subject of sea and air pollution, such as the CLC Convention, the LLMC Convention 1976, MARPOL and the OPRC Convention.

Internally, the environmental legal framework is set out in several federal laws, decrees, resolutions and regulations, the most relevant of which are:

- a* the Federal Constitution of 1988 (Article 225 et seq): assures the protection of the environment and establishes criminal and administrative liability in the event of environmental violations, in addition to the obligation to repair the damage caused;
- b* Law No. 6,938/81 (the National Environmental Policy): establishes the objectives, concepts, attributions and regulates the strict legal liability for environmental damage, among other matters;
- c* Law No. 7,347/85: provides for public civil-liability lawsuits for damages caused to the environment;
- d* Law No. 9,605/98 (the Environmental Crime Law): rules on administrative, civil and criminal liability resulting from environmental violations. This law has been regulated by Decree No. 3.179/99;
- e* Law No. 9,795/99: rules on environmental education and, *inter alia*, created the National Environmental Education Policy;
- f* Law No. 9,966/2000: known as the Oil Law, regulates the prevention, control and inspection of pollution caused by the discharging of oil and other noxious or hazardous substances in waters under Brazilian jurisdiction. Also included in this law are issues pertaining to some of the international conventions such as MARPOL, the CLC Convention and the OPRC Convention. This law has been regulated by Decree No. 4,136/2002; and
- g* National Environment Council Resolution No. 237/97, which regulates the national environmental licensing system.

v Collisions, salvage and wrecks

Brazil is a signatory to some international conventions regarding collisions and salvage, including:

- a* the Salvage Convention 1910;
- b* the International Convention on Regulation for Preventing Collisions at Sea 1983;
- c* the Colregs;
- d* the FAL Convention;
- e* the Search and Rescue Convention 1979;
- f* MARPOL;
- g* UNCLOS;

- h* the UN Agreement to implement UNCLOS; and
- i* the Salvage Convention 1989.

Based on the London Salvage Convention, Brazil has adopted the obligation that all vessels must assist other vessels in distress.

Lloyd's standard form of salvage agreement is acceptable, as well as the 'no cure, no pay' clause, although all expenses resulting from the incident must be reimbursed to the owner, if damages to third parties or the environment were avoided.

Wreck removal is governed by Law No. 7,542/86 and by the Maritime Authority Rule No. 10 (Normam 10), enacted by the DPC.

The navy is the entity responsible for coordinating, controlling and inspecting removal of things or assets sunken, submerged, stranded and lost in Brazilian jurisdictional waters. The Maritime Authority is responsible for authorising removals, which can be made either by an interested party or third parties, with possible intervention also by the environmental authorities.

vi Passengers' rights

Brazil is not a signatory to the Athens Convention or its protocols.

Brazilian and foreign passengers, while being transported or on cruise trips, have their rights supported by the Brazilian Civil Code and Consumers Act. With respect specifically to cruises, Law No. 11,771/08 and resolutions from the Tourism Ministry must also be observed.

A waterway carrier must guarantee the safety and well-being of the passengers during the entire voyage. The relationship between the waterway carrier and the passengers is deemed a consumer relationship and from such relationship arises the requirement for the providers to comply with the agreement and the offer under the exact terms it was presented and advertised.

vii Seafarers' rights

Brazil is a member of the ILO and has signed ILO Conventions 108 and 185.

There are different rules applicable depending on the type of navigation practised. For deep-sea navigation, foreign crew members may remain in Brazil without a visa for a maximum of 30 days, working on board vessels and having access to the local towns of the ports of call in Brazil, as long as they are in possession of a valid seafarer's passport.

For any period longer than the 30 consecutive days or for any crew member that does not hold a valid seafarer's passport or is not on a deep-sea voyage, a temporary work visa is required, otherwise the vessel may be detained and the crew members can be notified to leave the country under the penalty of deportation.

Foreign crew members, while working on a foreign-flagged vessel, are not considered admitted nor may they carry out paid activities in Brazil, as they are subject to the labour rules and rights applied by the law of the vessel's flag state.

VII OUTLOOK

The Brazilian Commercial Code, which has been in force since 1850 – albeit partially revoked by the Civil Code of 2002 – may soon be substituted by a new regulation. A project of law (No. 1,572/2011) is currently under way in the Brazilian National Congress for the enactment of a new Commercial Code.

This new Code seeks to update the provisions related to, *inter alia*, corporate issues, commercial relationships, titles of credit, bankruptcy and also maritime issues related to carriage of goods, limitations of liability, charter agreements and other shipping matters.

The enactment of a new Commercial Code would be a good opportunity to establish in the Brazilian legal system provisions that were instituted by some important international conventions that were not ratified by Brazil. However, a formal legislative process must still be completed before the project becomes actual law.

In addition to the project for a new Commercial Code, a new Code of Civil Procedure was enacted in Brazil on 2015 and entered into force on 18 March 2016. The new Code is expected to promote significant changes towards the course of civil lawsuits and attempt to reduce the number of court claims, the length of time of the court proceedings and the number of possible appeals. Apart from encouraging the use of new methods of conflict resolution, among other relevant modifications, the new code also brings strength to the value of jurisprudence.

Chapter 11

CANADA

Shelley Chapelski and Andrew Stainer¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Canada's coastline is the longest in the world, and shares the world's largest freshwater lake system, the Great Lakes, with the United States. The country's marine industry includes domestic marine service operators providing domestic and international shipping services, and international shipping lines calling at Canadian ports.² The National Port System includes 18 port authorities in the Pacific, Great Lakes/St. Lawrence and Atlantic regions.³

In 2011, the last year for which Statistics Canada published comprehensive shipping industry statistics, Canadian ports and marine terminals handled 466.1 million metric tonnes of cargo; comprising 341.5 metric tonnes of international cargo, and 124.6 metric tonnes of domestic cargo.⁴ In the same year, by volume, bulk cargo of primarily natural resources made up the largest share of port traffic tonnage; significant imports included petroleum products, minerals (iron ore) and coal, and significant exports included minerals, petroleum products, coal and grain.⁵ In 2014, Canadian ports also handled nearly 2 million cruise ship passengers.⁶

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2 'Transportation in Canada 2011 – Marine Transportation', online: Transport Canada <https://www.tc.gc.ca/eng/policy/anre-menu-3019.htm>.

3 'Public Relations – Port Industry Facts', online: Association of Canadian Port Authorities www.acpa-ports.net/pr/facts.html.

4 Shipping in Canada 2011, online: Statistics Canada www.statcan.gc.ca/pub/54-205-x/2011000/afertoc-aprestdm1-eng.htm.

5 'Transportation in Canada 2011 – Marine Transportation', online: Transport Canada <https://www.tc.gc.ca/eng/policy/anre-menu-3019.htm>.

6 'Cruise Fast Facts' <http://www.clia-nwc.com/cruise-fast-facts/>.

Canada is situated along many international shipping routes linked to North America, and as such, many international container lines call at Canadian Ports.

Canadian-flagged vessels are very active in domestic and coasting trades, and in trade between Canada and the United States; in contrast, in 2011, they only carried approximately 0.1 per cent of Canada's non-US international traffic.⁷

The port of Vancouver is Canada's largest, and the third-largest port in North America in terms of total tonnage. In 2014, the port handled 140 million tonnes of cargo, with almost 95 per cent of the port's total volume serving the Canadian import and export markets.⁸ The port of Montreal is the country's second-largest container port, moving C\$41-billion in goods annually. The port sees over 2,000 vessels per year, and over 1.4 million TEUs, handling more than 30 million tonnes of cargo.⁹

The port of Prince Rupert is the deepest natural harbour in North America, able to accommodate vessels of up to 250,000 SWT, and is the closest North American port to Asia. In 2014, the port handled over 20 million tonnes of grain, coal, chemical, forest products, containers and other cargo.¹⁰ In Atlantic Canada, the port of Halifax handled 7,569,286 metric tonnes of cargo in 2015.¹¹

In order to attract international shipowners, operators and managers to run their businesses from Canada, regardless of where their ships actually sail, a tax-friendly regime has been established by the federal government. The Vancouver International Maritime Centre¹² exists to promote, foster and support such international shipping enterprises. Income from 'international shipping activities' undertaken in Canada, capital gains on the sale of vessels outside of Canada and foreign-sourced income earned by non-resident companies are generally not subject to taxation in Canada.¹³

The Canadian shipbuilding industry includes shipyards located across the country, including firms specialising in ship repair, oil and gas rig construction, and the supply of shipping services, technology and equipment. Canadian shipyards build naval ships, icebreakers, and coast guard vessels, as well as tugs, barges, cargo ships, offshore drilling platforms, ferries and fishing vessels.¹⁴

7 'Transportation in Canada 2014', online: Transport Canada https://www.tc.gc.ca/media/documents/policy/2014_TC_Annual_Report_Overview-EN.pdf.

8 'About Us', online: Port of Vancouver <https://www.portvancouver.com/about-us/>.

9 'The Port of Montreal in Brief', online: Port of Montreal www.port-montreal.com/files/PDF/publications/2015-07-28_jaquette-corporation-en.pdf.

10 'Annual Report 2014', online: Port of Prince Rupert www.rupertport.com/documents/2014-annual-report/pdf.

11 'Statistics', online: Port of Halifax portofhalifax.ca/cargo/statistics/.

12 <http://vancouverimc.org/>.

13 <http://vancouverimc.org/canadian-incentives/>.

14 'The Canadian Shipbuilding and Industrial Marine Industry', online: Innovation, Science and Economic Development Canada <https://www.ic.gc.ca/eic/site/sim-cnmi.nsf/eng/uv00049.html>.

I GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Although Canada inherited its body of maritime law from England, Canadian maritime law has not remained static. It has evolved, in some instances, in distinct directions away from its English roots.

In Canada, matters are complicated by the division of authority in the Canadian constitution between property and civil rights, held by the 10 provinces, and navigation and shipping held by the federal government.¹⁵ Many of the provinces have enacted statutes in order to reform outdated or harsh elements of the common law. However, in Canada, maritime law is federally regulated so the effect of provincial law reforms has not always extended to reform maritime law. As a result, sometimes the courts have taken it upon themselves in maritime matters to judicially reform common law rules that are now perceived as unfair.

Although Canadian courts in recent decades had trended towards ensuring that all matters connected to the subject matter of navigation and shipping were only regulated by the federal government,¹⁶ thereby ensuring consistency across the country, the pendulum has begun to swing back to recognition of the provinces' rights to regulate in certain fields, such as workers' compensation and safety on the job, even when those jobs may involve aspects of shipping.¹⁷ In 2012, in *Tessier Ltée v. Québec*,¹⁸ it was declared that federal jurisdiction over shipping is not absolute, and must be construed in conjunction with the power to regulate works and undertakings, where the provinces are entitled to regulate transportation within their boundaries, while the federal government has jurisdiction over transportation that transcends provincial boundaries and connects the provinces with each other or with other countries.

The end result is that the effect of provincial laws on maritime matters remains a subject of uncertainty in Canada, especially with Québec applying its own civil law on occasion.

In Canada, in terms of statutory instruments, shipping and navigation is primarily regulated by the Canada Shipping Act 2001 (S.C. 2001, c. 26) (CSA 2001), and regulations thereto, which came into effect on 1 July 2007.

Another key statute is the Marine Liability Act (MLA).¹⁹ Pursuant to that Act, Canada either adopts or applies portions or all of the following conventions:

- a* Hague Visby Rules (HVR);
- b* Convention on Limitation of Liability for Maritime Claims 1976 amended by the Protocol of 1996 (LLMC);
- c* Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974) as amended by the Protocol of 1990;
- d* International Convention on Civil Liability for Oil Pollution Damage 1992 as amended by the Resolution of 2000 (CLC);

15 Constitution Act, 1867 (UK), 30 & 31 Vic. Chapter 3.

16 See *Ordon Estate v. Grail*, [1998] 3 SCR 437.

17 *Marine Services International Ltd. v. Ryan Estate*, [2013] 3 SCR 53; *R v. Mersey Seafoods Ltd.*, 2008 NSCA 67; *Jim Pattison Enterprises Ltd v. British Columbia*, 2011 BCCA 35.

18 2012 SCC 23 at par. 24–25, [2012] 2 SCR 3 (17 May 2012).

19 S.C. 2001, c.6.

- e* International Convention on Civil Liability for Bunker Oil Pollution Damage 2001;
- f* International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992, as Amended by the Resolution of 2000; and
- g* Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1982.

In addition, the Canada Marine Act²⁰ establishes semi-autonomous ports across the country and the Pilotage Act²¹ regulates the mandatory pilotage regime on both the west and east coasts and up the St. Lawrence River to the Great Lakes.

Other acts of importance include the Marine Insurance Act;²² the Canada Transportation Act,²³ the Canadian Environmental Protection Act 1999;²⁴ and the Oceans Act.²⁵

II FORUM AND JURISDICTION

i Courts

There are two legal systems in Canada. Civil law is applied in the province of Quebec. The common law is used in the remaining nine provinces, the three territories and with respect to federal matters.

Most maritime litigation matters are brought in the Federal Court of Canada whose jurisdiction is established by statute.²⁶ The Court has rules of procedure which allow for ship arrest and sale as well as sister ship arrest (if the vessel has identical beneficial ownership).

The courts of each of the 10 provinces and three territories can also exercise jurisdiction over maritime matters. They are courts of inherent jurisdiction. However, only the province of British Columbia also has Rules of Court to facilitate Admiralty proceedings and ship arrest.

In Canada, maritime matters are typically subject to time limitations of one year (if the HVR apply), two years (in instances involving the Athens Convention and matters arising from collision) or three years (pollution and all other maritime matters for which a time bar is not specified by statute). If the claim is not clearly of a maritime nature, then the limitation periods of the province in which the event occurred may apply. Provincial time bars range from two to six years. It has not been decided yet if a shorter contractually agreed upon time period for suit for any period of less than three years will be enforced or if it will be struck out in favour of the three-year time bar found in the MLA.

20 S.C. 1998, c. 10.

21 R.S.C. 1985, c.15.

22 S.C. 1993, c. 22.

23 S.C. 1996, c. 10.

24 S.C. 1999, c. 33.

25 S. C. 1996, c. 31.

26 Federal Courts Act, RSC 1985 c. F-7, Section 22.

ii Arbitration and ADR

Canadian courts are quick to enforce valid arbitration clauses. Canada,²⁷ and each of the provinces or territories (some with amendments), has adopted the UNCITRAL Model Law on International Commercial Arbitration. When Canada adopted it in 1986, it was the first country in the world to do so.

The same limitation periods apply for matters subject to arbitration as they do in litigation.

A maritime arbitration center has been established at the Vancouver Maritime Arbitration Center.²⁸ However, international shipping contracts used in Canada still usually specify one of the arbitration centres of London, New York or now Singapore.

iii Enforcement of foreign judgments and arbitral awards

Canada participates in several international conventions with respect to the enforcement of foreign judgments including the New York Convention 1958.²⁹ In particular, the Federal Court will enforce arbitration awards from other jurisdictions. Canada applies the United Nations Foreign Arbitral Awards Convention Act.³⁰

The common law provinces, which have constitutional jurisdiction over matters of property and civil rights, have legislated the application of the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters Convention as between Canada, the United Kingdom and Northern Ireland. There is legislation in each common law Canadian province and territory to provide for reciprocal enforcement of judgments of the other provinces and territories, of some states of the United States and some territories of Australia. Québec, which is a civil law jurisdiction, also has provisions in its Civil Code allowing for the recognition of foreign judgments.

Even if there is no automatic way to enforce a foreign judgment by means of a relying upon a convention to have the judgment recognised, the common law provinces will often allow a party to sue on the foreign judgment as if it were simply a debt. This means that the defendant cannot reopen the findings of fact. The defendant's defences are limited to procedural grounds or a finding that there was no real or substantial connection between the foreign judgment and the jurisdiction where it was issued and it would be against public policy to allow it to be enforced in Canada. It can be a lengthy and cumbersome proceeding to enforce judgments in this manner so it is typically only pursued if the case is of sufficient value.

III SHIPPING CONTRACTS

i Shipbuilding

Although they are no longer dominant industries, significant shipbuilding industries remain in the provinces of Nova Scotia, Québec and British Columbia. The federal government is

27 R.S. 1985 c. 17.

28 <http://vmaa.org/home>.

29 www.newyorkconvention.org/countries.

30 R.S.C. 1985 cl. 16.

currently funding a National Ship Procurement Strategy³¹ worth an estimated \$38 billion to rebuild the fleets of the Royal Canadian Navy and the Canadian Coast Guard with vessels being built in Canada. The programme is 'generational', meaning that the ships are intended to be built over many decades, employing two or more generations of workers. Most of the vessels are scheduled to be built in Nova Scotia and British Columbia with a Québec yard also having the opportunity to build government vessels.

Shipbuilding law in the common law provinces of Canada is very similar to that in England. The challenge for offshore buyers of ships built in Canada is how to secure their investment while at the same time not taking title in Canada so as to avoid paying substantial Canadian taxes on the purchase. If the transfer of title and delivery of a Canadian ship is conducted offshore, those taxes, which can range from 12 to 14 per cent, can legitimately be avoided. In order to effect off shore delivery, title to the ship must remain with the shipyard while under construction. The disadvantage of proceeding in this manner is that the ship, as it is constructed, remains liable to be arrested by unpaid creditors of the shipyard which supply necessaries or services to the hull. In order to reduce the prejudice that can arise from *in rem* claims against the hull, the prospective owner typically arranges for a marine mortgage to be recorded against the hull while it is under construction. If the shipyard becomes insolvent and a ship under construction must be sold, a marine mortgage will generally be paid in priority to most supplies of necessaries and other *in rem* claims.

If a shipyard refuses to deliver a vessel, the prospective owner may be able to arrest it or seek an order of specific performance from the courts.

ii Contracts of carriage

Canada has cabotage laws restricting commercial marine business in Canadian waters to Canadian registered vessels. Waivers under the Coasting Trade Act³² are generally granted when it is proven that no Canadian ship is available to perform the work. As Canada proceeds to enter into the Comprehensive Economic Trade Agreement with the European Union, its cabotage laws will be amended to permit more dredging by non-Canadian vessels, repositioning of empty containers within Canada on a non-revenue basis by European carriers and carriage of containers between Montréal and Halifax by EU owned ships as one leg of an international voyage.³³

Canada applies the Hague Visby Rules and the MLA provides that every five years, Canada is to consider the merits of enacting the Hamburg Rules.³⁴ Canada has never shown an interest³⁵ in switching to the Hamburg Rules and has been following the progress of the Rotterdam Rules with interest. The United States is by far Canada's largest trading partner and Canada will be very influenced by which cargo liability regime the United States decides to apply if and when it changes its ocean carriage laws.

31 <http://www.tpsgc-pwgsc.gc.ca/app-acq/amd-dp/mer-sea/snac-nsps/index-eng.html>.

32 S.C. 1992, c.31.

33 Fact Check: CETA and the Canadian Marine Shipping Industry <http://www.international.gc.ca/media/comm/news-communiques/2014/09/12b.aspx?lang=eng>.

34 MLA *supra* Section 44.

35 <https://www.tc.gc.ca/eng/policy/report-acf-hamburg-menu-1099.htm>.

Carriers may rely upon possessory liens for unpaid freight or hire. However, general liens, as opposed to specific liens relating to the particular goods involved in the unpaid debt, are only permitted by contractual agreement. The CSA 2001 allows for liens for seamen's wages, master's disbursements and for salvage.³⁶

Carriers can exercise liens for freight and associated costs arising from the carriage of goods and direct third parties to protect the lien. Carriers can place the goods with third parties instructing them to store the goods.³⁷

Canada has yet to take steps to reform its legislation to deal comprehensively with electronic documents of carriage or multimodal carriage. The latter matter will always be complicated by the fact that many aspects of land transportation are governed by each province's own legislation while shipping is generally governed by federal legislation.

iii Cargo claims

Canada applies the Hague Visby Rules to all outbound ocean cargo shipments³⁸ and will recognise the proper law of the contract which may be applicable to inbound ocean cargo. Canada also applies the HVR to cargo shipments shipped under a bill of lading within Canada³⁹ but not to cargo carried pursuant to a voyage charterparty. Within Canada, the application of the HVR can be displaced if no Bill of Lading is issued and a non-negotiable shipping receipt is issued which expressly states that the HVR do not apply. If the HVR apply, there is a one-year time bar under its liability regime. In circumstances of domestic carriage where the HVR can be displaced, the carrier may try to set all applicable terms of carriage, including liability, by contract.

Canada has enacted a Hamburg Rules style clause in the MLA⁴⁰ permitting jurisdiction over a claim to be kept in Canada even if the contract calls for litigation or arbitration elsewhere. However, a defendant may still attempt to oppose Canadian jurisdiction on the grounds of *forum conveniens*.

iv Limitation of liability

In addition to the limitation of liability provisions found in the HVR, the CLC and the Athens Convention discussed elsewhere, Canada applies the LLMC to inland waters and vessels under 300 GT.⁴¹

For vessels under 300 GT limitation of liability for personal injury claims is C\$1 million. For property damage the limitation amount is C\$500,000. In the *Telus Communications Co. v. Peracomo*⁴² the Supreme Court of Canada upheld the ability of the shipowner to limit liability to C\$500,000 even though he deliberately sliced through a fibre optic cable, not just once, but twice. The Court accepted that the vessel owner genuinely believed that the cable

36 CSA 2001 *supra* Sections 86, 143.

37 CSA 2001 *ibid* Section 248.

38 MLA *supra* Section 43 (1).

39 MLA *supra* Section 43 (2).

40 MLA *supra* Section 44.

41 MLA *supra* Part 3.

42 SCC 29 [2014] 1 S.C.R. 621.

was abandoned and he had no intention of cutting a live telecommunications cable. The Supreme Court of Canada accepted that the effect of the LLMC was to establish a virtually unbreakable limit on liability.

The MLA also allows for a dock, port or canal owner to limit its liability for damage to a ship, cargo or other property on board to the greater of C\$2 million or C\$1,000 per gross tonnage of the largest ship to have called at the facility within the five years prior to the loss.

Canada has increased the limits under the LLMC to those announced by the IMO in 2012 with effect as of 8 June 2015.⁴³

IV REMEDIES

i Ship arrest

Ship arrest in Canada is usually simple and relatively inexpensive. In Canada, it is not required that the marshall go into possession of the ship following arrest, unless specifically ordered by the court. Typically the only costs to arrest are the court filing fees, marshall costs to serve the ship and the legal costs to prepare the documentation.

The grounds for arrest are found in domestic legislation as Canada has not acceded to either convention deal with arrest of ships. Section 22 of the Federal Courts Act⁴⁴ sets out the grounds to establish *in rem* jurisdiction and Section 43(8) sets out when sister ship arrest may be exercised.

Canadian courts will recognise sovereign immunity but not for government-owned commercial ships.

An arrest is usually effected by hiring an authorised marshall to attend on the ship to affix the warrant in the wheelhouse. In the St. Lawrence River, communication with the pilots on board a vessel can facilitate the arrest as there is little or no opportunity for the ship under pilotage to evade arrest. Elsewhere in the country, on the rare occasion that a ship has advance notice of a pending arrest and attempts to avoid service, the local police have assisted with service and occasionally, even supported service by helicopter.

As a general principle, other than for maritime liens, the shipowner itself must be personally liable for the debt in order to arrest the ship. One exception is if it can be proven that the charterer was acting as the shipowner's agent when the debt was incurred. This agency authority must be proven by the arresting party. Unlike under US maritime law, the charterer has no deemed authority.

Additionally, if the proven foreign law of the contract governing the supply of ship's necessities grants a maritime lien to the supplier, then the supplier can arrest in Canada to enforce the lien even if that same claim would not otherwise constitute a maritime lien under Canadian law.⁴⁵ This is a different position than under English law.

Pursuant to an amendment to the MLA,⁴⁶ ship repairers and suppliers of goods, materials or services (other than stevedoring and lighterage) based in Canada may also claim a maritime lien if the supply of goods or services was to a foreign ship, and even if the debt

43 SOR/2015-98 1 May 2015.

<http://gazette.gc.ca/tp-pr/p2/2015/2015-05-20/html/sor-dors98-eng.php>.

44 *Supra*.

45 The *'Har Rai'* [1987] 1 SCR 57.

46 MLA *supra* Section 139.

was incurred by the charterer of the ship. This maritime lien was created to give Canadian suppliers of maritime services similar benefits to the lien enjoyed by some foreign necessities suppliers (especially American necessities suppliers) which the Canadian courts will enforce.

As well, with respect to stevedoring services, it is deemed by domestic legislation⁴⁷ that the creditor may arrest the ship for unpaid services incurred by a bareboat charterer, so long as the ship remains under charter to the bareboat charterer.

Countersecurity is not required for the arrest. However, if the plaintiff is a foreign entity without any assets in the jurisdiction, security for the court costs of the litigation, should that party lose the case and be required to pay costs to the defendant, is often ordered (if such an order is sought by the defendant).

If the court agrees to stay the proceeding on the grounds of *forum conveniens* or because of an enforceable agreement to have disputes heard in a foreign jurisdiction, it will generally require that the arrest security be transferred to that alternate jurisdiction so that the plaintiff is not prejudiced. In the instance of an arbitration agreement, the arresting party may request or the court may order a stay of the court proceeding in favour of the arbitration agreement, but again, will require that the arrest security stand wherever the arbitration is taking place.

Canadian law on wrongful arrest follows that of England. Damages for wrongful arrest can be awarded only when the owner of the arrested ship proves that the action was commenced with malice or gross negligence.⁴⁸

The Rules of Court themselves do not allow for letters of undertaking as a form of security against which to release a ship from arrest. However, the practice of the Canadian maritime bar is to recommend to their clients that they accept letters of undertaking from the International Group of P&I Clubs or other creditworthy organisations.

In rare circumstances the courts will order that a vessel be released from arrest without posting security.

Only one sister ship can be arrested in support of a claim and the security to be posted is up to the value of the claim (with interests and costs) or the maximum value of the arrested ship – whichever is the lesser. In other words, multiple ships cannot be arrested to try to ‘stack’ their value.⁴⁹

ii Court order for sale of a vessel

The rules of both the Federal Court and BC Supreme Court allow for the sale of arrested property free from all claims, but are short on the specifics to be followed.

The general procedure that the courts require is that the property must be advertised for sale, sold by some form of auction and then the sale made subject to the approval of the court to allow it to compare the price achieved as against a sealed estimate of the property’s value prepared by a qualified person. Once that has occurred, if the sale proceeds are insufficient to pay all claims made against the vessel, the court will conduct a priority hearing amongst all of the claimants to determine how to allocate the sales proceeds among the competing interests.

47 CSA *supra* Section 251.

48 *Armada Lines Ltd. v. Chaleur Fertilizers Ltd.* [1997] 2 SCR 617.

49 *Westshore Terminals Limited Partnership et al v. Leo Ocean S.A. et al*, 2014 FCA 231.

In special circumstances, the court may approve a private sale if it is satisfied that the best price has been achieved for the circumstances. The court will also consider a sale of the ship before judgment, especially if the ship is a deteriorating asset that the interested parties are not maintaining, and is likely to be sold in any event.

The length of time to sell a ship is largely determined by the degree of resistance from the shipownership interests. It can be done in as little as two months or, if there are many competing interests for the proceeds of the sale, it can take six months or longer.

V REGULATION

i Safety

Pursuant to the CSA 2001, Canada applies SOLAS 1974 as amended by the 1978 and 1988 Protocols (subject to Canadian modifications). For non-SOLAS ships, the regulations of the CSA 2001 set out the applicable regulatory framework.

In recent years, Transport Canada has delegated the inspection process of all vessels over 24 metres to recognised organisations (ROs), which are typically classification societies.⁵⁰ Canada would likely follow English law with respect to whether or not classification societies can be held liable to third parties for any acts of negligence, although there is no Canadian case on point. The Federal Court of Appeal has confirmed that Transport Canada inspectors have wide discretion when exercising their inspection authority.⁵¹

ii Port state control

Canada participates in Port State Control and is a signatory to both the Tokyo and Paris Protocols. In 2015, Canadian inspectors conducted over 1,500 inspections resulting in 36 detention notices.⁵²

iii Registration and classification

Canadian vessels with engines of 10 horsepower or more must be either registered or licensed through Transport Canada.⁵³ Commercial vessels must be registered with Transport Canada's Canadian Register of Vessels or the Small Vessel Register (Commercial). Only pleasure craft may be licensed but at the option of the owner, a pleasure craft can be registered with the Register of Vessels instead. Doing so is necessary to grant a marine mortgage against the vessel under the CSA 2001.

Vessels under construction in Canada may be temporarily recorded in the Canadian Register.

The Canadian Register of Vessels represents *prima facie* proof of ownership of a registered vessel. The Canadian Register allows for the registration against vessels of

50 <https://www.tc.gc.ca/eng/marinesafety/dvro-fsc-dspi-1781.htm>.

51 *Berhad v. Canada (The Lantau Peak)* 2005 FCA 267.

52 <http://www.wapps.tc.gc.ca/Saf-Sec-Sur/4/PSCQ-SRPSC/eng/detentions/search-results?Year=2015>.

53 CSA 2001 *supra* Part 2.

mortgages or priority agreements between mortgages. Other encumbrances or liens may not be registered. The licensing of pleasure craft is not maintained by any registry in a searchable format. Therefore, a licence is not a document of title.

Although Canadian registered vessels need not be owned domestically, each must be managed by a Canadian corporation if the vessel is foreign-owned.⁵⁴ Bareboat charters of foreign vessels may also be registered in certain circumstances.⁵⁵

iv Environmental regulation

In Canada, all the provinces and territories and the federal government have enacted a number of statutes intended to protect the environment. As a result, if there is a spill, the polluter could be exposed to enforcement proceedings under multiple acts. Furthermore, although marine pollution is predominantly governed by statute law, the common law torts of nuisance, trespass and negligence and the *Rylands v. Fletcher* doctrine may have some application.

The main federal statutes that deal with pollution from ships are:

- a the Canada Shipping Act 2001, Parts 8 and 9;
- b the Marine Liability Act, Parts 6 and 7 (and the scheduled Conventions);
- c the Canadian Environmental Protection Act 1999;⁵⁶
- d the Fisheries Act;⁵⁷
- e the Migratory Birds Convention Act;⁵⁸ and
- f the Arctic Waters Pollution Prevention Act.⁵⁹

Canadian legislation generally makes the polluter strictly liable for any discharge of pollutants with few, if any, defences. Pursuant to a number of the federal statutes, a polluter might be liable for an administrative monetary penalty if an incident occurs. If a polluter fails to dispute a penalty within 30 days, it is deemed to have admitted guilt and is liable to pay the fines, which can reach C\$25,000 per day.⁶⁰

If the polluter refuses or is unable to reimburse a party that has cleaned an oil spill, the polluter may seek reimbursement from the Ship Source Oil Pollution Fund (SOPF). The SOPF is intended to indemnify third parties for the costs of cleaning up oil spills from all classes of ships at any place in Canada, or in Canadian waters including the exclusive economic zone. The SOPF responds to claims from all types of vessels and oil.⁶¹

54 CSA 2001 *supra* Section 47.

55 CSA 2001 *supra* Section 18.

56 S.C. 1999 c. 3.

57 R.S.C. 1985, c. F-14.

58 S.C. 1994 c. 22.

59 R.S.C. 1985, c. A-12.

60 Administrative Monetary Penalties Regulations, SOR/2008-97 and Environmental Violations Administrative Monetary Penalties Act, SC 2009, c 14.

61 www.ssopfund.ca/en/the-fund/information-and-background.

v **Collisions, salvage and wrecks**

Canada has legislated, with Canadian specific amendments, the Collision Regulations⁶² based on the Convention on Prevention of Collisions at Sea 1972.⁶³ Pursuant to the MLA, if the proportionate fault of two or more ships cannot be determined, their liability is equal.⁶⁴

Canada is in favour of acceding to the Nairobi International Convention on the Removal of Wrecks 2007 (the Wreck Removal Convention)⁶⁵ and extending its application to its internal waters and territorial sea. It is also considering whether to extend the application of the Wreck Removal Convention to vessels under 300 GT.

Canada is a party to the Salvage Convention 1989 and that convention is scheduled to the CSA 2001.

Pursuant to the CSA 2001⁶⁶ the finder of a wreck (an abandoned vessel) must report the find to the receiver of wrecks and deal with the wreck as directed by the receiver. The finder is entitled to a salvage award, which is determined by the receiver but cannot exceed the value of the wreck. The receiver of wreck may sell or destroy the wreck:

- a* after 90 days if the value of the property is over C\$5,000; or
- b* at any time if:
 - the value is less than C\$5,000;
 - the storage costs would likely exceed the value; or
 - the wreck is perishable or poses a threat to health or safety.⁶⁷

If the wreck is sold and the owner does not make a claim within 90 days, the proceeds less the salvage award and the Receiver's expenses are paid to the Crown.

Pursuant to the Navigation Protection Act, a removal order can be issued in respect of vessels or wrecks which constitute a hazard or potential hazard to navigation. If the owner fails to respond to the removal order, the Crown may do so at the owner's expense.

vi **Passengers' rights**

Canada has adopted the Athens Convention 1974 as amended by its 1990 Protocol. Under the Athens Convention regime, in exchange for waivers of liability being invalidated and a limit of liability of 175,000 SDRs per passenger, the owner of a seagoing ship bears the burden to prove that it was not negligent for death or injury of a passenger caused during the period of carriage.

Canada has also chosen to apply the Athens Convention to the carriage of passengers on all commercial or public purpose vessels (other than those manually propelled) on Canadian waters whether or not there is a formal contract of carriage.⁶⁸

62 CRC, c. 1416.

63 CSA 2001 *supra*, Schedule 1.

64 MLA, *supra* Section 17.

65 <https://www.tc.gc.ca/eng/policy/acf-acfi-nairobi-recommendation-2235.htm>.

66 CSA 2001 *supra* Part 7.

67 CSA 2001 *supra* Section 160.

68 MLA *supra* Part 4.

Canada had not taken into account that operators of vessels in the adventure tourism industry would find that liability insurance rates were unaffordable once waivers were invalidated and they carried the burden of proof. As a result, Canada carved out a narrow exception⁶⁹ from the Athens Convention regime for marine adventure tourism if:

- a* it exposes the participants to an aquatic environment;
- b* it normally requires safety equipment and procedures beyond those normally used in the carriage of passengers;
- c* participants are exposed to greater risks than passengers are normally exposed to in the carriage of passengers; and
- d* its risks have been presented to the participants and they have accepted in writing to be exposed to them.

If those conditions are met, the owner or operator of a marine adventure tourism business can exempt itself from application of the Athens Convention. However, it still enjoys the benefits of the LLMC limitation regime.

Thus far Canada has shown no interest in adopting the Athens Protocol 2002 that is in force elsewhere in the world.

vii Seafarers' rights

Canada has been enforcing the Maritime Labour Convention 2006 with vigour, detaining vessels for breaches of collective agreements, including unpaid wages, the failure to provide medical care and a lack of personal hygiene amenities.

The rights of domestic seafarers are protected through a combination of the Canada Labour Code,⁷⁰ CSA 2001 (and its regulations) and the workers' safety and compensation regimes of each individual province or territory. The jurisdiction of a province to mandate a no fault compensation scheme for worker death or injury in domestic maritime industries was upheld by the Supreme Court of Canada in 2013⁷¹ and to legislate with respect to a safe work environment in other provincial court of appeal decisions.⁷²

VI OUTLOOK

Canada is grappling with the prospect of a greater number of ships using the Northwest passage through Canadian Arctic waters. Canada is a member of the Arctic Council playing a leadership role in the development of the Polar Code⁷³ the IMO International Code for Ships Operating in Polar Waters. As Canada seeks to assert its sovereignty over the area, it also struggles with the fact that significant funding is required to establish more than minimal number of aids to navigation, including wider charting of the Arctic waters.

69 MLA *supra* Section 37.1.

70 R.S.C. 1985 c.L-2.

71 *Marine Services International Ltd. v. Ryan Estate*, [2013] 3 SCR 53.

72 *R v. Mersey Seafoods Ltd*, 2008 NSCA 67; *Jim Pattison Enterprises Ltd v. British Columbia*, 2011 BCCA 35.

73 www.imo.org/en/MediaCentre/HotTopics/polar/Pages/default.aspx
www.parl.gc.ca/HousePublications/Publication.aspx?Mode=1&Parl=41&Ses=2&DocId=6255019&Language=E.

On the west coast, there is strong opposition to the construction of any pipelines to the coast of BC from oil producing neighbouring Alberta, and to tankers sailing in northern BC waters. The opposition makes it difficult to facilitate the export of oil and other fuel products from Canada. The east coast and especially the maritime provinces that have some offshore oil rigs are much more amenable to this form of industry.

On the regulatory front, Canada is challenged to devote sufficient resources to revise or enact legislation in a timely enough fashion to manage LNG-fuelled ships and other innovations in shipping technology.

In early 2016, the Minister of Transport postponed in Parliament the Canada Transportation Act Review⁷⁴ following an 18-month process of hearings held across the country and submissions from more than 220 parties. The purpose of the review was to identify the priorities and potential actions in transportation that will support Canada's economic well-being over the next 20 to 30 years. The review's many recommendations include ones relating to managing the Arctic waters and the regulation of new technologies. The review also made specific recommendations to promote short sea shipping, reorganise pilotage services and phase out some restrictions found in Canada's cabotage laws on a reciprocal basis.

The next stage is to see which recommendations, if any, the Canadian government will undertake to implement.

74 www.tc.gc.ca/eng/ctareview2014/canada-transportation-act-review.html.

Chapter 12

CHILE

*Ricardo Rozas*¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

From information provided by the Chilean Maritime Authority, as of December 2012 there were 110 shipowners with approximately 220 Chilean-flagged merchant ships.

The shipping companies with the greatest number of registered ships in Chile are Naviera Ultrana and Sociedad Nacional Marítima SA. Nevertheless, there are other shipping companies such as Compañía Sud Americana de Vapores SA and Compañía Chilena de Navegación Interoceánica whose fleets are mostly registered or chartered abroad.

To register a ship in Chile, the legal requirements are very demanding. Merchant vessels may be registered by Chilean nationals or citizens. If the owner is a corporation, it must meet the following requirements to be deemed Chilean:

- a* having its registered offices and true and effective headquarters in Chile;
- b* having a Chilean president, manager and majority of directors or administrators, as the case may be; and
- c* the majority of the equity capital must be owned by Chilean individuals or bodies corporate.

Special vessels may be registered in Chile by foreign natural persons as long as they are domiciled in the country and their main place of business is located locally (this rule does not apply to fishing vessels).

According to the Chilean Maritime Authority, the tonnage moved through Chilean ports in 2012 was 53.26 million tonnes in export cargo and 50.2 million tonnes in import cargo. In addition, Chilean seaports have connections with practically all the world's ports.

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II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The Chilean legislative framework in this area is constructed from various regulations and laws. The main sources are as follows:

- a* Book II of the Chilean Code of Commerce, 'About Navigation and Maritime Trade' (Articles 823 to 1250), which includes general provisions and specific chapters on vessel ownership, liens, shipowners, masters, ship agents, navigation contracts, navigation risks, marine insurance and procedural issues;
- b* the Navigation Law (Decree Law 2222/78);²
- c* the Merchant Navy Law (Decree Law 3059/79);
- d* international conventions, such as the Hamburg Rules, the CLC Convention and SOLAS; and
- e* regulations issued by the Chilean Maritime Authority.

III FORUM AND JURISDICTION

i Courts

Article 1203 of the Chilean Commercial Code establishes the general principle that the resolution of any maritime dispute, including those relating to marine insurance, is subject to mandatory arbitration. In short, all maritime disputes must be resolved by an arbitrator.

However, in certain cases the ordinary civil courts may hear maritime disputes, including:

- a* if the parties mutually agree to this (either by including it in the contract from which the dispute originates or by prior written agreement);
- b* if a criminal action could arise from the same facts (in this case the civil action can be filed before either the criminal court or an arbitrator);
- c* claims relating to oil pollution contained under Paragraph 4, Title IX of the Navigation Law;
- d* claims in which the state harbour or customs agencies are involved; and
- e* claims in which the amount at stake is less than 5,000 units of account (the SDR, as defined by the International Monetary Fund), provided that the claimant submits its claim before the ordinary courts.

In addition, the specific petitions for the appointment of an arbitrator and ship arrest are heard by ordinary civil courts.

As regards limitation periods, under Chilean law the general principle is that any action relating to maritime disputes is time-barred in two years. In this respect, it is worth noting that actions relating to passage contracts, freight, general average and contributions are time-barred after six months. In addition, in case of collision actions the two-year period is extended to three years if the responsible vessel was not arrested or detained while in Chilean jurisdictional waters, provided that the vessel abandoned them without calling to a Chilean port after the collision.

2 DL 2222/78, published in the Official Gazette dated 31 May 1978.

As to time extensions, under Chilean maritime law the running of the corresponding limitation period can be interrupted by a declaration in writing to the claimant by the person who enjoys it. This can be done successively but the corresponding period shall run again as of the date of the last declaration.

ii Mandatory arbitration

The resolution of maritime disputes is subject to mandatory arbitration. The key principle is that the applicable rules are those to which the parties have agreed in writing. If the parties reach no agreement the matter is subject to the rules set out by the Tribunal Code and the Civil Procedure Code.

Special powers of maritime arbitrators

The Commercial Code establishes special powers for maritime arbitrators as follows:

- a* ample freedom to admit any evidence that the arbitrator may deem relevant;
- b* a proactive role for the avoidance of delays within the trial; and
- c* the ability to consider the evidence under the ‘rule of the sane critic’, which allows the arbitrator to assess the evidence according to his or her own criteria.

Pre-judicial measures and special liens

If pre-judicial measures (whether preparatory, precautionary or evidential) or special liens need to be enforced before the arbitration tribunal is established, the interested party can petition for these before the competent ordinary civil court under the Tribunal Code or the Commercial Code rules.

iii Enforcement of foreign judgments and arbitral awards

Foreign judgments and arbitral awards are enforced through a process called *exequatur*. This process is contemplated in the Civil Procedure Code under which judgments issued in a foreign country shall be given force in Chile by existing treaties. For their enforcement, the procedures set out in Chilean law shall be followed unless they have been modified by such treaties. If there are no treaties related to the matter, Chile shall grant to the judgment the same force granted to Chilean judgments by the jurisdiction in which the judgment was made. If the judgment comes from a jurisdiction that does not enforce Chilean judgments, it shall not be enforced in Chile. If none of the previous rules may be applied, foreign judgments shall be enforced in Chile provided that:

- a* they contain nothing contrary to the laws of the Republic, except that procedural rules to which the case would have been subject to in Chile shall not be considered;
- b* they are not contrary to national jurisdiction;
- c* the party against whom enforcement is sought was duly served with process, except that such party may still be able to allege that for other reasons it was prevented from making a defence; and
- d* they are not subject to appeals or further review in the country of origin.

A duly legalised copy of the judgment – officially translated into Spanish, if necessary – must be presented to the Chilean Supreme Court to begin the *exequatur* process. In the case of an arbitral award, its authenticity must also be certified by attestation of a High Court of the originating jurisdiction.

Notice of the enforcement request must be served on the party against whom it is sought. Such party shall have 15 days (which may be extended depending on where the party is domiciled) to respond. An opinion from an independent court official is also requested by the Supreme Court.

The Supreme Court entertains the matter in a hearing at which the parties may make oral statements.

After enforcement is allowed, the judgment must be presented to the competent civil court to commence an executive proceeding (under which the defendant's assets can be foreclosed, if applicable).

In respect of foreign arbitral awards, a law on international commercial arbitration – based entirely on the UNCITRAL Model Law – was passed in 2004.³ Its Article 35 regulates the recognition and enforcement of foreign arbitral awards. Article 36 lists the defences that can be asserted against enforcement and regulates orders of stay. Chile is also a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In this respect, Chilean courts have enforced all foreign arbitral awards that comply with the rules set out in the law for enforcement.

IV SHIPPING CONTRACTS

i Shipbuilding

Chile does not undertake a significant amount of shipbuilding.

ii Contracts of carriage

In 1982, Chile ratified the Hamburg Rules, which entered into force internationally as of 1 November 1992. Additionally, the Chilean legislature included the provisions of the Hamburg Rules in the Chilean Commercial Code in 1988,⁴ with minimal changes.

Cabotage

A cabotage reservation system is in force in Chile under the Merchant Navy Law (Decree Law 3059/79). The Law implies that only Chilean vessels are permitted to provide maritime or fluvial transport services (of cargo or passengers) within the national territory or the exclusive economic zone. On exceptional occasions foreign vessels may participate in cabotage when:

- a* cargo volumes exceed 900 tonnes, and where a previous public bid has been carried out by the user in advance; or
- b* cargo volumes are equal to or less than 900 tonnes when Chilean-flagged vessels are not available (provided that the Maritime Authority's authorisation is received).

Liens

Chilean law recognises the concept of maritime privileges. See Section V.i, *infra*.

3 Law 19971, published in the Official Gazette dated 29 September 2004.

4 Paragraph 3 of Title V of Book III.

How the duties and liabilities of the shipper are addressed

In accordance with the Chilean adoption of the Hamburg Rules, 'shipper' means 'any person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier, and any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea.' Under Chilean practice the scope of this definition comprises both the person concluding the contract of carriage of goods by sea and the person actually delivering the cargo, provided they are not the same person.

The shipper is deemed to have guaranteed to the carrier the accuracy of particulars relating to the general nature of the goods, their marks, number, weight and quantity as furnished by him for insertion in the bill of lading. The shipper must indemnify the carrier against the loss resulting from inaccuracies in such particulars. The shipper remains liable even if the bill of lading has been transferred by him. The right of the carrier to such indemnity in no way limits his liability under the contract of carriage by sea to any person other than the shipper.

Operation of multimodal bills of lading

The main rules regarding multimodal transport can be found in Article 1041 et seq. of the Chilean Commercial Code, which are based on the United Nations Convention on International Multimodal Transport of Goods (Geneva, 24 May 1980). Thus, Article 1041 defines the main concepts applicable to multimodal transport: multimodal transport, contract of multimodal transport and operator of multimodal transport. Furthermore, Article 1043 sets out the regime of liability applicable in multimodal transport. The relevance of this article is that under Chilean law the liability of all those involved in any part or parts of the multimodal transport is joint. Likewise the Hamburg Rules must be taken into consideration when dealing with multimodal transport, especially in connection with the limitation of responsibility set out by the Hamburg Rules, of which Chile is a signatory country.

iii Cargo claims

Carriage of goods by sea

Under the Chilean adoption of the Hamburg Rules, any party may be subject to the provisions of the rules regarding carriage of goods by sea if:

- a* the port of loading or discharge as provided for in the contract of carriage by sea is located in Chile;
- b* the bill of lading or other document evidencing the contract of carriage by sea (such as the sea waybill, or through bills of lading or short-form bills of lading) stipulates that the contract will be governed by Chilean law (such as through a clause paramount); or
- c* one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in Chile.

Chilean regulations are compulsorily applicable regardless of the nationality of the ship, carrier, actual carrier, shipper, consignee or any other interested person. In this respect it is important to note that clauses paramount have been held as unwritten by the Supreme Court⁵ as they would be contrary to public policy.

The Chilean Rules are applicable to all contracts of carriage by sea and it is not a condition that they are necessarily evidenced in a bill of lading or other documents of title such as a sea waybill or short-sea notes. In respect of combined transport bills or through bills of lading, the Rules are applicable only to the corresponding sea-leg carriage.

Charterparties

The Chilean adoption of the Hamburg Rules does not apply to charterparties. Nonetheless, a bill of lading issued in compliance with a charterparty falls under these rules if it governs the relation between the carrier and the holder of the bill of lading other than the charterer. In the case of contracts providing for future carriage of goods in a series of shipments during an agreed period (e.g., tonnage or volume contracts used for cargo projects) the rules apply to each shipment. However, where a shipment is made under a charterparty, the Hamburg Rules do not operate, except with the aforementioned exception.

Demise clauses

Chilean law recognises a basic distinction between the ‘carrier’ (also known as the ‘contractual carrier’) and the ‘actual carrier’. The former is defined as ‘any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper’ and the latter as ‘any person to whom the performance of the carriage of the goods, or part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted.’⁶

The above distinction has very much simplified the problem of identifying the carrier as anyone who issues a bill of lading as a principal may be treated as a contractual carrier. This applies even to freight forwarders in case they issue their own ‘house’ bill of lading and many cargo claims are based on these documents. In this regard it is important to note that under Chilean practice ‘demise clauses’ have no effect.

It is also worth noting that where the performance of the carriage or part thereof has been entrusted to an actual carrier the carrier nevertheless remains responsible for the entire carriage. In this respect the carrier is jointly and severally responsible, in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment. Additionally, all the provisions governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him.⁷

5 *AJ Broom v. Exportadora*, Supreme Court of Chile, Case No. 683-98.

6 Article 975 Nos. 1 and 2 of the Chilean Code of Commerce (based on Article 1.1 of the Hamburg Rules).

7 Articles 1006–1008 of the Chilean Code of Commerce (based on Articles 10.1 and 10.2 of the Hamburg Rules).

iv Limitation of liability

Tonnage limitation

The Chilean regulations that refer to tonnage limitation (i.e., Articles 889 to 904 of the Commercial Code) are inspired by both the international conventions signed in Brussels in 1957 (the 1957 Convention) and in London in 1976 (the 1976 Convention). With respect to the tonnage limitation figures, the Commercial Code follows the lines of the 1976 Convention. In addition, it is important to note that the Commercial Code establishes a specific set of procedural provisions in connection with the constitution and distribution of the corresponding limitation fund.

The claims subject to limitation are as follows:

- a* death or personal injury and damage to property aboard;
- b* death or personal injuries caused by any person for whom the owner is responsible, whether on board or on shore (in the latter case, his or her acts must be related to the operation of the ship or to the loading, discharging or carriage of the relevant goods);
- c* loss or damage to other goods, including the cargo, caused by same person or people, grounds, places and circumstances given in (b); and
- d* resulting liability related to the damage caused by a vessel to harbour works, dry docks, basins and waterways.

The people entitled to limit pursuant to this regime are as follows:

- a* the shipowner as defined by Chilean regulations;
- b* the shipowner's staff;
- c* liability insurers;
- d* the operator, carrier, charterer and the ship's proprietor, if a different person or entity than (a); and
- e* individual employees of (d), including the master and members of the crew, if sued.

Limitation in connection with civil liability for damage derived from the spillage of hydrocarbons and other hazardous substances

The spillage of hydrocarbons from seagoing vessels carrying oil in bulk as cargo is subject to the CLC Convention 1992. On the other hand, the spillage of hydrocarbons from vessels not carrying oil in bulk as cargo or spillage of other hazardous substances, is subject to the terms of the CLC Convention 1969 and supplementary norms set forth by the Chilean Navigation Law (among others, it extends the limitation benefit to the owner, proprietor and operator).

Carriage of goods by sea

Chilean law draws a distinction between lost or damaged goods and delayed goods. In the former case, the carrier's liability is limited to an amount equal to 835 SDRs per package or other shipping unit, or 2.5 SDRs per kilogram of gross weight, if the latter is higher. In the case of delayed goods the carrier's liability is limited to an amount equivalent to 2.5 times the freight payable for the goods delayed, but not exceeding the total sum of the freight payable under the respective contract of carriage by sea. It is worth noting that the above rules do not include either the interest on the value of the damaged goods or judicial costs.

Passengers

Under the Chilean regulations that refer to passage contracts,⁸ liability can be limited in the following cases:

- a* passenger's death or personal injury: the maximum liability amount is obtained by multiplying 46,666 SDRs by the numbers of passengers that the vessel is authorised to carry with a maximum equal to 25 million SDRs; and
- b* damage to property on board: up to 1,200 SDRs unless higher limits were agreed in writing.

V REMEDIES

i Ship arrest

Key rules

Chile has not ratified any international convention regarding the arrest of ships. However, the fundamental regulations applicable to ship arrest that are found in Book III, Title VIII, Paragraph 5 of the Commercial Code 'About the Procedure to Arrest Vessels and its Release'⁹ are loosely based on the principles set forth under the Brussels Convention.

Under Chilean law, a vessel may be arrested if the requesting party has a credit that entitles it to do so. These credits may be of two types:

- a* privileged credits as set forth by Articles 844, 845 and 846 of the Chilean Commercial Code (listed below); and
- b* credits other than those mentioned in (a).

Under Chilean law, there is no statutory definition for privileged credits. However, they may be defined as those that give rise to a maritime lien and allow for requesting an arrest pursuant to the special rules set forth by Book III, Title VIII, Paragraph 5 of the Commercial Code. Articles 844, 845 and 846 of the Commercial Code establish and distinguish the following groups of privileged credits.

Article 844 credits

- a* Legal costs and other disbursements caused by reason of a suit, in the common interest of the creditors, for the preservation of the vessel or for its forced alienation and distribution of the yield.
- b* The remuneration and other benefits arising from the contracts of embarkation of the vessel's crew, in accordance with labour regulations and civil law that regulate the concurrence of these credits, together with the emoluments paid to the pilots at the service of the vessel. This privilege applies to the indemnities that are due for death or bodily injuries of the servants who survive ashore, on board or in the water, and always provided that they stem from accidents related directly to the trading of the vessel.
- c* The charges and rates of ports, channels and navigable waters, together with fiscal charges in respect of signalling and pilotage.

8 Articles 1,044–1,077 of the Commercial Code.

9 Article 1,231 et seq.

- d* The expenses and remunerations due in respect of assistance rendered at sea and general average contribution. This privilege applies to the reimbursement of expenses and sacrifices incurred by the authority or third parties, in order to prevent or minimise pollution damages or hydrocarbon spills or other contaminating substances to the environment or third-party property, when the fund of limitation of liability has not been constituted as established in Title IX of the Chilean Law of Navigation.
- e* The indemnities for damages or losses caused to other vessels, to port works, piers or navigable waters or to cargo or luggage, as a consequence of the collision or other accidents during navigation, when the respective action is not susceptible to be founded upon a contract, and the damages in respect of bodily injury to the passengers and crew of these other vessels.

Article 845 credits

Mortgage credits on large vessels (i.e., vessels over 50 GT) and secured credits on minor vessels (i.e., vessels up to 50 GT).

Article 846 credits

- a* Credits in respect of the sale price, construction, repair and equipping of the vessel.
- b* Credits in respect of supply of products or materials that are indispensable for the trading or conservation of the vessel.
- c* Credits arising from contracts of passage money, affreightment or carriage of goods, including the indemnities for damages, lack and short deliveries in cargo and luggage, and the credits deriving from damages in respect of contamination or the spilling of hydrocarbons or other contaminating substances.
- d* Credits in respect of disbursements incurred by the master, agents or third parties, for account of the owner, for the purpose of trading the vessel, including agency service.
- e* Credits in respect of insurance premiums concerning the vessel, be they hull, machinery or third-party liability.

The privileged credits of Article 844 enjoy privilege over the vessel in the order enumerated in 'Article 844 credits', *supra*, with preference over mortgage credits and the privileged credits of Article 846. Mortgage credits are preferred to those of Article 846, which in turn follow the rank indicated under 'Article 846 credits', *supra*.

In this respect, it is worth noting that the privileged credits established by the aforementioned provisions have preference and exclude all other general or specific privileges regulated by other legal bodies, when referring to the same goods and rights. However, the rules regarding priorities and privileges in matters of pollution or for avoiding damages from spills of hazardous substances, which are established in international treaties in force in Chile and in the Navigation Law, have preference over the provisions of Book III, Title III of the Commercial Code ('About Privileges and Naval Mortgage') in the specific matters to which they refer.

Procedure for ship arrest

An arrest order is usually granted quickly if the arrest petitioner supplies the court with sufficient supporting documents to justify the arrest petition such as invoices, bills of lading, contracts and survey or loss reports.

Arrest or retention of a vessel is carried out by service to the maritime authority where the vessel lies or by official letter or notification to the Director General of the Maritime Territory and the Merchant Marine if the vessel is not in the jurisdiction of the court that decreed the measure. Prior service to the person against whom the measure is requested is unnecessary.

In urgent cases, the court may communicate arrest via telegram, telex or other reliable means. In a preliminary proceeding, the person against whom the arrest is requested must also be notified within 10 days from the resolution that granted such measure. This may be extended by the court for good reason. Lack of service within a 10-day period or any extensions granted will cause the automatic forfeiture of the decreed arrest, which is communicated directly to the maritime authority by the court.

Sister and associated ship arrests

The lien on the ship granted by a privileged credit can be exercised not only against the actual ship to which the privileged credit relates, but also on a ship in the same ownership or a ship in the same administration or operated by the same person.

Security and counter-security

If the court considers that the supporting documents attached by the arrest petitioner is not sufficient or the petitioner states that they are not yet available to him or her, the court may require that counter-security be provided for the potential damages that may be caused if, subsequently, it is found that the petition lacked basis. As to its form and amount, there are no specific rules, so it is up to the court.

As regards security for lifting the arrest, the amount of security is usually established by the court based on the petition of the arresting party. Such amount cannot exceed the value of the arrested vessel and can be reviewed subsequently through incidental proceedings. Regarding the form of security, there are no specific rules and it will depend on the court's resolution, but the security usually requested and granted is a bank guarantee issued at the order of the court. As soon as the security is provided, the court shall lift the vessel arrest without delay.

For a long time, protection and indemnity insurance (P&I) club letters of undertaking were accepted only if agreed by the arrest petitioner, mainly due to the fact that the Chilean courts were not accustomed to them. However, in a recent arrest following a pollution case, the court hearing the arrest accepted a letter of undertaking with no prior approval from the arrest petitioner. This is a positive development, as Chilean courts seem to finally be aligned with international practice whereby a letter of undertaking is accepted by the courts as sufficient security.

Wrongful arrest

First, under Chilean regulations an arrest based on privileged credits is subject to the following conditions:

- a* The arresting party must invoke one or more of the privileged credits enumerated above. In this respect it is important to note that, except for the regulations related to pollution or for avoiding damages from spills of hazardous substances, the maritime privileges preclude any other general or special privilege regulated by other laws in connection with the same goods. The maritime privileges also confer upon the creditor the right to pursue the vessel in whosoever's possession it may be.

- b* The arresting party must attach antecedents that constitute presumption of the right being claimed.
- c* If the court considers that the supporting documents are not sufficient or the petitioner states they are not yet available to him or her, the court may require that counter-security be provided for the potential damages that may be caused if, subsequently, it is found that the petition lacked basis.

Second, when an arrest has been decreed as a pre-judicial precautionary measure (i.e., a measure to secure the outcome of a subsequent substantive action), the petitioner is obliged to file its complaint requesting that the decreed arrest remain in force within a period that, in principle, is 10 days, but that may be extended for up to a total of 30 days, provided there is a sound basis for doing so. The non-fulfilment of this obligation means the cancellation of the arrest and liability for the damages that may have been caused, on the irrefutable presumption that the grounds for the arrest were fraudulent. In addition, if the arrest was wrongful, fraudulent or lacked basis, the defendant may claim damages in separate ordinary proceedings subject to the general rules set forth by the Code of Civil Procedure.

Bunker arrest claims

An arrest can be made over a vessel provided the claimant has a credit that qualifies as a maritime privilege as per the rules explained above. Such credit will be considered as a privileged credit in accordance with Article 846(2) of the Commercial Code.

As regards specific regulations for arresting bunkers, in Chile there are no such regulations. Theoretically speaking, this could be achieved by means of the general rules set forth by the Chilean Code of Procedure regarding pre-judicial and precautionary measures but it is not an easy exercise due to formalities and timing restrictions.

Pre-judicial precautionary measures

Chilean procedural regulations are silent on the matter of whether the arresting party is required to pursue the claim on its merits in the jurisdiction of arrest or whether it is possible to effect an arrest only to obtain security. However, when an arrest is decreed as a pre-judicial precautionary measure (i.e., a measure to secure the outcome of a subsequent substantive action), it would be possible to arrest to obtain security and then pursue proceedings on the merits elsewhere. Note that the procedural obligations established must be met, namely, filing the petitioner's complaint requesting that the decreed arrest remains in force for a period that, in principle, is 10 days but may be extended for up to a total of 30 days provided there is sound basis to do so. However, this is an option that has to be further tested in Chilean courts.

ii Court orders for sale of a vessel

In accordance with Commercial Code, the judicial sale of a vessel, whether voluntary or forced, must observe the rules and formalities set forth by the Code of Civil Procedure for the judicial sale of real estate. The procedure may take between a couple of months and one or two years depending on the debtor's behaviour towards the proceedings. Court costs are usually minor but other costs might be generated, such as those relating to the administration of the attached property (incumbent on a depositary who has to render account for his administration before the pertinent court).

VI REGULATION

i Safety

Chile has ratified the following conventions:

- a* SOLAS 1974 and its Protocols of 1978 and 1988;
- b* Load Lines Convention 1966 and its Protocol of 1988;
- c* Colregs 1972;
- d* the STCW Convention 1978; and
- e* the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation 1988 and its Protocol 1988.

The above are in force notwithstanding the domestic regulations issued by the local Maritime Authority.

ii Port state control

In Chile such responsibility falls on the Maritime Authority in accordance with the Navigation Law and complementary regulations as well as applicable international conventions.

iii Registration and classification

In Chile any type of vessel, whether constructed or under construction, and naval devices can be registered at the following registries kept by the General Administration of the Maritime Territory and Merchant Marine (the Maritime Authority):

- a* the Large Vessels Registry;
- b* the Minor Vessels Registry;
- c* the Vessels in Construction Registry;
- d* the Naval Devices Registry; and
- e* the Mortgage, Liens and Prohibitions Registry.

The rules relevant to the organisation and operation of the registries as well as the procedures, formalities and requirements of registration are contained in the respective regulations. In this respect, it is important to note that the practice of registering vessels chartered on a bareboat basis does not occur in Chile.

In accordance with Article 15 of the Navigation Law, all large vessels (i.e., those of more than 50 GT), must be registered in the Large Vessels Registry, which is kept by the Maritime Authority. Minor vessels (those of 50 GT or less), are registered in the minor vessels registries that are kept by harbour masters.

iv Environmental regulation

In Chile the key legislation, rules and conventions in force regulating air and sea pollution are as follows:

- a* the CLC Convention 1992 on hydrocarbon spills from vessels carrying oil in bulk as cargo;
- b* the CLC Convention 1969 and supplementary norms set forth by the Chilean Navigation Law on hydrocarbon spills from vessels not carrying oil in bulk as cargo or spillage of other hazardous substances;
- c* the OILPOL Convention (with its amendments of 1962 and 1969);

d the London Dumping Convention; and
e MARPOL 73/78.

v Collisions, salvage and wrecks

Collisions

Articles 1116 et seq. of the Chilean Code of Commerce set out the main regulations applicable to collisions. The Chilean Navigation Law and the Collision Rules (1972) also apply.

Chilean collision regulations apply to damages that arise, for example, from a collision between two or more vessels or from waves caused by the movement of a vessel resulting in damage to other vessels, cargo or people onboard, even if an actual collision does not occur. A 'vessel' is a maritime device that can move either on its own or by external means.

These rules also apply to events occurring in fluvial waters, lakes and any other navigable waterway. In addition, Chilean collision regulations apply to collision damages that arise between vessels under the same ownership or administration.

For every collision, the applicable law is that of the state in whose territorial waters the event has occurred. If the collision occurs in waters not subject to the jurisdiction of any state, the law of the country where the lawsuit is instituted will apply.

Salvage

Salvage is regulated by Book 3, Title 6, paragraph 5 of the Chilean Commercial Code, 'Services rendered to a vessel or other property in damage'.¹⁰ These rules are based on the Comité Maritime International's draft International Convention (Montreal 1981) and the Salvage Convention 1989.

Wreck removal

Wreck removal is regulated under the Chilean Navigation Law. Generally speaking, the Chilean Maritime Authority can order the pertinent proprietor, owner or operator to adopt all necessary measures, at his own cost, to proceed with the wreck removal within a specified term.

Recycling

Chile has not signed the Hong Kong Convention; however, the IMO Guidelines on Ship Recycling (2003) are applicable.

vi Passengers' rights

The Athens Convention is not applicable in Chile. However, passengers' rights and the liability of the carrier are regulated by the Commercial Code (Articles 1,044–1,078), which is based on the Convention. In addition, where a travel agent is involved, the Chilean Consumer Protection Act may also apply.

vii Seafarers' rights

Chile has not ratified the Maritime Labour Convention 2006. This matter is regulated under a specific chapter in the Chilean Labour Code.

10 Article 1128 et seq.

VII OUTLOOK

In early 2012 the Chilean National Congress proposed a bill to replace the provisions on general and non-marine insurance contained in the Code of Commerce, which were enacted almost 140 years ago, so that Chilean insurance law could be updated in line with current trends and market practice. On 9 May 2013 this bill was approved and became law (Law No. 20,667). Its enforcement became valid as of December 2013.

The law contains a number of amendments to the existing marine insurance provisions, all of which have been in force since 1988. Some of the main features of the law that affect the shipping industry are as follows.

- a* In addition to relating directly to ships, marine insurance will apply to facilities and machinery used for loading, unloading and stevedoring operations, and will cover other goods or assets that the parties consider to be exposed to marine risks (new Article 1,160).
- b* The new Law expressly provides that a marine insurance contract is consensual. Its existence and terms can be evidenced by all legal means of proof, provided that a principle of written evidence is contained in a document, whether digital or electronic (new Article 1,173, in conjunction with Article 515).
- c* The obligation of utmost good faith has been reinforced (new Articles 1,176 and 1,177).
- d* The concept of total loss now includes assimilated total loss when the insured object is reasonably and finally abandoned. This may happen either because the effective total loss cannot be avoided or because the costs involved in avoiding such loss are greater than the insured value of the object (new Article 1,189).
- e* The new Law removes the current obligation for the insured first to pay compensation for damages to a third party in order to obtain compensation and reimbursement of expenses incurred (new Article 1,200).

Chapter 13

CHINA

*Nicholas Poynder and Jean Cao*¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

China plays an increasingly pivotal role in the global shipping industry. It is home to eight of the world's 10 busiest ports by cargo tonnage, with Shanghai consistently topping the list.² By the end of 2013, a total of 12,508 vessels were flying the Chinese flag with an overall gross tonnage of 88 million tonnes.³ China is also the largest shipbuilding nation by gross tonnage,⁴ and its expertise in this sector continues to develop.

Although known for its exports of manufactured products to all corners of the globe, China is also a major importer of commodities. According to Customs information,⁵ in 2015 China imported 32.70 million tonnes of grain, 81.69 million tonnes of soybeans, 952.72 million tonnes of iron ore and 335.50 million tonnes of crude oil. Despite the recent slowdown in growth of China's economy, this level of demand ensures China's place as one of the most significant players in the shipping business.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The Chinese Maritime Code governs commercial contracts (carriage of goods and passengers by sea, charterparties, towage), admiralty (collisions, salvage, general average, limitation of liability) and marine insurance. It adopts many provisions of international rules and conventions, including many of the elements of the Hague-Visby Rules, the Athens Convention, the Salvage Convention 1989, the LLMC Convention 1976 and the

1 Nicholas Poynder is a partner, Jean Cao is an associate at Holman Fenwick Willan LLP.

2 www.chineseport.cn/bencandy.php?fid=47&cid=201731.

3 www.chinairn.com/news/20140331/160754449.html. Information for Chinese fleet tonnage thereafter is not publicly available.

4 www.chyxx.com/data/201512/373304.html

5 www.customs.gov.cn/publish/portal0/tab49666/info784213.htm.

York–Antwerp Rules. In addition, China is party to a number of international shipping conventions on safety. Those international conventions will prevail if there is a conflict between them and Chinese laws.

III FORUM AND JURISDICTION

i Courts

Shipping disputes are heard by 10 maritime courts in China, located in Beihai, Dalian, Guangzhou, Haikou, Ningbo, Qingdao, Shanghai, Tianjin, Wuhan and Xiamen.

The maritime courts do not normally recognise foreign jurisdiction clauses in shipping contracts if the jurisdiction has no material connection with the contract or its performance; however, as China is a signatory to the New York Convention (the Convention – see subsection iii, *infra*), international arbitration clauses will generally be recognised by its maritime courts when it comes to enforcement.

Limitation periods

The limitation periods for shipping disputes are as follows:

- a* contracts of carriage of goods by sea: one year from the time of cargo delivery or the time when the cargo should have been delivered;
- b* charterparties: two years from the date on which the breach was discovered;
- c* towage contracts: one year from the date on which the breach was discovered;
- d* collisions: two years from the date of the collision;
- e* salvage: two years from the conclusion of the salvage operation;
- f* marine insurance: two years from the date on which the insured event occurred;
- g* oil pollution: three years from the date on which the damage occurred, but no more than six years from the date of the event causing the damage; and
- h* carriage of passengers: two years from disembarkation from the ship for personal injury, death before disembarkation and luggage loss or damage; two years from the date of death for deaths that occur after disembarkation, but not exceeding three years in total after disembarkation.

ii Arbitration and ADR

There is no specific maritime arbitration procedure in China. The procedure is governed by the rules of the particular arbitration committee chosen by the parties to the dispute. The China Maritime Arbitration Commission (CMAC) is an example of a domestic arbitration committee nominated by parties.⁶

Equally, China has no specific mediation, expert determination or alternative dispute resolution procedures. However, mediation is normally conducted by the judge or the arbitration tribunal hearing the case. If the parties cannot reach a resolution following the mediation, the judge or the tribunal will proceed with the case in the usual way. Clearly, this is a very different situation than that found in England, for example, where it is unusual for any details of settlement discussions to be disclosed to the presiding judge or tribunal other than details regarding the question of costs.

⁶ Its rules are published on its website, www.cmac-sh.org.

iii Enforcement of foreign judgments and arbitral awards

In practice, foreign judgments or rulings will be enforced in China only when there is an international treaty or agreement concluded between or acceded to by the foreign state and China. There are a few such foreign states, but they do not include the key dispute resolution centres for shipping.

Fortunately, the position is different in terms of foreign arbitration awards. China is a signatory to the New York Convention; consequently, China is bound to recognise an award issued in another signatory state as binding and to enforce it. The United Kingdom, Singapore, the United States and other key maritime centres are signatory states.

The first step to enforcement is applying to have the award recognised by the local courts. This must be done within two years of the last date provided for in the award for compliance with the award or, if no such period is stated, the date on which the award takes effect.

The Convention provides five grounds for refusing recognition or enforcement, and these will be applied by the local courts when considering an application for recognition.

Apart from these five grounds, the Convention permits a refusal of recognition or enforcement if the recognition or enforcement would be contrary to local public policy. Accordingly, the Chinese courts may also, as a matter of Chinese law:

- a* consider whether there is any social or public interest reason not to recognise the award (there is no clear guidance on what exactly this means); and
- b* if petitioned by one of the parties, investigate whether the arbitration agreement contained in the relevant contract is valid. An arbitration clause should be valid under Chinese law if it is in writing and if it:
 - contains an expressed intention to resolve disputes via arbitration;
 - describes which issues will be decided through arbitration (e.g., all disputes); and
 - identifies which arbitration tribunal or institution the parties agree to use.

If the local court of first instance (the Intermediate People's Court) refuses to recognise the award, it must refer the case to the Higher People's Court. If the Higher People's Court also refuses recognition, it must refer the decision to the Supreme People's Court, which is the only court that can ultimately refuse recognition of a foreign arbitration award.

In practice, enforcement of a foreign arbitral award in China, even though governed by the Convention, is not straightforward; it is well known that there can be problems. For example, some judges in the local courts may lack experience of applying the Convention. This can lead to inconsistent decisions and it can also slow down the recognition process.

Moreover, it can take a long time for the recognition application to be dealt with. First, it will take some time to put the application and supporting documents (with translations) together. Second, it will take time for the local courts to respond to the application once submitted. In one unreported case, a party applied for recognition of a foreign award and after 16 months the Chinese court had still not responded. In two other cases, it took seven months and 21 months respectively before the Chinese court's decision was issued.

IV SHIPPING CONTRACTS

i Shipbuilding

China has a very active shipbuilding industry, consistently taking orders for more gross tonnage than any other country in the world. With global economic crisis, the number of Chinese shipyards had fallen to about 1,600 at the end of 2014 from more than 3,000 in 2012. It is reported that the Chinese shipbuilding industry is facing further consolidation.⁷

Like the Japanese and Korean shipyards, Chinese shipyards tend to base their contracts on the SAJ Form, AWES Form or Norwegian Form. CMAC has also published its own Standard Newbuilding Contract (the Shanghai Form) in March 2011, which is increasingly used by Chinese shipyards.

English law is the typical choice in contracts, coupled with dispute resolution provisions for arbitration in either London or Singapore. As such, a buyer wanting to contract with a Chinese shipyard must take into account very similar legal considerations to those that would apply if it were buying from other key shipbuilding centres.

As regards title, this will normally transfer at the time of delivery as per the standard clauses in the contracts described above. If the yard refuses to deliver a vessel, depending on the reason for the refusal, the buyer may be able to apply to a Chinese maritime court for an injunction ordering the yard to deliver the vessel in accordance with the contract. Otherwise, for this issue and any others that may arise in the process, the parties would need to follow the dispute resolution procedure agreed in the contract – as noted above, this tends to be London or Singapore arbitration.

However, the buyer should be wary of potential pitfalls. If the buyer is successful at arbitration and the shipyard is ordered to pay a sum of money to the buyer – perhaps by way of a refund of the buyer's prepaid instalments – then the buyer may experience the enforcement issues described in Section III, *supra*. The industry has attempted to avoid such risks by establishing a system whereby the shipyard's bank will, at the outset, guarantee to the buyer that in certain circumstances the bank will refund to the buyer the prepaid instalments. This system is not exclusive to China; it is adopted worldwide. The problem in China, however, is that recently, some shipyards have persuaded local courts to issue injunctions preventing the bank from paying out under the guarantee even if the relevant arbitral tribunal has found in favour of the buyer.

ii Contracts of carriage

Contracts of carriage are governed by the Chinese Maritime Code, which contains similar provisions to the Hague-Visby Rules, although China is not itself a signatory to the Hague Rules, the Hague-Visby Rules, the Hamburg Rules or the Rotterdam Rules.

Trade between Chinese ports is governed by the Rules of Transportation of Goods by Waterway in China, promulgated by the Ministry of Transport.⁸

7 www.scmp.com/business/china-business/article/1725245/china-shipbuilding-industry-faces-further-consolidation.

8 Order No. 2000 [9] of the Ministry of Transportation (28 August 2000).

Duties of the shipper

Under the Maritime Code, the shipper is obliged to pack the goods properly and to provide accurate information about the goods. Failing this, the shipper will be liable for the carrier's losses so caused (Article 66).

Further, the shipper is obliged to complete relevant formalities (port, customs, quarantine etc.) in relation to the goods and submit documents to the carrier. Failing this, the shipper will be liable for the carrier's losses so caused (Article 67).

In respect of dangerous goods, the shipper is additionally obliged to mark the goods and to notify the carrier in writing of the description of the goods, their nature and any relevant safety measures to be taken. The shipper will be liable for any losses suffered by the carrier as a result of carrying the dangerous goods (Article 68).

Liens

A carrier is entitled to exercise a lien over cargo onboard for unpaid freight, general average contributions, demurrage and other necessary charges paid by the carrier on behalf of the owner of the cargo.⁹ The lien can only be exercised over cargo owned by the party that is liable for the claim.¹⁰ Further, unless the relevant bill of lading states clearly to the contrary, the bill of lading holder is not liable for demurrage, dead freight or any other expenses at the loading port; accordingly, a carrier cannot usually exercise a lien over the cargo for those matters unless the holder of the bill of lading is also the charterer.

Interestingly, in a case heard by the Shandong Province High People's Court in 2013, it was held that the carrier (in this case, the shipowner) could not exercise a lien over cargo in circumstances where the shipper named on the bill of lading had already paid freight to the charterers but the charterers had failed to pay the shipowner. This was so even though the shipper had promised to pay the shipowner the freight and demurrage at the port of loading, and requested the shipowner to carry the cargo to the discharge port.

Multimodal bills

Under the Maritime Code, the multimodal transport operator is responsible for all stages of multimodal transportation (Article 104). Importantly, if loss of or damage to the goods occurs during a certain leg of the voyage, liability will be limited according to the rules applicable to that leg only (Article 105). If it is impossible to ascertain on which leg the loss or damage occurred, the limitation of liability of the sea leg will be applied (Article 106).

iii Cargo claims

Under the Maritime Code, both the bill of lading holder and the subrogated cargo underwriter who has compensated the bill of lading holder for cargo loss have title in China to sue the carrier who entered into contract with the shipper, as well as the actual carrier (the registered owner or the demise charterer of the carrying vessel at the material time). This choice is beneficial to a bill of lading holder as, in other jurisdictions, the option to sue may be restricted by demise clauses; those clauses have accordingly not been an issue in China.

9 Article 87 of the Maritime Code.

10 Article 44 of the Maritime Special Procedure Code, promulgated in 1999.

It is important to note that in dealing with cargo claims, the maritime courts will normally ignore the incorporation into the contract of carriage of charterparty terms (including dispute resolution clauses).

Confusion was caused by Article 16 of the Supreme Court's Judicial Interpretation II on Insurance Law,¹¹ which provides that the limitation period for an insurer's right of action against a carrier or actual carrier starts to run at the time the insurance payment is made. The carrier or actual carrier could face a claim by the cargo underwriter when that same claim would otherwise be barred if brought by the bill of lading holder. This confusion has been resolved by the Supreme Court's Official Reply to Shanghai Senior People's Court on the Starting Date of the Statutory Time Limit for Subrogated Marine Insurer. Now it is clear that a marine cargo insurer will step into the shoes of the insured.

iv Limitation of liability

Although China is not a party to the LLMC Convention 1976, its regime for limitation of liability for maritime claims, contained in Chapter XI of the Maritime Code, is largely modelled on the LLMC Convention 1976. Save for claims in respect of wreck removal, destruction or rendering harmless of a ship that is sunk, wrecked, stranded or abandoned or cargo onboard, which cannot be limited, the scope of claims subject to limitation under the Maritime Code is the same as under the LLMC Convention 1976; in short:

- a* owners (including charterers and operators) and salvors are entitled to limit their liability unless it is proved that the loss resulted from their act or omission with intent to cause such loss, or their recklessly acting with knowledge that such loss would probably result; and
- b* for cargo loss or damage, a carrier or actual carrier (the shipowner or demise charterer) may limit its liability on the basis of 'package limitation' (i.e., its liability is limited to the higher of 2 SDRs per kilogram or 666.67 SDRs per package.¹² For delays, the liability is limited to the amount of freight.¹³ The carrier will lose the right to limit liability if it is proved that the loss, damage or delay in delivery of the goods resulted from an act or omission of the carrier with the intent to cause such loss, damage or delay, or from the carrier recklessly acting with knowledge that such loss, damage or delay would probably result.¹⁴

Limitation of liability for vessels below 300GT and vessels trading or operating along the Chinese coastal line is subject to the Regulation of the Ministry of Transport,¹⁵ which is 50 per cent of the figure calculated under the Maritime Code. Where there is a collision between international vessels and vessels trading or operating along the coastal line or below 300GT, the limitation of liability under the Maritime Code will apply, provided that the limitation fund is set by interests of the international vessel.

11 Promulgated on 13 May 2013 and entered into force on 1 March 2015.

12 Article 56 of the Maritime Code.

13 Article 57 of the Maritime Code.

14 Article 59 of the Maritime Code.

15 Promulgated on 15 November 1993 and entered into force on 1 January 1994.

Procedures in relation to setting up a limitation fund, claim registration and distribution are governed by the Maritime Special Procedure Code and the Supreme Court's Provisions on Trial of Cases in relation to Limitation of Liability for Maritime Claims.¹⁶

V REMEDIES

i Ship arrest

Ship arrest is governed by the Maritime Special Procedure Code and the Supreme Court's Provisions on Issues in Relation to Ship Arrest and Auction (the Supreme Court's Provision on Ship Arrest and Auction).¹⁷ The Maritime Special Procedure Code adopts many of the provisions of the 1999 Arrest Convention.

To obtain an arrest order from a Chinese maritime court, the claimant must submit an arrest application to the court together with the following items:

- a* power of attorney or certificate of legal representation in favour of the appointed Chinese lawyer;
- b* documents supporting the underlying maritime claims;
- c* proof that the person alleged to be liable for the maritime claims is the owner of the vessel at the time of the application; and
- d* counter security.¹⁸

The court should make a decision within 48 hours from receipt of the application.

The amount of the counter security required by the court is normally equivalent to 30 days' hire at the vessel's market rate at the time of the arrest or 30 per cent of the amount of the claim, whichever is higher. With the entry into force of the Supreme Court's Provision on Ship Arrest and Auction, the counter security shall also cover costs and expenditure of ship maintenance during the arrest period and costs incurred by the respondent to provide security for lifting the arrest.¹⁹ The counter security will take the form of either cash or a letter of undertaking issued by a Chinese bank or insurance company.

It is possible to arrest sister ships; any ship that is owned by the party in question can be arrested. However, a ship that is not directly involved in the underlying dispute can only be arrested if that dispute does not relate to the ownership, mortgage or management of the ship.

Arrest of bunkers is also possible. This can be achieved where the claim is against the owner of the bunkers. The claimant must consider the practical difficulties and cost of removing and storing the bunkers while arrested. The Supreme Court's Provision on Ship Arrest and Auction now clarifies that a ship arrested under a bareboat charter can be sold,²⁰ thereby putting to an end the controversy that a ship can only be sold when it belongs to the debtor.

16 Promulgated on 27 August 2010 and entered into force on 15 September 2010.

17 Promulgated on 28 February 2015.

18 Under Article 4 of the Supreme Court's Provision On Ship Arrest and Auction, applicants for crew contract claims or personal injury claims may be relieved from the requirement to provide counter security

19 Article 5 of the Supreme Court's Provision on Ship Arrest and Auction.

20 Article 7 of the Supreme Court's Provision on Ship Arrest and Auction.

Arrest orders can be issued for security purposes only. However, the claimant must commence litigation or arbitration proceedings on the underlying claim within 30 days of the arrest, no matter in which jurisdiction those proceedings will take place.

In terms of the mechanics of the arrest, it is not necessary for the vessel to be in the berth; a vessel can be arrested at anchor in territorial waters by traffic boat or, infrequently, by helicopter.

If, after obtaining an arrest order, a claimant goes on to lose the substantive proceedings, it will be arguable that the arrest was wrongful. There are, however, no provisions under Chinese law setting out the basis on which an arrest can be wrongful, so the point is unclear.

ii Court orders for sale of a vessel

When a vessel has been arrested in China for more than 30 days, the respondent has failed to provide security for its release and it is not appropriate to maintain the arrest, the claimant that commenced litigation or arbitration proceedings may apply to a Chinese maritime court for sale of the vessel by auction. If a sale order is granted, an affected party may apply for review within five days of receipt of the order. The court will then make its decision within five days after receipt of the review application.

The maritime court ordering the auction of a vessel will issue an announcement in newspapers or other news media. In the case of foreign vessels, such an announcement will be issued in the newspapers or other news media for overseas distribution for at least 30 days. The court will also issue a notice 30 days before the auction to the registrar of the registry state of the vessel and to any known maritime lien holders, mortgagees and shipowners.

Auctions are conducted by ship auction committees. Bidders must register with a ship auction committee within the prescribed time limit and pay the required deposit, which is usually around 10 per cent of the valuated price. Following payment of the full price of the ship by the successful bidder, the original owner must deliver the vessel to that bidder – the buyer – within the designated period under the supervision and guidance of the auction committee. The auction committee will sign a protocol of delivery and acceptance with the buyer, and the maritime court will then issue a release order and public announcement. The buyer can then register its ownership.

VI REGULATION

i Safety

China is a party to the following international conventions relating to safety at sea:

- a* the FAL Convention;
- b* the Load Lines Convention;
- c* the Tonnage Convention;
- d* the Intervention Convention;
- e* the Special Trade Passenger Ships Agreement 1971;
- f* the Oil Pollution Fund Convention;
- g* the Colregs;
- h* the London Dumping Convention;
- i* the Intervention Protocol;
- j* the Protocol on Space Requirements for Special Trade Passenger Ships 1973;
- k* the Athens Convention;
- l* SOLAS;

- m* the INMARSAT Convention;
- n* the STCW Convention;
- o* the Search and Rescue Convention 1979;
- p* Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation 1988;
- q* the Salvage Convention 1989;
- r* the OPRC Convention;
- s* the OPRC-HNS Protocol;
- t* the Anti-Fouling Convention; and
- u* the Bunker Convention.

ii Port state control

The Maritime Safety Administration (MSA) is the port state control authority in China and bears responsibility for maritime safety, security, prevention of pollution from ships and protection of seafarers' rights. The MSA's main responsibilities include:

- a* drafting and implementing guidance, policies, regulations and technological codes and standards in national water safety supervision, marine pollution prevention, navigational aids and other relevant matters;
- b* comprehensively supervising water safety and preventing marine pollution;
- c* investigating and handling water traffic accidents, marine pollution from vessels and water transport violation cases;
- d* supervising statutory surveys and certification for vessels and offshore facilities;
- e* checking the qualifications of ship survey organisations and marine surveyors, and approving and supervising the resident representative offices of foreign ship survey organisations within China;
- f* controlling Chinese flag vessels' registration, certification, survey and certificate endorsement, and the entry into and exit from Chinese ports and waters; and
- g* administering seafarers' and pilots' training, examination and certification, and monitoring the qualification and quality systems of training institutions for seafarers and pilots.

Although the MSA has power to detain vessels, in 2012 (the latest records available), vessels were detained in just 7.24 per cent of cases following an MSA inspection.²¹ When compared with numerous other flag states, such as the UK (7.45 per cent), Germany (10.78 per cent) and Russia (16.9 per cent), it can be seen that China's detention rate is relatively low.

iii Registration and classification

Registration

Registration of shipping interests in China is governed by the Regulations Governing the Registration of Ships and is administered by the MSA. The interests of ownership, mortgage and demise charter are all registrable.

21 MSA, 'Annual Report on Port State Control 2012', <http://en.msa.gov.cn/uploadfile/2013/0607/20130607094252896.pdf>, p. 29.

To register ownership, the owner must file an application with the registry together with documents showing its identity, the technical information of the ship and proof of ownership. If the application is in order, the registry will normally issue the ownership certificate within seven days.

To register a mortgage, the mortgagor and the mortgagee must apply together to the registry with a certificate of ownership or shipbuilding contract and the mortgage agreement.

If the application is in order, the registry will record the mortgage in the ship's certificates and ownership certificate, and will issue a certificate of mortgage to the mortgagee within seven days.

The owner or demise charterer must register a demise charter in the event that:

- a* the Chinese-flagged ship is demise chartered to a Chinese company;
- b* a Chinese company demise chartered-in to a foreign-flagged ship; or
- c* a Chinese-flagged ship is demised chartered-out to a foreign company.

To register the demise charter, the owner and demise charterer must submit the original demise charterparty, the certificate of nationality and certificate of ownership in the case of a charter-in of a foreign-flagged ship, class technical certificates and termination or cancellation of the nationality certificate issued by the previous port of registry.

Classification

The China Classification Society (CCS) is the only approved Chinese classification society. Consequently, if a vessel is to fly the Chinese flag, CCS must oversee its construction. However, if the vessel will fly another flag, the yard is entitled to engage any other classification society it wishes to oversee the build.

Interestingly, there is no reported case in China in which CCS (or any other classification society) has been held liable for negligent work.

iv Environmental regulation

The key Chinese legislation, rules and conventions in force regulating air and sea pollution and a brief outline of their terms are as follows:

- a* The Marine Environment Protection Law: the law was enacted to protect and improve the marine environment, conserve marine resources and prevent pollution damage. It applies to the internal waters, territorial seas and the contiguous zones, exclusive economic zones and continental shelves of China and all other sea areas under Chinese jurisdiction. All entities and individuals engaged in navigation, exploration, exploitation, production, tourism, scientific research and other operations in such sea areas, or engaged in operations in coastal areas that have impact on the marine environment, must comply with this law.
- b* The Regulations on Administration of the Prevention and Control of Marine Environment Pollution Caused by Vessels: these regulations aim to prevent pollution caused by the discharge and carriage of pollutants by ships, and shipping-related operations such as hold clearing or cleaning, fuel supply, loading and unloading, shipbuilding, salvage, ship breaking, and containerisation of hazardous cargo. The regulations also cover the response to, handling and investigation of ship pollution incidents, and liability for such incidents. Further, they require cargo owners and their agents receiving oil cargoes in Chinese waters to pay into a compensation fund to cover oil pollution damage from ships.

- c* The Regulations on Emergency Preparedness and Response on Marine Environment Pollution from Ships (together, 'the Regulations'): the Regulations require that owners or operators of (1) any ship carrying polluting and hazardous cargoes in bulk; or (2) any other ship above 10,000 GT, enter into a pollution clean-up contract with an MSA-approved ship pollution response company (SPRO) before the ship enters a Chinese port.²²
- d* The Prevention and Control of Atmospheric Pollution Law: this law was formulated for the purpose of preventing and controlling atmospheric pollution. It sets out the duties of the government in the prevention and control of atmospheric pollution, including that caused by the burning of coal and fuel by motor-driven vehicles and vessels. Motor-driven vehicles and vessels are prohibited from discharging atmospheric pollutants in excess of the prescribed discharge standards.²³ However, information on what the discharge standards in relation to motor-driven vessels are does not appear to be available.

In addition to the above-mentioned domestic laws, China is a signatory to the following international conventions:

- a* the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (usually known as the Basel Convention);
- b* the Anti-Fouling Convention;
- c* the CLC Convention; and
- d* the Bunker Convention.

v Collisions, salvage and wrecks

Collisions

Collisions are governed by the Maritime Code, the Supreme Court's Judicial Interpretation on Trial of Collision Cases 2008 and the Supreme Court's Judicial Interpretation on Compensation for Property Loss and Damage Due to Ship Collision and Allision 1995.

Vessels involved in collisions are liable for loss and damage according to the proportion of their liabilities. They are jointly and severally liable for personal injury.

Salvage and wreck removal

China is a party to the Salvage Convention 1989, and the Chinese Maritime Code contains similar provisions to that Convention.

Recycling

China is a party to the Basel Convention. In 2003, the Convention issued guidelines in relation to the dismantling of ships.²⁴ These Guidelines offer information and recommendations on procedures, processes and practices that should be implemented. The Guidelines also provide

22 The list of SPROs can be found on the MSA's website at: <http://en.msa.gov.cn/index.php?m=content&c=index&a=lists&ccatid=316>.

23 Article 32 of the Prevention and Control of Atmospheric Pollution Law.

24 Technical Guidelines for the Environmentally Sound Management of the Full and Partial Dismantling of Ships.

advice on monitoring and verification of environmental performance.²⁵ In 2005, China's Development and Reform Commission promulgated the Green Ship Recycling General Regulation, which has similar provisions to the Guidelines, and is the industrial standard to be followed by ship recycling industries in China.

vi Passengers' rights

China is a party to the Athens Convention 1974. Contracts for the carriage of passengers by sea are governed by the Maritime Code.

vii Seafarers' rights

A significant proportion of the world's seafarers are Chinese. Their rights and obligations are governed by the Chinese Labour Law, Labour Contract Law, Crew Regulations, Crew Assignment Regulations, and Administrative Measures on Seafarers' Working and Living Conditions on Board. China is not a party to the Maritime Labour Convention 2006.

Seafarers may arrest a ship for unpaid salaries and personal injury on board without putting up counter security.

VII OUTLOOK

China's recent change of leadership brings with it the promise of a new industrial era for the country. In September 2013, the first new free trade area was established in Shanghai to promote economic reform. The Chinese government has published incentives on registration, tax, banking, financing, customs supervision and foreign currency exchange. By 29 September 2014, 13 insurance companies had set up branches in the area and marine insurance has become the most popular type of insurance traded there.²⁶ As this new area develops, Shanghai port is expected to expand further. In addition, following the successful establishment of the Shanghai free trade area, on 12 December 2014 the Chinese government approved proposals to set up free trade areas in Fujian, Guangdong and Tianjin. The outlook for trade, and the scope for continued growth in the shipping industry, is therefore encouraging.

It may be argued, however, that China's maritime laws have not kept up with the pace of growth in trade and shipping. Since the entry into force of the Maritime Code in July 1993, China's shipping industry has seen rapid development. Issues commonly faced in the industry, such as the legal position of NVOCCs and cargo forwarders, and delivery of cargo without production of an original bill of lading, are not covered in the Maritime Code. As a result, there are some significant areas of uncertainty in Chinese maritime law. Some academics in China believe that it is therefore time for the Maritime Code to be reviewed and updated.

In response to this, the PRC Supreme People's Court issued 'Several Opinions on Providing Judicial Services and Guarantee for the Building of One Belt One Road by People's Courts' (No. 9 [2015] of the Supreme People's Court) in order to bring the trial function of

25 www.basel.int/Implementation/TechnicalMatters/DevelopmentofTechnicalGuidelines/AdoptedTechnicalGuidelines/tabid/2376/Default.aspx.

26 <http://insurance.hexun.com/2014-09-30/169018436.html>.

the People's Courts into full play and provide effective services and to guarantee the smooth building of One Belt One Road, which includes maritime trial and arbitration services. The Supreme Court also asked local courts to deepen judicial reforms to help foreigners to attend trials. As a result, the Shanghai Maritime Court has, for example, simplified the legalisation procedure of obtaining a power of attorney for lawyers representing international clients. A foreign company may now legalise one POA with general authority for all its disputes before the Shanghai Maritime Court.

We will be watching developments with interest over the next few years to see how China's proposed reforms play out. Undoubtedly, though, China will only become more and more important in the global shipping industry.

Chapter 14

CYPRUS

Andreas Haviaras¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The Cypriot merchant fleet ranks among the 10 largest fleets in the world and ranks third in the European Union, with 12 per cent of the total fleet of the 28 Member States of the EU. It has 1,769 ocean-going vessels with a total GT of more than 22.7 million.

Cyprus is also a major ship-management centre with a total of around 60 ship-management companies, some of which rank among the largest of their kind in the world, operating from within Cyprus. Of those ship-management companies, 87 per cent are controlled by Cypriot and EU interests and they employ almost 55,000 seafarers, of whom approximately 5,000 are EU nationals. The total fleet managed from Cyprus represents 20 per cent of the world third-party ship-management market.²

Cyprus's ports are the commercial ports of Limassol and Larnaka, the industrial port of Vassiliko, the Paphos Port, the small port at Latchi and the oil terminals at Moni, Vassiliko and Dhekelia. All of them are under Cyprus Port Authority (CPA) control. The ports of Famagusta and Kyrenia and the Karavostasi terminal are under Turkish occupation and therefore are not open to shipping activities. Restrictions have been put in place that declare these ports as closed to all Cypriot vessels.³

In 2013 there were 4,534 calls of ships in the Cyprus ports moving 180,827 passengers and 4.1 million tonnes of cargo.⁴

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2 The Department of Merchant Shipping, www.mcw.gov.cy/mcw/dms/dms.nsf/index_en/index_en?opendocument.

3 Decree of the Cabinet of the Republic issued on 10 March 1974 (PI 265/74).

4 Cyprus Port Authority, www.cpa.gov.cy/CPA/page.php?pageID=1&langID=13.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Cyprus has a legal system based on the English model harmonised with relevant EU legislation. As regards ship registration, maritime safety, security and seafarers' legislation, the key laws are:

- a* the Merchant Shipping (Registration of Ships, Sales and Mortgages) Laws of 1963 to 2005;
- b* the Merchant Shipping (Masters and Seamen) Laws of 1963 to 2002;
- c* the Merchant Shipping (Shipowners' Insurance for Maritime Claims) Law of 2012; and
- d* the Protection of Cyprus Ships Against Acts of Piracy and Other Unlawful Acts Law of 2012 (Law 77(I)/2012).

As regards the taxation of shipping activities, the key laws are:

- a* the Merchant Shipping (Fees and Taxing Provisions) Laws of 1992 to 2007 (repealed apart from the First Schedule concerning registration and other fees, which still remains in force);
- b* the Merchant Shipping (Taxation of Ship Management Services) Regulations of 2000;
- c* the Merchant Shipping (Fees and Taxing Provisions) Law of 2010 (New Tonnage Tax Law);
- d* the Tonnage Tax For Ship Managers (Special Provisions and Requirements) Notification of 2010 (PI 511/2010);
- e* the Tonnage Tax (Special Provisions for the Calculation of the Community Flagged Share) Notification of 2010 (PI 536/2010);
- f* the Tonnage Tax (Arm's-Length Principles) Notification of 2012 (PI 136/2012); and
- g* the Taxation of Owners of Cyprus Ships Notification of 2012 (PI 137/2012).

Cyprus imposes a special reduced tax on companies engaged in international maritime transport, which replaces the corporate tax, and this without unduly distorting competition. This scheme allows companies to opt for a tax calculated on the net tonnage of the fleet that they operate (tonnage tax) instead of being taxed on the actual profits of their maritime transport activities. The scheme is authorised until 31 December 2019. The tonnage tax system is available to any owner, charterer or ship manager who owns, charters or manages a qualifying ship in a qualifying shipping activity. The tonnage tax is calculated on the net tonnage of the ship according to a broad range of bands and rates prescribed in the legislation. The rates applicable to ship managers are 25 per cent of those applied for shipowners and charterers.

A qualifying ship is any seagoing vessel certified under applicable international or national rules and regulations and registered in the ship register of any member of IMO and the ILO. Certain types of ships such as fishing vessels, ships used primarily for sports or recreation, river vessels, non-self propelled floating cranes and non-ocean-going tug boats are specifically excluded.

A qualifying shipping activity is any commercial activity that constitutes maritime transport, crew management or technical management of ships. The definition of maritime transport includes the traditional carriage of goods and passengers, as well as ancillary services

such as all hotel, catering, entertainment and retailing activities on board a qualifying ship; the loading and unloading of cargo; and the operation of ticketing facilities and passenger terminals. Towing, dredging and cable laying are also eligible for the tonnage tax regime.

Owners of Cyprus-flagged ships automatically fall within the scope of the tonnage tax system. Owners of EU-flagged ships may opt to be taxed under the tonnage system. Owners of foreign-flagged ships must comply with certain requirements to qualify for the option to be taxed under the new system. These include the requirement that a certain share of their fleet is made up of EU-flagged ships, which must not be reduced in the three years following the exercise of the option (flag-share requirement) and that the commercial and strategic management of the fleet be carried out from the EU or EEA.

Any shipowner opting for the tonnage tax system must remain in the system for 10 years. Early withdrawal will result in penalties, calculated as the difference between the amount paid in the period the shipowner was under the tonnage tax system and the amount that would have been paid had it been subject to corporation tax in the same period. In addition, the shipowner will lose the right to opt for tonnage taxation until expiration of the 10 years from the date the option was first exercised.

The tonnage tax system covers profits from shipping operations, dividends paid directly or indirectly out of such profits, profits on the sale of the ship and interest earned on funds used as working capital or for the financing, operation or maintenance of the ship.

Any charterer who charters a ship under bareboat, demise, time or voyage charter is eligible for the tonnage tax system provided the tonnage of the ships under time or voyage charters do not exceed 75 per cent of the total tonnage of ships chartered and owned, for more than three consecutive years. This eligibility percentage increases to 90 per cent if the ships chartered are from the EU or EEA. The charterers of a fleet comprising both EU and non-EU flagged ships must also comply with the flag-share requirement.

An eligible charterer may opt to be taxed under the tonnage tax system, but once the option is made, the charterer must remain in the system for 10 years. Early withdrawal will result in the penalties outlined above for shipowners.

The tonnage tax system covers profits from shipping operations, dividends paid directly or indirectly out of such profits and interest earned on funds used as working capital or for the payment of expenses arising out of the charterparty.

A ship manager who provides crew or technical ship management services is eligible for the tonnage tax system provided it satisfies certain criteria. These include the maintenance of a fully operational office in Cyprus, the employment of a sufficient number of qualified personnel (51 per cent of whom should be EU or EEA citizens) and at least two-thirds of the management is entirely carried out from a territory in the EU or EEA. Further, a share of this fleet must comprise EU-flagged ships, the share of which must not be reduced in the three years following the exercise of the flag-share requirement. All ships and crews under management must comply with relevant international standards and EU law requirements must be fulfilled, in particular those relating to maritime security, safety, training and certification of seafarers, environmental performance and on-board working conditions.

Other specific criteria must be complied with, depending on the ship management service provided (i.e., full implementation of the Maritime Labour Convention 2006 (MLC) for crew managers and the ISM Code certificate for technical managers).

The tonnage tax system covers profits from the provision of crew or technical ship management services, dividends paid directly or indirectly out of such profits and interest

earned of funds used as working capital or for the payment of expenses relating to the management of the ships. The 10-year option rule also applies to eligible ship management and the same penalties apply for early withdrawal.

The international conventions ratified by Cyprus are:

- a* the SOLAS Convention (Ratification) Laws of 1985 to 2012;
- b* the MARPOL Convention (Ratification) Laws of 1989 to 2005;
- c* the STCW Convention (Ratification) Laws of 1985 and 1998;
- d* the Load Lines Convention (Ratification) Laws of 1969 to 1997;
- e* the Tonnage Convention (Ratification) Law of 1986;
- f* the Colregs (Ratification) Laws of 1980 to 2009;
- g* the IMO Convention (Ratification) Laws of 1973 to 1996;
- h* the CLC Convention (Ratification) Laws of 1989 to 2005;
- i* the CLC Convention 1992 Notification of 2008;
- j* the Bunker Convention (Ratification) Law of 2004; and
- k* the Maritime Labour Convention 2006 (Ratification) and for Matters Connected Therewith Law of 2012.

III FORUM AND JURISDICTION

i Courts

Shipping disputes in Cyprus are litigated before the Supreme Court of Cyprus in its admiralty jurisdiction or, exceptionally, before a district court of Cyprus. The Supreme Court of Cyprus has the same powers as those vested in the High Court of England and Wales in its admiralty jurisdiction as those existed immediately before the independence of Cyprus (16 August 1960). The district courts of Cyprus have jurisdiction to hear admiralty cases remitted to them by the Supreme Court of Cyprus, however, the district courts do not have power to order the arrest of a ship unless it is in execution of an existing judgment.⁵

There is a general six-year time bar for claims arising out of contractual relations and a three-year time bar for civil wrongs claims.⁶ However, claims related to the carriage of goods by sea have a time bar of one year.⁷

Admiralty courts gain jurisdiction for *in rem* claims simply by the presence of the ship in the territorial waters of Cyprus whereas they will not deny jurisdiction to litigate disputes on grounds that, assuming jurisdiction, would amount to forum shopping. Characteristically, Supreme Judge Papadopoulos said:

Lord Denning referring to the right of access to English courts said it: ‘... is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he decides to do so. You may call this forum shopping if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service.’ [The ‘Atlantic Star’ [1973] QB 364, at page 382]. With all respect I would adopt the above passage from Lord Denning’s judgment for Cyprus as a good forum for those foreign friends who seek the aid of the Cypriot courts.⁸

5 Courts of Justice Law No. 14/1960 as amended, Sections 19 and 22B.

6 Law No. 66(1)/2012.

7 Carriage of Goods by Sea Law.

8 *Williams and Glyn’s Bank plc v. the ship ‘Maria’* (1992) 1 CLR, p. 309.

ii Arbitration and ADR

Cyprus does not have any specific maritime procedure other than that provided for other commercial disputes.⁹ The Admiralty Court of Cyprus lacks jurisdiction to arrest a ship for the purpose of aiding foreign arbitration proceedings.¹⁰

iii Enforcement of foreign judgments and arbitral awards

Foreign judgments or arbitration awards, whether admiralty or otherwise, first need to be recognised before being capable of execution in Cyprus. This is possible under EU Regulation No. 44/2001 and 1215/12 for those of EU origin or under bilateral or multilateral treaties for those of non-EU origin. In an admiralty case it has been decided that an action based on a foreign arbitration award on a dispute under a charterparty is in fact based on the charterparty itself and not on the arbitration award. A direct consequence of such finding is that the arbitration award holder is entitled to claim his appropriate priority on the proceeds of sale of the ship.¹¹

IV SHIPPING CONTRACTS

i Shipbuilding

Cyprus does not have any significant shipbuilding facilities.

ii Contracts of carriage

The main local law related to the carriage of goods by sea is an adoption of the Hague Rules.¹² Cyprus has ratified the Hague-Visby Rules but has not, so far, adopted the Hamburg Rules or the Rotterdam Rules.

iii Cargo claims

Cargo claims may be brought either by an action *in rem* against the cargo itself or by an action in personam against the appropriate person depending on the facts of the case. The contract of carriage is evidenced by the terms of the bills of lading, which may or may not incorporate the terms of the charterparty, including dispute resolution clauses. The admiralty court has very recently accepted that the terms of the charterparty are in fact incorporated into bills of lading even if the appropriate parts of the bill of lading remain blank.¹³

iv Limitation of liability

The carrier's liability may be limited by adopting in the bills of lading the terms of the Hague-Visby Rules.

9 The Arbitration Law and the International Arbitration Law No. 101/1987.

10 Appeal No. 24/10 *Nationwide Shipping Inc v. the ship 'Athena'*.

11 *Caspi Shipping Limited and others v. the proceeds of sale of the ship 'Sapphire Seas'* (1998) 1 AAD 1015.

12 Carriage of Goods by Sea Law.

13 Action No. 22/2011 *Oscar Shipping Pte Ltd v. The cargo on board the ship 'Asphodel'*, dated 12 April 2013.

V REMEDIES

i Ship arrest

The *in rem* jurisdiction of the admiralty court of Cyprus may be invoked with a ship arrest or cargo arrest or sister ship arrest that is within the jurisdiction under the circumstances specified in Section 1 of the English Administration of Justice Act 1956. The claimant must file an *in rem* writ of summons and within those proceedings to apply *ex parte* for a warrant of arrest. The application needs to be accompanied by an affidavit verifying the facts of the case and requesting the aid of the court in arresting the targeted property. The court, when issuing a warrant of arrest, will order the claimant to file a security (normally in the form of a bank guarantee) to be answerable in favour of the defendant's property in the event of the arrest being proved wrongful. At the same time the court will determine the amount of the counter-security that, if offered by the defendants (again in the form of a bank guarantee), will secure the release of the arrested property. The court will further order the claimant to deposit with the court an amount sufficient to cover the initial expenses of the marshal of the court who will effect the arrest and maintain the arrested property in his or her possession. There has never been an arrest with the use of a helicopter but there have been arrests at anchor in territorial waters by the use of launches.

The arresting party must pursue its claim in Cyprus. It is not possible to arrest the ship in aid of foreign proceedings.

ii Court orders for sale of a vessel

An admiralty court may order the sale of the ship or cargo in execution of an *in rem* judgment or *pendente lite*. In the latter case an application must be filed and the court will issue the order for the sale only if it is satisfied that maintaining the ship or cargo under arrest will diminish its value or put it at unreasonably high risk. In both cases the court fixes a minimum reserved price and the sale is effected by the marshal of the court by public auction or private treaty.

VI REGULATION

i Safety

With regard to safety and pollution prevention, Cyprus has harmonised its legislation with the EU legislation. As for implementation, the Cyprus Department of Merchant Shipping has been strengthened by specialist personnel and a network of inspectors at the most important ports around the world something that has contributed substantially to the increase of inspections of Cyprus-flagged ships. With this set up, the number of detentions of Cyprus ships for serious deficiencies has greatly diminished allowing Cyprus to enter both the Paris MoU and the Tokyo MoU White Lists and to be removed from the United States Coast Guard targeting system.

As regards the danger of ships being used or being a target for terrorist activities, Cyprus has adopted the ISPS Code and all ships under the Cyprus flag, as well as all port facilities in Cyprus, have been duly certified as complying with its requirements.

Recently, Cyprus voluntarily participated in an audit scheme undertaken by the IMO. The completion of the audit revealed that the Department of Merchant Shipping has substantially complied with the IMO Assembly principles established under Resolution A974(24) and with the Code for the implementation of the mandatory IMO instruments

included in Resolution A973(24). Cyprus is one of only two countries to be voluntarily audited and is the only one to be deemed substantially compliant. The Department of Merchant Shipping already has in place a complete system for adopting and implementing the IMO's conventions and therefore the IMO audit scheme is viewed as a means of identifying weaknesses for the purpose of refining and perfecting the system.

ii Port state control

The CPA was established as a public entity¹⁴ to apply government policy in the maritime area. This policy is conveyed and supervised by the Minister of Communications and Works. The CPA is a member of the International Association of Ports and Harbors, the International Cargo Handling Coordination Association, the International Association of Lighthouse Authorities, the European Sea Ports Organisation and the Association of Mediterranean Cruise Ports. Under the provisions of the Agreement for Financial Support to Cyprus the government has committed itself to privatising a number of public entities, one of which is the CPA. The CPA has the power and authority to run and exploit the Cyprus ports.

iii Registration and classification

A vessel may only be registered in the Register of Cyprus Ships if more than 50 per cent of the shares of the ship are owned by Cypriot citizens or EU citizens who, if they are not permanent residents of the Republic, have appointed an authorised representative in Cyprus; or if 100 per cent of the shares of the ship are owned by one or more corporations that have been established and have their registered office in Cyprus or are established and have their registered office in the European Economic Area and that have either appointed an authorised representative in Cyprus or the management of the ship is entrusted in full to a Cypriot or EU ship-management company.

Ships of any type or size other than those constructed for exclusive use in inland navigation or that are to be used exclusively on inland navigation or are banned on port state control grounds¹⁵ may be registered in the Register of Cyprus Ships or the Special Book of Parallel Registration, provided the applicable age-related requirements and the applicable type-related requirements are complied with. The registration of the types specified in the table below may be allowed provided the age of the ship does not exceed the maximum age limit corresponding to the type of the ship and the related conditions corresponding to the type of ship (i.e., entry inspection and additional inspection) are complied with.

14 Law No. 38/1973.

15 Circular 12/2012 of the Merchant Shipping Department of Cyprus.

<i>Type of ship</i>	<i>Maximum age limit</i>	<i>Related conditions</i>	
		<i>Entry inspection required</i>	<i>Additional inspection required</i>
Cargo ships and high-speed cargo craft	Yes: ≤ 25 years	Yes: if ≥ 15 years	No
Passenger ships and high-speed passenger craft engaged in international or short international voyages	No	Yes: if ≥ 30 years	Yes: if 2–10 years, biennially; if > 10 years, annually
Passenger ships and high-speed passenger craft engaged in domestic voyages within the territory of a state, other than Cyprus	No	Yes: if ≥ 25 years	Yes: if 2–10 years, biennially; if > 10 years, annually
Passenger ships and high-speed passenger craft engaged in domestic voyages within the territory of Cyprus	No	Yes: if ≥ 20 years	No. In order to operate they are required to be inspected and certified annually
Fishing vessels	Yes: ≤ 25 years	Yes if ≥ 20 years	No
Floating production, storage and offloading vessels, floating storage and offloading vessels and mobile offshore drilling units	Yes: ≤ 25 years	Yes: if ≥ 15 years	No
Ships of types other than those listed above	Yes: ≤ 35 years	Yes: if ≥ 20 years	Yes: if the ship is carrying industrial or special purpose personnel and if 2–10 years, biennially; if > 10 years, annually

Cyprus law allows for the provisional registration of a vessel. This will allow the shipowner time (up to nine months, including a three-month extension) during which it will be able to complete the administrative formalities for permanent registration.

The application for registration of a ship under the Cyprus flag must be made by a local lawyer to the Minister of Communications and Works through the Registrar of Cyprus Ships. A ship may be provisionally registered under the Cyprus flag either in Limassol, by the Registrar of Cyprus Ships or at any diplomatic mission or consular post of the Republic of Cyprus abroad who will act on instructions issued by the Registrar of Cyprus Ships. At the time of her provisional registration under the Cyprus flag a ship must be at a port so that she can be surveyed and certified on behalf of the Cypriot government.

The permanent registration of a ship must be effected within six months (or nine months if the three-month extension has been obtained) from the date on which it was provisionally registered.

Under Cypriot legislation parallel (bareboat) registration of vessels is possible. The legislation provides for the two forms of internationally accepted bareboat registration: 'parallel-in' registration and 'parallel-out' registration. These two options offer some very interesting opportunities for leaseback, hire-purchase and finance arrangements. Parallel-in and parallel-out registration may be effected with more than 20 states whose legislation is compatible with Cypriot legislation.

Cyprus exclusively recognises and authorises the organisations that meet the criteria as specified in the Annex to European Union Directive 94/57/EC, as amended, to carry out

statutory surveys, inspections and certification services for ships flying the Cyprus flag.¹⁶ The Department of Merchant Shipping has in place a biennial audit schedule for monitoring each RO's performance so as to satisfy itself that the RO complies with the requirements of Directive 94/57/EC, as amended and of Appendix 1 of the Annex to Assembly Resolution A739(18), including future amendments thereto.

The classification societies recognised by the Republic of Cyprus and authorised to carry out assessment, auditing, verification and certification of safety management systems and ISPS Code, on behalf of the Republic of Cyprus are:

- a* the American Bureau of Shipping;
- b* Bureau Veritas;
- c* China Classification Society;
- d* DNV GL;
- f* the Korean Register of Shipping;
- g* Lloyds Register;
- h* Nippon Kaiji Kyokai;
- i* the Polish Shipping Register;
- j* Registro Navale Italiano; and
- k* the Russian Maritime Register of Shipping.

The standard agreement between Cyprus and the classification societies provides that if liability arises out of any incident that is finally attributed to the Republic of Cyprus by a court of law, or as part of the settlement of a dispute through arbitration procedures, and this may be attributed to an omission or gross negligence of the classification society, its bodies, employees, agents or others who act on its behalf, the Republic of Cyprus will be entitled to financial compensation to the extent of the said loss, damage, injury or death, as decided by that court to have been caused by the classification society.

iv Environmental regulation

The key legislation in force in relation to marine pollution is as follows:

- a* the Convention for the Protection of the Mediterranean Sea against Pollution and Related Protocols (Ratification) Law of 1979 (No. 51/79) (EU No. 1524, Supplement I, dated 8 June 1979);
 - the Convention for the Protection of the Mediterranean Sea against Pollution and Related Protocols (Ratification) (Amendment) Act 2001 (Law 20(III)/2001). (EU No. 3537, Section (III), dated 15 October 2001); and
 - the Convention for the Protection of the Mediterranean Sea against Pollution and Related Protocols (Ratification) (Amendment) Act 2007. (No. 35(III)/2007) (EU No. 4092, Section (III), dated 20 July 2007); and
- b* the Agreement between Cyprus, Israel and Egypt on Cooperation in Addressing Major Marine Pollution in the Mediterranean Sea (Ratification) Law of 2001 (V.21(III)/2001) (EU No. 3537, Supplement I (III), dated 15 October 2001).

16 Law for the Recognition and the Authorisation of Organisations No. 46(I)/2001 as amended by Law 83(I)/2004.

v Collisions, salvage and wrecks

Cyprus has in place the Wrecks Law and the Shipwrecked Passengers Law. It has also ratified the Salvage Convention 1910 and the Protocol of Signature, 1910.

vi Passengers' rights

Cyprus has in place the Merchant Shipping (Liability of Carriers of Passengers by Sea in the Event of Accidents) Law No. 5(I)/2014. This law applies to the carriage of passengers falling within the scope of Regulation (EC) No 392/2009, which incorporates certain provisions of the Athens Convention.

vii Seafarers' rights

There are a number of laws regulating the seafarers' training and certification whereby Cyprus has ratified the MLC by Law No. 6(III)/2012.

Chapter 15

DENMARK

*Jens V Mathiasen and Thomas E Christensen*¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

As of November 2015, the Danish merchant fleet comprised 659 vessels. Danish vessels account for 15.5M GT or 69.5M GT if including Danish owned vessels under foreign flags and chartered vessels. This makes Denmark the fourth largest shipping nation in the world.²

Danish shipping companies transport 10 per cent of world trade. Foreign currency earnings for the shipping industry reached 205 billion kroner in 2014. Danish shipping companies employ approximately 23,000 of the roughly 100,000 employed in the Danish maritime cluster.³

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The Danish legal system is divided into three separate jurisdictions, which are:

- a* Denmark;
- b* the Faroe Islands; and
- c* Greenland.

This contribution deals solely with the law applicable in Denmark, but the maritime systems in the Faroe Islands and Greenland are almost identical (based on Danish legislation) and with appeal to the Danish High Court.

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2 'Danish Shipping Statistics November 2015' published by the Danish Shipowners' Association, see www.shipowners.dk.

3 Report made by The Economic Council of the Labour Movement prepared on behalf of the Danish Maritime Authority, see www.dma.dk.

The Merchant Shipping Act (MSA)⁴ is the main legislation regarding material regulation of the shipping industry and is to a large extent based on international maritime conventions such as Hague Visby Rules, the Hamburg Rules, the LLMC, the CLC, the 1989 Salvage Convention and the Nairobi Convention, whereas the Administration of Justice Act (AJA)⁵ contains procedural regulation. In addition, EU law is increasingly of relevance, in particular in relation to the carriage of passengers as well as safety, offshore and environmental matters.

Circulars and guidelines are issued by The Danish Maritime Authority, an agency under the Ministry of Business and Growth that regulates almost every aspect of the shipping industry, with regulation on ship and crew as its core areas of responsibility. The Danish Maritime Authority also handles vessel registration. For further information, see www.dma.dk.

III FORUM AND JURISDICTION

i Courts

Maritime disputes may in most instances be commenced at either one of the 22 district courts or the Commercial and Maritime Court in Copenhagen, which considers disputes in commercial and maritime matters.⁶ This court is therefore very experienced in deciding maritime disputes. The decisions of the districts court can be appealed to either the Western or Eastern High Court while the Commercial and Maritime Court's decisions can be appealed to either the High Courts or the Supreme Court of Justice.⁷

The international competence of the Danish courts will in relation to maritime disputes in most cases be determined by the EU Regulation 1215/2015 (Brussels Ia Regulation) which apply in Denmark, irrespective of the Danish opt-out to the EU's judicial cooperation, pursuant to an agreement between Denmark and the EU entered into on 19 October 2005.⁸ The Brussels Ia Regulation is supplemented by Chapter 21 of the AJA and certain provisions in the MSA covering specific cases such as carriage of goods and marine pollution.

The limitation periods for maritime claims are set out in Chapter 19 of the MSA. The limitation period is from one to three years depending on the type of the claim. By way of example, the limitation period for claims for salvage and special compensation is two years from the day on which the salvage operations were terminated and one year in relation to maritime liens and actions under a bill of lading. As to the limitation periods for claims that are not listed in the MSA, the generally applicable limitation period under Danish law is three years from the due date of the claim, see Section 3 of the Limitation Act.⁹ The claimant's unawareness of the claim or the debtor may postpone the limitation period by a maximum of 10 years or, for claims relating to personal injury and environmental damage, 30 years.

4 Consolidated Act No. 75 of 17 January 2014 as last amended by Act No. 740 of 1 June 2015.

5 Consolidated Act No. 1255 of 16 November 2015 as last amended by Act No. 263 of 16 March 2016.

6 Section 225 of the AJA.

7 Section 368 of the AJA.

8 See Act on the Brussels I Regulation No. 1563 of 20 December 2006 as amended by Act No. 518 of 28 May 2013.

9 Consolidated Act No. 1238 of 9 November 2015.

ii Arbitration and ADR

The Danish Institute of Arbitration resolves commercial and maritime disputes through confidential arbitration and mediation procedures. The Institute was established in 1981 and is based in Copenhagen, see www.voldgiftsinstituttet.dk. In maritime disputes, it is also very common with *ad hoc* arbitration. Arbitration proceedings are governed by the Arbitration Act (AA) which is based on the 1985 UNCITRAL Model Law.

iii Enforcement of foreign judgments and arbitral awards

Foreign judgments may be recognised and enforced in Denmark depending on the country the judgment was issued in. Under the Brussels Ia Regulation, judgments issued in other member states of the EU may be recognised and enforced without any declaration of enforceability required. Recognition and enforcement may, however, be refused on certain grounds, including public policy, insufficient service of the defendant (default judgments) and if the judgment is irreconcilable with an earlier judgment.¹⁰ Judgments from the EFTA states (Norway, Liechtenstein, Iceland and Switzerland) can be recognised and enforced based on the Lugano Convention with similar exceptions as the Brussels Ia Regulation.¹¹

In Section 223a and 479 of the AJA, the Minister of Justice has the authority to lay out provisions on the recognition and enforcement, respectively, of foreign judgments. This authority has, however, never been utilised. Apart from a few provisions on specific types of cases, there is no generally applicable statutory basis for the recognition and enforcement of foreign judgments. However, based on recent case law, it has been asserted in Danish legal literature that foreign judgments might in some instances be recognised if the parties had agreed upon the jurisdiction of the foreign court issuing the judgment.

Arbitral awards can be recognised and enforced on certain conditions set out in the AA which in this regard is based on the New York of 1958. Recognition and enforcement may only be denied on a few specific grounds, including public policy and non-arbitrability.¹²

IV SHIPPING CONTRACTS

i Shipbuilding

Under Danish law, shipbuilding contracts are subject to the general principle of contractual freedom. Thus, the parties to a shipbuilding contract will have considerable latitude to enter into a contract on individually negotiated terms. Often, this will be based on a standard form shipbuilding contract such as BIMCO's Newbuildcon 2007 or alternatively the parties' own templates.

10 See Article 39 and 45 of the Brussels Ia Regulation.

11 See Article 34 of the Lugano Convention (Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters), see Act on the Brussels I Regulation No. 1563 of 20 December 2006 as amended by Act No. 518 of 28 May 2013.

12 Section 37-38 of the AA.

Shipbuilding contracts are generally considered as sale of goods contracts and regulated by the Sale of Goods Act (SGA).¹³ However, the SGA only applies to the extent that the parties have not departed from its provisions in their contract. Given the detailed nature of most shipbuilding contracts the SGA will most often not be applied.

ii Contracts of carriage

The provisions of the MSA that govern contracts of carriage are based on the Hague Visby rules, which Denmark has ratified. Denmark has not ratified the Hamburg rules, however, Danish law follows the Hamburg-rules on some points. Denmark has signed but not yet ratified the Rotterdam-rules.

Contracts of carriage are regulated in Chapter 13 of the MSA. Under Section 262, the carrier must perform the carriage with appropriate care and dispatch, and otherwise safeguard the interest of the cargo owner. Under Section 274, the carrier is liable for the goods during the period in which he has the goods in his possession at the port of loading, during carriage and at the port of discharge.

The obligations and liability of the shipper is regulated in Section 290 of the MSA, which follows Article 12 of the Hamburg-rules. Under Danish law, a shipper is only liable for loss sustained by the carrier or the sub-carrier, which is caused by the fault or neglect of the shipper or any person for whom he is responsible. The same applies to any person for whom the shipper is responsible.

Some of the provisions of the MSA contains are relevant for multimodal transport, including Section 285 whereby the contracting carrier may limit his liability for losses arising out of the carriage of the cargo by a sub-carrier under certain circumstances.

iii Cargo claims

Danish law on liability for cargo claims and bills of lading are based on the Hague Visby Rules that are mandatorily applicable. Claims for damage or loss to cargo, and for delay, can be brought by the lawful owner of the bill of lading against the carrier. The carrier is liable for any loss, damage or delay to the cargo caused while the cargo was in the carrier's custody, see Section 274(1). The carrier can counter this presumption of negligence and avoid liability by proving that the carrier and its crew acted with due care in the carriage of the cargo.

Further, a number of exemptions from liability apply.¹⁴ The carrier is not liable for losses caused by measures to save persons or reasonable measures to salvage a ship or other property at sea, see MSA Section 275(2). If the carrier's negligence is not the only cause of damage, he is only liable for the part of the loss attributable to his negligence, see Section 275(3). The carrier is not liable for loss due to error in navigation or fire that was not caused by the carrier, see Section 276, unless the loss was caused by unseaworthiness, see section 276(2). Exclusion of liability for deck cargo and transport of live animals is set out in Sections 263 and 277.

The carrier is entitled to limit liability for cargo claims, see Sections 280–283 of the MSA. Liability can be limited to the higher amount of 667 special drawing rights (SDR) per package or SDR 2 per kilo of cargo lost or damaged.

13 Consolidated Act No. 140 of 17 February 2014.

14 The exemptions are incorporated from the Hague-Visby Rules and the Hamburg Rules.

The limitation period for claims for compensation under the MSA Sections 275 and 276 is one year from the day on which the goods were delivered or should have been delivered.

iv Limitation of liability

Chapter 9 of the MSA which is based on the Convention of Liability for Maritime Claims of 1976 as amended by the 1996 Protocol (LLMC) governs the rights for owners, charterers, managers and operators of a vessel to limit liability arising in connection with the vessel, see Section 171 of the MSA. The types of claims for which limitation applies (including damage to property and personal injury, loss resulting from delay etc.) are listed in Section 172, and the types of claims that are excluded from limitation (including claims for salvage and damage from oil pollution) are listed in Section 173. Further, liability cannot be limited if the entity seeking to limit liability caused the loss or damage through its own wilful act or gross negligence. Danish law follows the ‘single liability’-principle, see Section 172(2) of the MSA.

The limits for liability are set out in Section 175 of the MSA as set out below. Sections 177 to 180 and Chapter 12 of the MSA set out the rules for establishing a limitation fund.

Under Section 175 of the MSA claims for death and personal injury can be limited to SDR 3.02 million for vessels with a tonnage of 2,000 tons and below. For vessels with a greater tonnage, the limits are increased as follows:

- a* for every ton from 2,001 to 30,000 tons, by SDR 1.208,
- b* for every ton from 30,001 to 70,000 tons, by SDR 906; and
- c* for every ton from 70,000 tons, by SDR 604.

All other claims can be limited to SDR 1.51 million for vessels with a tonnage of 2,000 tons and below. For vessels with a greater tonnage, the limits are increased as follows:

- a* for every ton from 2,001 to 30,000 tons, by SDR 604,
- b* for every ton from 30,001 to 70,000 tons, by SDR 453; and
- c* for every ton from 70,000 tons, by SDR 302.

These limitation amounts do not apply to claims relating to oil pollution from tankers which may be limited to 3–59.7 million SDR depending on the vessel’s tonnage under Section 194 of the MSA (based on the CLC Convention), see further under Section VI.iv, *infra*.

As for injury to passengers, the limitation is set to SDR 175,000 multiplied by the amount of passengers that the vessel is certified to carry, Section 175 of the MSA. However, if this overall amount is not reached, under the Regulation (EC) 392/2009 that incorporates the Convention relating to the Carriage of Passengers as amended by the Protocol of 2002 (the Athens Convention), the limitation amount is 400,000 SDR per passenger, see Article 7. In addition, special limitation amounts are in place for claims relating to damage to luggage, see Article 8 of the Athens Convention, and passengers’ delay, see Chapter 15 of the MSA.

V REMEDIES

i Arrest

Under Danish law, a vessel may be arrested either under Chapter 4 of the MSA which is based on the 1952 Brussels Arrest Convention or under Chapter 56 of the AJA. In case, the MSA applies, the generally applicable rules on arrest in Chapter 56 of the AJA apply only to the extent the rules do not conflict with the MSA, see Section 96 of the MSA. Arrest falls under the jurisdiction of Denmark’s bailiff’s courts that are located at the district courts.

Under the MSA, a vessel can only be arrested as security for a 'maritime claim' against the vessel owner, which term covers the types of claims listed in Section 91, and only if the vessel is present in Danish waters. For some of the types of claims listed in Section 91, any vessel owned by the owner of the vessel to which the claim relates can be arrested as security for the claim. However, for some types of claims (notably disputes as to ownership and mortgages over a vessel), only the vessel to which the claim relates can be arrested.

The Court may order the arrest applicant to put up security for the arrest application. Legal proceedings must be commenced against the debtor within a week from the date of the arrest, see Section 534 of the AJA. If the arrest was wrongful, the applicant must pay compensation to the debtor, see Section 639 of the AJA.

Some of the 'maritime claims' listed in Section 91 also constitute maritime liens under Chapter 3 of the MSA, which in part is based on the 1967 Brussels Convention on Maritime Liens and Mortgages. Under Section 51 of the MSA, such claims include crew wages, port fees and duties, claims for damages arising out of the operation of the vessel, and claims for salvage (but notably not claims for payment of bunkers supplied to the vessel). A maritime lien over cargo arises for the types of claims listed in Section 61 of the MSA.

As opposed to arrest under the MSA, under the AJA, an asset of the debtor (including a vessel) can be arrested as security for any claim (provided the claim does not provide a basis for the levying of an execution against an asset under Section 538(1)). However, the applicant must show that the possibility of recovering the underlying claim from the debtor will at a later stage cease to exist or be fundamentally reduced if the arrest is not granted, see Section 627.

ii Court orders for sale of a vessel

Judicial sales of vessels are regulated by the general rules on judicial sales of personal property laid down in Chapters 49–50 (Sections 538–559) of the AJA. Rights over vessels, including maritime liens, are generally regulated by the MSA.

Under Section 538(1) of the AJA, the levying of an execution on goods entitles a creditor to request a judicial sale of the goods in order to cover his claim. Under Section 478 of the AJA, execution can be levied on the basis of:

- a* decisions of courts or other authorities, provided their decisions are enforceable according to Danish law including in relation to costs;
- b* a written demand for payment undisputed by the debtor and endorsed by the Bailiff's Court under Section 477(e)(2) of the AJA;
- c* negotiated settlements of disputes entered into by the parties before the above-mentioned authorities;
- d* other negotiated settlements of disputes relating to payable debt, provided that it is explicitly decided in the settlement that it can serve as a basis of enforcement;
- e* instruments of debt, not included in (d) above, provided it is explicitly decided in the document that it is enforceable;
- f* mortgage deeds; or
- g* bills of exchange.

In addition, arbitration awards can form the basis of execution under the same rules as judgments under (a) above with some exceptions, see Sections 38 and 39 of the AA. The execution is levied by the bailiff's court against the vessel itself.

Under Danish law, the arrest of an asset is considered to prepare for the levying of execution on the asset for the benefit of not only the arrest applicant, but all creditors of the owner of the asset. As such, an arrest does not in itself give the arrest applicant a priority in the distribution of the proceeds of the sale.

When an execution has been levied on a vessel, the creditor may request the bailiff's court in which the execution was levied to schedule a judicial sale, see Section 539 of the AJA.

In order to protect his execution against claims from other creditors or other third parties acquiring rights over the vessel, the creditor must register the execution with the Danish Ship Register or the Danish International Ship Register, see Section 28(1) of the MSA.

VI REGULATION

i Safety

Safety at sea is governed by the Safety at Sea Act (SSA).¹⁵ The Act is based on international conventions such as the SOLAS Conventions, the Load Line Convention, the STCW Convention, the MARPOL Convention and various EU Regulations, and applies to all Danish ships except for naval vessels. The purpose of the SSA is to ensure safety at sea, in particular to ensure the seaworthiness of vessels on departure from port. The Danish Act on the Manning of Ships regulates safety concerning the manning of ships.¹⁶ The shipowner and the master have the main responsibility to comply with the rules of safety at sea.

ii Port state control

Denmark has ratified the SOLAS Convention and the Paris Memorandum of Understanding on Port State Control, which requires the states to execute efficient port state control on ships from any state. The Danish Maritime Authority is responsible for port state control.

Where a vessel does not comply with applicable regulation, the Authority may order the owners to rectify any deficiencies. The Authority and the local port master may also confiscate the vessel's certificates, and detain the vessel, see Sections 14 and 16 of the SSA.

iii Registration and classification

Denmark maintains two ship registers, the Danish Ship Register (DAS) and the Danish International Ship Register (DIS), which are governed by Chapter 1 and 2 of the MSA and the DIS Act¹⁷ respectively. The income generated by vessels registered under the Danish flag (whether in DAS or DIS) may be subject to the Danish tonnage tax regime, which is considered one of the most competitive and attractive shipping taxation systems in the world. The rules on the taxation are primarily set out in the Tonnage Taxation Act.¹⁸

When a vessel is registered in DAS or DIS, it becomes subject to Danish jurisdiction and is entitled to fly the Danish flag and will have to comply with Danish mandatory legislation.

15 Consolidated Act No. 72 of 17 January 2014 as amended by Act No. 724 of 25 June 2014.

16 Consolidated Act No. 74 of 17 January 2014.

17 Consolidated Act No. 68 of 17 January 2014.

18 Consolidated Act No. 945 of 6 August 2015.

Registration in DAS

Danish vessels must be registered under Danish flag, see Section 10 of the MSA. In order for a vessel to be considered Danish, the owner of the vessel must be Danish, which will be the case if the owner is a Danish citizen, a Danish public company (A/S) or a limited company (ApS) with a board of directors of which at least two-thirds are Danish citizens resident in Denmark. No licences are required to establish a business in Denmark with the purpose of owning or commercially operating vessels.

Registration in DIS

The criteria for registration in DIS are less strict than for registration in DAS. Also, registration in DIS allows the vessel's crew to exempt their wages from being subject to taxation. However, a vessel registered in DIS may not transport passengers from one Danish port to another.

There are two main categories of vessels that can be registered in DIS: Danish vessels and certain foreign or non-Danish vessels. Registration in DIS requires that the vessel is owned by a legal entity registered in Denmark or in the EU/EEA.

Vessels that are not considered as Danish under the MSA (see above) may be registered in DIS if their owners are based in the EU/EEA. If the owner of the vessel is a legal entity certain conditions relating to ownership of the legal entity have to be satisfied. In any case, the foreign shipowner must have a representative in Denmark (either an office, a subsidiary, or an agent) who is responsible for compliance with the owner's obligations following the vessel's registration in DIS. Further, a ship registered in DIS must be administered, controlled and directed from Denmark.

Bareboat registration in DIS

A legal entity in the EU/EEA that complies with the criteria for registration of a vessel in DIS may also choose to bareboat-register a vessel, which the entity is bareboat chartering, in DIS. A bareboat-registered vessel needs not fly the Danish flag, but it must fly the flag of an EU/EEA country. A bareboat registration may be granted for a maximum of five years. Afterwards the registration may be prolonged by one year each year. Bareboat registration in DIS does not allow for other rights, including mortgages, to be registered in DIS.

Registration fee

To register a ship in DIS a fee of 0.1 per cent of the vessel's value applies. The value of the vessel will be estimated either by the value stated in the bill of sale (if the vessel has recently been sold), or alternatively the market value of the vessel. The registration of a mortgage is also subject to payment of a registration fee of 0.1 per cent of the mortgage value.

Registration of rights

Under Section 28 of the MSA, all rights over vessels (except for maritime liens and possessory liens, see Section 30) must be registered with the Danish Ship Register to obtain protection against claims from, and acquisitions by, third parties. This also applies for vessels under construction.

Under Section 10(3) of the MSA, vessels under construction in Denmark can be registered with the Danish Shipbuilding Register provided that the vessel's construction has reached a level where it can be easily and individually identified. Registration with the

Shipbuilding Register is optional and there is no requirement that the registered owner is a Danish citizen. When construction of the vessel is completed, the vessel must be deleted from the Danish Shipbuilding Register and registered with DAS or DIS.

Classification

The following classification societies are recognised by the Danish Maritime Authority to undertake Statutory Certification and Services on Danish-flagged vessels:

- a* American Bureau of Shipping (ABS);
- b* Bureau Veritas (BV);
- c* Class NK (Nippon Kaiji Kyokai);
- d* DNV GL;
- e* Lloyd's Register (LR);
- f* Polish Register of Shipping (PRS);
- g* RINA; and
- h* Korean Register (KR)

There is some uncertainty as to whether classification societies will be subject to liability for negligence in carrying out their work, however, the exclusion of liability clauses in the terms and conditions of classification societies has not been set aside by the Danish courts.

iv Environmental regulation

Ship source pollution and environmental damage is primarily governed by the MSA and the Protection of the Marine Environment Act (PMEA);¹⁹ while supplementary rules follows from, *inter alia*, the Environment Protection Act,²⁰ the Environmental Damage Act²¹ and the Nature Protection Act²² and the Coastal Protection Act (CPA).²³ These regimes *inter alia* incorporate the international conventions and EU Directives mentioned below into Danish law. Under Danish law, shipowners are strictly liable for ship-source pollution.

The 1992 Convention on Civil Liability for Oil Pollution Damages (the CLC Convention is implemented in Chapter 10 of the MSA). In certain areas, Danish law on liability for oil pollution differs from the provisions of the CLC Convention. The channelling provisions of the CLC Convention are implemented in Danish law, albeit with some important changes as set out in Section 193(2) and 193(3) on shipowners' recourse claims against charterers and cargo owners. Danish law on recourse claims by shipowners is considered more onerous for charterers and cargo owners than Article III.4 of the CLC Convention.

In addition to the CLC Convention, the following international conventions and EU legislation are, *inter alia*, in force in Denmark:

- a* the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 1992;

19 Consolidated Act No. 1616 of 10 December 2015.

20 Consolidated Act No. 1317 of 19 November 2015 as amended by Act No. 132 of 16 February 2016.

21 Consolidated Act No. 916 of 3 July 2015.

22 Consolidated Act No. 1578 of 8 December 2015.

23 Consolidated Act No. 15 of 8 January 2016.

- b* the 2003 Protocol establishing an International Oil Pollution Compensation Supplementary Fund;
- c* the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001;
- d* the International Convention for the Prevention of Pollution from Ships 1973 as modified by the 1978 Protocol (MARPOL);
- e* Directive (EC) 2005/35 on ship-source pollution and on the introduction of penalties for infringements and Directive (EC) 2009/123 amending the Directive (EC) 2005/35;
- f* Directive (EC) 2008/99 on the protection of the environment through criminal law;
- g* Directive (EC) 2008/98 on waste and repealing certain Directives; and
- h* Regulation (EC) 1907/2006 on Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).

v Collisions, salvage and wrecks

Collisions

The rules on collisions can be found in Chapter 8 of the MSA. In case of a collision caused by the fault of one side that ship shall compensate the other ship for any damage suffered to the ship itself, its cargo and any passengers on board, see Section 161 (1).

Where a collision is caused by the fault of both of the involved vessels, liability for the damage is to be divided between the parties on the basis of each of the parties fault, see Section 161(2). This is based on estimates and is often divided into fractions such as half, one-third to two-thirds and one-quarter to three-quarters. If a collision is accidental without any fault of either of the parties involved, each party is responsible for the damage caused to its own ship.

Salvage

The rules on salvage are found in Chapter 16 of the MSA and are based on the 1989 Salvage Convention. It is a condition for a claim for payment for salvage that the salvaged item was in actual danger, see Section 441(a). When determining the payment for salvage, the circumstances listed in Section 446(a)–(j) are to be considered. Generally speaking, salvage of 5–10 per cent of the value of the salvaged items is not unusual.

Danish law operates a ‘no cure, no pay’ principle whereby the salvage has to be successful to entitle the salvor to a claim for salvage. However, where salvage is undertaken in circumstances of a threat to the environment, salvage may be payable even if the salvage operation was not successful, see Section 449.

Wrecks

The Danish authorities may, depending on the dangers and other circumstances relating to a wreck, order the removal of the wreck or demand reimbursement for any government expenses incurred in connection with wreck removal, pursuant to either the CPA, the PMEA, the Act on Additions to the Act on Wreckage²⁴ or Chapter 8a of the MSA, which incorporates the 2007 Nairobi International Convention on the Removal of Wrecks.

²⁴ Consolidated Act No. 838 of 10 August 2009 as amended by Act No. 1384 of 23 December 2012.

According to Sections 164(2) and 172(1)(4) of the MSA, the owner may limit his liability for wreck removal in accordance with the general limitation rules in Chapter 9 of the MSA.

vi Passengers' rights

Passenger's rights are regulated in Regulation (EU) 1177/2010 when travelling by sea and inland, including with regard to cancellation and delay of more than 90 minutes to and from ports situated in EU and cruises departing from an EU port. The regulation provides additional rights for disabled persons and persons with limited mobility.

Regulation (EC) 392/2009 governs the liability of carriers of passengers in the event of accidents based on the Athens Convention. It applies to all carriers involved in international carriage, including carriage between EU Member States and some types of domestic carriage.

Sections 401–432 of the MSA contains some regulation of passenger's rights, including claims relating to delay, however, due to the Regulation (EC) 392/2009, the bulk of regulation of passenger's rights is to be found in the EU Regulation and not in the MSA.

vii Seafarers' rights

The rights of Danish seafarers are regulated by the Seafarers Act.²⁵ The purpose of the act is to protect seafarers by ensuring proper conditions of employment and to contain provisions on standards for employment contracts, rest hours, right to return home and sickness.

Denmark is a party to the Maritime Labour Convention, which became effective on 20 August 2013. Since then, at least one vessel has been detained by the Maritime Authority.

VII OUTLOOK

As at November 2015, Danish shipowners had 131 vessels on order, constituting more than 45 billion kroner. This level of investment indicates an opportunistic approach to the current headwinds in the shipping industry among Danish shipowners. Danish shipowners would be well positioned to take advantage of any reversal of the current downturn in the shipping cycle, as the new vessels are more efficient than the existing fleet.²⁶

25 Consolidated Act No. 73 of 17 January 2014 as last amended by Act No. 740 of 1 June 2015.

26 See footnote 1.

Chapter 16

EGYPT

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I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Owing to the Suez Canal and its location at the crossroads between Africa, Asia and Europe, Egypt is an important world transportation hub. According to the Maritime Transport Sector of the Egyptian Ministry of Transport (MoT), Egypt has 15 major commercial ports with a total quay length of 32.4km and a total area of 481.54km², comprising 76.49km² of land and 405.04km² of water. In addition, Egypt has 44 specialised marine ports, five tourist ports, 11 petrochemical ports, seven mining ports, and four fishing ports. Major commercial ports include Alexandria, Damietta, El Dekheila, Port Said, the Suez Canal Container Terminal and Suez. Between January and August 2013, 50.24 million tonnes of cargo were imported through Egyptian ports and 28.5 million tonnes of cargo exported through Egyptian ports; about 2 million containers entered Egyptian ports and about 2 million containers exited Egyptian ports; 821,010 passengers arrived in Egyptian ports and 713,778 left from Egyptian ports. Egypt does not have a significant shipbuilding industry.

In 2014, the government commenced a project for the construction of a new Suez Canal project, in addition to deepening and widening the Great Bitter Lakes bypasses and the Ballah bypass, with a total length of 37km (the total length of the project is 72km). This will create a new canal, parallel to the existing one, to maximise benefit from the present Canal and its bypasses by doubling the length of the waterway that permits traffic in the two directions, thereby minimising the waiting time for transiting ships, reducing the time needed for the trip from one end of the Canal to the other and increasing the numerical capacity of the waterway. According to the government, the New Suez Canal project will increase the daily average of transiting vessels to 97 ships by 2023, up from 49 ships at present. The project was completed and inaugurated on 6 August 2015. The government established the

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‘Suez Canal Special Economic Zone’² as a mega industrial development project with an area of 461km². The targeted divisions are: ports and logistics, maritime services, industrial zones, ICT, and renewable energy. The project is still in development phase, but it is expected to attract investments in ship building and related industries and services.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Maritime trade is mainly governed by the Maritime Trade Law No. 8 of 1990 (the Maritime Law), which replaced Egypt’s first major maritime law, Law No. 4 of 1883. The Maritime Law regulates, *inter alia*, shipbuilding, ownership and rights, ship arrests, charterparties, contracts for the carriage of goods, collisions and marine insurance. The Maritime Law has had reasonable success in achieving its aims of aligning Egyptian maritime law with the international conventions to which Egypt is a party. Related laws include the Commercial Law No. 17 of 1999 (the Commercial Law), the Coastal Maritime Transport Law No. 63 of 1961 (the Coastal Maritime Transport Law), the Internal Navigation Law No. 10 of 1956 (the Internal Navigation Law) and the Commercial Vessels Registration Law No. 84 of 1949; all as amended.

In addition to national legislation, Egypt has acceded to several international conventions including:

- a* the Hague Rules (since 1944);
- b* the Hague-Visby Rules (since 1983);
- c* the LLMC Convention 1976 (since 1987);³
- d* the Hamburg Rules, which entered into force in 1992;
- e* the CLC Convention and the 1992 Amending Protocol; and
- f* the Bunker Convention.

III FORUM AND JURISDICTION

i Courts

The Egyptian judiciary is divided into two main branches: the ordinary courts (civil, commercial and penal) and the administrative courts. In addition, a number of specialist courts exist. The highest courts are the Court of Cassation and, for matters falling within their jurisdiction, the High Administrative Court and the Supreme Constitutional Court. There are no specialist shipping courts in Egypt, but in cities with major ports, courts will designate one or more circuits for hearing shipping and cargo disputes.

Most shipping cases will be tried before the ordinary courts and, in matters of execution, the execution and summary courts. There are three tiers of court in the ordinary courts: courts of first instance, courts of appeal and the Court of Cassation. Courts of first instance are the courts of primary jurisdiction and their judgments may be appealed to the courts of appeal if they exceed a certain monetary threshold. The judgment of a court of appeal is final and enforceable; however, it may be objected to before the Court of Cassation.

2 www.sczone.gov.eg.

3 Egypt has not acceded to subsequent Protocols.

There is only one Court of Cassation covering the entire country and located in Cairo. It oversees the uniform interpretation and application of the law. The Court of Cassation's jurisdiction includes consideration of challenges brought before it either by litigation or by public prosecution. It is a court of law and not of fact. Although Egypt operates a civil law system, principles set by the Court of Cassation are highly authoritative, if not generally binding, on lower courts.

Very few cases concerning shipping law reach the Court of Cassation, because parties in shipping disputes usually find it more economic to settle disputes amicably outside court.

Of particular relevance to shipping disputes are the execution courts. They are specialist courts that decide on objections to enforcement of judgments. They are also empowered to hear cases of sale of arrested vessels. Judgments of execution courts are appealed before a primary court acting as a court of appeals. The judgment of the court of appeals is final, subject to no further appeals and may not be appealed to the Court of Cassation unless the judgment contradicts and violates a previously issued final and controlling court judgment.

Most types of maritime claims are subject to a two-year limitation period. This applies to claims against shipowners, marine contractors and shipping agents, collision claims, claims arising out of contracts for the carriage of goods, charterparty claims and general average claims. Disputes arising out of seafarers' contracts are one of the few exceptions, which are subject to a one-year limitation period.

ii Arbitration and ADR

There is no specific maritime arbitration procedure in Egypt. Maritime arbitration, along with other types of arbitration, is governed by the Egyptian Arbitration Law No. 27 of 1994 (the Arbitration Law) and the Code of Civil and Commercial Procedure No. 13 of 1968 (CCCP).

Egypt's leading arbitration institute is the Cairo Regional Centre for International Commercial Arbitration, the rules of which follow the model UNCITRAL arbitration rules, and are aligned with the Arbitration Law.

The Arbitration Law applies to any dispute being arbitrated in Egypt or, in the case of arbitration conducted abroad, if the parties agree to subject the dispute to the Arbitration Law. Article 2 of the Arbitration Law extends its application to arbitration of transport contracts, including maritime transport, and environmental protection.

The parties may agree to subject their relationship to a model law, an international agreement or any other document. Such document and its provisions will be incorporated by reference into the parties' agreement, including any arbitration-related provisions contained therein. The arbitration agreement can be made before or after the dispute has occurred.

Arbitration awards are final and not subject to appeal, except that the losing party may bring a claim to annul the arbitration award based solely on procedural issues concerning due process and capacity, or the violation of Egyptian public order. In all cases, the court does not review or rule on the merits of the dispute.

Enforcement of local arbitration awards (i.e., awards not relating to international commercial arbitration) is made by an application to the competent court of first instance. The court's review is limited to ensuring that the award: (1) does not conflict with a previously issued Egyptian court judgment; (2) does not violate Egyptian public policy; and (3) was duly notified to the party against whom the award was rendered.

Arbitration remains the most widely used method of alternative dispute resolution and the number of cases arbitrated through major arbitration centres in Egypt has increased

in the past few years. To face an increasing caseload and litigation costs, the Egyptian government is working closely with an International Finance Corporation (IFC) mediation project to promote mediation. A draft mediation law has been prepared by the Ministry of Justice but has not yet been presented to Parliament. According to the latest draft published by the Ministry of Justice, all commercial disputes that exceed a certain monetary threshold will be subject to mandatory mediation before the case is allowed to be heard by courts. It is expected that settlement agreements resulting from mediation will have the same force as that of arbitral awards.

iii Enforcement of foreign judgments and arbitral awards

The enforcement of foreign judgment and arbitral awards in Egypt is regulated under Articles 296 to 301 of the CCCP, as well as the New York Convention to which Egypt is a party.

A request for enforcing a foreign judgment is submitted to the competent primary court by way of filing a regular court case. The court issues an *exequatur* under the same conditions required by the country from which the judgment was issued for the enforcement of Egyptian awards (reciprocity). Further, the court only issues the *exequatur* after it ensures that:

- a* Egyptian courts do not have jurisdiction over the matter and that the foreign country does;
- b* the parties have been properly serviced and represented in the foreign court;
- c* the foreign award is final according to the laws of the country in which it was rendered; and
- d* the award does not conflict with a prior Egyptian court award and does not contradict public policy or morality.

The principle of reciprocity is paramount to obtaining enforcement in Egypt. Enforcement of judgments issued by a US court may often encounter difficulties with regard to a finding of reciprocity because each of the various states has different enforcement laws. A foreign judgment will only be enforced in Egypt if the country (or state) in which the judgment was rendered would enforce a similar monetary judgment rendered by an Egyptian court.

Egypt is a party to the Arab League Treaty of 1953, the 1989 Agreement on Judicial Assistance between Egypt, Jordan, Iraq and Yemen. In addition, Egypt has bilateral agreements with 21 states. The existence of a treaty expedites the court proceeding by relieving the court from the requirement to determine whether there is reciprocity in the foreign jurisdiction. Proceedings to issue an *exequatur* will, however, still take several months, and certainly will exceed a year if the judgment debtor appeals.

A request for enforcement of a foreign arbitral award is made by an application to the Cairo Court of Appeals to issue an *exequatur*. As with enforcement of local arbitral awards, the Court ensures that due process was given and that the award does not violate Egyptian public policy. Any request made to annul an award does not automatically stay the enforcement proceedings, but the court may stay proceedings, if requested, at its discretion.

The limitation period for bringing an action for enforcement of a foreign judgment or arbitral award is 15 years.

IV SHIPPING CONTRACTS

i Shipbuilding

Egypt does not have a significant shipbuilding industry, and most vessels are purchased from abroad. A government-owned yard manufactures tugs and light machines used mostly in ports and the Suez Canal. The Maritime Law addresses shipbuilding contracts in brief, requiring that the contracts and any amendments thereto must be made in writing. On title transfer, the Maritime Law provides that title to the vessels remain with the contractor and does not transfer to the buyer until the buyer accepts its delivery after testing the vessel unless otherwise agreed between the parties. Further, the contractor warrants the vessel against hidden defects, even if the vessel has been duly inspected by the buyer before delivery. Claims for hidden defects are subject to a one-year limitation period, unless a fraud on the part of the contractor is established. For all other matters not regulated by the foregoing provisions of the Maritime Law, general contract rules, as found in the Civil Code, and judicial precedent apply.

ii Contracts of carriage

Egypt acceded to the Hague Rules and the Hague-Visby Rules, which were revoked in 1997 and replaced by the Hamburg Rules. In addition, the Maritime Law regulates contracts of carriage of goods in Articles 196 to 247. The Maritime Law provisions are aligned with the Hamburg Rules. Egypt did not sign the Rotterdam Rules.

One of the issues raised from time to time by carriers is delivery of cargo without presentation of bills of lading, which the Maritime Law does not recognise. The carrier, therefore, has a legal right to refuse delivery and may, after obtaining a court order, discharge the cargo and place it in a customs warehouses. Prior approval of the customs and port authority is needed to obtain the court order. Ports may accept a bank guarantee in lieu of obtaining the court order.

The carrier has a lien over the price of the cargo for any unpaid carriage and other amounts entitled to the carrier for the transport of the goods. This is a statutory lien that does not require any formalities.

The shipper's main obligations under the maritime law are:

- a* providing correct information regarding the cargo, and the shipper is liable, without limitation, for all damages resulting from provision of incorrect information;
- b* indemnifying the carrier for any damage caused to the vessel or loaded cargo if the damage resulted from the actions of the shipper or its subordinates or as a result of defects in the cargo; and
- c* payment of transport fees.

Currently, there are no laws regulating multimodal transport of goods. There are legislative impediments to the development and use of multimodal bills of lading, which include customs regulations. Under the current customs regulations, the Customs Authority office at the point of first entry into Egypt is entrusted with collecting customs dues, issuing customs release and selectively inspecting goods. All customs dues and other applicable taxes are payable at the time of the goods' arrival in Egyptian territory and customs clearance is not granted unless the foregoing amounts are paid in full. Although temporary release – without clearance – of the goods is legally permitted, the requirement that the cargo interest or its agent puts forward a guarantee for the full amount of the customs dues and other applicable

taxes and charges, makes it burdensome for carriers and freight forwarders who deal in large quantities to operate under multimodal bills of lading. As a result, carriers invariably refuse to issue door-to-door bills of lading and the bill of lading usually lists the port of first arrival as the place of delivery.

iii Cargo claims

Cargo claims may be brought by either the shipper or the rightful consignee of the cargo. The consignee is considered in the same legal position as the shipper and, consequently, the consignee becomes a party to the bill of lading or contract for the carriage of goods. A claim may be brought against the carrier or any of the carrier's subordinates who perform part of the contract. In the event of successive carriage of goods or where the contracting carrier subcontracts parts of the carriage to actual carriers, the shipper and receiver may sue the contracting carrier for the entire carriage and may sue the actual carrier only in respect of the portion of the transport actually undertaken by the actual carrier.

The carrier is strictly liable for demurrage, partial and total loss of the cargo, but the Maritime Law provides for the carrier's right to limit its liability, subject to limited exceptions.

According to the Civil Code, contractual obligations are governed by the law of the country in which the claimant and defendant have common domicile. In the event of the absence of a common domicile, the law of the country in which the contract was entered into would govern. This is all valid unless the parties have agreed otherwise, or the circumstances indicate that the parties have intended another law to apply. It must be noted that the parties' choice of law, if any, stands only to the extent that it does not violate Egyptian public policy.

There are, however, limitations on the incorporation of dispute resolution clauses. In litigation, despite the general rules on freedom of forum choice, courts will usually not uphold the parties' jurisdiction choice as the maritime law contains a special provision that is sometimes read to mandate Egyptian court jurisdiction over disputes arising out of contracts for the carriage of goods regardless of the chosen jurisdiction stated in the agreement. The parties may agree to arbitrate their dispute and the arbitration clause will be enforceable but the claimant has the choice to commence arbitration proceedings at the port of loading, port of discharge, the domicile of the defendant, the place of contracting signing, or the place stated in the arbitration clause; and the parties' agreement may not waive the claimant's right to choose.

The governing law clause may be effective under Egyptian law. The carrier may stipulate in the contract of carriage to apply any other rules or conventions as long as they do not contradict Egyptian law or the Hamburg Rules (as per Article 23).

iv Limitation of liability

Under the Maritime Law, shipowners and charterers may limit their liability for debts arising from damages caused by the vessel to port establishments and waterways, and physical and material damage occurring on board the vessel or directly relating to marine navigation or vessel operation. However, limitation of liability may not be invoked in the following cases:

- a* refloating the vessel and removal of her wreckage;
- b* salvage of the vessel;
- c* participation in general average;
- d* seafarers' rights;
- e* nuclear damage; and
- f* damage resulting from oil pollution.

Further, carriers may limit their liability in connection with contracts for the carriage of goods.

Egypt is a signatory to the LLMC Convention 1976 (but not the 1996 Protocol), the 1992 CLC Convention and the Bunker Convention.

In the application of limitation of liability regimes, an issue frequently arises in connection with the applicable regime, as there are discrepancies between the Maritime Law and the provisions of conventions to which Egypt is a party. For example, the formula for calculating limitation of liability under the LLMC Convention is different to the formula stated in the Maritime Law.

According to the Constitution, the provisions of international conventions become part of the laws of the land when properly enacted. Accordingly, parties are entitled to benefit from the limitation of liability regimes determined by each convention. The question raised is whether international conventions take precedence over national legislation, or whether the later-enacted law takes precedence. These issues have yet to be settled by legislation or uniform judicial precedent. In shipping legal practice, due to the length of the litigation duration, cases involving these issues have generally been settled outside court and the Court of Cassation has not had the opportunity to decide on the issue.

Another example is the possibility of limiting liability in oil pollution cases. Both the CLC Convention and the Bunker Convention permit limitation of liability, but the Maritime Law prevents limitation of liability for damage resulting from oil pollution. Recent cases show, however, that courts are willing to invoke the provisions of the Bunker Convention, being the more recent legislation, thus allowing the defendant to invoke limitation of liability.

Limitation funds are another area in which local law is not aligned with applicable international conventions. The Maritime Law does not regulate limitation funds either in implementation of the LLMC Convention or for purposes of its own regulation of limitation of liability. The LLMC Convention limitation fund may be, as a matter of principle, established as an applicable law in Egypt; however, there is no real procedure for setting up a limitation fund in place and, to the best of our knowledge, no limitation funds, in the meaning of the LLMC Convention, have been established in Egypt except on one occasion involving a collision with an oil platform in the Gulf of Suez. The matter did not, however, reach the phase of the distribution of the fund as the parties eventually decided to settle the matter outside court.

V REMEDIES

i Ship arrest

Arrest proceedings are regulated under Articles 59 to 66 of the Maritime Law. Egypt is not a party to the Arrest Convention 1999. A vessel may be arrested by an order from the president of the competent court of first instance or his or her acting deputy. The order may be issued even if the vessel is preparing for departure and it may only be imposed for the settlement of a maritime debt. Article 60 of the Maritime Law provides an exhaustive list of items or incidents that are considered to give rise to a maritime debt. Creditors to any maritime debt may seek to obtain an arrest order against the vessel in question or any other vessel owned by the debtor at the time the debt originates, subject to a few exceptions.

In theory, it is possible to arrest bunkers but it is difficult to convince courts to do so. The Maritime Law does not refer to the arrest of bunkers, but general principles of law may

allow such arrest subject to proper evidence supporting the claim and proving that the debtor is the actual owner of the bunker. This sometimes proves difficult in claims brought against sub-charterers or sub-sub-charterers.

Although not required by law, court practice has been consistent in rejecting requests for arrest orders in connection with vessels that are not physically present in Egypt. Some courts may require a certificate from the relevant port confirming the vessel's presence. It is not possible to arrest by helicopter a vessel that is at anchor in territorial waters but not yet at berth.

There has also been an increase in malicious arrest orders owing to the fact that the arrestor is not requested to submit a guarantee against wrongful arrests and that the fees for issuing an arrest order are modest.

To maintain the arrest, a creditor must bring, within a short duration, a legal action requesting that the court rule on the merits of the claim and declare the validity of the arrest. The purpose of the arrest under Egyptian law is to preserve the vessel pending determination of any dispute relating to the debt. It is not possible to arrest a vessel simply to obtain security and thereafter pursue the claim on its merit in a different jurisdiction.

At any time during the court proceedings, the court must lift the arrest if an adequate guarantee is submitted that is sufficient for settlement of the debt, subject to limited exceptions. The amount of security, which corresponds to the claimant's claim and its associated costs, coupled with the length of litigation, usually forces debtors or insurers to settle the claim outside court.

ii Court orders for sale of a vessel

If a favourable, final and enforceable judgment is rendered in a case filed following the arrest of the vessel, the creditor may proceed with effecting a judicial sale to satisfy its debt. Also, a creditor that has an established right (for example, by court order, court judgment or enforceable executive document) can proceed with levying an executory arrest, which is levied upon the request of a creditor for the sale of the vessel through a bidding session for the settlement of the debt. It is worth noting here that the debt for which the executory arrest is being levied does not need to be of a maritime nature. Generally, all assets owned by a debtor are treated as security for its obligations and a vessel is simply one of the debtor's assets for this purpose.

If the vessel is not already arrested, the court will issue an arrest order to be served on the relevant parties, and a court hearing will be fixed for the court to issue its judicial sale judgment.

The court will fix the basic price, and set the terms of sale and the auction dates. In determining the basic price, the court may appoint an expert to estimate the basic price, which prolongs the proceedings by three to four months. The court order to sell the vessel may be appealed, which further prolongs the proceedings by six to eight months.

The sale must be announced in a daily newspaper at the office of the vessel's registry, the vessel itself and any other location determined by the court. The announcement must include the name and domicile of the arrestor, details on the instrument based on which judicial sale has been ordered, the amount of the debt, information on the shipowners and the debtor, the basic price, terms of the sale, and the date and location of the auction.

The auction is conducted over two sessions, with the highest bid in the first session being the starting bid price for the second bid. The law provides for a reduction in the basic price if no bids are made at the auction. The successful bidder must pay one-fifth of the sale price immediately with the remainder to be paid within seven days.

Practical experience shows that the time usually required from the date of levying an executory arrest and finalisation of the sale proceedings is, on average, 18 months. Of course, this may increase or decrease depending on the circumstances of each case.

VI REGULATION

i Port state control

The MoT is generally authorised pursuant to Law No. 280 of 1960 to set, by issuing decrees, the rules and systems applicable to Egyptian ports and territorial waters, and also has the authority to determine the charges and use fees for port services subject to the limits set by law. Also, the MoT's Department of Ports and Lighthouses (DPLH) is granted authority, under Ministerial Decree No. 3285 bis of 1960, to supervise all affairs related to maritime navigation and ports and lighthouses.

Law No. 1 of 1996 regarding Specialised Ports empowers the MoT to grant licences for the management, operation and maintenance of specialised ports. It further empowers the competent minister to whom the entity operating the port is attached the right to set by decree the tariffs that will be charged to the maritime units using the port facilities and to set the collection procedures for such tariffs and cases where exemptions are granted.

Key Egyptian port authorities are organised and established pursuant to presidential decrees. For example, the powers of the Alexandria Port Authority (APA) are organised pursuant to Law No. 6 of 1967 establishing the APA and Presidential Decree No. 3293 of 1966 determining the powers of the APA. The APA manages also the Dekheila Port. Similar instruments are issued for the Port Said Port Authority (also covering El-Arish Port), Damietta Port Authority and the Red Sea Port Authority (responsible for, *inter alia*, Suez, Hurghada and Safaga ports). Accordingly, Egyptian ports fall either under the authority of a special port authority regulated by special instruments, or fall under the general authority of the MoT (DPLH).

ii Registration and classification

The Coastal Maritime Law and the Maritime Law restrict fishing, tugging and piloting activities in Egyptian territorial waters, as well as coastal navigation between Egyptian ports and Egyptian-flagged vessels. Foreign-flagged vessels may only sail between Egyptian ports to load passengers or goods to foreign ports or to discharge passengers or goods arriving from foreign ports; they cannot carry out purely domestic transport activities within Egyptian ports. Foreign-flagged vessels may exercise one or more of the foregoing activities for a limited period by a decision of the competent minister.

According to the Vessels Registration Law and the Maritime Law, a vessel is Egyptian if it is registered in one of the Egyptian ports and is owned by a natural or juridical Egyptian person. If the vessel is jointly owned by several persons, the majority of the shares must be owned by Egyptian persons. By law, a company incorporated in Egypt is deemed an Egyptian juridical person regardless of the percentage of shares actually owned by Egyptian persons.

Under the Investment Guarantees and Incentives Law No. 8 of 1997, maritime transport projects established in free zones are exempt from the requirements relating to the nationality of shipowners.

Title to an Egyptian-flagged vessel may not be transferred to a foreigner or chartered for a duration exceeding two years without obtaining the approval of the competent Minister. The government's policy is to limit the sale of Egyptian-flagged vessels to foreigners.

Vessel registration is done through the General Authority for Vessel Registration (GAVR), which maintains a registry at each port. For foreign-built vessels, an application to purchase a vessel from abroad must be made to the GAVR, including the designated port of registration in Egypt. The application must be accompanied by all vessel specifications, design and construction drawings and data, purchase contracts, the certificate confirming that the vessel is not subject to any liens or attachments, certificate of deregistration (if the vessel has been previously registered in another flag state), the proposed vessel name, and evidence of Egyptian nationality. A master must be appointed in accordance with applicable regulations. An inspection is then made by the GAVR and other inspection authorities before registration is completed.

Security interests in a vessel are not valid unless executed in an official contract and recorded in the vessel's registry. The following information, in particular, must be recorded:

- a* the name, domicile and profession of both the creditor and debtor;
- b* the date of the contract creating the security interest;
- c* the amount of debt owed to the creditor and payment terms;
- d* the name, specifications and details of the vessel; and
- e* the domicile of choice of the creditor.

Security interests are valid for 10 years and must be renewed under threat of deletion. Priority is determined based on the date of recording the security interest.

Executory arrest orders against Egyptian-flagged vessels (i.e., arrest for the purpose of effecting a judicial sale) are also recorded in the vessel's registry.

iii Environmental regulation

The Environment Law No. 4 of 1994 (the Environment Law) is the first comprehensive environmental law in Egypt. It aims principally to enhance the functions and authority of the Egyptian Environmental Affairs Agency and address the issues of land, air and sea pollution in an up-to-date manner.

The Environment Law provides, *inter alia*, incentives for the implementation of environmental protection activities, and addresses air and sea pollution. It addresses pollution from ships and from land-based sources by oil, harmful substances, or liquids and solid waste. It also requires ships to obtain international pollution prevention certificates and provides the necessary administrative and judicial framework for enforcement.

Law No. 72 of 1968 governs oil pollution in territorial waters, and incorporates the OILPOL Convention, as amended in 1962. In addition, Egypt is a signatory to the CLC Convention and the Bunker Convention.

The law prevents Egyptian vessels from discharging oil or oil mixings into the sea in contravention of the 1954 Convention. Egyptian masters are required to refrain from such actions and remain liable even when the offence was committed on instructions of the owners or charterers, who are in turn subject to doubled penalties in such a case. The prohibition

applies also to vessels of other nationalities, including countries not party to the convention, when discharging oil or oil mixings into the territorial or inland waters of Egypt; however, the foregoing does not apply to naval vessels.

The Law further requires Egyptian masters to keep an oil log on board. Masters of all nationalities are required to report oil discharged in Egyptian territorial or internal waters, naval vessels excepted.

Fixtures on land and in the sea and means of conveyance of oil are also prohibited from discharging oil and mixings; however, the percentage of oil in mixtures subject to the prohibition is determined by the Minister of Transport, who may issue partial or total exemptions from the foregoing provision.

The law requires the Minister of Transport to make available oil-disposal facilities at main harbours and to set the conditions for the equipment of Egyptian vessels with oil separators, and their inspection and testing. Oil tankers not registered at Egyptian ports are required to obtain an authorisation from the harbour authorities before loading and unloading.

Enforcement is monitored by the local harbour authorities and by the local ports and lighthouses authorities.

iv Collisions, salvage and wrecks

Egypt is a signatory to the Collision Convention 1910, the Criminal Collision Convention 1952, Collision Convention 1952, and the Colregs. The Maritime Law regulates collisions in Articles 292 to 301, which are influenced by the Collision Convention and the Collision Convention.

Collision rules apply to any collision between two seagoing vessels, or a seagoing vessel and a vessel of inland navigation. Therefore, a collision between two vessels of inland navigation does not trigger the application of the Maritime Law provisions, even if the collision occurs at sea. Further, collision rules would not apply to a collision between a towed vessel and the tug.

A physical collision is not required for the application of the collision rules, only damage to a vessel caused by the violation of traffic rules.

Collision claims may be brought by the claimant, at its discretion, at the defendant's domicile, the first port of call in Egypt after the collision, the port at which the vessel was arrested, or the place where the collision took place if in Egyptian territorial waters. The parties may agree to arbitration, but the seat of arbitration must be at one of the places of the claimant's choice.

v Seafarers' rights

The general law on employment relations is the Labour Law No. 12 of 2003 (the Labour Law) and, where silent on an issue, general rules of contract and labour contracts found in the Civil Code apply. The Maritime Law contains certain provisions that apply to maritime employment contracts. Egypt is not a party to the Maritime Labour Convention 2006.

Labour laws in Egypt are socialist-oriented and protective of employees, particularly state employees. For example, foreigners may not work on coastal maritime vessels or in tugging or piloting in Egyptian ports without the authorisation of the competent authority. In addition, the proportion of foreign seafarers may not exceed a certain percentage.

Recruitment of employees through manning agencies is heavily regulated by the Labour Law and can be done only through the competent governmental authorities or

licensed companies, which must be of Egyptian nationality. Licensed companies may not collect any fees from the employee in return for his or her recruitment, but may collect fees from the employer. As an exception, licensed recruiters may collect an amount not exceeding 2 per cent of the salary of the recruited employee, for the first year of employment only, as an administrative expense.

Employers are required to pay all seafarers' medical and health-care fees if they sustain an injury or become ill during sailing, while also continuing to pay the seafarer's full salary. Seafarers' salaries, bonuses, overtime, annual and other leaves are heavily regulated by ministerial decrees.

Egyptian seafarers can claim unpaid salaries before the Egyptian courts if the vessel in question is an Egyptian vessel, a foreign vessel located in Egypt, or has a local agent in Egypt. The unpaid salaries of masters, seafarers and other employees working on a vessel under a marine employment contract are entitled to levy a maritime lien for their unpaid salaries. The lien takes precedence over all other rights except judicial expenses for the sale of the vessel and distributing its proceeds, and tax and charges owed to the government as well as port, tugging, piloting and maintenance fees. Unpaid salaries take precedence over salvage fees, the vessel's share in general average, damages for collision, pollution and other marine accidents, damages to passengers and cargo, and any other lien on the vessel. It is worth noting that liens from the latest voyage take precedence over liens for previous voyages, except that where the marine employment contract covers several voyages, the unpaid salaries for the entire contract take precedence and are considered part of the latest voyage.

Labour claims are subject to a one-year limitation period. Labour courts usually extend their jurisdiction over claims concerning Egyptian seafarers regardless of the provisions of the contract or nationality of the employer, and apply Egyptian labour laws despite any contradictory language in the employment contract (reasoning that labour regulations are considered a matter of Egyptian public policy). In a recent case, a court refused to uphold the parties' agreement to apply the laws of Saudi Arabia and instead applied Egyptian law.

Chapter 17

ENGLAND & WALES

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I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The shipping industry has for centuries played an important role in the United Kingdom's island-nation economy. As of February 2016, there were 1,330 ships registered on the UK Ship Register, with a gross tonnage of 14.79 million.² In economic terms, shipping accounts for 95 per cent of visible trade by weight and is reported to make a total economic contribution of £12.5 billion (direct, indirect and induced impact) each year. The maritime sector also contributes approximately £13.8 billion and 260,000 jobs to the UK economy every year.³ According to the most recent annual statistics for 2014, total port freight traffic remained static in United Kingdom ports compared with 2013 at 503.2 million tonnes.⁴

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

England and Wales is a common law jurisdiction where the legal framework is founded upon a mixture of case law and legislation. Shipping law in particular has historically been

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 - 2 UK Ship Register's 30th edition of quarterly newsletter 'Flagging-Up', https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/496728/UKSR_Flagging_Up_Issue_30.pdf.
 - 3 Maritime and Coastguard Agency Business Plan 2016–2017, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/510043/MCA_Business_Plan_2016-17_Final_Version.pdf.
 - 4 UK Port Freight Statistics: 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/465439/port-freight-statistics-2014.pdf.

developed primarily by decided cases, although there are statutes in key areas. The Merchant Shipping Act 1995, consolidating previous statutes dating back as far as 1894, is a particularly important piece of overarching legislation in this field and various statutory instruments have been made under it.

International conventions that are ratified by the United Kingdom are usually implemented through domestic legislation. The United Kingdom has ratified all of the major international maritime conventions.

At the time of writing, as the United Kingdom is a member of the European Union. Regulations and directives made by institutions of the European Union currently have either direct or indirect effect in the jurisdiction of England and Wales. A referendum on the UK's membership of the European Union is planned for 23 June 2016. There is some uncertainty as to how a 'Brexit' would affect existing regulations and directives.

III FORUM AND JURISDICTION

i Courts

Forum and jurisdiction

Shipping disputes in England and Wales are heard in the Commercial Court or the Admiralty Court, depending on the precise nature of the claim. These are specialist courts experienced in dealing with shipping disputes and in which a number of highly experienced commercial and maritime judges sit. There are currently 16 judges attached to the Admiralty and Commercial Courts.⁵

Proceedings commenced in the Admiralty and Commercial Courts are governed by the general procedural rules contained in the English Civil Procedure Rules (CPR). There is also, however, a specialist Admiralty and Commercial Court Guide,⁶ which sets out detailed information regarding the conduct of litigation in these courts. The CPR also contains a specific rule and practice direction relating to Admiralty claims (CPR 61 and Practice Direction 61) and claims commenced in the Commercial Court (CPR 58 and Practice Direction 58).

Under English law, the following claims must be commenced in the Admiralty Court: salvage, collision, limitation and *in rem* proceedings for the arrest of a vessel. Claims that fall within the jurisdiction of the Commercial Court include carriage of goods, import or export of goods, insurance and reinsurance disputes and shipbuilding.

Several particularly significant shipping disputes have recently come before the English courts, including *MSC Mediterranean Shipping Co SA v. Cottonex Anstalt* (when demurrage claims may be classed as penal),⁷ *The 'New Flamenco'* (when financial benefits accruing to a claimant following a breach of a charterparty should be counted against damages),⁸ *The 'Atlantik Confidence'* (owners' right to constitute a limitation fund through a guarantee)⁹

5 Ministry of Justice website, www.justice.gov.uk/courts/rcj-rolls-building/admiralty-commercial-mercantile-courts/list-of-judges.

6 The current edition is the 9th edition, updated in April 2014.

7 *MSC Mediterranean Shipping Co SA v. Cottonex Anstalt* [2015] EWHC 283 (Comm).

8 *Fulton Shipping Inc of Panama v. Globalia Business Travel SAU (formerly Travelplan SAU) of Spain (The 'New Flamenco')* [2014] 2 Lloyd's Rep 230.

9 *Cosmotrade SA v. Kairos Shipping Ltd (The 'Atlantik Confidence')* [2014] 1 Lloyd's Rep 586.

and *The 'Ocean Victory'* (safe port warranties, reversing the earlier controversial decision).¹⁰ One of the most notable disputes to pass through the English courts all the way up to the Supreme Court is the primary test arising out of the insolvency of Danish bunker supplier OW Bunkers. In March this year, the Supreme Court finally confirmed that a bunker supply contract that contains a retention of title clause in favour of the bunker supplier, and that permits the buyer to use or consume the bunkers before title passes, does not fall within the scope of the English Sale of Goods Act 1979.¹¹

The Recast Brussels I Regulation¹² 1215/2012 (the Recast Regulation) covers jurisdiction as between courts of different EU Member States and replaces the 2001 Brussels I Regulation (the Brussels I Regulation).¹³ The Recast Regulation took effect on 10 January 2015 and applies to all proceedings instituted on or after that date. The Recast Regulation contains provisions aimed at preventing parallel proceedings in the courts of different EU Member States. Under the previous Brussels I Regulation it had been the case where proceedings involving the same dispute and the same parties were commenced in the courts of different Member States, the court 'first seised' of a dispute had the ability to determine whether or not it had jurisdiction over it (the 'first-in-time' rule). In principle this first-in time rule still applies, unless parties have agreed that the court of a Member State should have jurisdiction over the dispute (usually through a contractual jurisdiction clause). If such an agreement has been made the court nominated by it will have jurisdiction over the claim regardless of whether it was first seised of the dispute. This provision will apply even if no party to the dispute is domiciled within the EU. This new provision will help to give more certainty to commercial contracts, but significant concerns remain. Firstly, the Recast Regulation does not clarify what should happen if the jurisdiction clause states that one party must bring its claim in one jurisdiction, but that the other party may bring its claim in a number of jurisdictions. Secondly, the Recast Regulation is unclear on whether a Member State court is bound to uphold an exclusive jurisdiction agreement that nominates a court outside of the EU. Given these issues, the question of where to commence proceedings will continue to require careful thought.

Limitation periods

The following limitation periods may apply to maritime claims in England and Wales:

- a* one year for cargo actions under the Hague Rules or Hague-Visby Rules;
- b* two years for passenger claims under the Athens Convention;
- c* two years for salvage claims under the London Salvage Convention 1989;
- d* two years for collision claims under Section 190 of the Merchant Shipping Act 1995;

10 *Gard Marine & Energy Ltd v. China National Chartering Co Ltd* [2015] EWCA Civ 16, reversing the earlier decision *Gard Marine & Energy Ltd v. China National Chartering Co Ltd* [2013] EWHC 2199 (Comm).

11 *PST Energy 7 Shipping LLC and another (Appellants) v. OW Bunkers Malta Limited and another (Respondents)* [2016] UKSC 23.

12 Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

13 Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

- e* three years from the date of the act or omission that caused the death or injury for death or personal injury claims (or, in certain circumstances, from the date of knowledge of a latent injury);¹⁴
- f* three years from the date the loss or damage was discovered or could have been discovered for latent damage (except personal injury);
- g* six years from the date on which the cause of action occurred for ordinary contractual or tortious actions (except personal injury);¹⁵ and
- h* 12 years for ‘upon speciality’ claims, for instance, for claims based upon deeds.¹⁶

It is possible to extend time limits by agreement. However, in most cases, agreement to extend must be reached before the relevant time limit expires. The limitation period for personal injury claims under Section 11 of the LA 1980 may be extended at the court’s discretion under Section 33 of the LA 1980. Other specific tribunals may have further applicable limitation periods, and contractual limitation periods should always be checked.

ii Arbitration and ADR

Maritime disputes are often resolved via London arbitration. For a dispute to be subject to arbitration there must be an arbitration agreement, which may either be written in the contract under which the dispute arises or agreed between the parties after the dispute has arisen.

The LMAA is an association of specialist maritime arbitrators operating in London. In 2015 the LMAA received approximately 3,160 new arbitration appointments and published 553 arbitration awards.¹⁷

LMAA arbitration is frequently used to determine commercial shipping disputes, such as charterparty and bill of lading disputes, ship sale and purchase disputes, shipbuilding and repair disputes, marine insurance disputes, and offshore and oil and gas disputes. LMAA arbitration is not usually used for collision and salvage matters, salvage being more commonly resolved by Lloyd’s Salvage Arbitration (see Section VI, *infra*).

The LMAA operates within the framework laid out in the Arbitration Act 1996 and publishes its own set of rules, which are structured to deal with small, intermediate and larger cases. The most recent rules were published in 2012, and apply to all LMAA arbitrations commenced on or after 1 January 2012.

Several forms of ADR are used within England and Wales including expert determination, early neutral evaluation and mediation. Mediation in particular is an increasingly popular option for settling maritime disputes. Both the Admiralty and Commercial Courts and the LMAA encourage parties to a dispute to engage in mediation before proceeding to trial or arbitration. If a party refuses to mediate without reasonable grounds for doing so, the court may make an adverse costs order against the refusing party. Additionally, if an English law contract contains a mediation clause, this clause will be enforceable by the parties to the contract provided the clause is sufficiently certain.

14 Sections 11 and 12 of the Limitation Act 1980 (LA 1980).

15 Sections 2 and 5 of the LA 1980.

16 Section 8 of the LA 1980.

17 LMAA, www.lmaa.london/news-article.aspx?pkNewsEventID=208da443-7800-4720-84b3-7f4f3f5fc9ce.

iii Enforcement of foreign judgments and arbitral awards

Foreign judgments

There are various reciprocal regimes allowing for the recognition and enforcement of foreign judgments in England. The most significant of these relate to European and Commonwealth judgments.

The Recast Regulation (or the Brussels I Regulation for claims initiated before 10 January 2015) and the Lugano Convention (as implemented into English law) govern the enforcement of judgments delivered by Member States of the European Union, and Iceland, Norway and Switzerland. Enforcement of judgments from these countries is relatively straightforward and does not require the English courts to evaluate the merits of the underlying claim. The main circumstances in which the English courts will not enforce judgments from these countries are where the judgment is contrary to public policy, or where it is irreconcilable with a judgment issued in England involving the same dispute and the same parties. The principal change between the Brussels I Regulation and the Recast Regulation has been to simplify the procedure of enforcement, as no declaration of enforceability (*exequatur*) will have to be sought.

The Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933 govern the recognition and enforcement of judgments made in the Commonwealth and other reciprocating countries. These Acts require judgments to be registered before they can be enforced in England. The requirements for registration are that the court that issued the judgment must have had jurisdiction and the judgment must not have been obtained by fraud or be contrary to public policy. Once registration has occurred the judgment will take effect as if it were an English judgment.

Enforcement of judgments from countries that are not party to the above statutory regimes is governed by English common law and requires the commencement of a new action based on the judgment itself. The English courts will not examine the merits of the judgment. However, it will be necessary to show that the court that made the judgment had jurisdiction to do so under the English conflict-of-laws rules, that the judgment is for a debt or a limited sum and that it is final, conclusive and not contrary to public policy.

Foreign arbitral awards

Many foreign arbitration awards are enforceable within England and Wales. The United Kingdom is a party to the New York Convention. Accordingly, most awards from other contracting states are enforceable. Enforcement is governed by Section 66 of the Arbitration Act 1996.

It is also possible to enforce an award issued by a non-contracting state. Again, enforcement is covered by Section 66 of the Arbitration Act 1996 and by common law. The key criteria for enforcement are that the award is valid under its own governing law and that it is final.

IV SHIPPING CONTRACTS

i Shipbuilding

English law continues to be the governing law of choice for parties entering into shipbuilding contracts and so England and Wales remains a key jurisdiction in this respect. See the chapter on 'Shipbuilding' for further discussion of the law in this area.

The United Kingdom itself has a proud history of shipbuilding spanning many centuries; however, since the closure of many yards in the 1970s and 1980s, commercial shipbuilding in the United Kingdom has been in significant decline.

ii Contracts of carriage

The Hague-Visby Rules, incorporated into English law by the Carriage of Goods by Sea Act 1971, are the salient convention rules applicable in this jurisdiction. The Rules will apply compulsorily to bills of lading where the port of shipment is in England and Wales or where the bills are issued there. Further legislation on the function of bills of lading and contracts of carriage has been enacted by the Carriage of Goods by Sea Act 1992. There is no specific legislation governing multimodal contracts of carriage, although it is generally accepted that the Hague-Visby Rules will apply to the seagoing leg of such contracts for carriage. At the time of writing, the United Kingdom is not a signatory to the Hamburg Rules or the Rotterdam Rules.

The Carriage of Goods by Sea Act 1971 qualifies that for contracts falling under that Act (including bills of lading governed by English law) there is no absolute implied term as to seaworthiness. The effect of this is to make the carrier's general duty as to seaworthiness one of exercising 'due diligence'. Following Article III.1 of the Hague-Visby Rules, a carrier must exercise due diligence to: (1) make the ship seaworthy; (2) properly man, equip and supply the ship; and (3) make holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe. The duty is upon the carrier personally, and is not delegable to servants, agents or contractors. Deck and live animal cargoes are excluded from the provisions of the Hague-Visby Rules.

Pursuant to Article III.2 of the Hague-Visby Rules, the carrier must properly and carefully load, handle, stow, carry, keep, care for and discharge the goods under the contract for carriage. Owners may rely on the defences at Article IV.2 where goods in their care are lost or damaged. These defences include the act or neglect of the master in the navigation or management of the vessel, act of war and arrest or restraint of princes, as well as latent defects not discoverable by due diligence (otherwise known as 'inherent vice').

Article IV.6 states that inflammable, explosive or dangerous goods may be discharged or destroyed at any time before discharge without compensation if the carrier has not consented (with full knowledge of their characteristics) to carry them.

Unless notice of loss or damage is given in writing to the carrier or his agent before or at the time of the receiver removing the goods into his custody (or within three days of doing so, if the loss or damage is not immediately apparent), the carrier will be deemed to have complied with their obligations, as per Article III.6. In any event, the time limit under which a claim can be brought under the Hague-Visby Rules is one year from the cargo's date of delivery or the date when it should have been delivered.

Liens

The right to exercise a lien under English law may arise out of a variety of contexts, either pursuant to a contract or another legal relationship. Liens may be classed as 'maritime', 'statutory', 'equitable' or 'possessory' and each class of lien has a defined means of enforcement. A common characteristic among all liens is their function of conferring a proprietary interest in an asset as security for a claim and in enforcement against third parties. Liens generally do not have to be registered under English law.

Strictly speaking, maritime liens under English law are confined to five specific categories:

- a* bottomry and respondentia;
- b* damage done by a ship;
- c* salvage;
- d* seamen's wages; and
- e* masters' wages and disbursements.

These categories also overlap with the definitions under Section 20(2) of the Senior Courts Act 1981, and so maritime liens may be pleaded as statutory liens in the alternative. Purely statutory liens are defined under Section 20(2)(e)–(r) of the Senior Courts Act 1981, and include claims for loss or damage to goods carried in a ship, personal injury sustained in consequence of a defect in or wrongful act done by a ship, claims relating to any agreement in relation to the carriage of goods in a ship, and claims arising out of general average acts. Maritime and statutory liens fall under the umbrella term 'admiralty liens', coming under the exclusive jurisdiction of the Admiralty Court, and may be brought as *in rem* claims (see Section V, *infra*).

English common law recognises possessory liens, which confer the right to enforce a claim by means of retaining property already held by the claimant. Typical possessory liens include a shipowner's lien on cargo for outstanding freight or general average contributions.

If an owner or disponent owner under a time charterparty has not been paid hire by the charterer, the owner may be entitled to exercise a lien requiring the charterers down the charter chain to pay direct to the owner the sub-hire or sub-freight that would ordinarily have been payable to their owners. The Court of Appeal confirmed in *The 'Bulk Chile'*¹⁸ that owners are able to exercise a lien over freight from the shipper under the bill of lading as well as a lien over the sub-freights due under a charterparty in a charterparty chain. Salvors may exercise possessory liens over salvaged property. Possessory liens can also be created by contract or statute.

An equitable lien is a right to proceed against an asset pursuant to a claim arising from a contract (the classic example being a floating charge) or pursuant to a course of conduct. Equitable liens will only bind third parties where they have acquired a legal interest in the liened asset with notice of the lien.

iii Cargo claims

The bill of lading evidences a contract for carriage, obliging the carrier to deliver cargo against that document. Aside from charterparties, bills of lading are therefore a fundamental element to cargo claims under English law. A common basis for English law cargo claims is the breach by the carrier of their duty under Articles III.1 or III.3 of the Hague-Visby Rules, namely a failure to exercise due diligence to make the vessel seaworthy or a failure properly to care for the cargo.

Pursuant to the Carriage of Goods by Sea Act 1924, which is applicable to bills of lading, sea waybills and ships' delivery orders, title to sue is vested in the 'lawful holder' of the bill of lading. The lawful holder is the person who becomes the holder of the bill

18 *Dry Bulk Handy Holding Inc and another v. Fayetter International Holdings and another* [2013] EWCA Civ 184.

in good faith, that is, a consignee or endorsee (following a valid endorsement, or chain of endorsements) in possession of the bill. The Court of Appeal recently confirmed that a bank that is the pledgee of goods under a letter of credit can also be classed as a lawful holder of the bill of lading, because it is entirely entitled to those goods.¹⁹

The party that is potentially liable for the cargo claim under the bill of lading is the carrier stated under the bill. Typically, this is the shipowner or head time charterer. English law will generally give effect to 'identity of carrier' and demise clauses in bills of lading, which seek to make clear that it is the shipowner that is to be regarded as the carrier under the bill, although the issue of on whose behalf the bill has been signed will also be an important factor in deciding who is actually the carrier.

Liability in tort – that is, a breach of the duty to take reasonable care not to cause damage or loss (i.e., negligence) – will usually be asserted by any cargo claimant against the shipowner, and may also arise between parties where no contractual relationship exists, for example, between stevedores and cargo owners. The claimant must be able to prove physical loss or damage, and so cannot claim for pure financial losses absent any cargo loss or damage (for example, in the event of cargo delay). Furthermore, only the person who owned the cargo, or was entitled to possession, at the time of the negligent act may claim. Apart from tortious liability, English law also recognises the effectiveness of 'Himalaya' clauses in bills of lading in the context of losses caused by the acts of stevedores (for a deeper analysis of 'Himalaya' clauses, see the Ports & Terminals chapter).

Where bills of lading are issued in respect of carriage on a chartered vessel, carriers may attempt to limit liability to cargo owners with reference to a charterparty, by expressly incorporating terms of the charterparty into the issued bills of lading. Provisions incorporating charterparty terms into bills of lading will only be recognised if they are relevant to the bill of lading contract, and terms as to choice of law or jurisdiction (including arbitration) must be expressly referred to if they are to apply. There is a general presumption that terms in a charterparty will not be upheld if they are inconsistent with the terms of the bill of lading.

Parties will often attempt to incorporate the terms of the charterparty into the bill of lading. This will, however, only be successful if: (1) the wording purporting to incorporate the charterparty terms is wide enough; (2) the term of the charterparty being incorporated makes sense in the context of the bill of lading; and (3) the incorporated term is consistent with the terms of the bill of lading itself.²⁰ It is important when trying to incorporate charterparty terms into a bill of lading to refer to the exact charterparty in question, as the charter may not otherwise be effectively incorporated. There is a presumption that in circumstances in which the parties failed to specify which charterparty in a chain is being incorporated in the bill of lading, the head charterparty is incorporated, but that presumption is subject to several exceptions.

Cargo claims can also be brought under charterparties. Such claims will usually be made within the framework of the Hague or Hague-Visby Rules, which have usually been incorporated into the charter by contract. The apportionment of liability for cargo claims as

19 *Standard Chartered Bank v. Dorchester LNG (2) Ltd (The 'Erin Schulte')* [2015] 1 Lloyd's Rep 97.

20 Eder, Bennett, Berry, Foxton and Smith, *Scrutton on Charterparties and Bills of Lading* (22nd Edition, 2011), pp. 96–97.

between owners and charterers who are party to a dry bulk time charter is often governed by the International Group of P&I Clubs' Inter-Club New York Produce Exchange Agreement (revised in 2011) (ICA).

iv Limitation of liability

The earliest legislation entitling shipowners to limit their liability was the Shipowners Act 1733. This permitted shipowners to limit their liability to the value of the ship and freight in respect of theft by a master or crew. The subsequent legislation seeks to strike a balance between the claimants' right to be adequately compensated in allowed situations and the shipowners' requirement for the insurance costs of an adequately high limitation fund to be affordable.

The LLMC Convention 1976 was given effect in the United Kingdom by virtue of the Merchant Shipping Act 1995 (MSA 1995) and is enclosed in Schedule 7 of the MSA 1995. The 1996 LLMC Protocol was given effect in the United Kingdom by Statutory Instrument 1998 No. 1258, which varied the LLMC Convention (and Schedule 7 of the MSA 1995) to the extent set out in the LLMC Protocol. The main effect of the LLMC Protocol is to raise the limits.

As from 8 June 2015, the limits under the LLMC Protocol have automatically been increased by 51 per cent through the tacit acceptance procedure.²¹

Who can limit liability and what claims are subject to limitation?

Under the LLMC Protocol, shipowners and salvors may limit their liability in accordance with the rules of the Protocol. The definition of 'shipowner' under Article 1(2) includes 'the owner, charterer, manager or operator of a seagoing ship'. Each of these terms requires clarification and, while the 'owner' of a vessel may be reasonably clear, the English courts have not had an opportunity to define what is meant by 'manager or operator'.²² Charterers are entitled to limit their liability,²³ as are slot charterers,²⁴ but only in respect of certain claims. For example, they cannot limit in respect of damage to the vessel by reference to which the limitation fund is calculated.

Salvors are also entitled to benefit from limitation under the LLMC Convention provided the salvors are directly connected with the salvage. The LLMC Protocol does not change this.

An insurer may limit its liability to the same extent as its assured (under Article 1(6) of the LLMC Convention).

Before the LLMC Convention shipowners were only able to limit liability in respect of claims for which they were liable in damages, as opposed to debts. Consequently, towage costs and wreck removal expenses claims brought by harbour authorities, for example, could not be limited. The LLMC Convention removed this requirement and now, per Article 2 of

21 www.imo.org/MediaCentre/PressBriefings/Pages/12-LLMC-Prot-limits.aspx.

22 *McDermid v. Nash Dredging and Reclamation Co Ltd* [1987] AC 906 and *CF Turner v. Manx Line Ltd* [1990] 1 Lloyd's Rep. 137.

23 *CMA CGM SA v. Classica Shipping Co Ltd (The 'CMA Djakarta')* [2004] 1 Lloyd's Rep. 460, at p. 465.

24 *Metvale Ltd v. Monsanto International Sarl (The 'MSC Napoli')* [2008] EWHC 3002 (Admiralty).

the LLMC Convention (which is unchanged by the LLMC Protocol), 'claims whatever the basis of liability may be' may be limited. There are, however, exceptions so that, for example, claims for salvage, contributions in general average, certain oil pollution claims and others (Article 3) may not be subject to limitation, nor can a party limit in respect of claims to the extent they relate to remuneration under a contract with the person liable (Article 2(2)). It is also not possible to limit claims for wreck removal. Indemnity claims in respect of salvage contributions as between owners and cargo interests are however limitable.²⁵

Generally, limitation may be invoked against all qualifying claims 'arising on any distinct occasion' (Article 6). Claims in respect of loss of life or damage to property which occur 'on board or in direct connection with the operation of the ship [...] and consequential loss resulting therefrom' may be subject to limitation (Article 2). Thus, the action leading to limitation does not have to occur on board a vessel.

Breaking limits

The LLMC Convention (unchanged by the Protocol) makes it very difficult to break the limitation limit. To do so it must be proved that the act or omission of the person seeking to limit was 'committed with the intent to cause such loss or recklessly and with the knowledge that such loss would probably result' (Article 4).²⁶ The LLMC Convention (unchanged by the Protocol) is a compromise whereby claimants accept that they are unlikely to break the right to limit liability, in return for a higher compensation fund.²⁷

Overview of English procedure

As a matter of English law, it is not necessary to admit liability to take advantage of a limitation defence. Nor does invoking limitation constitute an admission of liability. The procedure for pleading limitation and constituting a fund is set out in Civil Procedure Rule 61.11 and the accompanying practice direction.

Two particularly important points are, first, that, as a matter of English law, it is not necessary for a liability action to already be pending before an owner is permitted to initiate limitation proceedings;²⁸ and second, bringing England in line with many other jurisdictions, a limitation fund can now be constituted by way of a letter of undertaking,²⁹ which offers owners and insurers a significant cost saving.

Summary

States across the world have enacted the provisions of the LLMC Convention 1976 and 1996 Protocol in different ways, in particular in relation to wreck removal expenses and whether an owner is entitled to limit for these (many states have excluded Article 2(1)(d)

25 *The 'Breydon Merchant'* [1992] 1 Lloyd's Rep 373.

26 Lord Hoffmann in the *Meridian Global Funds Management Asia Ltd v. Securities Commission* [1995] 3 All ER 918 sets out a comprehensive discussion of the new test and its application.

27 Griggs, Williams and Farr, *Limitation of Liability for Maritime Claims* (4th Edition, 2004), pp. 3–6.

28 *Seismic Shipping Inc v. Total E&P UK Plc (The 'Western Regent')* [2005] EWCA Civ 985.

29 *The 'Atlantik Confidence'* (footnote 9, *supra*).

from domestic law). Given that one state party should automatically recognise a fund constituted in another (Article 13), careful consideration is needed as to where to limit, as this may significantly mitigate against an owner's exposure following a casualty.

V REMEDIES

i Ship arrest

Vessel arrests may only be brought pursuant to an admiralty claim *in rem* (that is, in this case, against a vessel itself). As mentioned previously, the Admiralty Court has jurisdiction over such claims.

Grounds for admiralty claims are prescribed in an exhaustive list at Sections 20(2) (a)–(s) of the Senior Courts Act 1981. These include damage received or done by a ship, loss or damage to goods carried in a ship, claims in respect of a mortgage on a ship, towage and pilotage. It is not possible to base an arrest on a claim for bunkers.

The procedure for applying for an arrest pursuant to a claim *in rem* is set out in Part 61.5 of the Civil Procedure Rules (CPR) and the Practice Direction to that part (PD61). Additional procedural rules are contained within the Admiralty and Commercial Courts Guide and elsewhere in the CPR.

Procedure

As per CPR 61.5, a claimant may make an application for a vessel arrest in respect of a claim *in rem* issued by the Admiralty Court. In practice, an admiralty claim form and application for arrest may be issued and served on the target vessel at the same time, or separately.

An application must be made on the prescribed court form (ADM4) and must include an undertaking by the claimant to cover the Admiralty Marshal's expenses of arrest. The claimant must also request a search of the admiralty register for any cautions against arrest in respect of the vessel.

Subject to the claimant's compliance with the prescribed procedure, and the target vessel being within the territorial jurisdiction of the court, the Admiralty Marshal will proceed with issuing a warrant for the vessel's arrest.

The arrest itself is effected by service of the warrant by the Admiralty Marshal or his substitute (for example, a bailiff) on the target vessel. At the request of the claimant, the Admiralty Marshal may also serve the admiralty claim form at this time, otherwise it is the responsibility of the claimant to serve the admiralty claim form in accordance with the CPR.

Sister and associated ship arrests

It is possible to arrest a sister ship of a vessel subject to an admiralty claim, although to do so a claimant must satisfy certain strict criteria. The owner of the target sister vessel must have been the owner or demise or bareboat charterer, or in possession or control of that vessel when the cause of action arose in relation to the defendant vessel. That person or entity must also be the beneficial owner of all the shares in the target sister vessel when the admiralty claim is commenced.

Security and counter-security

A claimant is not required to provide security for an arrest, although they must provide an undertaking as to the arrest expenses of the Admiralty Marshal.

Security may be provided by the defendant in order to procure release of the vessel in the form of a payment into court or by issuing a guarantee acceptable to the claimant. On the application of any party, the Admiralty Court may order that any security provided in order to procure the release of an arrested vessel, or to prevent an arrest, be reduced, or that a claimant may arrest or re-arrest the property to obtain further security (unless such security would exceed the value of the vessel itself).

Wrongful arrest claims

It is open for a defendant owner to claim damages for wrongful arrest. The defendant must prove that the basis for the application for arrest was made in bad faith or gross negligence. In practice, satisfying these criteria is very difficult.

Requirement to pursue claim on its merits or possibility of arrest in order to obtain security only

Pursuant to Section 26 of the Civil Jurisdiction and Judgments Act 1982, a claimant may apply for the arrest of the vessel by reason of security for purposes of arbitration or other proceedings in the United Kingdom or in another country.

Arrest by helicopter of a vessel at anchor in territorial waters but not yet in berth

In theory, this can be done as long as the target vessel is within the territorial jurisdiction of England and Wales. Ultimately, however, arrest is effected by the Admiralty Marshal and so the means by which the service of the arrest warrant is effected is at his discretion.

ii Court orders for sale of a vessel

The Admiralty Court has the jurisdiction to order the sale of a vessel which is under arrest. The judicial sale of a vessel is made free from encumbrances, liens and with good title.

An applicant must follow the procedure as prescribed in CPR 61.10. The application may be made by any party, and must be served on all parties, including those who have obtained judgment against the vessel and those who have been granted cautions against arrest.

As recently illustrated in *The 'Union Gold'*,³⁰ any order for sale must be preceded by an appraisal of the vessel's value by the Admiralty Marshal with assistance from an appointed ship broker. The vessel is advertised and offers for purchase are invited, with the sale going to the highest bidder. In any event, a vessel cannot be sold at a price less than its appraised value unless permitted by the Admiralty Court. The Admiralty Court receives commission on the sale, and the Admiralty Marshal's expenses of arrest, appraisal and sale rank as first priority from sale proceeds.

The Admiralty Marshal acts as an impartial officer of the court, rather than the arresting party, and so this procedure is likely to be followed even if a claimant is able to procure buyers at ostensibly best possible price unless there is an exceptional reason to deviate. In the case of *The 'Union Gold'*, such reason was that 21 jobs were contingent on the urgent sale of a vessel that was unlikely to attract many buyers on the open market.

30 *Bank of Scotland Plc v. Owners of the Union Gold* [2013] EWHC 1696 (Admlty).

VI REGULATION

i Safety

The Maritime and Coastguard Agency (MCA) is the key executive agency of the UK Department of Transport responsible for maritime safety in the UK. The MCA fulfils a number of different maritime safety functions, including coordinating the UK's 24-hour maritime emergency response service, monitoring the quality of vessels operating in British waters, promoting and managing the UK Ship Register and working to minimise the environmental impact of shipping.

The MCA is also responsible for ensuring the United Kingdom implements and adheres to the key international conventions regarding maritime safety to which it is a party, which include:

- a* SOLAS;
- b* Colregs, as amended;
- c* the STCW Convention; and
- d* the Search and Rescue Convention.

ii Port state control

England is a party to the Paris MoU. The provisions of the Paris MoU were incorporated into EU law through the EU Council Directive on Port State Control.³¹ This was implemented into English law through the Merchant Shipping (Port State Control) Regulations 1995, Statutory Instrument 1995 No. 3128, as amended. This EU Directive was subsequently replaced by Directive No. 2009/16 on Port State Control, which was implemented into English law by the Merchant Shipping (Port State Control) Regulations 2011, which have been in force in England and Wales since 24 November 2011.

The port state control authority in England is the MCA. In this capacity, the MCA is responsible for checking that all vessels visiting UK ports and anchorages meet UK and international safety regulations and standards. Accordingly, the MCA has wide-ranging powers to carry out periodic checks on any vessels calling at UK ports and in-depth 'expanded inspections' on:

- a* vessels with a high-risk ship profile, as recorded on the Paris MoU database;
- b* oil, gas, or chemical tankers over 12 years old;
- c* bulk carriers over 12 years old; and
- d* passenger ships over 12 years old.

An expanded inspection involves a detailed check of the construction elements and safety systems in place on vessels by inspectors from the MCA. Inspectors are required to ensure that their visits and inspections do not disrupt the safety of any on-board operations, such as cargo handling.

In the event that a vessel is found not to comply with any applicable safety or environmental convention, a deficiency may be raised against the vessel. If the deficiency is regarded as serious enough to require rectification before the vessel's departure, then the vessel may be detained. A detained vessel must then satisfy MCA surveyors that remedial work has been carried out on the vessel before it is permitted to leave the United Kingdom.

31 95/21/EC.

In 2014 the MCA's ship surveyors carried out a total of 4,638 inspections, including 1,279 port state control inspections, with a total of 70 subsequent detentions.³²

iii Registration and classification

Registration

The UK Ship Register consists of four parts: Part I relates to merchant vessels and pleasure vessels; Part II relates to fishing vessels only; Part III is known as the UK Small Ships Registry; and Part IV relates to the registration of bareboat charters of foreign registered ships. The Register does not allow registration of vessels under construction under the UK flag.

The following may be registered as shipowners on the UK Ship Register:

- a* British citizens and companies;
- b* British dependent territory citizens;
- c* British overseas citizens;
- d* companies incorporated in one of the EEA countries;
- e* citizens of an EU Member State exercising their rights under Articles 48 or 52 of the EU Treaty in the UK;
- f* companies incorporated in any British overseas possession that have their principal place of business in the UK or in that British overseas possession; or
- g* European economic interest groupings.³³

Where none of the qualified owners is resident in the UK, a representative person must be appointed who may be either an individual resident in the UK or a company incorporated in an EEA country with a place of business in the UK.³⁴

The UK flag is currently ranked among the top performing flags on the Paris MoU and Tokyo MoU 'white lists'.³⁵ The UK Registry also offers a potentially advantageous tonnage tax regime under the UK Tonnage Tax Incentive. The Incentive offers an alternative method of calculating corporation tax profits in accordance with the net tonnage of the ship operated. The tonnage tax profit replaces both the tax-adjusted commercial profit or loss on a shipping trade and the chargeable gains or losses made on tonnage tax assets. The incentive is available to companies within corporation tax operating qualifying ships that are 'strategically and commercially managed in the UK'.³⁶

Classification

The following classification societies are recognised and approved by the UK government for the purpose of performing surveys and inspections on UK-registered vessels:³⁷

32 Maritime and Coastguard Agency Business Plan 2016–2017, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/510043/MCA_Business_Plan_2016-17_Final_Version.pdf.

33 UK Ship Register, Guide to Registration, <https://www.gov.uk/government/publications/uk-ship-register-guide-to-registration>.

34 *Ibid.*

35 *Ibid.*

36 HMRC website, www.hmrc.gov.uk/manuals/ttmmanual/index.htm.

37 Maritime and Coastguard Agency website, <https://www.gov.uk/uk-authorised-recognised-organisations-ros>.

- a* ABS Europe Ltd;
- b* Bureau Veritas;
- c* Class NK;
- d* DNV GL AS;
- e* Lloyd's Register Marine; and
- f* RINA UK Ltd.

Generally, classification societies exclude their liability in contract. Further, according to the leading House of Lords decision in *Marc Rich & Co v. Bishop Rock Marine (The 'Nicholas H')*, classification societies do not owe a duty of care to third parties in respect of their classification and certification duties.³⁸

iv Environmental regulation

The United Kingdom is a party to the major international conventions regulating air and sea pollution.

MARPOL 1973, as amended by the 1978 and 1997 Protocols is in force in England and Wales. Annex I of MARPOL (as amended) details regulations on tanker design and technology to reduce the risk of oil spillage. Annexes IV and V of MARPOL are enforced in England and Wales pursuant to the Merchant Shipping (Prevention of Pollution by Sewage and Garbage from Ships) Regulations 2008 (as amended), regulating the seaborne discharge and disposal of sewage and garbage. Annex VI of MARPOL, incorporated into English law through the Merchant Shipping (Prevention of Air Pollution from Ships) Amendment Regulations 2008 (as amended), contains specific provisions relating to the prevention of air pollution from ships. Annex VI was recently amended to introduce mandatory greenhouse gas emissions reduction measures. Since 1 January 2013 all ships are required to have a ship energy efficiency management plan and new ships must have an energy efficiency design index.

Annex VI imposes limits on the emissions of sulphur oxides (SOx) and nitrogen oxides (NOx) on a global scale as well as within specially designated Emission Control Areas (ECAs). In relation to the reduction of SOx, compliance with Annex VI is normally attained via the use of low-sulphur fuel. As for NOx reduction, the allowable emissions limits are split into three tiers. Tier I limits, being the least stringent, are applicable to ships built on or after 1 January, 2000. Tier II limits apply to ships built on or after 1 January, 2011. Ships built on or after 1 January, 2016 will now have to comply with more stringent Tier III standards if operating within the North American and Caribbean ECA-NOx.³⁹

In parallel with MARPOL, EU legislation regulates emissions via the Sulphur Content of Marine Fuels (SCMF) Directive (2012/33/EU), which entered into force in England and Wales by virtue of the Merchant Shipping (Prevention of Air Pollution from Ships) and Motor Fuel (Composition and Content) (Amendment) Regulations 2014/3076, and have applied since 1 January 2015. The SCMF currently mandates a sulphur limit of 0.1 per cent

38 [1995] 2 Lloyd's Rep 299.

39 Lloyd's Register Marine, www.lr.org/en/_images/213-35826_Your_options_for_emissions_compliance.pdf.

for ships in the Baltic, the North Sea and the English Channel. It also imposes a ban on the marketing of marine diesel and gas oils with a sulphur content greater than 1.5 per cent and 0.1 per cent by mass respectively.

The CLC Convention was incorporated into English law by the Merchant Shipping (Oil Pollution) Act 1971, subsequently Sections 152–70 Chapter III of the Merchant Shipping Act 1995. This convention imposes strict liability on tanker owners for damage caused by oil spills and requires compulsory liability insurance.

The Bunker Convention has been brought into force through the Merchant Shipping (Oil Pollution) (Bunker Convention) Regulations 2006. This Convention ensures that adequate compensation is available to parties suffering damage caused by spills of bunker oil when carried as fuel in a vessel's bunker tanks.

The Oil Pollution Fund Convention 1992 and the Supplementary Fund Protocol 2003 also apply. These provide for the payment of supplementary compensation where the funds available under the CLC Convention are not sufficient.

On 13 February 2004 the IMO adopted the International Convention for the Control and Management of Ships' Ballast Water and Sediments. This was in response to the growing concern over the spread of invasive species due to their carriage in ships' ballast. The effects of this spread is recognised as one of the most serious threats to the aquatic environment. The Convention therefore aims to establish safer management of ballast water to stop the spread of invasive species. The Convention hopes to achieve this goal by introducing various regulations to manage both the transfer and discharge of ballast water. The Convention will enter into force 12 months after it has been ratified by 30 states, representing 35 per cent of the world's merchant shipping tonnage. As of May 2016, the convention has been ratified by 48 states, representing 34.82 per cent of world shipping tonnage.⁴⁰

v Collisions, salvage and wrecks

Collisions

Several international conventions relating to collision claims operate in England and Wales. The 1910 Collision Convention was implemented into English law by the Maritime Conventions Act 1911 (repealed and replaced by the Merchant Shipping Act 1995). The 1910 Collision Convention sets out the basic rules regarding civil liability for collisions between vessels. Further, the Colregs also apply to all foreign ships sailing in British territorial waters and to all British ships sailing anywhere in the world. These were also brought into force by the Merchant Shipping (distress signals and prevention of collisions) Regulations 1996 and they are updated from time to time by reference to IMO Regulations.

Salvage

The Salvage Convention 1989 applies in England and Wales. There is no mandatory form of salvage agreement, but the LOF is by far the most commonly used. The LOF is governed by English law and provides for arbitration by the Lloyd's Salvage Arbitration Branch in London. The latest version is LOF 2011 and, together with accompanying Lloyd's Standard Salvage and Arbitration Clauses, the contract is kept under review and updated from time to time in consultation with industry stakeholders and salvage practitioners, as well as Lloyd's.

40 The Maritime Executive website, www.maritime-executive.com/article/belgium-ratifies-ballast-water-management-convention.

Where the LOF is not used, parties to a salvage operation are free to agree their own terms and conditions for salvage and, in the absence of any contractual arrangements, the salvors may also bring a claim for common law salvage.

Wreck removal

The Merchant Shipping Act 1995 grants coastal authorities broad powers to intervene in relation to the handling of wrecks. These powers include the power to take possession of, remove or destroy the wreck, as required. The relevant authority is also permitted to contract with a third party for the removal or salvage of the wreck. The owner of the vessel remains liable for the costs of removing the wreck and this liability is unlimited (however, this is usually a P&I risk).

The Wreck Removal Convention Act 2011 allowed the United Kingdom to ratify the Nairobi WRC 2007 and, on 15 April 2015, the Convention came into force following ratification by Denmark on 14 April 2014. The Nairobi WRC 2007 imposes a number of obligations on ship owners, for instance, a requirement to obtain a certificate from a WRC state party confirming that insurance or other financial security is in force in line with the Nairobi WRC 2007.

Ship recycling

Ships constituting waste and intended for export from the United Kingdom are subject to the EU Waste Shipment Regulation (No. 1013/2006) (WSR). This Regulation gives effect to the Basel Convention of 22 March 1989 on the control of trans-boundary movements of hazardous wastes and their disposal (the Basel Convention). The Basel Convention provides the framework for the international movement of hazardous wastes and all EU Member States have ratified it. It provides for a system of 'prior informed consent' whereby trans-boundary movements of hazardous wastes must be pre-notified to, and consented by, the relevant competent authorities. Contracts also have to be in place between the notifier and the consignee with a financial guarantee and insurance to cover foreseeable eventualities, including the requirement for the repatriation of the waste. An amendment to the Basel Convention also provides for the outright ban on the movement of hazardous wastes from OECD countries to non-OECD countries. This is not yet in force internationally but is a feature of the WSR. The applicability of the WSR to the export of ships is, however, a matter that has provoked debate and controversy for a long time. Aspects of the WSR that refer to EU Member State-flagged commercial vessels of more than 500 GT are repealed as a result of the EU Regulation on Ship Recycling (see further below).

The EU Regulation on Ship Recycling (No. 1257/2013) entered into force in England and Wales on 30 December 2013 and applies from December 2015. The Regulation will be applicable to all ships of 500 GT or greater flying an EU Member State flag and ships flying a non-EU Member State flag calling at a port or anchorage of an EU Member State. The main aim of the Regulation is to prevent, reduce, minimise and, to the extent practicable, eliminate accidents, injuries and other adverse effects on human health and the environment caused by ship recycling, and to enhance safety, and the protection of human health and of the marine environment throughout a ship's life cycle, in particular ensuring that hazardous waste from such ship recycling is subject to environmentally sound management (Article 1). The Regulation also looks to provide an interim solution for the recycling of ships owned by EU companies or registered in EU Member States pending the entry into force of the Hong Kong Convention.

The key provisions of the Regulation are:

- a* the prohibition or restriction of the use of certain hazardous materials on EU flagged ships such as asbestos, ozone-depleting substances and certain anti-fouling compounds and systems (Article 4);
- b* all EU-flagged and other ships operating within EU ports must establish and maintain an inventory of the hazardous materials present on board the vessel;
- c* a list of approved ship-recycling facilities that are in line with the design, construction and operation requirements of the European Union;
- d* EU-flagged ships must contract a recycling facility from the approved list to prepare a ship-recycling plan before recycling; and
- e* owners of EU-flagged ships will have to ensure that their ships are only recycled in recycling facilities that have been approved and included in a 'European List', which will be published by the Commission and put on its website at the latest by the end of 2016.

vi Passengers' rights

Passenger rights are dealt with by a mixture of common law, legislation, EU law and international conventions. In the first instance, the contract of carriage may apply to any disputes, subject to the protections of the Athens Convention and EU Regulations, such as the Package Travel, Package Holidays and Package Tours Regulations 1992 (as amended).

The Athens Convention was incorporated into English law via Section 183 of the Merchant Shipping Act 1995. The Athens Convention renders a carrier liable for damage or loss suffered by a passenger in the event the incident giving rise to the damage occurred during the carriage and was caused by the fault or neglect of the carrier. Under the Athens Convention as amended by the 1976 Protocol, carrier liability for death of, or personal injury to, a passenger is capped at 46,666 SDRs per carriage; however, under Article 7, England increased the limits in respect of its own national carriers to 300,000 SDRs.

The 2002 Protocol to the Athens Convention entered into force in England on 23 April 2014. The 2002 Protocol increases the limit for carrier liability contained in the Athens Convention to 250,000 SDRs for each passenger's injury or death. The 2002 Protocol also introduces changes to the liability regime for the loss of, or damage to, cabin luggage (2,500 SDRs per passenger per carriage) and compulsory insurance of 250,000 SDRs per passenger.

Although the Athens Convention usually applies to international carriage, under the Carriage of Passengers and their Luggage by Sea (Domestic Carriage) Order SI 1987/60, English law extends the Convention's protections to domestic voyages where the points of arrival and departure are within the United Kingdom.

The Package Travel Regulations apply to packages where two elements of travel, accommodation and other services are sold together. This therefore covers cruises and potentially overnight ferries. These Regulations set out a consumer protection regime, which includes details of the information to be provided to passengers, and that the tour operator is responsible to the passenger for performance of the package.

vii Seafarers' rights

The Maritime Labour Convention 2006 (MLC) entered into force in England and Wales on 14 August 2014, the UK having been the 41st ILO Member State to ratify the MLC on 14 August 2013. The MLC replaces various existing conventions, and provides a new framework aimed at protecting seafarers' rights.

The MLC was established by the ILO in 2006 and aims to provide a comprehensive set of rights and protections for all seafarers. The MLC applies to all commercial vessels, with the exception of ships navigating inland or sheltered waters subject to port regulations, fishing vessels, warships and naval auxiliaries and traditional ships, such as dhows. The MLC sets out minimum standards for seafarers working on ships including the minimum age, medical certification, training and qualifications, hours of work and rest, welfare and social security protection.

Seafarers employed in the UK, or substantially in the UK, may also benefit from the protections of English employment law, although many protective regulations contain exemptions for offshore work. Vessel owners and employers must also extend protection to seafarers regarding safety at work and (for example) providing suitable equipment.

VII OUTLOOK

London continues to be pre-eminent in global shipping, with around 40 per cent of international charterparties fixed in the city and over one-fifth of all marine insurance policies globally being written through London. P&I insurers are mostly managed out of London and almost 20 per cent of the world fleet is classed by London's Lloyd's Register. London also continues to be a major centre for ship finance, with the UK having around 15 per cent of the current global loan book, representing total loans of over US\$64 billion.⁴¹

The majority of shipping contracts are governed by English law and London is the leading shipping arbitration centre, measured by number of annual arbitrator appointments.⁴² In addition, the specialist courts, which hear the majority of shipping litigation (the Commercial and Admiralty Courts), continue to enjoy an excellent reputation internationally. This is highlighted by the fact that 81 per cent of cases heard in the English Commercial Court in 2012 to 2013 involved at least one party based outside England and Wales.⁴³

London also continues to be a major centre for mediation, with a total value of cases mediated each year of around £7.5 billion, including many shipping cases. Mediation remains attractive as settlement rates continue to be high, with mediators reporting a total settlement rate of around 86 per cent of all cases mediated in an audit conducted in 2014.⁴⁴

In this context, England and Wales seems set to remain a leading jurisdiction in relation to shipping law for the foreseeable future.

41 <https://www.londoninternationalshippingweek.com/overview/>.

42 There were 3,160 LMAA appointments in 2015, www.lmaa.london/news-article.aspx?pkNewEventID=208da443-7800-4720-84b3-7f4f3f5fc9ce.

43 Rose, 'Figures highlight importance of foreign litigants to Commercial Court', *Litigation Futures*, 14 March 2014, www.litigationfutures.com/news/figures-highlight-importance-for-eign-litigants-commercial-court.

44 www.cedr.com/docslib/TheMediatorAudit2014.pdf.

At the time of writing, it is yet unknown whether or not the United Kingdom will remain a member of the European Union. If the United Kingdom opts out of the European Union, the wider legal ramifications are, as mentioned in Section II, still unclear.

Chapter 18

FRANCE

*Mona Dejean*¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The French flag is classed first on the White List of the Paris MoU.² The International Chamber of Shipping designated it among the best flags in 2015, in terms of the quality of the fleet, the quality of port state control and the number of ratified international conventions.³

On 1 July 2015, the merchant fleet under the French flag comprised 301 vessels of over 100 GT among which 176 vessels were dedicated to transport and 125 were service vessels.

The average age of the French transport fleet is eight years at 1 July 2015 (the global average is 16.3 years).⁴

For freight transport, 257.8 million tonnes were handled in the large ports of metropolitan France from September 2013 to September 2014. The port of Marseilles is the port with the most developed activity (77.9 million tonnes), followed by the port of Le Havre (66.3 million tonnes) and then Dunkirk (47 million tonnes).⁵

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

France has ratified most of the major international maritime conventions (the Hague-Visby Rules, SOLAS, the LLMC Convention, etc.). As a Member State of the European Union, France is also subject to European legislation addressing maritime issues (for instance, the

1 Mona Dejean is an associate at Holman Fenwick Willan France LLP.

2 Paris MoU, '2014 Annual Report on Port State Control'.

3 ICS, 'Shipping Industry Flag State Performance Table 2015/2016'.

4 Ministry of Ecology, Sustainable Development and energy 'Statistiques - Flotte de commerce sous pavillon français – juillet 2015'.

5 Commissioner-General for Sustainable Development, 'Traffics des Grands ports maritimes métropolitains et du port de Calais à fin septembre 2014'.

extensive role of the Commission in port sectors). International conventions and European legislation can be directly applied by the French courts, but most of their provisions are also set out in domestic regulations.

Modern French shipping law was mainly developed in the 1960s under the impetus of Professor René Rodière, a famous maritime lawyer and university lecturer, who wrote France's five basic maritime laws such as the 18 June 1966 Act on Contracts of Chartering and Transport by Sea and the 3 January 1967 Act relating to Ships and Other Sea Vessels. In 2010, these laws and other laws relating to shipping and transport were codified in a Transport Code but some shipping provisions can be found in other acts and codes, and in the numerous decrees and orders that have not yet been codified.

In civil law systems, case law is considered to be a secondary source of law – statutory law being the primary source – and there are no binding precedents, although higher court decisions can have a persuasive effect on lower courts.

III FORUM AND JURISDICTION

i Courts

Most shipping disputes are heard before the commercial courts, occasionally the civil courts (competent to order judicial sales or enforcement of judgments) or the administrative courts (matters relating to damage to public assets such as port facilities).

The principal feature of the commercial courts is that the judges are lay magistrates, chosen from the local business community. These 'consular' judges' knowledge and understanding of complex legal issues will inevitably vary; moreover, not all commercial court judges will be familiar with maritime law or practice. Consequently, the decisions of the French commercial courts are at times somewhat inconsistent with the generally accepted understanding of the law. A shipowner or operator will, however, usually be sued before one of the principal traditional 'maritime' jurisdictions, where judges may have considerable practical experience of maritime matters.

Regional courts of appeal are competent to hear appeals against decisions rendered by commercial courts. The grounds for appeal are very broad, the underlying principle being that a party should always have access, as a matter of right, to two 'levels' of jurisdiction. An appeal can therefore always be made on questions of law or fact – the court of appeal is always free to reverse the court of first instance's findings of fact. A final appeal can be lodged with the Court of Cassation but only on points of law.

An interesting feature of French court procedures is that, unlike proceedings before English or American courts, witnesses are not called to give evidence and there is no equivalent system of disclosure or discovery of documents before the French courts. Each party is only required to provide documents that may be necessary to prove its case (i.e., to support its arguments). For questions of fact that require specialist knowledge, French commercial judges often appoint 'court surveyors' whose terms of reference usually encompass assessing the causes of the relevant incident, the implications thereof, the extent of the damage caused thereby and, in certain cases, providing solutions and discussing issues of loss mitigation. This process permits the courts to be guided by the experts and assists judges with rendering their final verdicts. The court surveyor can be persuaded to request evidence that would be relevant or to hear witnesses, and if such evidence is not provided the court surveyor may draw adverse inferences therefrom in his or her report.

Apart from the traditional jurisdiction clauses, the French courts have jurisdiction to rule on international matters either under specific jurisdiction provisions of international conventions, or under the general provisions of EU Regulation 1215/2012 or from French law provisions such as Articles 14 and 15 of the Civil Code, which respectively enable any French claimant to bring proceedings before the French courts against a foreign defendant, and enable a foreign claimant to do likewise when the defendant is domiciled in France.

As regards limitation periods, the general time bar under French law is five years. There are, however, exceptions: all actions arising under a charterparty or similar contract, as well as all actions under a bill of lading, are time-barred after one year. Claims arising out of a collision are time-barred after two years and in personal injury cases after 10 years.

ii Arbitration and ADR

Paris is an established seat of arbitration and several arbitral courts have their seats in the city, such as the International Chamber of Commerce. In addition, the Paris Chamber of Maritime Arbitration (CAMP) deals exclusively with maritime disputes.

Founded 50 years ago, the CAMP handles various types of shipping disputes, including: charterparties, carriage of goods by sea, shipbuilding, salvage,⁶ collision, sale and purchase, ship agency contracts.

Arbitrators must be chosen from the list of CAMP's arbitrators, of which there are approximately 60. Of these, two are members of the London Maritime Arbitrators Association.

Arbitrators are sorted into three categories according to their professional background: 'professionals of maritime trade' (shipowners, charterers, ship brokers, etc.), 'lawyers' (maritime law professors, in-house counsel, etc. – but not private practitioners) and 'technicians' (naval architects, master mariners, chief engineers, maritime surveyors). Each party chooses its own arbitrator and the CAMP nominates the chairman.

The administration costs of the CAMP and the arbitrators' fees depend on the total amount of the claims and counterclaims advanced by the parties. A sliding scale of arbitration costs for a three-member arbitration panel is listed in the CAMP's Rules. Arbitration costs before the CAMP are generally considered attractive compared with other arbitral institutions. For example, the total amount due to the Chamber and arbitrators will be €3,850 for total claims of up to €15,000, €18,800 for total claims of €200,000 and or €45,900 for total claims of €1 million. Where a sole arbitrator is appointed, the cost is approximately 60 per cent of these amounts. Costs are payable in advance at the beginning of the proceedings, half by the claimant, half by the defendant. The arbitral tribunal will be free to decide how to apportion the final burden of costs between the parties when issuing the award. In the event that proceedings are withdrawn before the final award is issued, there are detailed provisions in the Rules setting out the sums that can be recovered from the CAMP in respect of the monies paid on account.

One of the major features of French arbitration rules is that no appeal against the award is possible before the courts of appeal. A peculiarity of the CAMP Rules, however – which is generally regarded as a downside – is the right to second-degree arbitration, which allows any party to request that a dispute for which an award has already been made be submitted to a second-degree examination, which will be conducted in the same way as the

6 Salvage rewards granted by the CAMP tend to be higher than those awarded by state courts.

first arbitration. Any second award will override the first, which is then considered null and void. Apart from the obvious duplication of time and effort, as well as an almost redundant procedure, such an appeal leads to further expense.

An application for the annulment of an award rendered in France can be lodged by a party before the local court of appeal within one month of the award being issued, unless the parties have waived the right to apply for annulment. Article 1520 of the French Civil Procedure Code provides a limited list of grounds under which the nullity can be invoked, for example, if the tribunal was not lawfully constituted or failed to comply with its assignment, if the principle of contradictory debate has not been respected, or if the award infringes a rule of public interest.

iii Enforcement of foreign judgments and arbitral awards

Replacing Regulation No. 44/2001 since 10 January 2015, EU Regulation No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is applicable in France. The Regulation, which is binding and directly applicable, facilitates the enforcement of judgments issued in other European countries. Pursuant to Article 39, 'a judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required.' A declaration of enforceability from the Member State receiving the request is no longer necessary, the applicant only needs a certificate issued by the court of origin using the form set out in Annex I of Regulation 1215/2012, certifying that the judgment is enforceable and containing an extract of the judgment as well as, where appropriate, relevant information on the recoverable costs of the proceedings and the calculation of interest.

As regards judgments rendered outside the European Union, unless a bilateral convention on the reciprocal enforcement of judgments has been agreed by France, the question of enforcement of foreign judgments in France is subject to French procedural law. Pursuant to Article 509 et seq. of the Civil Procedure Code, the enforcement of foreign decisions is subject to *exequatur*.⁷ The French courts will not review the merits of the dispute. Contrary to European judgments, there are conditions to be met: the party requiring the *exequatur* will have to produce evidence testifying that the foreign court had jurisdiction, that the decision is enforceable in the country in which it was delivered, and that the decision was indeed notified to the defendant. The *exequatur* will not be granted if a conflicting judgment already exists in France on the same facts, if the decision contradicts French public policy, or if the French courts consider that the claimant introduced its claim before the foreign court for the sole purpose of avoiding the application of French law, which would have otherwise governed the dispute.

As for the procedure, the party wishing to enforce a foreign judgment in France must make an application to the French courts and give notice of this application to the defendant. The defendant has the right to file submissions in response to the application and will generally raise arguments based on the conditions set out above. Upon hearing the parties, the court will then deliver a French judgment authorising or refusing the enforcement of the foreign judgment. Each party has one month to lodge an appeal against such a judgment. It

⁷ A procedure resulting in the original decision being enforceable as a judgment of a French court.

is worth noting that as a matter of French law, an appeal suspends enforceability unless the court orders otherwise, in which case it might be possible to take enforcement action while the appeal is pending.

With respect to arbitral awards, France has ratified the New York Convention allowing the enforcement of non-domestic awards in other Member States.

Pursuant to Article 1487 et seq. and Article 1514 et seq. of the Civil Procedure Code, an arbitral award (regardless of whether it was issued in France) is enforceable in France once the *exequatur* has been granted by a civil court. The party wishing to have the award enforced in France must file an *ex parte* application and disclose the original award, the arbitration agreement and certified copies thereof, together with French translations if need be. If these conditions are met, the *exequatur* will be granted unless the decision is manifestly contrary to public policy.

IV SHIPPING CONTRACTS

i Shipbuilding

The French shipbuilding industry suffered a serious crisis in the early 1970s. Although in decline, the sector is still active in France and it has proved increasingly promising in recent years. In 2013, the state of Mozambique and the French shipyard CMN signed a €200 million contract for the delivery of 30 vessels and three additional patrol boats were ordered in early 2015. In view of its prospective contracts (with Saudi Arabia and Lebanon inter alia) CMN intends to extend its infrastructure. Built by the French shipbuilder STX, *Harmony of the Seas*, the biggest cruise-ship in the world, has been delivered to Royal Caribbean International in April 2016. In 2014, MSC cruises and the French shipbuilder STX signed a €1.5 billion contract for the delivery of two cruise ships and two additional sister ships were ordered in early 2016. A few month later, MSC and STX concluded another contract for four additional cruise ships, for about €4 billion, filling up STX order books until 2020 at least.

Shipbuilding contracts are governed by Articles L5113-1 to L5113-6 of the Transport Code, which provide for a ‘holistic approach’ to contractual freedom. Pursuant to Article L5113-2, the main requirement is for the contract to be in writing. The shipyard is moreover required to make a declaration to the competent maritime administration, to enable the administration to determine whether the safety conditions related to the construction are met.

The guiding principle is thus contractual freedom. Two types of sales coexist: the parties must choose between a sale that will be completed on delivery, or a sale in which the ownership is transferred during construction. This second type of sale aims to protect the owner if the shipyard goes bankrupt.

Regarding the actions that can be engaged against the shipyard for defects, Article L5113-4 of the Transport Code provides that ‘[t]he builder guarantees any hidden defect of the vessel, even if the buyer has accepted the delivery without reservation’. This action is time-barred one year after the defect is discovered. This provision sets out a strict liability regime, reinforced by the applicability of Article 1643 of the Civil Code, which imposes on the seller an obligation to reimburse the purchase price, or to compensate damages that may have occurred due to the defects. Clauses limiting or excluding the builder’s liability in event of the existence of hidden defects are only valid in certain circumstances under French law.

ii **Contracts of carriage**

The Hague-Visby Rules are enforceable in France. France signed the Hamburg Rules, but did not issue the decree necessary for its entry into force. Thus the Hamburg Rules have not been ratified and are not applied by the French courts unless the parties have inserted a paramount clause in the contract of carriage. The Rotterdam Rules have also been signed but not ratified by France. The Geneva Convention on international multimodal transport of goods has been ratified by France, but is not yet in force and will probably never be.

The French Transport Code and the Decree No. 66-1078 of 31 December 1966 also contain provisions related to the contract of carriage. Depending on the international nature of the contracts and other criteria such as the port of departure or destination, an international convention or French law will apply. When applicable under the conflict-of-law rules, French law also governs issues not addressed by the Hague-Visby Rules. For instance, Article L5422-1 of the Transport Code provides that the regime of the contract of carriage 'shall apply from the taking over of the goods until the delivery', which can occur after the period governed by the Hague Rules, 'from the time when the goods are loaded on to the time they are discharged from the ship'.

The duties and obligations of shippers are addressed by French law: the shipper is in charge of the wrapping and packaging of the goods; it must present the goods properly packed, secured and identified at the time and place specified in the parties' agreement. The shipper has an obligation to provide any relevant information about the goods and must indicate to the carrier the nature of the goods, and if it necessitates special requirements for transport by sea. Under Article L5422-10 of the Transport Code, the shipper is liable in the event of damages to the vessel or to any cargo owned by other cargo interests. Finally, the shipper owes the freight to the carrier. Under Article L5422-8, the carrier has a lien over the cargo until 15 days after its delivery, unless it has been sold to a third party. The carrier is also entitled to retain the cargo onshore.

As regards multimodal transports, French legislation does not contain specific provisions. Freedom of contract prevails, except in two cases where provisions on multimodal transport are set by an international convention: a rail-sea carriage will be governed by the mandatory provisions of the Uniform Rules Concerning the Contract for International Carriage of Goods by Rail; and in the case of a road-sea carriage, provisions of the CMR Convention are applicable if the goods are not unloaded from the road vehicle. It must be highlighted that under French law, a party that organises a carriage (multimodal or otherwise), acting for the account of another party but in its own name is considered to be a forwarding agent, governed by Article L132-3 et seq. of the French Commercial Code. A forwarding agent is liable for its own acts and omissions. Unlike a freight forwarder, it is also vicariously liable for the acts and omissions of its subcontractors, including the carrier. As such, it has a strict liability for loss or damage to the goods. A forwarding agent, moreover, has a general duty to advise and inform its customer.

Cabotage in France is reserved to French and European nationals: Article 257 of the Customs Code stipulates that transport between the ports of mainland France is reserved for vessels operated by shipowners who are nationals of and registered in EU or EEA Member States and are flying a flag of those states. Maritime cabotage is also governed by the Maritime Cabotage Regulation.

iii Cargo claims

As a contract of carriage will, most of the time, impose a strict liability on the carrier, cargo claimants will seek to found their claims on a contractual basis. Both the shipper, the consignee or the endorsee will have a right of action against the carrier under the bill of lading provided they have personally suffered losses. In addition, parties whose names are not mentioned on the bill can also sue the carrier on a contractual basis if they can establish that they are the actual shipper or consignee of a cargo (for example, because a freight forwarder or an NVOCC is named in lieu of them). Cargo underwriters can act personally before the French courts on a contractual basis if they establish that they have been subrogated to the rights of the insured.

A frequent issue concerns the identity of the carrier. Contractual claims can be pursued against the carrier named on the bill, even if it is not the actual carrier (NVOCC bills). Where the name of the carrier is not provided on the bill, a rule established since 1987⁸ states that the registered owner of the vessel is deemed the carrier. Demise clauses cannot be invoked against shipowners in France.

Under French law, a party can claim full recovery of losses sustained – that is to say, not only resulting from the actual damage to the cargo, but also as a consequence of, for example, the damage or loss and the extra costs incurred.

Both the Hague-Visby Rules and the Transport Code provide that action against the carrier for loss or damage is time-barred after one year. Pursuant to Article L5422-18 of the Transport Code, this period may be extended by agreement between the parties after the event that has given rise to the claim.

In contractual matters, French law attaches great importance to the parties' consent. A clause cannot be invoked against a party who has not accepted it. As a consequence, French courts have decided that the terms of a charterparty to which a bill of lading refers cannot be invoked against the consignee or endorsee unless it is proved that these terms were known and accepted by it. Where reference is made to an arbitration clause, however, the *Kompetenz–Kompetenz* principle prevents French courts from deciding by themselves whether this clause applies.⁹ A few years ago the French Supreme Court also moderated its position regarding jurisdiction clauses and considered that where the consignee, upon acquiring the bill of lading, succeeded to the shipper's rights and obligations by virtue of the relevant national law, then a jurisdiction clause can be invoked against the consignee with no need to establish the specific agreement.¹⁰ A recent decisions accepted the opposability to the consignee of a jurisdiction clause inserted in the bill of lading governed by French law, on the mere ground that it is part of the spirit of an international contract of carriage.¹¹

8 Court of Cassation, Commercial Chamber, 21 July 1987 (*The 'Vomar'*).

9 Court of Cassation, First Civil Chamber, 22 November 2005 (*The 'Lindos'*); Court of Cassation, Commercial Chamber, 21 February 2006 (*The 'Pella'*).

10 On 16 December 2008, the Commercial Chamber and the First Civil of the Court of Cassation rendered similar decisions inspired by the ICJ ruling in *The 'Tilly Russ'* (C71/83 of 19 June 1984). These decisions were recently confirmed by the Commercial Chamber on 17 February 2015.

11 Court of Cassation, Commercial Chamber, 12 March 2013.

iv Limitation of liability

France has ratified the LLMC Convention 1976 and the LLMC Protocol 1996 has been in force in France since 2007. This applies to vessels flying foreign flags (regardless of whether they are party to the LLMC Convention). French domestic law, which applies to vessels flying the French flag and subject to proceedings before the French courts, contains similar provisions to those of the LLMC Convention under Article L5121-1 et seq. of the Transport Code and the Decree of 27 October 1967.

One of the differences between French domestic law and the LLMC Convention is that the provisions of the Transport Code on limitation of liability do not refer to insurers. Article L173-24 of the Insurance Code states that when a limitation fund has been constituted, the claimants whose claim is subject to limitation have no right of action against the ship's insurers; however, in *The 'Dizzy'*,¹² the Court of Cassation held that, pursuant to the combination of those provisions, the shipowner's liability insurer cannot rely on the limitation of liability regime unless a limitation fund has been constituted.

Constituting a limitation fund in France is relatively quick and simple. An *ex parte* application requesting the court's permission to constitute a limitation fund can be presented to the president of a commercial court, who will appoint a liquidator and stipulate the way in which the fund can be constituted. Funds made up by way of a P&I club guarantee are generally accepted, especially when provided by a first-rank international club. Once the letter of undertaking or the cheque has been handed to the liquidator appointed by the court, a second application must be presented for the court to acknowledge the constitution of the fund.

France is known for being very strict with regard to shipowners seeking to limit their liability. The French courts have indeed adopted an objective approach of the conduct-barring limitation, considering that an inexcusable fault has been committed when the shipowner 'should have known' that the loss 'may' result from the conditions in which the voyage was undertaken. For instance, in *The 'Heidelberg'*, a 25-year-old saga that constituted the first major case in France to examine the right to limit under the LLMC Convention, a court of appeal deprived a shipowner of limitation as he failed to ensure that there existed between the master and the crew 'the confidence and cohesion indispensable to permit them to overcome difficulties which whilst unforeseen were not unforeseeable'.¹³ Recent decisions, however, suggest that the French courts are gradually overcoming their claimant-friendly approach. In *The 'Rosa Delmas'*¹⁴ and in the latest decision in *The 'Heidelberg'*,¹⁵ the courts adopted a subjective approach in line with a strict application of the terms of the LLMC Convention.

12 Court of Cassation, Commercial Chamber, 11 December 2012.

13 Court of Appeal of Bordeaux, 31 May 2005, subsequently overruled by the Court of Cassation.

14 Court of Cassation, 19 October 2010, concerning the Hague-Visby Rules limitation.

15 Court of Cassation, Commercial Chamber, 22 September 2015.

V REMEDIES

i Ship arrest

The 1952 Brussels Convention relating to the arrest of seagoing ships has been ratified by France. Ships flying a flag of a country that is a signatory to the Brussels Convention can only be arrested on the grounds of securing maritime claims. Ships flying flags of states that are not signatories to the Brussels Convention can be arrested either on the basis of a mere allegation of a maritime claim as defined in the Convention, or under French domestic law in respect of any type of claim the arresting party might have against the owner of the ship; this is subject to demonstrating that the arresting party has a valid *prima facie* claim, as provided in Article L5114-22 of the French Transport Code.

Bunker arrest is in theory possible, although rarely put into practice due to the need to discharge bunkers in shore tanks when the vessel herself is not under arrest. Moreover, although the issue is debated, some French Courts adopt a permissive interpretation of the Brussels Convention by considering that a ship can be arrested and the shipowner ordered to provide a security for a claim for unpaid bunkers ordered by a former charterer to supply the arrested vessel. Many such arrests took place in France since the bankruptcy of OW bunkers.

Arrest of an associated ship used to be possible in France as a result of the French courts' interpretation of the wording of the Brussels Convention that allows the arrest of associated vessels; however, the courts have narrowed their approach in recent years. Essentially, an applicant seeking authorisation to arrest an associated ship must now prove that either (1) there is a confusion of assets between the company whose assets have been arrested and the company that is alleged to owe the debt in question;¹⁶ or (2) the shipowner or the debtor company is, in reality, fictitious. This is referred to as an absence of *affectio societatis*¹⁷ so, for example, they have no participation in the profits and losses of the company, the shareholders are employed by the fictitious company or there is an inequitable allocation of the share capital.¹⁸

The procedure of ship arrests is set out in the provisions of Decree No. 67-967 dated 27 October 1967. An *ex parte* petition to arrest the ship must be made to the president of the commercial court of the vessel's port of call. Documents evidencing the claim are required, such as bills, contracts and letters concerning payment. Where documents are in English, the relevant sections must be translated into French. A power of attorney from the claimant's solicitors is not required and documents do not need to be notarised in France. The arresting party is generally not required to provide counter-security in order to obtain an arrest order; however, the courts have complete discretion to decide otherwise, and systematically requiring counter-securities has become an idiosyncrasy of some local courts.

In practice, an arrest order can be obtained within a few hours of a local lawyer having been fully instructed, if one is dealing with a straightforward arrest with 'simple' supporting documents. In serious emergencies, this period can be reduced, although much will depend on the availability of the president of the commercial court, who rules on individual arrests. French law does, however, allow for petitions to be presented to the president of the

16 Confusion de patrimoine.

17 Shareholders' mutual intention to create and run the corporate entity together.

18 For a recent example of a company withheld fictitious see the decision of the Rennes Court of Appeal, 4 February 2014, *the 'AG Vartholomeos'*.

commercial court at his or her home in extreme emergencies. Conversely, to carry out an associated vessel arrest in France, more time is usually needed. Obtaining the authorisation to arrest a vessel will thus generally be possible before the vessel is at berth or even before it arrives in a French port.

Once the president of the commercial court has issued an order authorising the arrest, this will need to be served by a bailiff on the ship's master, the port authority and customs, which can be done within a few hours. Depending on the means available for serving the order on the ship's master, it is possible for a bailiff to arrest a vessel that is anchored in a port's roads when there are reasons to believe that the ship will try to escape arrest.

The claimant must initiate legal proceedings on the merits (either in France or abroad, in a court or via arbitration proceedings) within one month of the arrest, otherwise the arrest or the security provided in order to lift the arrest will be held null and void.

Although claims for wrongful arrests are admissible in theory, French courts have, to date, been reluctant to grant compensation unless the arresting party had manifestly acted in bad faith.

ii Court orders for sale of a vessel

Under French law, the judicial sale of a vessel requires a creditor holding an enforcement title against the owner of the vessel, to proceed with the executory arrest of the vessel. These proceedings generally follow a conservatory arrest (attachment) ordered to prevent the vessel from leaving the port until the creditor obtains an enforcement title, which can be an enforceable judgment or an authentic instrument (i.e., a deed).

An executory arrest gives creditors the right to sell the vessel at a public auction and to obtain satisfactory proceeds therefrom. Decree No. 67-967 of 27 October 1967 sets out the steps of such a procedure. First, an order to pay must be served by a bailiff on the shipowner or the ship's master. Within 10 days of service of the order to pay, the creditor must instruct a bailiff to carry out the executory arrest of the vessel, the minutes of which must be served on the port authorities, customs and the consulate of the state the flag of which the foreign ship flies. Notice of the arrest must be served on creditors having a publicly registered claim on the vessel. The judicial sale of the vessel takes place, upon the request of the claimant, by the civil court in the jurisdiction where the vessel is located, and is carried out by auction. The court sets the reserve bid, the sale conditions and the date of the sale. After the auction sale, creditors of the shipowner or those who have a lien on the ship must file an application with the court requesting to partake in the distribution of the sale proceeds.

Creditors are invited to try to find an agreement on the distribution of the proceeds of the sale. If no agreement is reached, the court will decide how to distribute the proceeds taking into account all maritime liens and mortgages.

The entire procedure generally takes between six and 12 months, and can be costly. For this reason, judicial sales are very rare in France, especially for merchant vessels, although the recent economic crisis has increased the use of this procedure.

VI REGULATION

i Safety

As in most EU Member States, maritime safety is covered under French law by several ‘levels’ of legislation. France is a party to SOLAS and its successive protocols,¹⁹ most provisions of which have been incorporated into EU legislation. France incorporated SOLAS into domestic law through an Act dated 5 July 1983. The latter is now codified in the Transport Code and in some Regulations on the Safety of Human Life at Sea, which compile applicable rules in ‘divisions’ made available through the ministry in charge of transport and is frequently updated. Other Decrees apply to safety, for instance, Decree No. 2007-937 of 15 May 2007 relating to ship safety.

The safety regime also includes provisions for the treatment of casualties: Directive 2009/18/EC was transposed into the French provisions relating to the French Marine Accident Investigation Office, which established a procedure for investigating and for facilitating the exchange of information in the event of marine incidents.²⁰

ii Port state control

France is a member of the Paris MoU, the provisions of which were incorporated in EU Directive 95/21, now replaced by 2009/16/EC on Port State Control, which has been transposed into French domestic law in particular under Division 150 of the Regulations on the Safety of Human Life at Sea.

Inspections are conducted by inspectors of the ships safety centres, which are part of the Maritime Affairs Administration.

In 2004, France was found in breach of its obligations under the Directive by failing to carry out a total quota of annual inspections corresponding to at least 25 per cent of the number of vessels, as less than 15 per cent of vessels were inspected in 1999 and 2000.²¹ This performance has since improved with 1,780 inspections in 2008 representing 30 per cent of ships calling at French ports;²² and 1,321 inspections in 2014, thus reaching the 25 per cent objective.²³ Under the Erika III maritime safety package, the target has been increased to 100 per cent.

In 2014, 54 per cent of inspections in France revealed deficiencies and 36 ships were detained, 10 for more than six days.

iii Registration and classification

There are six registers under French law: five national registers and one international register (the French International Register – RIF):

- a* the applicable register in metropolitan France and overseas departments;
- b* the RIF;

19 The International Regulations for Preventing Collisions at Sea 1972, the International Safety Management Code, International Ship and Port Facility Security Code, the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, etc.

20 Article L1621-1 et seq of the Transport Code.

21 ICJ Case C-439/02, *Commission v. French Republic*.

22 Source: Union Professionnelle des Experts Maritimes.

23 Paris MoU, Port State Control, Annual Report 2014.

- c* the French Southern and Antarctic Lands (TAAF) Register;²⁴
- d* the New Caledonia Register;
- e* the Wallis & Futuna Register; and
- f* the French Polynesia Register.

As of 1 July 2015, the French transportation fleet of over 100 GT included 73 vessels registered in the RIF, 63 in the metropolitan register, and 40 in the overseas registers (including 27 in French Polynesia).²⁵

A distinction must be made between registration proceedings and ‘francisation’ proceedings. Although the two proceedings are quite similar in respect of administrative formalities, they have different purposes: francisation gives the ship French nationality whereas registration gives the ship the right to sail by issuing all the necessary sail and security certificates.

Francisation is the formality that gives the ship the right to fly the French flag and benefit from all advantages attached to it, and is officialised with a deed of francisation. The procedure is governed by the French Customs Code, which lists several conditions: the vessel must have passed a safety inspection, and it must have been built in an EU Member State or the import costs and fees must have been paid in such an EU Member State. A ship built outside the EU can be francised if at least 50 per cent is owned (or intended for ownership or bareboat chartered) by nationals or companies from an EU or EEA Member State with an actual presence in France. If these conditions are not met, francisation can also take place on a discretionary basis by the granting of a special licence by the government.

The criteria for registration will depend upon the concerned register. With regard to the RIF, which is most frequently used nowadays, there are some specific criteria as to the type of vessels that can be registered. Vessels employed in deep-sea trade or international cabotage and commercially operated leisure vessels exceeding 15 metres in overall length manned with a professional crew can be registered. In contrast, the following cannot currently be registered in the RIF: passenger vessels trading between EU countries as well as on some lines between the EU and third countries, vessels operating only on national cabotage or providing services in areas in which port regulations apply (such as boatmen and pilot launches, harbour tugs, signalling vessels and harbour maintenance dredgers), and professional fishing vessels.

Classification societies in France are subject to an amended ministerial order on ship safety dated 23 November 1987. There are currently three approved or recognised classification societies in France: Bureau Veritas, DNV GL and RINA Services. Classification societies can be held liable to shipowners, third parties (the victims) or the state when a party claims against the state in relation to control duties that have been delegated to classification societies. Their liability can be contractual, tortious or criminal. Both the managers and the classification society itself can be held criminally responsible. For instance, in the case of *The Erika*,²⁶ the classification society was found guilty of polluting because of the behaviour of its inspector, who had renewed a class certificate despite the ship’s poor condition.

24 The RIF will eventually replace the TAAF register, which is used today only for fishing vessels.

25 Ministry of Ecology, Sustainable Development and Energy, ‘Flotte de commerce sous pavillon français – July 2015’.

26 Cassation Court, criminal chamber, 25 September 2012.

iv Environmental regulation

MARPOL is in force in France. Sea pollution is also addressed by EU Directives, in particular the Directive on Ship Source Pollution (2005/35/EC, modified by Directive 2009/123/EC), incorporated into French law by Act No. 2008-757, dated 1 August 2008, relating to environmental liability and other provisions. Criminal sanctions against oil pollution are set out in Article L218-10 et seq. of the French Environment Code, pursuant to which oil spillage in breach of MARPOL can lead to up to 10 years' imprisonment and a €15 million fine. These sanctions can be ordered against the master, the registered owner and the operator of the vessel. They can also be ordered against the legal representatives or managers of the owner or operator, or against any other person exercising a control over, management in or running of the vessel, where the owner, operator or person is responsible for illegal spillage or has not taken the necessary steps to avoid it. Although the European Directive requires intent, recklessness or serious negligence, individuals can be held criminally liable under French Law for mere negligence or imprudence, as illustrated in *The 'Erika'*.²⁷

The French courts are generally severe on polluting vessels. Each year, several vessels are diverted to the French coast and arrested by order of the authorities. Masters are generally found guilty on the basis of aerial pictures taken by the Customs, the evidentiary weight of which is almost impossible to rebut. The French courts very often impose criminal sanctions against the interests of polluting vessels. In the most recent decisions, the courts have imposed fines of €800,000 and €1.5 million, plus civil damages granted to environmental associations.²⁸

As regards civil liability, France has ratified the International Conventions on Civil Liability for Oil Pollution Damage and Oil Pollution Compensation Funds, and the Protocol of 2003 establishing an International Oil Pollution Compensation Supplementary Fund. France has also ratified the Bunker Convention, which came into force in 2011.

Pollution can also give rise to the application of provisions on waste²⁹ as illustrated by the *Commune de Mesquer v. Total* case.³⁰

Air pollution from ships is mainly addressed by Directive 2005/33/EC of 6 July 2005 as regards the sulphur content of marine fuels, which has been transposed into French domestic law. As part of measures aiming to reduce greenhouse gas emissions, France has recently passed a Decree imposing on transport companies departing from or travelling to a location in France to disclose the quantity of carbon dioxide emitted during transport services.³¹

v Collisions, salvage and wrecks

France ratified the Collision Convention 1910 as well as the Collision Convention 1952 and the Criminal Collision Convention 1952. Furthermore, the Collision Convention 1910 regime has now been incorporated into French domestic law in Article L5131-1 et seq.

27 Paris Court of Appeal, 30 March 2010, where Mr Pollara (director of Panship, the vessel's technical manager), Mr Savarese (director of Tevere shipping, the vessel's registered owner), RINA (the classification society) and Total (charterer) were found guilty for pollution.

28 See *The 'Tian Du Feng'*, Rennes Court of Appeal, 27 February 2014 and *The 'FastRex'*, Court of Cassation, 18 March 2014.

29 EU Directives and Article L541-1 et seq. of the Environment Code.

30 See ICJ Case C188/07 of 28 March 2007.

31 Decree No. 2011-1336 of 24 October 2011, in force since October 2013.

of the Transport Code. Liability for the damage will rest with the vessel at fault for causing the collision. In the event that fault is shared between each vessel the principle of proportional liability, according to the respective faults, is applicable.

France also ratified the Salvage Convention 1910, the provisions of which have been incorporated into French domestic law in Article L5132-1 et seq. of the Transport Code. In 2002, France also ratified the Salvage Convention 1989.

Most salvage disputes raise the question of whether the assistance provided to a vessel constitutes salvage and thus gives rise to a salvage reward. There is no mandatory form of salvage agreement under French law. An agreement can be made in writing, using general standard contracts such as the LOF or the French Villeneau form, but most of the time the contract is made orally by radio. Moreover, there can be salvage without any salvage contract having been agreed upon between the parties in the event that special assistance is given to a vessel in great danger. Reciprocally, French courts can decide that no salvage reward is due, even if the parties have agreed a 'salvage contract', if the conditions of salvage are not met (e.g., where the danger was no longer an issue at the time when assistance was provided).

French provisions relating to maritime wreckage are set out under Article L5142-1 et seq. of the Transport Code and Decree No. 61-1547 of 26 December 1961 on maritime wreckage. Where a maritime wreck could be dangerous for navigation, fishing, the environment or the access to a port, the owner of the wreck has an obligation to proceed with recovery, removal, destruction or any other operation to remove all danger in relation to the wreck. Pursuant to Article L5242-18 of the Transport Code, the administration is entitled to carry out the removal of the wreck itself in three situations: in case of emergency, if the owner does not carry out the removal operations within the time allotted to it, or if the owner is unknown. In these cases, the administration may remove or destroy the wreck itself, or hire a company specialising in this type of operation, and the owner of the wreck or its insurer will have to bear the final cost of the operation. In November 2015, France ratified the Nairobi WRC 2007, which has just come into force and applies to wrecks in the EEZ.

Ships that constitute waste and which are subject to a trans-boundary movement for recycling are regulated by the Basel Convention of 22 March 1987 and Regulation (EC) No. 1013/2006. A specific EU regulation has been accepted in 2013 and will apply from 31 December 2015: Regulation (EU) No. 1257/2013 of 30 November 2013 on ship recycling aims at 'facilitating a rapid ratification', both in the EU and in non-EU countries, of the Hong Kong Convention for the Safe and Environmentally Sound Recycling of Ships. The Regulation applies to vessels of 500 GT or greater sailing under the flag of an EU Member State, but also includes some provisions for third-country ships calling at or mooring in an EU Member State. Regarding facilities for ship recycling, it applies to those located on the territory of a Member State and those located in the territory of a third country. According to the Regulation, such vessels can only be recycled in recycling facilities listed on a European list, following a ship recycling plan to be drawn up on the basis of the information provided by the shipowner and approved by the competent authority. Concerning the application for inclusion on the European list, the EU Commission adopted an implementing decision of 17 December 2015 (2015/2398) on information and documentation needed for such application from a facility located in a third country. Inspections of ships to be recycled are carried out by the administration or by an accredited agency. All vessels under the Regulation must carry on board an inventory of hazardous materials present in the structure

or equipment of the vessel, and which are listed in the Regulation's Annexes. In this regard, France inserted Article L5242-9-1 in the Transport Code, which requires shipowners to notify the administration of its intent to recycle a vessel.

vi Passengers' rights

EU Regulation No. 392/2009 (the Passenger Liability Regulation – PLR) on the liability of carriers of passengers by sea in the event of accidents came into force on 31 December 2012. This Regulation brought into force the 2002 Protocol to the Athens Convention for all EU Member States, despite the 2002 Protocol not having been ratified internationally at the time. The 2002 Protocol came into force internationally in April 2014.

This produced some important changes in French law, as France had never ratified the Athens Convention or any amending Protocol. Before the entry into force of the new PLR, carriage of passengers by sea was exclusively subject to the French law of 18 June 1966, enacted in the Transport Code in 2010, which did not provide for specific limitations of liability in cases of personal injury or death, but these are contained in the LLMC Convention, as amended by the 1996 Protocol.

The PLR applies to international carriage of passengers on seagoing vessels, but also, under certain conditions, to Class A and B vessels³² engaged in domestic seagoing voyages in France.

The PLR covers the liability of the carrier for losses arising from incidents that occur during the course of carriage, which covers the period during which the passenger is on board the ship, in the process of embarkation or disembarkation, or being transported by water from land to the ship or vice versa.

In the event of death or personal injury caused by a shipping incident, the carrier is under a strict liability up to a limit of 250,000 SDRs per passenger, unless it proves that the incident resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible nature, or was wholly caused by an act or omission by a third party, carried out with the intention of causing the incident. The carrier is also liable for shipping and non-shipping incidents up to a limit of 400,000 SDRs unless the carrier proves that the incident that caused the loss was not through his or her own fault or neglect. Moreover, contributory fault on the part of the passenger may wholly or partially exonerate the carrier. The carrier will lose its right to limit liability where it is proven that the damage resulted from an act or omission intended to cause damage or a reckless act, done with the knowledge that such damage would probably ensue. The carrier's limit of liability for loss or damage to luggage varies, depending on whether the loss or damage occurred in respect of cabin luggage, of a vehicle or luggage carried in or on it.

A provision for compulsory insurance, of no less than 250,000 SDRs per passenger per occasion has been introduced. The ship's registry must issue a certificate evidencing the insurance.

In some cases, maritime cruises will be considered as package travel, governed by The French Tourism Code implementing EU Package Travel Regulation No. 90/314/EEC, which provides for a liability regime different to that of the PLR.

32 Recreational craft designed for winds up to, and including (Class B) or that may exceed (Class A), wind force 8 (Beaufort scale) and significant wave height of 4 metres, as defined by amended Directive 94/25/EC on recreational craft.

Finally, EU Regulation 1177/2010 on maritime passenger rights established a mechanism in case of interruption of travel, requiring operators to comply with a series of obligations regarding information, assistance, cruise lines and not discriminating against disabled passengers.

vii Seafarers' rights

French legislation on seafarers used to be included in the French Maritime Labour Code, which has now been almost fully replaced by Article L5511-1 et seq. of the Transport Code, which contains some provisions specific to seafarers, such as provisions on the execution of the employment contract, probationary period, performance and termination of contract, and collective labour relations. Some general provisions of the Labour Code also apply to seafarers employed under a French contract, such as provisions relating to the company's work council, staff representatives, minimum wage, collective bargaining agreements, procedures for dismissal, hours of work, and the committee on health, safety and working conditions.

France ratified the Maritime Labour Convention 2006 (MLC) on 28 February 2013. As with other states in the same situation, France wished to promote the universal application of the MLC by incorporating it immediately into its domestic legislation. Rules of the French Transport Code on Seafarers were thus adapted in July 2013. As the French social legislation is relatively comprehensive, the implementation of the Convention did not require major reform.

The Convention officially came into force in France on 28 February 2014 and approximately 10 vessels were detained in France due to deficient labour conditions during the first year of application of the Convention.

VII OUTLOOK

The French parliament is about to enact a new act on the 'blue economy' to improve the competitiveness of the companies involved in the maritime sector, but also to simplify and modernise the whole legislative framework on maritime activities. This act will address many aspects of the maritime sector and sets the first specific legal provisions relating to maritime drones.

Another highly topical issue is the entry into force of the SOLAS requirements regarding the verification of the gross mass of packed containers, on 1 July 2016. These new rules will have substantial impact on operational practices between the parties in the international supply chain involved in the movement of containers by sea. The French decree implementing these rules should be published around May 2106.

Chapter 19

GERMANY

Olaf Hartenstein, Marco Remiorz and Marcus Webersberger¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Germany possesses an efficient and internationally competitive maritime economy of high macroeconomic importance. The maritime economy, with its more than 380,000 employees and annual volume of €50 billion, is one of the most important branches of the German economy. It is characterised by a modern and highly specialised shipbuilding and supply industry, internationally leading shipping companies, and effective port industries and logistics.²

The German commercial fleet consists of about 350 cargo vessels under the German flag with a gross tonnage of about 10.3 million (mainly container and general cargo vessels) and 2,500 cargo vessels temporarily under foreign flags with a gross tonnage of about 64 million (mainly under the flags of Liberia or Antigua and Barbuda). The German commercial fleet holds a market share of nearly 9 per cent and is the youngest, most modern and one of the largest commercial fleets in the world. With about 4.8 million TEUs, German container ships supply about 25 per cent of the container ship capacity worldwide.

German shipowners employ about 71,000 seafarers on board their ships and about 24,000 employees ashore. German sea ports handle an annual cargo volume of 300 million tonnes and provide 300,000 jobs. German shipyards have generated an annual volume of between €4 billion to €7 billion over the past four years and have employed 16,000 to 19,000 workers. The German shipbuilding industry holds a good market position in the area of passenger and cruise ships, yachts, modern ferries and special ships of any kind. They are also engaged in the construction of offshore platforms.

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2 The following numbers have been issued by the German Ministry of Economics and the Federal Maritime and Hydrographic Agency.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The German maritime trade law is mainly codified in Book 5 of the German Commercial Code (HGB).³ On 25 April 2013 the reform of German maritime trade law came into force, including some modifications to transport law in general. The main purpose of the reform was to modernise and adjust German maritime law to today's economic conditions. Besides the HGB, applicable maritime law can be found in various national statutes and international conventions. The numerous international conventions that apply under German law are either incorporated in the HGB or apply directly, depending on their regulatory content.

III FORUM AND JURISDICTION

i Courts

Shipping disputes are litigated within the system of ordinary courts; there are no special courts for shipping disputes. Within the system of ordinary courts, however, there are chambers of commercial law, which consist of one professional judge (chairman) and two honorary judges (merchants or business executives) as 'commercial judges'. These chambers within the regional courts deal exclusively with commercial matters and thus have a more comprehensive knowledge of these subjects.

ii Arbitration and ADR

The German Maritime Arbitration Association (GMAA) provides a set of arbitration rules for arbitration in all maritime matters. Since its founding in 1983, dispute resolution under the GMAA is the most common form of arbitration for shipping-related matters in Germany. The GMAA is in close contact with the LMAA, the SMA and other important organisations for maritime arbitration, especially via the ICMA Conferences. Under the GMAA rules, as there are no restrictions as to the choice of arbitrators (no *numerus clausus*), parties can always nominate the most qualified arbitrators. Another major advantage of a GMAA procedure is the time and cost factor. The fact that there is no 'discovery' and significantly shorter oral proceedings streamline the arbitration and save both time and money.

iii Enforcement of foreign judgments and arbitral awards

Foreign judgments and arbitral awards can be enforced in Germany if they are recognised by a German court in line with Section 328 and Section 1061 of the German Code of Civil Procedure.

The acceptance of a foreign ruling is determined by Regulation (EC) No. 44/2001 of 22 December 2000 (Brussels I) for rulings from EU Member States. For rulings issued in proceedings which have been instituted on or after 10 January 2015 the new Brussels I Regulations (Regulations (EU) No. 1215/2012) will apply. The Lugano Convention of 30 October 2007 applies subsidiary for rulings from countries of the European Free Trade Association. If the acceptance of a foreign ruling is not determined by these international regulations, the main condition for the acceptance in accordance with Section 328 of the

3 The revised Commercial Code, published in the Federal Law Gazette, Part III, Section 4100-1, as amended by Article 1 of the Act of 20 April 2013 (Federal Law Gazette, p. 831).

German Code of Civil Procedure is that the foreign state basically provides equivalent conditions for the enforcement of a ruling of similar nature. The acceptance of a foreign arbitral award is based upon Section 1061 of the German Code of Civil Procedure, which simply refers to the New York Convention. Based upon the reference in Section 1061 the Convention also applies in relation to arbitral awards of non-party states.

IV SHIPPING CONTRACTS

i Shipbuilding

A shipbuilding contract is considered to be a contract for the sale of goods by virtue of Section 651 of the German Civil Code. As shipbuilding contracts are subject to general sales provisions, the parties to such contract have to customise their contractual agreements to comply with the specific requirements and complexities of a shipbuilding contract. After completion of the building process the buyer is obliged to examine the vessel immediately after its delivery and give notice of discovery of any defects. If the buyer fails to do so, its claims for defects are considered as precluded.

As to choice of law clauses in a shipbuilding contract, the applicable law can be freely chosen by the parties, even if the law governing property rights and other rights *in rem* is governed by the law of the country where the ship under construction is registered. There are no special courts for shipbuilding matters; however, parties always almost agree on the jurisdiction of the courts of Hamburg or Bremen, or choose arbitration.

ii Contracts of carriage

Under German law there is a distinction between contracts for the carriage of goods by sea and charter contracts. Contracts for the carriage of goods by sea are regulated in Sections 481 to 535 of the HGB while charter contracts are regulated in Sections 553 to 569 of the HGB.

Contracts for the carriage of goods by sea

German law distinguishes between contracts for the carriage of general cargo and voyage charter contracts. Even if the voyage charter closely resembles a charter contract, it is thought of as a contract of carriage, which means international conventions also apply.

Contracts for the carriage of general cargo⁴

The contract for the carriage of general cargo is the fundamental contract type for the carriage of goods by sea. By virtue of such contract, a carrier is obliged to transport the goods to their destination and to deliver them to the consignee. Therefore, the carrier has to ensure that the vessel is in seaworthy condition and properly furnished, equipped and manned, and sufficiently supplied.

The parties to a contract for the carriage of general cargo may only diverge from the statutory provisions regarding the carrier's liability if they negotiate their particulars

4 Sections 481 to 526 of the HGB.

individually. Thus a divergence by standard terms and conditions is not possible. As a result, 'period of responsibility clauses'⁵ in standard terms are no longer valid under the new German maritime trade law in force since 25 April 2013.

Even though a divergence from the statutory provisions regarding the carrier's liability is not possible, carriers and freight forwarders used to operate under the German Freight Forwarders' Standard Terms and Conditions (ADSp) in order to deviate from other mandatory provision. From 1927 until 2015 the ADSp have been jointly issued by shippers and carriers and thus reached a high penetration of the market. However, during the negotiation regarding the 2016 version of the ADSp, shippers and carriers did not find an acceptable compromise any more. Thus, since January 2016 there have been two sets of standard terms and conditions: carriers include the ADSp 2016 and shippers include the German Transport and Storage Conditions (DTLB). As a consequence, shippers and carriers need to carefully check which terms and conditions are applicable to their contract.

Voyage charter contract⁶

By virtue of the voyage charter contract the carrier is obliged to carry goods to their destination, in one or more specified voyages by sea, using either the whole of a specified vessel, a proportion of a specified vessel or a specifically designated space within such vessel, and to deliver the goods to the consignee. The provisions for such contracts are basically those applicable to voyage charter contracts. As the provisions of the voyage charter contract are modifiable, these contracts are *de facto* regularly based upon international standard terms like Gencon, Baltime or NYPE-C/Ps. Thus, the applicable law is nearly always determined by choice-of-law and jurisdiction clauses.

International conventions regarding the carriage of goods by sea

Germany signed the Hague Rules in 1924 and incorporated their provisions into the HGB. Thus the Hague Rules do not apply directly but are applicable via the HGB.

Germany has not signed the Hague-Visby Rules. Nevertheless, these provisions were also implemented by incorporation into the HGB.

Germany has neither signed the Hamburg Rules nor the Rotterdam Rules, so these conventions do not apply directly, indirectly or by incorporation.

Transport documents

The provisions for accompanying documents have also been revised with the reform of German maritime trade law. For the first time, the law mentions the sea waybill beside its provisions concerning bills of lading.

The bill of lading constitutes an independent contractual relationship between the issuing carrier and the *ablader* (i.e., the person who delivers the goods for transportation to the carrier) and certifies the claims by virtue of a contract for the carriage of goods by sea of its entitled owner. A bill of lading gives rise to the presumption that the carrier has taken over the goods in the state described therein. In the event that this description refers to the contents of a closed article of transport, the bill of lading only establishes this presumption if the carrier

5 'The carrier shall in no case be responsible for loss of or damage to cargo arising prior to loading or after discharging.'

6 Sections 527 to 535.

has inspected the contents and the results of said inspection have been recorded in the bill of lading. This new rule in Section 517 I of the HGB implies that ‘unknown’ clauses are no longer necessary under German law. Additionally, it is no longer possible to incorporate the provisions of the contract of carriage into the bill of lading by mere reference, as Section 522 I 2 of the HGB states that any agreement to which the bill of lading merely makes reference is not incorporated into the bill of lading. Furthermore, an identity-of-carrier clause is void under German case law.⁷

Section 526 of the HGB gives the carrier the right to issue a sea waybill instead of a bill of lading. A sea waybill serves as *prima facie* evidence of the conclusion and content of the contract for the carriage of general cargo, as well as of the fact that the carrier has taken over the goods.

Charter contracts

Due to the reform of German maritime trade law, charter contracts for vessels have been statutorily regulated for the first time. The law distinguishes between bareboat and time charter contracts. While bareboat charter contracts are mainly assigned to the common provisions of rent in the German Civil Code the time charter is defined as a charter contract *sui generis*; however, both contract types have in common that they are *de facto* governed by the established charter forms, such as NYPE C/P or Baltime C/P, as the provisions for charter contracts are modifiable.

iii Cargo claims

Legal liability

The rules relating to the liability for loss or damage are based on the model of the Hague Rules and the Hague-Visby Rules. Accordingly, the carrier is liable for any damage resulting from the loss of or physical damage to the goods occurring while in its custody (Section 498 of the HGB). This liability is created as liability for presumed fault. The carrier is only released from this liability insofar as the loss of or physical damage to the goods was due to circumstances that could not have been avoided by a prudent carrier exercising due care. These circumstances have to be proven by the carrier in order to free himself of its liability. If the goods were carried by a vessel that was not in seaworthy or cargoworthy condition, and if the facts of the case indicate a likelihood that the goods were lost or physically damaged due to the ship’s lack of seaworthiness or cargoworthiness, the carrier is released from its liability only if it can prove that the lack of seaworthiness or cargoworthiness could not have been discovered before commencement of the journey by a prudent carrier exercising due care.

German maritime trade law does not contain special provisions for damages caused by delay. Thus, the general provisions for delay of the German Civil Code apply. As the statutory limitation of liability is only applicable in the event of loss or damage to the goods, damages caused by delay have to be compensated without any limitation.⁸ Of course, the carrier’s liability for damages caused by delay can be contractually limited or excluded, even though a universal exclusion will not be considered as valid, if such exclusion is contained in general terms and conditions and applies to damages caused by gross negligence as well.⁹

7 BGH Urteil v 12 February 2007 – I ZR 40/04, TranspR 2007, 119.

8 Czerwenka, *Das Gesetz zur Reform des Seehandelsrechts* (2013), Section 505, Rn.1.

9 HansOLG Hamburg, TranspR 2012, 382.

Where the carriage is performed, in whole or in part, by a third party who is not the contractual carrier, that third party (performing or actual carrier) is liable in the same way as the contractual carrier for any damages resulting from the loss of or physical damage to the goods. As a result terminal and port operators might be liable as 'performing carrier'.

Notice of claim and prescription

The consignee or shipper has to notify the carrier on delivery of the goods if they are externally apparently damaged or incomplete, and within three days of delivery if such damage or incompleteness was not immediately externally apparent. Otherwise, there is a presumption that the goods were delivered in their entirety and in undamaged condition. Goods are considered lost if delivery has not taken place within a period twice as long as the agreed delivery period.

Liability claims become time-barred after one year, beginning on the date on which the goods are delivered or, failing such delivery, on the date they should have been delivered. The limitation period for recourse claims of an obligor of a liability claim, however, begins on the day on which the judgment against the recourse claimant becomes final and non-reviewable or, in the event no legally final and non-reviewable judgment exists, on the day on which the recourse claimant has satisfied the claim. This does not apply if the recourse debtor was not informed of the damage within three months of the recourse claimant becoming aware of the damage and of the recourse debtor's identity. Claims for damages caused by delay however, will only become time-barred after three years in accordance with the general provisions of the German Civil Code. This limitation period commences at the end of the year in which the claim arose.

iv Limitation of liability

Exclusion of liability

Besides the general exclusion of liability for carriers exercising due care, a carrier is not liable for damages excluded in Article 4, Section 2 of the Hague Rules, which is incorporated in Section 499 of the HGB. In addition to the provisions of the Hague Rules there is also an exclusion of liability for the carriage of live animals; however, under the newly amended HGB there is no longer an exclusion of liability for error in navigation or fire or explosion on board the ship.

Limitation of liability

In general, the carrier has to compensate the value of the goods. Insofar as the carrier is liable to pay compensation for the total or partial loss of goods, the amount is calculated by reference to the value that the goods would have had if they had been delivered in due time at the destination contractually agreed. As regards physical damage to the goods, the measure of the damages payable is the difference between the value of the damaged goods at the place and time of delivery and the value the goods would have had at the place and time of delivery had they not been physically damaged.

Nevertheless, the carrier's liability is limited in Section 504 of the HGB in accordance with Article 4, Section 5 of the Hague-Visby Rules to the amount of 666.67 SDRs per package or per unit, or to the amount of 2 SDRs per kilogram of the goods' gross weight, whichever is higher. Insofar as a container, pallet or any other article of transport is used to consolidate cargo units, each package and each unit listed in an accompanying document as being contained in a given article of transport is seen as a 'package' or 'unit'. However, if

the accompanying document has not been issued by the contractual carrier, the information regarding the number of packages provided in such document by the actual carrier cannot be attributed to the contractual carrier.¹⁰

Notwithstanding these regulations, the liability of a carrier is unlimited in the event that the goods were loaded and stowed on deck in the event that the carrier had agreed with the shipper or the *ablader* that the goods were to be carried below deck, or the damages were caused by an act or omission of the carrier, done with the intent of causing such damage, or recklessly and with knowledge that such damage would likely result.

V REMEDIES

i Ship arrest

In principle under German law, there is no special regime for vessel arrests and so the general rules for conservatory measures of the German Code of Civil Procedure apply. Within these general provisions, there are some regulations with special reference to ship arrests that alter the general rules. Most importantly, the reform of German maritime trade law altered the requirements for ship arrests theoretically making the arrest of a vessel easier and far less risky than before as, according to the wording of the new law, the need for grounds for the arrest has vanished in the case of ship arrests. However, in recent commentaries on the German Civil Procedural Code¹¹ it is argued that the requirement for grounds for the arrest was removed only in respect of maritime liens. As a judge dealing with an arrest case might not be very experienced in respect of arresting vessels and might have a look into these commentaries, it is quite possible that a judge would still argue that there has to be an arrest ground.

Germany is a member of the Arrest Convention of 1952 (but not of the 1999 Convention), which applies directly. If the Arrest Convention applies, only maritime claims as listed in its Article 1 of the Convention may justify the arrest of a vessel. Outside the Convention any claim for money or any claim that may turn into a claim for money may justify an arrest. The further preconditions are the those of German procedural law.

Under German law, the assets of a debtor can only be attached if the creditor holds a legal title (e.g., an enforceable judgment or arbitration award). The arrest is an exception to this rule, but for conservatory purposes only. Therefore, the creditor has to bring *prima facie* evidence that it has a claim against the owner of the vessel or the bareboat or demise charterer.

The objective of an arrest may only be an item legally (not beneficially) owned by the debtor. Therefore, if the debtor (the same legal entity) legally owns more than one ship, all of its ships are 'sister ships' and can be the object of an arrest. There are two exceptions to the principle that the arrested item must belong to the debtor: first, if the creditor has a claim against the ship, which gives it a maritime lien in accordance with Section 596 of the HGB, an arrest is possible notwithstanding the fact that the debtor may no longer be the actual owner; second, as a result of the fact that, according to Section 477 of the HGB, a bareboat or demise charterer is regarded as the owner of a vessel, the arrest of a vessel is also possible for claims against the bareboat or demise charterer (but not against a time charterer).

The arrest application is to be filed either in the court that has jurisdiction for the main proceedings or (most common) in the local district court in which the vessel is located.

¹⁰ HansOLG Hamburg, MDR 2012, 720.

¹¹ Zöller, Section 917, Rn. 19; Thomas/Putzo, Section 917, Rn. 5.

These courts are not specialised in maritime matters, but staffed with ordinary judges (who usually deal with rather minor affairs). After the filing of a justified application form, the court will render the relevant arrest order (normally, without an oral hearing). Along with this order the court will rule out a certain period of time within which the applicant has to pursue the claim on its merits.

The arrest order is executed at the request of the arrest applicant by the competent bailiff who takes possession of the ship. Enforcing the arrest upon a vessel is inadmissible where the vessel is travelling and not lying at harbour. Further, the execution of the arrest order must take place within one month of its date of issue. In addition, the arrest must be served upon the debtor within one week of its execution, which can now (since the reform) be accomplished by serving the order on the captain onboard the vessel.

In the event of a wrongful arrest or an expiration of the time fixed by the court to start main proceedings, there is strict liability of the arrest applicant for all damage suffered by the vessel owner because of the arrest. For this liability, no negligence or bad faith is required on part of the applicant.

An arrest can be lifted if the defendant provides the applicant with the amount fixed in the arrest decision as a security. The security can either be provided in cash or transferred to the account of the court or be in form of a bank guarantee. As this security safeguards the applicant's rights it should cover the claim plus interest and costs.

As for the deposit of a counter-security, the decision on whether the applicant has to supply security and if so, to what amount, is at the discretion of the court. In practice, courts almost always ask for such security. Whether this will change in the light of the recent reform – as has been argued by some commentators – remains to be seen. Therefore, when preparing an arrest it is wise to argue that no counter-security may be requested but to nevertheless be prepared to arrange quick bank transfers or guarantees.

ii Court orders for sale of a vessel

To effect the judicial sale of a German ship, the ship has to be located in a German port. The creditor then has to apply to the district court for enforcement. Upon receipt and publication of an expert opinion on the value of the vessel, the court will set an auction date. At the auction, anyone can bid provided it can provide evidence of ability to pay the bid. A judicial sale will dispose of all third-party rights *in rem* according to German law. This effect should be recognised by other jurisdictions (in particular EU Member States); however, for some jurisdictions, the risk of third-party rights *in rem* or arrest remains.

The proceedings of a judicial sale will last a minimum of four months from application, depending on how quickly the court processes the matter and the expert report is available. A private sale is possible, but is accompanied by the risk that third-party rights *in rem* will not be affected by it. In addition, a judicial sale for foreign vessels can only be effected in Germany if the debtor has the ship in its proprietary possession.

VI REGULATION

i Safety

Regarding ship safety, the rules of the ISPS Code, the ISM Code and SOLAS apply under German law.

ii Port state control

Germany is member of the 1982 Paris MoU. The new inspection regime under the Paris MoU came into force on 1 January 2011. Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port state control has been transposed into German law. Ships are chosen for inspection in accordance with the criteria of the Paris MoU and European port state control guidelines. The competent authority for the execution of port state control in Germany is the Ship Safety Division of the Professional Association for Transport and Transport Economics.¹²

iii Registration and classification

The German shipping registry is composed of the shipping registers of ocean-going ships (first register) and the International German shipping register (GIS) (second register). As there is no central German first register, ocean-going ships are maintained by the registers of the district courts, depending on the home port of the ship; however, the GIS is a central register, maintained by the Federal Maritime and Hydrographic Agency.¹³

A German-owned ocean-going ship of 15 metres in length or more must be registered on the register of its home port (first register). A German-owned ocean-going ship remains registered in the first register even if changing temporarily to a foreign flag under a bareboat registration.¹⁴ Mortgages on ships in the first register can also be registered and remain registered even if the ship is flagged out under a bareboat registration. A registration in the GIS (second register) is not mandatory. Every German-flagged ship that operates in international trade can be registered in the GIS, allowing different employment and social security rules to apply.

Germanischer Lloyd, a German classification society with a good international reputation, merged with the Norwegian classification society Det Norske Veritas to form DNV GL in 2013. DNV GL's classification department is still seated in Hamburg. With regard to the liability of classification societies under German law, there are no special maritime provisions regarding such liability. Thus, a classification society is liable to its principal in accordance with the regulations of the German Civil Code regarding contractual liability. The liability towards third parties, however, is more complicated and based on the existence of a special relationship of trust. Thus, the question of whether a classification society can be held liable by a third party has to be assessed on a case-by-case basis.

iv Environmental regulation

Germany is party to MARPOL, and has also ratified the Anti-Fouling Convention and the International Convention for the Ballast Water Management Convention. Additionally, the ISMBC Code, the IMDG Code and the IBC Code apply in Germany.

12 www.bg-verkehr.de/ship-safety-division/psc.

13 www.deutsche-flagge.de/en/german-flag/registration?set_language=en.

14 www.deutsche-flagge.de/en/german-flag/registration/ships-register.

v Collisions, salvage and wrecks

Germany is member of the Collision Convention 1910, the Collision Convention 1952, the Colregs and the Nairobi WRC 2007. The London Convention has been incorporated into the HGB and so is also applicable under German law.

vi Passengers' rights

German law contains regulations regarding contracts for the carriage of passengers and their luggage in Sections 536 to 552 of the HGB. These provisions have been modelled on Regulation (EC) 392/2009 of 23 April 2009 (the Athens Regulation) and the Athens Convention. The Athens Regulation applies also directly and supersedes domestic law. The Athens Convention is not in force in Germany. The regulations regarding contracts for the carriage of passengers and their luggage in the Commercial Code are restricted to the liability of the carrier towards the passengers. Beyond that, the general provisions of the Civil Code apply.

vii Seafarers' rights

Germany has signed the Maritime Labour Convention 2006 (MLC). The MLC was implemented in the Maritime Labour Act of 2013, which contains special regulations for maritime labour law. Additionally, general labour law provisions apply where no special regulations exist. Further, SOLAS and the STCW apply under German law.

VII OUTLOOK

Germany reformed its maritime trade law with effect from 25 April 2013. This reform had been demanded and anticipated for a long time, as the former German maritime trade law was long since outdated. The new law revises the statute law to today's standards and brings it into line with the needs of the maritime economy. As such a major reform has just been effected, there are, at this moment, no further major legislative projects in prospect. One issue that the German legislator will have to deal with in the coming years is whether the Rotterdam Rules will one day be adopted. For the time being, Germany has not signed that Convention but rather continues to observe the approach of the other states with major maritime industries.

Chapter 20

GREECE

Paris Karamitsios, Richard Johnson-Brown and Dimitri Vassos¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

At least for the past four decades Greece has been at the top of the list of shipowning countries globally. Greek interests control approximately 23 per cent of the world's total merchant fleet. In terms of kinds of ships, Greeks rank at the top four for all kinds, being first for bulk carriers and tankers. In 2015 the Greek-owned merchant fleet measured a total DWT of 334,649,089 tons and 5,226 ships, being almost 50 per cent of the EU fleet. Although the dramatic drop of the freight market has negatively affected newbuildings, there is still a significant number of new vessels on order by Greek interests from (mostly Far Eastern) shipyards.

As a result, there are well over 1,500 offices established in Greece that are active in ship management, ship brokerage (sale and purchase and chartering) and other shipping activities, making the shipping sector one of Greece's major industries; perhaps second only to tourism.

The cargo import and export activities of Greek ports are not substantial, but the port of Piraeus is rapidly climbing the rankings of busy container terminal ports, mainly because it is used by COSCO and MSC as a hub; in fact COSCO has just purchased the majority share of the Port of Piraeus. The other two significant ports are Thessaloniki (also becoming more active in the recent years) and Patras (the latter mainly as a ferry port and main eastern gateway to the trans-Adriatic liner trade).

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II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The Code of Private Maritime Law (CPML) regulates private shipping law matters in Greece (such as crew claims, collisions, salvage and time bars, etc.). In parallel, the Code of Public Maritime Law regulates public shipping law matters, such as ship registries, the obligations of vessel masters and the duties of pilots. Numerous presidential decrees and ministerial decisions regulate specific maritime issues, such as Greek ports.

Greece has also ratified a number of international maritime conventions, which supersede the CPML to the extent that they contravene its provisions. The most important maritime conventions that apply in Greece are as follows:

- a* the Collisions Convention;
- b* the Hague-Visby Rules;
- c* the Salvage Convention 1989;
- d* the Arrest Convention 1952;
- e* the Athens Convention; and
- f* the LLMC Convention 1976 (including the 1996 Malta Protocol).

III FORUM AND JURISDICTION

i Courts

Shipping cases relating to the region encompassing Athens and Piraeus (i.e., the Prefecture of Attiki) are litigated before the Shipping Division of the Piraeus Court of First Instance or the Court of Appeal of Piraeus. The vast majority of shipping-related cases in Greece are litigated in Piraeus. Even if a shipping case does not have any link to Athens or Piraeus, the plaintiff has the option to litigate it before the maritime division of the Piraeus Court, instead of the otherwise local competent civil court.

The following claims have a limitation period of one year, starting at the end of the year during which the claim arises:

- a* claims relating to crew wages;
- b* owners' claims against the master and the crew arising from tortious actions committed by them;
- c* claims arising from the provision of supplies to (and works carried out) on ships relating to repair or to shipbuilding contracts;
- d* claims arising from charterparties or contracts for the carriage of passengers or the transportation of goods;
- e* general average; and
- f* collision claims (in case the preconditions for the application of the 1910 Brussels Collision Convention, which provides for a two-year limitation period, are not fulfilled).

The limitation period for the following claims is two years, starting at the end of the year during which the claim arises:

- a* claims between co-owners of a ship or against the ship's manager arising from the exploitation or the management of the ship;
- b* insurance claims;
- c* salvage claims; and
- d* claims against a shipbuilder in respect of its work on a ship.

To the extent that the international conventions apply, the provisions of the conventions supersede the provisions of the CPML (e.g., in salvage or collision claims).

ii Arbitration and ADR

Arbitration is not widely used in Greece. The two main tribunals that resolve maritime disputes are the Piraeus Association for Maritime Arbitration and the arbitration body of the Hellenic Chamber of Shipping. Both associations operate from Piraeus, and each has its own rules. The vast majority of maritime cases are litigated in the Piraeus courts and not in arbitration. No special limitation periods apply to arbitration proceedings.

Mediation centres operate in the major lawyers' bar associations, such as the Piraeus Bar Association. As mediation has only recently been introduced into the Greek legal framework, it is not yet widely used.

iii Enforcement of foreign judgments and arbitral awards

To enforce a foreign judgment in Greece, the following conditions need to be fulfilled:

- a* the judgment must be enforceable in the country in which it was rendered;
- b* it must not be contrary to Greek public policy and to good morals;
- c* the defendant must have had the opportunity to participate in the proceedings;
- d* the court that rendered the judgment must have seized jurisdiction over the dispute; and
- e* there must be no contradictory Greek judgment in the matter.

Greece has adopted the New York Convention. The Piraeus Court of First Instance declares a number of foreign judgments and awards enforceable in Greece each year.

IV SHIPPING CONTRACTS

i Shipbuilding

Greece does not have a significant shipbuilding industry and only a very few small vessels are built in Greece each year (usually special purpose vessels for local use, such as ferries and patrol boats). There are no notable local laws regulating shipbuilding contracts. That said, a ship may be registered while under construction.

ii Contracts of carriage

The Hague-Visby Rules apply compulsorily to bills of lading or other documents of title and local carriages by sea between Greek ports, regardless of whether a bill of lading is issued. Greece has not ratified the Hamburg Rules or the Rotterdam Rules.

Vessels that do not sail under an EU flag are still not allowed to transport passengers, vehicles or cargo between Greek ports in liner services; only Greek-flagged tugs are allowed to offer port towage services and salvage and wreck removal services within Greek territorial waters.

Under Greek law, maritime claims do not 'attach' to the vessel in the same way as maritime liens in other jurisdictions and the vessel cannot be sued *in rem* by a creditor. Where the previous owner of a ship owes a debt to a creditor, the creditor can, however, sue the new owner of the ship in personam provided that the circumstances of the sale of the ship have a sufficient link to Greece (e.g., the ship was sold from one Greek interest to another or the ship

is managed by Greek offices before and after the sale). This principle applies even if the ship was transferred under a memorandum of agreement subject to English law and jurisdiction. If the creditor is entitled to claim against the new owner under Greek law, the new owner's liability towards the creditor is limited to the price at which it purchased the ship.

There is no automatic right to lien under a bill of lading contract. The carrier cannot exercise a lien on cargo for non-payment of freight (nor demurrage, deadfreight, etc.). The carrier can, however, apply to the court for the following:

- a* cargo to be held by a trustee until freight is paid; and
- b* the sale of cargo (in the case of perishable cargoes).

The shipper is obliged to pay freight and all other charges of the voyage (such as demurrage) provided that it has such contractual obligation towards the carrier. It is also deemed as having guaranteed to the carrier the accuracy, marks, number, quantity and weight of the cargo at the time of shipment. The shipper must indemnify the carrier against all loss, damage and expenses resulting from inaccuracies in such particulars.

There is no legislation in Greece specifically regulating multimodal bills of lading. The Greek courts accept the validity of multimodal bills of lading and consider that they have the same functions as 'port-to-port' bills of lading. A multimodal bill of lading is therefore evidence of loading or receipt of the cargo, the contract of affreightment, and a document of title.

iii Cargo claims

As a matter of principle under Greek law, if cargo is lost or damaged during sea carriage, the party entitled to claim in its own name is the shipper who entered into the contract with the carrier.

If, however, the original bill of lading was issued to the order of a consignee (or has been endorsed by the shipper to the consignee) and the latter has the original bill of lading, the consignee will be entitled to claim in its own name. The same applies to other legal holders of the bill of lading (e.g., other parties who bought the goods from the consignee) provided that they can establish their rights as legal holders of the bill of lading with an unbroken chain of lawful endorsements (or assignments – see below).

If the insurer compensates the legal holder of the bill of lading for losses sustained as a result of lost or damaged cargo, the insurer is subrogated to the rights of the assured and is entitled to claim in its own name against the carrier.

The cargo's pledgee or the assignee of the consignee's rights are entitled to sue the carrier provided that they are legal holders of the bill of lading. The shipper or charterer is also entitled to sue the carrier for damage or losses to the cargo if:

- a* it is the legal holder of the bill of lading;
- b* when it endorsed the bill of lading to the consignee or another third party, it bore the risk of the transportation (e.g., in a cost, insurance and freight sale); and
- c* it has compensated the consignee or legal holder of the bill of lading for the relevant loss or damage and subrogated to the rights of the legal holder of the bill of lading.

References in the bill of lading to the terms of a charterparty are binding on the receiver provided that:

- a* such terms are appropriate as between the carrier and the receiver; and

b the bill of lading incorporates specified terms of the charterparty and does not purport to incorporate all of the charterparty terms in general.

'Congenbill' bills of lading are, however, deemed to automatically incorporate all terms of the charterparty.

The party that has agreed to carry the goods is deemed the carrier. If the shipowner has not entered into an agreement with the shipper to carry the goods and such agreement was made between the shipper and the charterer, only the charterer (and not the shipowner) is deemed the carrier.

The demise charterer is deemed to be the carrier if it agreed to carry the goods. In the event that it is not clear from the bill of lading whether it has been issued on behalf of the shipowner or the charterer, the shipowner is deemed the carrier provided that:

- a* it has full control over the vessel and has not assigned the vessel to the charterer (e.g., by authorising the charterer to employ the master and the crew); or
- b* there is an agreement between the shipowner and the demise charterer that the latter has full control over the vessel but the shipper or the legal holder of the bill of lading, acting in good faith, is not aware of such an agreement.

A demise clause is invalid, because it is contrary to Article 3(8) of the Hague-Visby Rules.

iv Limitation of liability

In accordance with the Hague-Visby Rules, the carrier is entitled to limit its liability either by unit (666.67 SDRs per unit) or by weight (2 SDRs per kilogram), whichever is higher. The limitation limits set out by the Malta Protocol 1996 following the LLMC Convention, as well as the OPRC Convention, also apply.

V REMEDIES

i Ship arrest

Under Greek law, the arrest of a vessel is carried out in two stages: the first stage by the issuance of a provisional order and the second stage by the issuance of a judgment following a security measures hearing.

To obtain an arrest order, the applicant must file a security measures application demonstrating to the court that it has a *prima facie* claim against the defendant debtor and that, unless security measures (i.e., an arrest) are ordered, it runs the risk of not being able to satisfy its claim in the event that it obtains a favourable court decision or award.

Filing a security measures application does not interrupt any time bars under Greek law. Separate substantive proceedings must be pursued before the competent court or tribunal in Greece or abroad.

Upon filing the application, the court gives the defendant at least 24 hours' notice of an informal hearing to consider the application. At the informal hearing, the parties' arguments are presented orally and the court will decide on the spot or within a short time thereafter whether to issue a provisional order. The provisional order will remain in force until the application is heard by the court and, in most cases, until judgment is rendered on the application.

In exceptional cases (e.g., if there is an imminent danger that by summoning the defendant to attend the hearing the vessel will sail from the court's jurisdiction), the applicant may request a provisional arrest order without summoning the defendant (*ex parte*). In such

case the court may grant a provisional order (without first hearing the defendant's arguments), which will remain in force for a few hours or a working day for the purpose of preventing the vessel from leaving the jurisdiction. Thereafter, the defendant is summoned to present its defence and the court decides whether to uphold the provisional order or revoke it.

Following the issuance of the provisional order, the court schedules the hearing date of the security measures application. In Piraeus (which issues the largest number of arrest orders in Greece), the hearing date is usually three to four weeks later and the applicant must formally summon the defendant to attend the hearing.

During the hearing the parties examine their witnesses (usually one witness is allowed for each party). Within one to three working days the parties usually submit their written pleadings and all evidence in support of their position (documents, affidavits etc.). Within approximately one to two months, the court issues its judgment on the arrest application. The judgment is final and unappealable and can be revoked only if new facts arise thereafter that are material to the case.

Any arrest order can be lifted by the defendant depositing with the court a bank guarantee letter issued by a bank operating in Greece, securing the applicant's claim up to the amount ordered by the court. Usually the Greek courts do not order the arrestor to provide counter-security, although this is a matter for the courts' discretion.

The arrestor must commence substantive proceedings against the owner of the vessel before a competent court or tribunal in Greece or abroad within 30 days, starting from the date of service of the security measures judgment on the defendant or owner, ordering the conservatory attachment of the vessel, otherwise the arrest will be revoked.

An arrest is deemed wrongful and set aside if the arrestor has obtained the arrest order by submitting fraudulent evidence.

Under Greek law it is extremely difficult to obtain an associated arrest as this involves piercing the corporate veils of the shipowning companies involved – a very difficult exercise under Greek law.

The arrest of a vessel's bunkers is possible provided that the arrestor has a claim against the owner of the bunkers. Arrest orders are enforced by the port authority while the vessel is in a berth or anchored at roads provided that the port authority has a boat available to enforce the arrest at the anchorage. Arrest by helicopter is not practicable.

ii Court orders for sale of a vessel

Judicial sales of vessels are carried out by way of public auctions. The enforcement procedure commences as soon as the creditor of the vessel's owner obtains an enforceable title against the owner (usually a final and unappealable judgment or a provisionally enforceable judgment in exceptional cases, such as in crew claims).

The claimant must first serve the enforceable title on the owner of the vessel. If the owner does not pay the awarded amount within 24 hours, the court bailiff attaches the vessel and schedules its auction at a date at least 40 days from the date of attachment.

The court bailiff sets the first bidding price, which is equal to two-thirds of the vessel's market value at the time of her attachment. Auctions take place before a notary public on Wednesdays (provided that the relevant day is also a working day) at the county court in the district of the vessel's attachment.

The attachment process (as well as the auction) may be delayed by the vessel's owner or by any creditor that is entitled to file an objection against the sale. They are also entitled to request the increase of the vessel's appraised value.

To bid at the auction, a party must file with the notary public a sealed offer and security with the notary public (in the form of cash, bank guarantee letter or bankers' draft) equal to 30 per cent of the amount of the starting bid of the auction.

Once the sealed offers are opened, the vessel is awarded to the highest bidder. If two or more bidders make the same highest bid, then they continue to bid. The vessel is awarded to the highest bidder who should pay the purchase price (in excess of the amount of the security which is retained by the notary) within 15 days of the auction. Each party having a claim against the vessel's owner is entitled to file a claim with the notary public, five days before the auction at the latest. Thereafter, the notary public drafts the adjudication list (at the latest within two months after the auction), to which the other creditors have a right to object.

On distributing the sale proceeds, the following claims will be deemed to be privileged and will have priority above all others:

- a* legal costs incurred for the common benefit of the creditors, dues and charges incurred by the vessel, taxes relating to navigation, dues payable to the Seamen's Pension Fund and fines imposed or to be imposed by the Bureau for the Provision of Marine Employment in favour of the Seamen's Fund for Sick and Unemployed Seamen;
- b* claims of the master and crew arising out of their employment contracts and the costs of guarding and maintaining the vessel from her arrival at the port where the auction takes place up to her auction;
- c* costs payable in respect of marine salvage and the raising of wrecks; and
- d* damages due to vessels, passengers and cargoes as a result of collisions.

Privileged claims have priority over registered mortgages.

In order for a claim to have privileged or priority status, it must have such status both under the law of the vessel's flag and under Greek law. The ranking of the various privileged claims will be determined in accordance with Greek law.

VI REGULATION

i Safety

Greece applies all EU and IMO regulations and international conventions relating to safety at sea. The most important are the following:

- a* the Colregs;
- b* SOLAS and all its protocols and amendments;
- c* the ISM Code; and
- d* EU Regulation No. 1406/2002 establishing a European Maritime Safety Agency as amended by EU Regulation No. 100/2013.

ii Port state control

Greece is a member of the Paris MoU and has implemented the port state control regime. The guidelines of the Paris MoU apply to all ships calling at Greek ports and anchorages, irrespective of their flags.

In 2014, a total of 1,079 inspections were carried out, 750 deficiencies were recorded and 68 detentions were ordered.

iii Registration and classification

All major Greek ports have their own ship registries, kept by the local port authorities. The vast majority of ships under the Greek flag is registered in the port of Piraeus.

The following interests may be registered:

- a* title or transfer of ownership (or both);
- b* ownership of a ship under construction;
- c* the right of exploitation of the ship by a non-owner (usually the bareboat charterer);
- d* mortgages;
- e* arrest orders;
- f* prohibitions against any change in the ship's factual and legal condition (e.g., the right to carry out repairs, sell or encumber the vessel); and
- g* enforcement or auction proceedings against a ship.

To be registered in a Greek ship registry (i.e., under the Greek flag), a ship must be more than 50 per cent beneficially owned by Greek or other EU nationals. Various documents are required for the registration of a ship in a Greek registry, such as:

- a* documents evidencing title of ownership (such as a bill of sale);
- b* documents evidencing that the ship is beneficially owned by Greek or EU interests;
- c* a tonnage certificate; and
- d* a certificate of deletion from the vessel's previous registry (from certain registries) or a letter of undertaking by the new owner that such certificate will be submitted within one month of its registration.

The following classification societies are approved to issue certificates in respect of Greek flag vessels:

- a* the American Bureau of Shipping;
- b* Bureau Veritas;
- c* the China Classification Society;
- d* DNV GL;
- e* Lloyd's;
- f* the Korean Register of Shipping;
- g* Nippon Kaiji Kyokai;
- h* Registro Italiano Navale;
- i* the Russian Register of Shipping;
- j* the Hellenic Register of Shipping;
- k* the International Naval Survey Bureau; and
- l* Phoenix Register of Shipping.

Classification societies can be held liable towards the owners of the ships they monitor if they have breached their contractual obligations towards them. They can also be held liable in tort towards third parties if they have acted negligently in the performance of their duties and such negligence caused loss or damage to the third party (e.g., seamen who suffer injuries because of the ship's defects).

The classification society that monitored a vessel before its sale can be held liable towards the buyers of the vessel under Greek consumer protection laws if it has erroneously described the vessel's condition in her class records.

iv Environmental regulation

Greece has ratified MARPOL, as modified by the Protocol of 1978, as well as Annex I (Prevention of Pollution by Oil), Annex II (Control of Pollution by Noxious Liquid Substances), Annex III (Prevention of Pollution by Harmful Substances in Packaged Form), Annex IV (Prevention of Pollution by Sewage from Ships), Annex V (Prevention of Pollution by Garbage from Ships) and Annex VI (Prevention of Air Pollution from Ships) thereto.

The following conventions have also been ratified by Greece:

- a* the CLC Convention;
- b* the London Dumping Convention;
- c* the Convention for the Protection of the Mediterranean Sea Against Pollution;
- d* the OPRC Convention; and
- e* the Bunker Convention.

According to the data published by the Hellenic Coast Guard, in 2015 there were 17 pollution incidents arising from ships, 41 pollution incidents arising from inland installations and 11 pollution incidents arising from other sources.

v Collisions, salvage and wrecks

Greece has ratified the Collision Convention and the Salvage Convention. Issues relating to wreck removal are governed by Greek law. The owner of a wreck that endangers other vessels (in ports, canals or channels) is obliged to remove the wreck at its own expense, otherwise the authorities are entitled to remove it at the owner's expense. There is no specific regulation on the recycling of shipwrecks.

To the extent that no LOF or other agreement with a foreign jurisdiction clause is signed between the salvor and the owner of a salvaged vessel, salvage cases relating to incidents that take place in Greece are litigated before the Greek courts. The amounts awarded to salvors by the Greek courts are generally considered to be less generous than those awarded in London arbitration.

The conditions for a salvage claim under Greek law are as follows:

- a* assistance is offered to a vessel;
- b* the vessel receiving assistance faces a danger of loss or of sustaining damage. This danger must be real, even if not imminent, but predictable, possible and existing at the time of the offering of salvage services. The existence and extent of the danger are examined by reference to all the facts and circumstances surrounding the particular incident; and
- c* the salvors' actions must have a beneficial result.

vi Passengers' rights

Greece has ratified the Athens Convention and the subsequent 2002 Protocol. The Athens Convention applies only to international carriages when the place of departure and the place of destination are located in two different states, or in a single state if, according to the contract of carriage or the scheduled itinerary, there is an intermediate port of call in another state.

On domestic journeys, the liability of the carrier is regulated by Greek law. In respect of the carriage of passenger vehicles, the Hague-Visby Rules apply instead of the Greek CPML. If a passenger has suffered injury during the carriage that is attributable to the carrier's negligence, he or she is entitled to receive damages (including damages for loss of

income and emotional distress). The passenger is also entitled to recover all directly resulting losses in cases where the accident occurred due to a fault in the ship's command or navigation by the vessel's master.

vii Seafarers' rights

Greece has ratified the Maritime Labour Convention 2006 (MLC) and the Prevention of Accidents Convention, 1970 (No. 134) of the ILO.

A sick or injured seaman is entitled to receive sickness wages for a period of up to four months and may be compensated where he or she suffers a 'labour accident'. This is defined as follows:

- a* an injury that occurs during his or her employment on a ship and by reason of his or her employment; or
- b* an illness that occurs during his or her employment on a ship and by reason of his or her employment while working under extraordinarily harsh conditions that are not appropriate for a seaman, or if the seaman continued working under normal conditions after showing symptoms and (as a result of continuing to work) his or her medical condition worsened.

If a seaman is not fit to work as a result of a labour accident for more than four months, he or she is entitled to compensation in addition to sick pay if he or she has been (at least partly and temporarily) disabled due to the labour accident. This compensation is paid regardless of whether the employer is at fault in respect of the labour accident. The compensation is calculated according to a specific formula based on the seaman's monthly wage (strict liability compensation). If, however, the employer is at fault in respect of the labour accident, it is also obliged to pay compensation for the 'moral suffering' of the seaman due to such accident.

If the labour accident was the result of a breach of safety regulations by the owner, the seaman is entitled to claim for loss of income for the period during which he or she was not fit for work as a result of the accident (in addition to compensation for moral suffering). He or she would not, however, be entitled to claim strict liability compensation in these circumstances.

In the event that the employer's principal place of business is in Greece, the law of the seaman's employment contract does not apply to the extent that it conflicts with the minimum privileges afforded by Greek law. Greek courts tend to calculate damages on the basis of the minimum salaries prescribed by Greek law as opposed to the actual salary that the seaman is entitled to receive under his employment contract.

VII OUTLOOK

In 2013 a Supreme Court judgment examined the requirements for lifting the corporate veil of a shipowning company and the transfer of its debts to its beneficial owner personally. According to this judgment, the circumstances that could result in such a transfer include:

- a* assurances from the beneficial owner of the company to the company's creditors that he or she will personally make the necessary arrangements for the payment of the company's obligations;
- b* commingling of the assets of the company and its beneficial owner;
- c* lack of an actual corporate structure within the ship-owning group; and
- d* insufficient financing of the company by its owner or shareholder.

Greece has during the past few years introduced favourable taxation laws in relation to income deriving from shipping activities. As a result, the income from dividends of shipowning companies deriving from the exploitation or sale of their own ships (whether the ships are flagged in Greece or abroad) is free of any income tax. Ships managed from Greece (including those not under Greek flag), shall pay (in addition to their usual annual tonnage tax) special additional tonnage tax to the Greek state for the next four years by special arrangement between the Greek government and the Union of Greek Shipowners.

Dividends from shipping offices (except ship managers) that are established in Greece under a special regime (known as Law 89) are taxed at a flat rate of 10 per cent. In either case there is no corporate income tax imposed on such shipowning, ship management or other such special regime shipping companies, save for low percentage taxation on the money imported by non-ship management or shipowning special regime shipping companies (such as marine brokers).

Chapter 21

HONG KONG

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I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Hong Kong is currently the fifth-busiest container port in the world behind Shanghai, Singapore, Shenzhen and Ningbo-Zhoushan.² In 2015, the port of Hong Kong handled 20.1 million TEUs of containers and provided about 340 container liner services per week connecting to around 470 destinations worldwide.³ As of March 2016, there were over 2,488 vessels on the Hong Kong Shipping Register (set up in 1990),⁴ totalling over just under 104 million GT,⁵ making it the fourth-largest register after Panama, Liberia and the Marshall Islands.⁶ In addition, Hong Kong has become a major centre for ship management, finance and insurance.

Several factors make Hong Kong attractive.⁷ Since January 2000, Hong Kong-registered ships receive preferential rates for port charges when calling at Chinese ports.⁸ Further, Hong Kong's profit tax rate is modest (16.5 per cent)⁹ and the tax regime is territorial, which means that income derived from the international operation of Hong Kong-registered ships

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2 <http://fairplay.ihs.com/ports/article/4261051/hong-kong-drops-to-fifth-on-list-of-world%E2%80%99s-busiest-container-ports>.

3 www.pdc.gov.hk/eng/facilities/port.htm.

4 The autonomous Hong Kong Shipping Register was set up in 1990. The Hong Kong register, had been in existence for some time before that as a British register.

5 www.mardep.gov.hk/en/pub_services/pdf/mon_stat.pdf.

6 http://flag-news.com/index.php?option=com_content&view=article&id=256&Itemid=198.

7 www.mardep.gov.hk/en/pub_services/reg_gen.html.

8 www.mic.gov.hk/pmb/eng/board/press28.htm.

9 www.gov.hk/en/residents/taxes/taxfiling/taxrates/profitsrates.htm.

is exempted from profits tax. Another consideration is that in recent years Hong Kong has significantly increased the number of its double taxation agreements from just four to over 40, with more under negotiation. One focus of these agreements has been shipping income.¹⁰

In terms of direct economic contribution, in late 2015 there were over 700 companies in Hong Kong offering a wide range of quality and high-value added maritime services, such as ship agency and management, chartering and broking, finance, insurance, maritime law and arbitration and maritime and port industries directly contributed 1.2 per cent (US\$24 billion) to Hong Kong's GDP and 2.5 per cent (92,000 jobs) of the total employment.¹¹ In the past, there was a considerable shipbuilding industry in Hong Kong; however, cheaper labour costs, as well as the high prices of Hong Kong real estate, have led to Hong Kong's shipbuilders moving across the border into mainland China.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The effect of Articles 5 and 8 of the Basic Law of Hong Kong, promulgated on 4 April 1990, is that the laws that existed in 1997 are maintained for 50 years although they can be amended by Hong Kong's Legislative Council (LegCo). Thus, Hong Kong follows the common law system (in contrast with China's civil law system). To the extent that they have not been overridden by Hong Kong case law or by LegCo, pre-1997 English cases remain good law whereas post-1997 English and other common law cases are merely persuasive.

Further, pursuant to Article 153 of the Basic Law, the application to the Hong Kong Special Administrative Region of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region. International agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Special Administrative Region. The Central People's Government shall, as necessary, authorise or assist the government of the Region to make appropriate arrangements for the application to the Region of other relevant international agreements.

As a result, most key international shipping conventions are applicable in Hong Kong.¹²

III FORUM AND JURISDICTION

i Courts

Hong Kong has an Admiralty Court (part of the Court of First Instance).¹³ Admiralty actions are entered in the 'Admiralty List' and prefixed 'HCAJ' and proceedings are governed by Order 75 Rules of the High Court (Chapter 4A). Every action to enforce a claim for damage,

10 www.ird.gov.hk/eng/pol/dta.htm.

11 www.legco.gov.hk/yr15-16/english/panels/e/dev/papers/e/dev20151123cb4-217-6-e.pdf.

12 See, for example, www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx for a list.

13 www.judiciary.gov.hk/en/crt_services/pphlt/html/hc.htm.

loss of life or personal injury arising out of a collision or any breach of the collision regulations is assigned to the Court of First Instance admiralty jurisdiction and the District Court has no jurisdiction to hear such matters even if the claim value (less than HK\$1 million) would otherwise fall within the jurisdiction of the District Court rather than the High Court.¹⁴ The admiralty jurisdiction also includes claims in respect of liability falling on the International Oil Compensation Fund, limitation actions, salvage claims and claims *in rem* for damage done by a ship.

The Limitation Ordinance applies to most maritime claims except collisions, where two years apply (see Section VI.v, *infra*). For claims in contract¹⁵ and tort the time limit is six years from the date on which the cause of action accrued or from the date the damage was suffered, respectively. For personal injury or death claims, the limitation period is three years from the date on which the cause of action occurred.

In shipping disputes there are often conflicts of law and disputes as to the forum in which the claims should be heard. In Hong Kong, where an action is brought *in personam*, the position is generally the same as in non-admiralty proceedings and will depend on whether the plaintiff should be granted leave to effect service on a foreign defendant outside Hong Kong under Order 11 Rules of the High Court.¹⁶ In *in rem* proceedings, no such procedure exists as, generally, it will involve service of a writ on the vessel when it is in Hong Kong territorial waters (i.e., service outside the jurisdiction is not required).¹⁷ Provided that the claim is one that by its nature gives rise to an action *in rem*, service of a writ on the ship is sufficient to found jurisdiction, even in the absence of any other factor connecting the case with Hong Kong.¹⁸ However, even where jurisdiction has been established, through arresting in Hong Kong or service out of the jurisdiction, the court has inherent power to order a stay of proceedings in favour of another jurisdiction if it is a more appropriate forum (see, for example, *Shijiazhuang Iron & Steel Co Ltd*) or where the claim is governed by an exclusive jurisdiction clause,¹⁹ or in favour of arbitration where the relevant contract contains an arbitration clause.²⁰ Anti-suit injunctions will also be granted by the Hong Kong courts, for example, where cargo claimants have commenced proceedings in the country of discharge (e.g., China) in breach of a jurisdiction clause in the relevant contract (e.g., a bill of lading).

14 www.doj.gov.hk/eng/legal/. Note that in August 2015, the Hong Kong Judiciary issued a Consultation Paper on the Review of the Civil Jurisdictional Limits of the District Court and the Small Claims Tribunal. Among other things an increase in the general financial limit of District Court: from HK\$1 million to HK\$3 million was proposed. The increases are likely to be implemented: www.hk-lawyer.org/content/consultation-review-civil-jurisdictional-limits-district-court-and-small-claims-tribunal.

15 Hong Kong has ratified the Hague-Visby convention thus for cargo claims a one-year contractual time bar modifies the statutory limitation period.

16 Halsbury's Laws of Hong Kong Vol. 38: Maritime Law (2013), p. 204.

17 *Ibid.*

18 *Ibid.* In *Shijiazhuang Iron & Steel Co Ltd and others v. Hui Rong Nav Corp SA and other* [2009] 1 HKLRD 144, the Hong Kong Court of Appeal held that 'the founding of jurisdiction as of right usually arises upon an arrest of the ship in question or a sister ship'.

19 *The 'El Amria'* [1982] 2 Lloyd's Rep 28 and *The 'Pioneer Container'* [1994] 2 AC 324.

20 Section 20 of the Arbitration Ordinance (Cap 609).

In such situations, the party seeking an anti-suit injunction should apply for the injunction as soon as possible and in any event avoid ‘culpable and inordinate’ delay, otherwise the injunction might not be granted.²¹

ii Arbitration and ADR

A new Arbitration Ordinance came into force in Hong Kong on 1 June 2011; this incorporates the majority of the UNCITRAL Model Law on International Commercial Arbitration and replaces the previous Arbitration Ordinance, providing a clearer framework. Under Section 14 of the Arbitration Ordinance, the Limitation Ordinance and any other ordinance relating to the limitation of actions apply to arbitrations as they apply to actions in the Hong Kong courts.²² The Arbitration Ordinance is updated from time to time to reflect the latest developments in the international arbitration scene.²³ Thus amendments to Sections 22A and 22B of the new Arbitration Ordinance give the Hong Kong courts power to enforce emergency orders or relief granted by an emergency arbitrator, whether such relief was initially granted by an arbitral tribunal within Hong Kong or elsewhere.²⁴ On 9 July 2015, the Arbitration (Amendment) Bill 2015 was passed; its main purpose was to remove some legal uncertainties about the opt-in mechanism for domestic arbitrations under Part II of the Arbitration Ordinance.

Hong Kong’s main arbitration body is the Hong Kong International Arbitration Centre (HKIAC), which has been designated the appointing body under the Arbitration Ordinance to appoint arbitrators and to determine the number of arbitrators where the parties to a dispute are unable to agree. The International Court of Arbitration of the International Chamber of Commerce (ICC) opened a branch of its Secretariat in Hong Kong in November 2008 to serve ICC arbitration in the Asia-Pacific region. Further, in September 2012, the China International Economic and Trade Arbitration Commission (CIETAC), which handles a large number of international arbitration cases, also established its first office outside the mainland in Hong Kong;²⁵ the China Maritime Arbitration Commission (CMAC) has also set up a branch office in Hong Kong.²⁶ On 4 January 2015, the Permanent Court of Arbitration (PCA) based in the Hague and government of the People’s Republic of China signed a host country agreement and related memorandum of administrative arrangements. This agreement establishes in Hong Kong, a legal framework under which PCA-administered proceedings can be conducted in Hong Kong on an *ad hoc* basis, without the need for a physical presence of the PCA in Hong Kong.²⁷ The PCA is an inter-governmental organisation to facilitate arbitration and other forms of dispute resolution between states. Its dispute resolution services also involve inter-governmental organisations and private parties.

21 *Sea Powerful II Special Maritime Enterprises (ENE) v. Bank of China Ltd*, HCMP 319/ 2015, judgment dated 12 January 2016.

22 Generally, in contract and tort claims, the relevant limitation period is six years from the date of accrual of the cause of action.

23 www.news.gov.hk/en/record/html/2014/02/20140220_151614.shtml.

24 Similar provisions are contained in the HKIAC’s administered arbitration rules.

25 www.doj.gov.hk/eng/public/arbitration.html.

26 www.news.gov.hk/en/record/html/2014/02/20140220_151614.shtml, www.info.gov.hk/gia/general/201411/19/P201411190765.htm.

27 www.info.gov.hk/gia/general/201501/04/P201501040801.htm.

There has been growth in arbitration and mediation in Hong Kong in shipping and maritime disputes in recent years. In 2000, the Maritime Arbitration Group (MAG) was formed as a division of the HKIAC with the specific aim of the promotion of the development and use of maritime arbitration and mediation in Hong Kong. The MAG works in close cooperation with the Hong Kong Ship Owners Association and publishes a list of specialised maritime arbitrators as well as of mediators accredited by the HKIAC and with maritime experience.²⁸ At present, Hong Kong does not have a specialist maritime arbitration procedure, however, we understand that the MAG hopes, with the support of the LMAA, to soon be able to adopt and slightly adapt the LMAA Rules for use in Hong Kong.

As regards the standard of arbitration in Hong Kong, in a recent case Mr Justice Hamblen of the English Commercial Court²⁹ praised Hong Kong as: ‘a well-known and respected arbitration forum with a reputation for neutrality, not least because of its supervising courts’. In that case it was confirmed that the seat of the arbitration and clear words or significant contrary indicia are necessary to establish that some other seat or curial law has been agreed.

iii Enforcement of foreign judgments and arbitral awards

Judgments

There are three methods of enforcing a foreign judgment in the Hong Kong courts – under a special arrangement with China, under a statutory regime or at common law.

Enforcement of judgments between Hong Kong and the mainland is governed by the Arrangement on Reciprocal Enforcement of Judgments in Civil and Commercial Matters, and the Mainland Judgments (Reciprocal Enforcement) Ordinance (the Mainland Judgments Ordinance). The Mainland Judgments Ordinance applies to judgments requiring the payment of a sum of money in commercial and civil cases. The judgment creditor must register the judgment that it wishes to enforce in Hong Kong within two years of the date of the judgment taking effect. The decision dated 16 February 2016 in the case of 吳作程 *v.* 梁麗 *and others* HCMP 2080/2015 is the first reported Hong Kong decision on the Mainland Judgments Ordinance. In that case the High Court dismissed the defendant’s application to set aside an order for registration of a mainland judgment in Hong Kong. In dismissing the application, the Court refused to hold a mini trial on the merits and reminded that partial registration of a mainland judgment is possible when that judgment is for performance in stages.

Foreign judgments in civil and commercial matters may be enforced in Hong Kong under the Foreign Judgments (Reciprocal Enforcements) Ordinance (the Reciprocal Enforcement Ordinance). The underlying aim of the Reciprocal Enforcement Ordinance is to facilitate the reciprocal recognition and enforcement of foreign judgments on the basis of reciprocity. The countries that have reciprocal arrangements with Hong Kong are listed in the Schedules 1 and 2 of the Foreign Judgments (Reciprocal Enforcement) Order (the Order) and include Australia, Austria, France, Belgium and Italy.³⁰ A judgment creditor with a foreign judgment for the payment of a sum of money from a country listed under

28 www.hksoa.org/links/maritime_arbitration.html.

29 *Shagang South-Asia (Hong Kong) Trading v. Daewoo Logistics (The ‘Nikolaos A’)* [2015] EWHC 194 (Comm).

30 [www.legislation.gov.hk/blis_pdf.nsf/4f0db701c6c25d4a4825755c00352e35/964BE6177CD640D0482575EE00602A1C/\\$FILE/CAP_319A_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/4f0db701c6c25d4a4825755c00352e35/964BE6177CD640D0482575EE00602A1C/$FILE/CAP_319A_e_b5.pdf).

the Order can make an *ex parte* application to the Court of First Instance to register that foreign judgment. To do this, certain requirements as set out in the Reciprocal Enforcement Ordinance must be met. Most notably, the application must be made within six years of the date of the judgment, or, where there has been an appeal against the judgment, after the date of the last judgment given in those proceedings. Once the foreign judgment is registered it can be enforced in Hong Kong as a Hong Kong judgment.

If a foreign judgment cannot be enforced under one of the aforementioned Ordinances, it may be enforced at common law. To enforce at common law, fresh proceedings must be brought by the judgment creditor in the Hong Kong court. The judgment creditor must issue a fresh writ in Hong Kong and serve it on the defendant. The court will not go into the underlying merits of the claim founding the foreign judgment if certain conditions are met. The judgment creditor must prove that the foreign judgment:

- a* is a final and conclusive judgment;
- b* is for a fixed sum of money;
- c* was not obtained by fraud;
- d* was obtained in a foreign court that had jurisdiction over the defendant according to the Hong Kong rules; and
- e* is not contrary to Hong Kong rules of public policy or natural justice.

After commencing proceedings, the plaintiff can apply for summary judgment on the basis that the defendant has no defence. If summary judgment is not given, the action will go to trial.

Arbitration awards

Enforcement between Hong Kong and the mainland is governed by the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region 1999.

Hong Kong, as part of China, is a party to the New York Convention, which provides for the mutual enforcement of arbitration awards between contracting states. The Hong Kong courts also have discretionary power to enforce arbitration awards from countries that are not party to the New York Convention.

Further, the Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards between the Hong Kong SAR and the Macao SAR was signed in January 2013. Under this arrangement, Macao arbitration awards are enforceable in Hong Kong in the same way as other non-New York Convention awards; the grounds for refusal to enforce a Macao award are in line with those grounds set out in the New York Convention. This legislation deals with the problem brought about by both Hong Kong and Macao having their own judicial systems but not being separate countries for the purpose of the New York Convention, and is similar to legislation already in place between Hong Kong and mainland China.

IV SHIPPING CONTRACTS

i Contracts of carriage

Contracts of carriage in Hong Kong are governed by the Carriage of Goods by Sea Ordinance, which gives the full force of law to the Hague-Visby Rules (the Rules), the Rules having been

ratified by Hong Kong.³¹ Provided that one of the criteria set out in the Rules apply (e.g., shipment from Hong Kong; bill of lading issued in Hong Kong; or if the bill of lading provides for the Rules to apply), then the only instance when the Rules will not apply is when the contract of carriage does not require a bill of lading or similar document of title to be issued.³² The Bills of Lading and Analogous Shipping Documents Ordinance³³ defines what constitutes a bill of lading under Hong Kong law.³⁴ Although the Rules do not apply to charterparties *per se*, they are frequently incorporated in charterparties by agreement by way of a clause paramount.³⁵

The Rules govern the rights and liabilities of both the carrier and the shipper. Hong Kong is a party to the SOLAS Convention, which makes the International Maritime Solid Bulk Cargoes Code (which requires a declaration to be made by the shipper on the nature of cargo) mandatory for the carriage of bulk cargoes.³⁶ This is relevant where allegations are made that a shipper has shipped dangerous goods in breach of the Rules. As regards the application of the Rules, see Section II, *supra*.

Under common law in Hong Kong, a shipowner may in certain circumstances exercise a lien on cargo, freight or subfreight (or both) in certain circumstances and if the relevant contract gives the shipowner such precise right in respect of the sums that the shipowner is due. A discussion of the applicable law is beyond the scope of this chapter.

Cabotage is not something that applies in Hong Kong (the territory is small), but Hong Kong is deemed a foreign port under Chinese legislation and so is not subject to Chinese cabotage rules.³⁷ As a result, Hong Kong is still an attractive trans-shipment hub and is able to relay cargoes to mainland Chinese ports. That said, the Chinese cabotage rules are under review – if they are changed, this could adversely affect Hong Kong.³⁸

ii Cargo claims

In Hong Kong, cargo claimants generally plead their claims on three bases: in contract (bill of lading), in tort or in bailment.

31 The Rotterdam Rules and the Hamburg Rules have not been ratified by Hong Kong and are not expected to be in the near future.

32 See the Hong Kong cases of *Carewins Development (China) Ltd v. Bright Fortune Shipping Ltd & Anor* [2009] 5 HKC 160; and *Synehon (Xiamen) Trading Co Ltd v. American Logistics Ltd* [2009] 6 HKC 283.

33 Bills of Lading and Analogous Shipping Documents Ordinance (Cap 440).

34 Section 3 of the Bills of Lading and Analogous Shipping Documents Ordinance. See also *Carewins Development* (footnote 29, *supra*) for the court's ruling that a sea waybill is different to a non-negotiable bill.

35 As provided for by Section (3)(4)(a) Carriage of Goods by Sea Ordinance.

36 IMO Resolution MSC.268(85) made the International Maritime Solid Bulk Cargoes Code mandatory for signatories of the SOLAS Convention from 1 January 2011.

37 HCAJ 106/2008, decision dated 2 April 2013; www.lloydslist.com/ll/sector/containers/article/430674.ece.

38 www.joc.com/port-news/asian-ports/port-hong-kong/change-chinas-cabotage-law-s-could-hit-hong-kong-hardest_20151203.html.

Contracts (bills of lading)

Who is able to sue?

Under Section 2(2) of the Bills of Lading and Analogous Shipping Documents Ordinance, anybody who is the 'lawful holder' of a bill of lading has title to sue.³⁹ This includes: (1) the person in possession of the bill who, by being identified on the bill, is the consignee of the goods; (2) a person with possession of the bill as a result of completion, by delivery of the bill, by endorsement of the bill or by transfer of the bill; and (3) a person with possession of the bill as a result of any transaction where he or she would have become a holder under (1) or (2) when the transaction took place at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates. The holder must become the holder in good faith.

Who can be sued?

It is also important for cargo interests to determine who is the contractual carrier to be sued. If a demise clause is incorporated into the bill, even if the bill is not provided by the shipowner or demise charterer of a vessel (e.g., a charterer's bill), a contract will nevertheless exist between the shipowner or demise charterer and the shipper. The demise clause will have to show a clear intention to act in this manner and has been the subject of previous (English) case law,⁴⁰ as has the way in which the bill of lading is in fact signed, which can also have legal consequences.

Are the charterparty terms incorporated into the bill of lading?

Often, particularly where there is a voyage charter (e.g., Gencon), charterparty terms are incorporated into the bill of lading (e.g., Congenbill). Whether the charterparty terms are incorporated into the bill of lading will depend on the construction of the incorporation clause in the bill. It is thought that when the specific charterparty is not identified (usually by its date) there is a question of which charterparty (when a chain exists) applies, the one with the most appropriate legal relationship to the parties will apply usually a voyage charterparty having precedence over a time-charterparty.⁴¹ The position in Hong Kong on the incorporation of a jurisdiction clause mirrors that under English law – the mere incorporation of a charterparty in a bill of lading does not bring an arbitration clause with it unless sufficiently clear words exist to show this intention.⁴² The legal analysis applied to determine whether other charterparty terms (for example, terms that relate to 'charterers') are incorporated also follows English law.

Suing under a letter of indemnity

Bills of lading are documents of title. As a result, disputes can arise where cargo is released without production of the original bills. In *The 'River Globe'* case the shipowners accepted a letter of indemnity (LOI) issued by head charterers who had, in turn, received an LOI

39 The Hong Kong equivalent to the UK's Carriage of Goods by Sea Act 1924.

40 See *The 'Hector'* [1998] 2 Lloyd's Rep 283; *The 'Flecha'* [1999] 1 Lloyd's Rep 612; and *The 'Starsin'* [1999] Lloyd's Rep 85.

41 *The 'Yaoki'* [2005] HCAJ 134 / 2005 held that the charterparty with the most appropriate legal relationship to the parties would apply.

42 Treitel and Reynolds, *Carver on Bills of Lading* (Third Edition, 2012), paragraph 3-031.

from sub-charterers.⁴³ Subsequently, the true holder of the bills brought a claim against the shipowners for the wrongful release of the cargo and threatened the arrest of the vessel. The shipowners relied upon the LOI and demanded that the headcharterers put up bail or security, or alternatively pay the claim. Headcharterers made a similar demand on the sub-charterers under the second LOI. Subcharterers refused. Headcharterers successfully applied for a mandatory injunction compelling subcharterers to provide bail or security under the LOI. In *Cargill International Trading Ltd v. Loyal Base Development Ltd*,⁴⁴ the Hong Kong Court again enforced an LOI for delivery of cargo without presentation of original bills of lading granting a mandatory injunction compelling the company that had given the LOI to perform the undertakings given in the LOI.

Time limits and bars

Time limits apply to any cargo claim made under the Hague-Visby Rules. Notice of loss or damage must be given by the party claiming the damage within three days of the cargo being delivered (failure to do so has evidential consequences), while any proceedings, unless an extension of time is agreed between the parties, will be substantively time-barred unless they are brought within one year of the date of delivery or the date that the cargo should have been delivered.⁴⁵

If the Hague-Visby Rules do not apply, then the normal six-year time bar for contract and tort applies; however, for cargo claims the Hague-Visby Rules generally will apply (e.g., by virtue of a clause paramount, sub-bailment on terms or a Himalaya clause) and cautious claimants will respect the one-year time bar even if in doubt as to whether it applies. To protect time, proceedings must be commenced in the correct jurisdiction.⁴⁶ If that is in Hong Kong, a writ must be issued and served within its validity (one year counting the date of issuance of the writ).⁴⁷

iii Limitation of liability

On 3 May 2015, the Merchant Shipping (Limitation of Shipowners Liability) (Amendment) Ordinance 2005 came into effect in Hong Kong and increased the limits for personal injury and other claims from traditional 1976 limits to the limits provided for by the original 1996 Protocol. Only the provisions of the LLMC Convention ‘as set out in Schedule 2’ of the Merchant Shipping (Limitation of Shipowners Liability) Ordinance (the LSL Ordinance), have force of law in Hong Kong (see Sections 12–23 of the Ordinance). Hong Kong has not given effect to the higher 1996 Protocol limits, which have recently been adopted by some states.

Under Hong Kong law, a person may limit his liability for claims in respect of loss of life or personal injury, or loss of or damage to property (such as other ships, harbour works, basins or waterways and aids to navigation). A person merely has to establish that the claims in respect of which he is alleged to be liable fall within Article 2 of the Convention as set out in Schedule 2 of the LSL Ordinance, in order to limit liability. Once this is established, he

43 [2014] HKCFI 1876.

44 HCCL 12/2015, judgment dated 24 December 2015.

45 Article III(6) of the Hague-Visby Rules.

46 *The ‘Pioneer Container’* [1994] 2 AC 32.

47 As to the circumstances in which an *in rem* writ’s validity may be extended (or not as the case was) see *The ‘Shun An’*, HCAJ 24/2012, decision dated 27 February 2014.

will be entitled to a decree limiting his liability, unless any person opposing the making of the decree proves that his conduct bars his entitlement to limitation. Article 4 provides that a person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his 'personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result'. This is a high burden to overcome. The English Admiralty Court commented *obiter* in *The 'Saint Jacques II'* that 'it is likely that only truly exceptional cases will give rise to any real prospect of defeating an owner's right to limit'. This approach is likely to be followed by the Hong Kong courts.

Under Section 22(4) of the LSL Ordinance, 'owner' includes any part owner, charterer, manager or operator of the ship, and in *Metvale Ltd v. Monsanto International Sarl (The 'MSC Napoli')* the English Admiralty Court held that the word 'charterer' in the equivalent UK legislation includes a slot charterer. This case is likely to be followed by the Hong Kong courts.

Articles 6 and 7 explain how the (new) general limits and passenger limits are computed. A limitation fund is constituted under Article 11 and distributed under Article 12. Pursuant to Article 13, where a fund has been constituted, any person who has made a claim against the fund is barred from exercising any right in respect of his claim against any other assets of the person by or on behalf of whom the fund has been constituted.

V REMEDIES

i Ship arrest

Arrest in Hong Kong

The Brussels Convention applies in Hong Kong. The maritime claims for which a ship may be arrested are set out in Section 12A(2) of the High Court Ordinance (Chapter 4) and include claims in relation to possession or ownership of, or mortgage on, a ship, loss of life or personal injury because of a defect in a ship, damage done by or to a ship (including pollution) and loss or damage to goods carried by ship and other claims relating to carriage of goods by ship. Claims for insurance premiums are not included.⁴⁸

A ship under any flag may be arrested in Hong Kong and security arrests are permitted. Generally, the only precondition to an arrest in Hong Kong is that the claim falls within Section 12A(2) of the High Court Ordinance. Recently there have been three key cases concerning a ship manager's right to arrest: *The 'Ruby Star'*, *The 'Oriental Dragon'* and *The 'King Coal'*.⁴⁹ The first two cases suggest that even where ship managers keep a running account, as long as the underlying items in that running account would give rise to an *in rem* claim, managers have a right to arrest a vessel (although only for *in rem* claims – and the security put up was reduced to the extent that the claims were not *in rem* claims). *The 'Ruby Star'* appeal decision⁵⁰ clarifies that the admiralty jurisdiction has to exist at the time of commencement of the action (i.e., the issuance of the writ) – in *The 'Ruby Star'* it

48 *The 'Oriental Dragon'* [2014] 1HKLRD 649.

49 *The 'Ruby Star'* [2014] HKCU 205 and [2014] HKCA 645; *The 'Oriental Dragon'* [2014] 1HKLRD 649; and *The 'King Coal'* [2013] 2 HKLRD 620.

50 [2014] HKCA 645.

did not since the appropriation of the sums to the bunker claims was not exercised at the commencement of the action but afterwards – this was fatal to the arrest as the *in rem* right of action had to exist at the time the action was commenced.

The 'Oriental Dragon' suggests that managers are entitled to arrest in respect of unpaid management fees (not previously thought to be the case). *The 'King Coal'* is authority that where a statutory *in rem* crew wages claim is assigned, the right to arrest is lost. This is because of the express wording of Section 12A(2)(n) of the Rules of the High Court: 'Any claim by a Master or member of the crew' that does not provide for a party with assigned rights to make an *in rem* arrest. *The 'Fearless I'*⁵¹ follows *The 'King Coal'* decision. It is authority that if a party that does not have a valid *in rem* claim against a vessel (in this case, the assignees of the master's and the crew's rights to wages) nonetheless arrests the vessel, that party should not be reimbursed out of the proceeds of sale.

In *The 'Alas'*⁵², the Hong Kong High Court was asked whether a party could arrest, notwithstanding that that party had already obtained an LMAA arbitration award. The Court held that as long as the claim was based on the original underlying *in rem* cause of action (under Section 12A(2) of the High Court Ordinance), and was not simply a claim to enforce an award issued by a tribunal, it could be brought. Following *The 'Rena K'*⁵³ decision, the Court held that an action *in rem* does not merge in a judgment *in personam* but remains available as long as the award remained unsatisfied. Both the Hong Kong High Court and the Court of Appeal refused the right to appeal the decision in *The 'Alas'*,⁵⁴ confirming that a security arrest is possible in Hong Kong even after an arbitration award has been obtained in a foreign jurisdiction. However, this is not possible in respect of judgments in view of Section 5 of the Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance.

Ownership

When exercising its admiralty jurisdiction, the court must be satisfied that the person who would be liable for the claim *in personam* was either the sole beneficial owner of the vessel or the demise charterer at the time the *in rem* action is commenced. In *The 'Almojil 61'* case,⁵⁵ the Hong Kong High Court exercised its admiralty jurisdiction against the beneficial owner as stated on the (Dominican) shipping register, and the vessel was arrested and, in turn, sold. A second company (not on the register) alleged that it was the co-owner of the vessel and sought to claim proceeds of the sale. The Court held that the shipping register was of formal importance and it would not go behind the register except in exceptional or special circumstances – such as where the registration of a vessel is procured by fraud. A similar conclusion was subsequently reached in *Bo Shi Ji*⁵⁶ in which *The 'Almojil 61'* was followed and the Court refused to overlook the ownership details set out in a vessel ownership registration (and was not in any event satisfied, on the evidence presented, that another individual (not the owner of the arrested sister ship) was the owner of the vessel that had sunk at the time the writ was issued).

51 [2013] 5 HKLRD 48.

52 [2014] 4 HKLRD 160.

53 [1979] QB 377.

54 The written grounds for the refusal had not been published at the time of writing.

55 [2014] HKEC 1077; [2014] HKEC 1076.

56 Judgment of the Hon Ng J, dated 3 June 2015 in HCAJ 44/2014.

Sister ship arrests

By virtue of Section 12B(4) of the High Court Ordinance, sister ship arrests are permitted under Hong Kong law. Under Section 12B(4), a sister ship may be arrested if, when the cause of action arose, the defendant was the 'owner or charterer of, or in possession or in control' of the offending ship, and at the time when the action is brought, the defendant is 'the beneficial owner as respects all the shares' of the ship to be arrested. In a recent Hong Kong High Court case⁵⁷ the Court limited the scope for sister ship arrest, deciding that 'control' for the purposes of Section 12B(4) must mean something more than the control that would normally come with the possession of a ship. It was decided that 'control' of the ship rests with the person who is able to tell the person in possession of the ship what to do with the ship. By limiting the definition of control, the Court has kept the test for whether or not an arrest can be made simple. A key passage of the judgment is: '[T]he court is not looking to see if a party is exercising control over a company which is the charterer but to see if it is exercising control over the ship itself. Unless the corporate veil is lifted, the separate corporate identity of the contracting party in the charterparty relationship cannot simply be ignored.'

The concepts of associated ship arrest and bunker arrest are not recognised under Hong Kong law. Depending on the circumstances, it may be possible under Hong Kong law to obtain an injunction to prevent bunkers from being used but in view of the costs involved, this may not be an attractive option.

Procedure

A ship may be arrested if the arresting party has a cause of action that carries with it a right of arrest. A party wishing to arrest in Hong Kong must first issue an *in rem* writ against the ship in the Hong Kong admiralty jurisdiction of the Court of First Instance.

Before an arrest can be made, the person who intends to arrest the vessel should check that no caveats against arrest have been entered into the caveat book and, if not, prepare to file in court a writ of summons (and blank acknowledgment of service), warrant of arrest, praecipe for service of writ *in rem*, praecipe for warrant of arrest, undertaking and affidavit to lead to arrest (arrest papers). The affidavit will set out the details of the claim and, as it is *ex parte*, the arresting party has an obligation to make full and frank disclosure in relation to the material facts stated in it.⁵⁸ The affidavit is the only evidential requirement for arrest and the arresting party need only to establish a *prima facie* right to arrest. Once completed, the relevant arrest papers (and cheques for the applicable fees) should be taken to the bailiff. The bailiff will check to see whether there is a caveat entered against the named vessel. After checking that there is no caveat against arrest entered for the vessel, the bailiff will endorse the arrest papers. The bailiff will then take the papers to the Registrar of the High Court, who will review the arrest papers and issue the warrant. The bailiff will then notify the Hong Kong Marine Department that a warrant for arrest has been issued that will mean that the ship will not be allowed to sail. The bailiff then travels to the ship to serve the warrant on the ship. As Hong Kong is relatively small, and most vessels are arrested while calling or anchoring at Hong Kong, we are unaware of any arrests by helicopter.

57 *Chimbusco Pan Nation Petro-Chemical Co Ltd v. The Owners and/or Demise Charterers of the ship or vessel 'Decurion'* [2013] 2 HKLRD 930.

58 On full and frank disclosure see: *The 'Oriental Phoenix'* [2014] 1HKLRD 649 and *The 'King Coal'* [2013] 2 HKLRD 620.

The party applying to arrest the vessel bears the cost of maintaining the vessel while it is under arrest. Further security will be charged on a daily basis. The party applying to arrest the vessel will also be liable for the bailiffs' expenses and any overtime.⁵⁹ Further, it may be necessary to pay to bunker and provision the vessel and its crew.

Wrongful arrest

Depending on the facts and conduct of the parties, the warrant of arrest may be set aside and the owner of the arrested ship can make a claim for damages for wrongful arrest; however, the Hong Kong courts are reluctant to award damages for wrongful arrest and a claim will only succeed where the arresting party acted in bad faith or in a grossly negligent manner. The onus is on the owner of the arrested ship to prove bad faith or gross negligence on the part of the arresting party and this requires a very high level of proof. In *Birnam Ltd v. the Owners of the Ship or Vessel 'Hong Ming'*⁶⁰ Mr Justice Reyes set aside the arrest and unusually ordered an inquiry for damages for wrongful arrest. This decision does not, however, seem to have lowered the threshold as in the subsequent judgment in *Cosmotrade Exports SA v. Owners and/or Demise Charterers of Ship or Vessel 'Jimrise'*⁶¹ the same judge set aside the arrest on the basis that the demise charterers were not the demise charterers at the time of arrest but refused to order an inquiry into damages on the basis he was 'not persuaded that Cosmotrade has shown any degree of malicious negligence to justify an inquiry into damages'.

ii Court orders for sale of a vessel

Court orders for sale of a vessel can be obtained either *pendente lite* or upon judgment. The first method is more common. The second method relates to enforcement (e.g., by way of a writ of *fiery facias*), regarding which, see Section III.iii, *supra*.

When *in rem* claims are defended, ordinarily the vessel's owners (or their P&I club) will put up security to allow the vessel to depart with the claim to be litigated in an appropriate forum. Thus, when a claim is defended, ordinarily the vessel will not be sold.

The situation is different when the vessel's owners are in financial difficulty. A sale *pendente lite* is possible, and an order can be made within six to eight weeks in limited circumstances when a vessel has been arrested in Hong Kong but before an award or judgment has been obtained basically to stop asset wastage pending a judgment. The court will require a good reason to make such an order (e.g., where the costs of maintaining the arrest may exceed the value of the claim, thereby diminishing the value of the plaintiff's security).

Once a sale order is made the vessel is confidentially appraised (normally by a shipbroker and a ship surveyor agreeing values). The bailiff then advertises the vessel for sale on two consecutive days inviting sealed tenders, together with bank drafts for 10 per cent of the amount being offered. The tenders are opened on the appointed day, normally about two to three weeks after the advertisements appear, and the vessel is sold to the highest tenderer provided the amount offered is at least equal to the appraised value. Normally, about seven days after tenders are opened by the court the sale is complete with the payment of the 90 per cent balance and the execution of a bill of sale.

59 Ibid. C/6 17 and 18.

60 HCAJ 105/2011, judgment dated 26 August 2011.

61 HCAJ 180/2011, judgment dated 13 January 2012.

If the appraised value is not reached, the court may still direct that the vessel be sold to the highest tenderer unless the mortgagee requests that the vessel be re-advertised, in which case it will have to give an undertaking to indemnify the court if subsequent tenders are lower than those obtained in the first round. Alternatively, the court itself can decide that the vessel should be re-advertised. The court rarely orders the sale of vessels by private treaty.

Broadly, the order of priorities is as in England. For buyers, the attraction of purchasing a vessel sold by the court is that it will be free of encumbrances.⁶²

VI REGULATION

i Safety and port state control

The Marine Department (MD) of the Hong Kong Special Administrative Region is the main body responsible for administering the port of Hong Kong, the responsibility vesting in the Director of Marine. The Director of Marine is supported by various government bodies: the Port Operations Committee, the Pilotage Advisory Committee, the Local Vessels Advisory Committee, the Hong Kong Port Development Council and Hong Kong Maritime Industry Council (the latter two of which have just merged into a new Hong Kong Maritime & Port Board – see Section VII below). The MD ensures that ships are able to enter the port, load or discharge cargo and then leave the port as quickly and as safely as possible. It also regulates aspects of safety and pollution.⁶³ As a key flag state, Hong Kong is mindful of the need to uphold standards and maintain an excellent safety record and to this end most key maritime conventions are applicable.

Hong Kong signed the Tokyo MoU in December 1993 and became a member of the Port State Control Committee in the Asia-Pacific Region.⁶⁴ The MD carries out port state control inspections on ships visiting Hong Kong in accordance with IMO Resolution A1052(27) and the Tokyo MoU Port State Control Manual. Updated monthly detention lists from 2008 can be found on the MD website.⁶⁵

ii Registration and classification

Registry

The Hong Kong Shipping Register was set up on 3 December 1990 under the Hong Kong Merchant Shipping (Registration) Ordinance. Under Section 11(1) Part IV (Registration of Ships) of the Merchant Shipping (Registration) Ordinance, a ship can be registered in Hong Kong if a representative person is appointed in relation to the ship and the majority interest in the ship is owned by one or more qualified persons or the ship is operated under a demise charter by a corporation that is a qualified person⁶⁶ (i.e., an operator register). The ship must also not be registered elsewhere.⁶⁷ Under Section 11(4) of the Ordinance, a qualified

62 Meeson, *Admiralty Jurisdiction and Practice* (Third Edition, 2003), p. 157.

63 www.gov.hk/en/about/abouthk/factsheets/docs/port.pdf.

64 www.mardep.gov.hk/en/aboutus/pdf/psc.pdf.

65 www.mardep.gov.hk/en/others/dlist.html.

66 www.legislation.gov.hk/blis_ind.nsf/CurAllEngDoc/B160A8015DD86FF448257C91002FB0D3?OpenDocument.

67 www.mardep.gov.hk/en/pub_services/reg_gen.html.

person is: an individual who holds a valid identity card and who is ordinarily resident in Hong Kong; a body corporate incorporated in Hong Kong; or a registered non-Hong Kong company as defined by Section 2(1) of the Companies Ordinance.⁶⁸ There are three types of registration: a provisional registration, a full registration and a demise charter (bareboat charter) registration. This means that a demise charterer can register a vessel in Hong Kong.

Procedure

An application must be made to the MD Shipping Registry. The application consists of an application form and declaration of entitlement. The Shipping Registry will approve the ship name, allot a call sign and official number, and issue the ship's marking note for the ship master to complete. The declaration or certificate of marking is then signed by the ship master or classification society surveyor. The applicant then submits title certificate of ownership or encumbrance, builder certificate or bill of sale and other documents as required by the Shipping Registry. The Shipping Register will then issue a certificate of registry (or a provisional certificate of registry) and the application is complete. The evidence to be produced for ship registration is set out in Section 21, Part IV (Registration of Ships), of the Merchant Shipping (Registration) Ordinance.⁶⁹ The Hong Kong Shipping Register registers mortgages on full and provisional registration.⁷⁰

Pre-registration quality control system

The pre-registration quality control system (PRQC) was launched in 2003 and requires that the MD search all available sources for information about any ship that applies to join the Registry. The quality of the ship is then assessed. The PRQC was introduced in order to maintain the high standards of the Register.⁷¹

Classification societies

There are eight well-known classification societies that are authorised to act on the MD's behalf to perform survey and certification functions for Hong Kong-registered ships. These are:⁷²

- a* the American Bureau of Shipping;
- b* Bureau Veritas;
- c* the China Classification Society;
- d* DNV GL;
- e* Lloyd's Register of Shipping;
- f* Nippon Kaiji Kyokai;
- g* the Korean Register of Shipping; and
- h* RINA SpA.

68 www.gov.hk/en/about/abouthk/factsheets/docs/port.pdf.

69 www.legislation.gov.hk/blis_ind.nsf/CurAllEngDoc/67B08BEC06FD8DE248257C91002FB0CF?OpenDocument.

70 www.mardep.gov.hk/en/pub_services/reg_gen.html and Section 50, Part VI (Mortgages) Cap 415 of the Merchant Shipping (Registration) Ordinance.

71 www.mardep.gov.hk/en/publication/pdf/hkmm0309.pdf; www.info.gov.hk/gia/general/200309/17/0917112.htm.

72 www.legco.gov.hk/yr03-04/english/bc/bc06/papers/bc060528-2015-1e.pdf.

iii Flag state control

A ship quality control system known as the Flag State Quality Control (FSQC) System was developed in 1999 for monitoring and maintaining the quality of ships under the Hong Kong Shipping Register. Any Hong Kong-registered ships that breach quality standards will be subjected to FSQC inspections and suggestions for improvement. The system ensures that ship management companies perform inspections and surveys on their ships.⁷³ Flag state control in Hong Kong is based on international conventions.⁷⁴ Equipment on Hong Kong-flagged ships must fulfil the requirements on safety and protection of marine environment ratified by IMO. In addition, owners are required to periodically arrange for classification societies to carry out statutory surveys and issue relevant certificates.⁷⁵

If there are any serious deficiencies noticed, the ship will be detained under the flag state control regime. If the ship is detained, the ship's agent or owners, classification society and flag state will be notified of the detention and told how to rectify the situation. Serious deficiencies 'affecting the seaworthiness of the vessel and/or the safety of the crew and/or causing damages to the marine environment are required to be rectified prior to the ship's departure'.⁷⁶ There is an appeal mechanism against any detention under Section 66 of the Shipping and Port Control Ordinance.⁷⁷

iv Environmental regulation

Hong Kong is committed to implementing MARPOL 73/78, which is the principal international convention aimed at preventing or minimising pollution of the environment due to ship operations. The convention has six annexes: Annex I Regulations for the Prevention of Pollution by Oil; Annex II Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk; Annex III Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form; Annex IV Prevention of Pollution by Sewage from Ships; Annex V Prevention of Pollution by Garbage from Ships; and Annex VI Prevention of Air Pollution from Ships. All annexes have been implemented through the Merchant Shipping (Prevention and Control of Pollution) Ordinance 1991 and its subsidiary legislation, and are applicable to any Hong Kong vessel and to all vessels while they are in Hong Kong waters. Also, Section 5 of the Bunker Oil Pollution (Liability and Compensation) Ordinance provides that if as a result of an incident, any pollution damage is caused in Hong Kong, the owner of the ship concerned is liable for the damage caused.⁷⁸

Under Annex VI, the sulphur content of marine fuel on the high seas was capped at 3.5 per cent starting from January 2012.⁷⁹ In 2011, 17 major ship liners in Hong Kong launched the Fair Winds Charter, an initiative committed to switching to fuel with no more than 0.5 per cent sulphur content as far as possible when berthing in Hong Kong

73 www.gov.hk/en/about/abouthk/factsheets/docs/port.pdf.

74 www.mardep.gov.hk/en/msnote/pdf/msin1357.pdf.

75 Ibid.

76 www.mardep.gov.hk/en/others/home.html.

77 [www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/BBCEA67E7FCB3784482575EE005CC2E1/\\$FILE/CAP_313_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/BBCEA67E7FCB3784482575EE005CC2E1/$FILE/CAP_313_e_b5.pdf).

78 [www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/884575DE2FC61DAF482576730052E8C2/\\$FILE/CAP_605_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/884575DE2FC61DAF482576730052E8C2/$FILE/CAP_605_e_b5.pdf).

79 www.epd.gov.hk/epd/english/boards/advisory_council/files/ACE_Paper_10_2013.pdf.

waters.⁸⁰ To encourage ocean-going vessels (OGVs) to switch to cleaner fuel while at berth, a three-year incentive scheme to halve the port facilities and light dues charged on OGVs using low-sulphur marine fuel (i.e., fuel with sulphur content not exceeding 0.5 per cent) while at berth was launched by the government in September 2012. However, the participation rate was only 13 per cent.⁸¹

On 1 April 2014 the Hong Kong Air Pollution Control (Marine Light Diesel) Regulation came into effect. This Regulation provides for the specifications that must be met by marine light diesel suppliers in Hong Kong.⁸² It also requires importers and suppliers of light diesel to keep records. The Regulation states that sulphur content of marine light diesel must not exceed 0.05 per cent by weight.⁸³

The Air Pollution Control (Ocean Going Vessels) (Fuel at Berth) Regulation, which mandates OGVs to use clean fuels while berthing in Hong Kong, was gazetted on 13 March 2015 and took effect on 1 July 2015. The compliant fuels that are required by the Regulation are low-sulphur marine fuel, liquefied natural gas and any other fuels approved by the Director of Environmental Protection. Since 1 July 2015, the master and owners of any OGV using non-compliant fuel while at berth in Hong Kong (except for the first and last hour) and shipmasters and shipowners who fail to keep records (for three years) will be liable to fines or imprisonment. Hong Kong will be the first port in Asia to require OGVs to switch to cleaner fuel while at berth.⁸⁴ It was announced in the 2015–16 Budget Speech that the incentive scheme would be extended for 30 months up to March 2018 for OGVs using compliant fuel while berthing in Hong Kong waters. The aim is that ultimately all Pearl River Delta ports will apply the same fuel restrictions so that there will be a level playing field. We understand that in practice the fuel required by the Regulation (0.5 per cent sulphur) is not widely available so that some OGVs are burning Ultra Low Sulphur Fuel (0.1 per cent sulphur compliant with MARPOL Annex XI for Emission Control Areas) instead.

v Collisions, salvage and wrecks

Collisions

The Merchant Shipping (Safety) (Signals of Distress and Prevention of Collisions) Regulations gives the Colregs force of law in Hong Kong. It is an offence under the Shipping and Port Control Ordinance to contravene any of the Colregs, although it is a defence for the person charged to prove that it took all reasonable precautions. The decision of the Court of Final Appeal in *Kulemesin Yuriy and Tang Dock-Wah v. HKSAR*⁸⁵ offers helpful guidance on the scope of criminal responsibility for navigation that endangers the safety of any person at sea. In *HKSAR v. Chow Chi-wai and Lai Sai-ming*⁸⁶ a coxswain was sentenced to eight years'

80 Ibid.

81 www.legco.gov.hk/yr14-15/english/subleg/brief/51_brf.pdf, paragraph 6.

82 That is, light diesel oil that is intended for use in a vessel.

83 [www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/208E23A64E5F7E0448257C620052DA67/\\$FILE/CAP_311Y_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/208E23A64E5F7E0448257C620052DA67/$FILE/CAP_311Y_e_b5.pdf).

84 www.legco.gov.hk/yr14-15/english/subleg/brief/51_brf.pdf.

85 [2013] 16 HKCFAR 195.

86 *HKSAR v. Chow Chi-wai and Lai Sai-ming* [2015] HKCFI 267.

imprisonment after being found guilty of manslaughter by a Hong Kong jury. The case arose out of a collision on 1 October 2012 between two ferries in Hong Kong waters, resulting in the tragic loss of 39 lives. The case is currently under appeal.

The Admiralty Jurisdiction of the Court of First Instance includes the jurisdiction to hear and determine claims for damage done by a ship and claims for loss of life or personal injury. The Merchant Shipping (Collision Damage Liability and Salvage) Ordinance enacts the provisions of the (now repealed) Maritime Conventions Act 1911 (UK). Accordingly, the doctrine of proportionate fault applies with respect to claims for property damage; however, where loss of life or personal injuries are suffered by a person on board a vessel owing to the fault of that vessel and of any other vessel, the liability of the owners of the vessels is joint and several. Rights of contribution between the owners of the vessels concerned are preserved. A vessel is not liable for damage or loss to which its fault has not contributed, and if it is not possible to establish degrees of fault, the liability is apportioned equally. There is a two-year limitation period for civil claims arising out of a collision.

Salvage

The law governing a dispute arising out of the provision of salvage services (or a collision between ships) is determined in Hong Kong by applying the principles and rules of the Hong Kong conflict of laws. Unless it is pleaded that foreign law governs the question at issue, the Hong Kong *lex fori* applies. The provisions of the Salvage Convention, as set out in Part I of Schedule I of the Merchant Shipping (Collision Damage Liability and Salvage) Ordinance, has force of law in Hong Kong. There is no standard form of salvage agreement under Hong Kong law. Any salvage contracts governed by Hong Kong law would be treated in the same manner as any other contract made under Hong Kong law. Pursuant to Section 12A of the High Court Ordinance, the Admiralty Jurisdiction of the Court of First Instance consists of jurisdiction to hear and determine any claim under the Salvage Convention, any claim under any contract for or in relation to salvage services, or any claim in the nature of salvage; however, the provisions of the Salvage Convention do not apply when the property involved is maritime cultural property of prehistoric, archaeological or historical interest and is situated on the seabed.

Wreck removal

Section 21 of the Shipping and Port Control Ordinance empowers the Director of Marine to give the owner or the master of a vessel that is stranded, abandoned or sunk in the waters of Hong Kong directions as he or she sees fit in respect of the removal, raising or destruction of the vessel, and it is an offence not to comply with such directions. The Director has wide powers to contract with tugs and salvors for this purpose. Pursuant to Section 12 of the Merchant Shipping (Limitation of Shipowners Liability) Ordinance, most of the provisions of the LLMC Convention have force of law in Hong Kong; however, claims in respect of the raising, removal, destruction or the rendering harmless of a ship that has been sunk, wrecked, stranded or abandoned are not subject to limitation of liability under Hong Kong law. The Nairobi WRC 2007 has not been ratified by China on behalf of Hong Kong.

Recycling

There is no specific legislation governing the dismantling and recycling of ships under Hong Kong law. The Hong Kong Convention has not yet been ratified by China on behalf of Hong Kong.

vi Passengers' rights

The Merchant Shipping (Limitation of Shipowners Liability) Ordinance gives effect to both the LLMC Convention and the Athens Convention. These two Conventions are set out in Schedules 1 and 2 to the Ordinance respectively. Under the Ordinance, claims made under the Athens Convention would not affect the right of a passenger to bring a claim under the LLMC Convention.

Under the liability regime provided in the Athens Convention, a carrier is liable for damage or loss suffered by a passenger if the incident causing the damage occurred in the course of the carriage and was due to the fault or neglect of the carrier. The Athens Convention provides for various matters relating to claims for damage or loss against the carrier. These matters include limits of liability for personal injury and for loss of or damage to luggage and the time bar for actions.

The Athens Convention establishes a regime of limited liability for damage suffered by passengers on a seagoing vessel in the course of an international carriage. International carriage is defined in the Athens Convention to mean any carriage in which, according to the contract of carriage, the place of departure and the place of destination are situated in two different states, or in a single state if, according to the contract of carriage or the scheduled itinerary, there is an intermediate port of call in another state.

The Athens Convention has been applied to Hong Kong since 1980. Following the reunification of Hong Kong and Macao with China in 1997 and 1999, respectively, carriages between Hong Kong and Macao and between Hong Kong and the mainland ports (regional carriages) ceased to qualify as international carriages within the scope of the Athens Convention;⁸⁷ however, Section 3(2) of the Merchant Shipping (Limitation of Shipowners Liability) Ordinance extends the application to cover regional carriage. Schedule 1 of the Merchant Shipping (Limitation of Shipowners Liability) Ordinance gives effect to the Athens Convention in Hong Kong law. The limitation period for a passenger to bring a personal injury claim under the Athens Convention is two years.⁸⁸

vii Seafarers' rights

In Hong Kong, working standards and employment conditions for seafarers are specified in the Merchant Shipping (Seafarers) Ordinance (MSSO) and its subsidiary legislation.

The Maritime Labour Convention 2006 (MLC) was adopted by the ILO to protect seafarers' rights to decent employment. It contains a comprehensive set of global standards governing the working and living conditions of seafarers on board ocean-going ships in 14 areas including minimum age, medical certification, qualifications, hours of work and rest, accommodation and food. The MLC came into force on 20 August 2013, in jurisdictions of those ILO Member States that have ratified it.

The Merchant Shipping (Seafarers) (Amendment) Bill 2013 aimed to implement the requirements of the MLC.⁸⁹ In particular, it sought to align existing definitions and provisions under the MSSO with the MLC. The major amendments proposed in the Merchant Shipping (Seafarers) (Amendment) Bill 2013 included amending the definition

87 www.legco.gov.hk/yr04-05/english/hc/papers/hc0204ls-22e.pdf at [5].

88 [www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/711D13DF76337381482575EF0007CBE6/\\$FILE/CAP_434_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/711D13DF76337381482575EF0007CBE6/$FILE/CAP_434_e_b5.pdf).

89 www.info.gov.hk/gia/general/201304/03/P201303280489.htm.

of ‘seafarer’, allowing seafarers’ organisations to provide recruitment and placement services, and to adopt the ‘direct reference approach’ in making subsidiary legislation under the MSSO for implementing the requirements of international agreements applicable to Hong Kong. There were also miscellaneous amendments, including the removal of a provision which allows a company engaged in the supply of seafarers to recover from seafarers part of the prescribed fee paid to the government for their employment, as well as the removal of a restriction that persons aged 35 years or above cannot be registered with the MD for employment as seafarers. The Merchant Shipping (Seafarers) (Amendment) Bill 2013 was passed on 6 November 2013⁹⁰ and became the Merchant Shipping (Seafarers) (Amendment) Ordinance 2013.⁹¹ It has not commenced (i.e., is not effective) yet and in any event does not take into account amendments to the MLC made in 2014 and thus requires updating. According to LegCo:⁹² ‘To implement the MLC, apart from updating relevant provisions under the Merchant Shipping (Seafarers) Ordinance (Chapter 478) (the Ordinance) through the Bill, we plan to amend the subsidiary legislations under the Ordinance after the Bill has been passed, and enact a new piece of subsidiary legislation, tentatively named the Merchant Shipping (Seafarers) (Maritime Labour Convention) Regulation (the new Regulation), to incorporate the detailed MLC requirements...’

The Mercantile Marine Office registers local seafarers, regulates their employment terms and conditions on board ships of all flags, and supervises the employment and discharge of seafarers on Hong Kong ships. Today, Hong Kong has 1,488 Hong Kong officers and ratings serving on board more than 221 seagoing and river-trade ships of four different marine nations.⁹³ Hong Kong carries out examinations and issues certificates of competencies to seafarers working on Hong Kong-registered ships and local vessels. Certificates of competencies are issued to those candidates who have passed the master, coxswain, deck officer and engineer examinations to operate ships trading locally and internationally. Licences are also issued to seafarers whose certificates of competencies are issued by countries on the STCW White List to serve on Hong Kong-registered ships. There are no nationality requirements for officers and crew who serve on Hong Kong-registered ships. Ships’ officers must have respective certificates of competency issued by the MD in compliance with the STCW Convention. Crew size depends on the ship’s size and nature.

VII OUTLOOK

i The current situation

World shipping is currently – hopefully near the end – of a prolonged downturn. Hong Kong, a traditional shipping hub, has suffered too and in 2015 it moved from fourth to fifth-busiest container port in the world. Furthermore, a number of recent major revisions to international conventions and Hong Kong law will affect companies in the maritime sector operating out of Hong Kong. These include the entry into force of a Competition Ordinance, which became effective on 14 December 2014, the implementation of amendments to SOLAS Chapter VI, which mandate container weighing that came into effect on 1 June 2016, the

90 www.legco.gov.hk/yr12-13/english/bc/bc06/general/bc06.htm.

91 www.legco.gov.hk/yr13-14/english/ord/ord016-13-e.pdf.

92 www.legco.gov.hk/yr12-13/english/bc/bc06/papers/bc060617cb1-1213-3-e.pdf.

93 www.gov.hk/en/about/abouthk/factsheets/docs/port.pdf.

mandatory burning of low-sulphur fuels in Hong Kong ports and possible amendments to Chinese cabotage rules. We have described the latter two developments above (in Sections IV.i and VI.iv respectively), and so will now focus on the former two.

ii Competition Ordinance

With the new Competition Ordinance, competition law has been introduced to Hong Kong for the first time. The Competition Ordinance does not treat the shipping sector differently from any other sector. This is largely because the Competition Ordinance is entirely new, it has not evolved over time and does not form part of a greater system of planning and cooperation. The Competition Ordinance contains three rules: the First Conduct Rule (aimed at preventing cartels and anti-competitive agreements); the Second Conduct Rule (aimed at preventing abuse of dominant position) and the Merger Rule (which initially at least only applies to telecoms companies and thus does not apply to shipping).

Broadly, the shipping sector can be divided between liner shipping and tramp vessel services. Liner shipping involves the transport of cargo, chiefly by container, on a regular basis to ports of a particular geographic route, generally known as trades. Other general characteristics of liner shipping are that shipping schedules or timetables with sailing dates are advertised in advance and are made available to any transport use either directly or online. Tramp vessel services involve the transport of goods in bulk or in break bulk in a vessel chartered wholly or partly to one or more shippers on the basis of a voyage or time charter or any other form of contract for non-regularly chartered or non-advertised sailings, where the freight rates are freely negotiated case-by-case in accordance with the conditions of supply and demand. It is mostly the unscheduled transport of one single commodity that fills the vessel.

The market organisation of liner shipping has traditionally featured a variety of cooperative elements:

- a* conferences (no longer prevalent in the industry): which recommend freight rates (non-binding) and set surcharges (bunker adjustment factor (BAF), currency adjustment factor (CAF), terminal handling charge (THC)), and regulate capacity etc.;
- b* 'looser' voluntary discussion agreements (VDAs): which have no common tariff but provide a forum for members to discuss the trade and may provide recommendations for general rate increases (GRI);
- c* alliances: agreements between carriers to cooperate on space and capacity on a global or regional basis; and
- d* consortia and vessel sharing agreements (VSAs): agreements that focus on a particular route.

These cooperative elements are usually forbidden by competition laws, but the liner industry has enjoyed special status with a number of exemptions from antitrust regulations, although in recent years the regulatory balance has shifted in some jurisdictions.

Shipping companies, in theory, can self-assess whether they can rely upon the efficiency exclusion to the First Conduct Rule. However, the Hong Kong Liner Shipping Association (HKLSA) has made it clear, from at least 2012 onwards, that liner shipping companies operating in Hong Kong crave the legal certainty of a block exemption (similar to those in the EU and Asian countries including Singapore) and HKLSA filed the application in 2015. HKLSA's application was the first application for a block exemption under the

Competition Ordinance, and as at the date of writing remains the sole application made. The two page Non-Confidential Summary dated 17 December 2015 makes it clear that block exemptions for VDAs and VSAs are being sought.

The tramp shipping sector may also be affected by the Competition Ordinance as it is not usual in this sector for pools to be formed. In the EU, the operators of pools tend to self assess their arrangements to be able to prove, if challenged, that they were entitled to rely on the efficiency exemption (to the First Conduct Rule). As the Hong Kong Competition Commission is a new regulator, no one knows how it will approach the shipping industry.

iii Mandatory container weighing

In May 2014, the International Maritime Organization (IMO) approved changes to the SOLAS Convention regarding a mandatory container weight verification requirement on shippers. On 21 November 2014 the amendments were adopted by the IMO. They will become effective (and mandatory) in IMO countries on 1 July 2016.

The MD is the authority that will regulate the container mass verification in Hong Kong. The MD intends to amend subsidiary legislation in the summer of 2016 and has already published two guidelines:

- a Merchant Shipping (Safety) (Carriage of Cargoes) Regulation (the Regulation) to be amended;
- b Guidelines on the Verification of Gross Mass of a Container with Cargo Packed in Hong Kong (the Guidelines);⁹⁴ and
- c guidelines specific to Method 2 under which shippers must have their procedure approved and are given a registration number by MD.⁹⁵

The MD is close to finalising arrangements. No further consultation is envisaged. However, we understand that some shippers are concerned that the MD's current proposals might exceed those of other authorities and put Hong Kong shippers at a disadvantage (e.g., the requirements of Method 2 require training and registration and under both Methods a signed declaration is required). In our view the MD's arrangements are sensible. However, it is our observation that the SOLAS amendments are not being uniformly implemented across the world, which is causing difficulties for the shipping industry – especially to the many companies that operate internationally and need to be able to operate on the basis of single company policies or documents.

iv What next

Happily, there are currently several government initiatives to improve the competitiveness of the Hong Kong maritime sector.

The Maritime and Aviation Training Fund was approved by the LegCo in January 2014, with a commitment of HK\$100 million over five years from 2014–2019. The Fund is a training fund for maritime and aviation transport and aims to sustain and expand various schemes and scholarships, and to implement other new initiatives.⁹⁶

94 www.mardep.gov.hk/en/pub_services/ocean/pdf/miss_vgm_guidelines.pdf.

95 www.mardep.gov.hk/en/pub_services/ocean/pdf/miss_vgm_method2.pdf.

96 www.thb.gov.hk/eng/whatsnew/transport/2014/20140401.htm.

In April 2014 a ‘Consultancy Study on Enhancing Hong Kong’s Position as an International Maritime Centre’⁹⁷ was published, which contains several concrete recommendations. This study was referenced by the Chief Executive, CY Leung, in his policy address for 2014:⁹⁸

The study concluded that Hong Kong is well positioned to develop high value-added maritime services. It also proposed setting up a new statutory maritime body. In the coming year, the government will work out the specific functions, structure and funding of the proposed new body and consult the industry. We will then take forward the necessary legislative procedures as soon as possible.

In his 2016 Policy Address,⁹⁹ the Chief Executive announced the merger of the existing Maritime Industry Council and Port Development Council to form a new Hong Kong Maritime & Port Board (the Board). The government decided to set up the Board having taken on board the findings and recommendations of the business case study commissioned in mid-2014 to look into the feasibility of setting up a new maritime body, as well as views and suggestions received from stakeholders during the study period.¹⁰⁰ The Board, officially established in April 2016, will be chaired by Prof Anthony Cheung the Secretary for Transport & Housing, and will be a high-level steering body to assist the government in formulating strategies and policies to drive the growth of high value-added and professional maritime services in Hong Kong, foster talent development (including overseeing the implementation of the Maritime and Aviation Training Fund), and promote Hong Kong as an international maritime hub.¹⁰¹ Three functional committees will be formed under the Board, respectively focusing on manpower development, promotion and external relations, and industry development. Each of these committees will be chaired by an industry person. The Board will cooperate with Hong Kong Trade Development Council and Invest Hong Kong to expand efforts to raise Hong Kong’s profile in the international maritime landscape.

97 [www.mic.gov.hk/docs/8870%20IMC%20Final%20Report%20-%20ENG%20\(16.04.2014\).pdf](http://www.mic.gov.hk/docs/8870%20IMC%20Final%20Report%20-%20ENG%20(16.04.2014).pdf).

98 http://hksoa.org/news_events/newsletter/2014/Chief%20Executives%20Policy%20Address%202014.html.

99 www.policyaddress.gov.hk/2016/eng/p15.html.

100 www.hkmpb.gov.hk/en/pressreleases/20160401.html.

101 <http://hong-kong-economy-research.hktdc.com/business-news/article/Hong-Kong-Industry-Profiles/Sea-Transport-Industry-in-Hong-Kong/hkip/en/1/1X000000/1X0018WG.htm>, <http://www.hkmpb.gov.hk/en/reference.html>.

Chapter 22

INDIA

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I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

India achieved a unique economic distinction in 2016 of becoming the fastest growing economy in the world surpassing China and other big emerging economies. While Chinese GDP grew 6.9 per cent in 2015, India's GDP grew at a rate of 7.3 per cent in 2015. Despite record growth rates, the merchandise trade intensity of India's GDP is still below 30 per cent. This indicates that there is still a lot of untapped potential for further trade growth, and consequently further opportunities in the shipping and port sector. The Indian federal government has recently made a concerted effort to boost the manufacturing sector by running a 'Make in India' campaigns. Shipping and dry bulk commodity trade has been hit very hard by the slowdown in the Chinese economy and the world economy in general. In the present gloomy scenario India could turn out to be the knight in shining armour by being the country that could revive the Baltic dry bulk index from its lowest ebb.

India is heavily dependent on the imports of coal from countries such as Indonesia, Australia and South Africa to fire its thermal power plants. Over the past decade Indian companies have routinely been investing in mines in these overseas jurisdictions. Preliminary data from the International Energy Agency (IEA) indicate that India may well overtake China as the largest importer of coal. The Indian government's push for universal energy access and an expansion of manufacturing will drive electricity growth. It should, however, be noted that the Indian government plans to cut coal imports and rely on domestic production for power generation in the coming years. According to the World Steel Association India was the only country in the world that had shown a positive increase in steel production despite steel prices plummeting globally. This would undoubtedly lead to further imports in steelmaking coking coal.

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An overwhelming majority of Indian petrochemical companies are government-owned companies that import crude oil from Africa and the Middle East. Indian oil refiners have recently sought to increase their uptake of Iranian crude, after the lifting of a range of European Union and United Nations sanctions in mid-January, and are likely to continue buying given that they are geographically the nearest market to Iran. The Jamnagar refinery located in western India and operated by Reliance Industries is the world's largest oil refining complex. It recently began to export gasoline and diesel from to the United States and Europe on large tankers capturing much of the ex-Asia product tanker trade. As general practice, Indian government-owned petrochemical companies float tenders (which are open to bidding from foreign shipowners) for the chartering of ships to carry cargo of crude oil. The tenders provide for Indian law and jurisdiction. Indian shipping companies operating in spot tanker market in the year 2015 have made whopping profits. As the price of crude oil went down, the refining margins expanded all over the globe. This led to higher utilisation and throughputs by the refineries and as a consequence better utilisation of the product tanker fleet. Taking advantage of the fall in global crude oil prices, the Indian government has embarked on a policy to fill up strategic petroleum reserves with cheap oil at a rock bottom price and this would further push demand for tankers calling to various Indian ports.

Indian ports are classified as major ports and minor ports. Major ports are owned and operated by the Indian federal government while minor ports are owned and operated by various state governments. India has 12 major ports and over 200 minor ports. The drafts at major ports have been historically low in comparison to required draft to match with advancements in size and shapes of the ships. Average draft in most Indian ports ranges between 12 and 14 metres, which makes it difficult to handle new generation container vessels with capacity of more than 15,000 TEUs and super tankers. The coming years would witness a huge potential in the dredging industry in India with foreign players being allowed to bid for lucrative tenders subject to the 'right of first refusal' of Indian dredging companies. Around 25 per cent of India's container cargo is trans-shipped through international trans-shipment ports such as Colombo and Singapore due to lack of infrastructure to handle larger vessels at Indian ports. The Vallarpadam container terminal has to date already surpassed its estimated annual throughput, which is currently approximately 400,000 TEU.

The Indian government has recently come up with a number of projects to augment port sector development in the country under its ambitious Sagarmala initiative. Under the plan, the Indian government has identified more than 150 projects for development of its port infrastructure and is seeking to *inter alia* focus on port modernisation and port-led industrialisation. The Indian government is in presently seeking to emulate the Chinese port led development and intends to create new age 'smart cities' modelled on the lines of Shenzhen. Over the next 10 years the Indian government seeks to attract foreign direct investment in ports to the tune off US\$59 billion.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Shipping in India is a federally regulated matter exclusively controlled by the Ministry of Shipping. The Directorate General of Shipping (DG Shipping) in a statutory constituted under the Indian Merchant Shipping Act, 1958 (MSA) to deal with all matters relating to shipping policy and legislation, implementation of various International Conventions relating to safety, prevention of pollution and other mandatory regulations of the International Maritime Organisation. The DG Shipping routinely issues circulars and notifications

regulating shipping in India. The DG Shipping is assisted by the Nautical Advisor-cum Additional Director General (Technical) with respect to all technical aspects relating to shipping.

The Mercantile Maritime Department is a body under the control of DG Shipping dealing with the registration of Indian-flagged vessels and survey of ships and the enforcement of shipping regulations and International conventions such as the SOLAS Convention and Load Line Conventions.

The MSA sets out cabotage regulations that restrict the use of foreign-flagged vessels for transporting cargo along the coast of India. Indian charterers are required to obtain permission from the Directorate General of Shipping (DG Shipping) before chartering a foreign-flagged vessel for the transportation of cargo.² Indian charterers are required to circulate an enquiry with the Indian National Shipowners Association (INSA) to meet their tonnage requirements and it is only after obtaining a no-objection certificate from INSA that an Indian charterer may charter a foreign-flagged vessel. Foreign-flagged vessels can engage in coastal trade in India only after obtaining a licence from the DG Shipping wherein Indian-flagged vessels have the right to first refusal. The Indian government has recently amended the cabotage policy to promote trans-shipment.

The Ministry of Shipping has a Chartering Wing (Transchart) to carry out Indian government policy for transportation of government-owned or controlled cargoes. Transchart makes shipping arrangements at internationally competitive freight rates while giving preference or support to Indian-flagged vessels without any difference in freight rate. Transchart regularly finalises long-term time charterparty's, COA's for various Indian government-owned entities such as the Steel Authority of India, Rashtriya Ispat Nigam Ltd along with government departments such as the Department of Fertilizers. Transchart levies a 1 per cent chartering services charge with respect to the contracts it concludes.

There have been instances where vessels have been detained for their failure to properly declare. The carriage of arms and ammunition poses added complications for vessels calling in India following the recent *Seaman Guard Ohio* incident. While Indian Guidelines issued by the Ministry of Shipping are clear on the formalities required to carry arms and ammunition on board a vessel before calling into an Indian port there appears to be a considerable amount of ambiguity on the rights of foreign-flagged vessels to carry arms and ammunition while entering India's Economic Exclusive Zone and territorial water. The Supreme Court of India in its recent judgment upheld the detention of Indian authorities of *Seaman Guard Ohio* a foreign-flagged floating armoury that entered Indian waters without valid documents and directed the local court to expedite the trial of the 35 seafarers who have been imprisoned in India.³ The decision of Indian authorities in imprisoning 35 foreign seafarers of *Seaman Guard Ohio* and the imprisonment of two Italian marines on board *MV Enrica Lexie* who accidentally shot Indian fishermen outside the territorial waters of India has come into serious criticism internationally.

Generally, an Indian shipping company would have to pay corporate tax at the rate of 33.3 per cent, unless it opted for the tonnage tax system, which is approximately 1 to

2 Section 406 of the MSA.

3 Inspector of Police, 'Q' Branch C.I.D., *Thoothukudi v. Dudinik Valentyn Captain of Vessel*, Criminal Appeal No. 837 of 2015.

2 per cent of its income. An Indian shipping company could opt for the tonnage tax system by fulfilling certain guidelines laid down by the government such as the training of Indian seafarers and making financial provision for new vessel ownership.

III FORUM AND JURISDICTION

i Courts

Commercial shipping disputes in India are as a general rule litigated primarily in Civil Courts and High Courts of coastal states in exercise of its Admiralty Jurisdiction. While the High Courts of Bombay, Calcutta, Delhi, Madras and Himachal Pradesh exercise original jurisdiction for claims that have arisen within their territorial and pecuniary jurisdiction, all other civil suits have to be instituted in the courts of first instance, which invariably are District Courts. The Bombay High Court and the Calcutta High Court exercise pan India admiralty jurisdiction (i.e., these courts can pass an order of arrest against any vessel calling in any port in India).⁴ The High Courts of other coastal states of Gujarat, Karnataka, Kerala, Madras, Andhra Pradesh and Orissa can exercise admiralty jurisdiction over vessels calling in those respective states albeit in practice there have been relatively very few orders of arrest passed by the High Courts of Karnataka, Andhra Pradesh and Orissa.

India has recently enacted the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015 (the Commercial Courts Act), legislation which is set to transform the commercial judicial landscape in India. The government has established special commercial courts modelled on the lines of the English High Court to deal with a specific cluster of subject matters disputes which *inter alia* include disputes relating to export or admiralty and maritime law, carriage of goods, import of merchandise, sale of goods, insurance etc. The Commercial Courts Act imposes very tight deadlines to complete procedural formalities in litigation. It seeks to impose an absolute duty of full and frank disclosure of facts and documents at the time of filing of the statement of claim and defence. Commercial courts have greater power to compel parties to disclose documents. In keeping with the latest developments in technology, the Commercial Courts Act has introduced the system of e-discovery of electronic records such as metadata and logs relating to the creation and modification of documents. There is also a radical overall in the regime relating to the recoverability of legal costs along with obtaining summary judgments. A very recent and novel development in the judicial landscape of India is the setting up of case management conferences wherein each party provides the court a budget of future legal costs to be incurred. The court has the power to provide suggestions on the future legal costs budget to the parties.

Some important points to bear in mind in the context of issues arising in India on choice of law and civil jurisdiction are as follows:

- a words such as 'alone', 'only' or 'exclusive' are not required to make a clause an exclusive jurisdiction clause as a matter of Indian law.⁵ If a contract provides for parties to submit to the jurisdiction of a particular court, there is a general presumption that the intention of the parties would be to exclude the jurisdiction of all other courts;

4 *Kamla Kant Dube & Anr v. m.v. Umang & Others*, 2002 (Supp.2) Bom. C.R. 864.

5 *Swastik Gasses P Ltd v. Indian Oil Corporation Ltd* (2013) 9 SCC 32.

- b* as a general rule, in the absence of a cause of action arising in India, it may be difficult for two foreign parties to litigate before an Indian court save for admiralty disputes;⁶
- c* if, in any case, more than one Indian Civil Court has jurisdiction over the subject matter, it is open for the parties to contractually agreed to choose one courts thereby ousting the jurisdiction of the other courts which would under normal circumstance also have jurisdiction;⁷
- d* an Indian and foreign entity can agree to litigate in a foreign court and this is enforceable as a matter of Indian law;⁸
- e* two Indian parties cannot exclude, by contract, the applicability of Indian substantive law if the place of performance of the contract is in India;⁹
- f* Indian courts can apply foreign law in deciding disputes. The question of what constitutes foreign law is a question of fact.¹⁰ If no evidence is adduced regarding foreign law, normally the presumption is that it is the same as the Indian law on the point in consideration;¹¹
- g* limitation being an issue of the *lex fori*, the Indian Limitation Act 1963 will mandatorily apply to disputes litigated in India. For most types of cause of action, the limitation period under Indian law is three years; and
- h* parties cannot extend or reduce the limitation period by contract.¹²

ii Arbitration and ADR

Maritime arbitrations in India may be *ad hoc* arbitrations or be administered by the Indian Council of Arbitration (ICA). It is common for shipping contracts involving Indian government-owned companies to provide for arbitration in India to be administered by the ICA under its Maritime Rules.

India has given effect to the UNCITRAL Model Law on International Commercial Arbitration vide the enactment of the Arbitration and Conciliation Act 1996 (the Arbitration Act). Parliament has recently enacted the Arbitration and Conciliation (Amendment) Act 2015 (the New Arbitration Regime), which has far-reaching ramifications on both arbitrations seated in India and arbitrations taking place out of India. Under the New Arbitration Regime the default court to move any application with respect to an international commercial arbitration (an arbitration in which one of the parties are a foreign party irrespective of the fact whether or not the arbitration is taking place in India or not) would be a High Court. Indian High Courts are better equipped to deal with complex commercial disputes international transactions and the official language of High Courts in India is English. This brings an end to a notorious dilatory tactic adopted by certain litigants to initiate proceedings in courts in interior parts of India where the proceedings may be in a language other than English and the judge is ill-equipped to handle complex international commercial disputes.

6 Section 20 of CPC.

7 *AsBC Laminart Pvt. Ltd. v. AP Agencies, Salem*, (1989) 2 SCC 163.

8 *Modi Entertainment Network and Anr v. WSG Cricket Pte Ltd*, AIR 2003 SC 1177.

9 Section 23 of the Indian Contract Act, 1862.

10 *Hari Shanker Jain v. Sonia Gandhi*, AIR 2001 SC 3689.

11 *Malaysian International Trading Corpn v. Mega Safe Deposit Vaults (P) Ltd* 2006 (3) Bom C R 109.

12 Section 28 of the Indian Contract Act 1872.

The New Arbitration Regime further strengthens the powers of Indian courts to pass interim orders of security and other ancillary reliefs in support of arbitrations taking place out of India. Another notable feature is allowing 'any person claiming through or under' a party who was a signatory of the original arbitration agreement to be party to the arbitration agreement. This has the effect of binding even an assignee or subrogate within the ambit of the arbitration agreement contained in the underlying contract. The New Arbitration Regime has inserted the Fifth Schedule to the Arbitration Act wherein the arbitrator is liable to disclose in writing any circumstance relating to his impartiality and independence, which contains an exhaustive list of grounds including any direct, indirect, past and recent relationship with the subject matter and parties to the dispute, be it financial, business, professional, personal etc. Furthermore, there is an mandate imposed upon the Tribunal to pass and publish the final award within one year from the commencement of the reference (and this can in limited circumstances be extended by a further maximum period of six months). Moreover, the New Arbitration Regime has introduced fast-track arbitration or documents and is the only arbitration in which the tribunal would consist of a sole arbitrator, the award would be passed by the tribunal merely by reviewing documents without any need for an oral hearing and the tribunal would be under an obligation to pass and publish its award within six months from its reference.

The Indian courts would be bound to decline to exercise jurisdiction and to refer the parties to arbitration unless the Indian courts 'find that the said agreement is null and void, inoperative or incapable of being performed'.¹³ The Supreme Court, in the case of *Chloro Controls India Private Ltd v. Severn Trent Water Purification Inc*,¹⁴ held that the court could have a fully-fledged trial (which includes leading oral or documentary evidence) to make a determination on whether an arbitration agreement exists before referring the parties to arbitration. The finding of the Indian court on whether an arbitration agreement exists or not is final and cannot be revisited by the arbitral tribunal. In other recent judgments, the Supreme Court took the view that the question of fraud leading to the conclusion of the underlying contract and arbitration agreement is an arbitral issue that ought to be decided by the tribunal.¹⁵

iii Enforcement of foreign arbitral awards and foreign judgments

Enforcement of arbitral awards under the New York Convention or the Geneva Convention

Although, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the New York Convention) has also been incorporated into the Arbitration Act; a foreign arbitral award can be enforced in India only if the Indian government declares the country in which the award was passed to be a 'reciprocating territory' under Sections 44 or 53 of the Arbitration Act. A foreign award holder seeking to enforce an award in India would have to apply to the court, within whose jurisdiction the award debtor has its assets, to enforce the foreign award.¹⁶ Presently, there is no requirement to convert the foreign award into a judgment of the Indian court and the party seeking to enforce a foreign

13 Section 45 of the Arbitration and Conciliation Act 1996.

14 (2013) 1 SCC 641.

15 *MSM Satellite v. World Sport Group* (2014) 1 SCC 58.

16 *Bharat Aluminium Co v. Kaiser Aluminium Technical Services* (2012) 9 SCC 552.

award can directly initiate execution proceedings to liquidate the assets of the award debtor.¹⁷ Enforcement and execution proceedings can be initiated in India by placing on record the following documents before the Indian court:

- a the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;
- b the original agreement for arbitration or a duly certified thereof; and
- c such evidence as may be necessary to prove that the award is a foreign award. In this regard an affidavit from a lawyer from the country in which the foreign award was passed stating that the foreign award is final and binding as a matter of the laws in that jurisdiction and confirming that there is no appeal against the award pending in that jurisdiction.

The Award Debtor can resist the enforcement of the Foreign Award on the grounds enumerated in the New York Convention which are reproduced under Section 48 of the Arbitration Act. The Supreme Court of India in the judgment of *Shri Lal Mahal Ltd v. Progetto Grano Spa*¹⁸ defined 'public policy of India' to mean '(1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality.' Prior to this judgment the term 'public policy of India' in the context of the enforcement of a foreign arbitral award also *inter alia* the award being patently illegal (i.e., against Indian statutory law). The Supreme Court of India in the case of *Oil and Natural Gas Corporation Ltd. v. Western Geco International Ltd*¹⁹ elaborated on what was meant as the 'fundamental policy of Indian law' to mean circumstance where the arbitral tribunal does not adopt a 'judicial approach' demands that a decision be fair, reasonable and objective a decision be fair, reasonable and objective or if the award is perverse or so irrational that no reasonable person would have arrived at the same.

Indian courts are now prone to adopting a commercial approach in refusing to allow an Indian party to take advantage of its own wrongdoing and avoid a contract (e.g., in circumstances such as issuing guarantees for overseas companies that do not comply with Indian foreign exchange regulations).²⁰ The Bombay High Court in its judgment involving shipping disputes held that a party is estopped from challenging the foreign arbitral award at the time of its enforcement in India on the ground of the existence of a valid and enforceable arbitration agreement when they have chosen not to appeal against the award before the appropriate court in the country where the arbitration had been seated.²¹

Enforcement of foreign judgments in India

A foreign judgment can only be enforced in India as if it were a decree of an Indian court if it has been passed in a reciprocating territory declared by the Indian government.²² Notably,

17 *Fuerst Day Lawson Ltd v. Jindal Exports Ltd* (2001) 6 SCC 356.

18 (2014) 2 SCC 433.

19 (2014) 9 SCC 263.

20 *Intesa Sanpaolo SPA v. Videocon Industries Ltd*, 2014 SCC Online Bom.1276.

21 *Mitsui OSK Lines Ltd (Japan) v. Orient Ship Agency Pvt. Ltd (India)*, Arbitration Petition No. 842 of 2009 and *Aurelia Reederei Eugen Friederich GmbH v. POL India Projects Limited*, Arbitration Petition 12 of 2012.

22 To date, only 11 countries have been notified as reciprocating territories by the Indian government; Aden, Bangladesh, the Cook Islands, Fiji, the Federation of Malaysia, Hong

only a foreign 'decree' (i.e., a final judgment on the underlying merits of the case) can be enforced in India and not an interim order. Courts in India have the right to examine whether a foreign judgment has been given on the merits.²³ In these circumstances, it would appear that interim or interlocutory orders of freezing or *Mareva* injunctions passed by foreign courts are not enforceable in India.

While the Gujarat High Court in the case of *M V Cape Climber v. Glory Wealth Shipping Pvt Ltd*²⁴ has allowed the enforcement of a London arbitral award which has been subsequently converted into a judgment of an English High Court as a decree of the English High Court the Delhi High Court in the case of *Marina World Shipping Corporation Ltd v. Jindal Exports & Imports Private Ltd*²⁵ rejected this approach and held that a London arbitral award can only be enforced in India under the Arbitration Act and not under English judgment under the Code of Civil Procedure 1908 (CPC) albeit in that case the London arbitral award had been converted into a judgment of the English High Court. The Bombay High Court in the case of *Marine Geotechnic LLC (Marine) v. Coastal Marine Construction & Engineering Ltd*²⁶ held that a foreign judgment could in principle be directly enforced in India by way of bankruptcy or winding-up proceedings strictly subject to the decree holder establishing that the foreign decree satisfies the requirements of Section 13 of the CPC.

IV SHIPPING CONTRACTS

Under Indian law, as a general rule of contractual construction, an attempt must be made to reconcile the relevant terms of a contract if possible and not to treat any of them as idle surplusage.²⁷ Indian courts have held that if a party seeks to invoke a termination clause in the contract it is incumbent upon the party to strictly follow the procedural requirements stipulated in the contract to effect a valid termination.²⁸

i Shipbuilding

India allows 100 per cent foreign direct investment into shipbuilding in India. A shipbuilding contract providing for Indian law would be governed by the Indian Sale of Goods Act 1930. The Indian Sale of Goods Act 1930 is based upon and is largely a reproduction of the English Sale of Goods Act 1893, and the principles of the law of sale of goods in both the countries are the same.²⁹

The shipbuilding industry is subject to a plethora of taxes ranging from VAT, central sales tax (CST), excise duty, octroi, customs duty, customs bond, cost clearing and forwarding

Kong, New Zealand, New Guinea, the Republic of Singapore, Trinidad and Tobago, and the Trust Territories of Western Samoa, Papua, the United Kingdom and the United Arab Emirates.

23 *International Woolen Mills v. Standard Wool (UK) Ltd*, AIR 2001 SC 2134.

24 Civil Application (OJ) No. 250 of 2015.

25 2007 (3) ARBLR 46 Delhi.

26 Company Petition No. 67 of 2013.

27 *Tiruvenibai v. Lilabai* AIR 1959 S.C. 620.

28 *Base International Holdings NV Hockenrode 6 v. Pallava Hotels Corporation Ltd* 1999 PTC (19) 252.

29 *Consolidated Coffee Ltd v. Coffee Board, Bangalore* (1980) 3 SCC 358.

excise, foreign income tax, taxes by ancillary units and subcontractors. Octroi, CST, VAT, service tax at 12.36 per cent is applicable on all design and engineering services procured by the shipyards during the course of ship construction. It is important to ensure that any shipbuilding contract with an Indian counterparty governed by Indian law and jurisdiction has clear provisions on the allocation of liability for the payment of taxes imposed by a gamut of Indian authorities.

The Indian Ministry of Shipping has made it mandatory for government departments, agencies and state-run fleet owners to order all their ships only from Indian shipbuilders from 2025 onwards. In line with the government policy GAIL India Ltd floated a US\$7 billion tender for owning and chartering nine newly built ships to carry LNG or shale gas from the United States to India. Indian shipyards desirous to bid for the tender have now entered into collaborations with South Korean shipyards and have also entered into technology licensing agreements to procure LNG containment technology licences.

ii Contracts of carriage

Key legislation

The key legislation, rules and conventions applicable to contracts of carriage include the following:

The Indian Carriage of Goods by Sea Act, 1925 (as amended in 1993) (Indian COGSA)

The Indian COGSA, in its Schedule, incorporate the Hague Rules. In 1993, India amended the COGSA and included certain provisions of the Hague-Visby Rules. Significantly, the legislation increased the limits as prescribed in the Hague-Visby Rules. However, the Hague-Visby Rules do not have the force of law in India.

The Indian COGSA has the force of law only in respect of outward cargo (i.e., ships carrying goods from Indian ports to foreign ports and does not apply to inward cargo i.e., ships carrying goods from foreign ports to Indian ports). The Supreme Court of India in the case of *Shipping Corporation of India Ltd v. Bharat Earth Movers Ltd*³⁰ had to make a determination on whether the Indian COGSA or the Japanese Carriage of Goods by Sea Act 1992 (Japanese COGSA) in a particular case involving goods carried from Japan to India. The Supreme Court of India held that the Indian COGSA did not apply to inward shipments and chose to apply the Japanese COGSA. Indian courts have allowed carriers to take defences enumerated under Article IV of the Hague Rules such as fire etc.³¹ The Multimodal Transport Act 1993 applies to multimodal transportation of cargo from any place in India to a place outside India using two or more modes of transport.

The Indian Contract Act 1872

Charterparty contracts are also governed by the Indian Contract Act 1872 and common law principles derived from various jurisdictions. This is the position in the absence of any provision in the contract whereby a different substantive law applies to the contract.

Sections 73 to 75 of the Indian Contract Act 1872 deal with the measure of damages to which the claimant may be entitled resulting from the counterparty's breach of contract. In the case of liquidated damages, it can perhaps be argued that there is a slight divergence

30 (2008) 2 SCC 79.

31 *Collis Line Private Ltd. v. New India Assurance Co. Ltd* AIR 1982 Ker 127.

between Indian and English law. Indian courts have held that in the absence of loss, a claimant is unlikely to be awarded liquidated damages. In their interpretation of Section 74 of the Indian Contract Act 1872, Indian courts have taken the view that clauses in a contract providing for liquidated damages are enforceable only if it is impossible to compute the loss resulting from the breach of a contract, subject to the same not being a penalty clause.³²

Liens

Liens can be exercised under Indian law in the following circumstances:

Where cargo is to be discharged at a port designated as a major port a shipowner may be able to exercise a statutory lien over the cargo shipped on board the vessel for claims of outstanding freight and other charges payable to the shipowner.³³ Certain ports in the ownership of the state governments, for example Gujarat, also have similar provisions enabling a shipowner to exercise a statutory lien over the cargo.³⁴ Notice of such a lien must be served upon the consignee and the concerned port authority prior to the discharge of the cargo from the vessel.

Other than the right of lien under the MPT Act, the question of whether an owner has the right of lien against the charterers and the cargo interests will depend upon the lien clauses in the charterparty, in the bill of lading and the incorporation clause in the bill of lading.

A shipowner can also in principle exercise a possessory lien over the cargo by refusing the discharge the same in an event the party liable to pay the shipowners dues is the owner of the cargo. The exercise of a possessory lien over cargo owned by third-party cargo interests may potentially expose the shipowners to vessels for claims under the bills of lading contract.

iii Cargo claims

India does not have an equivalent of the English Carriage of Goods by Sea Act 1924 but rather follows a colonial legislation the Indian Bills of Lading Act 1856. The Madras High Court in the case of *MT Titan Vision v. 3F Industries Ltd*³⁵ and the Gujarat High Court in the case of *MG Forest Pte Ltd. v. M.V. Project Workshop*³⁶ in their interpretation of Section 1 of the Indian Bills of Lading Act 1856 held that in India only a named 'consignee' or 'endorsee' would have the right to initiate a cargo claim against the carrier under the bill of lading contract. In these circumstance, it can be argued that the consignee 'assumes only those rights and liabilities created by the contract of carriage which concern the carriage and delivery of the goods, and the payment therefor' so that for example the consignee would not be liable for the consequences of the shipment of dangerous cargo. To incorporate an arbitration or dispute resolution clause, the bill of lading will be required to specify that the arbitration or dispute resolution clause is incorporated.³⁷ The Supreme Court of India in the case of

32 *Fateh Chand v. Balkishan Dass* AIR 1963 S.C. 1405; and *Oil & Natural Gas Corporation Ltd v. Saw Pipes Ltd.* 2003(5) SCC 705.

33 Section 60 of the Major Port Trust Act 1963.

34 Section 48 of the Gujarat Maritime Board Act.

35 (2014) 2 MLJ 154.

36 Misc. Civil Application No. 187 of 2003 in Admiralty Suit No. 14 of 2003.

37 *MV 'Baltic Confidence' v. The State Trading Corporation of India Ltd* (2001) 7 SCC 473.

*British India Steam Navigation Co Ltd v. Shanmughavilas Cashew Industries*³⁸ had expressed the opinion that a consignee or an endorsee may be bound by the terms of the charterparty terms incorporated into the bill of lading contract even in circumstances when the consignee or endorsee is unaware of those terms.

iv Interest

Indian courts have the power to pass judgments in foreign currency.³⁹ As a general rule, for commercial transactions Indian courts award interest at the rate at which monies are lent or advanced by nationalised banks.⁴⁰ Indian arbitrators generally award interest at the rate of 18 per cent a year.⁴¹

In the case of *Forysthe Trading Services Ltd v. MV Niizuru*⁴² the contract between the bunker supplier and shipowner provided for interest of 20 per cent per annum for late payment. The Bombay High Court disregarded the interest rate stipulated in the bunker supply contract and awarded interest of only 8 per cent per annum. In a recent judgment, the Supreme Court has held that a tribunal's award may be inclusive of interest and the sum of the principal amount plus interest may be directed to be paid by the tribunal for the pre-award period.⁴³

v Limitation of liability

Carriers can limit their liability for cargo claims by way of 'package limitation' and 'kilo limitation' pursuant to the Indian COGSA and the Multimodal Transportation Act 1993.

A party seeking to limit liability under the LLMC Convention 1976 can initiate limitation proceedings by filing an Admiralty Suit in the High Court.

India acceded to the 1996 LLMC Protocol in 2011; accordingly the limits therein apply in India. This issue came for consideration before the High Court of Bombay.⁴⁴ The High Court of Bombay held that 'Convention' means LLMC Convention 1976 as amended from time to time. As such, in that case the limitation fund was computed based on the provisions of the 1996 Protocol. It was further decided that institution of a prior legal proceeding against the concerned vessel or its owner cannot be said to be a pre-condition for maintainability of suit for constitution of limitation fund. As such, a suit for constitution of limitation fund can be initiated as a pre-emptive action. Further, the Bombay High Court was posed with the question as to whether the shipowner's right to limit liability under Part X-A of the MSA is absolute and without reference to any proof of loss resulting from a personal act or omission of the shipowner. The Court decided the issue in affirmative and held that right to limit liability is absolute. This decision of the High Court of Bombay is therefore likely to make India a favourable jurisdiction for constituting a single worldwide

38 (1990) 3 SCC 48.

39 *Forasol v. Oil & Natural Gas Commission* 1984 SCR (1) 526; and *Forysthe Trading Services Ltd v. MV 'Niizuru'* 2004 (5) Bom CR 806.

40 Section 34 of the Code of Civil Procedure 1908.

41 Section 31(7)(b) of the the Indian Arbitration and Conciliation Act 1996.

42 2004 (5) Bom CR 806.

43 *Hyder Consulting Ltd v. State of Orissa* (2015) 2 SCC 189.

44 *Murmansk Shipping Company v. Adanin Power Rajasthan Ltd & Ors*; Admiralty Suit No. 43 of 2012 (decided on 8 January 2016).

limitation fund, that too without any prior claim being initiated. Interim limitation funds are not permissible under Indian law. However, the judgment in *The 'Eleni'*⁴⁵ has been appealed to a higher bench.

The CLC Convention as amended from time to time, has been incorporated under Part X-B of the MSA. A party seeking to limit liability can file an action in the admiralty court.⁴⁶ Security in the form of cash or bank guarantee is permissible.

V ARREST AND SALE OF SHIPS

i Arrest of ships

To date India follows the English Admiralty Act 1861, which has been incorporated into Indian law by virtue of the Colonial Courts of Admiralty (India) Act 1891 designating the High Courts of Calcutta, Bombay and Madras to be Admiralty Courts. However, the Supreme Court in *MV Elisabeth v. Harwan Investment and Trading Pvt. Ltd.*⁴⁷ (*MV Elisabeth*) extended the admiralty jurisdiction to other littoral states (namely, the High Courts of Gujarat, Kerala, Andhra Pradesh and Odisha), which have adopted verbatim the admiralty rules of the High Courts of Bombay (Gujarat), Calcutta (Odisha) and Madras (Kerala, Andhra Pradesh). The Apex Court in *MV Elisabeth* held that the admiralty jurisdiction of an Indian High Court is not limited to what is set out in English Admiralty Act 1861 (which prevented an Admiralty Court for excising jurisdiction over a claim under a bill of lading involving outward shipment of cargo) but held that 1952 Arrest Convention has the force of law in India. The Apex Court in a later case in making a determination of what constitutes 'necessities supplied to a vessel' under the Admiralty Act 1861 applied the 1999 Arrest Convention albeit the 1999 Arrest Convention was internationally not in force when the same was applied.⁴⁸

The Supreme Court of India in the case of *Epoch Enterrepots v. MV Won Fu*⁴⁹ had applied the 1967 Maritime Liens and Mortgages conventions and recognised a limited cluster of maritime claims to be 'maritime liens' which are limited to (1) damage done by a ship; (2) salvage; (3) seamen's and master's wages; (4) master's disbursement; and (5) bottomry. The Supreme Court has held that 'not every kind of service or every kind of damage which arises in connection with a ship gives rise to a maritime lien'. Various High Courts in India have routinely applied the 1993 Maritime Liens and Mortgages Convention. The Gujarat High Court in the case of *MV Sena vs. Galeheal Inc*⁵⁰ adopted the reasoning of the Canadian Supreme Court in *The Ioannis Daskalelis*⁵¹ in which the issue of whether or not there existed a maritime lien ought to be determined by the proper law of the contract or transaction. That said, it can be argued that the *MV Sena* case may no longer serve as a precedent or have any persuasive value in light of the Supreme Court judgment in the case of *MV Won Fu*.

45 Footnote 47, *supra*.

46 For an Indian-registered ship, in the High Court of the state in whose port the vessel is registered or where the incident occurs. For foreign ships, at the port or place within whose territorial waters the vessel is present.

47 (1993) SCC Supp (2) 433.

48 *Liverpool & London S.P. & I Association Ltd. v. M.V. Sea Success I* (2004) 9 SCC 512.

49 (2003) 1 SCC 305.

50 Admiralty Suit Nos. 8 of 2001.

51 [1974] 1 Lloyd's Rep. 174.

Furthermore, the Bombay High Court in the case of *Flag Mersinidi*⁵² rejected the notion that a maritime lien can be enforced under a bunker supply contract if the governing law of the bunker supply contract recognises a maritime lien for bunkers supplied to a vessel. In that case, the Bombay High Court had refused to apply US law, which was the governing law of the bunker supply contract.

While most admiralty courts in India do not require counter-security to be deposited, Bombay and Gujarat require an undertaking to pay compensation as damages in the event the arrest is vacated and 'prejudice' is suffered as a consequence of the arrest.⁵³ Arrests can be moved *ex parte*, unless there is a caveat against arrest filed up to a reasonable contemplation of the claim with an undertaking to furnish security for the claim amount. India follows the English case of *The Moschanthy*⁵⁴ on the basis of which a claimant can sustain an order of arrest over a vessel merely by making a reasonably best arguable case.⁵⁵

A party seeking release of the vessel is required to furnish security either by way of cash deposit or bank guarantee.⁵⁶ Indian courts do not accept club LoUs as security unless they are accepted by the claimant.⁵⁷

In India, every company is a separate and independent legal entity. The ownership of the assets vests with the company and not in its shareholders.⁵⁸ *Prima facie*, the registered owner of the vessel is deemed the beneficial owner save in very exceptional cases.⁵⁹ Only in exceptional circumstances where questions of public policy, fraud or malice are involved, will the courts consider piercing the corporate veil. It must be noted that the party seeking to lift the corporate veil will be required to plead and particularise fraud or malice or public policy.⁶⁰

Notwithstanding the fact that the Arrest Conventions allow an Admiralty Court of one country to pass an order of arrest over a vessel for security to pending the determination of the underlying merits of the case in another country, there has been a lot of uncertainty on the circumstances whether or not an Admiralty Court in India can pass an order of arrest against a vessel merely for security in support of foreign juridical and arbitration proceedings. The Bombay High Court has vacated a number of its earlier orders of arrest in security for arbitration or foreign judicial proceedings taking place out of India.⁶¹ This view, however, has not been adopted by the Gujarat High Court.⁶²

Recent notable judgments in India involving ship arrest and sale have clarified the following matters:

52 Notice of Motion No. 763 Pf 2013 and Admiralty Suit No. 8 of 2013.

53 Rule 941, The Bombay High Court (Original Side) Rules 1980.

54 [1971] 1 Lloyd's Rep 37.

55 *Videsh Sanchar Nigam Limited v. MV 'Kapitan Kud'* (1996) 7 SCC 127.

56 Security can be deposited in US dollars in the Bombay High Court.

57 *Stephen Commerce Pvt Ltd v. Owners and Parties in Vessel MT 'Zaima Navard'*, AIR 1999 Cal 64. However, the parties can agree to an LoU as security which could be accepted by the courts.

58 *Lufeng Shipping Company Ltd. v. MV 'Rainbow Ace'*, 2013 (4) ABR1412.

59 *Universal Marine & Anr. v. MT 'Hartati'*, MANU/MH/0131/2014.

60 Order VI Rule 4, Civil Procedure Code 1906.

61 *Rushab Ship International LLC v. The Bunkers on board MV African Eagle*, 2014(4) Bom CR 269.

62 *Phaeton International Co. S.A. v. MV Americana*, Admiralty Suit No. 17 of 2015.

- a* Mere acknowledgment on a bunker receipt by a crew member would not entitle a bunker supplier to arrest the vessel in the absence of satisfactory evidence to show privity between the owner and the bunker supplier.
In the event bunkers are ordered by the owner (irrespective of whether the vessel is on time charter or not) the bunker supplier will be entitled to arrest a vessel at the *prima facie* evaluation stage.⁶³
- b* A vessel cannot be arrested for security pending arbitration in the admiralty jurisdiction of the court.⁶⁴
- c* A claim for damages for wrongful arrest of a vessel is not a special law. Principles of mitigation will apply and the claim is subject to mitigation of losses arising from the wrongful arrest of the vessel.⁶⁵
- d* Arrest of bunkers on board a vessel is not subject to the admiralty jurisdiction of the courts in India.⁶⁶
- e* A pre-emptive limitation action for constitution of a fund to limit the shipowners' liability under the LLMC Convention of 1976 and its Protocol of 1996 cannot be filed in India.⁶⁷
- f* Proceedings for sale of a vessel under arrest can be taken out on expiry of three days from the date arrest if no security or bail has been furnished.⁶⁸
- g* Indian vessels are not subject to the admiralty jurisdiction of courts in India.⁶⁹
- h* In the case of vessels meant to be scrapped, once a vessel is beached and a bill of entry is filed, a ship is no longer subject to the admiralty jurisdiction of the court.⁷⁰
- i* Freight alone cannot be arrested.⁷¹
- j* Owner means 'registered owner'. The corporate veil can be lifted in exceptional cases, for example, fraud. The party seeking arrest on basis of fraud must plead and *prima facie* establish that fraud is committed.⁷²

63 *Gulf Petrochem Energy Pvt Ltd v. MT 'Valor'* in Notice of Motion (L) No. 581 of 2015 in Admiralty Suit (L) No. 94 of 2015 and *Drop Energy Services Ltd. v. MT 'Tradewind'* in Notice of Motion No. 805 of 2015 in Admiralty Suit No. 240 of 2015. The former judgment is under appeal to a higher bench of the Bombay High Court.

64 The 'Rushab' (footnote 58, *supra*).

65 *Lufeng Shipping Co Ltd v. MV 'Rainbow Ace' and Ors*, Notice of Motion No. 1646 of 2013 in Admiralty Suit No. 29 of 2013.

66 *Peninsula Petroleum Ltd v. Bunkers on board the vessel MV 'Geowave Commander'*, Notice of Motion No. 385 of 2014 in Admiralty Suit No. 85 of 2014.

67 *The 'Eleni'* (footnote 47, *supra*).

68 *Coromandel International Limited v. MV 'Glory I' and Andromeda Ship Holdings Ltd*, 2014 (3) ABR 365.

69 *Porto Maina Maritime SA v. MV 'Gati Majestic'* AIR 2014 Cal 47; however, the Bombay High Court permits arrest of Indian vessels.

70 *Destel Marine Ltd v. MV 'Star 7'*, Admiralty Suit No. 1 of 2011 (Guj HC).

71 *Bulk Shipping Management SEA & Anr v. The Bunkers on board MV 'African Eagle'*, 2013 (3) BomCR 380.

72 Footnote 55, *supra*.

- k* The 'undertaking' provided to the court is deemed to be a 'blank cheque'. Once the order of arrest is vacated, the party that has suffered 'prejudice' can invoke the undertaking and the test of malice or *crassa negligentia* does not apply.⁷³
- l* There is no right vested in a shipowner against a receiver or consignee or the shipper or the charterer (unless a vessel is a party) *in personam* in the admiralty jurisdiction of the court.⁷⁴

ii Court orders for sale of a vessel

There is no legislation in India setting out the procedure for the sale of vessels through the judicial process. The procedures for sale of vessels are usually formulated by each High Court within their own admiralty rules. Indian rules of civil procedure do not allow a judgment creditor to sell the vessel by way of a private sale.

VI REGULATION

India is party to the Indian Ocean MoU, which lays down basic standards for vessels calling at ports. Port Entry Rules: - In order to prevent wreckage of older foreign ships in Indian waters as well as to prevent oil spills incidents the Ministry of Shipping has notified the Merchant Shipping (Regulation of Entry of Ships into Ports, Anchorages and Offshore Facilities) Rules, 2012 which *inter alia* provides that foreign-flagged vessels can only enter Indian territorial waters on being in possession of a 'Blue Care' (i.e., valid insurance coverage). Furthermore, a subject to certain exceptions, foreign vessels can enter into Indian territorial waters only if they are entered with a classification society that is a member of the International Association of Classification Societies.

iii Registration and classification

Indian-flagged vessels either be registered under the MSA, the Inland Vessels Act 1917 and the Coasting Vessels Act 1838 depending on the nature and type of vessels. The Customs Act 1962 imposes various obligations upon owners of vessels calling in India such as the Import General Manifest. A central register is maintained by the DG Shipping, which contains all the entries recorded in the register books kept by the registrar at the port of registry in India. Any vessel that is registered requires a licence to trade. Vessels that are over 25 years old require a special licence to trade.

iv Environmental regulation

India has ratified the CLC Convention and its 1976 and 1992 Protocols. Part XB of the MSA deals with civil liability for oil pollution damage and Part XC was also introduced to incorporate the requirements of the International Oil Pollution Compensation Fund (IOPC

73 *Navbharat International Ltd v. Cargo on board MV 'Amtees'*. MANU/MH/0192/2014.

74 *M/s Greenwich Meridian Logistics (India) Pvt Ltd v. M/s Sapphire Kitchenware Pvt. Ltd*, Admiralty Suit 31 of 2008 of Bombay High Court and *MUR Shipping BV Amsterdam v. Al Gyas Exports Private Ltd*.

Fund). Where an oil spill occurs from two or more ships as a result of an accident, the owners of all such ships are jointly and severally liable for all such damage, which is not reasonably separable.⁷⁵

India is the second-highest contributor to the IOPC fund in the world with 13.12 per cent of the total composition of the fund. The IOPC Fund is under an obligation to pay compensation to states and persons who suffer pollution damage, if such persons are unable to obtain compensation from the owner of the ship from which the oil escaped or if the compensation due from such owner and P&I club is not sufficient to cover the damage suffered. The recently has been a number of cases filed against the IOPC Fund before the Bombay High Court.

The Supreme Court of India, in the case of *Research Foundation for Science v. Union of India*,⁷⁶ laid down detailed guidelines to be followed during the process of ship breaking. The Supreme Court directed the federal government to formulate a legislation to deal with the hazards posed by ship breaking.

v Collisions, salvage and wrecks

The International Regulations for Preventing Collisions at Sea 1972 have been incorporated into Indian law vide the Merchant Shipping (Prevention of Collisions at Sea) Regulations 1975. Collision cases are as a general rule tried before the High Court in exercise of its Admiralty Jurisdiction. While in principle Indian courts have the power to apportion liability between two vessel in accordance with its degree of fault there have been very few instances when Indian courts have proceeded to apportion liability. There is 'no mathematically exact formula' to measure the degree of negligence of a party under Indian law and the court has a considerable amount of discretion in this regard on abstract notions of justice and equity.⁷⁷ Section 345(1)(a) of the MSA provides that in the event it is not possible to establish different degrees of fault, the liability shall be apportioned equally. In these circumstances, liability between two vessels in a collision would be apportioned equally unless it is ex facie evident that the degree of fault of one vessel was palpably higher than the other vessel.

The law in India with respect to shipwrecks is laid down in Part XIII of the MSA and in the Indian Ports Act 1908. The term 'wreck' includes 'a vessel abandoned without hope or intention of recovery'. While Indian is in the process of giving effect to the Nairobi Wreck Removal Convention into domestic law, at this point of time there is no legal regime to deal with the removal of wrecks in the exclusive economic zone of India. The Bombay High Court, in the case of *Oil & Natural Gas Corporation Ltd. v. Osprey Underwriting Agencies Ltd*,⁷⁸ in interpreting Section 14 of the Indian Ports Act directed a foreign P&I club and its Indian agents to deposit the cost of removing and raising the wreck in the Indian court. It should, however, be noted that the Bombay High Court, *inter alia*, dealt with a dispute between the assured and the P&I club.

75 Section 352 I (4) of MSA.

76 (2007) 8 SCC 583.

77 *Municipal Corporation of Greater Bombay Vs. Laxman Iyer* 2003(8) S.C.C. 731.

78 1998 (2) BOMLR 179.

Sections 402 to 404 of the MSA provide the salvor a right to claim salvage services. The Kerala High Court, in the case of *Commander KP Shashidharan v. Union of India*,⁷⁹ allowed an officer of the Indian Coast Guard to claim salvage services even though he had a pre-existing duty to protect life and property at sea.

vi Passengers' rights

India does not have any domestic legislations specifically governing the terms of contract for the carriage of passengers and their luggage by sea nor is the Athens Convention 1974 in force in India. In lieu of the same it would appear that there is absolute freedom of contracts between passenger liners and Indian passengers. That said, not all terms in the standard for contract between the passenger liner and the passenger would be enforceable as a matter of Indian law. The passengers may have recourse to the consumer protection tribunal and the consumer protection tribunal may choose to disregard certain terms in the standard terms and conditions of the passenger liner on the ground that the same is unconscionable. One would expect Indian courts would adopt jurisprudence under the Motor Vehicles Act 1988 in dealing with these issues surrounding compensation to passengers.

vii Seafarers' rights

The Maritime Labour Convention 2006 (MLC) has been incorporated into Indian law and forms part of the Indian Merchant Shipping Act 1958. The Indian Maritime Administration has put in place a system by which Indian shipowners may subject their ships to inspection for MLC so that the statement of compliance with the MLC can be issued to such ships, allowing them to receive favourable treatment under MLC regime in foreign ports.⁸⁰ The Supreme Court of India in the case of *O Konavalov v. Commander, Coast Guard Region*⁸¹ held that a foreign seaman's right to wages falls within the ambit of a fundamental right to life and liberty under Article 21 of the Constitution of India. Indian courts are likely to be guided by the general standard agreement between National Union of Seafarers of India and Indian National Shipowners' Association as an overwhelming majority of contract of employment on board a vessel incorporates these terms.

Indian law recognises the rights of an injured seafarer or the family members of a deceased seafarer to claim compensation for injury or death of the seafarer. The Employees' Compensation Act 1923 (ECA) is a general legislation that allows workmen or employees to claim compensation for death and personal injury of seafarers. The ECA would not, however, apply to Indian seafarers working aboard foreign-flagged vessels. Under Indian law, foreign seafarers cannot be employed on Indian-flagged vessels unless they obtain prior permission from the DG Shipping. Although the Fatal Accidents Act 1855 also provides for compensation to the family of the deceased in an event that the death is caused by a wrongful act, neglect or default it is not as comprehensive as the ECA and is rarely followed by Indian courts.

79 AIR 2002 Ker 388.

80 Id, M.S. Notice No. 07 of 2013(F. No. 16(5)/CR/2010) dated 1 February 2013.

81 (2006) 4 SCC 620.

VII OUTLOOK

India is presently a very friendly jurisdiction for the arrest of ships as courts would pass orders of arrest on the basis of the claimant's 'reasonably arguable best case' and courts were very liberal in disregarding the corporate and juridical identity of companies at the time of moving the arrest, thereby allowing arrest of vessels in the beneficial ownership of the party liable for the claimant's 'maritime claim'. That said, the recent judgments of the Bombay High Court in the matters of *MT 'Hartati'* and *MV 'Rainbow Ace'* indicate that courts are reluctant to disregard the corporate personality of a company unless a case of fraud is made.

India still lags far behind in enacting domestic legislations to give effect to various international conventions and that it is only in the recent past that there has been a conscious effort to deal with this lacuna in a constructive manner. Interim orders, judgments, *Mareva* or freezing injunctions passed by foreign courts are not enforceable in India. Indian Courts also do not recognise foreign bankruptcy and rehabilitation proceedings. It is hoped that in the future, Indian courts play a more proactive role in transnational litigations. Notwithstanding the above, the new arbitration regime and the Commercial Courts Act have come as a breath of fresh air. It is hoped that the government provides the necessary infrastructure to ensure that these new institutions are able to meet the exigencies of the present day dynamic environment of international commerce. The ability legitimately coerce a counterparty to perform his contractual obligations is absolutely critical to the success of any firm in the field of shipping and international trade. The World Bank in its Doing Business 2016 Index rates India No. 178 out of 189 while China Ranks No. 7. This clearly indicates that India has a very long way to go to reform its judicial system and the New Arbitration Regime along with the Commercial Courts Act is just the beginning of a long journey.

Chapter 23

INDONESIA

*Sahat Siahaan, Muhammad Muslim, Desi Rutvikasari and
Dwi Meitiara Pratiwi Bakrie¹*

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The Indonesian shipping industry is one of the many emerging industries to have enjoyed significant growth over the past few years. According to the December 2014 report by the Directorate General of Sea Communications of the Ministry of Transportation (SeaComms), 2,718 companies conduct shipping business and hold shipping business licences. As of 31 December 2014, Indonesian companies operate approximately 14,156 Indonesian vessels of various tonnages and vessel types. By way of comparison, there were only 1,272 shipping companies established in Indonesia in 2005, and approximately 6,041 vessels in operation.

After the 2008 adoption of a cabotage policy by the Indonesian House of Representatives, by virtue of Law No. 17 of 2008 concerning Shipping (the Shipping Law), there was a decline in the volume of cargo carriage by foreign vessels in the Indonesian market. In 2008, the total volume of domestic cargo carriage was 242.89 million tonnes, with approximately 20.6 per cent of that volume (approximately 50.12 million tonnes) carried by foreign vessels. By December 2014, this percentage had declined to 0.013 per cent (around 53,730 tonnes) of a total volume of 408 million tonnes of cargo carried in the domestic market. This trend directly correlates with the growth of the number of Indonesian vessels in recent years.

On the other hand, international vessels continue to dominate international cargo carriage in Indonesia, carrying 88.98 per cent of the total volume of 653 million tonnes of cargo; however, the total volume of international cargo carried by Indonesian-flagged vessels

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is steadily increasing each year, with growth ranging from 0.07 per cent to 1.5 per cent since 2008. The figures for 2014 show a 25 per cent increase in the volume of cargo carried by Indonesian vessels compared with 2013.²

The main commodities carried to international destinations are textile products, electronic components and products, rubber products, palm oil, palm kernel, wood and forest crops, and agricultural products such as cocoa and coffee. The key destinations for these products are the United States, a number of European countries, Japan and China.

Indonesia is currently constructing a new industrial port in Kalibaru, Tanjung Priok, Jakarta. The new project was initiated to tackle cargo container congestion in Tanjung Priok, one of Indonesia's major ports. By the end of 2012, the total amount of containers reached 6.2 million TEUs, up from 5.6 million TEUs in 2011. The port was only designed to accommodate 5 million TEUs, showing the urgent need to expand its infrastructure.

When the project is completed – which is expected to be by 2023 – Tanjung Priok will have increased its annual capacity to 18 million TEUs and will be able to facilitate triple-E class container ships (with an 18,000 TEU capacity) in a 300-metre two-way sea lane. The Kalibaru port project is divided into three phases. The first phase includes the installation of container terminal infrastructure and equipment (US\$1.38 billion) as well as construction of a new petroleum product terminal (US\$730 million) on a total of 195 hectares of land in north Jakarta. In this phase the port's piers will be extended to a length of around 4,000 metres. The first phase that was expected to be completed by 2014³ is delayed.⁴

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Indonesia's regulation of the shipping industry continues to focus on its public and administrative aspects; only a small portion of Indonesia's legal instruments regulate the commercial aspects of the shipping industry. The Shipping Law is the most recent general regulation of the shipping industry and it covers almost all public and administrative aspects of the shipping industry, such as port operations, ship registration and seaworthiness, pollution and salvage. Other specific areas of the shipping industry, such as vessel ownership or the establishment of shipping companies, may be found in lower legislative instruments, such as Government Regulations and Regulations from the Ministry of Transportation.

Any commercial aspects of the shipping industry, such as carriers' liability, bills of lading, charterparties, limitations of liability, collisions and general average, are predominantly regulated in the Indonesian Commercial Code (ICC). The Commercial Code is a legislative instrument dating from the Dutch colonial era, which was enacted in 1847. Since its enactment, Indonesia has not revised or amended it, causing several provisions to fall short of current trends in the shipping industry.

Indonesia has adopted a cabotage policy that prohibits foreign vessels from carrying passengers and goods in domestic waters. At certain times, however, particular types of vessels that are related to specific activities, such as oil and gas survey vessels, drilling vessels, offshore construction and support activities, dredging, salvage and underwater works,

2 The information regarding the growth of Indonesian flag vessels, total volume of cargo carried by Indonesian and foreign flag vessels, etc., was obtained from SeaComms.

3 www.indonesia-investments.com/projects/public-projects/new-priok-port/item319.

4 <http://industri.kontan.co.id/news/pelindo-ii-operasikan-kalibaru-medio-2015>.

are still permitted to operate in Indonesian waters pursuant to Regulation of Minister of Transportation No. 10 of 2014, as amended, concerning Permission for Foreign Vessels aside from Carrying Passengers and Goods in Domestic Area. By the end of 2015, these types of vessels must all be Indonesian-flagged vessels, subject to SeaComms' further review.

Indonesia is a signatory to several international shipping conventions, but any international convention ratified by Indonesia must be adopted into Indonesian law before its provisions will apply. Most of the international conventions that have been ratified by Indonesia are related to the public aspects of the shipping industry. Indonesia is a signatory to, *inter alia*, the Colregs, MARPOL (including Annex IV and Annex V), SOLAS, the CLC Convention, and the Maritime Liens and Mortgages Convention. Indonesia is not, however, party to some important conventions such as the Hague Rules 1924, the Hague-Visby Rules 1968, the Hamburg Rules 1976 or the LLMC Convention 1976.

III FORUM AND JURISDICTION

i Courts

Indonesia does not have a specific court that deals with shipping disputes. As such, shipping disputes are litigated in the district courts (as courts of first instance). The relevant court that has the jurisdiction must be the district court in the domicile of the defendant or the location of the vessel. Indonesian courts do not litigate disputes arising out of contracts governed by foreign law.

The Maritime Court in Indonesia does not litigate shipping disputes, but merely examines indications or allegations of error or negligence in the application of professional standards of seamanship by the master or officers of a ship in the event of an accident. A decision of the Maritime Court may either release and discharge or impose administrative sanctions on the master or officers concerned.

Under Article 1967 of the Indonesian Civil Code (ICC), a 30-year time bar to file a claim for breach of contract and tort applies, unless otherwise provided. The ICC, however, stipulates different time bars for different claims. For example, a one-year time bar applies to a claim in relation to the sum that is payable by a consignee in a carriage-of-goods contract and to a claim against a carrier in a carriage-of-goods contract. A two-year time bar applies to a claim in connection with damage caused by a ship collision and a claim in relation to a salvage award. A three-year time bar applies to claims in connection with delivery and performance of work of supplies to the ship or maintenance or repair to the ship.

ii Arbitration and ADR

Shipping disputes are among the commercial matters that can be referred to arbitration under Indonesian law. Procedures for arbitration and other alternative dispute resolution mechanisms such as mediation and expert determination are governed by Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. There is no arbitration procedure specific to shipping disputes in Indonesia.

Law No. 30 of 1999 does not adopt UNCITRAL Model Law on International Commercial Arbitration; it does, however, encompass various stages of arbitration, such as constitution of arbitration, powers of the court to assist arbitration proceedings and enforcement of arbitral awards.

One of the arbitration institutions in Indonesia is the Indonesian National Arbitration Board (BANI), which has its own Rules of Arbitral Procedures and it has a number of

arbitrators with expertise in shipping law matters. BANI's head office is in Jakarta and it has branch offices in some Indonesian cities, such as Batam, Bandung, Denpasar, Medan, Surabaya, Palembang and Pontianak.

iii Enforcement of foreign judgments and arbitral awards

Foreign court judgments are not recognised or enforceable in Indonesia. Thus, if a foreign court judgment is to be enforced in Indonesia, the dispute must be re-litigated before an Indonesian court.

As to recognition and enforcement of foreign arbitration awards, the position is somewhat different from that of foreign court decisions. Indonesia is a party to the New York Convention, and so under Indonesian arbitration law, foreign arbitration awards are recognised and can be enforced in Indonesia upon the issuance of a leave of enforcement (*exequatur*) by the chairman of the Central Jakarta District Court, to the extent that the arbitration award fulfils the following requirements:

- a* it is issued in a country with which Indonesia is bound by a treaty concerning recognition and enforcement of foreign arbitration awards;
- b* it is pertaining to a commercial dispute under Indonesian law; and
- c* it does not violate Indonesian public policy.

IV SHIPPING CONTRACTS

i Shipbuilding

Under Indonesian Law, there is no specific regulation that provides any formalities that must be complied with in entering a shipbuilding contract. As such, the preparation and the execution of a shipbuilding contract refers to the general provisions of contract stipulated under the Civil Code.

Under the Civil Code, the parties to a shipbuilding contract are entitled to set the provisions of such contract as long as they do not conflict with any applicable law in Indonesia. As these are agreed by the parties, under Indonesian law such provisions must be deemed exhaustive and binding on both parties.

General practice in Indonesia indicates that during the building process, the buyer and the shipbuilder will jointly hold possession of the concerned ship. Every action that takes place regarding the ship must be made with the approval of both parties.

Under Indonesian law, title to a ship is evidenced by a ship registration deed. Article 7 of Ministry of Transportation Regulation No. 13 of 2012 regarding Registration and Nationality of Ships (PM 13/2012) provides that the ship registration deed of a newly built ship can only be issued if the buyer is able to present a protocol of delivery of the ship signed by the shipbuilder and the buyer. Therefore, by law, title to a newly built ship is deemed to have passed to the buyer once the completed ship has been delivered to the buyer.

As title of a ship will legally be passed on to the buyer once the ship has been delivered, as per Article 7 of PM 13/2012, in a normal situation any risk will also be deemed fully transferred to the buyer from such delivery date. Based on the freedom of contract principle, however, the parties may agree to set out provisions that customise the timing or conditions that trigger the passing of risk. Under a shipbuilding contract, parties will normally agree to set out a provision stipulating that any risk during construction is borne by the shipbuilder unless such risk occurs as a result of actions of the buyer or the buyer's contractors.

Should the shipbuilder fail to deliver the ship at the time given in the shipbuilding contract, the buyer will then be entitled to declare that an event of default has occurred and may submit the claim to the court after serving a warning letter on the shipbuilder.

ii Contracts of carriage

Under Indonesian law, matters regarding the carriage of goods by sea are regulated under the ICC. The ICC contains basic provisions of carriage of goods by sea, including the duties and liability of the carrier, the legal relationship between carrier, shipper and consignee, and limitation of liability. One of the most notable provisions of the ICC is prescribed under the Article 470, which prohibits the carrier from contracting out or limiting its liability with regard to cargo damage as a result of the following:

- a* negligence in taking care of or providing appropriate facilities or staff to ensure the seaworthiness of the means of transport used for the shipment;
- b* failure to determine an appropriate means of transport for the shipment; or
- c* wrongful handling or insufficient protection of the goods.

A clause that contains a waiver of cargo damage liability arising from the aforesaid conducts is deemed null and void.

To date, Indonesia has not ratified the Hague Rules or the Hague-Visby Rules, but in practice parties may refer to any of the provisions of those rules in a bill of lading. Indonesia has not ratified the Rotterdam Rules either.

Indonesian legislation also adopts a cabotage policy allowing only vessels flying the Indonesian flag to carry out domestic or inter-island carriage of goods by sea. This cabotage policy is set out in Article 5 of the Shipping Law. It provides a strict requirement for a vessel to fly the Indonesian flag; a vessel can only legally fly the Indonesian flag if it is owned by an Indonesian individual or a legal entity majority owned by Indonesian shareholders.

The concept of lien is not recognised under Indonesian law. If the maritime lien needs to be enforced in Indonesia, the claimant (the shipowner or ship operator) must commence a civil proceeding and request that the court issue an order containing an attachment over the goods or assets that are to be the object of the lien, or security in favour of the claimant.

iii Cargo claims

Any dispute arising from a contract of carriage of goods by sea is considered a civil dispute under Indonesian law and must be litigated in an ordinary court. Civil proceedings consist of proceedings in the first instance court (district court) and the appeal court (the High Court). If there is an appeal filed against the decision of the High Court, the party that is not satisfied may file its appeal to the highest court under the Indonesian judicial system to the Supreme Court. The Supreme Court's judgments are final and binding. Nonetheless, a civil review of the decision by the Supreme Court may also be filed upon the discovery of new evidence, or on the grounds of the incorrect implementation of law by the Supreme Court.

The proceedings commence with a claim that is submitted to and registered with the district court having jurisdiction over the matter at the domicile of the defendant. The court examines and decides all civil disputes without any limitation whatsoever, either in respect of

the value or the nature of the disputes. The Indonesian Civil Procedural Law is governed by the Indonesian Procedural Code for the Islands of Java and Madura (HIR), the Procedural Code for the Outer Islands (RBG) and the Supreme Court's Regulation and Circular Letter.⁵

Cases may be appealed from the district court to the High Court and then, ultimately, to the Supreme Court. There is currently a heavy backlog of cases before the Supreme Court meaning that fully contested litigation can take more than five years to resolve.

In the event of default in a carriage contract, the shipper, as a contracting party of the carriage contract, has title to sue. Article 1243 of the Civil Code grants the right to a non-defaulting party to claim the compensation in the event of default. Moreover, Article 510 of the ICC grants a right to the holder of bill of lading to demand that the carrier hand over the goods at the place of destination in accordance with the bill of lading. The provisions of this article can be construed as giving title to the holder of the bill of lading to sue the carrier if the delivered goods are not in the condition described in the bill of lading. In the event the carrier is not the owner of the ship, Article 455 of the ICC provides that the carrier will still be held liable for cargo damage unless the carrier specifically mentions in the carriage contract that it merely acted on behalf of the owner whose name is also specified in the carriage contract. Therefore, should a carriage contract contains demise clause, it will only be enforceable if the clause specifically mentions the name of the shipowner on whose behalf the carrier is acting.

Should the carriage contract contain a dispute resolution clause, it is possible under Indonesian law to incorporate this clause into the bill of lading. Under the freedom of contract principle adopted under Indonesian law, the parties to a contract are entitled to agree upon any provision they desire, including incorporating charterparty terms under a bill of lading.

iv Limitation of liability

The ICC was enacted during the Dutch colonial era in Indonesia. Until now, most of the provisions in the ICC with regard to shipping matters, including those related to the carrier's limitation of liability, have never been amended.

With respect to the carrier's limitation of liability, the ICC recognises two types of limitation of liability: package limitation of liability, and tonnage limitation of liability. Moreover, the ICC also recognises limitation of liability in collision cases. These limitations are as follows:

- a* carrier's package limitation of liability: maximum of 600 rupiah.⁶
- b* carrier's tonnage limitation of liability: maximum of 50 rupiah per cubic metre of net tonnage of the ship;⁷ and

5 The HIR and RGB originated in the pre-World War II period, and are still valid based on Article II of the Transitional Provisions of the 1945 Constitution, which stipulates that all laws and legislation existing under the Dutch colonial administration automatically became laws and legislation of the Republic of Indonesia, unless repealed, revoked or amended. In addition, the Code of Civil Procedure formerly applicable to Europeans may be used as guidance for the issues not regulated by the HIR.

6 Article 470 (2) of the ICC.

7 Article 474 of ICC.

- c* limitation of liability in collision: maximum of 50 rupiah for each cubic metre of the net tonnage of the vessel.⁸

There do not appear to be any precedents dealing with limitation of liability actions in Indonesia, so it may be assumed that the parties to the cases of carriers' liability or collision have never applied the statutory provisions in the court proceedings and have settled the dispute amicably.

V REMEDIES

i Ship arrest

The legal provisions regarding ship arrest are stipulated in Articles 222 and 223 of the Shipping Law. These articles allow any ship involved in criminal and civil cases to be arrested. These provisions also enable a party to request that the court arrest a ship without filing a claim or lawsuit. The arrest of a ship can take place after the relevant court issues an order.

The provisions of Articles 222 and 223 of the Shipping Law are to some extent ineffective due to the lack of implementing regulations – in Indonesia, the general provisions in an act are required to be further stipulated in detail in the implementing regulations. Article 223 of the Shipping Law on the arrest of vessel explicitly mentions that an implementing regulation is required to stipulate further technical guideline for the procedures of arrest. Until now, the government (especially the Ministry of Transportation (MoT)) has not issued any such regulation. Because of this, some courts are still reluctant to issue orders for the arrest of ships.

From current precedent, however, it can be observed that several courts (particularly courts outside Jakarta) have been confident enough to issue the order of ship arrest despite the absence of an implementing regulation. This court order has a significant chance of being challenged, however, it does take time to challenge such court order and release a ship, so arrest may indeed potentially delay a ship's operation. Based on the foregoing, even though the regulation on procedures for ship arrest has not been enacted, in practice, there is still a chance that some courts may issue the order of arrest. It is, however, difficult to give an estimate of the time that may be taken in effecting the arrest as the current law is silent on such matter.

Indonesian law does not recognise arrest of a sister ship – arrest of a ship can only be effected strictly on the ship in question.

ii Court orders for sale of a vessel

Under Indonesian law, the judicial sale of a vessel can only take place if the defendant (the shipowner) does not satisfy its obligations. In this situation, the plaintiff may invoke the court to issue an executorial attachment under which the judgment will ultimately be satisfied by a public auction on the assets of the defendant (including its vessel). Such public auction is effected by a special administrative board. A public auction should be preceded by a notification published in a local newspaper.

⁸ Article 541 of the ICC.

VI REGULATION

i Safety

Article 116 of Law No. 17 of 2008, 'safety and security of shipping', covers the aspects of safety and security in waters and ports as well as protection of the marine environment. 'Safety and security in shipping' is defined as a state in which the conditions for seaworthiness and navigation are met. Further, seaworthiness covers aspects such as ship safety, protection of pollution from ships, manning, management of safety and pollution prevention from ships as well as the management of ship safety.

Indonesia ratified SOLAS through Presidential Decree No. 65 of 1985. Since its ratification, the implementation of SOLAS is scattered throughout various laws and regulations. One notable regulation on ship safety is Regulation of the Minister for Transport Affairs No. 45 of 2012 concerning Management of Ship Safety (MR No. 45 of 2012). Under Article 2 of this regulation, ship operators that operate ships of certain types and sizes must fulfil certain conditions in the management of safety and prevention of pollution from the ship by implementing safety management systems. Such safety management systems must ensure that certain conditions for ship safety are met, and that codes, recommendations or standards imposed by the IMO, the government and classification societies are also taken into account. Further, SeaComms Decree No. PY 67/1/6-96 dated 12 July 1996 makes it clear that the ISM Code must be applied by certain types of ships flying Indonesian flags, ships that are used in both domestic and international shipping. This mandatory application of the ISM Code is valid irrespective of the manufacturing year of the ships.

Pursuant to Article 3 of MR No. 45 of 2012, safety management systems must be implemented by the operators of the following types of ship:

- a* passenger ships, including high-speed passenger crafts of all sizes;
- b* oil tankers, chemical tankers and liquid gas carriers with gross tonnage of 150 or more; and
- c* other cargo ships, high-speed cargo crafts, fishing vessels, offshore mobile drilling units, and floating storage unit and offloading/floating production storage and off-loading facilities, including manned barges of 500 GT or more.

ii Port state control

Indonesia is a party to the Tokyo MoU. In Indonesia, port state control is carried out by the harbour master. Pursuant to Law No. 17 of 2008, the harbour master is defined as the government official appointed by the MoT who holds the highest authority to maintain marine safety and security within a commercial or a non-commercial port, in accordance with the prevailing laws and regulations. Under the implementing regulation, Government Regulation No. 61 of 2009 on Harbours, the marine safety and security responsibilities of the harbour master include the implementation and supervision of compliance with marine safety and security rules, as well as those in respect of the protection of the marine environment within the area of a port.

Ministerial Regulation No. 36 of 2012 on the Organisation of the Harbour Master's Department and Port Authority further sets out the internal bodies within the harbour master's department in achieving its function, including divisions responsible for seaworthiness, control and patrol. The department has the authority to perform the following functions:

- a* inspection of manning compliance;

- b* preparation of materials for publication of seafarer documents, seafarers' employment agreements and lists of crews and crew protection;
- c* supervision of compliance of seaworthy, seagoing traffic, movement of ships, pilotage and towage activities;
- d* supervision of compliance with ships' seaworthiness requirements;
- e* issuance of port clearance;
- f* supervision of foreign ships (port state control and flag state control);
- g* implementation of safeguards, security and policing on embarkation and disembarkation facilities for passengers at port;
- h* supervision of loading and unloading activities of particular goods and dangerous goods and fuel storage, including supervision of hazardous and poisonous waste, construction of port facilities and reclamation and dredging work;
- i* performance of patrols at the port area, and supervision and maintenance of safety for seagoing ships, anchored ships and ships at berth;
- j* preparation of coordination and assistance for search and rescue, prevention of marine pollution and fire-fighting facilities at port area and monitoring protection of the marine environment;
- k* supervision of salvage activities and underwater works;
- l* supervision and system verification of ship safety and the port facility (ISPS Code);
- m* preparations for the initial examination of accidents at sea; and
- n* investigations of criminal acts in shipping in accordance with laws and regulations.

iii Registration and classification

Ships can be registered at the office of the MoT and various ports (more than 40) in Indonesia that have been designated by the government. Various ship documents must also be submitted along with the application letter to register the ship. The registration of ship will be conducted by the execution of a deed of registration by the ship registration office, and the registration certificate will be issued to the owner of the ship upon the completion of such registration. These documents will subsequently serve as evidence of ownership of a ship.

Based on Law No. 17 of 2008, mortgages can be imposed on ships that are registered in Indonesia. The mortgage must be registered at the MoT's office or at the port at which the ship is registered.

Upon such registration, the ship registration office will issue a ship mortgage registration certificate to the mortgagee (creditor/lender) as evidence that the loan granted by the mortgagee is secured by mortgage. Subsequent mortgages are allowed but their priority will rank in order based on the registration date of the mortgage deed. The registrations of mortgage deed that were conducted at the same date will rank *pari passu* in relation to each other. Upon the payment of a loan agreement, the mortgagee may discharge the ship's mortgage by submitting an instruction letter to the officer of ship registration and record of ownership change at the MoT or the port at which the ship and the ship's mortgage is registered.

Indonesian law imposes a requirement to maintain class on any Indonesian-flagged ships that either: (1) have a length between the front vertical line and the rear of 20 metres or more; (2) have gross tonnage of 100 or more; or (3) have propulsion power of 250 horsepower

or more. Classification activities may be carried out by the Indonesian Bureau of Classification or acknowledged foreign classification societies. Indonesian government acknowledges several foreign classification societies which all of them are members of IACS.⁹

For foreign classification societies to conduct the activities of ship classification, they must obtain an approval of acknowledgement and appointment of a foreign classification society, as issued by SeaComms.¹⁰

Regulation of the Director General of Sea Transportation No. HK.103/2/5/DJPL-13 on Procedures and Requirements for the Acknowledgement and Appointment of Foreign Classification Societies specifies that such branch office must be established in the form of an Indonesian limited liability company. It further prescribes that the majority of shares in such company must be held by Indonesian shareholders; such shareholders must control at least 51 per cent of the company's total paid-up shares. The Indonesian company will operate as a separate entity instead of being under common management as often occurs in the relationship between headquarters and branch offices.

There is no Indonesian law or regulation that specifies the liability of a classification society in any circumstances.

iv Environmental regulation

The Indonesian territory is owned by the state and is used for the maximum benefit of the population. The state, through the government, is obliged to maintain and preserve such resources. This obligation constitutes the basis for the government to be involved in any aspects of environmental matters, including pollution issues. The most recent Environmental Law was passed in 2009. Indonesia has also ratified various international conventions related to the marine environment. By means of Presidential Decision No. 18 of 1978, Indonesia ratified the CLC Convention, and the amending Protocol of 1992 was ratified through Presidential Decision No. 52 of 1999. In addition, Indonesia ratified MARPOL 73/78 through Presidential Decision No. 46 of 1986.

Environmental protection is also governed under Law No. 17 of 2009. This Law prohibits pollution resulting from ship operations and port activities, including waste disposal in port waters. It stipulates that each crew must prevent and mitigate the occurrence of environmental pollution originating from their ship. Furthermore, every captain or any party responsible for activities in the waters (for example, the party managing offshore oil drilling and oil storage facilities in the water) are liable to mitigate any pollution originating from the ship or its activities. Violation of the foregoing requirement is subject to criminal sanctions of a maximum of two years' imprisonment and a maximum fine of 300 million rupiah.

In addition, based on the Shipping Law, the captain of a ship must, immediately after becoming aware of any maritime pollution originating from the ship or its activities, report

9 Members of IACS include American Bureau of Shipping, Bureau Veritas, China Classification Society, DNV GL, Indian Register of Shipping, Korean Register of Shipping, Lloyd's Register, Polish Register of Shipping and the Russian Maritime Register of Shipping.

10 The implementing regulation on the issuance of such approval under Regulation of the Director General of Sea Transportation No. HK.103/2/5/DJPL-13 on Procedures and Requirements for the Acknowledgement and Appointment of Foreign Classification Societies was only enacted in August 2013 and full compliance by foreign classification societies was required by March 2014.

such to the nearest harbour master or other government authority. Following the report, the harbour master will inform the relevant government authorities to carry out further action. The implementing regulation (Government Regulation No. 21 of 2010 regarding Protection of the Marine Environment) further elaborates that shipowners, ship operators or any responsible party will be liable for any costs incurred for handling the mitigation and losses arising from pollution originating from a ship or any of its activities.

v Collisions, salvage and wrecks

In relation to collisions, Indonesia has ratified the Colregs, but has not yet ratified any salvage conventions.

Under Indonesian law, collisions or accidents at sea must be investigated by the National Transportation Safety Committee, as the state authority authorised to conduct investigations of accidents at sea. Such investigation will, however, not determine who is negligent or liable for such accidents. Under the ICC, the liability of parties in a ship collision depends on the proportion of fault in the collision. In practice, the most crucial issue to be proven in a case of liability in collision is the element of fault. From a shipping practice point of view, the element of fault in the collision is reasonably closely related to the professionalism of the ships' crews. In light of this, it is the admiralty court that is authorised to determine whether the master or crews of the ships were at fault when the accident or collision occurred.

Salvage operations may be carried out by companies with business permits issued by SeaComms. Companies that wish to engage in such activities must be established solely to engage in such activities, with the same applying to the business activities of companies involved in underwater works. Pursuant to the implementing regulation (Government Regulation on Navigational Waters 5 of 2010 (GR No. 5 of 2010)), several requirements must also be met by an applicant to obtain a business permit issued by SeaComms, one of which is to fulfil certain technical requirements (i.e., to employ certified diving experts and to have at least one operating ship, including scuba equipment, cutting devices and diving equipment).

As to wreck removal, SeaComms is the state authority authorised to issue an order of wreck removal. As required under GR No. 5 of 2010, the owner of the wreck is obliged to remove such wreck or its cargo to a location specified by the MoT. Such wreck removal operation must be conducted within 180 calendar days of the ship sinking. If the owner fails to do so, the MoT will conduct the wreck removal operation at the cost of the owner.

vi Passengers' rights

Indonesia is not a party to the Athens Convention or its Protocols. Obligations of ship operators carrying passengers (or 'water transportation companies', using the term under Law No. 17 of 2008) and the rights of passengers are briefly set out in Law No. 17 of 2008 as well as some of its implementing regulations.

Under Article 40 of Law No. 17 of 2008, ship operators carrying passengers (carriers) are responsible for the safety and security of the passengers carried, as operators of the ship. Further, pursuant to Article 41(1)(a), they are liable for death or injury to passengers being carried as a result of an accident during the carriage period and that took place on board the ship, or during embarkation or disembarkation. Under Article 41(1)(c), they are also liable for delay in the transportation of passengers. Such liability includes appropriate services to

passengers in the event of departure delays due to the operators' negligence. They can be exonerated in whole or in part from liability arising out of delay if they can prove that such delay was not their fault.

Most importantly, Article 41(3) of Law No. 17 of 2008 provides a compulsory insurance regime in relation to the liability arising out of death or injury to passengers and delays in their transportation. This compulsory insurance must be taken out in accordance with the applicable insurance laws and regulations. As further stipulated under Article 181(3) of Government Regulation No. 20 of 2010, as amended by Government Regulation No. 22 of 2011 (GR No. 20 of 2010), carriers must insure their liability in relation to death or injury to passengers and delays in transportation, but they must also take out basic insurance protection for passengers. Further, in line with Article 181(5) of GR No. 20 of 2010, the limit for insurance of liability arising out of delay in transportation of passengers will be based on contractual arrangement between the operators and passengers, as evidenced by the terms and conditions on the tickets.

Violation of the compulsory insurance obligation and the obligation to carry out basic protection for passengers under Article 41(3) may entail imprisonment for up to six months and a fine of up to 100 million rupiah.

vii Seafarers' rights

Indonesia has not yet ratified the Maritime Labour Convention 2006 so, to safeguard seafarers' rights under Indonesian law, seafarer employment agreements play an important role. As specified under Government Regulation No. 7 of 2000 on Seamanship (GR No. 7 of 2000), an employee must have a seafarer employment agreement in order to work on board a ship. The agreement must set out the seafarer's rights to receive salary, overtime fees, compensation for holiday, daily allowance, transportation costs, wages for termination, and insurance for personal goods carried and personal accidents, and also to be provided with appropriate clothing for cold weather or a winter season in regions with a temperature of 15 degrees Celsius or below. GR No. 7 of 2000 also sets out the limit for a seafarer's working hours is eight hours a day, with one day's holiday every week, excluding official holidays. Any working hours exceeding this limit must be calculated as overtime.

To assure every seafarer's safety, taking into account recent cases relating to the taking hostage of Indonesian crews, the Indonesian government has issued a circular letter instructing port administrators and the heads of port authorities to be more vigilant in legalising seafarers' employment agreements, including ensuring that seafarers are aware of the content thereof by advising them of the content before their signing.

VII OUTLOOK

In 2015, the Indonesian government set out the new minimum capital requirement for companies engaging in sea transportation and several other related business activities, through the enactment of Regulation of Ministry of Transportation No. 45 of 2015 on Capital Ownership in Transportation Business (Regulation 45/2015). The details on the affected lines of business and the new minimum capital requirements are set out below:

- a* sea transportation business, minimum authorised capital of 50 million rupiah and minimum paid up capital of 12.5 million rupiah;
- b* salvage and underwater works business, minimum authorised capital of 3 million rupiah and paid-up capital of 750,000,000 rupiah;

- c port management and operation business:
- minimum paid up capital of 1 billion rupiah for port companies operating in a main port;
 - minimum paid up capital of 2 billion rupiah for port companies operating in a collecting port;
 - minimum paid up capital of 25 million rupiah for port companies operating in a channel port;
 - dredging and land reclamation business, minimum paid up capital of 25 million rupiah.

Following the enactment of Ministry of Transportation Regulation No. 11 of 2016 on Shipping Agency Business (Regulation 11/2016), the Indonesian government now acknowledges shipping agency business as a stand-alone business. Previously, the shipping agency business was considered an integral part of the sea transportation business.

Any party who wished to carry out shipping agency business in the past was compelled to satisfy requirements to obtain a sea transportation business licence. The requirements included the obligation to procure a vessel with a certain gross tonnage. These requirements have long been seen as an impediment for those who would like to only carry out shipping agency business without engaging in the sea transportation business.

Following the passing of Regulation 11/2016 a party may now apply for a shipping agency business without being obliged to procure a vessel. This regulation also sets out a minimum capital requirement. A shipping agency company is required to have at least 6 million rupiah of authorised capital and paid-up capital of 1.5 million rupiah.

Chapter 24

IRELAND

Catherine Duffy, Vincent Power and Eileen Roberts¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

With Ireland having the EU's third-largest ocean area, the Irish government plans to double the state's ocean wealth by 2030 and, in the interim, make Ireland an attractive location for international shipping activities. As an island nation, Ireland has always placed great emphasis on its maritime sector and, in particular, the ports and shipping services that connect traders on the island with international markets.

Irish ports and shipping services are making a valuable contribution to the national effort for economic recovery by facilitating growth in trade. The Irish Maritime Development Office (IMDO)² has reported that Irish exports in merchandise trade increased by 20 per cent to €111 billion in 2015, while imports in merchandise trade grew strongly by 10 per cent to €67 billion, with shipping being the dominant mode of trade.

Equally, Ireland's tourist industry relies significantly on the efficiency, reliability and effectiveness of the shipping sector. Up-to-date statistics on ship registration are not available publicly but as of May 2015 there were approximately 3,200 vessels registered on the Irish Ship Register, of which approximately 133 are categorised as commercial vessels.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Ireland, like England and Wales, is a common law jurisdiction whose legal framework is comprised of legislative enactments and case law.³ The Irish government, in furtherance of its commitment to attract international shipping to Ireland, plans to consolidate shipping legislation into a single statute and, to that end, the Merchant Shipping (Consolidation) Bill

1 Catherine Duffy, Vincent Power and Eileen Roberts are senior partners at A&L Goodbody.

2 IMDO, *The Irish Maritime Transport Economist* (Volume 13, 2016).

3 Where Irish case law does not provide a precedent, English case law is of persuasive authority in the Irish courts.

is making its way through the drafting process. Until it is enacted, the principal legislation applicable to shipping is the series of statutes cited collectively as the Merchant Shipping Acts 1894 to 2014. These Acts are supplemented by a plethora of statutory instruments (or Ministerial orders) which legislate for specific issues (e.g., the commencement of statutes as well as the detail of maritime operations).

As a member of the European Union, EU maritime laws including treaty provisions, regulations, directives and decisions apply in Ireland.

Ireland has ratified most of the major international maritime conventions including the Collision Convention 1910, the Brussels Convention 1952 (the Arrest Convention), the Oil Pollution Fund Convention 1992, the LLMC Convention, the Athens Convention (including the 1976 and 2002 Protocols), the Oil Pollution Fund Convention 1992, the Salvage Convention 1989, the OPRC Convention 1990, the Bunker Convention 2001 and the United Nations Convention on the International Multimodal Transport of Goods.

Irish maritime legislation is primarily formulated and administered by the Department of Transport. Within the Department, the 'Irish Maritime Administration' (IMA) was established to integrate the Department's maritime services. The IMA consists of the Maritime Safety Policy Division, the Marine Survey Office, the Irish Coast Guard, the Maritime Transport Division and a new Maritime Services Division.

III FORUM AND JURISDICTION

i Courts

The Irish courts are in the common law tradition, with the High Court being a court of universal jurisdiction and usually the most relevant court in maritime matters.

The Jurisdiction of Courts (Maritime Conventions) Act 1989 incorporates the 1952 Arrest Convention into Irish Law. The Act confirms that the High Court has jurisdiction to hear and determine proceedings in Ireland in relation to maritime claims. Such proceedings are dealt with by a specialist division of the High Court known as the Admiralty Court. Order 64 of the Rules of the Superior Courts (RSC) deals specifically with the rules and procedures that apply to admiralty claims. Claims arising from the carriage of goods by sea with a value in excess of €1 million are generally heard by another specialist division of the High Court, the Commercial Court, under the provisions of Order 63A of the RSC.

Regulation (EU) 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast) (Brussels I *bis*) came into effect in Ireland on 10 January 2015 (with the exception of Articles 75 and 76 which applied from 10 January 2014). Brussels I *bis* was implemented to update Regulation 44/2001 (Brussels I), which covered jurisdiction as between courts of different EU Member States. Brussels I still applies for proceedings or judgments issued before 10 January 2015. Brussels I established a set of EU rules to determine which court has jurisdiction in cross-border disputes (including maritime disputes) and how court judgments issued in one EU Member State are recognised and enforced in another Member State. Some of the key changes introduced by Brussels I *bis* include the following:

Abolition of the exequatur procedure

Under Brussels I, a judgment given in one Member State does not automatically take effect in another Member State. Instead it first has to be validated and declared enforceable in a special intermediate court procedure, known as the *exequatur* procedure, which is costly and time-consuming.

Article 36 and 39 of Brussels I bis abolishes the *exequatur* procedure, so that any judgment obtained in one Member State will be automatically recognised and enforceable in Ireland as if it were delivered in Ireland itself.

Abolition of the Italian torpedo⁴

Under the Brussels I Regulation, where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised must stay its proceedings until the courts have determined whether or not it has jurisdiction. This rule applies even where a party brings proceedings in breach of a jurisdiction agreement for tactical reasons (known as ‘Italian Torpedo’ actions).

Under Article 31(2) of Brussels I bis, a court that is named in an exclusive jurisdiction agreement will now have priority of jurisdiction. This enhances the effectiveness of exclusive jurisdiction agreements over a court in which the proceedings may have been first brought. Brussels I bis seeks to avoid abusive litigation tactics by providing for an exception to the general *lis pendens* rule. This exception to the usual *lis pendens* rule does not apply, however, where: (1) the parties have entered into conflicting exclusive jurisdiction agreements; (2) the dispute involves insurance, consumer or employee matters; (3) the parties have chosen a non-Member State as having jurisdiction; or (4) where non-exclusive jurisdiction only has been conferred on a Member State court.

Application to Non-EU domiciled parties

Brussels I does not apply to defendants domiciled outside of the EU and in such cases the courts of the Member States apply their own national rules to determine if they have jurisdiction. Article 24 of Brussels I bis extends the scope of the rules in relation to jurisdiction agreements by removing the current requirement that at least one party must be domiciled in a Member State. Therefore where two non-EU parties agree that any dispute will be subject to the exclusive jurisdiction of the Irish courts, the Irish courts will be required to accept jurisdiction.

Article 25 of the Brussels I bis also introduces a harmonised conflict of law rule on the substantive validity of jurisdiction agreements. The laws of the Member State court designated in the jurisdiction agreement shall govern questions of substantive validity of the jurisdiction agreement, even if that is different from the governing law of the contract.

Introduction of a limited international lis pendens rule

The Brussels I bis introduces a new international *lis pendens* rule that aims to avoid proceedings taking place inside and outside the EU. It provides the court of a Member State with discretion to stay proceedings where a court of a non-EU state has already been seised with a related action at the time the EU Member State court is seised.

4 See *Websense v. ITWAY* [2014] IESC 5.

Clarification on the exclusion of arbitration from the scope of the Regulation

Arbitration matters are excluded from the scope of the Brussels I Regulation. Brussels I *bis* confirms that it does not apply to arbitration; it clarifies the ambit of the arbitration exception and provides that it shall not affect the application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It further clarifies that nothing in the Brussels I *bis* will prevent the courts of Member States from referring parties to arbitration, staying or dismissing proceedings, and ruling on the validity of an arbitration agreement in accordance with their national law. The New York Convention takes precedence over Brussels I *bis*, and therefore Member States' courts are permitted to recognise and enforce an arbitral award even if it is inconsistent with another Member State's judgment. The scope of the arbitration exclusion has also been clarified. Brussels I *bis* does not apply to any action or ancillary proceedings relating to the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration or to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.

Service

Rules governing the service of proceedings within EU Member States are set out in Council Regulation (EC) 1348/2000 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil and Commercial Matters. This Regulation is directly effective and came into force on 31 May 2001. In Ireland, the relevant entity responsible for transmitting documents to be served outside the state and for receiving documents from another state for service in Ireland is the County Registrar (an official operating at a local level in Ireland). Order 11D of the RSC provides for service of judicial documents within the EU in accordance with this regulation. Ireland is also a party to the Hague Convention on the Service Abroad of Judicial and Extra Judicial documents in Civil and Commercial Matters 1965, which governs service of judicial documents within signatory countries. The relevant central authority in Ireland entitled to receive requests for service of documents is designated under court rules as the Master of the High Court.

Limitation periods

Pursuant to the Statute of Limitations Act 1957, any proceedings brought in Ireland on foot of a breach of contract claim will be statute barred six years after the cause of action accrues.⁵ Tortious claims must also be brought within six years of the accrual of the cause of action⁶ (except personal injuries based on negligence, nuisance or breach of duty. Specific (shorter) limitation periods may be prescribed by agreed contractual arrangements.

Maritime cases are afforded unique conditions under the Civil Liability Act 1961. Pursuant to Section 46(2), any claim against the owners or operators of a vessel for personal injury or fatal injury or property damage suffered by a passenger on that vessel or for damage to another vessel or cargo must be initiated within two years of the accrual of the action. This period of two years can be extended at the discretion of the court under Section 46(3) subject to certain conditions as it deems fit.⁷

5 Section 11(1)(a) of the Statute of Limitations Act 1957.

6 Section 11(2) of the Statute of Limitations Act 1957.

7 *Lawless v. Dublin Port and Docks Board* [1998] 1 ILRM 514 – the plaintiff must show special circumstances before an extension of time would be granted. The court will consider the

A longer limitation period of 12 years applies to actions based upon deeds executed under seal.

Cargo actions under the Hague Rules or Hague-Visby Rules have a limitation period of one year. These rules were made part of Irish law by Section 31 of the Merchant Shipping (Liability of Ship Owners and Others) Act 1996 (the 1996 Act).

Another provision potentially relevant to limitation periods for maritime claims involving defective products (such as a defective vessel) is Section 7(1) of the Defective Products Act 1991, which provides for a three-year limitation for initiating proceedings under the Act. The producer will not be liable once 10 years have passed since the product was put into circulation.

ii Arbitration and ADR

For a dispute in Ireland to be subject to arbitration, there must be a valid arbitration agreement applicable to the dispute (either by a clause written in the contract under which the dispute arises or where the parties after the dispute has arisen have agreed to arbitrate the dispute). The Arbitration Act 2010 (the 2010 Act), which repealed the Arbitration Acts 1954–1998, applies to all arbitrations in Ireland (both domestic and international) commencing after 8 June 2010.

The 2010 Act includes the entire text of the United Nations Convention on International Trade Law Model Law on International Commercial Arbitration (the Model Law). It adopts the Model Law in its entirety and incorporates only minimal amendments to the Model Law in the text of the Act itself. For example, the default number of arbitrators (if not specified in the arbitration agreement) will be one and not three as is provided in the Model Law. Under the 2010 Act, the Irish courts may make orders in support of all arbitrations in the same manner irrespective of whether such arbitrations are domestic or international.

The court will give full judicial consideration to the issue as to whether there is an arbitration agreement between the parties. A recent decision in *Vertom Shipping and Trading BV*⁸ highlighted the tension between the courts and arbitrators over responsibility for deciding challenges to arbitrators' jurisdiction. The High Court refused an application to stay proceedings and refer the dispute to arbitration. It held that it was appropriate for the court, rather than an arbitral tribunal, to decide whether an arbitration agreement existed and gave full judicial consideration to the issue.

Several forms of ADR are commonly used in Ireland, including expert determination, early neutral evaluation and mediation. In relation to mediation in particular, the Irish courts often encourage mediation in appropriate cases. If a party refuses to mediate without reasonable grounds for doing so, the Irish courts have jurisdiction to make an adverse costs order against the refusing party. Contracts under Irish law increasingly include mediation and other alternative dispute resolution clauses including 'stepped' clauses, which require different forms of dispute resolution to be used in a particular order with ADR often being the first method of resolution followed by arbitration or court proceedings.

degree of blameworthiness of the second defendant and the length of the delay.

8 *The Lisheen Mine (Being A Partnership Between Vedanta Lisheen Mining Limited and Killoran Lisheen Mining Limited) v. Mullock and Sons (Shipbrokers) Limited and Vertom Shipping and Trading BV* [2015] IEHC 50.

iii Enforcement of foreign judgments and arbitral awards

Foreign judgments

Since the introduction of Brussels I *bis* in Ireland, it is no longer necessary for parties to apply for and obtain a declaration of enforceability from another Member State. Under Brussels I *bis*, the applicant must only present a copy of the original judgment and a standard form certificate to implement the judgment in another Member State.

Article 54 of Brussels I *bis* provides that where a judgment from one Member State is sought to be enforced in another Member State but ‘contains a measure or an order which is not known in the law of that Member State’ then the court may adapt the judgment and enforce a ‘measure or an order known in the law of that Member State which has equivalent effects’. However, it is still possible for a court to refuse recognition of a judgment on certain grounds. Article 45 specifies the circumstances in which a judgment will not be recognised including:

- a* any judgment that was contrary to public policy;
- b* if it was granted in default of appearance or if the defendant was not served with notice of the proceedings to allow him or her prepare a defence, or if he or she was not served with sufficient notice;
- c* if it is irreconcilable with a judgment given in Ireland in connection with the dispute; or
- d* if it is irreconcilable with a judgment given in another Member State or in a third state involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

While the Irish courts have previously refused to enforce a foreign judgment because it was manifestly contrary to public policy grounds as in *Eurofood IFSC Limited*,⁹ the Irish courts generally construe the public policy defence narrowly, as was the case in *Bostrom Tankers*.¹⁰

Enforcement of judgments from countries which are not party to the Brussels or Lugano Conventions are governed by Irish common law and require the commencement of a new action based on the judgment itself. The Irish courts will not examine the merits of the judgment. However, it will be necessary to show that the court that made the judgment had jurisdiction to do so under Irish conflict of laws rules, that the judgment is for a debt or liquidated sum, that is final, conclusive and not contrary to public policy.

Foreign arbitral awards

Irish law incorporates the UNCITRAL model law on international commercial arbitration which was initially given force of law by the Arbitration (International Commercial) Act 1998 and more recently by the Arbitration Act 2010 which repealed and replaced the earlier legislation for all arbitrations after 8 June 2010. A party may now seek recognition and enforcement of an arbitration award as envisaged by Articles 35 and 36 of the Model Law irrespective of where the award was made or whether it was made in a state which is a party to any particular convention.

9 *In the matter of Eurofood IFSC Limited and in the matter of the Companies Acts 1963 to 2003* [2004] IEHC 54.

10 *Bostrom Tankers AB v. Factorias Vulcano SA* [2004] 2 IR 191.

IV SHIPPING CONTRACTS

i Shipbuilding

Although once host to a vibrant shipbuilding industry, by the end of the 20th century shipbuilding in Ireland had diminished to almost nothing in terms of commercial vessels.

ii Contracts of carriage

The 1996 Act gives effect to the Convention relating to the Athens Convention 1974 and the Protocol thereto and to the Hague-Visby Rules. In this Chapter, we focus on the Hague-Visby Rules (the Rules) as they apply in Ireland.

The Rules have the force of law in relation to, and in connection with, the carriage of goods by sea where the port of shipment is an Irish port whether or not the carriage is between ports in two different states. The Rules apply in relation to any bill of lading and any receipt marked as a non-negotiable document if the contract contained in or evidenced by the bill of lading expressly provides that the Rules govern the contract.

Bills of lading are otherwise governed by the Bills of Lading Act 1855 (the 1855 Act). Other than through the adoption of the Rules, there has been no change in Irish law dealing with bills of lading. The 1855 Act is restrictive¹¹ and, accordingly, does not capture multimodal contracts of carriage. As of May 2015, Ireland is not a signatory to the Hamburg Rules or the Rotterdam Rules.

The 1996 Act provides an absolute warranty of seaworthiness is not to be implied in contracts to which the Hague-Visby Rules apply.¹²

Liens

The following classes of liens apply in Ireland:

- a* maritime liens:
 - bottomry and respondentia;
 - damage done by a ship;
 - salvage;
 - crews wages; and
 - master's wages and disbursements;
- b* possessory liens;
- c* statutory liens; and
- d* equitable liens.

As a matter of Irish law, liens do not have to be registered to be effective against the ship or third parties. Under the RSC, maritime liens may be pleaded as statutory liens.¹³

Irish common law recognises possessory liens whereby a claimant in possession of an asset may enforce its claim by retaining the relevant asset. This includes a repairer's lien and a shipowner's lien on cargo for outstanding freight or general average contributions.

An equitable lien exists independently of possession and, like England, is only binding on third parties who have acquired a legal interest in the lien asset with notice of the lien.

11 See subsection iii, *infra*.

12 Section 35.

13 Order 64 of the RSC.

While liens enjoy priority over other rights regardless of registration, it is worth noting that, with regard to limitation funds constituted under the LLMC Convention, the 1996 Act provides that a lien shall not prejudice or affect the proportions in which a fund is distributed among the claimants.

iii Cargo claims

A bill of lading evidences a contract for carriage, obliging a carrier to deliver a cargo against that document. Under the 1855 Act, every consignee of goods named in a bill of lading and every endorsee of it to whom the ownership of the goods described in the bill of lading has passed has, or will have, all rights of action and will be subject to the same liabilities in respect of the relevant goods. This is rather restrictive as it is confined to consignees and endorsees and therefore does not include a pledgee of goods and does not apply to waybills, multi-modal contracts of carriage or delivery orders. Ireland does not have an equivalent of the English law comprised in the Contracts (Rights of Third Parties) Act 1999 to assist it to overcome issues arising from lack of privity of contract. However, in some circumstances, Irish law looks to the principle applicable in the UK and Ireland implying a contract between a consignee and a carrier in circumstances where a consignee takes delivery of goods from the carrier by presenting the bill of lading and paying outstanding charges. It is generally thought that the Irish courts would follow the decision of the English courts in *Brandt v. Liverpool, Brazil and River Steam Navigation Co Ltd*,¹⁴ which determined the conditions for implying a contract as being: (1) the holder of the bill of lading must have some interest in the property; (2) the actions of the parties must be construed as offer and acceptance and (3) sufficient consideration must be provided.

As a general principle, the Irish courts will not interfere in contractual terms agreed as arms' length between commercial parties. Accordingly, demise and 'identity of carrier' clauses incorporated in a bill of lading are likely to be recognised and upheld by an Irish court.

There is no case law in Ireland to give guidance on whether a bill of lading relating to carriage on a chartered vessel which expressly incorporates the terms of the charterparty would be upheld in the Irish court. However, on general principles, it is possible to incorporate terms into a contract by reference to another contract. In the absence of specific legislation or case law, it is likely that the Irish courts would look to English law and decisions in the English courts for guidance on the extent to which the terms of a charterparty may be incorporated into a bill of lading.

Under Irish law, a shipowner may be liable for damage caused whether or not it is the contractual carrier.

The 1996 Act expressly excludes shipowners' liability where any property on board the ship is lost or damaged by reason of fire on board the ship; or precious materials are lost or damaged through theft or otherwise and the nature and value of the relevant items has not been disclosed to the owner or master of the ship in the bill of lading or otherwise in writing.

iv Limitation of liability

By the enactment of the 1996 Act, Ireland gave effect to the LLMC Convention in Irish domestic law. The 1996 Protocol to the LLMC Convention was given effect in Irish law by the Sea Pollution (Hazardous Substances) Compensation Act 2005. Under Irish law,

14 [1924]1 KB 575.

the LLMC Convention applies to seagoing ships and to non-seagoing ships¹⁵ and to any structure (whether completed or in the course of completion) launched and intended for use in navigation as a ship or a part of a ship.¹⁶

Who can limit liability and what claims are subject to limitation? The shipowner (defined for Irish law purposes as being a shipowner as owner, charterer, manager and operator of a ship, whether seagoing or not)¹⁷ is the party entitled to limit liability under the LLMC. There is no case law in Ireland to determine what is meant by 'charterer', 'manager' or 'operator' of a ship. However, the decision of the English courts in the case of *CMA CGM SA v. Classica Shipping Co Ltd*¹⁸ in which the Court of Appeal determined that charterers are entitled to limit their liability would be of persuasive authority in Ireland.

A salvor may avail of the limitation of liability in respect of claims in connection with salvage operations.

An insurer of liability for claims subject to limitation under the LLMC Convention is entitled to the same benefits of the LLMC Convention as the assured.

Article 2 of the LLMC Convention specifies claims subject to limitation. Section 11 of the 1996 Act qualifies Article 2 and provides that the right to limit liability under the LLMC shall not apply to claims in respect of raising, removal, destruction or rendering harmless of a ship which has sunk, wrecked, stranded or abandoned, including anything that is or has been on board such a ship and that Article 3 of the LLMC providing for claims excepted from limitation are to be construed accordingly.

Irish procedure for establishing limitation

Under Irish law, it is not necessary to admit liability in order to avail of a limitation defence. Nor does raising a limitation defence constitute an admission of liability. If successfully pleaded as a defence, liability is limited to the amount per claim provided for in the LLMC Convention.

Limitation can be pleaded by a party as a defence to a claim made against it. It is also open to a party anticipating a claim being made against it to open limitation proceedings to have the court determine its right to limit its liability under the LLMC Convention.

Article 6 of the LLMC Convention provides for the calculation of the general limits that may be claimed. Article 11 permits any person alleged to be liable for a claim to constitute a fund with the court or other competent authority in any state party in which legal proceedings are instituted in respect of claims subject to the limitation. Under Article 11(2) a fund may be constituted by producing a guarantee or by depositing a sum of money. The constitution of a fund is not, however, a requirement to avail of the benefit of limitation.

Under Irish law, the distribution of the fund among claimants is not affected by the rights of lien holders.¹⁹

15 Part II, Section 10 of the 1996 Act.

16 Part II, Section 9 of the 1996 Act.

17 Section 10 of the 1996 Act.

18 [2004] 1 Lloyd's Rep. 460, at p. 465.

19 Section 16 of the 1996 Act.

Breaking limits

Article 4 of the LLMC Convention provides that a person shall not be entitled to limit his or her liability if it is proved that the 'loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result'. With such a high level of proof required, breaking the limits is difficult.

V REMEDIES

i Ship arrest

Two pieces of legislation govern shipping arrests in Ireland. The 1952 Arrest Convention was implemented into Irish law by the Jurisdiction of Courts (Maritime Conventions) Act (the 1989 Act), which is the basis of modern shipping law in Ireland. However, the older Courts of Admiralty (Ireland) Acts 1867 and 1876 are applicable to ships registered in non-Convention countries. Ships to which the Convention applies may be arrested under the 1989 Act. Otherwise, as Ireland is a common law jurisdiction, the law of arrest in Ireland is similar to the law of arrest in England. Ireland has not ratified the International Convention on the Arrest of Ships 1999. It is possible to arrest a sister ship of Convention countries²⁰ though it is not possible to arrest associated ships.

Procedure to arrest

Proceedings must be brought *in rem* before the admiralty judge of the High Court. Often a warning letter is sent to the owner or agent in advance of the application to arrest but this is not a legislative requirement or legal proof. A summons is issued in the Central Office of the High Court setting out the claim and must be accompanied by an affidavit exhibiting the bill of lading, charterparty and other documents relevant to the application for the arrest and must include the information set out in Order 64 of the RSC. The affidavit can be sworn by either the arresting party or their solicitor. The applicant must undertake to be responsible for the Admiralty Marshal's expenses of arrest.

The application is made *ex parte* to the Master of the High Court or the admiralty judge. No arrest order will be granted by the court unless it is satisfied that the vessel is within Irish waters and is flying the flag of one of the contracting States to the 1952 Arrest Convention. The arrest is effected by service of the warrant of arrest by the Admiralty Marshal or his or her substitutes and the warrant is then filed in the Central Office. Service of a summons or warrant against the ship, freight or cargo on board is effected by nailing or affixing the original summons or warrant for a short time on the main mast or on the single mast of the vessel and, on taking off the summons or warrant, leaving a true copy nailed or affixed in its place.

In a recent decision of the Admiralty Court²¹ a third party sought to intervene in the proceedings by virtue of the fact that its subsidiary companies had paid a sum of money to the plaintiff on foot of an order for arrest. The Court held that a shareholder has no property,

20 The 'Marshal Gelovani' [1995] IR 159 and The 'Kapitan Labunets' [1995] 1 IR 164.

21 *Amsterdam Trade Bank NV v. The owners and all persons claiming an interest in the M.V. 'Clipper Faith'* [2014] IEHC 329.

legal or equitable in the assets of a company and thus the third party never had any interest in the vessel, or, by extension, in any of the funds in court and thus had no locus standi to defend the proceedings and otherwise intervene in them.

Types of claims

The claims for which a vessel can be arrested are set out in Sections 27–37 of the Court of Admiralty (Ireland) Act 1867. These are:

- a* all claims whatsoever relating to salvage and to enforce the payment thereof;
- b* all claims in the nature of towage and to enforce payment thereof;
- c* any claims for damage received or done by any ship;
- d* any claim for the building, equipping or repairing of any ships;
- e* any claim by a seaman of any ship for wages earned by him on board the ship;
- f* any claim in respect of a registered mortgage; and
- g* any claim by the owner of any bill of lading of any goods carried into any port in Ireland in any ship for damage done to the goods by the negligence or misconduct of or breach of duty or breach of contract on the part of the owner, master or crew of the ship.

The claims for which a vessel can be arrested were extended by Article 1 of the Arrest Convention 1952 and include the following:

- a* damage caused by any ship either in collision or otherwise;
- b* loss of life or personal injury caused by any ship or occurring in connection with the operation of any ship;
- c* salvage;
- d* agreement relating to the use or hire of any ship whether by charterparty or otherwise;
- e* agreement relating to the carriage of goods in any ship whether by charterparty or otherwise;
- f* loss of or damage to goods including baggage carried in any ship;
- g* general average;
- h* bottomry;
- i* towage;
- j* pilotage;
- k* goods or materials wherever supplied to a ship for her operation or maintenance;
- l* construction, repair or equipment of any ship or dock charges and dues;
- m* wages of masters, officers, or crew;
- n* master's disbursements, including disbursements made by shippers, charterers or agent on behalf of a ship or her owner;
- o* disputes as to the title to or ownership of any ship (includes disputes as to possession of a ship);
- p* disputes between co-owners of any ship as to the ownership, possession, employment, or earnings of that ship; and
- q* the mortgage or hypothecation of any ship (includes the mortgage or hypothecation of any share in a ship).

Sister and associated ship arrests

Sister ship arrest in Ireland is permissible. However, this power of arrest of a sister ship in Ireland is confined to ships of Convention countries only.²² It is not possible to arrest associated ships.

Security and counter-security

A claimant is not required to provide security for an arrest, although they must provide an undertaking for the arrest expenses of the Admiralty Marshal and undertake to indemnify the Admiralty Marshal for all losses incurred in arresting the vessel. The Admiralty Marshal is responsible for the maintenance of an arrested vessel until such time as it is released.

The defendant can provide security to procure the release of the vessel in the form of a payment into court, or a payment to the plaintiff, either in money or in the form of an appropriate letter of guarantee from a recognised bank or a letter of undertaking from a recognised P&I club. On payment of appropriate security, the vessel will be released.

In Ireland, it is possible for a third party who also has a claim against the same vessel to enter what is known as a caveat against release. This means that should the owner seek to release the vessel, the caveat would prevent the application being successful on the basis that there is another claim seeking to maintain the arrest of the vessel.

Wrongful arrest claims

The test for wrongful arrest is usually bad faith or gross negligence and is a difficult burden of proof to satisfy. There is very little Irish case law relating to wrongful arrest and what amounts to a good and sufficient reason. In the limited case law to date²³ reference was made to the need to establish a 'fair and statable' case and 'sufficient grounds for the arrest of the vessel'. Where a vessel has been wrongfully arrested, the arresting party may be held liable for the costs of the proceedings and for damages for wrongful arrest.

ii Court orders for sale of a vessel

If no security is forthcoming or indeed no settlement agreement has been reached whereby the arresting party and the shipowners can progress matters, it is possible for an application to be made by the arresting party to the courts to have the vessel sold. The vessel will be sold 'as is', free from encumbrances, liens and with good title. Any claims that existed pre-sale against the vessel are transferred to a claim against the sale proceeds.

The Admiralty Marshal appoints an auctioneer and an expert to appraise the vessel and fix a reserve price that is not disclosed to the auctioneer or any other party until the auction gets under way. Auctions of vessels in Ireland are advertised internationally and attract buyers from around the world. If the reserve price is reached at the auction then the vessel is sold to the highest bidder. All parties, including those who have obtained judgment or registered cautions, must be served with the application for sale. The Admiralty Marshal can also order the vessel to be sold under Rule 35 of Order 64 of the RSC where no appearance is entered by the shipowner to the arrest proceedings. Where the vessel is sold before the conclusion of the case, the funds from the sale will be lodged in court and then subsequently, once the case

22 *The 'Marshal Gelovani'* [1995] IR 159 and subsequently in the case of *The 'Kapitan Labunets'* (footnote 20, *supra*).

23 *MV 'Blue Ice'* [1997] IEHC 56.

is determined, the monies will be distributed according to the court order. The court costs are usually 5 per cent of the sale price and are the responsibility of the purchaser. In addition, 10 per cent of the sale price is payable to the court by way of duty and is deducted from the sale proceeds.

The determination of priorities against the proceeds of sale is decided by the admiralty judge in the absence of agreement between the parties. Generally wages and Admiralty Marshal's expenses take priority over the mortgage and then other creditors follow if there are sufficient funds available.

VI REGULATION

i Safety

Ireland has a well-established legislative code relating to maritime safety. This code comprises both domestic legislation (principally, the Maritime Safety Act 2005) and international conventions on safety.

Maritime safety is administered by the Department of Transport's 'Maritime Safety Directorate' (MSD). The MSD comprises two main sections: the Maritime Safety Policy Division and the Marine Survey Office (MSO) (which includes the Marine Radio Affairs Unit).

Maritime safety policy is formulated by the Department of Transport's Maritime Safety Policy Division. This division is responsible for maritime safety policy, security policy and legislation (including leisure safety), aids to navigation and the corporate governance of the Commissioners of Irish Lights.

ii Port state control

Port state control (PSC) is administered in Ireland by the MSO, which is the designated competent authority. The PSC regime in Ireland is primarily embodied in the European Communities (Port State Control) Regulations 2010 (as amended) (SI No.656 of 2010), which give effect in Irish law to the EU regime on PSC (principally, Directive 2009/16).

iii Registration and classification

Registration

Irish ship registration is in a transitional phase following the enactment of the Merchant Shipping (Registration of Ships) Act 2014 (the 2014 Act) at the end of 2014, which, when it becomes effective,²⁴ will provide a modernised, centralised and flexible ship registration system in Ireland akin to that in the United Kingdom. Pending the 2014 Act coming into effect, Irish ship registration is governed by the Mercantile Marine Act of 1955 (the 1955 Act) and the Fisheries (Consolidation) Act 1959 as amended by the Fisheries (Amendment) Act 1962 and the Fisheries (Amendment) Act 1983.

The following persons are qualified to be registered as an owner or part owner of a ship in Ireland:

- a* the Irish government;
- b* a minister of the Irish government;

24 Expected shortly.

- c* a national of a Member State of the European Union;
- d* a body corporate established under and subject to the law of and having its principal place of business in a member state of the European Union; and
- e* nationals of and body corporates having their principal place of business in a reciprocating state and entitled under the laws of that state to own a ship having the nationality of that state.²⁵

The following categories of vessel must be registered under the Irish flag:

- a* ships fully owned by persons being citizens of Ireland or Irish bodies corporate and that are not registered under the law of another country; and
- b* fishing vessels 35 feet and over in length, wholly owned by qualified persons or bodies.

The following categories of vessel are exempt from the obligation to register:

- a* ships not exceeding 15 NRT (other than fishing vessels over 35 feet in length) provided they are used only in navigation on the rivers, canals, lakes or coasts of Ireland, Great Britain, the Channel Islands or the Isle of Man, or within the territorial waters off their coasts;
- b* ships acquired before the passing of the 1955 Act;
- c* ships in respect of which the Minister for Transport, Tourism and Sport (the Minister) has, under Section 21 of the 1955 Act, consented to registry under the law of another country; and
- d* ships owned by Irish citizens not ordinarily resident in the state.

There is no provision to register vessels under construction under the flag of Ireland and dual flagging is not permitted.

Other than the ownership of a vessel, only mortgages and discharges of registered mortgages may be registered on the register of an Irish ship. The mortgage register is a prioritised register with priority being afforded according to the date and time at which the mortgage is recorded by the Registrar on the ships register and not by reference to the date of creation of the mortgage. The Registrar will record mortgages in the order in which they are presented to him or her for registration.

The register is maintained at the particular port of registration. There are currently several ports at which a vessel may be registered in Ireland. The 2014 Act will centralise registration on to one computerised register.

Classification

The following classification societies are recognised and approved by the Irish government for the purposes of performing surveys and inspections on Irish registered vessels:²⁶

- a* the American Bureau of Shipping;
- b* Bureau Veritas;
- c* Nippon Kaiji Kyokai;
- d* Germanischer Lloyd AG;

25 The current reciprocating states are the United Kingdom and the Commonwealth states of Canada, New Zealand and Pakistan.

26 www.dttas.ie.

- e* Lloyd's Register;
- f* Registro Italiano Navale SpA; and
- g* the Russian Maritime Register of Shipping.

Generally, classification societies exclude their liability in contract. Any claim in tort for breach of duty of care would require the person claiming the breach to establish that a duty of care was owed by the classification society; that the classification society breached the duty of care; and that such breach resulted in loss or damage to the claimant.²⁷ There has been no Irish case law specifically with regard to classification societies and their duties of care to third parties. However, English case law is of persuasive authority in the Irish courts and accordingly the House of Lords decision in *Marc Rich & Co v. Bishop Rock Maritime (the 'Nicholas H')*²⁸ in which it was held that classifications societies do not owe a duty of care to third parties in respect of their classification and certification duties would be likely to be followed.

The European Communities (Ship Inspection and Survey Organisations) Regulations 2011 gave effect in Irish law to the EU Directive 2009/15/EC in Ireland on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations. It contains articles relating to the financial liability of recognised organisations for any marine casualty caused by wilful act, omission or gross negligence.

iv Environmental regulation

There are three sources of environmental regulation in the Irish context: the international; the EU; and the national.

First, Ireland is a party to conventions such as the CLC Convention 1969 and its 1976 and 1992 Protocols (see Ireland's Oil Pollution of the Sea (Civil Liability and Compensation) Acts 1988–2005). Ireland is also a party to the HNS Convention 1996 (see the Sea Pollution (Hazardous Substances) (Compensation) Act 2005). Second, as an EU Member State, Ireland is subject to the entire body of EU environmental law including the maritime environmental directives. Third, there are also Irish statutes and statutory instruments that are relevant, including the Air Pollution Act 1987 and the Harbours Acts. In terms of policy, Ireland is intent on enforcing vigorously its environmental regime.

v Collisions, salvage and wrecks

Ireland is a party to the Collision Convention 1952 (see the Jurisdiction of Courts (Maritime Conventions) Act 1989).

Ireland is also a party to the Salvage Convention 1989 (see the Merchant Shipping (Salvage and Wreck) Act 1993). The Minister for Transport has general superintendence of all matters relating to every wrecked or stranded vessel. There is no mandatory form of salvage agreement, but the Lloyd's open form is normally used.

Ireland is a party to the Nairobi International Convention on the Removal of Wrecks 2007 but no enabling Irish legislation has been adopted to date.

27 *Ward v. McMaster* [1989] ILRM 400.

28 [1995] 2 Lloyd's Rep 299.

Pursuant to the European Communities (Vessel Traffic Monitoring and Information System) Regulations 2010 (as amended), it is an offence under Irish law to fail to report immediately to the Irish Coast Guard any incident or accident affecting the safety of the ship, such as a collision within the exclusive economic zone of the state. Failure to notify is likely to result in prosecution.

The Merchant Shipping (Investigation of Marine Casualties) Act 2000 provides that certain responsible persons involved in a marine casualty must, by the quickest means feasible, notify the casualty to the Chief Surveyor of the Marine Survey Office immediately. The Act also provides for a no-fault review by the Marine Casualty Investigation Board of casualties to determine the cause of the casualty so as to ensure that the occurrence is not repeated.

vi Passengers' rights

Ireland acceded in 1998 to the 1974 Athens Convention. Ireland acceded to the 1976 Protocol also in 1998 and acceded to the 2002 Protocol in 2014. However, since 31 December 2012, EU Regulation 392/2009 applies in Ireland by virtue of SI No. 552 of 2012. This raises the limits of liability on, and introduces compulsory insurance to, cover passengers on ships covered by the Regulation. The Regulation's application has been deferred in relation to class B ships travelling in the state until the end of 2018. SI No. 552 of 2012 also gives effect to EU Council decisions 2012/22/EU and 2012/23/EU to give the force of law to the 2002 Protocol to the Athens Convention.

vii Seafarers' rights

Seafarers have extensive rights not only under international and EU law but also under domestic Irish law. In 2014, it was announced that Ireland had ratified the Maritime Labour Convention. With effect from 21 July 2015, Ireland will be a party to the Convention and will implement the requirements contained in it both for Irish-flagged ships and for international ships calling at Irish ports. Seafarers also benefit from a favourable tax regime as well. The Mercantile Marine Office maintains the Register of Seafarers.

VII OUTLOOK

The outlook for the Irish shipping sector is broadly positive. There is now a commitment by the state to foster and develop the sector further. This has been supported by the establishment of the IMDO, the streamlining of the administration in the sector and the enactment of new legislation (e.g., Merchant Shipping (Registration of Ships) Act 2014 and the proposed consolidation of existing statutes). The state has also been working on developing a new national ports policy and the Competition and Consumer Protection Commission has published a study of competition in the Irish ports sector. There are also plans to establish an international shipping services centre in Dublin along the lines of Dublin's very successful International Financial Services Centre. The Irish government is hoping that the Irish shipping sector will continue to grow with some indigenous activity but also overseas companies relocating some or all of their operations to Ireland.

Chapter 25

ISRAEL

*Amir Cohen-Dor and Michael Safran*¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

On 22 February 2016, the Israeli fleet consisted of 36 vessels, with a total of approximately 2.1 million DWT, 1.4 million GRT and 0.9 million NRT. The fleet included 10 Israeli-flagged vessels, representing approximately 15 per cent of the total DWT.²

The Israeli fleet is operated by several shipping companies, including Zim Integrated Shipping Services Ltd and XT Shipping Ltd.

The ports of Israel are the main gateway to the Israeli foreign trade of goods (99 per cent of Israeli imports and exports). The Israeli ports consist of two energy ports in Hadera and Ashkelon, and the three main commercial ports: Haifa, Ashdod and Eilat. An additional general cargo port is operated by the Israel-Shipyards Ltd. Two additional container terminals are planned to be built and operational by 2021 in Ashdod (Southport Terminal) and Haifa (Bayport Terminal).

During 2015, 5,893 vessels passed through the Israeli ports; approximately 70 million tonnes of goods (including 27 million tonnes of bunker and coal); and 2.5 million TEUs (1.3 million TEUs were unloaded and 1.25 loaded).

The import of containerised cargo was generated in 2015 mainly from western Europe (35 per cent), Asia and the Far East (32 per cent), the eastern Mediterranean (17 per cent), eastern Europe (8 per cent) and North America (6 per cent). The destination of export for containerised cargo in 2015 was mainly to western Europe (49 per cent), North America (17 per cent), the eastern Mediterranean (15 per cent), eastern Europe (11 per cent), and Asia and the Far East (8 per cent).

Israel has landside connections with Jordan, Egypt and the Palestinian Authority.

1 Amir Cohen-Dor and Michael Safran are partners at S Friedman & Co.

2 Administration of Shipping & Ports, Ministry of Transport, National Infrastructure & Road Safety, 'Ports and Shipping Annual Statistical Journal', 2015.

i Competition law

Up to the end of 2012, the Israeli Restrictive Trade Practices Law of 1988 contained a statutory exemption for agreements between carriers relating to international sea transport, as long as such agreements were filed with the Minister of Transport in accordance with the Restrictive Trade Practices Law.

At the end of 2010, the Israeli parliament decided to remove this exemption for the maritime sector as part of the Omnibus Law for the State Financial Market (Statutory Amendments for the Fulfilment of the Budget and Economical Policy Targets for the Budget Years 2011–2012). The removal of the statutory exemption was effected on 1 January 2013, two months after a block exemption for operational agreements between carriers (i.e., consortia agreements) was published.

The block exemption is based on the European Consortia Block Exemption³ with several changes that are related to the size of the Israeli market and Israeli competition law, such as the following:

- a* The aggregated market share threshold was set at 40 per cent (in the EU it is 30 per cent).
- b* The maximum notice period was set at 12 months and the maximum initial period, 36 months (in the EU these periods are allowed only for highly integrated consortia).
- c* Due to the extremely wide definition of restrictive arrangements in the Law, even simple slot charter agreements will be considered restrictive arrangements unless they are within the boundaries of the Block Exemption, or have been individually exempted by the Israel Antitrust Authority (IAA) or approved by the Antitrust Tribunal.
- d* In Israel, if the parties exceed the market share threshold the arrangement may still fall within the Block Exemption if the self-assessment conducted by the parties is positive. In the EU, if the threshold is exceeded the parties are automatically outside the boundaries of the Block Exemption and will have to conduct a self-assessment that will not be subject to the Block Exemption's conditions (such as the lock-in and termination periods).
- e* In Israel, once the arrangement is outside the framework of the Block Exemption (for example, due to long initial and termination periods) there is no option to conduct a self-assessment and the parties will have to apply to the IAA for an individual exemption or apply to the Antitrust Tribunal for approval of the arrangement.

The Guidelines for the Shipping Sector published by the IAA on 28 July 2013, refer to the EU regulations and decisions when interpreting the new Block Exemption, 'subject to' the necessary adjustments to 'the Israeli law' and the terms and conditions of the shipping sector in Israel.

It is important to note that in spite of the IAA's declaration that it would stick to the EU regulation and interpretation, it has made it clear in the Guidelines that, although the EU has instructed otherwise, the market share of other parties who are engaged with either of the parties to the arrangement in other operational arrangements within the same market (such as slot charterers) will also be taken into account when calculating the aggregated market share of parties to an arrangement.

3 Regulation (EC) No. 906/2009.

When taking into account the volumes of the Israeli market and the number of services that it can reasonably accommodate for each 'product market', it is likely that a significant number of operational arrangements will exceed the 40 per cent threshold and will require self-assessments (although these may not have been required in Europe for the very same arrangements).

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Before the establishment of the State of Israel (in 1948), during the period of the British Mandate, the Supreme Court of Palestine was established by the provisions of the Palestine Order in Council of 1922 in terms of powers set out in the Foreign Jurisdiction Act of 1890. Thereafter, following the Palestine Admiralty Jurisdiction Order of 1937, which was enacted under the powers of the Colonial Courts of Admiralty Act of 1890, it was ruled that the Supreme Court of Palestine should be the Admiralty Court and should exercise admiralty jurisdiction.

The Palestine Admiralty Court applied the admiralty law adopted by the English High Court of Admiralty in 1890, and therefore statutes enacted in England following 1890 did not apply in Palestine. The Admiralty Court thus had the same jurisdiction as that exercised in admiralty matters by the High Court of Justice in England in 1890, subject to any enactments by the local legislative authority, and could exercise such jurisdiction in the same manner and to the full extent as the High Court in England.

Upon the establishment of the state of Israel, and following the Law and Administration Ordinance enacted at that time by the Provisional Council of State, it was ruled that the law that existed in Palestine on 14 May 1948 should remain in force and that the law courts existing in the territory of the state should continue to function within the scope of the powers conferred upon them by law. In 1952, in terms of the Israeli Maritime Court Law, it was provided that all the powers and procedures of the Supreme Court, in its capacity as a Court of Admiralty, should be vested in the District Court of Haifa, which should act as the Maritime or Admiralty Court.

Thus, admiralty law and practice in Israel is still based on the provisions of the British Admiralty Court Acts of 1840 and 1861 and the rules of procedure as set out in the Vice Admiralty Rules of 1883. Accordingly, the above laws and procedures govern the proceedings for enforcement of a foreign vessel's mortgage before the court.

III FORUM AND JURISDICTION

i Courts

Shipping disputes in Israel are litigated in the civil courts or the Admiralty Court.

Civil courts

General cargo claims against carriers and damage caused to vessels are considered as commercial or civil disputes and therefore may be handled by the civil courts in accordance with the amount sued. Claims for up to 2.5 million new Israeli shekels are sent to the magistrates' courts and above this sum claims are sent to the district courts. Generally speaking, these types of claim are governed by the Israeli Carriage of Goods by Sea Ordinance as amended in 1992 (as amended, Codex 1379, 5752 (22 January 1992)), which incorporates the Hague-Visby

Rules into Israeli law. These Rules govern claims concerning cargoes that are both imported into Israel and exported out of the country. According to these Rules the statute of limitation in cargo claims is one year after the date that the cargo was discharged or should have been discharged.

The Admiralty Court

Under the terms of the Israeli Admiralty Court Law of 1952 the District Court of Haifa serves as an Admiralty Court, the jurisdiction of which is derived from the old British Admiralty Court Acts of 1840 and 1861, according to which the court has jurisdiction to decide in claims concerning title or ownership of a vessel, salvage, towage, services rendered to a vessel, damage done by any ship, necessities supplied to a ship, building, equipping or repairing a ship, or damage to cargo. Furthermore, the Israeli Shipping Law (Vessels) of 1960, specifies several types of occurrence that give rise to a maritime lien over a vessel and therefore provides the Admiralty Court jurisdiction to decide in claims that concern such liens: expenses in respect of selling a vessel by the court, payments made for docking services and pilotage operations, payments sued of a vessel by its crew, payments sued of a vessel pursuant of casualties or injuries occurring on a vessel, damages sued pursuant to a collision of a vessel and payments sued for the supply of necessities, etc.

The Admiralty Court has jurisdiction over a vessel provided that it is in Israeli waters, regardless of whether the dispute involves an Israeli citizen, company or vessel.

ii Arbitration and ADR

ADR and arbitration instruments are not common in Israel as far as maritime disputes are concerned and there are no special facilities for such resolutions.

iii Enforcement of foreign judgments and arbitral awards

The Israeli legislator allows for enforcement of foreign judgments and arbitral awards. The Israeli Enforcement of Foreign Judgments Law of 1958 provides that an Israeli court may declare a foreign judgment enforceable in Israel subject to several conditions:

- a* that the court that gave the judgment was certified to give it;
- b* that the judgment is final and is not subject to appeal;
- c* that the judgment is enforceable in nature and does not contradict public policy;
- d* that the judgment is enforceable in the country in which it was given; and
- e* that the judgment was given in a country that enforces Israeli judgments.

Foreign arbitral awards are enforceable as Israel is a party to the New York Convention, which allows the court to approve a foreign arbitral award and declare it enforceable in Israel as if it were given by an Israeli court.

IV SHIPPING CONTRACTS

i Contracts of carriage

By virtue of the Israeli Carriage of Goods by Sea Ordinance as amended in 1992, the Hague-Visby Rules apply on any bill of lading in respect of carriage of goods by sea in any vessel:

- a* from a port in Israel to another port, whether in Israel or outside of Israel;

- b* from a port in a country who is party to the Hague Rules or the Hague-Visby Rules, or when the bill of lading was issued in a country that is party to the Rules;
- c* when they apply to the contract of carriage included in the bill of lading or the bill serves as proof of its existence, according to a term stipulated in a contract or under the laws of the country whose laws apply to such contract; and
- d* to a port in Israel, when the laws of Israel apply to such carriage whether according to the contract of carriage, according to another agreement between the parties, or according to the determination of the court.

Regarding the application of the law on contracts of carriage, the nationality of the vessel or the nationality of the carrier, shipper, consignee or any other person concerned is immaterial. The Hamburg Rules are not applicable.

In Israel, the terms and conditions of liner bills of lading are applicable and enforceable and formally valid according to Israeli law. According to the Carriage of Goods by Sea Ordinance (the Ordinance), the Hague-Visby Rules are applicable to bills of lading in respect of the carriage of goods by sea in any vessel, *inter alia*, 'when they apply on the contract of carriage included in the bill of lading'. The law therefore considers the bill of lading as an instrument that includes the contract of carriage. Furthermore, according to various Israeli Supreme Court precedents, the bill of lading is considered and classified as 'evidence to the contract of carriage' and not necessarily as the entire agreement, given that additional terms and conditions (including those varying the terms of the bill of lading) may have been agreed between the parties thereto elsewhere (in a service contract, by oral agreement, etc.) and may be evidenced by both contractual parties. Given that a bill of lading is considered a standard contract, the Standard Contracts Law 5743-1982 applies. According to this law, a client is entitled to challenge any contractual term included therein by claiming that the condition under deliberation – having regard to the totality of the conditions of the contract and to other circumstances – involves an undue disadvantage to customers or an unfair advantage to the supplier, likely to lead to the detriment of customers. In such a case, the court may annul or vary the condition of a standard contract.

In any bill of lading and any such document of title given in Israel containing a contract or serving as evidence of the existence of a contract to which the Hague-Visby Rules apply by virtue of the Ordinance, an explicit notice should be included therein saying that such bill of lading or such document of title will be in force considering the provisions of the Hague-Visby Rules as imposed by the Ordinance, and the bill of lading or the document of title will be in force considering those Rules, even where no such explicit notice is included therein.

According to the Ordinance, the party to which the cargo was consigned (the consignee) and the party to which the bill of lading was duly endorsed (the endorsee) are considered, as applicable, as a party to the bill of lading, and as such are entitled to all the rights arising from the transaction due to which the bill was made, and subject to the obligations referring to such transaction in exercising their aforementioned rights.

These provisions will not prejudice:

- a* the right of delay in transit;
- b* the right to claim the shipping fees from the shipper of the goods or from their owners; or
- c* any charge applicable to the consignee or endorsee due to receiving the goods.

Otherwise, it is worth mentioning that under Israeli law there are no provisions stipulating who bears responsibility for carriage, insurance, loading and discharge; however, the Israeli Sales Law (International Sale of Goods) 1999, which incorporated the UN Convention on Contracts for the International Sale of Goods (Israel's accession to which was ratified on 16 August 2001), and which applies to contracts of sale of certain types of goods between parties whose places of business are in different states under various conditions, does contain various provisions on delivery (especially Articles 31 to 34) and passing of risk (Articles 66 to 70). However, parties can elect to exclude the Law by contract. Who bears the cost of loading and discharge is a matter of inter-party negotiations.

Cabotage rules

On the 31 October 2012 the Minister of Transportation and Infrastructure published the official version of the Coastal Shipping (Permit to Foreign Vessel) (Application for Permit) Regulations 5773-2012 (the Regulations). These Regulations will now enable the enforcement of the already existing provisions of the Coastal Shipping (Permit to Foreign Vessel) Law 5766-2005 (the Coastal Shipping Law) by detailing in full the procedure governing the application for the permit, the various pre-conditions to be fulfilled, technically and in terms of manning, and the terms of such permit.

According to the Coastal Shipping Law, cabotage by a foreign vessel will be prohibited unless a permit is issued by the Shipping and Ports Directorate of the Ministry of Transportation and Infrastructure in accordance with the terms and conditions to be set out in specific regulations. Given that these Regulations have recently been published, *de facto* the Law may be presently implemented in full.

The Coastal Shipping Law, defines coastal shipping very broadly to include the carriage of goods and passengers originating from or destined to a port, vessel, facility or structure located in the coastal or internal waters of Israel without calling at a foreign port thereby, and also any other operation performed in such waters, excluding fishing, oil and natural gas drilling and production, and the placing of pipes for the transport of the same on or below the seabed.

According to the Regulations, various detailed preconditions and procedures must be fulfilled to entitle a foreign vessel to obtain a permit, including ongoing technical supervision and fulfilment of technical requirements. Additionally, partial crewing of the foreign vessel by Israeli seamen (and not less than two Israeli crewmen) is required.

Originally, the Regulations allowed the Shipping and Ports Directorate to grant an interim exemption to a vessel that, at the time of the publishing of the Regulations, had already been involved in coastal shipping for one year or until the termination of the contractual period, whichever was the earlier of the two. The latest possible date for this exemption was 1 December 2013.

A foreign vessel to which a permit has been given and that carries out coastal shipping activities, will employ, inasmuch as is possible, no less than two Israeli crew members whose language is Hebrew and, in the event that crew members serve in such vessel as officers, one of the two Israeli crew members will be an officer.

Nevertheless, the manager may, in terms of shipping and operational considerations of the foreign vessel and the nature of the coastal shipping activity, instruct that the foreign vessel be exempt from such directives, in whole or in part; such exemption may be dependent on conditions and its validity may not exceed one year.

In December 2014 the Minister of Transportation and Infrastructure published the Coastal Shipping (Permit to Foreign Vessel) (Exemption from the Provisions of the Law) Regulations 5775-2014. The new Regulations provide that to combat road congestion and the difficulties in the land transportation of containers, and as no Israeli liner operator for carriage of containers between Israeli ports is available, for the benefit of the Israeli market, the application of most of the provisions and requirements contained in the original Regulations have been excluded and shall not apply to a foreign vessel carrying containers between Israeli ports on an exceptional basis (i.e., where the vessel is not employed in a regular published liner service between Israeli ports).

ii Cargo claims

Many cargo claims in Israel are brought against carriers by insurers of cargo on the basis of their subrogation rights, but it is not uncommon to have the importers or exporters themselves sue. The courts obtain jurisdiction over the claim where the cargo that is allegedly lost or damaged was either discharged or loaded in Israel. Nevertheless, should the contract of carriage contain a jurisdiction clause (be it an arbitration clause or a regular jurisdiction clause), the court may dismiss the case at its discretion and in compliance with guidance prescribed by Supreme Court precedents. Furthermore, in some cases the court may find that Israel is not the correct forum for litigating a case despite the apparent existence of Israeli jurisdiction. The Magistrates Court of Tel Aviv dismissed a case for *forum non conveniens* in spite of the fact that the cargo was discharged in Israel and was designated for Israel under the bill of lading. The case concerned a general average declared because of a fire on board a Panamanian vessel while it was outside Hong Kong bound for Singapore. The reason for the court's decision in this case was that all the witnesses resided outside Israel and that the Hong Kong jurisdiction was more suitable for discussing the case.

The vast majority of cargo claims in Israel are directed against the carrier named in the bill of lading and the vessel onboard which the cargo was carried. Such claims are based on both the contractual obligation of a carrier that issued the bill of lading and on the tort caused either by the same carrier or by another.

iii Limitation of liability

There are two main facilities that limit liability regarding a vessel, both of which are based on internationally accepted sets of rules.

First, the Hague-Visby Rules, incorporated into Israeli law, provide general defences and immunities to a carrier.

Second, the Israeli Shipping Law (Limitation on a Shipowner's Liability) of 1965 incorporates the International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships (Brussels, 10 October 1957). In a nutshell, this Convention gives a shipowner the opportunity to establish a limitation fund that will serve as a maximum exposure against the shipowner for any specific occurrence giving rise to the dispute. This tool has not been used extensively by Israeli courts, but it remains in force and often serves as a catalyst for settlements.

V REMEDIES

i Ship arrest

For the type of claims that can give rise to the arrest of a vessel, see Section III.i, *supra*. The procedure for arresting a vessel is quite simple and all that is required is a short application to the Admiralty Court, which includes an application for arresting the vessel and a claim supplement. This application is made *ex parte* and the Court reviews the application; if it meets the requirements of any of the causes of arrest then the Court will issue a warrant for an arrest. Such a warrant remains in force for six months after its issuance and may be executed once the vessel enters Israeli waters. In this regard, it is possible to arrest a vessel even if not at berth and waiting outside the port (as long as it anchors on Israeli territory). If, however, the vessel is not moored alongside a pier it may be difficult to enforce as it is almost impossible to prevent a ship from sailing without permission in such circumstances.

After the vessel is arrested, it is possible to release it in exchange for a P&I club letter of undertaking or equivalent security. In the event the vessel is not released and the claim against it is accepted, the court will initiate a procedure to sell the vessel to enforce the judgment given.

There has been a notable increase in bunker supply-related arrests during the past few years in Israel but the Admiralty Court rejected a claim of a subcontractor of a bunker supplier and ruled that the entitlement to sue for unpaid bunkers lies with the entity that supplied and contracted with the vessel.⁴ This is an important ruling that indicates that the Court has little tolerance for the current trend of claims against a vessel by entities that served only as mediators and intermediate traders in the supply chain of bunkers and that apply to arrest the vessel regardless of the fact that its owners paid in full for the bunkers supplied to the direct supplier (which may or may not have paid the other entities in the supply chain).

Israeli law does not recognise the arrest of a vessel for a liability claimed against her sister ship.

ii Court orders for sale of a vessel

Court orders for the sale of a vessel are usually the outcome of claims for the enforcement of mortgages, either following a prior arrest order on the basis of a maritime lien (or cause of action falling within the jurisdiction of the Admiralty Court) or following an independent action for the enforcement of the mortgage. The Admiralty Court has the exclusive and full jurisdiction to admit and deal with all claims and causes of action of any person in respect of any mortgage on a ship or vessel, and to decide on any suit instituted by any such person in respect of any such claims or causes of action, subject to the said ship or vessel being under arrest by process issuing from the court, or the proceeds (from the sale thereof) having been so arrested.

The consequences of this conditional jurisdiction are that the commencement of *in rem* proceedings based on a claim in respect of a mortgage over a foreign-flagged vessel requires the ship or vessel to have been arrested by another third party based on a different cause of action in respect of which the court has jurisdiction (such as, for instance, claims for necessities supplied, for damage to imported cargo, damage done by the ship and wages

4 MC 45897-02-12 *OW Bunker Malta Ltd v. MV 'Emmanuel Tomazos'*.

due to seamen). Similarly, the jurisdiction of the Admiralty Court over claims for building, equipping or repairing of a ship is also subject to the ship or proceeds thereof being under arrest by the Court.

The Court may, either before or after final judgment, order that the arrested vessel be appraised or that the vessel be sold with or without appraisal, by public auction or by private contract. If the vessel is deteriorating in value, the Court may order it to be sold forthwith and the sale proceeds will serve as substitute security for the claim, pending judgment.

VI REGULATION

i Safety

There are various sets of regulations dealing with safety requirements for vessels calling at Israeli ports. The main guidelines and particulars may be found in the Port Regulations (Safety of Navigation) of 1982 as amended from time to time. These Regulations make reference to several international conventions, including SOLAS, the STCW Convention as amended in 1995, the IMO Codex and IMO Resolutions, the ISM Code and various other specific codes.

ii Port state control

According to Administration of Shipping and Ports of the Ministry of Transport, Israel implemented the port state control (PSC) inspection system in 1997, in accordance with IMO and ILO resolutions. PSC inspections are conducted to ensure that foreign vessels calling at Israeli ports comply with international regulations and conventions.

Israel is a signatory to the regional PSC organisation, the Mediterranean MoU.⁵ The Administration of Shipping and Ports is responsible for all PSC activities and aims to inspect each and every tanker and passenger ship arriving at Israeli ports, as well as 25 per cent of the container ships and general cargo, with an emphasis on bulk carriers.

iii Registration and classification

Vessel registration is dealt with by the Shipping Law (Vessels) 1960, the Shipping Regulations (Vessels) (Building & Acquisition of Vessels and Mortgages Thereon) 2002 and the Shipping Regulations (Vessels) (Registration and Marking) 1962. Israel has one central Register of Vessels maintained in the Office of the Registrar of Vessels in Haifa (the Registrar). There is no official age limit for vessels that will be approved for registration based on ownership and seaworthiness (each vessel must possess all safety and other customary certificates). Survey and safety requirements are in line with IMO/ILO/WHO requirements. The American Bureau of Shipping, Bureau Veritas, DNV GL, Lloyd's Register of Shipping and Nippon Kaiji Kyokai have been authorised to survey vessels and issue certificates on behalf of the Israeli government.

⁵ Fellow signatories are Algeria, Cyprus, Egypt, Jordan, Lebanon, Malta, Morocco, Tunisia and Turkey.

A vessel (including a floating dock) that is majority-owned (i.e., more than 50 per cent) by the state of Israel, an Israeli citizen or an Israeli corporation is eligible for registration in the Israeli Register of Vessels and any vessel that is eligible for registration must be so registered.

A vessel under construction in Israel or abroad that complies with the eligibility conditions mentioned above may be registered in Israel in accordance with certain rules set out in the regulations listed above.

However, the Minister of Transport and Road Safety (the Minister) may inform the Registrar that any vessel is not eligible for registration in Israel if he or she has special reasons for doing so, such reasons being connected with the ownership of the shares not owned by the state, Israeli citizens or Israeli corporations (to date, the Minister does not appear to have exercised this right).

Where a vessel does not comply or has ceased to comply with the eligibility conditions (this mainly concerns vessels owned by foreigners), the Minister may, if satisfied that a sufficient link exists between the vessel and the state of Israel, permit the owner of that vessel to register the vessel in the Israeli Register subject to conditions, or unconditionally, as he or she deems fit. What constitutes a 'sufficient link' appears to be open to the Minister's interpretation. In past cases, permits were given to foreign entities who bareboat chartered vessels to Israeli corporations and foreign entities whose shares were owned by Israeli corporations.

Registration that is effected in Israel is permanent; however, provisional registration of a vessel may be made through a diplomatic or consular representative of Israel abroad. Deletion of a vessel from the Register requires a formal application to the Registrar setting out the reasons for such deletion. If deletion is requested due to a sale of a vessel abroad, the owner or seller must give the Registrar at least 14 days' notice to this effect. Before deletion the vessel must be free from registered encumbrances unless the consent of the mortgagee or chargee is produced for the Registrar.

An owner applying for registration of a vessel in Israel in respect of a vessel that is at such time registered elsewhere, must provide the Registrar with a certificate of deletion of the vessel from her prior registry or proof, acceptable to the Registrar, that deletion proceedings have commenced and a certificate of deletion is forthcoming as well as proof that the vessel is free from registered encumbrances, unless the consent of the mortgagee or chargee to register the vessel in Israel has been produced to the Registrar.

Bareboat (parallel) registration is not allowed in Israel.

It should be noted that in accordance with the provisions of the Shipping Law (Foreign Vessel Controlled by Israeli Interest) 2005, any Israeli interest (i.e., Israeli citizen, Israeli resident or a corporation incorporated in Israel but excluding a foreign company registered as such in Israel under Section 346 of the Companies Law 1999) that has control over a foreign-registered vessel (i.e., a vessel that is not obliged to be registered in the Israeli Register) must give notice to this effect to the Registrar within 30 days of gaining control of such vessel and such vessel will be registered by the Registrar in a special register maintained for this purpose.⁶

The definition of 'control' is vast and further sets out details and modes of deemed control. It is highly recommended to carefully examine each case on its merits.

6 This registry is commonly called the 'Grey Registry'.

The Shipping Law (Foreign Vessel Controlled by Israeli Interest) 2005 further provides that the Shipping Law (Seamen) 1973 (the Seamen Law) will apply to a foreign vessel registered in the register book as if such vessel is duly registered in Israel as an Israeli vessel. The Seamen Law provides for the crewing of certain positions on board by Israeli crewmen (the same provisions as for Israeli-registered vessels).

iv Environmental regulation

The CLC Convention was incorporated into the domestic Law for Liability for Oil Pollution Damages of 2004. The Oil Pollution Fund Convention, as amended 2000, is also in force by virtue of the same Law. According to the Law, the liability for oil pollution is borne by the registered owner of the vessel. Clause 22(2)(d) of the Law explicitly excludes, where a cause of action for liability may be established according to the law, the liability, *inter alia*, of the vessel's charterers (without making any distinction between the various possible classifications of the charterer, i.e., time, voyage or otherwise), managers or operators according to any other law, to the extent that said damage was not caused by any action or omission intentionally made by the aforesaid to cause the pollution, or due to recklessness, made with the actual knowledge that the action would probably cause the damage.

The specific laws dealing with oil pollution do not impose, as such, liability on a charterer (time or voyage) or owner of the oil carried on board the vessel. Nevertheless, such liability may be established on the basis of the local tort laws, to the extent that negligence on part of the charterer or cargo owners may be established in connection with the pollution and damages. Nevertheless, in the event of damage or incident falling within the terms of the Law for Liability for Oil Pollution Damages of 2004, the charterer or owner of the vessel will be exempted from liability unless it is proved that their action or omission was intentionally made to cause the pollution, or that the pollution occurred because of their recklessness.

Civil liability may also be imposed by virtue of the Seawater Pollution by Oil (Prevention) Ordinance (New Version) 1980 (the Ordinance), with the reservation that such law does not specifically impose liability on a charterer or owner of the oil carried on board the vessel. Otherwise and generally, according to various environmental laws in Israel, liability for environmental incidents will be imposed on the person that actually caused the environmental incident or that violated the provisions of the relevant environmental laws, and such laws include not only criminal penalties, but also liability for the costs of restoration of the damages caused thereby.

The main criminal law which may be applied to such circumstances (criminal proceedings) is the Ordinance, pursuant to which the owner or master of the vessel from which the oil is discharged or allowed to escape will be liable for a fine.⁷ The law does not impose liability on a charterer or owner of the oil carried on board the vessel as such, but the Ordinance does not preclude the criminal liability of other parties according to the general criminal law (not only for negligence but personal injury, for instance).

The Bunker Convention entered into force internationally on 21 November 2008, but the Israeli legislator has not yet commenced the implementation of the Convention into the domestic law.

7 If he or she has been convicted before of an offence under this Section, or aggravating circumstances are established, he or she shall be liable to a greater fine or imprisonment for one year.

v **Collisions, salvage and wrecks**

The Ports Ordinance 1971 is the relevant legislation for the handling of wrecks and salvage of ships in Israeli waters. This Ordinance provides that should a vessel be lost or abandoned in Israeli waters and it poses a danger for the navigation or docking of vessels, then the authorised authority (the Israeli Ports Company Ltd, a state company) may demand the wreck's removal of its owners. In the event that the owner does not cooperate, the authority may remove the wreck by itself and later sue the owner for its costs or damages.

Additionally, the Wrecks and Salvage Ordinance (an Ordinance to make provision for control over wrecks and payment of salvage) of 1926 determines that where any services are rendered wholly or in part within the waters of Israel in saving life from any vessel, or in assisting any vessel that is wrecked, stranded or in distress, or saving the cargo or apparel of that vessel, or any part thereof, there shall be payable to the salvor by the owner of the vessel, cargo, apparel or wreck, a reasonable amount of salvage, to be determined through mandatory arbitration in the event of dispute. Salvage in respect of the saving of life of any person on the vessel will be payable by the owner of the vessel in priority to all other claims for salvage payable.

vi **Passenger rights**

There is no specific legislation applied to passenger rights. Those rights would be determined according to the usual civil law, namely the various laws regulating contracts and the tort laws regulating the injured party's rights in case of personal injuries. The Athens Convention has not been incorporated into Israeli law. Nevertheless, a claimant for death or bodily injury of passengers in a vessel enjoys a maritime lien on the vessel according to the Israeli Shipping (Vessels) Law of 1960.

vii **Seafarers' rights**

Like all employees in Israel, seafarers also enjoy working conditions and protective rights applicable by virtue of the various labour laws existing under Israeli law, *inter alia*, restrictions pertaining to the number of working hours per day or week, provisions in respect of vacation and sick leave, a weekly rest day, ensuring payment of and provisions for pension insurance and provisions relating to termination of employment relations.

Additionally, the rights of seafarers are also regulated under a dedicated law: the Seamen Law and the Regulations promulgated thereunder. Thus, for example, the Seamen Law explicitly regulates the prohibition on payment of 'inclusive wages' to any crew member (without separate payment due to overtime actually performed), the duty of an owner of a vessel to deliver a written service contract to any crew member upon the commencement of employment, and to include therein all the agreed conditions of service applicable to the service of such crew member. Also, regulations promulgated under the Seamen Law explicitly and specifically regulate the basic and special requirements for the accommodation of the crew on board a vessel registered in Israel employed for any commercial purpose or transportation of cargo.

Furthermore, the working conditions of seafarers are particularly regulated within the scope of special collective agreements that include benefiting and improving clauses regarding the terms of their employment beyond what is set out in the protective legislation of the labour laws and specific regulation.

According to Israeli law, where any Israeli citizen (or any person other than an Israeli citizen whose service has been approved by the Superintendent of Seamen) meets the general

conditions of eligibility⁸ and the owner of the vessel wishes to employ him or her as a crew member, he or she will be issued a seaman's book by the Superintendent of Seamen. It is prohibited to employ any person not holding a seaman's book or regarding whom there is no such permit.

The Israeli Supreme Court ruling in *Moshe Ben Raphael Levi v. The Minister of Transport et al*⁹ stated that:

[t]he issue of withdrawing the seamen's book is a very serious matter of denying the citizen's right to engage in his profession, and this matter requires careful and meticulous handling on part of the parties with whom the decision of this matter was placed by the legislator.

The Seamen Law provides that as far as possible, only Israeli personnel shall serve on a vessel. Israeli law prohibits the service of a non-Israeli as master of a vessel, except by special permit.

VII OUTLOOK

Israeli law has two sets of rules regarding rights to take action against a vessel: the British Colonial Admiralty Court Acts, dating from the middle of the 19th century, and the Israeli Shipping Law (Vessels) from 1960. The Admiralty Acts define the types of claims over which the Admiralty Court has jurisdiction. Since the Admiralty Court has the authority to order the arrest of a vessel, the meaning is that an arrest of a vessel is possible in all these kinds of claims. In addition, the Israeli Shipping Law defines the types of debt that are secured by a maritime lien on the vessel, which gives the creditor a direct cause of action against the vessel.

The right of suppliers to take action against a vessel is established both in the Admiralty Acts and in the Shipping Law. The Admiralty Acts mention the Admiralty Court's jurisdiction over a 'claim for necessities', while the Israeli law provides a maritime lien for 'payments claimed for or in connection with supplies or services provided to the vessel under agreements or transactions entered into by the master of the vessel within the scope of the authority conferred on him by law, insofar as such supplies or services were required for the safeguarding of the vessel or for the continuation of its voyage'. This duplication creates legal ambiguity regarding the nature of transactions for goods or services supplied to a vessel that grants the supplier a right to take action against the vessel when payment is not made.

In *Jupiter v. MV 'Tara Kaptanoglu'*,¹⁰ the Admiralty Court ruled that a maritime lien arises not only when the supply was made following a contract with the master, but also when bunkers were supplied to a vessel following a contract made with its owners. One of the assumptions that supported the court's conclusion, which may seem to be in contrast with the wording of the Shipping Law, was that bunkers fall within the definition of 'necessaries'

8 In general, according to Israeli law, a person above the age of 16 years (and if that person is an apprentice in a maritime school, 15 years), who is suitable health-wise for service at sea, has no criminal record and was found suitable in terms of the disciplinary requirements is eligible for service. For service in a position not requiring accreditation, vocational suitability for service at sea is also required, as well as successful completion of a basic safety course. The validity of the certificate of accreditation is for five years.

9 HCJ 292/80 *Moshe Ben Raphael Levi v. The Minister of Transport et al* 35(1)57).

10 MC 42908-03-11.

supplied to a vessel. The Court explained its ruling by pointing out the fact that the master is the agent of the owners, and thus if the master can bind the vessel by ordering supplies, there is no reason to conclude that the owner cannot.

A further uncertainty arises when the supply is ordered not by the master and not even by the owners of the vessel, but by a charterer. The question of whether a supply ordered by a charterer can impose a maritime lien on a vessel has been raised in several claims submitted to the Maritime Court, but has not yet been determined.

Another question regards the identity of the supplier that is entitled to benefit from the maritime lien. This question arises when the contract for supply is made on behalf of the vessel with one supplier or trader, but the goods are physically supplied by another supplier (physical supplier), which is then the trader's subcontractor. In a recent judgment, the Admiralty Court rejected a claim of a subcontractor of a bunkers supplier and trader, and ruled that the only supplier entitled to a maritime lien is the supplier or trader who directly contracted with the vessel.¹¹

11 *Bunker Malta* (footnote 4, *supra*).

Chapter 26

ITALY

*Pietro Palandri and Marco Lopez de Gonzalo*¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The Italian fleet is ranked 13th in the world (fourth in Europe) in terms of gross tonnage with more than 1,600 ships of 100 GT and over registered, with a total gross tonnage of more than 18 million.

The fleet is composed of liquid cargo ships (286: 5.3 million GT), dry cargo ships (232: 8.1 million GT), mixed and passenger ships (444: 4.5 million GT), and auxiliary service ships (601: 696,000 GT). Italy has the world's largest Ro-Ro fleet with 157 vessels of a total gross tonnage of 2.7 million.

Over the past 11 years the Italian fleet has registered an increase in terms of both number of vessels and total gross tonnage. In 2005, in fact, the number of ships in the fleet was 1,400 vessels with an overall gross tonnage of 11.4 million.

The Italian shipbuilding industry has a long tradition and an established reputation; however, fierce competition, especially from Asian shipyards, has recently caused a significant restriction in the activity of Italian shipyards. Such activity is now mainly focused on high-quality niche markets, such as cruise vessels and mega-yachts.

Fincantieri, the largest shipbuilding company, controlled by the Italian state, presently accounts for 80 per cent of Italian shipbuilding production and is a leading shipyard for cruise vessels (e.g., it has built several vessels for the Carnival group).

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The legislative framework for shipping in Italy is set out in domestic and international legislation. As far as domestic legislation is concerned, the Italian Code of Navigation is the main set of rules, and regulates both maritime and air navigation. The maritime and inland

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navigation section regulates the administrative organisation of the navigation, ownership and operation of a vessel, charterparties, bills of lading, salvage, collision, maritime insurance and procedural rules for maritime claims.

In addition to the Code of Navigation, a number of complementary laws provide specific rules for particular areas of shipping, such as Law No. 135/1977 on the Role of Shipping Agents and Law No. 84/1994 on Port Organisation and Services.

International conventions and EU legislation provide an important contribution to the shipping framework in Italy, completing and derogating (if necessary) domestic legislation. Such conventions and EU legislation will, in fact, usually prevail over domestic legislation.

On 10 January 2015 EC Regulation No. 1215/2012 (Brussels I *bis*) entered in force and replaced EC Regulation No. 44/2001 (Brussels I) in matters relating to jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The main amendments brought by the new regulation are connected with the recognition and enforcement of foreign judgments (see Section III.iii *infra*).

There are a number of conventions that have been ratified and enforced by Italy and these include the Hague Rules, the Brussels Convention, the Athens Convention, the Salvage Convention 1989 and the Maritime Labour Convention 2006 (MLC).

The most prominent convention not yet ratified by Italy is the LLMC Convention 1976, the provisions of which have, however, been partially included in domestic legislation (see Section IV.iv, *infra*).

III FORUM AND JURISDICTION

i Courts

In Italy there are no specific courts in which shipping disputes are litigated, but courts of the main maritime districts have divisions that deal mainly with this type of claim and have a wide experience in maritime matters.

Choice-of-forum clauses will be considered valid by the Italian courts if they comply with provisions set out in Article 25 of Brussels I *bis* (which replaced Article 23 of Brussels I). There are two main improvements in this respect: (1) the parties can agree the jurisdiction of a Member State even if none of them is domiciled in a Member State; and (2) a jurisdiction clause is to be considered as an agreement independent of the other terms of the contract and its validity cannot be contested solely on the ground that the contract is not valid.

In the event that proceedings are commenced before an Italian court without jurisdiction, the defendants must challenge this in their first pleadings under penalty of inadmissibility.

Choice-of-law issues are regulated by EC Regulation 593/2008 on the law applicable to contractual obligations (Rome I). According to Rome I, the choice of law made by the parties requires no formalities and can be inferred by the judge taking into consideration parties' intention and behaviour.

Limitation periods depend on the nature of the claim. According to Article 2951 of the Italian Civil Code, a one-year time limit applies to claims arising under a contract of domestic rail or road carriage. The same one-year limit applies to cargo claims in international contracts under the Hague Rules. If, however, a claim arises under a contract of domestic sea carriage, the time bar will be six months in the event that the carriage is within Europe or a

Mediterranean country; otherwise, the time limit is of one year.² Other limitation periods in shipping are one year for charterparties (six months or one year for voyage charter or contracts of carriage), two years for collision damages and salvage remuneration, and three years for oil pollution damages. The general rule for liability in tort provides a five-year time limit.

Time limits cannot be extended or shortened by agreement between the parties, but domestic law time limits may be interrupted, so that a new limitation period commences by a claimant serving a writ of notice of claim with a request of payment.

ii Arbitration and ADR

Arbitration is not the main method of dispute resolution in Italy and therefore there are no specific associations dealing with maritime arbitration such as there are in other maritime countries. Most arbitration clauses included in contracts, even with Italian parties, refer to arbitration in London.

Nonetheless, arbitration in Italy can be instituted according to Article 840 et seq. of the Italian Code of Civil Procedure and it can be formal or informal. The main difference between the two procedures is that in formal arbitration, the arbitrators actually substitute for the ordinary courts and their award is enforceable as a judgment, while in the informal arbitration, the arbitrators are deemed as acting as agents to whom the parties have delegated the function of settling the dispute by means of a document (the award) that is in the nature of a settlement agreement rather than a judicial decision. An award in informal arbitration cannot therefore be directly enforced but must be 'sued on' like a contract and is carried into effect through enforcement of the judgment rendered upon it.

As far as arbitration clauses are concerned, courts in Italy are very strict on ascertaining the validity of such clauses, which must be specifically signed by the parties. An arbitration clause included in a contract that has not been specifically signed is likely to be considered void.

From September 2013, compulsory mediation was introduced in Italy for certain types of claims. As far as shipping is concerned, mediation is compulsory for insurance claims and therefore must be carried out before any proceedings against insurers are brought to court.

iii Enforcement of foreign judgments and arbitral awards

The rules on the recognition and enforcement of judgments rendered in other EU Member States are set out by Brussels I *bis*. Under the new regulation a judgment rendered in a Member State that is enforceable in that Member State is enforceable in the other Member States without any declaration of enforceability being required. Proceedings may be instituted only in cases where the grounds for enforcement are disputed. The person against whom the enforcement is sought can in fact make an application for refusal of enforcement to the competent authority (for Italy, the Tribunal).

For all other countries, international and bilateral conventions may exist.

2 Article 438, paragraphs 1 and 2 of the Code of Navigation.

As far as international conventions are concerned, judgments rendered in, for example, Switzerland, Norway, Denmark and Iceland will be recognised and enforced in accordance with the Lugano Convention 2007 (succeeding the Lugano Convention 1988), which is, in fact, very similar to EU legislation.

If Brussels I bis or international conventions do not apply, specific bilateral conventions exist between Italy and certain countries (such as Tunisia since 1967) or, as a residual criterion, the Italian courts will apply Articles 64 to 71 of Italian Law No. 218/1995, which provides a test regarding only the regulatory proceedings followed in rendering the judgment without any reconsideration of the merits.

Regarding the enforcement of foreign arbitral awards, Italy is a signatory party to the New York Convention. Pursuant to the Convention, the Italian courts will consider arbitral awards rendered in another contracting state as directly binding in Italy. Enforcement will be provided by means of an *exequatur* procedure that involves a petition to be filed with the competent court of appeal, the decision of which whether to grant or reject the enforcement of the award can be challenged by any interested party within 30 days.

As far as awards rendered in non-contracting states of the New York Convention are concerned, the Italian courts will apply Articles 839 to 840 of the Code of Civil Procedure, the test for the recognition and procedure for enforcement of which are very similar to those described above.

IV SHIPPING CONTRACTS

i Shipbuilding

A shipbuilding contract is considered as a contract for the supply of workmanship and materials. Article 241 of the Code of Navigation in fact refers to the provisions of the Civil Code regarding ‘appalto’ (which corresponds to ‘supply of workmanship and materials’). In any case, parties are free to select the law to govern their contract³ and usually each contract includes an express clause to that effect.

With reference to transfer of title to the vessel, this is another aspect that is usually dealt with from contract to contract. Parties can agree that ownership will be transferred upon delivery; in this case pre-delivery instalments are secured by refund guarantees or by a mortgage on the ship under construction. It is also, however, possible to agree that ownership will be transferred ‘step by step’, concurrently with payment of pre-delivery instalments.

Another aspect that must be underlined is that under Italian law there is a separate Registry of Ships under Construction.⁴ The shipbuilding contract and a declaration that construction has started must be registered. The registration is made in the name of the builder or of the buyer, depending on who holds title in construction.

As to the remedies for defects, the parties can incorporate into the contract clauses providing for liquidated damages in the event of breaches of guaranteed standards of performance, for example, regarding speed or consumption⁵ and for the right of termination in the event of particularly serious breaches.⁶

3 Article 3 of EU Regulation No. 593/2008.

4 Article 234 of the Code of Navigation.

5 Article 1383 of the Civil Code.

6 Article 1456 of the Civil Code.

The signature of the protocol of delivery and acceptance will be final and binding except for continuing performance warranties, defects that were fraudulently concealed and latent defects (i.e., defects that could not be detected by reasonable diligence).⁷

ii Contracts of carriage

After entering into force in 7 April 1939, the Hague Rules were renounced in 1984 and, in August 1985, Italy ratified the Hague-Visby Rules, which entered into force in November 1985, as amended by the protocols of 1968 and 1979. The Hague-Visby Rules are to be considered as a special Italian law, overruling the general Code of Navigation law. Whenever the Hague-Visby Rules do not apply, the Italian courts make reference to the law stated in the bill of lading to be applicable or, in the absence of a choice of law, to the law of the country in which the carrier has its principal place of business. In the absence of sufficient evidence of a foreign law, the Italian courts would apply the Code of Navigation.

The Code of Navigation – which is also applies to any carriage performed by Italian vessels between Italian ports (cabotage) – is inspired by the Hague Rules, and its provisions on carriers' liability do not differ substantially from the Convention, except for the amount of the package limitation.

Article 423 of the Code of Navigation provides that 'the compensation due by the carrier cannot exceed, for each unit of cargo, the amount of €103.29 or any higher amount equal to the value declared by the shipper before loading'; the package limitation under the Hague-Visby Rules is certainly higher than the limitation figure under the Code of Navigation. However, after judgment No. 199/2005 of the Constitutional Court, the limit of Article 423 of the Code of Navigation cannot be applied in a case of wilful misconduct or gross negligence of the carrier and in practice the limit is frequently overruled by Italian courts.

iii Cargo claims

Only the person who has title can sue for loss or damage to the cargo. The title holder is the legitimate holder of the original bill of lading according to the rules of transfer of the bill of lading itself. Once the bill of lading has been surrendered to the carrier against delivery of the goods, the cargo owner can also sue. Therefore, the shipper cannot sue unless it has retained possession of the original bill of lading or has become assignee of the rights of the cargo owner. Insurers may bring a suit in their own name, but must be properly subrogated in the rights of their assured.

A suit may be brought against the carrier. Unlike in common law jurisdictions, Italian law does not allow a suit to be brought against the ship, as defendant, by an action *in rem*.

Under Italian law, the ship's agent can also be sued as representative of the carrier,⁸ provided the carrier was his principal. The identity of the agent's principal can be gathered from the notice that the agent must file with the harbour master in connection with the arrival of a foreign ship in port. If the ship's agent was not appointed by the carrier, the claimant will have no alternative but to sue the carrier direct by serving a writ of summons at the carrier's registered office.

7 See Article 1667 of the Civil Code.

8 Article 288 of the Code of Navigation.

A jurisdiction clause contained in a bill of lading will be recognised by the Italian courts provided it complies with the provisions of Brussels I *bis* (Article 25) or of the Italian International Private Law, Law No. 218/1995 (Article 4).

An arbitration clause contained in a charterparty will be recognised by the courts on condition that the charterparty is signed and its terms and conditions, including express mention of the arbitration clause, are incorporated into the bill of lading. The incorporation of an unsigned arbitration agreement into a contract will not be recognised. If a bill of lading refers to the terms of a charterparty without identifying it, incorporation will not be recognised.

iv Limitation of liability

According to Article 7 of the Code of Navigation, shipowners' liability is ruled by the law of the ship's flag state. Therefore, the tonnage limitation regime in respect of claims against the vessel to be applied by the Italian courts depends on the national law or international conventions ratified by the country of the ship's flag.

As previously mentioned, Italy has not ratified the LLMC Convention but, by means of Legislative Decree No. 111/2012, the Italian government has enacted in Italy the provisions of the EU Directive 2009/20/EC on the insurance of shipowners for maritime claims. This decree also introduces into Italian law a new regime of limitation of liability for shipowners. Articles 7 and 8 of the Decree have, in fact, introduced the same limits of liability as those provided under Chapter II of the LLMC Convention as amended by the LLMC Protocol 1996 for vessels of 300 GT or more.

For vessels of 300 GT or less, the regime of the Code of Navigation remains applicable.⁹

V REMEDIES

i Ship arrest

Italy has ratified the Brussels Convention under which a vessel registered in a contracting state can be arrested only for maritime claims as defined and listed in Article 1 of the Convention. Ships flying the flag of non-contracting states can be arrested in Italy for any claim.

Procedural rules for arrest are set out in domestic legislation by Articles 682 to 686 of the Code of Navigation and Article 669 *bis et seq.* of the Code of Civil Procedure.

To obtain the arrest of a ship, the claimant must file a petition for arrest in the competent court, providing *prima facie* evidence of its claim (*fumus boni iuris*). Following the petition, the court sets a hearing for the discussion of the arrest with both the claimant and the defendant in order to decide whether to grant the arrest. If the arrest is urgently needed and waiting to summon the defendant would jeopardise the claimant's rights, the court can order the immediate arrest of the ship and then set the hearing in order to decide whether to confirm, amend or revoke the arrest.

The court may also, at its discretion, order the applicant to provide counter-security in favour of the owner to cover damages in the event the arrest is found to be wrongful. A claim in Italy will be declared wrongful if it is found to be groundless and brought by the claimant without due care.

⁹ Article 275.

Pursuant to Article 669 *terdecies* of the Code of Civil Procedure, it is possible to appeal the arrest order issued by the court.

Once the ship has been arrested, the court fixes a deadline (not exceeding 30 days) for the claimant to start proceedings on the merits before the competent court, which is not necessarily an Italian court. If the claimant fails to do so, the arrest ceases to be effective.

Apart from in exceptional cases, sister and associated ships can only be arrested in Italy if they are owned by the same debtor.

ii Court orders for sale of a vessel

Rules concerning the judicial sale of a vessel can be found in Articles 643 to 686 of the Code of Navigation and Articles 483 to 542 of the Code of Civil Procedure.

The procedure for carrying out a judicial sale of a vessel starts with service by the court bailiff of an order to pay the shipowner and a deadline to do so, with the notice that, in the event of non-compliance, the creditor will proceed with the attachment of the debtor's goods. In order to do so, the creditor must be in possession of an enforceable title, usually a judgment.

If the debtor fails to pay within the deadline, the creditor will be entitled to serve upon the debtor and the master of the vessel, through the bailiff, a writ of attachment, along with the order to pay and the enforceable title. The same writ of attachment must be sent to the harbour master of the port at which the ship is registered so that it can be recorded in the register. The procedure can be joined by other creditors according to Articles 499 to 500 of the Code of Civil Procedure.

Once the vessel is attached, it cannot leave the port without specific permission from the court. If the debtor persists in not paying, a creditor is entitled to apply for the judicial sale of the vessel between 30 days and 90 days after the attachment. The application must be served, through the bailiff, upon the debtor and to all other creditors who joined the procedure, who are allowed to make observations on the method of the sale.

The application must be filed within 30 days of its service at the competent court so that an expert can perform a survey to render an estimate of the value of the vessel. After hearing all interested parties, the judge will then order the sale of the vessel. The sale is carried out by means of a public auction.

VI REGULATION

i Safety

SOLAS was enacted in Italy by Law No. 313/1980. Following its enactment and taking into consideration its subsequent amendments, the national Regulation on the Safety of Life at Sea was reformed in 1991 by Presidential Decree No. 435/1991.

As far as the safety of work onboard ships is concerned, the relevant rules are set out in Legislative Decree No. 271/1999.

Finally, the European Commission, in connection with the *MV Erika* and *MV Prestige* disasters in 1999 and 2002, respectively, introduced various measures on maritime safety. These measures pertain, *inter alia*, to the setting up of a European Maritime Safety Agency, the setting up of a Compensation Fund for Oil Pollution in European Waters, the introduction of a Community monitoring, control and information system for maritime

traffic, the speeding up of the replacement of single-hull oil tankers with double-hull oil tankers, the ban from all European ports of all ships older than 15 years that have been detained more than twice in the previous two years.

ii Port state control

Italy is party to the Paris MoU, pursuant to which each contracting state must maintain an effective system of port state control with a view to ensuring that foreign merchant ships calling at or anchored off a port of its state, comply with certain international standards as provided in the international conventions listed under Section 2. For European countries like Italy, the provisions of the Paris MoU are reinforced by EU Directive No. 2009/16/EC on port state control, which substantially endorses the MoU's content.

In Italy, the port state control officers (i.e., the parties responsible for port state control) are harbour masters.

In accordance with the MoU, when deficiencies are found that render a ship unsafe to proceed to sea or that pose an unreasonable risk to safety, health or the environment, the ship may be detained. The harbour master will issue a notice of detention to the ship's master also informing the ship's owner or operator that it has the right of appeal. An appeal must be made to the competent regional administrative tribunal within 60 days of notification of the detention. A complaint may also be addressed by the owner, the flag, the class or the ISM manager to the harbour master's headquarters.

iii Registration and classification

Under Article 143 of the Code of Navigation, registration of a ship in the Italian Registry is subject to the following requirements:

- a* at least half of the shares in the ship are owned by an Italian or a European person or entity; or
- b* in the case of a new build or ship that was previously registered in a non-European country, the vessel is owned by a non-European person or entity that directly assumes the exercise of the ship through a stable organisation in Italian territory.

Law No. 30/1998 instituted the International Registry where ships exclusively destined for commercial international trade are registered. Furthermore, a special registry (bareboat registry) is dedicated to vessels already registered in a foreign registry and temporarily suspended from that registry when on bareboat charter to an Italian or European subject.

Regarding the registration of a ship under construction, see Section IV.i, *supra*.

The Italian classification society is RINA, which, along with all other recognised classification societies, is entrusted by the state with technical control over the building of ships in Italian shipyards.¹⁰

As to the liability of classification societies, the sole precedent is the decision rendered by the Genoa Tribunal in 2010 in a case regarding the claim of a charterer against a classification society for damages suffered due to the detention of the vessel after a control order under the Paris MoU. The Tribunal held that the unjustified attestation of the class of a vessel by a classification society can be regarded as a cause of incorrect evaluation by the charterer in the selection of the vessel to charter.

¹⁰ Article 235 of the Code of Navigation.

However, it has to be noted that such decision has been overruled by the Court of Appeal of Genoa (though for reasons related to the merits of the cause and not to the legal principle mentioned above).

iv Environmental regulation

Italy has ratified:

- a* the CLC Convention;
- b* the Oil Pollution Fund Convention; and
- c* the Bunker Convention.

In terms of domestic legislation, environmental regulation is contained in the Environmental Code.¹¹

Part 6 of the Environmental Code contains the procedure for the establishment of liability and compensation for damage to the environment. Article 303 provides that Part 6 of the Code does not apply to environmental damage relating to accidents falling within the application of an international convention, including the CLC Convention, Fund and Bunker Conventions.

Despite this exclusion, a recent decision of the European Court of Justice in the *Erika*¹² deemed the European Directive on waste (which was enacted in Italy with the Code of Environment) applicable to a spill of hydrocarbons after the sinking of a ship and therefore invited the national judge to apply the principles of the Directive.

v Collisions, salvage and wrecks

The 1910 Collision Convention is in force. Jurisdiction will be founded on the Collision Convention 1952. Therefore, an Italian court will have jurisdiction if Italy is:

- a* where the defendant has either its habitual residence or a place of business;
- b* where arrest of the defendant ship was effected or of any other ship belonging to the defendant that can be lawfully arrested, or where arrest could have been effected and bail or other security has been furnished; or
- c* where the collision occurred.

The Court of Cassation (judgment No. 4686 of 9 March 2015) held that the special criteria of jurisdiction of the Collision Convention 1952 prevail over the general discipline of Brussels I. Brussels I as well as the new Brussels I *bis* does not affect any conventions to which the Member States are parties and that govern jurisdiction in relation to particular matters.

A party can claim all damages that are immediate and direct consequences of the collision, including material damages and loss of earnings. Italy has ratified the Salvage Convention 1989, which therefore applies as a general rule.

The limitation period for enforcing salvage claims in Italy is two years from the day on which the salvage operations are completed.¹³

11 Legislative Decree No. 152/2006.

12 C-188/07.

13 Article 500 of the Code of Navigation.

The salvor can arrest the salvaged ship (or a sister ship) under the Brussels Convention. It can also arrest the cargo within 15 days of discharge and before it has been lawfully delivered to a third party.

According to Article 73 of the Code of Navigation, the owner of the vessel has the duty to remove a wreck. Further, a general obligation of remediation or depollution is imposed by the Environmental Code¹⁴ on the party responsible for the pollution of an area. In a case of omission, the remediation or depollution is carried out by the public administration, which can claim the costs from the responsible party.¹⁵

Finally, EU Regulation No. 1257/2013 provides for a new regime on ship recycling. The Regulation – which, according to Article 32, may not apply earlier than 31 December 2015 – introduces the same standards of ship recycling as is imposed by the Hong Kong Convention (not yet in force) and establishes a list of recycling facilities authorised to conduct ship-recycling operations.

vi Passengers' rights

The EU recently implemented two important pieces of legislation on passenger's rights: Regulation (EU) No. 1177/2010 concerning the rights of passengers when travelling by sea and inland waterways, and Regulation (EC) No. 392/2009 on the liability of carriers of passengers by sea in the event of accidents, implementing the Athens Convention as amended by the 2002 Protocol (according to the 2006 IMO guidelines for implementation of the Athens Convention). The Italian Code of Navigation also regulates the carriage of people by sea in Articles 396 to 418.

For example, Article 400 of the Code of Navigations provides that if a passenger is unable to leave for serious, justified and unpredictable reasons, he or she may terminate the contract of carriage by paying the carrier a penalty of 25 per cent of the ticket price. If, however, for reasons that cannot be attributed to the passenger's fault (such as an illness that forces him or her to disembark), the journey is interrupted, he or she is entitled to a refund of the price from the carrier for the part of the journey that has not been undertaken.

In the event that the carriage forms part of an 'all-inclusive' tourist package, in application of Directive 90/314/EEC, Articles 32 to 51 of Legislative Decree No. 79/2011 (the Code of Tourism) provide special provisions in order to protect passengers' rights on sea carriage, such as liability of the seller and of the provider of the services included in the tourist package in relation to the respective activities.

On 25 November 2015 the EU Directive 2015/2302 of the European Parliament and of the Council on package travel and linked travel arrangements was issued. The new rules, which should be implemented by the Member States in their national legislation by 1 January 2018, increase the existing protection for travellers and, for the first time, set out a regulation on linked travel arrangements too.

vii Seafarers' rights

Italy ratified the MLC on 19 November 2013 and it entered into force on 19 November 2014. As of that date, 13 maritime conventions previously ratified by Italy are considered *ipso jure* denounced.

14 Legislative Decree No. 152/2006.

15 Article 250 of the Environmental Code.

In accordance with Standard A4.5(2) and (10) of the MLC, the Italian government has specified that it will progressively extend the following branches of social security to seafarers:

- a* sickness benefit;
- b* unemployment benefit;
- c* old-age benefit;
- d* employment injury benefit;
- e* family benefit;
- f* maternity benefit;
- g* invalidity benefit; and
- h* survivors' benefit.

In domestic legislation, seafarers' rights are granted by National Labour Collective Agreements (the last one signed in Rome on 17 July 2007) and a wide number of specific laws such as Presidential Decree No. 231/2006 on seafarers' placement regulation or Legislative Decree No. 271/1999 on security and health of seafarers on board of merchant ships.

As far as stability of employment is concerned, Article 18 of Law 18/1970 has always protected employees, providing strict rules on the termination of employment agreement by the employer. This law became directly applicable to seafarers after judgment 364/1991 of the Italian Constitutional Court. Nonetheless, the current government is reviewing labour law legislation, and the application of Article 18 of Law 18/1970 may be modified.

VII OUTLOOK

A potential issue for owners of vessels calling at Italian ports might be the threat of arrests in connection with claims for bunker supplies. The issue is becoming relevant particularly after the collapse, in November 2014, of the Danish group OW Bunker. This has given rise to a series of claims pursued by various parties involved in the bunkers supply chain: physical suppliers, lending banks, bunkers' traders. Other possible claims are those from the banks or other entities that purchased the credits of OW after the collapse.

As said (see Section V.i *supra*) Italy has ratified the 1952 Brussels Convention under which a vessel registered in a contracting state can be arrested in respect of each maritime claim listed at Article 1 of the Convention. In particular, the claim for unpaid bunkers supply definitely falls within the definition of the maritime claim under letter k of Article 1 ('goods or materials wherever supplied to a ship for her operation or maintenance'); thus, when the debtor is the shipowner itself, the claimant may secure the claim with an arrest of the supplied vessel.

More controversial is the possibility to obtain an arrest of the vessel in case the debtor is a person other than shipowner, usually the charterer. It is disputed whether Article 3 paragraph 4 of the Convention may be interpreted as authorising the arrest of the vessel even when the claim is not assisted by a lien on the vessel. The trend of the Italian courts is more favourable to claimants and arrest are usually granted even in the absence of a lien on the vessel.

However, according to a recent decision rendered in February 2016 by the Tribunal of Gorizia, Article 3.4. authorises the arrest of the supplied vessel only when the debtor (other than the shipowner) has control over the vessel (like the charterer).

Chapter 27

JAPAN

Tetsuro Nakamura, Tomoi Sawaki and Minako Ikeda¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Japan is one of the most prominent shipping nations in the world. Out of the approximately 46,000 ocean-going commercial ships in the world, about 2,600 vessels with 120 million GRT are owned or operated by Japanese companies, registered in places such as Panama, Liberia, the Bahamas and the Marshall Islands. Among these, bulk carriers account for about 40 per cent of the total, tankers about 20 per cent, vehicle carriers about 20 per cent and container carriers about 10 per cent. They make up a little less than 10 per cent of all sea transportation in world trade.

The three main shipping companies account for approximately 70 per cent of freight revenue of all the Japanese shipping companies. In the carriage of crude oil, chemical products, LNG, LPG, dry cargo and cars, bills of lading are issued, while time or voyage charters are entered into in most other cases. The Japanese container fleet operated by these three companies consists of around 280 ships (approximately 1.3 million TEUs) out of the total of 3,200 ships (about 16 million TEUs) operated by the world's top-20 container carriers. Each of these three container carriers is a member of an alliance such as CKYH/Green, Grand Alliance, New World Alliance and G6 Alliance. The Japanese container fleet makes up about 15 per cent of the total TEUs for North America–Asia trade, and about 15 per cent of Asia–Europe trade.²

1 Tetsuro Nakamura is a partner and Tomoi Sawaki and Minako Ikeda are associates at Yoshida & Partners.

2 All data has come from the Japanese Shipowners' Association.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

While Japan has provisions that regulate shipping set out in Article 684 et seq of the Commercial Code,³ these are not often applied to international shipping or carriage. Japan has, however, ratified most maritime conventions, such as the Hague-Visby Rules, the latest versions of the LLMC Convention 1976 (with its Protocol 1996), the CLC Convention and the Oil Pollution Fund Convention, as well as SOLAS and its relevant rules and conventions.

III FORUM AND JURISDICTION

i Courts

There are no specialised maritime courts in Japan, and shipping disputes are litigated first in district courts and then appealed to the High Courts (Sapporo, Sendai, Tokyo, Nagoya, Osaka, Hiroshima, Takamatsu and Fukuoka) and thereafter to the Supreme Court.⁴ Two administrative institutions, the Japan Marine Accident Tribunal (JMAT) and the Japan Transport Safety Board (JTSB),⁵ carry out investigations into the causes of maritime casualties. The JMAT may hold its findings on the causes of an incident and take disciplinary action against seamen and pilots with Japanese licences, while the JTSB (like the UK's Marine Accident Investigation Branch) will issue an investigative report on the causes of an incident and any resulting preventive measures. These findings will often influence the court's finding of the facts, such as fault and causation. The Japanese Code of Civil Procedure⁶ (CCP) does not have a strict hearsay rule and, as such, the findings or reports of the JMAT or the JTSB are admissible as evidence.

The jurisdiction of each district court can derive from various factors⁷ and more than one court may have jurisdiction over any given action. For example, if a shipowner were to file a tort claim against the shipowner of the opposing vessel in a collision case, it can file a complaint with the local court at the venue of either the defendant's domicile or the defendant's principal office address,⁸ where the collision took place⁹ or where the damaged ship first arrived after the collision.¹⁰

The general prescription (time bar) for a tort action is three years from knowledge of both the damages and the identity of the tortfeasor.¹¹ For claims arising out of commercial

3 Sho Ho: Law No. 48 of 1899 see [www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&yo=&ia=03&x=12&y=19&kn\[\]=%E3%81%97&ky=&page=67](http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&yo=&ia=03&x=12&y=19&kn[]=%E3%81%97&ky=&page=67). Many Japanese laws are being translated to English at the initiative of the Ministry of Justice and these can be seen at www.japaneselawtranslation.go.jp/law/search_nm/?re=02.

4 www.courts.go.jp/english/judicial_sys/index.html.

5 www.mlit.go.jp/jtsb/english.html.

6 Minji Soshō Ho: Law No. 109 of 1996 see [www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&yo=&ia=03&x=16&y=17&kn\[\]=%E3%81%BF&ky=&page=9](http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&yo=&ia=03&x=16&y=17&kn[]=%E3%81%BF&ky=&page=9).

7 Article 4 of the CCP.

8 Article 4(1), (4) of the CCP.

9 Article 5(9) of the CCP.

10 Article 5(10) of the CCP.

11 Article 724 of the Civil Code (Minpo: Law No. 89 of 1896); see [www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&yo=&ia=03&x=16&y=17&kn\[\]=%E3%81%BF&ky=&page=13](http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&yo=&ia=03&x=16&y=17&kn[]=%E3%81%BF&ky=&page=13).

transactions, it is five years as a general rule;¹² however, shipowners' claims against charterers, shippers or consignees,¹³ claims arising from general average or collisions,¹⁴ and carriers' liability relating to carriage¹⁵ all have a short-term extinctive prescription of one year. Insurance claims have a slightly longer time bar of three years.¹⁶

ii Arbitration and ADR

The Japan Shipping Exchange (JSE), founded in 1921, is home to the Tokyo Maritime Arbitration Commission¹⁷ (TOMAC), which is the only permanent maritime arbitral tribunal in Japan; the place for arbitration is either Tokyo or Kobe.¹⁸ Nowadays, the number of TOMAC arbitration cases is increasing. Although the International Chamber of Commerce has an arbitration system that is sometimes used for shipping matters, this is used only infrequently.

TOMAC has a panel of about 150 members as candidates for arbitrators, which includes representatives from various maritime industries such as shipping, trade, shipbuilding and insurance, as well as maritime lawyers and law professors. It has three sets of rules: Ordinary Rules, Simplified Rules (for claims up to ¥20 million) and SCAP Rules (for claims up to ¥5 million); it also has rules for mediation.

Under the Ordinary Rules, each party nominates an arbitrator from the panel of TOMAC arbitrators and unless the parties agree to one arbitrator, the two nominated arbitrators then nominate a third arbitrator from the same list.¹⁹ The style of arbitration proceeding is similar to arbitration in the other countries. Normally, awards are given within a year of the time of the application. Unlike in Japanese court proceedings, TOMAC does not request a Japanese translation of the documents and oral hearings are held in English, which enables the parties to save both time and cost.

Arbitral awards have the same effect as final and conclusive judgments, binding the parties.²⁰ No appeal to the court may be entered against an arbitral award unless there is a significant violation of due process, public policy or other unusual circumstances. There have been no court cases invalidating or amending TOMAC arbitral awards.

12 Article 522 of the Commercial Code.

13 Article 765 of the Commercial Code.

14 Article 798(1) of the Commercial Code. This special provision applies only to claims in respect of loss of or damage to property. For collision cases where 1910 Collision Convention is applied, the time bar is two years.

15 Article 14(1) of the International Carriage of Goods by Sea Act (Kokusai Kaijo Buppin Unso Ho: Law No. 172 of 1957).

16 Article 95(1) of the Insurance Act (Hoken Ho: Law No. 56 of 2008).

17 www.jseinc.org/en/tomac/index.html. JSE commenced its function as an arbitral tribunal in 1926.

18 Article 13(1) of the Ordinary Rules; see www.jseinc.org/en/tomac/arbitration/ordinary_rules.html.

19 Article 15(1) of the Ordinary Rules.

20 Article 45(1) of the Arbitration Act (Chusai Ho: Law No. 138 of 2003); see [www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&cyo=&ia=03&cx=7&cy=8&kn\[\]=%E3%81%A1&ky=&page=7](http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&cyo=&ia=03&cx=7&cy=8&kn[]=%E3%81%A1&ky=&page=7).

Prescription periods are the same as when filing an action with the courts and the prescription will be interrupted (protected from time bar) on the day the application arrives at the office of the JSE.²¹

iii Enforcement of foreign judgments and arbitral awards

Japan is a party to the New York Convention and thus awards made in signatory countries of the Convention are enforceable in Japan if the conditions set out in the Convention are met. Enforcement of awards made in non-convention countries, or in the absence of bilateral treaties between Japan and any other country, will be governed by the Arbitration Act.²²

For foreign judgments to have effect in Japan, the following conditions must be fulfilled:²³

- a* the jurisdiction of the foreign court is recognised under the law;
- b* the defeated defendant has received service of a summons or order necessary for the commencement of the suit, or has appeared before the court even without receiving such service;
- c* the content of the judgment and the court proceedings are not contrary to public policy in Japan; and
- d* reciprocity exists.

To enforce a foreign judgment, one must file an action seeking judgment to enforce the foreign judgment with the district court.²⁴ In this proceeding, whether the requirements set out above are satisfied will be investigated rather than the merits of the case.²⁵

IV SHIPPING CONTRACTS

i Shipbuilding

The Japanese shipbuilding industry now holds roughly a 20 per cent worldwide share of new commercial ships²⁶ although it faces severe competition from Chinese and Korean shipbuilders. Japanese shipbuilding enjoys a reputation for its high quality, punctuality and advanced technology.

The majority of shipbuilding contracts involving Japanese shipbuilders use a form drafted by the Shipbuilder's Association of Japan (the SAJ Form), which is also the basis for the contract forms in China, Korea and Singapore. The terms are favourable to builders. The Japan Shipping Exchange also offers a JSE form of shipbuilding contract. Usually, advanced payment in three or four instalments before delivery is required, with refund of a performance guarantee or a completion bond.

21 Article 7(2) of the Ordinary Rules.

22 Article 46(1) of the Arbitration Act.

23 Article 118 of the CCP.

24 Article 24(1) of the Civil Execution Act (Minji Shikko Ho: Law No. 4 of 1979); see [www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&yo=&ia=03&x=9&y=18&kn\[\]=%E3%81%BF&ky=&page=5](http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&yo=&ia=03&x=9&y=18&kn[]=%E3%81%BF&ky=&page=5).

25 Article 24(2), (3) of the Civil Execution Act (CEA).

26 Data from the Japanese Shipowners' Association.

Most shipbuilding contracts are of the nature of a contract for work and materials, and, unless otherwise provided, are subject to Articles 632 to 642 of the Civil Code. In contracts for work, a shipowner who orders the building of a vessel may demand that the contractor repair any defect or demand compensation for damages except when the defect is not significant and the repair would incur excessive costs.²⁷ This contractor's warranty is understood as entailing strict liability. If the defect is such that the purpose of the contract cannot be achieved, the shipowner may rescind or terminate the contract.²⁸ The Supreme Court ruled that when the defect in a newly built ship is relatively minor but the cost to repair it is remarkably high, subject to the intent of Article 634(1) of the Civil Code, the party who ordered the building may not demand compensation for the repair cost of the defect or demurrage in lieu of repair of the defect.²⁹ Although contracts usually provide for a time limitation of one year for claims based on defect in accordance with the Civil Code,³⁰ claims in tort or under product liability law would not be precluded.

ii Contracts of carriage

Japan has ratified the Hague-Visby Rules, and the Law on the International Carriage of Goods by Sea (JCOGSA) is an enactment based thereon. JCOGSA has force of law for the carriage of goods by sea where either the port of loading or discharge is in Japan.

Similarly to a recent trend in other maritime jurisdictions, cargo interests often argue that it is part of the carrier's due diligence to make the ship seaworthy – especially being fit for use by its crew – through ISM Code compliance, and even a typical case involving an error in navigation or management of the ship (such as collision or grounding) could now lead to a serious dispute in relation to the appropriateness or sufficiency of the ship's safety management system for seamen. Several recent judgments in respect of these issues show this recent trend. On the other hand, the carrier is entitled to claim against cargo interests for indemnity of its loss or damage, for instance, arising out of fire or liquefaction of the cargoes.

Possessory liens against consignees are permitted and the master can detain goods for freight and any other costs or disbursements accompanying the carriage and anchorage as well as their contributions to general average and salvage.³¹ The shipowner has a possessory lien on the cargo.

Neither JCOGSA nor the Commercial Code has clear provisions covering multimodal transport. The Legislative Council for revision of Carriage and Maritime Sections of the Commercial Code discussed whether such a discretionary provision should be introduced for use in cases where it cannot be proven where loss or damage occurred (concealed damage), in which any loss or damage will be deemed to have occurred on the portion of carriage of the longest duration; however, such provision is not included in the Legislative Council's draft of the revision. There have so far been no discussions on ratifying either the Hamburg Rules or the Rotterdam Rules.

27 Article 634 of the Civil Code.

28 Article 635 of the Civil Code.

29 Judgment of the Supreme Court dated 20 January 1983.

30 Article 637 of the Civil Code.

31 Article 753 of the Commercial Code through Article 20 (1) of JCOGSA.

iii Cargo claims

A *bona fide* holder of the bill of lading may sue the carrier for loss, damage or delayed arrival of the goods under the contract of carriage.³² Where a bill of lading has not been issued, for example, but a sea waybill has, upon arrival of the goods at the port of discharge, the consignee may exercise the rights that the shipper has under the contract of carriage.³³

If the shipper, consignee or *bona fide* holder of the bill of lading brings an action before Japanese courts despite an arbitration clause or an exclusive jurisdiction clause under the bill of lading, the courts will dismiss the claim.³⁴ In a recent case, the court dismissed a claim by an insurer of the consignee due to an arbitration clause on the reverse of the surrendered bill of lading.³⁵

If a bill of lading has clear incorporating words identifying a particular charterparty, the courts will construe that all provisions of the charterparty have been incorporated into the bill.³⁶ Even if not identified, the court could uphold the incorporating words if it is clear from all the circumstance which charterparty the parties intended to incorporate into the bill.

The amount of damages under JCOGSA should be the market price or, if there is no market-normal value, the price of the goods at the place and time where the goods should have been discharged.³⁷ Some courts have determined the normal value by the insured value of the goods, but recently, the court set it to be the CIF value.³⁸

A demise clause on the bill of lading would be enforceable,³⁹ and a '*Himalaya*' clause is validated.⁴⁰ There is no clear precedent supporting the US clause paramount, especially its effect of applying a package limitation under the US Carriage of Goods by Sea Act, but the prevailing opinions support its recognition.

iv Limitation of liability

Japan has ratified the LLMC Convention and the LLMC Protocol 1996, and the Act on Limitation of Liability of Shipowners (the Limitation Act)⁴¹ is an enactment based thereon.

A shipowner, lessee and charterer can commence the limitation procedure,⁴² but it is not clear from the letter of the law whether time or slot charterers may apply as 'charterer' or whether they could take the benefit of a fund established by others. Japanese courts have accepted time charterers as applicants or beneficiaries, and thus slot charterers would be dealt with similarly. The courts would treat the NVOCC not as a beneficiary.

32 Articles 573 to 575 of the Commercial Code through Article 10 of JCOGSA.

33 Article 583 of the Commercial Code through Article 20(2) of JCOGSA.

34 Judgment of the Supreme Court dated 28 November 1975, *The 'Tjisadane'*.

35 Judgment of the Tokyo High Court dated 27 August 2008, *The 'New Camellia'*.

36 Judgment of the Osaka District Court dated 11 May 1959, *The 'Tribeam'*.

37 Article 12-2 of the JCOGSA.

38 Judgment of the Tokyo District Court dated 27 October 2008, *The 'Keiyo'*.

39 Judgment of the Supreme Court dated 27 March 1998, *The 'Jasmine'*.

40 Article 20-2(2) of the JCOGSA.

41 Senpaku no Shoyusyatou no Sekinin no Seigen ni kansuru Horitsu: Law No. 94 of 1975 see [www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&yo=&ia=03&x=21&y=13&kn\[\]=%E3%81%9B&ky=&page=8](http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&yo=&ia=03&x=21&y=13&kn[]=%E3%81%9B&ky=&page=8).

42 Article 3(1) of the Limitation Act.

As Japan has reserved the right under Article 18(1) of the LLMC Convention not to apply Article 2(1)(d)(e), the shipowner's liability for the cost to render the wreck or ship harmless is not subject to limitation, while that shipowner's indemnity claims for wreck removal cost against the opposing ships in collision is subject to limitation.⁴³ The removal of oil from a sunken ship is not 'rendering harmless of a ship' and falls into a category of Article 2(1)(f) claims, and thus, the claims for such cost will be subject to limitation.

V REMEDIES

i Ship arrest

Vessels may be seized in the following two cases: seizure for the compulsory auction on the vessel, and a provisional seizure as a means of preserving the debtor's assets for future litigation.⁴⁴

Claimants with a maritime lien or mortgage over a vessel, or claimants with a title of obligation (such as a final and binding judgment) against the shipowners are qualified to petition for an order for a compulsory auction. In the case of a maritime lien, a petitioner must submit evidence to the court proving its existence⁴⁵ and, in general, evidence with a relatively high level of probative value is required.

When the court issues an arrest order, the certificate of vessel's nationality will be confiscated by the court.⁴⁶ The court must also declare the seizure of the vessel and prohibit it from leaving the port.⁴⁷ Auction proceedings will continue in the court that issued the commencement order.

In the case of a petition for provisional seizure, the petitioner must make a *prima facie* case to clarify the claim to be preserved and the necessity of its preservation.⁴⁸ Before issuing an order for provisional seizure, the court will decide the amount of security to be deposited by the petitioner.⁴⁹ The amount of security (by way of cash deposit or letter of guarantee issued by a Japanese bank or an insurance company) is generally between one-quarter and one-third of the claim amount but the vessel's value would also be taken into account.

Sister or associated ships may be seized in Japan by provisional seizure if the petitioner can prove that the debtor owns the ship to be arrested.

A shipowner whose ship has been seized may make a tort claim⁵⁰ based on wrongful seizure against the party who seized the ship if it can prove negligence.

43 Judgment of the Supreme Court dated 26 April 1985, Eiho Maru No. 8.

44 Article 20(1) of the Civil Provisional Remedies Act (CPRA).

45 Article 189, 181 of the CEA.

46 Article 114(1) of the CEA.

47 Article 114(2) of the CEA.

48 Article 13 of the CPRA.

49 Article 14(1) of the CPRA.

50 Article 709 of the Civil Code.

ii Court orders for sale of a vessel

As mentioned above, the compulsory auction of a vessel may be petitioned for by claimants with a maritime lien or mortgage over the vessel, or claimants with a certified title of claims against the shipowners, such as a final and conclusive judgment.

The local court that has jurisdiction over the location of the vessel at the time the commencement order is issued will conduct the judicial sale.⁵¹ After the issuance of the commencement order for a compulsory auction (and after the vessel's seizure), the court must publicly notify a time limit for claimants to submit their demands for distribution.⁵² The court also issues a notice of judicial sale to the shipowner, the mortgagee and other parties having registered charges or other registered encumbrances on the vessel. In the meantime, the court will appoint an appraiser to determine the value of the vessel to be auctioned and the court will then determine a minimum sale price.⁵³ The court will decide whether the vessel will be sold by bid or by auction and will give public notice of the date and time of the sale.⁵⁴ The date of the auction is usually at least three months after the commencement order is issued. Once the vessel is sold and the funds paid across, the court will distribute the sales proceeds according to the distribution list prepared under the applicable law.⁵⁵ The debtor or shipowner may provide a guarantee before any purchase offers are made and petition the court to rescind the procedure.⁵⁶

Japan is not a signatory to the Maritime Liens and Mortgages Convention or the Arrest Convention 1999. There is no bilateral treaty or agreement recognising judicial sales made by other countries.

VI REGULATION

i Safety

Japan is a signatory to SOLAS and has introduced all of its amendments, annexes and codes into its domestic regulations. These include the IMDG Code, the IBC Code, the INF Code, the IMSBC Code, the ISM Code and the STCW Convention. Japan has been recognised as a White List country that adequately manages the system of training and licensing seamen, while Japan has entered into treaties with many foreign countries to recognise the other country's licensees (16 countries whose foreign-licensed seamen may board Japanese-flagged ships and 14 countries whose ships Japanese-licensed seamen may board).

51 Article 113 of the CEA.

52 Article 49 of the CEA.

53 The minimum purchase price is 80 per cent of the standard sales price; see Article 60 of the CEA.

54 Article 64 of the CEA.

55 Articles 842–849 of the Commercial Code.

56 Article 117(1) of the CEA.

ii Port state control

Japan is a member of the Tokyo MoU,⁵⁷ one of the most active regional port state control organisations, consisting of the authorities of 18 member states in the Asia-Pacific region.⁵⁸ The Maritime Bureau of the Ministry of Land, Infrastructure, Transport and Tourism (MLIT) is the authority in Japan under the Tokyo MoU. Nippon Kaiji Kyokai (ClassNK)⁵⁹ is one of the major organisations that sends PSC officers to Japanese ports not only for Japanese PSC inspections but also for inspections assigned from the other major flag states. There is a list of ships detained in Japan on the MLIT's website.⁶⁰ In 2014, over 16,000 ships were inspected (an inspection rate of a little less than 70 per cent) and about 1,200 ships (about 4 per cent) were detained for having deficiencies.⁶¹

iii Registration and classification

To fly the Japanese flag, shipowners must be Japanese individuals or Japanese corporations, all the representatives and at least two-thirds of the executive officers of which must be Japanese. The MLIT is actively promoting the Japanese flag, trying to ensure international competitiveness as well as for the purposes of dealing with national emergencies, especially after the devastating earthquake in Japan in March 2011. However, according to the MLIT Maritime Bureau Annual Report 2015, only 180 (or 7 per cent) of the 2,600 ocean-going vessels owned or operated by Japanese companies or their foreign subsidiaries are Japanese flagged. Interest chiefly centres on how to 'flag out', but there is currently little demand or incentive for shipping interests to register under the Japanese flag.

Class NK was the only approved classification society for many years, but Lloyd's Register was added to the list in May 2010, followed by Det Norske Veritas AS in November 2012 and the American Bureau of Shipping in December 2012, obtaining the MLIT's approval to classify Japanese-flagged vessels. Whether approved classification societies can be held liable is a pending issue. There is no precedent or arbitral award in which claims have been made against such a body by shipowners, charterers or cargo interests. In our opinion, courts and arbitrators would be unlikely to accept such claims due to their practical position as counsel both for shipowners, shipbuilders and independent organisations.

iv Environmental regulation

Japan has ratified MARPOL 73/78 and its amendments, as well as the OPRC Convention and the HNS-OPRC Protocol, all of which are codified in the Act on Prevention of Marine

57 www.tokyo-mou.org/doc/Memorandum%20rev15.pdf, most recently revised in October 2015.

58 www.tokyo-mou.org.

59 www.classnk.or.jp/hp/en/info_service/psc/: Class NK has prepared the Good Maintenance On Board Ships check list for masters (https://www.classnk.or.jp/hp/pdf/Rules_Guidance/techpub/good_maintenance_on_board_ships_e_2015.pdf) and the Port State Control CheckList (https://www.classnk.or.jp/hp/pdf/publications/Publications_image/port_state_inspections_pocket_checklist_e.pdf).

60 www.mlit.go.jp/english/psc/psc.html.

61 Tokyo MOU, Annual Report on Port State Control in the Asia-Pacific Region 2014.

Pollution and Maritime Disaster.⁶² Under the Act, when oil or other noxious liquid substance spills from vessels, the Japan Coast Guard (JCG) may order the shipowners to conduct responsive prevention action with regard to the spill. If the shipowners do not follow the order or there is no time to do so, the JCG may itself carry out such action or may order a designated marine disaster prevention organisation to do so. In either case, the shipowner bears the cost.

Japan has ratified the CLC Convention and Oil Pollution Fund Convention, and has been one of the major contributors to the International Oil Pollution Compensation Fund. The Act on Liability for Oil Pollution Damage⁶³ (Oil Pollution Act) is an enactment based thereon. Japan has not ratified the Bunker Convention, although the Oil Pollution Act has introduced provisions having almost the same effects as the Bunker Convention on shipowners' liability for oil pollution. Japan took this action because of concerns about low-tonnage coasters and ships trading between China, Taiwan, Korea and Japan, and thus the Oil Pollution Act applies to ships of 100 GRT or more, which must retain compulsory insurance to cover their liability for oil pollution and wreck removal.⁶⁴

v Collisions, salvage and wrecks

Japan ratified the 1910 Collision Convention, which is in force. In the event of a collision between Convention country-flagged ships, the Convention applies. In the event of a collision in Japanese territorial waters between Japanese-flagged vessels, or between a Japanese-flagged vessel and a non-Convention country-flagged vessel, the general rules in tort claim under the Civil Code and the Commercial Code apply; however, they are not parallel to those in the 1910 Collision Convention. One of the major differences with the 1910 Collision Convention for inter-ship claims is the one-year prescription (time bar) running from the time the victim comes to know of the damages and the identity of the tortfeasor.⁶⁵ Another is that each vessel should be jointly and severally liable to third parties.⁶⁶ This time bar of one year will not apply to claims for personal injury and death, which runs for three years from the time the victim comes to know of the damages and the identity of the tortfeasor or 20 years from the incident.

Japan has ratified the Salvage Convention 1910. Japan has not ratified the Salvage Convention 1989 but, in practice, almost all salvage contracts involving Japanese ships or made in Japanese waters are in LOF or Japan Shipping Exchange Form, the terms of which are broadly similar to LOF. In general, JSE Salvage Arbitration is shorter in duration and is less expensive, and the number of arbitrations is increasing.

Japan has not ratified the Nairobi WRC 2007, and so the removal of wrecks in Japanese territorial waters is regulated by domestic law. The shipowner's liability to remove wrecks is provided in various administrative laws, such as the Port and Harbour Act⁶⁷ and

62 Kaiyo Osentou oyobi Kaijo Saigai no Boshi ni kansuru Horitsu: Law No. 136 of 1970.

63 Senpaku Yudaku Songai Baisho Hoshō Ho: Law No. 95 of 1975.

64 www.mlit.go.jp/english/maritime/Web/insurance_portal3eng.htm.

65 Article 798(1) of the Commercial Code. The reform of the Commercial Code is pending to follow the two-year time bar of the 1910 Collision Convention.

66 Article 719(1) of the Civil Code.

67 Kowan Ho: Law No. 218 of 1950.

its local regulations, the Act on Port Regulations⁶⁸ and the Act on the Prevention of Marine Pollution and Maritime Disasters. In the event that the conditions provided under the laws are met, the authorities may order removal of the wreck and in the event of failure to do so, may themselves remove the wreck following the Administrative Execution by Proxy Act⁶⁹ and then recover the cost of removal from the shipowners or other obligators. The normal course of action is, however, to make a recommendation for voluntary removal before the issuance of such a compulsory order.

vi Passengers' rights

There are several provisions in the Commercial Code regulating passengers' rights, but they are not up to date and the conditions of carriage supplement them. For domestic passenger ships, standard conditions of carriage publicly notified by the MLIT, and for ocean-going passenger ships, standard conditions of carriage provided by the JOPA⁷⁰ are generally used.

The Act on Limitation of Liability of Shipowners was amended in 2005 and shipowners may not limit their liability concerning claims for damages caused to passengers.⁷¹ Carriers must pay compensation for all damages that passengers suffer, including loss of earnings.⁷² When determining the amount of damages for injury or death, the court must take into consideration the circumstances of the victim and his or her family.⁷³ As compensation for passengers' damages is influenced by personal matters, the amount of damages can vary significantly for each passenger, and its assessment is largely influenced by the standard of assessment derived by the precedents of Tokyo and Osaka district courts' traffic accident divisions. Japan has not ratified the Athens Convention.

vii Seafarers' rights

The Mariner's Act,⁷⁴ the key legislation regarding seamen's status, was amended to respond to the Maritime Labour Convention 2006 and its entry into force in August 2013. Amendment of the Mariner's Act consist of: (1) improvement of seamen's labour conditions; (2) inspection of seamen's labour conditions aboard ocean-going Japanese ships (flag state inspection);⁷⁵ and (3) inspection of seamen's labour conditions aboard foreign-flagged ships calling at Japanese ports (port state control).⁷⁶ There are only a few cases regarding the ship's detention as a result of the inspections conducted under (2) and (3).

In the event that a collision, grounding or other casualty occurs due to the negligence of the master, the pilot or other seafarer, they would be subject to criminal charges (e.g., the crime of obstructing marine traffic or for endangering safety of marine traffic, or for causing death or personal injury). The JCG would detain them for interview and investigation and, if the case is serious, such as one involving heavy oil pollution or a person's death, seafarers

68 Kosoku Ho: Law No. 174 of 1948.

69 Gyosei Dai Shikko Hou: Law No. 43 of 1948.

70 Japan Oceangoing Passenger Ships Association.

71 Article 3(4) of the Act on Limitation of Liability of Shipowners.

72 Judgment of the Supreme Court dated 20 October 1913.

73 Article 786(1), 590(2) of the Commercial Code.

74 Sennin Ho: Law No. 100 of 1947.

75 Both of which came into force in 2013.

76 Entered into force in 2014.

suspected of negligence would be arrested, sometimes for a long period. Punishment includes fines, suspended sentences or imprisonment. The relevant vessel could be detained according to the needs of the JCG or the prosecutors for investigation.

There is no law that exempts seamen from liability in tort, but there have been few cases in Japan in which the seafarer has been named as one of the defendants along with the shipowner. Those seafarers are beneficiaries in the limitation procedure. Although the pilot could stand accused in criminal proceedings, the pilot would not assume liability in tort unless his or her conduct was intentional or took place with gross negligence (such liability scheme is provided for in the standard pilotage contract).

VII OUTLOOK

The Japanese shipping and shipbuilding industries appear to have maintained their reputations well and retained top-level knowledge, skill, management and operation. Being subject to fiercer competition from China, Korea, Singapore and other Asian countries – not to mention European and American countries – participants appear to have worked harder to satisfy the needs of the shipping and shipbuilding industries. Maritime lawyers and other people involved in those industries – as well as the legal regime – have also tried to follow such needs, and there are no real unpredictable advantages or disadvantages in Japanese shipping law and practice in general.

The Commercial Code and its part on shipping matters (and also those on land and air transportation), has been the key legislation of Japanese shipping law, but it has not been amended since its enactment in 1899 and is not often applied to actual cases since practice has progressed on the prevailing contract forms, the international conventions referred to above and the practice in shipping circles. Since 2014 the Ministry of Justice has been in discussion with the Legislative Council and the draft of an amended Commercial Code for shipping matters will be submitted for discussion in the Cabinet and the Diet in the near future. It is expected that the new law will be in force within a few years. It is unlikely, however, that there will be significant amendments to influence current shipping and legal practice.

Chapter 28

KOREA

*Tae Jeong Kim*¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Korea is renowned for its shipping industry and even more so for its shipbuilding industry.

As of 2014, total 1,126 ocean-going commercial vessels of gross tonnage of 43 million tonnes are owned or operated under BBCHP by Korean shipping companies. Among them 617 vessels of 11 million tonnes are owned vessels.² Total cargo volume handled in Korean ports amounts to 1,415 million R/T.³

In 2014, the orders won amounted to 10.1 million CGT, and 12.7 million CGT was built, with the backlog amounting to 30.5 million CGT.⁴

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The basic legislation regarding carriage of goods and admiralty issues is the Commercial Code. Chapter 5 of the Commercial Code provides for: captain's power and responsibility, global limitation, maritime lien, carriage of goods contracts and charterparties, collision, salvage, and general average. The Shipping Business Act is a legislation to regulate shipping related business in administrative perspective. There are several other pieces of legislation regulating certain areas or supplemental procedural issues, such as pilotage, crew, procedure for global limitation liability, investigation of marine accident, etc.

Korea has ratified: the IMO Convention 48, the SOLAS Convention 74 and Protocols 78 and 88, the Loadlines Convention 6 and Protocol 88, the Tonnage Convention 69, the

1 Tae Jeong Kim is a partner at Bae, Kim & Lee LLC.

2 Major Statistics for Oceans and Fisheries 2015, issued by the Ministry of Oceans and Fisheries.

3 Major Statistics for Oceans and Fisheries 2015, issued by the Ministry of Oceans and Fisheries.

4 www.index.go.kr/potal/main/EachDtlPageDetail.do?idx_cd=1151.

COLREG Convention 72, the CSC Convention 72, the STCW Convention 78, the SAR Convention 79, the IMSO Convention 76 and Inmarsat OA 76, the Facilitation Convention 65, MARPOL, the London Convention 72 and Protocol 96, CLC Protocol 76, 92, Fund Protocol 92 and 2003, the SUA Convention and Protocol 88, the OPRC Convention 90, OPRC-HNS 2000, the Bunkers Convention 01, Anti Fouling 01, and Ballastwater 2004.⁵

These ratified conventions are given the force of law equivalent to national statutes (Article 6 of the Constitution of Korea).

III FORUM AND JURISDICTION

i Courts

There is no special court dedicated to handling maritime matters. Maritime matters are dealt with by the national court system. The District Court or its branch will have the jurisdiction to hear any case at the first instance, depending upon the claim amount, etc. The unsuccessful party may as a right appeal against the first instance judgment or decision to the High Court or the District Court, and then finally to the Supreme Court. The hearings will take place consecutively with approximately four-week intervals, and each hearing will be conducted for a very short period, namely tens of minutes. As for evidence, the disclosure procedure is not available under Korean law, while a party may apply to the court to order the other party to disclose 'specific' documents. Witness evidence and expert evidence are usually available, subject to the court's discretion. There is no concept of 'without prejudice'. In principle the successful party would be entitled to recovery of legal costs from the opposing party, but the amount of recoverable costs is substantially restricted.

A Korean court's jurisdiction will be determined pursuant to the provisions of the Civil Procedure Act (CPA) and the Private International Law Act (PILA). An exclusive jurisdiction agreement between the parties will be valid unless the court to be seized with the case lacks reasonable link or such an agreement is contrary to public policy.⁶ Under the PILA, certain maritime issues⁷ are to be determined by the law of the vessel's flag.

Limitation periods are considered to amount to substantive issues rather than procedural issues under Korean law, and thus will be subject to the proper law applicable to each claim. For a general civil claim, the statute of limitations is 10 years, and the limitation period for a contractual claim between merchants is five years.⁸ For tort claims, the limitation period is three years from the date on which the injured party became aware of damages or ten years from the date of the occurrence of the tort (whichever is earlier).⁹ However, certain claims are subject to a one-year limitation period, and such claims include debt claims between the carrier and the shipper or the consignee under a carriage of goods by sea contract

5 www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx.

6 Supreme Court Judgment on 28 April 2011, 2009DA19093 (on an agreement providing for exclusive jurisdiction of Korean court); Supreme Court Judgment on 26 August 2010, 2010DA28185 (on an agreement providing for exclusive jurisdiction of foreign court).

7 Such as ownership of a vessel, maritime lien, mortgage, priority of security, the scope of a shipowner's liability for activities of master or crew, global limitation applicable, general average, and the authority of master; Article 60 of the PILA.

8 Article 162(1) of the Civil Code, and Article 64 of the Commercial Code.

9 Article 766 of the Civil Code.

(from the date of delivery of goods), and contribution claims under a general average (from the completion of calculation).¹⁰ A two-year limitation period is applicable to, for example, the following claims: (1) debt claims between the owner and the charter or the consignee under a voyage charter (starting from the delivery of goods), (2) debt claims between the owner and the charterer under a time charterparty or a bareboat charterparty (starting from the date of vessel's redelivery to the owner), (3) damages claims arising from collision (starting from the date of collision), and (4) salvage remuneration (starting from the completion of salvage).¹¹

ii Arbitration and ADR

In Korea, there is no arbitration board or procedure dedicated to maritime matters. As a general arbitration board, the Korean Commercial Arbitration Board plays a very active role.

If there is a valid arbitration agreement between the parties, the court has to dismiss a litigation.¹² An appeal to the court against an arbitral award is not permitted.

It appears that there is no evidence that other types of alternative dispute resolution are in popular use in Korea.

In the case of maritime casualty, the Marine Safety Tribunal (MST) will render decisions in relation to disciplinary measures against seafarers and, if parties so wish, the proportion of liability between the parties involved. The decision of the MST is not legally binding upon the relevant parties in the civil proceedings to deal with the liability issues, but is in practice respected.

Limitation period applicable to arbitration proceedings is same as in the court proceedings.

iii Enforcement of foreign judgments and arbitral awards

To enforce a foreign judgment the prevailing party must obtain an enforcement judgment from a Korean court, which will allow such an enforcement only if statutory requirements are met. Article 217 of the CPA sets out four requirements for a foreign judgment to be enforced in Korea, as follows: (1) the competence of the foreign court that rendered the judgment in view of Korean law or international conventions ratified by Korea, (2) the adequacy of the service, (3) no violation of public policy of Korea, and (4) the reciprocity between the country in which the court that made the judgment is situated and Korea. Further, the foreign judgment sought to be enforced will have to be the final and conclusive judgment, against which no ordinary appeal is allowed. The procedure for an enforcement judgment is identical to that for obtaining any civil judgment, while the court is not allowed to scrutinise the merits of the foreign judgment in question.

In practice, the existence of reciprocity will be most problematic, as there are not so many precedents to refer to. The courts have recognised reciprocity between Korea and the United States where the Uniform Foreign Country Money-Judgments Recognition Act

10 Articles 814 and 875 of the Commercial Code.

11 Articles 840, 846, 851, 881 and 895 of the Commercial Code.

12 Article 9(1) of the Arbitration Act.

is adopted,¹³ Japan¹⁴ and Ontario, Canada,¹⁵ but refused reciprocity between Korea and Australia.¹⁶ There are unreported lower court judgments recognising reciprocity in cases of English judgment and Chinese judgment.

Korea ratified the New York Convention 1969, and thus arbitral awards rendered in the contracting state of the convention would be enforceable. To enforce arbitral awards, the successful party will have to obtain an enforcement judgment from the court, which will not look into the merits of the case unless public policy issues arise.

Limitation periods applicable to enforcement of foreign judgments and arbitral awards are regarded as substantive issues, and thus will be decided by reference to the law applicable to such judgments or arbitral awards.

IV SHIPPING CONTRACTS

i Shipbuilding

Korea has been a very prosperous shipbuilding nation in the world for over decades, and most shipbuilding contracts are concluded based on the SAJ Form with some customised variations and usually subject to English law with any disputes being referred to LMAA arbitration. Thus, it is not surprising that there is virtually no publicly reported case dealing with shipbuilding contracts despite the considerable shipbuilding business in Korea.

Due to the location of the objects (i.e., vessels under construction), Korean law will inevitably apply to the title to and ownership of the object, particularly before delivery under the shipbuilding contracts. While the parties are at liberty to agree on this issue, the default position under Korean law is that the builder obtains the title to and ownership of a vessel under construction unless the buyer procures and provides the whole or a substantial part of the materials.¹⁷ In practice, based upon the SAJ Form, the builder acquires the title to a vessel under construction and then at delivery it is transferred by the builder to the buyer.

During the construction, however, it appears to be a prevailing practice that a vessel under construction is provided as a security to a bank issuing a refund guarantee in relation to that vessel, and the title to the vessel under construction is transferred for security purposes to the RG issuing bank. If the builder refuses to deliver the vessel to the buyer, the buyer may consider applying to the court for an injunction to order the builder to deliver the vessel to the buyer, which may be defeated by the fact that the title to the vessel is held not by the builder but by the RG issuing bank.

13 Supreme Court Judgment on 28 October 2004, 2002DA74213. Recently the court acknowledged reciprocity between Korea and Kentucky, US, where the Uniform Act is not adopted but common law is applicable as to the enforcement of foreign judgments (Supreme Court Judgment 28 January 2016, 2015DA207747).

14 Supreme Court Judgment on 11 June 2015, 2013DA208388.

15 Supreme Court Judgment on 25 June 2009, 2009DA22952.

16 Supreme Court Judgment on 28 April 1987, 85DAKA1767.

17 While there is no publicly reported case on this point, there are various cases dealing with the acquiring of title in relation to construction works, which appear to be applicable to shipbuilding contract cases as well. Supreme Court judgment on 5 July 1962, 4292MINSANG876; Supreme Court judgment on 27 December 1988, 87DAKA1138; Supreme Court judgment on 28 January 2010, 2009DA66990.

ii **Contracts of carriage**

Contracts of carriage are regulated by the Commercial Code, which was last amended in 2007. Korea has not ratified any of the Hague and the Hague-Visby Rules, the Hamburg Rules or the Rotterdam Rules, but introduced some provisions of the Hague-Visby Rules into the Commercial Code in 2007.

The carrier owes duty of care in relation to seaworthiness and the goods, and will be liable for damages unless it proves that such duties of care are fully complied with.

The Commercial Code provides for rights and obligations of the parties in bareboat charterparty, time charterparty, voyage charterparty and other carriage of goods by sea contracts. In case of general carriage of goods by sea contracts the carriers' liability is not permitted to be reduced from what the Commercial Codes provides for,¹⁸ and such a prohibition is also applicable to bills of lading even when such bills are issued under charterparties. The shipper is under obligation to present the goods to the carrier at the time and place designated in the agreement or pursuant to practice in the loading port, and to submit documents required to carry the goods within the loading period to the captain.

The carrier or the shipowner or both are obliged to issue bills of lading upon the request of the shipper or the charterer after the goods are received by the carrier or the shipowner or both. The shipowner in this context includes a demise owner, such as a bareboat charterer, time charterer, voyage charterer etc.

If a bill of lading is issued, the captain may deliver the goods against production of one of multiple original bills of lading in the designated destination, but in other ports the captain is not allowed to deliver the goods unless a full set of original bills of lading are presented.

Electronic bills of lading have been introduced by the Commercial Code, and they are treated as having the same effect as that of paper ones.¹⁹

The carrier and the captain may exercise lien in relation to cargoes. They are entitled to refuse to deliver the goods until freight or hire is paid in full and to sell the goods by auction after obtaining the court's approval and recover the unpaid freight or hire from the auction proceeds.²⁰ These articles are also applicable to voyage charterparties and time charterparties.

The Commercial Code contains only one provision for multimodal transport.²¹ A 'network liability system' is adopted for multimodal transport including a leg of carriage by sea, and the carrier's liability will be subject to the principles of liability applicable to each specific mode of transport where loss occurred. If the leg where loss occurred is unclear or extended to separate modes of transport, the carrier's liability will be subject to the principles of liability applicable to the leg covering the longest distance or if impossible to discern which leg is the longest then the leg of the highest freight.

Coastal trading between Korean ports is exclusively allowed to domestic shipping companies.²²

18 Article 799 of the Commercial Code.

19 Article 862 of the Commercial Code.

20 Articles 807 and 808 of the Commercial Code.

21 Article 816 of the Commercial Code.

22 Article 6 of the Ship Act.

iii Cargo claims

There is no special regime applicable to cargo claims different from what is generally applicable to ordinary civil proceedings.

Title to sue usually lies with the lawful holder of bills of lading and its insurers as long as the insurers subrogated to the rights of the holder. In some cases, the shipper or the consignee named in the bills of lading may have the title to sue, depending on particular circumstances.

In general the carrier will be liable for cargo claims, but in practice it would often be difficult to discern who the carrier is in a particular case, which will often be the issue of facts. The owner or the demise charterer of a vessel may be liable jointly and severally with a charterer being the carrier, particularly where the scope of performance of the relevant carriage contract is within the ambit of the captain's obligations.

Employees and agents of the carrier or the shipowner and the demise charter are entitled to defences and limitation of liability applicable to the carrier etc. Independent contractors of carriers are not entitled to the carriers' defences and limitation of liability, unless the applicable *Himalaya* clause is wide enough to cover the independent contractors.²³

In principle, loss and damages having proximate causal relation will be recoverable. However, in the carriage contract, recoverable damages are limited and will be assessed by reference to the price of the cargo at the destination as at the date (1) when the cargo would have been delivered in case of total loss or delay, or (2) when the cargo was actually delivered in case of partial loss. If such loss, damage or delay was due to the carrier's wilful misconduct or gross negligence, then the carrier is liable for the full loss and damages having proximate causal relation, less any freight or expenses saved due to such loss, damage or delay.²⁴ This limitation is distinct from global limitation or package limitation, both of which will be discussed in the following paragraph.

Whether charterparty terms are validly incorporated into a bill of lading is an issue to be determined pursuant to the law applicable to the bill of lading, which will be the law of the place where the bill of lading was issued unless there is parties' agreement thereon in the bill of lading.²⁵ This issue has been reviewed in respect of the incorporation of arbitration clauses in charterparties as between the carrier and the bill of lading holder. The Supreme Court²⁶ held that an arbitration clause in a charterparty would be considered as being validly incorporated into a bill of lading if:

- a* the bill of lading provides that the arbitration clause is incorporated into it, and the relevant charterparty is specified or the bill of lading holder is aware of the existence of the charterparty and the contents of the arbitration clause therein; or
- b* the bill of lading provides that all the terms of a certain charterparty without specifically referring to an arbitration clause, the holder of the bill of lading is aware of the existence and contents of the arbitration clause and the arbitration clause is not inconsistent with other terms and its wording is wide enough to apply to a third-party bill of lading holder.

23 Supreme Court Judgment on 13 February 2004, 2001DA75318; Supreme Court Judgment on 27 April 2007, 2007DA4943.

24 Articles 815 and 137 of the Commercial Code.

25 Supreme Court Judgment on 10 January 2003, 2000DA70064.

26 Supreme Court Judgment on 10 January 2003, 2000DA70064.

A demise clause is not valid as it is regarded as reducing the liability of the carrier.²⁷ However, where a foreign law was the proper law applicable to a carriage contract and such a foreign law recognised the validity of demise clauses, the court held that a demise clause was valid.²⁸

iv Limitation of liability

As for global limitation, Korea adopted a substantial part of the LLMC 76 (and part of the LLMC Protocol 96 for limitation amounts in respect of a passenger's death or injury) into the Commercial Code,²⁹ while Korea has not ratified any of these conventions. However, as Korea is not a state party to these conventions, constitution of funds in Korea would not bar claimants from exercising their rights in other jurisdiction³⁰ and vice versa. A person entitled to global limitation must apply to the court for commencement of limitation proceedings within one year from his or her receipt of claim letter exceeding the limitation amount from a claimant.³¹

Package limitation under the Commercial Code³² is the same as that under the Hague-Visby Rules, namely the higher of 666.67 SDRs per package or unit and 2 SDRs per kilogram, while Korea has not ratified the Hague-Visby Rules.

V REMEDIES

i Ship arrest

Korea has not ratified any convention in this respect.

Under Korean law, there are two distinct types of arrest. One is by way of attachment to enforce claims for final satisfaction (based upon an enforceable judgment or a mortgage or a maritime lien), and the other is by way of prejudgment attachment for the purpose of obtaining security for either domestic or foreign judgment or arbitral award to be rendered in the future. The distinction is stringent and thus it is crucial to determine at the outset which process is to be followed, as for example an arrest by way of prejudgment attachment where the claim attracts a maritime lien could be revoked.

The arrest is available only if the target vessel is legally owned by the person who is liable for the claims, and the only exception is an arrest based on a maritime lien, where the target vessel may be arrested irrespective of the owner's identity once the claim attracts a maritime lien in relation to the target vessel. (Whether a claim attracts a maritime lien is a matter to be decided pursuant to the law of the flag of the vessel.³³) Thus, it would be virtually impossible to arrest a sister vessel or an associated vessel in Korea.

27 Seoul High Court Judgment on 13 June 2008, 2006NA28074. Also, Seoul High Court Judgment on 3 July 2001, 2000NA10002 held that a demise clause in a bill of lading did not exempt a time charterer, on whose behalf the bill of lading had been issued, from the liability of carrier.

28 Seoul High Court on 15 May 1989, 88NA44126.

29 Articles 769 to 776.

30 Cf. Article 13 of the LLMC 76.

31 Article 776 of the Commercial Code.

32 Article 797 of the Commercial Code.

33 Article 60(i) of the PILA.

The court of which jurisdiction the vessel is located in will have jurisdiction to order the arrest. The applicant usually applies for a preservation and custody order concurrently. The arrest application will be dealt with *ex parte*. Once an arrest order is made, the court sheriff will serve the order on board of the vessel, by which the enforcement of the arrest will be completed. In the arrest for prejudgment attachment the applicant is required to provide counter security to the court in an amount equivalent to 10 per cent of the claim amount either in cash or by a guarantee insurance policy at the court's discretion. On the contrary in the arrest for main attachment counter security is not required, but expenses for court sale are required to be paid to the court as upon the court's arrest order the court sale is automatically commences. For preservation and custody, it is usual practice for the applicant to pay the fees for the first month in whole or in part when the application is made.

In case of prejudgment attachment arrest, the merits of the claim based upon which the arrest is sought will have to be referred to the agreed jurisdiction or arbitration. As for arrest as a main attachment, it may be based upon an enforceable judgment already rendered on merits, or if it is based upon a maritime lien or a mortgage the vessel interests will have to challenge the arrest order before a Korean court.

In any case the vessel interests, usually in the name of the registered owner, may apply to the court for the release of the vessel with providing security of the total amount claimed only in cash, unless otherwise agreed with the applicant. The security bail for release will be regarded as a substitute for the vessel or the sale proceeds. The vessel interests may object to the arrest order, challenging the grounds for the arrest application.

If the claimant's claim turns out to have been unfounded, the claimant would be liable for negligence in tort. The claimant would then need to prove that it was not negligent in order to escape from such liability, which is usually difficult. The claimant may have to compensate the shipowner for the loss of trading by the ship during the period that the ship remained under arrest and if the ship was released on bail, potentially, the interest on the bail fund.

A bunker on board a vessel would be eligible for arrest theoretically, but in practice it would be virtually impossible.

The jurisdiction of the court reaches beyond the ambit of the port limit, and thus a vessel at anchor in territorial waters but not within the port limit can be arrested. We have not heard of the use of a helicopter in a vessel arrest yet.

ii Court orders for sale of a vessel

An arrest by way of main attachment, either based upon an enforceable judgment or security rights such as a mortgage or a maritime lien, forms a part of the commencement of court sale proceedings. In case of an arrest by way of prejudgment attachment, court sale proceedings may be commenced once an enforceable judgment (e.g., in the case of an arbitral award, the enforcement judgment in Korea to enforce the award) is obtained from the court.

The court will have the vessel's condition investigated and the vessel valued. Meanwhile other claimants having claims against the shipowner or secured by a maritime lien can file their claims to the court. Within one month of the closing of other claimants' filing periods, the court will have notifications of court sale published in newspapers. The court will discern the highest bidder and decide whether or not to approve the sale. The sale proceeds will be distributed to the claimants and the shipowner pursuant to priority determined after the distribution hearing.

VI REGULATION

i Safety

Korea has ratified the following international conventions in respect of safety: Loadlines Convention 6 and Protocol 88, Tonnage Convention 69, COLREG Convention 72, CSC Convention 72, STCW Convention 78, SAR Convention 79, IMSO Convention 76 and Inmarsat OA 76, Facilitation Convention 65, and SUA Convention and Protocol 88. The legislation in this respect includes: the Ship Safety Act and the Maritime Safety Act.

Korea is one of the White List countries of IMO.³⁴

ii Port state control

Korea is a member of the Tokyo MOU.³⁵ The authority in charge is the Ministry of Oceans and Fisheries. The legislation in this respect includes the Ship Safety Act, the Ship Act, the Seafarers Act, the Ship Personnel Act, the Maritime Safety Act and the Marine Environment Management Act.

As of 2014, 2,555 vessels (27.2 per cent) were inspected and among them 73 vessels were detained (detention rate of 2.86 per cent).³⁶

iii Registration and classification

There are two different types of registry applicable to ships in Korea. One is the ship register operated by the courts, which deals with the ownership, bareboat charter, security such as a mortgage, court's prejudgment or main attachment orders and injunction orders etc. The other is the ship register operated by regional offices of oceans and fisheries, which deal with mainly administrative aspects.

Those registries are only available for the vessels owned by Korean persons (including companies).

Many members of the International Association of Classification Societies operate in Korea as Korea is renowned for her shipping and shipbuilding businesses. Among them, the Korean Register is authorised by the Korean government to conduct ship surveys and issue certificates on behalf of the Korean government.

There appears to be no published precedent where a classification society's civil liability is dealt with.

iv Environmental regulation

Korea has ratified MARPOL 73/78 (Annex I/II, III, IV, V), the OPRC Convention 1990, OPRC-HNS 2000, CLC Protocols 76 and 92, Fund Protocols 92 and 2003, the Bunkers Convention 2001, the Anti-Fouling Convention 2001 and Ballast Water 2004. The legislation in this area includes the Marine Environment Management Act and the Clean Air Conservation Act.

34 www.imo.org/blast/contents.asp?topic_id=67&doc_id=1026.

35 http://tokyo-mou.org/organization/contact_us.php.

36 www.index.go.kr/potal/main/EachDtlPageDetail.do?idx_cd=1277.

v Collisions, salvage and wrecks

Collision

Korea has not ratified any Collision Convention. The Commercial Code deals with collisions in Articles 876 to 881.

If a collision case is brought before a Korean court, it will decide the law applicable to the collision as follows: (1) the law of the country of the territorial water where the collision took place, or (2) the law of the flag of the vessel in fault in case of collision on the high seas.

If Korean law applies, the victim shall bear the loss or damage and will not be entitled to claim damages if the collision was caused by a force majeure or the cause of the collision is left in doubt. If the collision was caused by the fault of the crew or pilot of one vessel, the owner of such vessel is liable for damages. If the collision was caused by the fault of the crew or pilot of both vessels, the owner of each vessel is liable in proportion to the degree of the respective faults, however, the owners of the vessels are jointly and severally liable for any death or injury. Damages claims arising from collision will expire if a lawsuit is not brought within two years of the date of collision, unless the parties agree to extend the limitation period.

Salvage

Korea has not ratified the Salvage Convention 89. Salvage is dealt with in Articles 882 to 895 of the Commercial Code.

If a salvage remuneration claim is brought before Korean court, it will decide the law applicable as follows: (1) the law of the country of the territorial water where the salvage operation took place, or (2) the law of the flag of the salvor vessel if the salvage operation took place on the high seas.³⁷

If Korean law applies, a person who salvaged a vessel or cargo without obligation is entitled to appropriate remuneration not exceeding the price of the salvaged vessel or cargo, and if the amount of remuneration is not agreed between the parties the court will decide the amount upon the application of the relevant party. If the salvage operation was such that prevented or minimised damage to the environment, the salvor is entitled to special compensation irrespective of the useful result or scope thereof. The remuneration claims for salvage will expire if a lawsuit is brought within two years of the completion of salvage, unless the parties agree to extend the period.

Wreck removal

Korea has not ratified the Nairobi Wreck Convention 2007. The legislation dealing with wreck removal includes: the Act on Vessels Entering and Departing Port, the Marine Environment Management Act and the Maritime Safety Act.

The owner or the occupant of any object that causes or may cause a hindrance to the vessels' navigation, or the master or owner or operator of a vessel that causes obstruction in navigation, is obliged to remove such object or obstruction or bear the costs and expenses for its removal.³⁸ The master of a vessel that causes certain pollutants to be emitted into the sea

37 Article 62 of the PILA.

38 Article 40 of the Act on Vessels Entering and Departing Port; Articles 25 to 29 of the Maritime Safety Act.

is obliged to report to the authority and to take measures to prevent expansion and further emission and remove the emitted pollutants, and to bear the costs and expenses of such operation.³⁹

vi Passengers' rights

Korea has not ratified the Athens Convention or any protocols. Passenger carriage is dealt with in Articles 817 to 826 of the Commercial Code.

The carrier is liable for the death or personal injury of passengers unless the carrier proves that it or its employee were not negligent. The global limitation amount for a passenger's death or personal injury is in line with that of the LLMC Protocol 1996, which Korea has not ratified.

vii Seafarers' rights

Korea has ratified the Maritime Labour Convention 2006, which came into force in Korea in January 2015. The major legislation in this area includes: the Seafarers Act (dealing with employment terms and conditions, etc.), the Ship Personnel Act (dealing with the licence and qualification of seafarers, etc.), and the Act on the Investigation of and Inquiry into Marine Accidents (dealing with the procedures of the Marine Safety Tribunal and the grounds for seafarers' disciplinary actions).

VII OUTLOOK

The shipping and shipbuilding industries in Korea have maintained a remarkable presence in the international market. After the anticipated restructuring of the shipping and shipbuilding industry in the near future, we believe that Korea will be able to have a more significant and stronger presence in the international market based on the knowledge, expertise and experience accumulated over several decades.

The Korean government recently announced its plan to authorise a foreign classification society in addition to the Korean Register to carry out safety surveys on vessels on behalf of the government.

There are no significant changes anticipated in the legal regime in the near future and it seems that Korea will continue to maintain the current legal framework.

³⁹ Articles 63 and 65 of the Marine Environment Management Act.

Chapter 29

MALAYSIA

Jeremy M Joseph¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

2015 proved to be a challenging year for the maritime industry in Malaysia, what with the weakening of the currency, which slumped to a 17-year low, the injurious fall of crude oil prices to as low as US\$30 per barrel, the introduction of goods and services tax (GST) by the government, and a cut in fuel subsidies. To add salt to the wound, an overcapacity of tonnage in the market, as proved by the Baltic Dry Index being at its all-time low as recorded in February 2016, will undoubtedly result in an increase in competition between regional ports. Malaysia has been affected no less than the other port states that are dealing with these similar circumstances and many maritime business and ancillary services have gone into corporate bankruptcy, foreclosures and restructurings.

However, it is safe to say that the operating landscape in 2016 seems optimistic, as the ringgit continues to strengthen, slowly but surely. The numerous container ports in Malaysia have been doing a lot better than their neighbouring counterparts, as the favourable exchange rate for trans-shipping in Malaysia has attracted liners to the country's shores. China's revival of the 21st Century Maritime Silk Road (CMSR) initiative, which is backed by a US\$40 billion development fund, has set into motion the establishment of sister-port relationships between the largest port in the country, Port Klang, with eight Chinese ports in economically-thriving locations such as Shanghai and Guangzhou. This will undoubtedly benefit the shipping and trade industry by facilitating the import export dynamic between the two countries, as China retains its position as Malaysia's largest trading partner.

Another reason for optimism would be the enactment of the Malaysia Shipping Master Plan (MSMP), which is currently in its last stages of finalisation. The MSMP is a collaborative effort between the Ministry of Transport through its agencies such as the Marine Department and the Maritime Institute of Malaysia together with representatives from the shipping industry itself. The goal of the MSMP is to propose, among other things,

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a strategy to provide for a conducive environment to foster the development of the local shipping sector in tandem with the fast-evolving global shipping industry. It also seeks to address the concern of the fact that a large amount of cargo that passes through Malaysian ports are carried by foreign ships, causing a negative transport balance of payment among local shippers. With proper implementation and a perpetual driving force, it is undeniable that the MSMP may just be the lifeboat that comes to the rescue and prepares the weakened shipping industry for a market turnaround.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Much of the Malaysian legal framework is inherited from the English legal system. The laws of the United Kingdom were adopted and either turned into local legislation or simply applied as case law. The Malaysia maritime legislative framework is an amalgamation of local legislation, international treaties and conventions. The Malaysian courts have applied international treaties to which Malaysia is a party provided that the treaty concerned has been incorporated into Malaysian law by means of a parliamentary statute.

The Malaysian courts have applied relevant rules of customary international law but only through the medium of English common law.

Malaysia has ratified various international conventions adopted by the IMO:

- a* the Load Lines Convention;
- b* the Convention on the International Maritime Organization 1948;
- c* the Colregs, as amended;
- d* SOLAS, as amended, and the 1978 SOLAS Protocol;
- e* Tonnage Convention;
- f* the INMARSAT Convention, as amended;
- g* the STCW Convention, as amended;
- h* MARPOL 73/78, Annexes I to VI;
- i* the OPRC Convention;
- j* Amendments to the Convention of the International Maritime Organization (Institutionalization of the Facilitation Committee);
- k* the CLC Convention;
- l* the Oil Pollution Fund Convention;
- m* the Bunker Convention;
- n* the LLMC Convention 1976 as amended by the 1996 Protocol;
- o* the Anti-Fouling Convention; and
- p* the Ballast Convention (yet to enter into force).

III FORUM AND JURISDICTION

i Courts

The Admiralty Court in Kuala Lumpur hears maritime-related cases. It is, however, the prerogative of the claimant to file in any other relevant state court but parties are encouraged to use the Admiralty Court.

The limitation period to bring a cause of action will depend on what has been stipulated in the contract or any specific statute. Should no such provision be stipulated, the general limitation period of six years will apply under Section 6 of the Limitation Act 1953 for contract and tort claims.

ii Arbitration and ADR

Malaysia has no procedure specific to maritime arbitration; however, the Fast-Track Arbitration Rules (revised 2013) are suitable for commercial claims, including maritime claims. Further, the Kuala Lumpur Regional Arbitration Centre (KLRCA) is fast becoming a centre for maritime arbitration disputes. The procedure for arbitration is contained in the applicable arbitration rules on procedure and also in the Arbitration Act 2005.

The Act does not contain any provision on limitation period, but Section 30(1) of the Malaysian Limitation Act 1953 provides that the Limitation Act and any other written law relating to the limitation of actions apply to arbitration; however, the Limitation Act only applies in West Malaysia. According to Section 6(1) of the Limitation Act, the general length of the limitation period for contract and tort and certain other actions is six years from the date on which the cause of action accrued. Sabah has its own Limitation Ordinance (Chapter 72) and Sarawak, the Limitation Ordinance (Chapter 49). They differ from the Limitation Act 1953 in that they provide detailed schedules of the periods of limitation applicable to various different forms and causes of action, with commencement dates stated for each action.

iii Enforcement of foreign judgment and arbitral awards

Certain foreign judgments are enforceable in Malaysia by virtue of the Reciprocal Enforcement of Judgments Act 1958 (REJA). However, before a foreign judgment can be enforced, it has to be registered. The registration of foreign judgments is only possible if the judgment was given by a Superior Court from a country listed in the First Schedule of the REJA.²

Malaysia is a party to the New York Convention. The two features under the New York Convention³ that spell out the conditions for enforcement, reciprocity and the commercial nature of the dispute are absent under the 2005 Act. Therefore, foreign arbitral awards can be enforced in Malaysia regardless of whether reciprocity is accorded to Malaysian awards in another state.

An application in writing is made to the High Court with an authenticated original award or a duly certified copy of the award and the original arbitration agreement or a certified copy of it. Once approved, the foreign arbitration award is recognised as binding and enforced by an entry as a judgment.

If a claimant, in breach of a judicial clause, institutes proceedings outside Malaysia, those affected may apply for a stay of proceedings. Similarly, a defendant can apply for a stay of proceedings on the basis that the domestic tribunal lacks jurisdiction if domestic proceedings breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction.

2 Countries listed in the First Schedule include the United Kingdom, Singapore, India, Hong Kong and New Zealand.

3 Article 1(3).

IV SHIPPING CONTRACTS

i Shipbuilding

In Malaysia shipyards are mainly located in Lumut, Miri, Kuching, Port Klang, Kemaman, and Pasir Gudang. Currently, there are about 120 registered shipyards in Malaysia and Malaysian-built ships account for 1.07 per cent of the world's total deadweight tonnage.

Shipbuilding contracts in Malaysia are carried out using the standard form. Generally, under the terms of a typical shipbuilding agreement, the title in the ship remains vested in the shipbuilder until delivery and payment in full of the purchase price, which is normally evidenced by the protocol of delivery and acceptance signed by the shipbuilder and shipowner. Title will formally pass on the date specified in the protocol, and passing of title will depend on the terms of the shipbuilding contract.

The buyer makes payment of the purchase price for shipbuilding in tranches, usually at different stages of completion. These payments, made by the buyer as part of the purchase price, are secured with a refund guarantee issued by a bank of behalf of the shipyard as guarantee for the completion of that stage as agreed by the shipyard in the contract. Certain formalities need to be complied with for a refund guarantee to be valid. A refund guarantee will fall under the ambit of Sections 79 and 80 of the Contracts Act 1950. Section 79 defines a 'contract of guarantee' as a contract to perform the promise or discharge the liability of a third party in the event of default, and Section 80 provides that consideration for the guarantee may be anything done or any promise made for the benefit of the principal debtor.

A refund guarantee can be given by way of:

- a* a bank guarantee by a bank that operates in Malaysia, licensed under the Bank and Financial Institution Act 1989;
- b* a finance company's guarantee from a finance company that operates in Malaysia, licensed under the Bank and Financial Institution Act 1989;
- c* an insurance guarantee from an insurance company that operates in Malaysia, licensed under the Insurance Act 1996;
- d* an Islamic bank guarantee from a licensed bank under the Islamic Bank Act 1983; or
- e* a takaful guarantee from Syarikat Takaful under the Takaful Act 1984.

If a yard refuses to deliver a vessel once the purchase price has been paid or agreed in the contract, an application for an order for specific performance can be made to the court by the shipowner, which is a discretionary remedy. It has to be proved by the shipowner that damages for breach of contract would not be sufficient compensation for its loss.

If the vessel is found to be defective, then the following legislation would be applicable:

- a* Section 16 (1)(a) of the Sale of Goods Act 1957, which provides liability for breach of implied terms of quality and fitness;⁴
- b* the Contracts Act 1950 for breach of contract; and
- c* liability under the common law tort of negligence.

⁴ Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description which it is in the course of the seller's business to supply (whether it is the manufacturer or producer) there is an implied condition that the goods shall be reasonably fit for such purpose.

ii Contract of carriage

In 2010, the Malaysia Shipowners' Association stated that an estimated 95 per cent of Malaysia's international trade was carried out by merchant ships, and that 95 per cent of its international trade was carried out by foreign vessels.

At present the applicable legislation in Malaysia in this area is the Carriage of Goods by Sea Act (COGSA) 1950 (Revised 1994) in West Malaysia; the Merchant Shipping (Implementation of Convention relating to Carriage of Goods by Sea and to Liability of Shipowners) Regulation in Sarawak; and the Merchant Shipping (Applied Subsidiary Legislation) Regulation 1961 in Sabah.

The Hague Rules apply in Malaysia by way of the COGSA 1950 (Revised 1994) and the English Bills of Lading Act 1855 pursuant to the provisions of Section 5 of the Civil Law Act 1956, which provides for the application of English law in commercial matters.

There are no combined transport or multimodal bill of lading conventions in force at present in respect of road, rail or air transport that apply to the stages of transport other than by sea under a combined transport or multimodal bill of lading in Malaysia.

The cabotage policy was implemented in Malaysia by amending Section 65 (KA) of the Merchant Shipping Ordinance 1952 (MSO). The policy states that domestic trade between any two ports in the country are only to be served by Malaysian-owned shipping companies.

Malaysia has not yet declared whether it will ratify, approve or accede to the Rotterdam Rules.

iii Cargo claims

Cargo claims are typically brought by a writ application in the High Court of Malaya, High Court of Sabah or Sarawak. The Sale of Goods Act 1957 (Revised 1989) applies to the sale of goods.

The English Bill of Lading Act 1855 (the Act) applies in Malaysia by virtue of Section 5(1) of the Civil Law Act 1956. Malaysia has therefore adopted Section 1 of the Act, which provides as follows:

Every consignee of Goods named in a Bill of Lading and every endorsee of a Bill of Lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement shall have transferred to and vested in him all rights of suit and be subject to the same liabilities in respect of such goods as if the contract contained in the Bill of Lading has been made with himself.

The extent to which the terms of the charterparty can be incorporated in the bill of lading will depend on how the bill of lading has been worded.

Although Section 1 of the Act was intended to give the consignee or endorsee of the bill of lading a right to sue the carrier in contract, it provides that such rights of suit are only transferred to and vested in the consignee and endorsee when property in the goods has passed to it upon or by reason of such consignment or endorsement.

However, to sue the carrier in contract, the buyer of the goods must establish:

- a* that the buyer is the consignee named in the bill of lading or the endorsee of the bill of lading; and
- b* that possession of the goods must have passed to it 'upon or by reason of such consignment or endorsement'.

Provided the above requirements have been met, it would appear that the arbitration clause in the charterparty, where incorporated into the bill of lading, can be binding on a third party.

An owner of a Malaysian ship or of any share therein will not be liable to make good any loss or damage happening without actual fault on its part, any privity where loss or damage is caused by fire, where the value of goods is not ascertained or where the loss or damage is as a result of robbery, theft, breach of trust or misappropriation.⁵

There have been no relevant cases on the effect of deviation from a vessel's route in Malaysia but the position is likely to be the same as under English law.⁶

Common law liens can be exercised in Malaysia. The responsibilities and liabilities of the shipper are those stated in the COGSA 1950, which has incorporated the Hague Rules.

Under Section 517 of the MSO, any claim or lien against a vessel must be brought within two years from the date when the damage or loss or injury was caused or the salvage service were rendered. In contrast, any claim based on a bill of lading incorporating the Hague Rules or the Hague-Visby Rules provides a time bar of one year. As for other general causes of action founded in tort or contract, Section 6 of the Limitation Act 1953 provides that the limitation period is six years from the date on which the cause of action arose. It is possible to extend time by mutual agreement between the parties.

The courts can also extend the time limit provided the party seeking to extend the time period has a persuasive reason and the requirements of the Rules of the Court 2012 are abided by. In arbitration matters, the time limit can be extended pursuant to Section 21 of the 2005 Act provided that the arbitral tribunal conducts the arbitral proceedings in the manner that it considers appropriate if parties to the arbitral proceedings are unable to come to an agreement. These include powers of the arbitral tribunal to fix and amend time limits.

The demise clause or identity of carrier clause is recognised and binding if the Malaysian courts can be persuaded to follow the decision of the English courts in *The 'Starsin'*.⁷

iv Limitation of liability

With respect to the carriage of goods and any goods that are damaged or lost, the shipowner has another option of limiting liability under Article IV, Rule 5 of the Hague Rules, which were incorporated under the First Schedule of the COGSA 1950. The £100 is gold value and not its paper value.⁸ Although the Hague Rules were subsequently amended by the Hague-Visby Rules, the Hague-Visby Rules are yet to be adopted by Malaysia.

As for oil pollution, the Merchant Shipping (Oil Pollution) Act 1994 (the 1994 Act) implements the provisions of the CLC Convention as amended by the 1976 Protocol, which applies to West Malaysia, Sabah and Sarawak. This 1994 Act applies to seagoing vessels or any seaborne craft of any type whatsoever actually carrying oil in bulk or cargo.

Limitation of liability is encapsulated in Part IX of the MSO, in particular Section 360, which ratifies the LLMC Convention 1976 and the LLMC Protocol 1996. Under Section

5 Section 359 of the MSO.

6 See *The 'Al Taba'* [1990] 2 Lloyd's Rep 117; *The 'Isla Fernandina'* [2000] 2 Lloyd's Rep 15; *The 'Irbensky Proliu'* [2005] 1 Lloyd's Rep 383; *Renton v. Palmyra* [1957] AC 149; *Hain v. Tate & Lyle* (1936) 2 All ER 597.

7 [2003] 1 Lloyd's Rep. 571.

8 *The 'Rosa S'* (1989).

360 of the MSO, Malaysian and foreign shipowners can limit liability for certain cases of loss of life, injury or damages, provided these occurrences were not due to the shipowner's wilful and reckless act.

It should be noted that the states of Sabah and Sarawak (East Malaysia) have not incorporated the LLMC Convention 1976 or the LLMC Protocol 1996. These states still follow the 1957 Convention for limitation of liability and are hence subject to the provisions under this convention.

Section 360 of the MSO provides for general limitation for maritime claims. The limits of liability for claims other than those mentioned in Article 7 of the LLMC Convention, arising on any distinct occasion, are calculated as follows:

- a* in respect of claims for loss of life or personal injury, 2 million SDRs⁹ for a ship with a tonnage not exceeding 2,000; for a ship with a greater tonnage, 800 SDRs for each tonne from 2,001 to 30,000 tonnes; 600 SDRs for each tonne from 30,001 to 70,000 tonnes; and 400 SDRs for each tonne over 70,000 tonnes; and
- b* in respect of any other claims, 1 million SDRs for a ship with a tonnage not exceeding 2,000; for a ship with a greater tonnage, 400 SDRs for each tonne from 2,001 to 30,000 tonnes; 300 SDRs for each tonne from 30,001 to 70,000; and 200 SDRs for each tonne over 70,000.

In cases of oil pollution, Section 6(2) of the 1994 Act provides that shipowners may only limit their liability under Section 3 of the 1994 Act if the incident was caused without their actual fault or privity.

A limitation fund as provided for under Section 6(2) of the 1994 Act allows shipowners to limit their liability. The aggregate of liabilities under Section 3 of the 1994 Act in respect of any single incident for a ship under 5,000 GT will be 4.51 million SDRs and for a ship of over 5,000 GT, there will be an additional 631 SDRs for each additional tonne, provided that this aggregate amount does not exceed 89.77 million SDRs. Furthermore, as defined in Section 2(4) of the 1994 Act, the ship's tonnage will be the gross tonnage calculated in accordance with the tonnage measurement regulations contained in Annex I of the Tonnage Convention.

Limitation funds were established under the Oil Pollution Fund Convention as amended by the 1972 Protocol. Funds, as provided for under Section 16 of the 1994 Act, have a legal personality that is capable of assuming rights and obligations and of being a party in legal proceedings.

The limit under the LLMC Convention as incorporated in the MSO can only be broken if the person seeking to exclude the limitation can prove that the loss was a result of a personal act or omission, committed with the intent to cause such loss or recklessly and with knowledge that such loss would result (Article 4). A subjective intent to cause such loss must be proven.

In cases of oil pollution, Malaysia has adopted the CLC Convention and the Oil Pollution Fund Convention by passing the Merchant Shipping (Oil Pollution) Act 1994

9 The SDR is converted to Malaysian ringgit in which the limitation is sought and the value will be ascertained on the date the limitation fund is constituted; see Article 8 under the Sixteenth Schedule of the Merchant Shipping (Amendment and Extension) Act 2011.

(MSOPA). Under Section 5 of the MSOPA, crew members, pilots, charterers and salvors are not liable unless the pollution damage results from their intentional or reckless acts or omissions, committed with the knowledge that such damage would probably result.

Although economic conditions may be considered as a factor in enforcing strict rights and liabilities, the courts are nevertheless generally inclined to enforce the express terms agreed between the parties. Alternatively, one would be able to enforce rights or to obtain relief pursuant to the Specific Relief Act 1950.

V REMEDIES

i Ship arrest

Malaysia has neither acceded to nor ratified the Arrest Convention; however, by virtue of Section 24 of the Malaysian Courts of Judicature Act 1964, the civil jurisdiction of the High Court of Malaya will include the same jurisdiction as the English High Court of Justice, under the English Supreme Court Act 1981.

Following the provisions of the English Supreme Court Act 1981, the circumstances under which a ship may be arrested include:

- a* any claims to the possession or ownership of a ship or share in a ship;
- b* disputes between co-owners of a ship as to, for example, her employment;
- c* claims in respect of a mortgaged ship;
- d* claims for damage suffered or done by a ship;
- e* claims for death, or personal injury caused by a defect in a ship or negligence of the owners, charterers or persons in possession of such ship;
- f* claims for loss or damage to goods carried;
- g* claims for breach of contract of carriage, for example, charterparty, bills of lading (related to carriage on a specified vessel, see *The 'Lloyd Pacifico'* (1995)); and
- h* claims relating to salvage.

Common law tests can be carried out to ascertain wrongful arrest, for example, where the arrest of a ship has been carried out with mala fide intention or gross negligence so as to imply malice on the part of the arresting party, which results in damage to the owner of the arrested property.

In Malaysia, generally, bunker suppliers will not be able to arrest the vessels or bring a claim against the owners of the vessel for non-payment of dues pursuant to contract with the charterers.¹⁰ This is the case even under circumstances where the invoice is addressed to both the shipowner and the charterer. Malaysia follows the same principle as is applicable under English law;¹¹ however, in *The MV 'Ira'*,¹² in an interim application, the question of liability was left to trial because there was some suggestion in the documentary evidence that supply was made to the shipowner, although the charterer was responsible for ordering bunkers, as there were some indication that the order for bunkers was authorised by the shipowner.

10 See *Sunly Petroleum Co Ltd v. The Owners of the Ship or Vessel* (1996 Unreported).

11 See *The 'Fesco Angara'* [2011] 1 Lloyd's Rep 61.

12 [1996] 4 MLJ 109.

The court may order the shipowner to furnish security to the extent of the claim and, if such claims fall under limitation of liability, to the amount so limited by the Act. The sheriff is responsible for the maintenance of the vessel while it is under arrest.

It is not possible to arrest a vessel in Malaysia as security for court proceedings elsewhere. The arresting party must pursue the claim on its merits in Malaysia if it intends to arrest a vessel in Malaysia. As for the arrest to obtain security for a foreign arbitration proceeding, the position in Malaysia is now similar to the English and Singapore positions. According to Sections 10 and 11 of the Arbitration Act 2005 read together with Sections 4 and 5 of the Arbitration (Amendment) Act 2011, the Malaysian court has the power to order the arrest of a vessel to satisfy an arbitral award or order that alternative security be provided for its release.

An applicant may also apply to the court for a *Mareva* injunction to obtain security, which is essentially a freezing of assets. Although a *Mareva* injunction is not strictly meant for security purposes, it is nonetheless a means of preventing a defendant from taking actions to dissipate its assets beyond the jurisdiction of a court so as to frustrate a potential judgment.

Pursuant to Order 29, Rule 2 of the Rules of Court 2012, the court has the discretion to grant an order to detain, take into custody or to preserve any property that is the subject of the cause or matter. Under Rule 3 of the Order, a court can also authorise or require any sample to be taken, any observation to be made or any experiment to be tried for the purpose of obtaining full information or evidence in any cause or matter.

Further, in accordance with Order 70, Rule 27 of the Rules of Court 2012, the court may, on the application of any party, make an order for the inspection of any ship that may be necessary or desirable for the purpose of obtaining full information or evidence in connection with any issue in the action.

Alternatively, the applicant could seek a 'Mare Del Nord' order from the court to inspect the ship documents onboard the ship.

There are no legal provisions governing the arrest of bunkers in Malaysia. It may, however, be possible to obtain a freezing injunction against the bunkers on board the vessel.

ii Court orders for sale of vessel

The arresting party, the owner of the vessel or any party with an *in rem* claim against the vessel may apply for the judicial sale of an arrested vessel.

The first step towards obtaining the judicial sale of a vessel is for an application to be made for an order for appraisal and sale by a sheriff of the High Court. The order for sale will usually include an order specifying the period after which the court will determine the priorities between the competing claims.¹³ The claimant must seek from the court a commission for the appraisal and sale of the property arrested to put the order into effect. The commission, according to Order 70, Rule 22(1) of the Rules of Court 2012, may not be issued until the party applying for it has filed a request in the prescribed form. The commission cannot be executed by the sheriff until a satisfactory undertaking to the sheriff in writing to pay his or her fees and expenses on demand has been lodged with the sheriff's office.¹⁴

13 Order 70, Rule 22(2) of the Rules of Court 2012.

14 Order 70, Rule 22(3) of the Rules of Court 2012.

The sale of the vessel by the sheriff is usually by public auction or private tender. The duration of the sale depends on the response from potential buyers to the auction or the sheriff's call for tender. If no bids or tenders above the appraised price are received by the sheriff, the normal procedure is for the sheriff to hold another auction or call for fresh bids. The vessel can only be sold below its appraised values with the approval of the court.

The court costs of filing the summons and supporting affidavit to obtain an order for appraisal and sale, and for the appointment of an appraiser (excluding his or her fees) are prescribed in the Rules of Court and are in the region of 100 ringgit. In addition, if the vessel is sold by way of a public auction, the court's commission is 5 per cent of the first 1,000 ringgit and 2.5 per cent upon the amount above that sum. The court's commission in the event of a private sale is half those amounts.

The order of priority of claims against the proceeds of sale is generally as follows, from highest to lowest:

- a* the sheriff's costs and expenses arising from the arrest and sale of the vessel;
- b* the costs of the arresting party up to and including the arrest and the costs of subsequent proceedings up to and including the order for appraisal and sale;
- c* maritime liens;
- d* possessory liens that arise after the maritime lien has accrued;
- e* mortgages; and
- f* statutory liens.

The effect of a judicial sale is to transfer all claims in the vessel to the proceeds of sale. The sale therefore frees the vessel from all claims, liens and encumbrances, including maritime liens and gives the purchaser clean title to the vessel. The court retains the proceeds of sale to answer all claims that may be made against the vessel.

A judicial sale effected by a foreign court in an action that, in the eyes of Malaysian law, is either an action *in rem*, or has the same effect as an action *in rem*, will be recognised by the Malaysian courts. The court will recognise that such judicial sale in a foreign jurisdiction has the effect of giving the purchaser clean title to the vessel.

VI REGULATION

i Safety

Part V of the MSO addresses issues relating to marine safety. Malaysia has also ratified several international conventions adopted by the IMO as safety regime. These include:

- a* the Colregs, as amended;
- b* SOLAS, as amended;
- c* SOLAS 1978 Protocol, as amended;
- d* the STCW Convention, as amended;
- e* MARPOL 73/78, Annexes I to VI;
- f* OPRC Convention;
- g* CLC Convention;
- h* the Oil Pollution Fund Convention;
- i* the Bunker Convention; and
- j* the Anti-Fouling Convention.

ii Port state control

Malaysia is a member of the Tokyo MoU, which came into effect in April 1994. The Maritime Industrial Control Division of the Marine Department, is the agency that conducts port state control in Malaysia.

The port state control for foreign-registered ships and flag control for Malaysian-registered or licensed boats is normally carried out within the gazetted harbour limit to ensure the safety of ships or boats before berthing in any wharf or being given clearance to unload from the port.

Under Section 302 of the MSO, the port officer has the power to detain an unsafe ship. By virtue of Section 302(d) of the MSO, before a detention order is made final, a shipowner or master of the ship may appeal to the court of survey at the port where the ship was detained.

iii Registration and classification

Under the provisions of the MSO in West Malaysia, the MSO (Sarawak) 1960 and the MSO (Sabah) 1960 as amended by the Merchant Shipping (Amendment) Act 1998, which now provides for a Malaysian International Ship Registry, vessels are eligible for registration under the Malaysian flag if they are wholly-owned by Malaysian citizens or Malaysian corporations. Under Section 66E of the MSO a ship may be registered unless:

- a* it is not fitted with mechanical means of propulsion;
- b* it is smaller than 16,000 GT;
- c* the age of ship is over 15 years if it is a tanker or bulk carrier; and
- d* the age of ship is over 20 years if it is of a type other than a tanker or bulk carrier.

It is not possible to register vessels under construction under the Malaysian flag.

Pursuant to Section 11 of the MSO, a ship may be registered in Malaysia by:

- a* Malaysian citizens; or
- b* corporations that:
 - are incorporated in Malaysia;
 - have their principal office and the management of the corporation carried out mainly in Malaysia;
 - have the majority of their shareholding held by Malaysian citizens free from any trust or obligation in favour of non-Malaysians; and
 - the majority of the directors of which are Malaysian citizens.

Alternatively, under Section 66B of the MSO, irrespective of where the ship was built, a ship can be registered in the Malaysian International Ship Registry (MISR) if the ship is owned by a corporation:

- a* that is incorporated in Malaysia;
- b* with an office established in Malaysia; and
- c* the majority of the shareholding of which is not held by Malaysian citizens.

It must, however, be noted that under Section 66D(1) of the MSO, a ship may not be registered in the MISR unless the corporation has a minimum paid-up capital of 10 per cent of the value of the ship or 1 million ringgit, whichever is higher.

An application for the registry of a ship is made pursuant to Section 16 of the MSO. In particular, a statutory declaration must be prepared containing the following details:

- a* the name of the ship and its existing tonnages;
- b* a statement of the date when and the place where the ship was built or if unknown, a statement that the declarant does not know the date and place of the building of the ship;
- c* a statement as to the owner of the ship and the citizenship of the owner and, if the ship is owned by more than one person, the number of shares each is entitled to;
- d* a statement of the name of the master of the ship and his or her citizenship;
- e* a statement that no other person is entitled as owner to any legal or beneficial interest in the ship or any share thereof;
- f* except where the operator and the owner are the same person, the name and citizenship of the operator of the ship; and
- g* a declaration that the particulars stated in the form are true to the best of his or her knowledge and belief.

Besides a statutory declaration, a surveyor's certificate of measurement must be provided to the registrar¹⁵ and marking of ships must take place¹⁶ before registration. A registrar will further, on registering the ship, retain in his or her possession a copy of the surveyor's certificate of measurement, the builder's certificate, bill of sale (if any), and condemnation certificate (if any) in accordance to Section 23 of the MSO.

The Register of Mortgages is maintained by the Registrar of Ships, which has offices in Port Klang, Labuan, Kuching and Penang. The information it contains is a description of the type of mortgage being registered. It can either be a mortgage to secure the principal sum and interest or a mortgage to secure the current account.

The instrument of mortgage must be submitted on registration, together with the document of title of ownership and a letter from the previous port of registry (if any) to state that the vessel is free from any encumbrance.

It is provided under Part IIC of the MSO that the following are the approved classification societies:

- a* the American Bureau of Shipping;
- b* Bureau Veritas;
- c* Det Norske Veritas;
- d* Germanischer Lloyd;¹⁷
- e* Lloyds Register of Shipping; and
- f* Nippon Kaiji Kyokai.

Classification societies could theoretically be held liable under the common law principles of the tort of negligent misrepresentation.

iv Environmental regulation

Currently, the sulphur limit for petrol and diesel is 0.05 per cent m/m; however, there is no regulatory enforcement relating to low-sulphur marine fuel that has yet been implemented.

15 Section 17 of the MSO.

16 Section 18 of the MSO.

17 In September 2013, Det Norske Veritas and Germanischer Lloyd merged to form DNV GL.

v Collisions, salvage and wrecks

The following conventions or protocols are in force in relation to collision, salvage and pollution:

- a* the Salvage Convention 1989;
- b* the Colregs;
- c* the SR Convention;
- d* the OPRC Convention;
- e* the Merchant Shipping (Oil Pollution) Act 1994;
- f* MARPOL 73/78;
- g* the CLC Convention; and
- h* the Funds Convention.

There is no standard form of salvage agreement required for use in Malaysia.

vi Passengers' rights

Passengers' rights for loss of life and personal injury are covered under Section 360 of the MSO (Article 7 of the Merchant Shipping (Amendment and Extension) Act 2011). Malaysia is not a signatory to the Athens Convention.

vii Seafarers' rights

In Malaysia, seafarers' rights are broadly covered under Part III of the MSO. They include the right to wages, medical examination and attendance in the event of injury or illness, and compensation for improper discharge. The Maritime Labour Convention 2006 will enter into force in Malaysia on 20 August 2014.

VII OUTLOOK

Malaysia is strategically located at the middle of a global shipping trade route, the Asia–Europe network, and it will remain an important maritime highway. As many exciting new endeavours await the country in 2016, the industry is expected to continue to grow albeit at a slower pace and scale. As briefly explained above, the government must be applauded for taking the lead in the collaborative effort together with the representatives from the industry to foster the growth of the sector. The MSMP aims to revitalise the shipping and maritime sector through structured strategies such as formulating supportive policies and measures, facilitating financial aid, as well as dedicating a significant component of the plan to maritime education and training. This will definitely create a clearer maritime career pathway for the local labour force, and inspire investment by the community in the training of maritime talent.

The formulation of such policies will not only allow local players to prosper, but will provide them with an edge when competing with international players from Korea, China and Japan, where the maritime industry receives substantial support from government. The MSMP intends to address the issue of constrained capital and large production output that plagues the cyclical shipping industry. Nonetheless, banks must be more understanding in areas such as market players' needs, concerns, limitations and expectations.

Despite the existing turbulence in the global market, the positive developments that have taken place in the first quarter of the year seem to suggest that the Malaysian shipping industry may just have been given the push that it needs to further revive the local maritime practice.

Chapter 30

MALTA

*Ann Fenech*¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Malta is truly a maritime nation that has, over the years, provided the international maritime industry with a variety of maritime services. Its position in the centre of the Mediterranean, equidistant from Suez and Gibraltar and the shores of North Africa and continental Europe, make it an ideal location for trans-shipment, bunkering, ship repair, yacht repair, marinas, services associated with the offshore oil and gas industry and a host of other services.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Maltese law is based on Roman law; however, from 1801, when Malta became a British colony, to 1964, when it gained independence, all the new laws promulgated in England during this period became part and parcel of the law of Malta. Therefore, most of the shipping law is based on English shipping laws promulgated in England during that period. This has led to Maltese law itself being a unique system of law: predominantly Roman-based with very heavy doses of English statute law as far as ‘modern’ shipping law and mercantile law are concerned.

Thus, most shipping laws today are rooted in English statutes, including the Maltese Merchant Shipping Act of 1974 as amended, as well as international conventions to which Malta is either a signatory or that have been incorporated into Maltese law.

III FORUM AND JURISDICTION

i Courts

Shipping disputes with a value of over €11,646.86 are heard by the First Hall of the Civil Court with smaller claims being heard by the Court of Magistrates. There is no further official

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subdivision of the First Hall and therefore technically each of the 18 judges sitting in the First Hall of the Civil Court can hear a variety of cases as they appear before them, ranging from shipping to bankruptcy to property issues. In practice, however, shipping cases are assigned to one judge. Appeals are heard by the Court of Appeal, composed of three judges.

Shipping cases are the subject of both *in personam* and *in rem* claims before Maltese courts.

There are a number of limitation periods but generally speaking, claims arising from contract attract a five-year time bar and claims arising from tort attract a two-year time bar.

In personam

The grounds upon which Maltese courts have jurisdiction to hear *in personam* claims are listed in Section 742 of the Code of Organisation and Civil Procedure (COCP), which is the Code that effectively regulates court procedure. In *Finaval SpA v. Scorpio Ship Management*,² the Civil Court affirmed that since the case was about the failure of Scorpio (Monaco) to transfer to Finaval (Italy) the shares of one of two Maltese shipowning companies, and since shares in a company are considered property situated in Malta, the Maltese courts had jurisdiction. The Court also decided that the fact that by the time the case was decided the company had been struck off did not affect its jurisdiction because when the action was instituted, the company was still registered. In this case, the plaintiffs were awarded what was then a record amount of damages awarded by a Maltese court.

Apart from Section 742 of the COCP, Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters must also be considered and kept in mind.

In rem

Until 2005, the grounds upon which the Maltese courts could exercise jurisdiction *in rem* were governed by the English Admiralty Court Acts of 1840 and 1861. These grounds were extremely limited. With Malta's presence in the international maritime world increasing exponentially, it was vital that the law relating to jurisdiction *in rem* was totally overhauled. In addition, the series of cases in 1995 that became known as the 'Poker' cases,³ highlighted the existence of a lacuna in the law related to whether suppliers of a vessel could sue a vessel *in rem* for debts incurred by the bareboat charterer. The courts decided these cases on the basis of equity and held against the plaintiffs, but it was clear that the matter had to be regulated by law.

The result was that 2005 saw the introduction of a very extensive list of maritime claims that was based on Section 20 of the UK Supreme Court Act and the list of maritime claims found in the Arrest Conventions 1952 and 1999. Furthermore, the 'Poker' lacuna was

2 Case number 90/04/TM (COA 2 July 2010).

3 *Abergomara DUE Srl v. MV 'Poker' 291/95/PS* (withdrawn); *TechnoSpares Trading Ltd v. MV 'Poker' 131/95/VG* (withdrawn); *Metaltrade Srl v. MV 'Poker' 107/95/JF* (COA 30 November 2007); *Grangco Metalock GmbH v. MV 'Poker' 150/95/GS* (11 July 2001); *Tommaso Montano Srl v. MV 'Poker' 130/95/JSP* (withdrawn); *International Paint Italia SpA 288/95/GCD* (withdrawn); and *SO.GE CO.MAR v. MV 'Poker' 170/95/PS* (withdrawn).

solved by adopting the English approach. An action *in rem* can only be instituted against a vessel if the person who would be liable for a claim in an action *in personam* when the cause of action arose is the owner or bareboat charterer of the vessel at the time the action is instituted.

ii Arbitration and ADR

Arbitration in Malta is regulated by the Arbitration Act 1991, which incorporates the UNCITRAL Model Law, the Geneva Protocol on Arbitration Clauses, the Geneva Convention on the Execution of Foreign Arbitral Awards, the UN Convention on the recognition and Enforcement of Foreign Arbitral Awards and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The Act provides parties to international commercial arbitration a degree of flexibility in that the parties may choose to exclude the operation of the Model Law and apply their own rules or alternatively to adopt the procedure set out in the Arbitration Act for domestic arbitration.

With regard to other forms of dispute resolution, Maltese law allows for mediation in disputes involving civil, family, social commercial and industrial matters.

Apart from the foregoing, no other forms of ADR are used frequently in Malta.

iii Enforcement of foreign judgments and arbitral awards

A Maltese court would recognise a judgment given in another European state by virtue of the release of a declaration of enforceability in line with EU Regulation 44/2001, which is being superseded in stages by Regulation 1215/2012. A judgment will not be recognised if the judgment is manifestly contrary to Maltese public policy, if the defendant was not served with the document instituting proceedings in the foreign court so as to enable a defence, if the judgment is irreconcilable with a judgment given in a dispute between the same parties in Malta, or if it is irreconcilable with an earlier judgment given in another EU or non-EU Member State involving the same cause of action and the same parties.

When a European judgment relates to an uncontested claim, the judgment creditor may simply request that the court hand down the judgment for a European enforcement order, which would enable that judgment to be enforced directly in Malta without having to undergo the process of recognition.

In respect of judgments delivered by non-EU courts, the judgment creditor would need to file an application before the courts requesting the court to enforce said judgment.

The recognition and enforcement of arbitral awards follow the Geneva and New York Conventions. Once the award is registered at the Malta Arbitration Centre the award constitutes an executive title and can then be directly enforced through numerous executive warrants such as the warrant of seizure, garnishee and arrest.

IV SHIPPING CONTRACTS

i Shipbuilding and ship repair

From 1600 through to the mid-1800s, there were a number of Maltese families involved in the shipbuilding trade. This trade, however, came to a fairly abrupt end with the advent of steel. On the other hand, with the arrival of the British in Malta in 1801 and the building of the Admiralty docks, ship repair flourished. These dry docks were and still are located in Grand Harbour, the deepest natural harbour in the Mediterranean and therefore, until after World War II, ship repair and associated trades also thrived. These shipyards were run by the

Admiralty and then, following independence in 1964, by the Maltese government. In their heyday they employed thousands of men and were referred to as the Malta Drydocks. The Malta Drydocks were in fact turned into a public corporation and totally regulated by an Act of Parliament in 1967.

Over the years and running parallel with what was taking place all over Europe, shipbuilding and ship repair started to migrate eastward, work at the Malta Drydocks diminished substantially and major restructuring was required. The Malta Drydocks were terminated and Malta Shipyards Ltd was created. Even then, however, the very survival of the Malta Shipyards Ltd depended heavily on government subsidy, which had to come to an end following Malta's membership of the EU. This led to the privatisation process of the Malta Shipyards Ltd, which was effectively split into four sites, all owned by separate private entities. Today there are no state-owned shipyards left but several privately owned repair yards. All these yards operate on the basis of their own standard terms and conditions regulated by Maltese law.

ii Contracts of carriage

Malta is not a signatory to either the Hague Rules, the Hague-Visby Rules, the Hamburg Rules or the Rotterdam Rules. Nevertheless, the Carriage of Goods by Sea Act 1954 incorporates the text of the Hague Rules. The Rules, however, apply only in relation to vessels carrying goods from Malta to any other port and therefore the law excludes contracts of carriage in which goods are being imported into Malta, which is the norm, Malta being an importing rather than an exporting country.

The only other Maltese law that would typically govern contracts of carriage would be the Commercial Code, which contains sections dealing with contracts of carriage. These sections are, however, totally outdated and very rarely used. In practice, the vast majority of disputes that arise and get to court concern disputes arising out of bills of lading, which invariably contain a clause paramount. The courts in Malta have stringently upheld and applied the law indicated in the clause paramount, which, in nine cases out of 10, follow the Hague Rules or the Hague-Visby Rules. With regard to disputes arising out of charterparties, very frequently these contracts provide for English law and the courts are very happy to apply English law under these circumstances. In the occasional cases where there is no reference to proper law, Maltese courts are ready to apply English law principles if Maltese law is totally silent on the matter. One such area is, for instance, demurrage. There are no sections in the Commercial Code that deal with demurrage and therefore the courts are ready to use English case law and precedent as guidance.

iii Cargo claims

As in most jurisdictions, the vast majority of claims are brought by consignees or endorsees of bills of lading against the carrier. There are a number of claims also brought by charterers against owners, however, these are becoming few and far between. Most disputes are quite repetitive in nature and deal with typical shortage claims, damages on discharge, etc. Every so often important issues of principle are decided upon. In *The 'Northeastern Breeze'*,⁴ it was held that a general clause on the front of a bill of lading incorporating all the clauses in the

4 Case number 30/90/MB (COA 10 October 2005).

charterparty did not incorporate the arbitration clause, and in the *The 'Hope I'*⁵ the Court delved into the issue of the identity of the carrier. It referred to *The 'Starsin'*⁶ and held that the identity of carrier clause identifying the owner as the carrier should be overruled if, on the face of the bill of lading, the signature box was signed off by agents at the port of loading expressly as agents of the charterers who were described as 'the carrier'.

iv Limitation of liability

The limitation of liability regime applicable in Malta is the LLMC Convention 1976 as amended by the 1996 Protocol. In fact, Malta was the 10th member state of the IMO to accede to the 1996 Protocol, triggering its coming into force internationally. This took place by virtue of the deposit of an instrument of accession by Malta on 13 February 2004.

V REMEDIES

i Ship arrest

The subject of arrest of ships is inextricably linked to jurisdiction. Once a vessel is arrested the arrestor must commence an action on the merits in Malta within 20 days. Thus, it is only possible to arrest a vessel for reasons that would establish the jurisdiction of the Maltese courts, as described above.

In the context of *in rem* claims, a vessel can only be arrested for any one of the maritime claims granting the courts jurisdiction *in rem*. The arrest of sister ships is permitted, but not of associated ships.

The actual arrest is effected by means of a warrant of arrest. If the arrest is required to obtain security, one would need to issue a precautionary warrant of arrest. If the arrest is to be effected for the purposes of enforcing a judgment, one would file an executive warrant of arrest.

The warrants are filed *ex parte* by the arresting party and can be issued for any claim in excess of €7,000. The warrants themselves are standard forms calling upon the judge to order the arrest of the vessel. The arrestor needs to list four identifying features of the vessel and indicate where the vessel is located. Once filed, the warrants are sent to the duty judge and are issued immediately. The warrant is then served by the court marshal on the vessel itself, on the Commissioner of Police and on Transport Malta. All expenses incurred in the preservation of the vessel from the moment that the warrant of arrest is served on Transport Malta are borne by the arresting party without prejudice to its right to recover such expenses along with the claim.

A vessel may be arrested provided it is within Maltese territorial waters but not necessarily in the harbour. The warrant is served on the vessel at which time the court marshal seizes all the important documentation of the vessel. No counter-security need be put up by the arresting party.

A warrant of arrest can only be lifted by means of a counter-warrant of arrest issued by the court. A court will issue a counter-warrant if the arrest is replaced by a guarantee filed by the vessel. Historically, the courts have only accepted cash deposits or bank guarantees drawn

5 Case number 212/99/AM (COA 26 June 2009).

6 2003 1 Lloyd's Rep 571.

on a Maltese bank. Any other form of guarantee needs to be agreed to between the parties. It is customary to agree to guarantees put up by a P&I club member of the International Group of P&I Clubs.

An arresting party can, on the application of the defendant, be found liable for damages if it is proven that the arrest was malicious, frivolous or vexatious. In such a case, the arresting party would also be liable for the payment of a penalty to the court.

As stated earlier, once a vessel is arrested in Malta the arresting party needs to commence an action on the merits within 20 days. There are two exceptions: (1) when a contract under which the dispute arises provides for arbitration, or (2) if Article 31 of Regulation 44/2001 applies, since it is possible, by virtue of that regulation, to arrest a vessel in Malta even if the court that has jurisdiction over the merits in accordance with the Regulation is not the Maltese court but the court of another EU Member State.

ii Court orders for the sale of a vessel

Court orders for the sale of a vessel normally follow either an action on the merits in Malta or are resorted to by mortgagees of a vessel who want to enforce their mortgage in the face of a defaulting owner.

A judgment and a mortgage are two examples of 'executive title'. The holder of an executive title may proceed directly with enforcement. The most common and effective methods of enforcement are the judicial sale by auction and the court-approved private sale.

Judicial sale by auction

The holder of the executive title would file an application in court requesting the court to order the judicial sale of a vessel. The plaintiff would also ask the court to appoint an auctioneer, as well as a date for the auction and would request that the court appoint a person empowered by the court to sign off a bill of sale following the judicial sale by auction. The auction is held at the law courts. There is no reserve price or minimum sale price and the vessel is sold to the highest bidder. It has become the practice for potential bidders to be in possession of a bank guarantee showing that the bidder is vouched for up to a maximum figure.

It is possible for the execution creditor to bid for the vessel *animo compensandi* – in other words, as a form of set-off for what it is owed. When that occurs, however, the execution creditor would have to file an application in court within seven days requesting that the court approve a set off. A court is likely to agree to such set-off only if there is no opposition from other creditors who would clearly rank higher in the order of ranking of creditors in the eventuality that there is more than one creditor. If there are in fact other creditors who make themselves known to the court, the court will not allow the set off, and the next step would be for any of the creditors to commence the ranking of creditors procedure at which point the court would decide on the order of ranking in accordance with Section 50 of the Merchant Shipping Act.

When a vessel is sold in a judicial sale by auction, the vessel is sold free and unencumbered and any previous claim against the vessel *in rem* can only continue against or be recovered from the proceeds of the sale.

Court-approved private sale

The court-approved private sale was only introduced into the COCP in 2006 and it was entirely market and industry driven. It is the answer to the uncertainty related to the price

that can be achieved in a judicial sale by auction and the answer to the problem of a vessel not being sold free and unencumbered when a mortgagee exercises its rights of a private sale in the context of a defaulting owner.

In this form of sale, the holder of an executive title, say a mortgagee, sources the market for the best offer for the vessel; in the meantime it obtains two valuations for the vessel. A memorandum of agreement is entered into with a buyer for a price that must exceed the higher of the two valuations. An application is then filed in court giving all the necessary details requesting that the court approve the private sale of the vessel. The court is obliged to appoint the case for hearing within 10 days. Once the hearing is held, and there is no reason for any further delay, it is usual for the court to adjourn the hearing for judgment. In the judgment the court would approve the private sale of the vessel at the price and to the buyer indicated in the memorandum of agreement. The vessel is sold free and unencumbered.

This procedure has been used extensively over the past few years. In 2014 the Maltese courts featured prominently in approving the private sales of a number of vessels belonging to the bankrupt TMT group. There were three court-approved sales in all involving the TMT Group.⁷

VI REGULATION

i Safety

Malta ratified SOLAS in 1986 and the Load Lines Convention in 2003. Maltese law contains other regulations dealing with safety requirements for particular sectors such as the Merchant Shipping (Fishing Vessels) Minimum Safety and Health Requirements Regulations) 2004, Merchant Shipping Fishing Vessel Safety rules,⁸ Merchant Shipping (Safe Operation of Regular Ro-Ro Ferry and High Speed Passenger Craft Services) Regulations 2004 and the Merchant Shipping (Certification of Commercial Yachts and Commercial Cruising Vessels) Regulation 2006. Further, the Merchant Shipping Flag State Requirements Regulations 2001⁹ place a number of auditing and supervisory obligations on Transport Malta emanating from Directive 2009/21 EC that relate to ensuring compliance by ships with flag state requirements.

ii Port state control

Transport Malta, through its Merchant Shipping Directorate, together with other Mediterranean maritime administrations and with the assistance of the IMO, the ILO and the European Commission concluded a memorandum of understanding for the Mediterranean region that was eventually signed in Malta in 1997 (Mediterranean MoU). Malta also

7 *Bank of America NA v. MV 'D Ladybug'* (8 October 2014); *Macquarie Bank Limited v. MV 'A Ladybug'* (28 April 2014); and *Hyundai Heavy Industries Co Ltd and Hyundai Samho Heavy Industries Co Ltd v. MV 'B Ladybug'* (8 April 2014).

8 SL234.36.

9 SL234.48.

continues its active participation in the Paris MoU and the Tokyo MoU. Furthermore, the Merchant Shipping (Port State Control) Regulations¹⁰ implement the measures contained in Directive 2009/16 EC with regard to inspection and detention procedures and obligations.

iii Registration and classification

The Maltese flag is currently the largest flag in Europe and being in the EU has meant that the flag is highly sought after by owners wanting to fly an EU flag. It is on the Paris MoU White List and its strength and success is down to a number of factors:

- a* there are no trading restrictions on Maltese-registered vessels;
- b* there are straightforward and quick company and vessel registration procedures;
- c* there are no restrictions on the nationality of the shareholders and directors of Maltese owning companies; and
- d* it has a tonnage tax regime with no tax on income derived from shipping activities, and very competitive administrative fees and charges for the registration of vessels and the incorporation of owning companies.

English is also an official language in Malta, which removes the need for documents that are usually in English to be translated and authenticated. The registry is open on a 24-hour, seven-days-a-week basis, which is extremely useful in the case of owners or financiers operating in different time zones.

Ownership of a Maltese-registered vessel is not limited to Maltese companies. A foreign person may own a Maltese-registered vessel provided that the foreign company appoints and operates through a resident agent, who is considered the connecting factor between the regulator in Malta and the foreign owner. Through the resident agent, the foreign company owning a Maltese-registered vessel is deemed to have submitted to the jurisdiction of the Maltese courts.

One of the most important factors associated with the strength of the Malta flag is the reassurance that the flag gives to financiers who register their mortgages against vessels registered under the Maltese flag, who derive a huge degree of comfort in the knowledge that their rights are protected.

Under Maltese law ships form separate and distinct assets within the estates of their owners for the security of actions and claims to which the vessel is subject. In the event of the bankruptcy of the owner of a ship, all actions and claims to which the ship may be subject have preference on the said ship over all other debts of the estate.

In the event of a default of any term or condition of a registered mortgage, the mortgagee has the right to take possession of the ship, has absolute power to sell the ship and has the right to apply for any extension, pay fees, receive certificates, and generally do all such things in the name of the owner as may be required in order to maintain the status and validity of the registration of the ship.

Most importantly, a registered mortgage is deemed an executive title under our law and as referred to above, this would entitle the mortgagee to proceed directly to a judicial sale by auction or a court-approved private sale without the need to commence an action on the merits and obtain a judgment.

10 SL234.38.

In the eventuality that the mortgage is indeed enforced through a judicial sale or a court-approved private sale, and the price for the vessel is insufficient to pay all the creditors necessitating a ranking-of-creditors procedure, the order in which various creditors rank is regulated by Section 50 of the Merchant Shipping Act, which lists a number of claims from (a) to (p) that are privileged and that rank one after the other in order of preference. In terms of Article 54(A) of the same act, a mortgage is positioned between (k) and (l) and therefore ranks 11th in order of priority after important claims including salvage claims, crews' wages, expenses for the preservation of the ship and damages to seamen for personal injury.

Only classification societies that are members of IACS are accepted by the regulator. To date, there has not been a case in Malta on the liability or otherwise of classification societies.

iv Environmental regulation

Malta is bound by a number of international, regional and EU instruments that have either been ratified or that directly form part of domestic law. These include MARPOL, the Convention for the Protection of the Mediterranean Sea Against Pollution and its 2002 and 2004 Protocols, the UNEP Convention on Biological Diversity 1993, the OPRC, the OPRC-HNA Protocol, the Anti-Fouling Convention, the Bunker Convention, Directive 2005/35/EC as subsequently amended by Directive 2009/123/EC on ship-source pollution and on the introduction of penalties, including criminal penalties, for polluting offences, Directive 2000/59/EC on port reception facilities for ship generated waste and cargo residues, Directive 2002/59/EC as subsequently amended concerning dangerous and polluting goods and Directive 2010/65/EU on reporting formalities for ships arriving in and or departing from ports of the Member States.

v Collisions, salvage and wrecks

Collisions

Malta is a signatory to the Colregs. That said, in the running of any case before the Maltese courts, there would be two other important laws that would play a very prominent role: the first would be the sections regulating tort in the Civil Code and the second would be Section 347 of the Merchant Shipping Act.

The law of tort provides for fault-based liability with all persons being liable for damages that they cause as a result of their own fault. In addition, Section 347 of the Merchant Shipping Act is particularly useful as it provides that the owner of a ship will be liable for any damages caused by acts or omissions in the navigation or management of the ship. This section therefore enables the injured party to commence an action in personam against the owners of the vessels for navigational errors committed by the crew.

Salvage

Malta is not yet a signatory to the Salvage Convention 1989; the law of salvage is contained in the Merchant Shipping Act, which provides for the payment of a salvage award to any person that renders services to a vessel that is wrecked, stranded or in distress in Maltese territorial waters 'limited to the amount of the property saved'. Further, the liability of the owner to pay salvage extends to persons having an interest that has been saved by the property being brought into a position of safety. Maltese law is based on the principal of 'no cure, no pay'.

The criteria that courts should use in determining the amount of salvage to be awarded are found in Section 345 of the Merchant Shipping Act. These include the measure of success

obtained and the efforts of the salvor, the danger run by the vessel saved, by its passengers, crew and cargo, the danger run by the salvor and the salving vessel, the time expended, the expenses incurred and the losses suffered and the risks of liability and other risks run by the salvors, and also the value of the property exposed to such risks.

Wrecks

Malta became a signatory to the Nairobi WRC 2007 on 18 January 2015. The subject of wrecks is in addition also dealt with in Sections 330–341 of the Merchant Shipping Act, which provide that where a vessel is wrecked, stranded or in distress on the coast of Malta or in Maltese territorial waters, the Minister of Transport may appoint a receiver of wrecks who would be authorised to take such steps as he or she deems fit for the preservation of the vessel, of the lives on board and of cargo carried. There are a number of provisions dealing with what the receiver or wreck or third parties can or cannot do with property associated with the wreck.

In practice, the Minister of Transport would normally delegate these powers to the Ports Directorate within Transport Malta, the maritime regulatory body, which then embarks on a very wide consultative process with owners, insurers, salvors and tug operators as to the procedure and steps of the wreck removal.

vi Passengers' rights

Malta is bound by Regulation (EC) No. 392/2009 on the liability of carriers of passengers in the event of accidents, which came into effect on 31 December 2012. It incorporates certain provisions of the Athens Convention as amended by the 2002 Protocol, and constitutes the main legislation dealing with the carriage of passengers and their luggage by sea. The Merchant Shipping (Carriage of Passengers by Sea) Regulations 2004¹¹ provide for the issuance by the Registrar of Ships of certificates attesting that an insurance cover or other financial security is in force in respect of ships entering or leaving Maltese ports.

vii Seafarers' rights

Malta ratified the Maritime Labour Convention 2006 on 18 January 2013, which entered into force on 20 August 2013 and has acceded to the STCW Convention.

Maltese ships are subject to the provisions of the Merchant Shipping Act and ancillary regulations concerning the competence of officers and seamen. There are no restrictions imposed on the nationality of the master, officers or crew engaged on Maltese ships.

As far as the certification of seafarers is concerned, this is the responsibility of the Registrar-General of Shipping and Seamen. Certificates of competence are issued by Transport Malta after the candidate has successfully completed the approved training courses and examinations, all of which are of a high standard. In addition to and with the coming into force of the STCW, Transport Malta has entered into bilateral agreements with over 46 foreign maritime administrations for the recognition of certificates of competence issued to seafarers after having ascertained that such certificates are issued in full compliance with the STCW Convention.

11 SL234.52.

VII OUTLOOK

It is likely that more and more unpaid financiers and shipyards will continue to enforce their mortgages against defaulting owners through court-approved private sales. Ten years' experience of putting into action Section 742 of the COCP dealing with jurisdiction *in rem* means that Malta is likely approaching the stage where this section needs to be fine-tuned to take into account possible imperfections or flaws. Fortunately, and as stated, maritime lawyers, the regulator and the legislator enjoy a very good working relationship as well as very effective cooperation with each other, which normally leads to the prompt amendment of law.

Chapter 31

MARSHALL ISLANDS

*Lawrence Rutkowski*¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The Republic of the Marshall Islands is home to one of the world's largest registries of ocean-going vessels, mobile drilling units, floating production platforms and other vessels. There are over 3,000 such vessels registered under the Marshall Islands flag comprising a total of over 102 million GRT, making it the world's third-largest ship registry. The Marshall Islands is considered an 'open' or 'international' registry, meaning that it is possible for entities not resident in the Marshall Islands to own Marshall Islands-registered vessels.

The Marshall Islands fleet has grown rapidly since its inception in 1990. Pursuant to a joint venture agreement between the government of the Marshall Islands and International Registries Inc (IRI), IRI – acting as maritime administrator – administers both the maritime and corporate programmes of the Marshall Islands. IRI's headquarters is in the United States in Reston, Virginia (near Washington, DC) although it has offices to assist in corporate formation, vessel registration, port state control and mortgage recording throughout the world. IRI currently maintains offices in New York, London, Zurich, Piraeus, Hong Kong, Singapore, Dalian, Hamburg, Seoul, Istanbul, Mumbai, Roosendaal, Shanghai, Reston, Tokyo, Baltimore, Geneva, Fort Lauderdale, Dubai, Houston, Taipei, Long Beach and Rio de Janeiro.

The Republic of the Marshall Islands is an independent nation comprising atolls and islands in the middle of the Pacific Ocean with fewer than 70,000 inhabitants but is party to a Compact of Free Association with the United States pursuant to which the United States provides defence, funding grants and certain social services. As such, although the Marshall Islands has no significant domestic shipping industry of its own, the location of the management of its corporate and shipping programmes in the United States and the

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political stability derived from its relationship with the United States has allowed its registry to continue to grow without the setbacks that have beset nations supporting other popular open registries.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The principal legislation for shipping in the Marshall Islands is the Maritime Act 1990, as amended (the Maritime Act). The Maritime Act comprises legislation covering, *inter alia*, vessel registration, mortgages, financing leases, maritime liens, rules of navigation, the carriage of goods and passengers, liability rules for oil pollution, duties of a master and rights of seafarers, though most practitioners are concerned principally with vessel registration and mortgages.

As noted above, the Marshall Islands flag fleet comprises principally ocean-going tonnage owned by parties not resident in the Marshall Islands. While it is valuable to know that Chapter 6 of the Maritime Act adopts the CLC Convention and that the Marshall Islands is a party to SOLAS and has ratified the Maritime Labour Convention 2006 (MLC), it is equally important to understand that much of Marshall Islands law has its roots in US law.

Indeed, much of the Maritime Act, at least as adopted in its original form in 1990, was based on similar legislation in the Republic of Liberia, which was in turn modelled on US law. In particular, Chapter 3 of the Maritime Act on ship mortgages can be traced back to the US Ship Mortgage Act, 1920 (subsequently amended and recodified). Moreover, Section 113 of the Maritime Act provides that insofar as it does not conflict with any other law of the Marshall Islands, the non-statutory general maritime law of the United States is adopted as the general maritime law of the Marshall Islands. This has the benefit of affording practitioners a deep body of American jurisprudence from which they can draw in analysing legal questions arising under Marshall Islands maritime law.

III FORUM AND JURISDICTION

i Courts

All causes of action arising under the Maritime Act fall within the jurisdiction of the High Court of the Marshall Islands, sitting in Admiralty, but Section 116 of the Maritime Act specifically provides that nothing in the Maritime Act will be deemed to deprive other courts of jurisdiction to enforce causes of action. Hence, mortgage foreclosures, as is customary in marine practice, continue to be conducted in the courts of the jurisdiction in which the relevant vessel is found at the time of foreclosure and other commercial arbitration and litigation in commercial matters continues to be pursued in the jurisdictions and before the tribunals to which the parties have submitted. Marshall Islands law generally respects the parties' choice of law and forum. Indeed, the most recent notable cases somewhat related to international shipping that have been litigated in the Marshall Islands involve shareholder-derivative suits brought by dissident shareholders of Marshall Islands companies that are publicly traded in the United States. Decisions are appealed from the High Court to the Supreme Court of the Marshall Islands. The Supreme Court consists of a chief justice

and two associate justices. Historically, the associate justices are pro tempore judges from other jurisdictions (e.g., the United States Ninth Circuit Court, the Republic of Palau, the Commonwealth of the Northern Mariana Islands and Canada).

That said, the Marshall Islands did adopt the Admiralty Jurisdiction Act 1986. That Act separately vested the High Court with jurisdiction in respect of suits involving any of the following matters:

- a* any claim to the possession or ownership of a ship or the ownership of any share therein;
- b* any question arising between co-owners of a ship as to possession, employment or earnings of that ship;
- c* any claim with respect to a mortgage of or charge on a ship or any share therein;
- d* any claim for damage received by a ship;
- e* any claim for damage done by a ship;
- f* any claim for loss of life or personal injury sustained in consequence of:
 - any defect in a ship or in its apparel or equipment; or
 - the wrongful act, neglect or default of the owners, charterers or persons in possession or control of a ship or of the master or crew thereof or of any other person for whose wrongful act, neglect or default the owners, charterers or persons in possession or control of a ship are responsible, being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from the ship or in the embarkation, carrying or disembarkation of persons in or from the ship;
- g* any claim for loss of or damage to goods carried in a ship;
- h* any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;
- i* any claim in the nature of salvage;
- j* any claim in the nature of towage or pilotage with respect to a ship;
- k* any claim with respect to goods or materials supplied, or services rendered, to a ship for its operation or maintenance;
- l* any claim with respect to the construction, repair or equipment of a ship, or dock charges or dues;
- m* any claim by a master or member of the crew of a ship for wages and any claim by or with respect to a master or member of the crew of the ship for any money or property which under any law in force for the time being, is recoverable as wages;
- n* any claim by a master, shipper, charterer or agent with respect to disbursements made on account of a ship;
- o* any claim arising out of bottomry; and
- p* any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for jetsam, flotsam, lagan and derelict found in or on the sea, the shores of the sea or any tidal water, or for property found in the possession of convicted pirates.

ii Arbitration and ADR

Neither arbitration nor alternative dispute resolution customarily occurs in the Marshall Islands for commercial disputes between non-residents, which includes ‘non-resident domestic’ entities, which are entities formed under the laws of the Marshall Islands, be they

corporations, limited liability companies, partnerships or other entities, but that do not do business in the Marshall Islands. Such entities are not deemed resident in the Marshall Islands merely because they register vessels under the Marshall Islands flag or maintain a resident agent there as required by the Marshall Islands Associations Law. The Marshall Islands is a party to the New York Convention.

iii Enforcement of foreign judgments and arbitral awards

Generally, to the extent enforcement would be sought in the Marshall Islands (an unlikely occurrence given that non-resident domestic entities are unlikely to have assets in the territory of the Marshall Islands), a foreign judgment may be enforced in the Marshall Islands without a retrial on the merits of the matter provided that: (1) the judgment was for a sum of money and was final in the jurisdiction granting the judgment; (2) the court granting the judgment had jurisdiction under the laws of the place where it sat and the judgment did not offend principles of the Republic of the Marshall Islands as to due process, propriety or public policy; and (3) the defendant was actually present in person or by duly appointed representative and the judgment did not constitute in effect a default judgment.

IV SHIPPING CONTRACTS

i Shipbuilding

The Marshall Islands does not have an active shipbuilding industry for commercial vessels.

ii Contracts of carriage

Chapter 4, Part 1 of the Maritime Act (also cited as the Carriage by Sea Act) governs the carriage of goods. However, consistent with the approach taken generally by the Marshall Islands as an open or international registry, the Carriage by Sea Act, insofar as it relates to the carriage of goods by sea, is only applicable if the goods are carried on Marshall Islands vessels in 'foreign trade' or on other vessels to or from ports of the Marshall Islands in 'foreign trade'. Section 402(f) of the Maritime Act defines foreign trade as the transportation of goods between the Marshall Islands and foreign countries or between foreign countries. Therefore, as a practical matter it is principally relevant with respect to Marshall Islands-flagged vessels in international commerce. No similar rules are adopted purely for cabotage trades and there are no rules limiting cabotage trades to Marshall Islands-flagged vessels.

The Marshall Islands has not adopted either the Hamburg Rules or Rotterdam Rules.

iii Cargo claims

A carrier is obliged to make the ship on which the goods are to be carried seaworthy, to properly man, equip and supply the same and to make the holds fit and safe for the reception, carriage and preservation of cargo. While disputes can be submitted to the courts of the Marshall Islands, little, if any, litigation or arbitration occurs within the Marshall Islands over these claims. As noted above, the Marshall Islands generally respects the choice of law and forum by the parties to a contract.

iv Limitation of liability

Similar to the US Carriage of Goods by Sea Act (COGSA), the Carriage by Sea Act contains a 'package limitation', although the package limitation under the Carriage by Sea Act provides

that unless the shipper has declared the value of the goods prior to shipment, the carrier's and the vessel's limit of liability is 666.67 SDRs per package or 2 SDRs per kilogram of gross weight of the goods lost or damaged.

In addition, Marshall Islands law provides for the customary exemptions from liability not caused by the carrier's want of due diligence or for those matters customarily covered by a shipper's insurance.

The Marshall Islands has also adopted the LLMC Convention 1976 as Chapter 5 of the Maritime Act. Pursuant to Chapter 5, various parties are entitled to limit their liability in respect of certain claims but unable to claim the same limitations to others. For example, many claims are limited to an amount equivalent to a variable number of units (as described above in respect of certain cargo claims) following the formula for (1) 1 million SDRs plus (2) 400 SDRs for each tonne from 2,001 to 30,000, plus (3) 300 SDRs for each tonne from 30,001 to 70,000 plus (4) 200 SDRs for each tonne in excess of 70,000.

V REMEDIES

i Ship arrest

Marshall Islands ship mortgage law (Chapter 3 of the Maritime Act) is extremely important in the world of vessel finance as so much of the world's merchant fleet is registered there. Nonetheless, as a small nation comprising thousands of small islands, very few significant carriers trade there. As a consequence, there is no history of vessel arrests on which to draw. More relevant is a brief synopsis of Marshall Islands mortgage law as it relates to enforceability elsewhere and what lien priorities exist by statute to the extent other jurisdictions follow the laws of the flag state.

It should be noted that, as alluded to above, the Maritime Act permits any 'citizen', 'national' or 'foreign maritime entity' to register any seagoing vessel engaged in foreign trade (subject to certain age restrictions and matters of technical compliance described below). For these purposes, that includes any entity formed within the Marshall Islands, regardless of whether legally or beneficially owned by residents of the Marshall Islands, and entities formed elsewhere as long as they register and meet the limited qualifications of a foreign maritime entity.

Once a vessel is registered, a mortgage may be recorded against the vessel. Any such mortgage (which, like Liberia, Panama, Vanuatu and others follows the American form and not the English-style mortgage form accompanied by a deed of covenants) must identify the owner, the vessel, the amount of the direct or contingent obligations secured by the mortgage and must cover the 'whole of the vessel': one cannot grant a mortgage covering a limited interest in the vessel. There are certain formalities required with respect to number of copies, notarisation or legalisation and related items but these are not unduly complicated – more complicated is the nature of the obligations that can be secured. Unlike English-law-type 'account current' mortgages or security interest filings under the Uniform Commercial Code in the various states of the United States, Marshall Islands mortgages are intended to secure specific, identified debts to (*inter alia*) provide notice to third-party vendors who might be supplying credit to the vessel. This requirement sometimes leads to complications when the parties desire the mortgage to secure obligations that may not be extant or where the amount to be secured is unliquidated (e.g., obligations under a derivatives contract). Traditionally, Marshall Islands mortgages secured debt obligations (loans and other extensions of credit) but changes in the law have made it possible to secure contingent obligations including

revolving credits, letters of credit reimbursement obligations and certain other obligations that are the subject of commitments or agreement subject to certain additional formalities in the language of the mortgage instrument.

Assuming the mortgage instrument has been properly drafted and meets the formal requirements for recording, it has a high priority. Specifically, the lien of the mortgage up to the amount of the outstanding indebtedness secured thereby will have priority over all claims against the vessel *in rem* except for liens arising before the recordation of the mortgage and: (1) maritime liens arising out of tort; (2) tonnage taxes and other fees owing to the Marshall Islands; (3) maritime liens for the crew's wages; (4) maritime liens for general average; (5) maritime liens for salvage; and (6) expenses and fees allowed and taxed by the court sitting in foreclosure.

In addition to the preferred maritime liens referenced above, whoever furnishes repairs, supplies, towage, use of dry dock or marine railway, or other necessities may have a maritime lien on the relevant vessel. Based on US case law, 'other necessities' can comprise a large variety of other claims but the case law is too extensive to discuss in this context. Again, as noted above, US case law is relevant due to its incorporation into Marshall Islands law.

Notwithstanding that the Marshall Islands is not a prominent jurisdiction for vessel arrests, the Admiralty Jurisdiction Act 1986 does contain rules governing the arrest of vessels. Where an action *in rem* has been commenced, and the court is satisfied that the vessel to which the action relates will be removed out of the jurisdiction of the court before the plaintiff's claim is satisfied, the court may issue a warrant for the arrest and detention of that vessel, provided, however, that no warrant will be issued if the defendant, or any person who has entered an appearance, in such action:

- a* pays into court the amount claimed in such action or an amount equal to the appraised value of the vessel or the property to which such action relates; or
- b* gives bail, guarantee or other security, to the satisfaction of the plaintiff to the action, for the payment of such amount.

Where any vessel or property has been arrested and detained in pursuance of a warrant, the court may, on an application by the defendant or any other person who has entered an appearance in the action relating to such vessel or property, make an order releasing such vessel or property if such defendant or other person subsequently:

- a* pays into court, the amount claimed in such action or an amount equal to the appraised value of the vessel or property that has been arrested or detained; or
- b* gives bail, guarantee or other security, to the satisfaction of the plaintiff to the action, for the payment of such amount.

ii Court orders for sale of a vessel

As noted above, very few (if any) foreclosures of commercial vessels have taken place in the Marshall Islands. The Maritime Act confers jurisdiction with respect to foreclosures of mortgages on the High Court of the Marshall Islands. And, in accordance with the Admiralty Jurisdiction Act, when the Court determines an arrested vessel is subject to 'speedy decay', the Court may, on an application made by the Chief of Revenue of the Marshall Islands, direct that such vessel be sold and the proceeds deposited in court, pending the determination of the action. Hence, Marshall Islands procedure is much like the Anglo-American procedure permitting the interlocutory sale of a vessel.

VI REGULATION

i Safety

The Office of the Maritime Administrator discusses the safety regime in the Marshall Islands as follows:

The Marshall Islands is a sovereign nation that has been a full member of the United Nations (UN) since 1991 and its maritime agency, the IMO, since 1998. [...] It is an active participant in the deliberations of the IMO and is one of the original sponsors of the concept of the Member State Audit Scheme. [...]

Pursuant to Section 155 of the Maritime Act, the international conventions and agreements to which the Marshall Islands is or may become a state party, shall be complied with by all vessels documented under the laws of the [Marshall Islands] that are engaged in foreign trade. [...]

The Maritime Administrator is committed to providing the highest quality ship registry and flag state administration found anywhere in the world. The premise of this commitment is the Maritime Administrator's understanding of the need to balance timely and effective compliance with the provisions of UNCLOS, all international conventions, regulations, procedures and practices contained in IMO instruments (such as SOLAS, MARPOL, the STCW Convention, Load Lines Convention, the Tonnage Convention, the Colregs and the MLC), and other mandatory instruments to which the [Marshall Islands] is a party, with the professional knowledge of, and pragmatic appreciation for, the complexities of conducting international trade in today's world without unnecessary interference.²

ii Port state control

The Marshall Islands is not a major hub of commercial shipping activity and as such there is little to say about port state control. The Marshall Islands is better known for the responsible exercise of its authority as flag state. The Marshall Islands' record as a flag state under white lists for both the Paris MoU and the Tokyo MoU, and its holding Qualship 21 status with the USCG for nine consecutive years, has been exemplary for an open registry with comparatively few detentions or bannings by port states of Marshall Islands-flagged vessels.

iii Registration and classification

Any seagoing vessel engaged in foreign trade, wherever built, owned by a citizen or national of the Marshall Islands, or a foreign maritime entity qualified in the Marshall Islands may be registered under the Marshall Islands flag. In addition, the following vessels may be registered if owned by such a party:

- a* any decked commercial fishing vessel of 24 metres or more in length, engaged in foreign trade, wherever built;
- b* any commercial yacht of 24 metres or more in length;
- c* any private yacht of 12 metres or more in length; and
- d* any vessel under construction, provided that a vessel under construction may only be registered in the name of the party making the application for such registration.

² Office of the Maritime Administrator, Marine Notice No. 1-000-4 Rev. 11/13.

Generally, vessels may not be registered under Marshall Islands flag if they are older than 20 years of age; however, both the minimum length restrictions referred to and the 20-year maximum age limitation may be waived at the discretion of the Maritime Administrator.

In addition, almost as an historical footnote to political crises that have plagued other jurisdictions, for vessels newly entering the flag, the Maritime Administrator may, for good cause shown, including but not limited to cases of international, civil, political or military crisis, temporarily suspend or modify certain requirements of registration, and allow such vessels to be registered.

iv Environmental regulation

The Marshall Islands is a contracting state to SOLAS, including the Protocols of 1978 and 1988. It is also a party to the Colregs, as amended, as well as the INMARSAT Convention and other significant conventions related to the safe operation of vessels. The Marshall Islands is a participating member of the IMO and has implemented the ISM Code, the International Life-Saving Appliance Code (LSA Code), the International Code for Fire Safety Systems and all other SOLAS, MARPOL and STCW-mandated international codes and IMO maritime safety Resolutions and Conventions. Pursuant to Section 155 of the Maritime Act, all vessels registered under Marshall Islands flag are required to comply with the terms of all such conventions and codes.

v Collisions, salvage and wrecks

As in the case of the safety regulations discussed above, the Marshall Islands is a party to, or has implemented, all the major conventions and codes relevant to environmental regulation including MARPOL 73/78, the OPRC Convention, as well as regional agreements such as the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region.

vi Passengers' rights

Part II of the Carriage by Sea Act provides for certain protections and rights of passengers that applies to international carriage of passengers (and luggage) but only if the contract for carriage has been made in a state which is party to the Athens Convention, as amended, and the place of departure or destination is in such a state. Moreover, the statute is inapplicable in the event the applicable carriage is mandatorily the subject of a civil liability regime under another convention. This statute also contains a limitation of liability regime not unlike that contained in the law relating to the carriage of cargo.

vii Seafarers' rights

The Marshall Islands has adopted a Merchant Seaman Act, which codifies and expands on the older Seamen's Protection Act. These Acts provide for, *inter alia*, prohibitions against unjustifiable discharge, overtime pay, repatriation rights and similar provisions. In addition, the Marshall Islands has acceded to the MLC.

VII OUTLOOK

The Marshall Islands has recently amended the Maritime Act in two areas pertinent to ship financing. First, the Marshall Islands has introduced the concept of the recording of a

'financing charter' in respect of a vessel. In light of the recent spate of bankruptcies in shipping that have resulted in serious questions as to the nature of the interest that a vessel owner had under a lease, when that lease was intended (or could be construed) as an alternative financing structure, the Marshall Islands permits the recording of a financing charter on a vessel. Previously, in a US bankruptcy court, such a lease was re-characterised as a financing contract; since the lease was not recorded anywhere the vessel could be considered to be an asset of the lessee (charterer) and the owner as nothing more than an unsecured creditor of the lessee. The intent of this new legislation is to provide a basis for the owner to assert its status as a secured creditor in such a bankruptcy, a secured creditor having a considerably more favourable position in such proceeding.

Second, the Marshall Islands has amended the Maritime Act to permit the registration of a vessel under construction and the recording of a mortgage against such a vessel. The value of this latter amendment will likely be limited to those circumstances wherein certain export subsidy programmes assist in the provision of construction finance but which, by their terms, require a mortgage as security. Before this, it was not possible to convey a security interest in a vessel under construction by way of a mortgage.

Chapter 32

NEW ZEALAND

*John Knight*¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

New Zealand is predominantly a shipper, not a carrier.² Its shipping policy reflects the ‘philosophy that the country’s interests are best served by being a ship-using rather than a ship-operating nation’.³ In 2014/2015, over 99 per cent of New Zealand’s exports and imports by volume were transported by sea.⁴

As in most advanced economies, the shipping industry contracted during the global financial crisis. Fortunately, New Zealand’s recession was relatively shallow and, since the March quarter of 2010, the economy has rebounded with annual growth averaging 2.2 per cent, and was strong by historical standards in 2014.⁵

1 John Knight is a partner at Chapman Tripp. The author wishes to thank Chapman Tripp solicitor Gabrielle Scott-Jones for her help in preparing this chapter, and previous Chapman Tripp solicitors Armando Neris and BoHao (Steven) Li, for their assistance in preparing the previous editions of this chapter.

2 As described by Paul Myburgh ‘New Zealand Transport Law’ in M Huybrechts (ed.) *International Encyclopaedia of Laws: Transport Law* (2nd edn, Kluwer Law International, The Hague/Boston, looseleaf, 2000) at [7].

3 See New Zealand Treasury ‘New Zealand Economic and Financial Overview 2015’ (April 2015) (available at www.treasury.govt.nz/economy/overview/2015) at 21. Treasury states that New Zealand’s policies seek to ensure for exporters and shippers unrestricted access to the carrier of their choice and to the benefits of fair competition among carriers.

4 Maritime New Zealand Annual Report 2014/2015 (November 2015) (available at www.maritimenz.govt.nz).

5 New Zealand Treasury ‘New Zealand Economic and Financial Overview 2015’ (April 2015) at 9–11.

External trade is of fundamental importance to New Zealand. Exports of goods and services make up over 30 per cent of New Zealand's GDP. New Zealand is reliant on exports of commodity-based products as the main source of export receipts, and on imports of raw materials and capital equipment for industry.⁶

Australia, China, North America, the European Union and the Association of South-East Asian Nations (ASEAN) take around 10 per cent and 25 per cent each of New Zealand's goods exports. Japan and the Republic of Korea are other major trading partners.⁷

There are 18 seaports on the New Zealand coast. Port companies operate 13 of New Zealand's 14 commercial ports.⁸ Of the commercial ports, 14 are engaged in exporting and 13 importing. In the year to September 2015, there had been:⁹

- a* exports valued at NZ\$43.9 billion with a gross weight of 39.3 million tonnes, of which 65 per cent were bulk exports and 35 per cent were containerised (by value, 82 per cent containerised and 18 per cent bulk exports);¹⁰ and
- b* imports valued at NZ\$53.3 billion with a gross weight of 20.0 million tonnes.¹¹

Overseas vessels chartered by international shipping lines and registered in open-registry jurisdictions transport most of New Zealand's bulk cargo tonnage. Around 30 international shipping lines call at New Zealand ports.¹² Fifteen major international routes are trans-Tasman and South-East Asia routes. 3,343 port visits were made by 934 overseas ships

6 Ibid.

7 New Zealand Treasury 'New Zealand Economic and Financial Overview 2015' (April 2015) at 12.

8 New Zealand Treasury 'New Zealand Economic and Financial Overview 2015' (April 2015) at 21. These companies operate at arm's length from their predominantly local authority owners, although four are partly privatised and listed on the New Zealand Stock Exchange.

9 See the Ministry of Transport's full report entitled 'Freight Information Gathering System & Container Handling Statistics October 2014 – September 2015' (December 2015). Further Import and Export Statistics can be available at the Statistics New Zealand website (www.stats.govt.nz/browse_for_stats/industry_sectors/imports_and_exports/overseas-cargo-statistics.aspx).

10 Of the 39.3 million tonnes, 23.3 million tonnes, were forestry products (the majority by volume). By value, of the NZ\$43.9 billion, dairy made up NZ\$12.0 billion.

11 Of the 20.0 million tonnes, 8.2 million tonnes were oil and coal. By value, NZ\$9.9 billion was vehicles, NZ\$8.07 billion was oil and coal, and NZ\$7.9 billion was chemicals, plastics, and rubber.

12 New Zealand Treasury 'New Zealand Economic and Financial Overview 2015' (April 2015) at 21.

in the year to September 2015, with the largest ship having a TEU capacity of 5,057.¹³ New Zealand-registered ships, by contrast, are mainly involved in domestic (coastal) and Pacific Island routes.¹⁴

Apart from cargo shipping:

- a* each year on average 12 million tonnes of oil are transported around New Zealand's coastline;¹⁵
- b* over 1,500 fishing vessels operated around the coastline, generating NZ\$1.4 billion in the year ending in 2014;¹⁶
- c* 5 million passengers a year use harbour ferries in Auckland;¹⁷
- d* 1 million passengers and more than 230,000 vehicles cross the Cook Strait (between the North and South Islands) annually on 7,000 interisland ferry crossings;¹⁸ and
- e* in the 2014/2015 cruise season more than 30 cruise ships spent 716 vessel port days in New Zealand.¹⁹

The marine industry is New Zealand's largest non-primary manufacturing industry, worth NZ\$1.6 billion.²⁰ While New Zealand does not build many commercial vessels, it is well known for the design, build and refit of superyachts and luxury launches.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

New Zealand has a three-tier scheme of primary legislation, regulations and tertiary rules giving effect to its obligations under various maritime conventions. Primary legislation prescribes the framework for the maritime regime, and subordinate regulations and orders

13 The five main ports have increasingly large proportions of their import/export containers travelling on ships of 4,000 TEU or more: Lyttelton Port (67 per cent), Port Otago (60 per cent), Port of Tauranga (48 per cent), Ports of Auckland (36 per cent), Port of Napier (37 per cent). In the quarter ending June 2012 there were five ship visits from ships 5000 TEU or greater, in the quarter ending September 2015, there were 43. Approximately 43 per cent of import and export containers travel by ships 4,000 TEU or greater.

14 There are four vessels regarded as domestic ships (ships registered in New Zealand) for the purposes of the Freight Information Gathering System: *Spirit of Endurance*, *Spirit of Independence*, *Spirit of Resolution*, and the *Spirit of Canterbury*.

15 Maritime New Zealand Annual Report 2014/2015 (November 2015) (available at www.maritimenz.govt.nz).

16 New Zealand Treasury 'New Zealand Economic and Financial Overview 2015' (April 2015) at 18; and Maritime New Zealand Annual Report 2014/2015 (November 2015) (available at www.maritimenz.govt.nz).

17 Auckland Transport 'Statistics Report March 2014' (March 2014) at 14.

18 Maritime New Zealand Annual Report 2014/2015 (November 2015) (available at www.maritimenz.govt.nz).

19 Maritime New Zealand Annual Report 2014/2015 (November 2015) (available at www.maritimenz.govt.nz).

20 See *NZ Marine News Winter* 2015, p 32 (available at www.nzmarine.com).

contain administrative and mechanical provisions. Tertiary maritime rules, often formulated by Maritime New Zealand (MNZ), a Crown entity, are promulgated to give effect to technical standards.

The Maritime Transport Act 1994 (MTA) is the principal statute governing maritime activity. Broadly, it regulates:

- a* maritime activity;
- b* the powers and duties of MNZ;
- c* maritime offences;
- d* limitation of liability for civil maritime claims;
- e* civil liability for marine pollution;
- f* protection of the marine environment (including criminal liability for discharges from ships beyond the territorial sea); and
- g* the international carriage of goods by sea.

The Maritime Transport Act (Conventions) Order 1994 and the Maritime Transport (Marine Protection Conventions) Order 1999 list the conventions given effect to by the MTA.²¹ A number of more recent conventions are also either incorporated directly into the MTA or given effect to by subordinate legislation.²²

There were significant amendments to the MTA through the Maritime Transport Amendment Act 2013 (the MTA Amendment Act 2013) concerning the regulation of, and civil liability for, pollution of the marine environment, the catalyst for which was the grounding of the *MV Rena* in October 2011.²³

The most important tertiary rules underpinning the MTA are:

- a* the Maritime Rules: concerned with (*inter alia*) ship operations, ship design, construction and equipment, the health, safety and welfare of ships' personnel, documentation, and pilotage and navigation;²⁴ and
- b* the Marine Protection Rules (subset of the Maritime Rules): concerned with preventing pollution by discharge of harmful substances from ships, oil pollution

21 The international conventions include the Salvage Convention 1989, the STCW Convention, the LLMC Convention 1976, MARPOL, OPRC, the 1992 Protocol to amend the CLC Convention Convention, the 1996 Protocol to the London Dumping Convention, the Intervention Convention, the Oil Pollution Fund Convention, the Colregs and SOLAS.

22 Examples include the LLMC Protocol 1996, the Bunker Convention and the Intervention Protocol.

23 The 2013 amendments (*inter alia*) give direct force of law to the LLMC Convention 1976, the LLMC Protocol 1996, and extend the MTA to incidents where the Intervention Protocol applies. At the same time, oil pollution levies to feed into the Oil Pollution Fund established under the MTA have been increased under the Maritime Transport (Oil Pollution Levies) Order 2013 to meet the costs of maintaining New Zealand's oil pollution preparedness and response system. For more information on the *MV Rena* disaster, see Bevan Marten 'The *Rena* and liability' [2011] NZLJ 341.

24 The Maritime Rules give effect to a number of conventions, including the STCW, the Colregs and SOLAS.

preparedness and response, the dumping of waste, compulsory public liability insurance for damage from oil pollution, and the notification of shipping operations involving harmful substances.²⁵

Apart from the MTA, other relevant maritime-related legislation includes:

- a* Admiralty Act 1973 (AA) and Part 25 of the High Court Rules 2008 (HCRs): contain rules and procedures governing the admiralty jurisdiction;
- b* Carriage of Goods Act 1979 (CGA): regulates domestic carriage of goods by sea;
- c* Biosecurity Act 1993: contains requirements for the discharge of ships' ballast water from overseas;
- d* Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act): establishes an environmental management regime for New Zealand's Exclusive Economic Zone (EEZ) and continental shelf and (following 2013 amendments) will, at a time to be appointed, assume jurisdiction from the MTA for harmful substance discharges in the EEZ or continental shelf by structures (e.g., offshore installations) and ships engaged in mining activity;
- e* Health and Safety at Work Act 2015 (HSW): non-sector specific safety legislation that extends to (among others) seafarers working onboard New Zealand flagged ships;
- f* Maritime Security Act 2004 (MSA) and Maritime Security Regulations 2004: give effect to (aspects of) SOLAS and the ISPS Code by introducing security measures around ships and ports;
- g* Maritime Crimes Act 1999: provides for specific criminal provisions relating to maritime matters, which are intended to give effect to the Rome Convention and Rome Protocol;²⁶
- h* Mercantile Law Act 1908:²⁷ governs rights and liabilities under shipping documents and the delivery of goods, liens for freight, and warehousing of cargo;
- i* Port Companies Act 1988: provides for the formation of port companies and management and operation of the commercial aspects of ports;
- j* Resource Management Act 1991 (RMA) and Resource Management (Marine Pollution) Regulations 1998: regulate discharges from ships and offshore installations within 12 nautical miles from shore. Monitoring and enforcement is carried out by regional councils;
- k* Ship Registration Act 1992 (SRA): provides for ship registration, transfer of ownership and mortgages; and
- l* Shipping Act 1987: contains the objectives of New Zealand's shipping policy relating to outward shipping and exempts outward shipping from the restrictive trade practices provisions in the Commerce Act 1986.

25 The Marine Protection Rules give effect to a number of Conventions, including MARPOL, the London Dumping Convention, OPRC and CLC Convention.

26 That is, the Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 and the Rome Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf 1988.

27 The Contract and Consumer Law Bill, if enacted, will combine a number of contracts and commercial law statutes, including the Mercantile Law Act 1908, into a single statute.

III FORUM AND JURISDICTION

i Courts

Jurisdiction broadly depends on: (1) proper service of process establishing territorial jurisdiction or submission to jurisdiction; (2) the type of claim; and (3) power to grant the remedy sought.²⁸

Territorial jurisdiction

Civil jurisdiction over an intended defendant in an action *inter partes* depends on valid service under the relevant procedural rules (Parts 6 and 25 of the HCRs).²⁹ Service out of the jurisdiction for *in personam* proceedings is permissible in certain circumstances.³⁰

Procedural rules governing High Court admiralty actions are contained in Part 25 of the HCRs.³¹ Admiralty jurisdiction will arise in an *in rem* proceeding where there has been valid service in accordance with the HCRs upon the res within New Zealand's territorial jurisdiction.³² A notice of proceeding *in rem* may not be served out of the jurisdiction.³³ Proceedings endorsed with both *in rem* and *in personam* claims may be served out of the jurisdiction in respect of the *in personam* claim only.³⁴

The *forum non conveniens* doctrine may be able to be invoked if there is a competent foreign forum in which the case can be more suitably tried.³⁵ However, in an *in rem* action,

28 In the New Zealand context, see the illuminating seminar by David Goddard and Campbell McLachlan Private International Law – Litigating in the trans-Tasman context and beyond (NZLS CLE Seminar, Wellington 2012) at 15–56. For a classical exposition, see Lawrence Collins (ed) *Dicey, Morris and Collins on the Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2015).

29 *Cockburn v. Kinzie Industries Inc* (1998) 1 PRNZ 243 (HC). In certain situations, substituted service will be permissible. The HCRs are incorporated in Schedule 2 of the Judicature Act 1908. The District Courts Rules 2014 (DCRs) cross-reference the HCRs on service in DCRs 5.66–5.70 and Part 6. For detailed analysis of procedural rules, see *Sim's Court Practice* (online ed, LexisNexis) at Part 25 and McGechan on Procedure (online ed) at Part 25.

30 HCR 25.7(3) applies HCRs 6.27–6.35 for service out of the jurisdiction of *in personam* proceedings in the admiralty jurisdiction. For protests to jurisdiction where civil proceedings are served outside the jurisdiction, see HCRs 5.49 and 6.29. For jurisdictional objections in admiralty proceedings, see HCR 25.17.

31 For the District Courts, the procedural rules for the admiralty jurisdiction are contained in Part 20, Subpart 6 of the DCRs.

32 See HCR 25.10(1)(a) and (b).

33 HCR 25.8(4).

34 HCR 25.8(4) and (5).

35 *Wing Hung Printing Co v. Saito Offshore Pty Ltd* [2011] 1 NZLR 754 (CA) at [30]. A New Zealand court will consider a wide range of factors to determine which forum is most appropriate: see, for example, David Goddard and Campbell McLachlan Private International Law – Litigating in the trans-Tasman context and beyond (NZLS CLE Seminar, Wellington, 2012) at 48–50.

security provided by arresting the vessel will usually be a significant factor weighing in favour of New Zealand proceedings, unless equivalent security in the foreign forum can be provided.³⁶

Claims courts are competent to hear

Shipping disputes are typically resolved in the High Court, which exercises a general (statutory and inherent) civil jurisdiction over all types of dispute,³⁷ as well as admiralty jurisdiction to determine *in rem* and *in personam* admiralty actions.³⁸ The High Court is the only court with the jurisdiction to determine disputes involving sums greater than NZ\$200,000. The District Courts have jurisdiction to determine civil or admiralty *in personam* proceedings for lesser amounts.³⁹

Remedial jurisdiction

New Zealand courts may grant common law, equitable or statutory remedies. Civil and admiralty (*in rem* and *in personam*) jurisdiction may be exercised concurrently.⁴⁰

The Accident Compensation Act 2001 (ACA) prevents (subject to exceptions) proceedings in respect of 'personal injury' claims.⁴¹

Limitation periods generally expire six years after the date of the act or omission on which the claim is based as per the Limitation Act 2010.⁴² There are a number of exceptions, the most notable being for 'late knowledge' of certain facts necessary to be able to bring a claim.⁴³

Additional limitation periods include:⁴⁴

- a* a one-year time limit for claims in respect of loss or damage to goods under a contract of carriage governed by the Hague-Visby Rules;⁴⁵
- b* a one-year time limit (except in the case of fraud) on actions against a carrier for loss of goods under the CGA.⁴⁶ Loss or damage must be notified within 30 days (subject to exceptions);⁴⁷

36 *Swards v. The Ship 'Derwent Enterprise'* HC Wellington AD 397, 8 October 1996; and *Tomita v. The Unnamed Vessel Formerly Known as 'Amami Taiki Go' and Also Known as 'Intrepid'* HC Auckland AD 36/00, 8 December 2000.

37 See Part 1 of the Judicature Act 1908.

38 AA, Section 3(1)(a). Section 4(2) of the AA also provides that the High Court retains the admiralty jurisdiction it enjoyed prior to commencement of the Act.

39 District Courts Act 1947, Section 29; and AA, Section 3(1)(b).

40 AA, Section 3(2) and 3(3). Equitable relief such as specific performance and injunctions may be granted in the admiralty jurisdiction.

41 ACA, Section 317(1).

42 Limitation Act 2010, Section 11(1).

43 Limitation Act 2010, Sections 11(2)–(3) and 14.

44 Limitation periods in relation to the enforcement of foreign judgments (and arbitral awards) are addressed below.

45 Article 3(6) of the Hague-Visby Rules provides that suit must be brought within one year after delivery of the goods or when the goods should have been delivered.

46 CGA, Section 19.

47 CGA, Section 18(1).

- c no action for discharge of oil from a CLC Convention ship, or for discharge or escape of bunker oil from a Bunker Oil Convention Ship, may be brought unless proceedings are commenced within three years after the date on which the claim arose (and not later than six years after the event);⁴⁸
- d a one-year time limit for MTA offences (not running while person charged is beyond the territorial sea);⁴⁹ and
- e a six-month time limit for RMA offences.⁵⁰

ii Arbitration and ADR

Parties may include enforceable arbitration agreements (specifying the seat of arbitration, procedural rules, and the law of the contract) in their commercial contracts.

There are no maritime-specific arbitration procedures. Domestic arbitrations are governed by the Arbitration Act 1996, which implements, with some amendments, the 1958 New York Convention and the 1985 UNCITRAL Model Law on International Commercial Arbitration.⁵¹

Many maritime disputes are resolved offshore by private arbitration. However, the Maritime Law Association of Australia and New Zealand has a panel of arbitrators and specialised arbitration rules that parties may adopt. Mediation and expert determination may also be contractually adopted as precursors to litigation.

Where proceedings in a matter subject to an arbitration agreement are brought in New Zealand, the court must, if requested, stay those proceedings and refer the parties to arbitration, subject to certain exceptions.⁵² Granting a stay of *in rem* proceedings in favour of arbitration will not necessarily result in unconditional release of an arrested vessel. A court has discretion to retain security if there is a significant prospect of an *in rem* judgment being obtained.⁵³

Limitation enactments apply to arbitral claims as they apply to civil proceedings.⁵⁴

48 MTA, Section 361.

49 MTA, Section 411.

50 RMA, Section 338(4).

51 For a detailed treatment of arbitration in New Zealand, see David Williams and Amokura Kawharu, *Williams and Kawharu on Arbitration* (LexisNexis NZ, Wellington, 2011).

52 Arbitration Act 1996, Schedule 1, Article 8. For detailed consideration of Article 8, see the Supreme Court decision in *Zurich Australian Insurance Ltd v. Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383; and the earlier Court of Appeal decision *Zurich Australian Insurance Ltd v. Cognition Education Ltd* [2013] NZCA 289, [2014] 3 NZLR 289.

53 The applicability of *The Rena K* [1979] QB 377 was confirmed by the High Court in *Raukura Moana Fisheries Limited v. The Ship 'Irina Zharkikh'* [2001] 2 NZLR 801 (HC) in which Young J also indicated that he was attracted to the view that an overall stay of proceedings under the Arbitration Act 1996 should not be available in respect of *in rem* proceedings because of the inability of an arbitrator to make an *in rem* award.

54 Limitation Act 2010, Section 39.

iii Enforcement of foreign judgments and arbitral awards

Depending on the circumstances, foreign judgments may be enforced through an action at common law, by registering the judgment under the Reciprocal Enforcement of Judgments Act 1934 or the Trans-Tasman Proceedings Act 2010 (TTPA), or by registering a memorial of judgment under Section 56 of the Judicature Act 1908.⁵⁵

A foreign judgment may be enforced through an action at common law where:⁵⁶

- a the foreign court's jurisdiction to give that judgment is recognised by New Zealand law;
- b the judgment is for a debt, or definite sum of money (but not a sum payable in respect of taxes or other charges of that nature, or in respect of a fine or penalty); and
- c the judgment is final and conclusive.

An *in rem* judgment of a foreign court will be recognised where the prerequisites as to jurisdiction and finality are met, and can be enforced by *in rem* proceedings in New Zealand.⁵⁷ A foreign judgment pronounced *in rem* on a maritime lien will be binding even if the lien would not have arisen under New Zealand law.⁵⁸ The holder of the lien may enforce the judgment against the res regardless of the possessor's personal liability.⁵⁹

Enforcement of a foreign judgment can be resisted on grounds that it was obtained by fraud, that enforcement is contrary to public policy, or that the proceedings were contrary to New Zealand's conceptions of natural justice.⁶⁰

The Reciprocal Enforcement of Judgments Act 1934 provides for the registration of money judgments of foreign countries under Part 1 (being the United Kingdom and

55 Section 56 of the Judicature Act 1908 is a rarely used procedure for enforcement of a money judgment obtained in any court of 'Her Majesty's dominions' (i.e., under the sovereignty of the Crown) to which the Reciprocal Enforcement of Judgments Act 1934 does not apply.

56 *Von Wyl v. Engeler* (1998) 12 PRNZ 187 (CA). A judgment cannot be enforced at common law if it is a judgment to which Part I of the Reciprocal Enforcement of Judgments Act 1934 applies, thereby requiring registration under that Act per Section 8.

57 David Goddard and Campbell McLachlan Private International Law – Litigating in the trans-Tasman context and beyond (NZLS CLE Seminar, Wellington, 2012) at 57–90.

58 *Laws of New Zealand*, Maritime Law: Admiralty at [113]; and *The Despina GK* [1983] QB 214.

59 *Ibid.*

60 *Kemp v. Kemp* [1996] 2 NZLR 454 (HC) at 458.

certain other countries).⁶¹ A statutory conception of 'jurisdiction' is prescribed.⁶² The most important prerequisites for registration are that the judgment must be final and conclusive, capable of being enforced in the country in which it was given, and not have been wholly satisfied.⁶³ The Act addresses circumstances in which registered judgments may be set aside (similar to common-law bases).⁶⁴

The TTPA ensures most final money and non-money judgments of Australian courts are able to be recognised and enforced in New Zealand.⁶⁵ Broadly, a final and conclusive judgment given in a civil proceeding is registrable and enforceable in New Zealand.⁶⁶ The only defences to enforcement are that the judgment is contrary to public policy or registration contravened the TTPA.⁶⁷ A proceeding *in rem* may be set aside where the subject matter was moveable property not situated in Australia at the time of the proceeding.⁶⁸

There is (generally) a six-year limitation period on enforcement of any foreign judgment (including an arbitral award entered as a judgment) from the date on which judgment became enforceable (or registrable) irrespective of the mode of enforcement.⁶⁹

61 Relevantly, the Reciprocal Enforcement of Judgments Act 1934 also applies to any judgment given by a court in a country (other than Australia) in respect of which the CLC Convention is in force, to enforce claims in respect of liability for discharge of harmful substances or waste: see Section 369 of the MTA. Part 1 of the Reciprocal Enforcement of Judgments Act 1934 also applies to any judgment given by a court against the International Oil Pollution Fund (IOPF) in a country in respect of which the Oil Pollution Fund Convention is in force. Subsections (3) and (4) of Section 6 of the Reciprocal Enforcement of Judgments Act 1934 (relating to jurisdiction) have no effect in the case of any such judgment: Section 382 of the MTA.

62 Reciprocal Enforcement of Judgments Act 1934, Sections 6(1)(b) and 6(3)–(4); and *Morgan v. Brierley Holdings Ltd HC Auckland CIV-2008-404-3725*, 1 September 2009.

63 Reciprocal Enforcement of Judgments Act 1934, Sections 3 and 4.

64 Reciprocal Enforcement of Judgments Act 1934, Sections 6(1)(a) and (c)–(e) and 6(2).

65 A judgment given by a court in Australia to enforce a claim in respect of liability incurred under Part II of the Protection of the Sea (Civil Liability) Act 1981 (Aust) (or any later Australian enactments corresponding to Section 345 of the MTA, relating to liability of shipowners for pollution damage) must be treated as a registrable Australian judgment for the purposes of subpart 5 of Part 2 of the Trans-Tasman Proceedings Act 2010.

66 Trans-Tasman Proceedings Act 2010, Section 54(1).

67 Trans-Tasman Proceedings Act 2010, Section 61.

68 Trans-Tasman Proceedings Act 2010, Section 61(2)

69 See Limitation Act 2010, Section 35(1). The court has the ability to order that the limitation defence not apply: Sections 35(5) and (6). The principles on which the discretion will be exercised are not prescribed by the Act. See also Trans-Tasman Proceedings Act 2010, Section 56(2)(c); and Reciprocal Enforcement of Judgments Act 1934, Section 4(1).

Arbitral awards are enforceable under the Arbitration Act 1996, subject to procedural requirements and limited grounds for refusing enforcement.⁷⁰ The limitation period for enforcement of an arbitral award or entry of an arbitral award as a judgment is six years after the date it became enforceable.⁷¹

IV SHIPPING CONTRACTS

i Shipbuilding

There is no specific statutory regime for shipbuilding contracts – general contract law applies. Determination of property interests in a partly completed vessel, and when property passes to a ship's purchaser, depends on the terms of the shipbuilding contract and rules regarding passing of title in the Sale of Goods Act 1908.⁷²

ii Contracts of carriage

New Zealand has two main statutes governing carriage of goods by sea:

- a* the MTA (incorporates the Hague-Visby Rules for international carriage of goods by sea);⁷³ and
- b* the CGA (governs domestic carriage of goods).⁷⁴

New Zealand has not signed or ratified the Hamburg Rules or Rotterdam Rules. In cases of multimodal carriage involving international and domestic stages, the Hague-Visby Rules cover international carriage of goods by sea from loading to discharge.⁷⁵ Any other stage performed in New Zealand is subject to the CGA.⁷⁶

70 Arbitration Act 1996, Schedule 1, Articles 35–36.

71 Limitation Act 2010, Section 36. The court may, if it thinks it just to do so, order that relief may be granted in respect of the claim as if no limitation defence applies: Section 36(4).

72 Sale of Goods Act 1908, Part 2. Property interests in partly completed vessels are not usually registrable under the SRA because such vessels will not usually meet the definition of 'ship' in Section 2(1).

73 MTA, Section 209(1). The Hague-Visby Rules comprise the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 24 August 1924 (Hague Rules) as amended by the First (Visby Rules) Protocol of 23 February 1968 and the Second (SDR) Protocol of 21 December 1979. Section 212 of the MTA repealed the Sea Carriage of Goods Act 1940, which gave domestic effect to the Hague Rules in respect of outward, but not inward, carriage of goods by sea. In limited cases, the Sea Carriage of Goods Act 1940 continues to apply to contracts made before the commencement of the MTA: Section 213(1).

74 For a useful exegesis of carriage of goods contracts in New Zealand, see Paul Myburgh and Geoff Mercer 'Practical Aspects of the Law Relating to Carriage of Goods' (Continuing Legal Education Seminar, Auckland District Law Society, May 1995).

75 MTA, Schedule 5, Article 1(e).

76 Terms in combined (multimodal) transport documents that govern domestic transport stages and which are inconsistent with the provisions of the CGA are of no application: CGA, Sections 5–7.

New Zealand has (partially) deregulated cabotage.⁷⁷ The MTA provides⁷⁸ that no foreign ship may carry ‘coastal cargo’⁷⁹ unless it is:⁸⁰

- a* passing through New Zealand waters while on a continuous journey from a foreign port to another foreign port, and is stopping in New Zealand to load or unload international cargo; and
- b* whose carriage of coastal cargo is incidental to carriage of international cargo.

A foreign ship may only load and unload coastal cargo at a New Zealand port: (1) at which it loads or unloads international cargo; or (2) that it is scheduled to pass in the course of its continuous journey.

International carriage of goods by sea

The Hague-Visby Rules (incorporated in Schedule 5 of the MTA) have direct force of law in New Zealand.⁸¹ Carriage of goods by sea from a New Zealand port to a foreign port is governed by Part 16 of the MTA.

The Hague-Visby Rules apply to every bill of lading (BOL) relating to the carriage of goods between ports in two different states if:⁸²

- a* the BOL is issued in a contracting state;⁸³
- b* the carriage is from a port in a contracting state; or
- c* the contract evidenced by the BOL provides that the Hague-Visby Rules or legislation giving effect to them (e.g., MTA) are to govern the contract.

77 See Chuyang Liu *Maritime Transport Services in the Law of Sea and the World Trade Organisation* (Peter Lang, Bern, 2009) at 171–174 for an analysis of New Zealand cabotage reform.

78 MTA, Section 198(1)(c).

79 ‘Coastal cargo’, in relation to any ship, means (1) passengers who initially board the ship at a New Zealand port for carriage to and final disembarking from that ship at another New Zealand port; or (2) goods initially loaded on the ship at a New Zealand port for carriage to and final unloading at another New Zealand port: see MTA, Section 198(6).

80 The only other type of foreign ship that may carry coastal cargo is a foreign ship on demise charter to a New Zealand-based operator who employs or engages crew to work on board the ship under an employment agreement or contract for services governed by New Zealand law: Section 198(1)(b).

81 MTA, Section 209(1). The scheme of the Hague-Visby Rules, and the extent to which carriers are liable for loss or damage to goods, was recently outlined by the Supreme Court in the leading case, *Tasman Orient Line CV v. New Zealand China Clays Ltd* [2010] NZSC 37.

82 MTA, Schedule 5, Article 10. The MTA also extends the application of the Hague-Visby Rules to carriage of goods by sea evidenced by a non-negotiable document (other than a BOL or similar document of title) that contains express provision to the effect that the Hague-Visby Rules are to govern the carriage as if the document were a BOL.

83 As to ‘Contracting States’, see Section 211 of the MTA which creates a rebuttable presumption for the Secretary of Foreign Affairs and Trade to certify that, for the purposes of the Rules, a State specified in the certificate is a Contracting State.

Parties may not limit the New Zealand courts' jurisdiction in respect of a:⁸⁴

- a BOL, or a similar document of title, relating to the carriage of goods from any place in New Zealand to any place outside New Zealand (or vice-versa); or
- b non-negotiable document (other than a BOL or similar document of title) that contains express provision to the effect that the Hague-Visby Rules are to govern the carriage as if the document were a BOL.

However, arbitration agreements and foreign 'choice of law' clauses are generally enforceable.⁸⁵

The obligation to pay freight is a common law and contractual obligation, enforceable by a carrier's lien.⁸⁶ Generally, a BOL will provide that freight payment is earned when the goods are delivered to the carrier and loaded onto the ship.⁸⁷ The Mercantile Law Act 1908 provides for continuation of liens where a shipowner gives notice to a warehouse owner.⁸⁸

Domestic carriage of goods by sea

Domestic carriage of goods by sea is governed by the CGA.⁸⁹ It applies to 'every carriage of goods, not being international carriage, performed [...] by a carrier pursuant to a contract' (even if the ship is simultaneously engaged in international carriage).⁹⁰

The CGA creates a framework for liability for all those involved in domestic carriage. 'Carrier' is defined widely to include persons who procure carriage but do not perform the

84 MTA, Section 210(1).

85 MTA, Section 210(2); *Mobil Oil New Zealand Ltd v. The Ship 'Stolt Sincerity' HC Auckland AD628/93*, 14 March 1995. Arbitration must be commenced within the one-year time limit imposed by the Hague-Visby Rules: MTA, Schedule 5, Article 3(6). See also Paul Myburgh 'New Zealand' in William Tetley (ed) *Marine Cargo Claims* (Vol 2, 4th ed, Thomson Carswell, Canada, 2008) at 2532.

86 See Robin Burnett and Vivienne Bath, *Law of International Business in Australasia* (Federation Press, Australia, 2009) at 139–140.

87 For a recent New Zealand example of the contractual obligation to pay freight arising out of the *MV Rena* disaster, see *Resource New Zealand Limited v. Mediterranean Shipping Co SA* [2014] NZHC 292. In that case, MSC's entitlement to the freight charges arose according to the contract before *MV Rena* left port (with the timber on board) despite the fact that the timber was never delivered.

88 Mercantile Law Act 1908, Part 4.

89 The leading New Zealand Supreme Court decision is *Ports of Auckland Ltd v. Southpac Trucks Ltd* [2009] NZSC 112, [2010] 1 NZLR 363.

90 CGA, Sections 5 and 9(6)–(7). The Act applies mandatorily to domestic carriage of goods, including cargo handling within New Zealand ports: see *Fletcher Panel Industries Ltd v. Ports of Auckland* [1992] 2 NZLR 231 (HC). 'International carriage' is defined as meaning 'carriage from any port in New Zealand to any port outside New Zealand, or to any port in New Zealand from any port outside New Zealand, commencing when the goods are loaded onto a ship and ending when they are discharged from a ship': CGA, Section 2. *Fletcher Panel Industries* held that the effect of the definition of 'international carriage' was that the ship's tackle constitutes the demarcation between domestic and international carriage, and all activity on the port side of the ship's tackle falls under the CGA.

work ('contracting carriers') as opposed to 'actual carriers'.⁹¹ The Act provides (subject to exceptions) for strict liability for carriers for loss or damage to goods. But loss caused by delay in delivery is not covered, so common law principles apply.

The CGA recognises four types of carriage contract:⁹²

- a* 'At limited carrier's risk': this essentially amounts to strict liability with limited defences.⁹³ It is the default liability regime.
- b* 'At owner's risk': the carrier will only be liable for intentionally causing loss or damage.
- c* 'At declared value risk': the carrier's liability is the same as 'at limited carrier's risk', but liability is limited as specified in the contract.
- d* 'On declared terms': the contracting parties may regulate the carrier's liability under the contract.

Subject to limited defences,⁹⁴ the default rule is that the contracting carrier is liable to the contracting party for loss or damage to any goods while the contracting carrier is responsible for them,⁹⁵ whether caused by the contracting carrier or by an actual carrier.⁹⁶

The right to sue for freight arises when each carrier ceases to be responsible for the goods.⁹⁷ The right to sue is supported by a lien.⁹⁸ If the owner does not pay within two months' notice of the lien, the carrier may sell the goods by public auction.⁹⁹

iii Cargo claims

In practice, few cargo claims make their way to a hearing – most disputes are settled on commercial terms. The High Court has statutory and inherent jurisdiction to hear cargo claims in the civil jurisdiction, and admiralty actions *in rem* and *in personam*.¹⁰⁰

91 CGA, Section 2. 'Carriage' includes any 'incidental service', defined as any service (such as that performed by consolidators, packers, stevedores and warehousemen) undertaken to facilitate the carriage.

92 CGA, Section 8.

93 CGA, Section 17.

94 A carrier will avoid liability if he or she can prove that the loss or damage resulted directly, without fault on his or her part, from an inherent vice; or breach of the contracting party's statutorily implied warranties relating to the condition, packing and lawfulness of the consignment; or seizure under legal process; or saving or attempting to save life or property in peril: CGA, Section 14.

95 CGA, Section 9(2).

96 CGA, Section 9(1).

97 CGA, Section 21. An action for recovery of freight may be brought against the consignee if property in the goods has passed to the consignee: CGA, Section 22.

98 CGA, Section 23(2). The carrier's lien is active, which means there is a right to sell the goods in certain circumstances. The carrier's lien is also particular, which means that it is confined to the sum owing in relation to the goods held, and does not extend to a general balance of account.

99 CGA, Section 23(5).

100 Under Section 4(1)(g) of the AA, admiralty jurisdiction extends to any claim for loss of or damage to goods carried in a ship.

Who has the right to sue?

The Mercantile Law Act 1908 governs rights and liabilities under shipping documents, including title and the right to sue. A person falling into one of the following categories has rights of suit on a BOL or similar document governed by the Hague-Visby Rules:¹⁰¹

- a lawful holder of the BOL;
- b consignee identified in a sea waybill as being entitled to delivery; or
- c person entitled to delivery of goods specified in a ship's delivery order.

Under the CGA, the 'contracting carrier' is liable to the 'contracting party' (either the consignor or consignee, depending on who contracted for carriage).¹⁰² A non-contracting consignee may sue the contracting carrier for loss or damage if property in the goods has passed to the consignee.¹⁰³

Who should be sued?

Interpretation of the Hague-Visby Rules in New Zealand is similar to English law. The key issue is the identity of the 'carrier' – determined based on the BOL in accordance with contractual construction principles.¹⁰⁴ In practice, the proper defendants in a contractual cargo claim are likely to be the ship (*in rem*) and the shipowner or the contracting carrier (e.g., charterer).¹⁰⁵ There may also be a right to sue shipowners in tort.¹⁰⁶

Demise and identity of carrier clauses that transfer liability to the shipowner are, in principle, enforceable provided they are given sufficient prominence on the face of the BOLs, and are not contradicted by written terms.¹⁰⁷

101 Mercantile Law Act 1908, Section 13B(1). The transferal of rights of suit and liabilities under BOLs and similar documents is not dependent on property passing at a specific stage of the transaction.

102 CGA, Section 9.

103 CGA, Section 20. As passing of property triggers the non-contracting consignee's right of suit against the carrier, problems may arise in cases where the risk of loss or damage has already passed to the consignee, but property has not. In such cases, the consignee will, apart from where the Contracts (Privity) Act 1982 applies, be forced to rely on the cooperation of the contracting consignor.

104 *Homburg Houtimport BV v. Argosin Pvt Ltd & Ors* (The Starsin) [2003] 1 Lloyd's Rep 571 (HL). See John F Wilson, *Carriage of Goods by Sea* (7th ed, Pearson Longman, London, 2010) at 246 (and the cases cited therein).

105 John F Wilson, *Carriage of Goods by Sea* (7th ed, Pearson Longman, London, 2010) at 244. See, generally, William Tetley (ed.) *Marine Cargo Claims* (Vol. 1, 4th edn, Thomson Carswell, Canada, 2008) who recommends that suit be brought against all possible contenders.

106 For instance, where the shipowner is an independent contractor of the charterer. However, shipowners may be able to rely on a Himalaya clause or other mechanism (e.g., the Contracts (Privity) Act 1982) to exempt or limit liability in tort in accordance with the BOL. See Paul Myburgh 'Interpreting Bills of Lading: The Lords Giveth and the Lords Taketh Away' [2003] NZLJ 253.

107 See Paul Myburgh 'New Zealand' in William Tetley (ed.), *Marine Cargo Claims* (Vol. 2, 4th edn, Thomson Carswell, Canada, 2008).

Under the CGA (subject to limited exceptions) the contracting carrier is directly liable to the contracting party.¹⁰⁸ An actual carrier is generally liable to the contracting carrier (who may seek compensation from the responsible actual carrier for loss or damage to goods).¹⁰⁹

Damages

The measure of damages under the Hague-Visby Rules is the reduction in value of the cargo at delivery (i.e., arrived sound market value less arrived damaged market value).¹¹⁰ Consequential losses are excluded, except by agreement.¹¹¹ Loss by delay is usually contractually excluded, but where it is not, loss of market may be recoverable if it was in the reasonable contemplation of the parties.¹¹²

Under the default CGA regime, the contractual measure of damages is recoverable, including consequential losses arising out of the contract provided it meets the common law requirements (e.g., causation and remoteness).¹¹³

Courts have a discretionary power to award interest¹¹⁴ or legal costs (including increased or indemnity costs) to successful claimants, together with disbursements.¹¹⁵

iv Limitation of liability

Limitation of liability is governed either by contract or by default statutory regimes incorporating conventions on limitation of liability.

Cargo claims

For cargo claims, both the Hague-Visby Rules and the CGA limit carriers' liability (by default):

- a* the Hague-Visby Rules limit liability for loss or damage unless the nature and value of goods has been declared by the shipper before shipment and inserted in the BOL; and
- b* the CGA limits liability of the contracting carrier to the contracting party to NZ\$2000 for each 'unit of goods' lost or damaged.¹¹⁶ This limit applies unless the

108 CGA, Section 9.

109 CGA, Section 10. There is an exception in the case of insolvency of the contracting carrier: CGA, Section 11. There is also an exception where the actual carrier intentionally caused the loss or damage whereby the goods owner retains its common law right to sue the actual carrier directly in tort or bailment.

110 William Tetley (ed), *Marine Cargo Claims* (Vol 1, 4th ed, Thomson Carswell, Canada, 2008) at 761 et seq. See also MTA, Schedule 5, Article 5(b).

111 *Ibid.*, at 788.

112 *Ibid.*, at 790.

113 *Transtext Network New Zealand Ltd (In Liquidation) v. Greaney* [2001] 3 NZLR 378 (HC).

114 Judicature Act 1908, Section 87.

115 HCRs, Part 14.

116 CGA, Section 15(1). As to the definition of 'unit of goods', see CGA, Section 3.

contract is 'on declared terms' or another amount is specified in a contract 'at declared value risk'.¹¹⁷ Limitation of liability does not apply to intentional loss or damage, delay or consequential damages.¹¹⁸

Overall limitation of civil liability

A shipowner has a general right to limit civil liability, save in exceptional cases.¹¹⁹ The limitation of civil liability regime (the 'overall limit') for maritime claims applies to New Zealand or foreign ships in cases where the High Court has admiralty jurisdiction.¹²⁰

Following the *MV Rena* grounding, the limitation of liability regime in the MTA was reformed.¹²¹ Prior to 2013, Part 7 (unsatisfactorily) paraphrased the LLMC Convention 1976.¹²² Further, the LLMC 1996 Protocol was not incorporated into New Zealand law.

Part 7 now gives direct force of law to the LLMC Convention (incorporated in Schedule 8) as amended by the LLMC Protocol (incorporated in Schedule 9). The relevant limits on liability for qualifying claims are prescribed by the Protocol.¹²³ Those limits are now able to be amended by Order in accordance with Article 8 of the Protocol.¹²⁴

The right to limit liability may be pleaded as a defence to an admiralty action, or may take the form of an in personam action.¹²⁵ The constitution and distribution of a limitation fund, together with a bar on other actions, is provided for in the LLMC Convention.

V REMEDIES

i Ship arrest

Ship arrest is provided for in the AA and Part 25 of the HCRs.¹²⁶

117 CGA, Section 8.

118 CGA, Section 15(2).

119 *Daina Shipping Company v. Te Runanga O Ngati Awa* [2013] 2 NZLR 799 (HC).

120 MTA, Section 83.

121 See Maritime Transport Amendment Act 2013.

122 For the problems involved in the pre-2013 regime, see the recent *MV Rena* case, *Daina Shipping Company v. Te Runanga O Ngati Awa* [2013] 2 NZLR 799 (HC), where the Court had to 'correct' the MTA to enable the constituting of a limitation fund. See also *Tasman Orient Line CV v. Alliance Group Ltd* [2004] 1 NZLR 650 (HC).

123 A person liable is not entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

124 MTA, Section 87A.

125 See HCR 25.25.

126 For detailed treatment of the ship arrest jurisdiction in New Zealand, see Damien J Cremean *Admiralty Jurisdiction: Law and Practice in Australia, New Zealand, Singapore and Hong Kong* (4th ed, Federation Press, Australia 2015); *Laws of New Zealand Maritime Law: Admiralty; and Sim's Court Practice* (online ed, LexisNexis).

An admiralty claim (in personam or *in rem*) must be based on a maritime lien or otherwise fall within one of the 18 claims enumerated in Section 4(1) of the AA.¹²⁷ Section 5 prescribes those claims which can be commenced *in rem* against a 'particular ship' (in respect of which a claim arose) or one of its 'sister ships'.

Where there is a maritime lien on any ship, aircraft, or other property for the amount claimed, an action *in rem* may be commenced against the particular res.¹²⁸

An action *in rem* may also be commenced for Section 4(1) claims provided that:

- a* for claims specified in paragraphs (a) to (c) and (s) of Section 4(1), an *in rem* action may be invoked only against the particular ship or property in respect of which the claim arose;¹²⁹ and
- b* for claims specified in paragraphs (d) to (r) of Section 4(1) 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 control of, the ship, the *in rem* action may be invoked against:¹³⁰
 - that ship if, at the time when the action is brought, it is beneficially owned as respects all the shares by, or is on charter by demise to, that person; or
 - any other ship (sister ship) that, at the time the action is brought, is beneficially owned or on charter by demise as aforesaid.¹³¹

Where an *in rem* action is commenced, a plaintiff (or counter-claimant) may apply for a warrant to arrest the res.¹³² The party applying for the warrant must conduct an Admiralty Registry search to determine whether any caveat against arrest is extant.¹³³

127 The AA also expressly preserves the inherent jurisdiction of the Admiralty Court as it existed before the AA came into force: Section 4(2). Section 2 of the AA defines a maritime lien 'without derogating from the generality of the term' as including a lien in respect of bottomry, respondentia, salvage of property, seafarers' wages and damages.

128 AA, Section 5(1). There is no statutory requirement for a link between the personal liability of the owner of the ship or property and the ownership at the time when the proceedings are commenced in order to bring a claim *in rem* under Section 5(1). Maritime lien claims cannot be brought against sister ships, although claims which give rise to maritime liens may provide a basis for statutory *in rem* claims under Section 5(2).

129 AA, Section 5(2)(a).

130 AA, Section 5(2)(b)

131 Accordingly, a sister ship can be the subject of *in rem* proceedings if the person who would be liable on the claim in personam was the owner or charterer or in possession or control of the ship in connection with which the claim arose at the time the cause of action arose, and, at the time the action *in rem* is brought against the sister ship, the sister ship is beneficially owned as regards all the shares in the ship by, or on demise charter to, the person who would be liable on the claim.

132 HCR 25.34(1).

133 HCR 25.34(3). The entry of a caveat against arrest does not prevent the issue of a warrant of arrest: HCR 25.43(2).

Arrest procedure

The following documents must be filed on application for an arrest warrant: (1) application; (2) affidavit in support;¹³⁴ (3) indemnity and security to registrar for fuel, expenses, and harbour dues; (4) draft notice of arrest by registrar; and (5) warrant of arrest.¹³⁵

For a compliant arrest application, the registrar must (1) complete the certificate on the application for a warrant and (2) issue the warrant.¹³⁶ A warrant must be served by the registrar in the manner prescribed for service of a notice of proceeding *in rem*.¹³⁷

A caveat can be requested (with a security undertaking) to prevent an arrest. The caveator must undertake to give security in a sum specified in the request.¹³⁸ Entry of a caveat does not prevent an arrest warrant, but where a party arrests caveated property, that party will be liable for damages on application to set aside the arrest unless good and sufficient reason for arrest is shown.¹³⁹ Where property has been arrested and, for instance, several parties have claims against it, any of those parties can prevent the release of property in an action *in rem* or payment of proceeds out of court by filing a request for a caveat against release or payment.¹⁴⁰

134 For the requirements of the affidavit, see HCR 25.34(4)(a).

135 See HCRs 25.34–25.38. The relevant forms are annexed to Schedule 1 of the HCRs at AD1–AD17. Court filing fees are contained in the High Court Fees Regulations 2013. The current fees for filing an initiating document (notice of proceeding) is NZ\$1,350 and an application for the issue of a warrant of arrest under HCR 25.34 is currently NZ\$1,500.

136 HCR 25.35(3).

137 HCR 25.36(1) and (2). Where the action is brought in relation to a ship, cargo, or other property on board a ship, the proceedings must be served by attaching a sealed copy of the notice close to the bridge, or some conspicuous part of the ship, or next to an entrance way to the superstructure, or accommodation section of the ship, and by leaving a copy of the notice with the person apparently in charge of the ship, if that person is available at the time of service: HCR 25.10(1)(a) and (b).

138 HCR 25.42.

139 HCR 25.43(2).

140 HCR 25.46(1).

Ships may be arrested via helicopter or chase boat within New Zealand's territorial waters,¹⁴¹ provided the warrant is properly served.¹⁴² Once served, custody of the ship passes to the court until the action is determined, or the vessel is released (under authority of an instrument of release)¹⁴³ or sold under court order.¹⁴⁴

Bunker arrest

Whether bunkers can be arrested independently of the ship has not been tested, but is unlikely, and would in any case depend on the bunkers being the subject of a maritime lien. Bunkers may be able to be arrested as part of an arrested 'ship' provided the bunkers are in the ownership of the shipowner. The trend of Australian authority is in that direction.¹⁴⁵ However, in one New Zealand case, it was remarked (*obiter*) that a 'ship' includes permanent structures, components, and accessories but not its bunkers.¹⁴⁶

Arrest of ship for security

A claim may be brought for security where there is reason to believe an arbitral award or *in personam* judgment may not be satisfied. The High Court stated that although certain claimants were not New Zealand based, proceedings *in rem* could be issued if a vessel in which the respondent had a qualifying interest was to visit New Zealand (the purpose being to obtain security for foreign arbitration claims).¹⁴⁷ Similarly, an action commenced under a contract containing an arbitration clause was stayed on condition that the shipowners provide security.¹⁴⁸

Security and counter-security

An arrest (or threat of arrest) will usually result in agreement with the plaintiff that security be provided to avoid detention of the ship. Where property under arrest is released, the

141 For example, on 15 June 2013, the registrar arrested the log carrier *New Giant* by attaching the original arrest writ to the hull of the vessel by tape. The *New Giant* was anchored in Poverty Bay and was not allowed to berth at the Gisborne Wharf.

142 A warrant of arrest can be served at any time. The registrar (or his or her duly appointed officer or agent) must give notice of the arrest of property by serving on any person or by affixing on a conspicuous part of the property a notice in form AD10: HCR 25.38.

143 A party interested in any property arrested under a warrant of arrest may request a registrar to issue an instrument of release in form AD12 for the release of the property unless the property is sold under an order of the court: HCR 25.44. A registrar may issue a release on payment into court of the amount claimed in the notice of proceeding together with the costs of issue and execution of the warrant of arrest; or on security for those amounts given to the satisfaction of the registrar: HCR 25.45.

144 HCR 25.44(1).

145 *Scandinavian Bunkering AS v. The Bunkers on Board The Ship FV 'Taruman'* [2006] FCAFC 75; see also Matthew Harvey 'Arresting a 'Ship': Boats, Bunkers and Barometers' (available at www.mlaanz.org/uploads/matthewharvey.pdf).

146 *Mobil Oil NZ Ltd v. The Ship 'Rangiora'* HC Auckland AD 877, 10 August 1999.

147 *Lee v. Korea Line Corporation* HC Auckland CIV-2011-404-1315, 14 March 2011.

148 See *Raukura Moana Fisheries Ltd v. The Ship Irina Zharkikh* [2001] 2 NZLR 801, [2001] 2 Lloyd's Rep 319 (HC).

plaintiff is entitled to security on the basis of the reasonably arguable best case together with interest and costs.¹⁴⁹ Security cannot exceed the value of the ship. A P&I club guarantee is an accepted form of security.¹⁵⁰ If security is provided by a person not ordinarily resident in New Zealand, that person must usually submit to the court's jurisdiction.¹⁵¹

Counter-security is not required; however, an indemnity and security must be provided to cover fees and expenses incurred in keeping property under arrest.

Re-arrest and wrongful arrest

Where a ship or property is arrested and released on provision of security, it cannot generally be re-arrested on the same claim. In exceptional circumstances, a party will be permitted to re-arrest prior to judgment (e.g., inadequate initial security).¹⁵²

A claim for damages for wrongful arrest is available where the party arresting has acted in bad faith or with gross negligence.¹⁵³ At least one wrongful arrest claim has succeeded in New Zealand.¹⁵⁴

ii Court orders for sale of vessel

A party may request a commission for the appraisal and sale of any property under arrest on undertaking to pay the registrar's reasonable fees and expenses.¹⁵⁵

149 *Det Norske Veritas AS v. The Ship 'Clarabelle'* [2002] 3 NZLR (CA). Where money has been paid into court, it can only be paid out by court order, except where the written consent of all parties to the action, of any caveator, and of any intervener, has been obtained: HCR 25.49(1) and (2).

150 New Zealand courts have approved the provision of guarantees from the International Group of P&I Clubs: see *General Motors New Zealand Ltd v. The Ship 'Pacific Charger'* CA88/81, 16 July 1981; and subsequent decisions in the Wellington High Court on 21 and 24 July 1981.

151 HCR 25.48(2).

152 In *Det Norske Veritas AS v. The Ship 'Clarabelle'* [2002] 3 NZLR (CA), the court held that an interlocutory application to re-arrest the vessel was appropriate and available under the inherent jurisdiction of the court.

153 *Centro Latino Americano de Comercio Exterior SA v. Owner of the Ship 'Kommunar' (No. 3)* [1997] 1 Lloyd's Rep 22 at [80]–[82]. See also *Nalder & Biddle (Nelson) Ltd v. C & F Fishing Ltd* [2005] 3 NZLR 698 (HC). A wrongful arrest may also constitute an abuse of process.

154 An award of aggravated damages for wrongful arrest was available in *Transpac Express Ltd v. Malaysian Airlines* [2005] 3 NZLR 709 (HC) where bad faith or at least gross negligence had been established in applying for arrest since the plaintiff's commercial representative had known that there was no proper factual basis for the claim. The conduct of the plaintiff's lawyer, in deciding to institute proceedings when there was no jurisdiction (arrest of an aircraft was not available in the circumstances), was described as an error of judgement not amounting to bad faith or gross negligence and for which only compensatory damages would be available. See also *Nalder & Biddle (Nelson) Ltd v. C & F Fishing Ltd* [2007] 1 NZLR 721 (CA).

155 Appraisal and sale of property under arrest is addressed in HCR 25.51. A request in form AD15 must be filed, and payment for filing fees of NZ\$2,000 must be made.

A vessel may be sold, before or after final judgment, with or without appraisalment, either by public auction or by private contract.¹⁵⁶ The court has a broad discretion as to manner of sale.¹⁵⁷ Property under arrest can be sold before judgment where the costs of maintaining it are significant, although this is not normally done unless the vessel is deteriorating.¹⁵⁸ The gross proceeds of the sale will be brought into court.¹⁵⁹

A sale cannot be concluded for less than appraised value, unless the court is satisfied that a higher price cannot be achieved.¹⁶⁰ Sales are usually by registrar-appointed broker.¹⁶¹ A party who obtains judgment against the ship or its sale proceeds may apply for orders determining the order of priority of claims.¹⁶²

VI REGULATION

i Safety

The MTA is the principal maritime safety enactment, although much of the comprehensive regime regulating construction, operation, and navigation of vessels is found in the Maritime Rules.¹⁶³

Parts 19 to 25 (regulating ship operations and safety management systems) and Parts 40A to 49 (regulating ship design, construction, and equipment) of the Maritime Rules are most significant for present purposes. In particular:

- a Part 20 defines ships' operating limits, and sets standards for commercial ships, equipment, and qualifications of crewmembers.
- b Parts 19 and 21 provide for safe ship management systems (SSMS) to ensure compliance with prescribed standards relating to construction, stability, equipment, operating limits, operating parameters, crew qualifications and training, vessel maintenance, emergency procedures, and health and safety.¹⁶⁴ Section 1 (Part 21)

156 HCR 25.51(2).

157 Laws of New Zealand Maritime Law: Admiralty at [192].

158 HCR 25.51(3). *UFL Charters Ltd v. The Ship 'Malakhov Kurgan' HC* Christchurch CIV-2006-409-1370, 17 October 2006. For examples where orders were made despite opposition, see *Bank of Nakhodka v. The Ship 'Abruka'* (1996) 10 PRNZ 326 (HC); and *Glencore Grain BV v. Ship Lancelot* [2015] NZHC 2052. Such an order was refused in *Tomita v. The Unnamed Vessel Formerly Known as 'Amami Taiki Go' and Also Known as 'Intrepid' HC* Auckland AD36/00, 5 December 2001.

159 HCR 25.51(7).

160 Laws of New Zealand Maritime Law: Admiralty at [192].

161 *Ibid.* For an insight into the customary procedures, see *Mobil Oil NZ Ltd v. The Ship 'Rangiora'* [2000] 1 NZLR 49 (HC) (order for sale); *California Bank & Trust v. The Ship 'Cavu' HC* Whangarei CIV-2010-488-39, 23 March 2010 (order for appraisalment and sale) and *Mobil Oil NZ Ltd v. The Ship 'Rangiora' HC* Auckland AD877, 21 August 1998 (judgment on application concerning appointment of broker).

162 HCR 25.52 sets out the procedure for determining priority of claims against proceeds of the sale of a ship.

163 Health and safety issues regarding seafarers are addressed below.

164 MTA, Section 17(4). Part 21 prescribes the conditions of entry to a Safe Ship Management system and for remaining within that system.

applies to foreign SOLAS ships, and incorporates SOLAS Chapter IX by requiring shipowners to implement shore-based and shipboard SSMS in compliance with the International Safety Management Code (ISM). For New Zealand-registered ships, Part 19 implements a maritime operator safety system (MOSS) by which operators develop safety systems required for maritime transport operator certificates (MTOC).¹⁶⁵

- c* Part 22 contains the Colregs. The MTA imposes further obligations on shipowners and masters regarding accidents.¹⁶⁶
- d* Parts 24A–E address carriage, stowage, and securing of cargo, including dangerous cargo.¹⁶⁷
- e* Part 40B requires (broadly) foreign passenger ships, non-passenger ships exceeding 500 GRT and ships operating on the New Zealand coast that exceed 45 metres in length and that proceed beyond restricted limits to comply with SOLAS design, construction, telecommunications and equipment requirements.
- f* Part 46 implements SOLAS survey certification requirements for applicable New Zealand ships and foreign ships while at New Zealand ports.
- g* Part 47 prescribes requirements for assigning and marking load lines and issue of load line certificates.¹⁶⁸
- h* Part 48 requires certain New Zealand ships to be measured for tonnage and issued with tonnage certificates.¹⁶⁹
- i* Part 49 addresses testing, examination and inspection of ships' lifting appliances and loose cargo gear onboard ships.¹⁷⁰

165 Part 19 replaces Section 2 (Part 21). MOSS also replaces Part 46 (which guides surveys, certification and maintenance) with Part 44. Part 44 prescribes requirements for recognition as to who may be a surveyor and requirements for survey, certification, and maintenance of ships operated under an MTOC.

166 For instance, Section 30 requires every employer of seafarers on a New Zealand ship to maintain a register of accidents, incidents and mishaps, and by Section 31 a master of a ship that is involved in a mishap that results in serious harm to a person, an accident, or an incident, must notify the mishap, accident, or incident to MNZ as soon as practicable. Section 32 imposes obligations on masters to assist persons in danger, assist following a collision, and respond to distress calls, and Section 33 imposes a requirement that a master report dangers to navigation.

167 These Parts give effect to several aspects of SOLAS, the International Convention for Safe Containers 1972, and several IMO codes of safe practice.

168 Part 47 implements the requirements of the Load Line Convention and its 1988 Protocol.

169 The tonnage measurement and tonnage certificate requirements implement the International Convention on Tonnage Measurement of Ships 1969.

170 Part 49 complements the Code of Practice for Health and Safety in Port Operations. The Code of Practice and Part 49 implement the Occupational Safety and Health (Dock Work) Convention 1979.

Regional port and marine regulation

Part 3A of the MTA provides for local regulation of maritime activity by regional councils. The most important provisions relate to harbourmasters,¹⁷¹ port operations,¹⁷² and navigation by-laws.¹⁷³ Harbourmasters have extensive powers to perform prescribed duties conferred to ensure maritime safety. Obligations are placed on regional councils to promulgate navigation by-laws and prescribe ship traffic separation and management schemes.¹⁷⁴ Finally, port operation provisions require operators not to operate in a manner causing unnecessary risk, and include a comprehensive regime for port inspection and audit to ensure health and safety standards are upheld. The non-legally binding New Zealand Port and Harbour Marine Safety Code¹⁷⁵ and Code of Practice for Health and Safety in Port Operations are also of practical import to port operators in this regard.¹⁷⁶

Maritime security

The MSA was enacted in the aftermath of 9/11 to ‘enhance ship and port security’ and to ‘prevent international terrorism’.¹⁷⁷ It establishes a maritime security framework to reduce the risk of security incidents affecting ships or ports, and reflects New Zealand’s adoption of Chapter XI-2 of SOLAS by implementing the ISPS Code. It contains provisions necessary for:

- a* assessing security risks for individual ships and port facilities;
- b* developing ship and port facility security plans based on risk assessments;
- c* specifying security levels at which ships and port facilities must operate;
- d* maintaining communication protocols for ships and port facilities;
- e* preventing unauthorised access to ships, port facilities, and restricted areas; and
- f* preventing the introduction of unauthorised weapons, incendiary devices, or explosives to ships and port facilities.

The MSA (in Part 2) imposes security measures for ports and ships (e.g., mandated security plans and systems) and (in Part 3) provides for preventive security measures concerning access to, and security at, ports. The Maritime Security Regulations 2004, together with Rule 40B of the Maritime Rules, implement detailed technical security requirements.

171 MTA, Sections 33D–F.

172 MTA, Sections 33S–V.

173 MTA, Sections 33M–Q.

174 The navigation by-laws may be sourced directly from the regional councils.

175 The Code was introduced together with accompanying Guidelines for Port and Harbour Risk Assessment and Safety Management Systems in New Zealand, Guidelines for Providing Aids to Navigation in New Zealand, and Guidelines of Good Practice for Hydrographic Surveys in New Zealand Ports and Harbours. Additional Guidelines include the Guidelines on environmental factors affecting safe access and operations within New Zealand ports and harbours, Guidelines for aquaculture management areas and marine farms, and Guidelines in relation to safety management of power line waterway crossings.

176 Code of Practice for Health and Safety in Port Operations is based on the Occupational Safety and Health (Dock Work) Convention 1979.

177 MSA, Section 3.

ii Port state control

Port state control (PSC) of foreign ships is governed by the MTA.¹⁷⁸ MNZ has the power to detain, seize, or impose conditions upon the operation of dangerous or hazardous ships.¹⁷⁹

A PSC regime – the Tokyo MoU – has been in effect for major Asia-Pacific maritime nations since April 1994.¹⁸⁰ It requires members to establish and maintain an effective PSC system to ensure foreign merchant ships comply with appropriate international standards. New Zealand adopted the Tokyo MoU targeting system under which it aims to inspect 90 per cent of all high-risk vessels calling at its ports.¹⁸¹ In harmonising the Paris and Tokyo MoUs, a new inspection regime has been implemented from January 2014, under which ships are categorised by risk with corresponding inspection intervals.¹⁸² New Zealand and Australia signed a separate MoU in 1999 recognising each other's PSC inspections. Both countries operate identical PSC documentation and inspection data exchange regimes.

In 2014, there were 335 inspections of foreign vessels that revealed 620 deficiencies and resulted in nine detentions.¹⁸³

178 MTA, Section 54. The Director may require any person who holds a maritime document or operates, maintains, or services, or does any other act in respect of any ship to undergo inspections and audits in the interests of maritime safety or the health or safety of seafarers, or for the purposes of any provision of any of Parts 1 to 15. A recently added Section 54A also enables the Director to investigate maritime document holders in certain cases. There are 11 inspectors based at 11 ports throughout New Zealand.

179 MTA, Sections 55 and 397.

180 The governments whose maritime administrations are parties to the non-legally binding Tokyo MoU are Australia, Canada, Chile, China, Fiji, Hong Kong, Indonesia, Japan, Korea, Malaysia, the Marshall Islands, New Zealand, Papua New Guinea, Peru, the Philippines, the Russian Federation, Singapore, Thailand, Vanuatu and Vietnam. The MoU gives effect to a number of international conventions: see paragraph [2.1] of the MoU.

181 If a vessel had deficiencies at its last inspection, whether in New Zealand or any other member, it will be inspected on its next visit to New Zealand regardless of when the last inspection occurred.

182 See www.tokyo-mou.org/inspections_detentions/NIR.php.

183 Maritime New Zealand Annual Report 2014/2015 (November 2015) (available at www.maritimenz.govt.nz).

iii **Registration and classification**

Registration

The SRA establishes a Register of Ships, divided into Parts A and B.¹⁸⁴ It applies to all New Zealand-owned ships.¹⁸⁵ Registration under Part A confers nationality, is evidence of title, and enables registration of mortgages.¹⁸⁶ Part B registration only confers nationality.¹⁸⁷ Caveats against dealing may be entered in some cases.¹⁸⁸

It is compulsory for New Zealand-owned ships 24 metres and over to be registered under Part A except pleasure vessels and ships engaged on inland waters.¹⁸⁹ Foreign ships on demise charter to New Zealand-based operators are entitled to Part A registration.¹⁹⁰ Other New Zealand-owned ships are entitled to be registered under Part A or Part B, including ships not exceeding 24 metres.¹⁹¹ Registration under Part B is optional and includes pleasure vessels and ships less than 24 metres.¹⁹² Where such ships voyage overseas they must register under either Part A or B if New Zealand-owned.¹⁹³

184 The Fisheries Act 1996 contains a separate registration regime for commercial fishing vessels within New Zealand waters.

185 See the detailed definition of 'New Zealand ship' in SRA, Section 3. The SRA also applies to ships on 'demise charter to New Zealand-based operators', for the definition of which see Section 4.

186 SRA, Sections 13 and 34. New Zealand has two registers in which security interests over ships can be registered, one being the SRA and the other the Personal Property Securities Act 1999. The interrelationship between the two in respect of ships less than 24 metres is of some complexity. Ships 24 metres and over cannot be registered on the PPSR, only the SRA.

187 SRA, Section 57(1). Ships entitled under Section 8 to be registered (not being ships that are required by Section 6(2) to be registered) are also conferred nationality. As to mortgages, see SRA, Sections 39–45 and 70.

188 SRA, Sections 51–56.

189 SRA, Section 6(1). There is an exception in the case of pleasure vessels, ships engaged solely on inland waters of New Zealand, barges that do not proceed on voyages beyond coastal waters and certain other ships exempted by the Director of MNZ.

190 SRA, Section 8(1).

191 SRA, Section 8(1).

192 SRA, Section 8(2).

193 SRA, Section 6(2). The Minister of Transport may exempt from registration any New Zealand-owned ship that is being operated by a foreign resident under a demise charter, if the Minister is satisfied that the ship is registered, or will be registered in a foreign country and that it is, or will be entitled to fly that country's flag. The exemption is for the period of the relevant charter.

For registration, the registrar must be provided with a prescribed application and statutory declaration.¹⁹⁴ Part A applicants must furnish certain evidence and the ship must be surveyed by the MNZ Director.¹⁹⁵ Part B requires the name, description, and overall length of the ship, and shipowner details.¹⁹⁶

The purchase, sale, and ownership of ships is broadly governed by ordinary personal property principles.¹⁹⁷ Property in ships can be divided into 64 individual shares.¹⁹⁸ Transfer of ownership in a registered ship normally occurs on execution of a bill of sale. For transfer of ownership or shares registered under Part A, a bill of sale must be lodged with the registrar.¹⁹⁹

Classification societies

MNZ maintains a list of approved classification societies. Presently, those societies are the American Bureau of Shipping, Bureau Veritas, Class NK, Lloyd's Register International and DNV-GL.²⁰⁰

The leading authority on tortious liability of surveyors is *Attorney-General v. Carter*, where the Court held no duty of care was owed by surveyors because the survey certificates were part of a statutory safety regime thereby militating against imposition of a duty to guard against economic loss.²⁰¹ It has also been held that a classification society does not owe a duty to protect economic interests of ship purchasers.²⁰² The position may be different where loss is not purely economic.²⁰³

iv Environmental regulation

Protection of New Zealand's marine environment from vessel-source pollution is provided for by a combination of primary legislation, regulations, Maritime Protection Rules, standards, guidelines and conventions.

194 Registration fees specified in the Ship Registration (Fees) Regulations 2013 must be paid, and registration form SR2 must be submitted for Part A. As to the declaration, see SRA, Section 13.

195 SRA, Sections 14–15. A certificate specifying the ship's length and description (in the case of ships with a register length of no more than 24 metres) or the ship's gross and net tonnages and its description (in the case of ships with a registered length of more than 24 metres) is required.

196 SRA, Section 12(3).

197 SRA, Section 57(2).

198 SRA, Section 22. Most commonly, where ships are (for instance) jointly owned, the owners will form a holding company under the Companies Act 1993 in which they will be shareholders.

199 SRA, Sections 35–36.

200 See www.maritimenz.govt.nz/Publications-and-forms/Commercial-operations/SSM/Authorised-classification-societies.pdf. DNV GL was formed in September 2013 by the merger between Det Norske Veritas and Germanischer Lloyd.

201 *Attorney-General v. Carter* [2003] 2 NZLR 160 (CA).

202 *Castlelight Maritime SA v. China Corporation Register of Shipping & Anor HC Auckland CIV-2005-404-003423*, 14 December 2005.

203 For critique, see Paul Myburgh 'Shipping Law' [2003] NZLR 287.

The major international conventions implemented in New Zealand are:²⁰⁴

- a* the Intervention Convention and the Intervention Protocol;
- b* CLC Convention;
- c* the Oil Pollution Fund Convention;
- d* MARPOL;
- e* UNCLOS;
- f* the OPRC Convention;
- g* the London Dumping Convention and 1996 Protocol; and
- h* Civil Liability for Bunker Oil Pollution Damage 2001.

Environmental framework

The enactments governing vessel-source pollution are the RMA and MTA:

- a* Within New Zealand's territorial waters – the coastal marine area (CMA) – criminal liability for dumping of waste and discharge of contaminants and harmful substances from ships into water or air is governed by the RMA.²⁰⁵
- b* Within the EEZ (and beyond for New Zealand ships), criminal liability for discharge of harmful substances is governed by the MTA, as is liability for dumping into the EEZ or onto the continental shelf.²⁰⁶
- c* Civil liability for pollution damage is (generally) governed by the MTA.²⁰⁷

The EEZ Act has recently been amended to transfer regulation of exploratory and development activities in the EEZ and continental shelf to the Environmental Protection Agency.²⁰⁸ The amendments prohibit harmful discharge and dumping from structures and ships (where it is a mining discharge).²⁰⁹ The MTA will continue to regulate non-mining discharges and dumping from ships in the EEZ (and beyond for New Zealand-registered ships) as well as civil liability for pollution damage and marine oil spill response.

Two other relevant environmental enactments are the Biosecurity Act 1993, which contains requirements for discharge in New Zealand waters of ships' ballast water from overseas,²¹⁰ and the Hazardous Substances and New Organisms Act 1996, which governs importation and management of hazardous waste and products.

204 Maritime Transport (Marine Protection Conventions) Order 1999.

205 RMA, Sections 15A–15C.

206 MTA, Sections 226 and 261.

207 MTA, Part 25.

208 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.

209 Section 11 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Amendment Act 2013 sets out the demarcation points between regulation under the EEZ Act and the MTA.

210 It does so via import health standards promulgated under Section 22. The rules controlling the discharge of ballast water are spelled out in the Import Health Standard for Ballast Water from All Countries.

Vessel-source pollution within territorial waters – RMA

The provisions of the RMA and Resource Management (Marine Pollution) Regulations 1998, concerning discharge of contaminants from ships within the CMA, mirror MARPOL and the London Dumping Convention. Monitoring and enforcement is conducted by regional councils.

The principal provisions provide that no person may:

- a* dump or incinerate any waste from any ship in the CMA (unless allowed to by resource consent);²¹¹
- b* discharge a harmful substance²¹² or contaminant²¹³ or water from a ship into water, land or into air, unless the discharge is permitted or controlled by regulations, a (proposed) regional (coastal) plan, or resource consent.²¹⁴ There are exceptions if there is no significant adverse effect on the environment (and contaminants incidental to normal ship operations may be discharged);²¹⁵ or
- c* dump from any ship in the CMA any radioactive waste or radioactive matter.²¹⁶

A strict liability offence is committed where a person contravenes or permits a contravention of the RMA concerning unauthorised dumping or incineration of waste (including radioactive waste).²¹⁷ Where a harmful substance or contaminant or water is discharged from a ship in breach of the RMA, the master and ‘owner’ each commit a strict liability offence.²¹⁸ ‘Owner’ includes:²¹⁹

- a* persons with legal or equitable ownership, or possession of the ship; and
- b* any charterer, manager, or operator of the ship, or any other person (apart from a pilot) responsible for navigation of the ship. It captures time charterers, even where not responsible for ship management.²²⁰

Non-natural persons face a maximum penalty of NZ\$600,000 plus NZ\$10,000 per day for continuing offences.²²¹ Natural persons face a maximum penalty of imprisonment for two

211 RMA, Section 15A.

212 The definition of ‘harmful substance’ is prescribed in Regulation 3 of the Resource Management (Marine Pollution) Regulations 1998 as including petroleum in any form, substances specified in Schedules 1 and 2 of the Regulations, drainage, and wastewater.

213 ‘Contaminants’ are defined in Section 2(1) of the RMA to broadly include any substance that when discharged into water, changes or is likely to change the physical, chemical, or biological condition of water.

214 RMA, Section 15B.

215 Resource Management (Marine Pollution) Regulations 1998, Regulation 5.

216 RMA, Section 15C. ‘Radioactive waste or other radioactive matter’ means any waste or other matter containing any radioactive material within the meaning of the Radiation Protection Act 1965.

217 RMA, Section 338(1A).

218 RMA, Section 338(1B).

219 By Section 2(1), the definition of ‘owner’ in Section 222(2) of the MTA is imported into the RMA.

220 *Southern Storm (2007) Ltd v. Nelson City Council* [2011] 1 NZLR 715 (HC).

221 The penalties are contained in Section 339(1) and (1A) of the RMA.

years or a maximum NZ\$300,000 fine. An additional penalty of three times the commercial gain can be imposed where the offence was committed in the course of producing that gain.²²² Reparations for clean-up costs may be awarded.²²³ Offenders on foreign ships (with exceptions) cannot be imprisoned for such offences.²²⁴

Vessel-source pollution beyond CMA – MTA

Parts 18–27 of the MTA regulate vessel-source pollution beyond the CMA.²²⁵ They prohibit (unless otherwise authorised):

- a* harmful substances from being discharged from any ship into (*inter alia*) the EEZ or beyond the outer limits of the EEZ for any New Zealand ship;²²⁶
- b* dumping into the sea within the EEZ or the continental shelf beyond the outer limits of the EEZ;²²⁷ and
- c* dumping radioactive matter from any ship within the EEZ, the continental shelf beyond the EEZ's outer limits, or from a New Zealand ship beyond New Zealand continental waters.²²⁸

Where a harmful substance is discharged from a ship, the master and owner of the ship each commit a strict liability offence.²²⁹ The maximum penalty is imprisonment not exceeding two years or a fine not exceeding NZ\$200,000 plus NZ\$10,000 per day for continuing offences. A court may also order that clean-up costs be paid.²³⁰ An additional penalty of three times the value of any commercial gain may be imposed where the offence was committed in the course of producing that gain.²³¹ The master and owner of a ship each commit a strict liability offence if waste or other matter, or radioactive waste or matter, is taken on board a ship for dumping or is dumped.²³² The penalties are the same as for discharges (except imprisonment is not available for dumping of non-radioactive waste).²³³ Restrictions on imprisoning shipowners or masters of foreign ships also apply.²³⁴

222 RMA, Section 339B.

223 Sentencing Act 2002, Section 12.

224 RMA, Section 339A.

225 See Section 11 and Schedule 1 of the EEZ Amendment Act 2013 for the regulatory functions transferred to the EEZ Act. These principally concern regulation of offshore installations, marine operations, pipelines, and mining discharges from ships within the EEZ.

226 MTA, Sections 226 and 226A. A 'harmful substance' is any substance specified as so by the Marine Protection Rules.

227 MTA, Section 261. Part 21 implements the London Dumping Convention.

228 MTA, Section 258.

229 MTA, Section 237. 'Owner' is defined in Section 222(2) of the MTA. There are limits on persons against whom proceedings can be commenced beyond the territorial sea in Section 224. Section 243 contains certain defences, such as where a discharge occurs for the purpose of securing the safety of a ship.

230 MTA, Section 244(1).

231 MTA, Sections 244(1)(c) and 409.

232 MTA, Sections 263–264.

233 MTA, Sections 266–267.

234 MTA, Sections 244(2) and 267(2).

Marine Protection Rules (Parts 100–200) implement technical requirements regulating pollution.²³⁵ Summary offences for non-compliance are prescribed in the Marine Protection (Offences) Regulations 1998.

The marine environment is protected from ‘hazardous ships’ in Part 20 of the MTA in accordance with the Intervention Convention and Protocol.²³⁶ A host of other (more minor) requirements (and offences)²³⁷ are imposed under the MTA concerning reporting of discharges that are in breach of the RMA or the MTA, notifying arrivals of ships carrying oil or noxious liquid substances, and notifying transfers of harmful substances.²³⁸

Marine oil spill response

New Zealand gives effect to its OPRC obligations by providing for plans and responses to protect the marine environment in the event of oil spills.²³⁹ MNZ has produced a National Oil Spill Response Strategy and Plan, which enacts a three-tiered (on-site, regional, and national) response to oil spill containment.²⁴⁰ Oil spill contingency plans and on-scene commanders are provided for.²⁴¹

The Oil Pollution Advisory Committee (OPAC) has the role of advising MNZ on response strategy for oil spills, oil pollution levies, and use of the Oil Pollution Fund (OPF).²⁴² Part 24 contains the framework under which levies are imposed on ships to fund the OPF.²⁴³ The OPF meets costs involved in running OPAC, and planning, implementing and responding to oil spills.²⁴⁴

Civil remedies for vessel-source pollution

The MTA imposes civil liability for pollution damage in internal and marine waters (i.e., the CMA and EEZ). Specifically, where:

- a* the Crown or marine agencies have incurred clean-up costs in dealing with harmful substances or dumped waste, the owner of a ship must pay – subject to the overall limit – reasonably incurred clean-up costs. This provision does not apply to discharge of oil from CLC Convention ships;²⁴⁵ and

235 These rules implement provisions of MARPOL, the OPRC and the London Dumping Convention.

236 MTA, Section 248. The MNZ Director may instruct the master of any New Zealand ship or ship within New Zealand continental waters to render assistance to a hazardous ship, assist in operations for the cleaning up and control of harmful substances, and take on board any items or equipment.

237 MTA, Sections 244–245.

238 For example, MTA, Sections 227–230.

239 Parts 23 and 24 of the MTA.

240 MTA, Sections 283–285.

241 MTA, Sections 286–328. Shipboard and site marine contingency plans are required to be prepared, reviewed, and kept in accordance with Marine Protection Rules.

242 MTA, Section 282.

243 The current levies are specified in the Maritime Transport (Oil Pollution Levies) Order 2013.

244 MTA, Sections 330–331.

245 MTA, Section 344 (subject to the overall Part 7 limit).

- b* pollution damage is caused by discharge of harmful substances or dumping of waste, a claim in damages may be made – subject to the overall limit – against the owner of the ship.²⁴⁶ Costs incurred for any reasonable preventive measures taken by the Crown to reduce or eliminate a grave and imminent threat of a discharge may also be recovered under this provision.²⁴⁷

While the RMA does not apply to civil claims for pollution damage, it does provide the option of pursuing an enforcement order against a shipowner for breach of certain RMA provisions.²⁴⁸ Enforcement orders are discretionary remedies,²⁴⁹ which may be sought as part of a stand-alone action or in connection with sentencing²⁵⁰ (except for pollution damage by CLC Convention ships liable under Part 25 of the MTA).²⁵¹

Limitation of liability for civil claims

The overall limit on liability applies for MTA pollution claims against non-CLC Convention ships (whether for damages or clean-up costs).²⁵² There is debate as to whether it applies to reparations or enforcement orders, with some commentators arguing that clean-up costs exceeding the overall limit may be recovered.²⁵³

For oil spills from CLC Convention ships, liability is based on the CLC Convention and Oil Pollution Fund Convention.²⁵⁴ CLC Convention ships are not liable to the Crown for clean-up costs from oil discharges, but damages claims may be brought for oil

246 MTA, Section 345. The definition of ‘pollution damage’ in Section 342 means that claims may be made for a number of heads of loss, including cost of any reasonable preventive measures taken, costs of reasonable measures of reinstatement of the environment that are or are to be undertaken and losses of profit from impairment of the environment.

247 Prior to 2005, the MTA did not provide for the recovery by the Crown of spill response preparation costs where no pollution from a ship actually occurred. Following Chapman Tripp’s successful defence of the *Tai Ping* (a bulk carrier that ran aground near the entrance to Bluff Harbour in October 2002) on this basis, Section 345(1)(b) of the MTA was inserted in order to enable the Crown to recover such costs.

248 RMA, Section 314(1) may apply where breach of Sections 15A–15C is concerned.

249 Enforcement orders could be made under Section 314(1)(d) to require a person to pay money to or reimburse any other person for any actual and reasonable costs and expenses which that other person has incurred.

250 RMA, Section 316(1). No person (other than the Minister, the MNZ Director, a local authority, or a consent authority) may apply to the Environment Court for an enforcement order to require any person to comply with or cease contravening Section 15B.

251 RMA, Section 325B(3).

252 Sections 344 and 345 are ‘subject to’ Part 7. That this is the case is also emphasised by Section 347(6) which states that overall liability limits for pollution damage, other than oil pollution damage, from CLC Convention ships, are specified in Part 7.

253 For an excellent analysis, see Bevan Marten ‘Limitation of Liability in Maritime Law and Vessel-Source Pollution: A New Zealand Perspective’ [2013] NZLR 199. Stand-alone enforcement orders cannot be made against CLC Convention ships in any event.

254 MTA, Section 347.

pollution.²⁵⁵ Those damages claims for oil pollution are subject to the liability limits in the CLC Convention regime (not the overall limit).²⁵⁶ Part 26 provides another layer of compensation for oil pollution damage from the International Oil Pollution Fund under the Oil Pollution Fund Convention.²⁵⁷

Claims against CLC Convention ships may be made by the Crown for clean-up costs of harmful substances, and damages claims for pollution may also be made, provided the harmful substance or pollution is not oil, subject to the overall limit.²⁵⁸

The Bunker Convention, to which New Zealand is now a party,²⁵⁹ provides for strict liability for reasonable economic costs incurred by any affected party and for reasonable costs of environmental mitigation when bunker oil is released into the marine environment. Bunker Convention claims are subject to the overall limit.²⁶⁰

v Collisions, salvage and wrecks

Collisions

The Maritime Rules give domestic effect to the Colregs and the IMO Traffic Separation Schemes.²⁶¹ Liability for collisions is determined under tort law. Contravention of the Colregs (where established) is normally considered negligent.

Section 6 of the AA bars *in personam* claims for damage, loss of life or personal injury arising from collisions between ships, manoeuvres to avoid a collision, or non-compliance with the Colregs, unless:

- a* the defendant ordinarily resides in, or has a place of business within New Zealand;
- b* the collision took place within New Zealand territorial waters;
- c* an action arising from the same incident or series of incidents is proceeding in, or has been decided by, a New Zealand court; or
- d* the defendant has submitted to the New Zealand courts' jurisdiction.

255 MTA, Sections 344(2) and 347(1).

256 MTA, Section 347(1). The current limits are specified in clause 4 of the Maritime Transport (Maximum Amounts of Liability for Pollution Damage) Order 2003. Note the 2003 Supplementary Fund Protocol, which would increase the upper limits, is not in force.

257 MTA, Section 372. Claims may be made against the IOPF where (*inter alia*) the owner of the ship is not liable for the pollution damage under Part 25 or the pollution damage exceeds the maximum amount of liability of the owner of the ship determined under Section 347. Section 373 contains the maximum amounts of liability, Sections 378–383 set out the mechanical provisions in respect of proceedings against the IOPF, and Section 385 provides for levies on oil imports. Levies on oil imports (required to comply with the Oil Pollution Fund Convention) are presently imposed in accordance with the Maritime Transport (Fund Convention) Levies Order 1996.

258 MTA, Sections 344(2) and 347(1) and (6).

259 Maritime Transport (Marine Protection Conventions) Amendment Order 2014

260 See the Report of the Ministry of Transport and the Ministry for the Environment on the Marine Legislation Bill at 78.

261 See MTA, Part 22.

Salvage

Most salvage services are undertaken by contractual arrangement, most commonly using the LOF. As the LOF requires the salvage award to be fixed by negotiation or, ultimately, arbitration, salvage disputes are typically settled without judicial intervention.

The Salvage Convention is incorporated in Schedule 6 to the MTA.²⁶² Part 17 of the MTA contains supplementary provisions, mainly regarding salvage for the purposes of preserving life and the apportionment of salvage payments.

Wrecks

The wreck regime aims to minimise navigational hazards. The MTA requires anyone who ‘finds or takes possession of any wreck within the limits of New Zealand, or takes possession of and brings within the limits of New Zealand any wreck found outside those limits’ to notify the MNZ Director.²⁶³ If the finder is not the owner, he must deliver it to the police or allow the police to take possession of it. Failure to comply is an offence, resulting in loss of any salvage claim against the wreck and a fine of double the wreck’s value.

The MNZ Director has the power to remove and sell wrecked or derelict ships that are navigational hazards.²⁶⁴ Regional councils may also take steps to remove wrecks (or abandoned ships)²⁶⁵ within their region posing a hazard to navigation.²⁶⁶ The Director may take steps to remove the wreck if a regional council fails to do so.²⁶⁷

vi Passengers’ rights

Carriage of passengers by sea is principally regulated by the individual terms of the carriage contract, although some aspects are statutorily regulated. New Zealand has not ratified the Athens Convention.

Passengers

Owners of New Zealand ships and seafarers (including masters) have a general duty to take all practicable steps to ensure the ship does not cause harm.²⁶⁸

262 For a recent New Zealand decision on the scope of the Salvage Convention, see *Switzer Salvage BV v. Z Energy Ltd* [2013] NZHC 3541. For more detail, see Bevan Marten ‘Salvaging the Rena’ [2013] NZLJ 412.

263 MTA, Section 105.

264 MTA, Section 110.

265 MTA, Section 33L. The MTA Amendment Act 2013 inserted the new wreck provisions in Part 3A.

266 MTA, Section 33J.

267 MTA, Section 33K.

268 See MTA, Sections 17–19. Safety systems are implemented through specific SSMS schemes, such as MOSS. The Maritime Rules also set criteria for determining numbers of passengers to be carried on ships and impose standards and requirements for passenger accommodation. MNZ has compiled detailed safety guidelines entitled ‘Passenger and Non-Passenger Safety Guidelines’ (2007) (available at www.maritimenz.govt.nz/Publications-andforms/Commercial-operations/Shipping-safety/Health-and-safety/Safety-guidelines-Passenger-nonpassenger-vessels.pdf).

For international carriage of passengers not ordinarily resident in New Zealand, the Accident Compensation Act 2001 (ACA) will not apply while they are on board a ship that comes to or leaves New Zealand.²⁶⁹ Accordingly, non-residents' proceedings for personal injury on international ships are not barred by the ACA (although New Zealand may not be *forum conveniens*). If a claim is brought, a carrier's civil liability for death or injury will be determined according to tort law but is subject to the overall liability limit.²⁷⁰

Claims for personal injury suffered by persons ordinarily resident in New Zealand during international carriage are barred in New Zealand (but not necessarily in foreign courts) provided the injury would have been covered by the ACA if it had occurred in New Zealand.²⁷¹

In terms of carriage of passengers on domestic ships (where the ship remains within 300 nautical miles from New Zealand), the ACA bars proceedings against the carrier for personal injury in New Zealand.²⁷²

Baggage

Carriers' liability for damage to passengers' baggage during international carriage is determined in accordance with the contract of carriage, subject to the overall limit.

Domestically, carriers' liability for damage to checked baggage is determined under the CGA, meaning that carriers are, by default, strictly liable for loss or damage, subject to a NZ\$2000 limit for each item of baggage.²⁷³ The ordinary regime does not apply to hand baggage, for which the carrier is only liable for loss or damage caused by negligence or wilful default.²⁷⁴

vii Seafarers' rights

Seafarers' conditions of employment on New Zealand vessels are largely determined by their employment contracts under the Employment Relations Act 2000 and the non-sector specific statutory overlay (e.g., the HSW, Minimum Wage Act 1983, Wages Protection Act 1983 and Holidays Act 1981).

The MTA sets minimum health and safety standards and prohibits unacceptable maritime employment practices.²⁷⁵ Employers owe duties to seafarers on New Zealand ships going overseas concerning employment agreements, illness and injury, return of seafarers to their home country, and certificates as to the quality of seafarer's work.²⁷⁶ Employers also owe duties regarding provision of food and water, medical attention, and wage payments in the event of the loss or foundering of the ship.²⁷⁷

269 ACA, Section 23.

270 *Birkenfeld v. Yachting New Zealand Inc* [2009] 1 NZLR 499 (CA).

271 ACA, Section 22.

272 ACA, Sections 16(3), 20 and 317(1).

273 CGA, Sections 12 and 3(1)(h).

274 CGA, Section 12(4).

275 MTA, Sections 22–27.

276 MTA, Section 22.

277 MTA, Section 23, which gives effect to the ILO Convention (Unemployment Indemnity).

The major technical health, safety, and welfare regulation concerning seafarers is located in the Maritime Rules.²⁷⁸ MNZ introduced a seafarer-licensing framework for competency called 'SeaCert'. At the core of the framework are Maritime Rules covering seafarer certification, medical standards, training and examination.²⁷⁹ These Rules give effect to STCW and SOLAS. The Rules also govern medical stores and crew accommodation per the international conventions.²⁸⁰ Shipowners must provide training and supervision to employees to maintain compliance with prescribed safety standards and promote safety.²⁸¹

These Maritime Rules will be amended when the Marine Labour Conventions Amendments 2015 come into force reflecting New Zealand's ratification of the Maritime Labour Convention 2006 (MLC). The MLC comes into force on 9 March 2017 and applies to all foreign ships in a New Zealand Port, and New Zealand registered ships of 200 GTR or over (or smaller ships engaged in international voyages), that are ordinarily engaged in commercial activities (excluding fishing) and operating outside the inshore limits. Part 52 of the Maritime Rules will give effect to MLC requirements not covered elsewhere in New Zealand law. The MLC sets out minimum standards relating to the health, safety and welfare of seafarers.

The non-sector specific HSW applies to New Zealand ships and to foreign ships carrying coastal cargo while on demise charter to a New Zealand-based operator.²⁸² It contains general duties on 'persons conducting a business or undertaking' to eliminate risks to health and safety of workers, so far as is reasonably practicable, or to minimise those risks where it is not reasonably practicable to eliminate them.²⁸³ The HSW duties are supplemented by regulations. MNZ has also promulgated a Code of Safe Working Practices for Merchant Seafarers, aimed at seafarers on New Zealand-registered SOLAS ships, which has not yet been updated to reflect the HSW (which came into force on 4 April 2016).

Seafarers ordinarily resident in New Zealand are covered by the ACA scheme for personal injury while on board ships even if outside New Zealand, and are therefore barred from bringing proceedings (but not necessarily in foreign courts).²⁸⁴

Finally, in terms of seafarer compensation, there is admiralty jurisdiction for claims by a master or seafarers for unpaid wages,²⁸⁵ for which a maritime lien can attach.²⁸⁶

VII OUTLOOK

The past few years have been marked by significant reform of the statutory and regulatory framework that governs environmental and safety aspects of New Zealand's maritime

278 Maritime Rules, Parts 31–35 and 50–53.

279 Maritime Rules, Parts 31–35.

280 Maritime Rules, Parts 50–51. See ILO Accommodation of Crews Convention (Revised) 1949 and the Accommodation of Crews (Supplementary Provisions) Convention 1970.

281 MTA, Section 17.

282 HSW, Section 10.

283 HSW, Section 30.

284 ACA, Sections 20, 22 and 317(1).

285 AA, Section 4(1)(o).

286 AA, Section 2 ('maritime lien').

environment. Further substantial reform seems unlikely in the short term. The next few years will be a period for bedding in new arrangements – with the hope that the environmental provisions, in particular, will not be tested.

There will be a continued focus on health and safety in the maritime sector. After spending the last few years rolling out the MOSS safety system and the related seafarer-licensing framework (SeaCert), the domestic maritime industry will, as of 4 April 2016, be focused on implementing those HSW duties for maritime transport operators that were not specifically addressed by MOSS safety systems. The HSW is intended to ensure there is one system for managing workplace health and safety across New Zealand.

The MLC will come into force on 9 March 2017. MNZ will check for compliance with the MLC as part of its routine port state control inspections. The MLC contains a ‘no more favourable treatment’ clause that ensures that regardless of a ship’s flag, it may be subject to inspection and detention in relation to compliance with the MLC when visiting New Zealand.

In spite of low global oil prices, New Zealand continues to promote offshore energy exploration and (potentially) development. 525,000 square km of new area for oil and gas exploration in five blocks, four offshore and one onshore, were announced in March 2016 as part of the New Zealand government’s annual block offer system. Nine new oil and gas exploration permits were announced following the 2015 block offer.

Consideration of whether to enter into the Nairobi International Convention on the removal of wrecks is expected as a potential means to consolidate New Zealand’s current law on wreck removal. The Convention, which came into force internationally on 14 April 2015, aims to ensure the prompt and effective removal of wrecks that pose a direct and immediate environmental hazard located beyond the territorial sea, establishing the liability of the owner for the costs of locating, marking and removing ships and wrecks. New Zealand’s current law involves a convoluted of the powers of different bodies under the MTA, RMA and the Local Government Act 1974, and there is uncertainty about whether the powers extend within the EEZ.²⁸⁷

Proposed reforms to the management of marine protected areas in New Zealand’s territorial sea are also under consideration. There is a proposal to move from one classification of marine reserves which prohibits the removal of all habitats and life in the classified area, to four types of protected areas: marine reserves, species-specific sanctuaries, seabed reserves, and recreational fishing parks. The reforms would result in the replacement of the Marine Reserves Act 1971 with the Marine Protected Areas Act.

287 William Irving ‘The Nairobi Convention: Reforming Wreck Removal in New Zealand’ (2010) 24 A&NZ Mar LJ 76.

Chapter 33

NIGERIA

L Chidi Ilogu and Adedoyin Adeloye¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Nigeria's goal of attaining rapid industrial growth is on a sound footing and one important part of the nation's economy that is set to hasten and sustain this goal is the maritime sector.

As an oil producing and exporting country, as well as a consumer nation, the country is a large market for foreign goods, owing to its population. In this regard, the maritime industry holds the key to the nation's growth and development.

The greater focus of the commercial shipping activities in Nigeria revolves around the seaports, the types and volume of cargo that come into them, the efficiency of the port infrastructure and available personnel to adequately handle the cargo traffic. There is also significant export activity, especially with regard to crude oil and liquefied natural gas, which, as in the case of imported cargo, essentially involves the use of foreign-owned vessels for their carriage.

There are seven major ports in Nigeria (excluding oil terminals). The ports are Apapa, Tin Can Island, Port Harcourt, Onne, Warri, Calabar and Koko. These seaports provide a total of about 93 general cargo berths, five Ro-Ro berths, seven bulk solid berths, 63 buoy berths, 11 bulk liquid cargo berths and several private jetties. Also available in the ports is a fleet of 54 harbour craft and over 600 different types of cargo-handling equipment.² Cargo volume at the ports has seen a remarkable rise since the privatisation of ports in 2006.

According to statistics obtained from the Nigeria Ports Authority (NPA),³ cargo throughput increased from 46.15 million tonnes in 2006 to 77.1 million tonnes in 2012, with

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2 Source: NPA, 'Annual Abstract of Ports Statistics'.

3 Eniola, et al., 'Performance Evaluation of Nigerian Ports: Pre and Post Concession Eras,' *Civil and Environmental Research* (Volume 6, No. 2, 2014), www.iiste.org/Journals/index.php/CER/article/view/10841.

inward cargo being at least 30 to 40 per cent higher in volume than outward cargo. Nigerian seaports recorded cargo throughput of 76.89 million tonnes from 5,185 ocean-going vessels with a total of 131.67 million GT during 2013. For 2014, the Nigerian Ports Authority (NPA) announced a cargo throughput of 86,603,903 metric tonnes of cargo, an increase of 12.64 per cent over the 2013 figure of 76,886,997 metric tonnes. In 2015, the NPA recorded a 7.2 per cent rise in cargo throughput.

The tonnage of Nigerian-flagged ocean-going vessels is low generally, but the increase in offshore supply and service vessels and oil tankers is quite notable. Most liquefied natural gas carriers, container vessels and bulk carriers are flagged abroad for financial and other considerations.

The volume of trade with Far Eastern countries, notably China, has increased significantly in the past 10 years, thereby increasing the traffic on the Far East trade route.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The legislative framework that guides and regulates activities at the country's ports is the Nigeria Ports Authority Act 2004. This Act is to be revised as port terminals are no longer under the exclusive control of the NPA. Since the port concession programme conducted by the federal government between 2004 and 2006, port terminals and supporting infrastructure have been transferred to, and are now overseen by, private investors and operators on the basis of leases from the NPA of between 15 and 25 years under a landlord–tenant concession model.

The NPA continues to exercise exclusive technical management over port infrastructure, especially with regard to port precincts, vessel traffic, pilotage, dredging, quay walls and channel controls and such services, while the terminal operators undertake cargo handling, discharge, storage and delivery to designated receivers.

In recent years, shipping industry operators have been urging the enactment of more comprehensive legislation that would adequately regulate activities and relations at the ports, and encourage the further growth and development of the industry. To this end, a number of bills are currently before the National Assembly, such as the National Transport Commission Bill. This bill, *inter alia*, seeks the establishment of the National Transport Commission to commercially regulate all transport services and facilities, including ports, inland waterways, and all forms of land transport, including rail and road transportation in Nigeria and within coastal waters. The Bill is yet to be passed by the National Assembly. As at March 2016, Nigeria's Minister of Transport reiterated his ministry's commitment to partner with the National Assembly to ensure that the four maritime sector bills pending before the upper and lower chambers are passed into law and implemented accordingly. He mentioned the pending bills as: the Nigeria Railways Authority Bill (2015), National Transport Commission Bill (2015), Nigerian Ports and Harbour Authority Bill and the National Inland Waterways Authority Bill.

The Nigerian Shippers' Council (NSC) was granted ministerial approval in 2014 to act as regulator over the entire nation's ports. The NSC's authority to perform these regulatory

functions has, however, been challenged in court by the Shipping Association of Nigeria (SAN) and the Seaport Terminal Operators Association of Nigeria (STOAN) as being outside its proper powers.⁴

Two additional legal instruments (subsidiary legislation) were introduced by the NSC in 2015 to enable it carry out its new Port Economic Regulation mandate. These are:

- a* the Nigerian Shippers' Council (Port Economic Regulator) Order 2015; and
- b* the Nigerian Shippers' Council (Port Economic) Regulations 2015.

III FORUM AND JURISDICTION

i Courts

Pursuant to Section 251(1)(g) of the Constitution of the Federal Republic of Nigeria (CFRN) and Sections 1 and 2 of the Admiralty Jurisdiction Act 2004 (AJA), the Federal High Court has exclusive jurisdiction over shipping matters. The CFRN expressly states that the Federal High Court will exercise jurisdiction in civil causes or matters in 'any admiralty jurisdiction', while Section 1 of the AJA provides the scope of admiralty jurisdiction in Nigeria.

Notably, Section 20(a)–(h) of the AJA stipulates that the Federal High Court can exercise jurisdiction over admiralty matters notwithstanding any exclusive jurisdictional clauses contained in any agreement or contract related to such a matter, where the following circumstances exist:

- a* the place of performance of the contract is in Nigeria;
- b* any of the parties reside in Nigeria;
- c* payment was (or was to be) made in Nigeria;
- d* the plaintiff submits to the Nigerian jurisdiction;
- e* the res is within Nigeria;
- f* the state or federal government of Nigeria is a party and submits to the court's jurisdiction;
- g* some financial consideration is to be derived from the contract in Nigeria; or
- h* in the court's opinion, the matter is one that should be adjudicated in Nigeria.

The interpretation of Section 20 of the AJA by the courts tends to suggest that jurisdiction clauses that seek to oust Nigerian courts' jurisdiction will be considered null and void. Only the jurisdictional aspects of the clause are affected, however, not the entire agreement. The

⁴ The Federal High Court in its decisions dated 17 December 2014, given in the cases of *Alraine Shipping Agencies & Ors v. Nigerian Shippers' Council & Anor* (Unreported – FHC/L/CS/1646/2014); and *Apapa Bulk Nigeria Limited v. Nigerian Shippers' Council & Anor* (Unreported – FHC/L/CS/1704/2014), affirmed the ministerial approval granted to the NSC as sufficient authority to act as port regulator in the absence of legislative enactments. Both SAN and STOAN have lodged appeals against the decisions of the Federal High Court at the Court of Appeal. SAN maintains in its appeal, *inter alia*, that the NSC is obliged to publish revised local shipping charges only after negotiating them with SAN and that it cannot do so unilaterally. In the other appeal, STOAN is contending that the NSC Act and the Port Act need to be amended before the NSC can exercise port regulatory functions. Both appeals are yet to be heard.

cases of *Owners of MV 'Lupex' v. Nigerian Overseas Chartering and Shipping Limited* (2003), *M.V. Panormos Bay v. Olam (Nig.) Plc* (2004); and *Lignes Aeriennes Congolese v. Air Atlantic Nigeria Ltd* (2005) underscore this point.

Section 18 of the AJA states that proceedings in a maritime claim, maritime lien or other charge shall be commenced within any stipulated period provided in the contract in respect of such claim. Where none is so provided by agreement or law, action must be brought within three years of the accrual of the cause of action.

The Merchant Shipping Act 2007 (MSA 2007) bars the commencement of any action for payment by a salvor beyond two years after the termination of salvage.⁵ Also, collision claims cannot be maintained beyond two years after the accrual of the cause of action.⁶

ii Arbitration and ADR

The Arbitration and Conciliation Act (ACA) is the national legislation governing commercial arbitration in Nigeria. It primarily grants parties the freedom through arbitration agreements to determine the arbitral procedure to govern their dispute. Where parties do not agree the procedure to govern the dispute, the arbitrator will apply the procedural rules set out in the first schedule to the Arbitration Act, which are based on the UNCITRAL Arbitration Rules.⁷ There are some other very active arbitral institutions in Nigeria, with their own arbitral procedures and which entertain commercial disputes, including maritime and shipping disputes. Notable in this regard are the Chartered Institute of Arbitrators UK, Nigeria branch and the Lagos Regional Centre for International Arbitration,⁸ the formation of which is backed by federal legislation.⁹

There is no specific maritime arbitration procedure legislated in Nigeria. There is a non-governmental body, the Maritime Arbitrators Association of Nigeria (MAAN) comprising maritime and commercial law practitioners, master mariners, shipping companies and other maritime operators, and experienced arbitrators committed to providing specialised arbitration services for the settlement of maritime and shipping disputes. MAAN has developed arbitration rules for large and small-scale arbitration schemes involving maritime industry claims.

There has been a progressive effort in the past 10 years or so to institutionalise the use of ADR, especially mediation, into the judicial process in Nigeria. The first and most advanced of these is the Lagos Multi-Door Courthouse (LMDC), which not only accepts direct referrals from the public, but works in conjunction with the High Court of Lagos State, whereby the Court may first refer commercial cases before it to mediation. In the event the parties fail to resolve their dispute through ADR, the Court would proceed to a trial of

5 Such time may, however, be extended by a court where the salvor has been unable to arrest the salvaged vessel.

6 The court may extend time to institute an action beyond two years where the plaintiff asserts that the offending ship had not come into the jurisdiction within the two years stipulated for filing such action.

7 Section 15 of the ACA.

8 Established in 1989 under the Asian-African Consultative Committee, an intergovernmental body with about 45 Member States.

9 The Regional Centre For International Commercial Arbitration Act 2004.

the action. Matters resolved by mediation at LMDC are entered as consent judgments of the High Court and are enforceable. The efforts of ADR through LMDC have been effective in decongesting the case list of the Lagos High Court.

iii Enforcement of foreign judgments and arbitral awards

Enforcement of foreign judgments in Nigeria has been very topical. The main issue that affects it is the position of the two federal legislations regulating it: the Foreign Judgment (Reciprocal Enforcement) Act 2004 (FJA) and the Reciprocal Enforcement of Judgment Act Ordinance 1958 (REJ).

Both Acts provide that the registration and enforcement of foreign judgments (including maritime judgments) be based on 'reciprocity'. While the REJ (originally enacted in 1922) contains a number of (Commonwealth) countries in favour of which reciprocal status was granted for judgments of their superior courts, the FJA (originally enacted in 1960) empowers the Minister of Justice to make orders in respect of countries that he or she is assured would grant reciprocal enforcement to Nigerian judgments, before the provisions of that Act would be applicable to the judgment of such countries. However, no such order has been made to date, making the provisions of the FJA effectively inoperative, even though it was enacted well after the REJ. Equally significant is the fact that the later FJA did not repeal the REJ.

While there have been several court decisions suggesting that the registration and enforcement of judgments should follow the provisions of the FJA, the Supreme Court has, in *Grosvenor Casinos Limited v. Halaoui* (2009) and *Conoil Plc v. Vitol S.A* (2012), confirmed its earlier decision in *Marine & General Insurance v. Overseas Union* (2006) that the REJ is the applicable law for the United Kingdom and other named Commonwealth countries (pursuant to Section 5 of the FJA)¹⁰ on reciprocity for the time being and until relevant orders are made by the Minister of Justice pursuant to the FJA.

It remains a moot point whether the one-year limitation period under the FJA or the six-year limitation under the REJ should be applicable. The number of foreign judgments enforced has not been high, not only as a result of the restricted number of countries that have been recognised by law as reciprocating enforcement of Nigerian judgments but also because of the conditions contained in the REJ, which may prevent a duly obtained judgment in any jurisdiction from being registered and enforced in Nigeria – for example, the non-appearance of a judgment debtor at the foreign court.¹¹

Nigeria is a signatory to the New York Convention, which is included as a schedule to the ACA. It would appear that an arbitral award may be enforced pursuant to either Section 51 or Section 54 of the ACA. While Section 51 allows recognition and enforcement of an

10 The Governor General of Nigeria had, pursuant to Section 5 of the REJ, made a Proclamation extending reciprocal status to apply in favour of Sierra Leone, Gold Coast (Ghana), the Gambia; Newfoundland, New South Wales, State of Victoria (territories of Australia), Barbados, Bermuda, British Guiana, Gibraltar, Grenada, Jamaica, Leeward Island, St Lucia, St Vincent and Trinidad and Tobago.

11 Some of the other conditions include that the original court must have jurisdiction; that the judgment was not obtained by fraud; that the judgment is subject to appeal in another country or that the judgment is contrary to public policy in Nigeria.

award from any country,¹² Section 54 applies to the recognition and enforcement of awards between Nigeria and any other contracting state to the New York Convention pursuant to the conditions stipulated thereunder.

There is no limitation period specified in the ACA, but the Limitation Law of the applicable state of Nigeria where the enforcement proceeding is maintained would apply: six years under the Limitation Law of Lagos State, the Federal Capital Territory, Abuja and most other states.

IV SHIPPING CONTRACTS

i Shipbuilding

There is no large-scale shipbuilding activity in Nigeria at the moment. Most new builds are ordered from abroad. There are some local shipyards where barges, tugboats and small crafts (generally below 5,000 tonnes) are constructed on a regular basis for use in the inland waterways, coastal operations and support services in the oil and gas industry.

Significant initiatives are, however, being made to develop and increase the shipbuilding capacity in Nigeria as exemplified by the strategic partnership recently entered into by some renowned shipbuilding companies, including Hyundai Heavy Industries and Samsung Heavy Industries with local shipbuilding companies and offshore service providers in Nigeria¹³ for the fabrication, construction and integration of major component parts of FPSOs and other deepwater development projects.

ii Contract of carriage

The Carriage of Goods by Sea Act (COGSA), which contains in its Schedule the Hague Rules of 1924, has, since 1926 (when it was enacted), been the leading legislation in Nigeria in respect of goods carried by sea pursuant to various bill of lading contracts. However, this Act expressly states that the Hague Rules apply in respect of outward carriage of goods from ports in Nigeria to ports outside Nigeria or other ports within Nigeria. For this reason, the choice-of-law clauses of most bills of lading in respect of shipments to Nigeria, providing for reliance on the terms of the Hague Rules Convention¹⁴ have been upheld.

12 *Tulip (Nig) Limited v. NTMSAS* [2011] 4 NWLR (Part 1237) 254.

13 Hyundai Heavy Industries is working in partnership with Jagal Group, Owners of Niger dock Shipyard and the partnership has already delivered on the fabrication of a gas-gathering compression platform and non-associated wellhead platform for Chevron's gas project in December 2014; while Samsung Heavy Industries is in partnership with LADOL is committing a total of about US\$600 million in constructing a deep offshore logistics base and a floating production, storage and offloading (FPSO) integration facility, from which a major part of the FPSO for the Egina Deep water project, due for delivery in 2017, will be fabricated and integrated. The LADOL initiative in particular has received a lot of acclaim by the Nigerian authorities and industry operators alike for its broadness and potential to significantly increase the country's shipbuilding capacity.

14 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Hague Rules), and Protocol of Signature 1924.

Nigeria never signed or ratified the Hague-Visby Rules, but ratified the Hamburg Rules in 1988,¹⁵ which were implemented¹⁶ by virtue of the United Nations Convention on the Carriage of Goods by Sea (Ratification and Enforcement) Act 2005. The 2005 Act contains no specific provision repealing the COGSA. Although there has not been any judicial interpretation of the current status of both carriage regimes (the Hague or Hamburg Rules), it is generally acknowledged that the Hamburg Rules now supersede the Hague Rules for both inward and outward carriage in Nigeria.

Nigeria is one of the 25 signatories to the Rotterdam Rules, which will come into force after ratification by 20 countries.¹⁷

iii Cargo claims

Cargo disputes often arise at the instance of importers as a result of loss or damage during carriage or at the ports during discharge. The rights and entitlements to sue with regard to cargo claims in Nigeria was originally premised on the Bill of Lading Act 1855, being a pre-1900 statute of general application in Nigeria. By virtue of the 1855 Act, only the consignor, consignee and endorsee have privity and right to sue, as illustrated in the cases of *Adesanya v. Leigh Hoegh & Co and Kaycee (Nig) Ltd v. Prompt Shipping Corp.*

The essential features of the 1855 Act were subsequently incorporated into the Merchant Shipping Act (MSA 2004), in Section 375. Regrettably, when the MSA 2004 was repealed by the MSA 2007, Section 375 was not preserved. As such, there is now a lacuna as to applicable legislation detailing the right-of-suit principle in Nigeria.¹⁸ At best, it remains applicable as a common law principle of contract in Nigeria.

Be that as it may, Nigerian courts have given credence to the rules conferring a right of suit to consignees or endorsees when there has been a transfer of the property in the bill of lading. *Nigerbrass Shipping Line v. Aluminium Extrusion Industries* (1994) is a case in point.

Some notable exceptions to these rules have been recognised, including the *Brandt v. Liverpool*¹⁹ doctrine, whereby the bill of lading holder can maintain an action at common law where the court is able to infer or imply a contract on the bill of lading terms between the holder and the carrier in circumstances where the holder:

- a* takes delivery of the goods;
- b* pays freight or demurrage;²⁰ or

15 United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules 1978) – Explanatory Documentation prepared for Commonwealth Jurisdictions by HM Joko Smart in association with the Commonwealth Secretariat, www.uncitral.org/pdf/english/texts/transport/hamburg/Hamburg-Rules-Commonwealth.pdf.

16 As a common law jurisdiction, conventions that have been ratified and come into force do not automatically become enforceable in Nigeria until they have been passed into law by an act of the Nigerian National Assembly.

17 Only three countries (Spain, Togo and Congo) have ratified the Convention till date.

18 Notwithstanding the cases which provide judicial precedent for it.

19 *Brandt v. Liverpool, Brazil & River Plate Navigation Co Ltd* [1924] 1 KB 575.

20 Here, the consideration does not need to be financial. Non-financial consideration may be acceptable, as adequacy of consideration need not be looked into.

c presents the bill of lading.²¹

The lack of capacity of a notified party to sue on a bill of lading was underscored by the Supreme Court in the case of *Pacer Multi-Dynamic Ltd v. MV 'Dancing Sisters' & Anor*, (2012).

The urgent need to introduce a bills of lading act or similar legislation in Nigeria has been addressed by the Nigerian Maritime Administration and Safety Agency (NIMASA), which has produced a draft bill of lading act (the Carriage Documents Bill), addressing the issue of right of suit and seeking to expand the scope beyond the bill of lading *per se* to cover electronic and other forms of carriage documentation applicable in international trade and carriage of goods by sea. The Bill is expected to be presented as an executive bill through the Federal Attorney General to the National Assembly.

iv Limitation of liability

The circumstances in which shipowners (including charterers, managers and operators of a ship), salvors and their insurers²² may limit their liability for maritime claims, as well as the calculation for such limitation, are provided in Sections 352–358 of the MSA 2007. Section 352(1)(a)–(g) states the types of claim that are subject to limitation, while Section 353(a)–(e) lists the claims that may not be subject to limitation, such as claims for salvage or contribution in general average, oil pollution liability and claims in respect of nuclear damage.²³

The admiralty jurisdiction of the Federal High Court includes ‘any action or application relating to any cause or matter by any shipowner or aircraft operator or any other person under the Merchant Shipping Act or any other enactment relating to a ship or an aircraft for the limitation of the amount of his liability’²⁴ and the procedure is laid down in Order 15 of the Admiralty Jurisdiction Procedure Rules 2011 (AJPR 2011). An action for limitation is commenced as an admiralty action in personam against at least one of the (possible) claimants in a maritime claim (as a defendant), who must be served before the case may be sent down for hearing or determination given in default of appearance. After determination of the applicant’s entitlement to a limitation of its liability, the Court may order advertisement of its determination in order to allow anyone with a maritime claim against the vessel or such other parties named above to apply to set aside, vary the determination or lodge its interest.

21 While the Court would enforce bill of lading terms on these grounds, there must, however, be delivery or at least existence of the goods and also, possession of the bill of lading must certainly have passed from the shipper.

22 Section 351(5) of the MSA 2007 extends the right to limit liability to the insurers of owners and salvors.

23 It should be noted that while the limits contained in above stated sections of the MSA are the same as provided in the 1996 Protocol to the 1976 Limitation Convention, Nigeria is not a signatory to the 1996 Protocol, neither did it acceded to it. The Country only adopted the limitation values contained in the 2006 Protocol in into its Laws under the MSA without more.

24 Section 1(1)(d) of the AJA.

V REMEDIES

i Ship arrest

The right to arrest a ship in Nigeria is predicated on the provisions of the AJA, especially Section 5, while the procedure for carrying out an arrest is contained in the AJPR 2011. Section 2 of the AJA contains a comprehensive list and description of maritime claims.²⁵ Section 5(1) specifies the proprietary maritime claims for which a ship (or other property) may be subject to arrest,²⁶ while Section 5(4) provides the conditions under which an action *in rem* may be brought against a ship for a general maritime claim, which are the same as those provided in Section 21(4)(a) and (b) of the UK Senior Courts Act 1981. The conditions are that:

- a* the claim arises in connection with a ship;
- b* the person who would be liable in an *in personam* action in respect of the claim (the relevant person) was at the time the claim arose the owner, or charterer, or in possession or control of the ship; and
- c* the relevant person is, at the time the claim is brought (commenced):
 - the beneficial owner of all the shares in the ship or its demise charterer; or
 - the beneficial owner of all the shares in another ship.

The last condition refers to the concept of ‘sister ship’ arrest, which is allowed under Nigerian admiralty practice. Associated ship arrest is not recognised under Nigerian maritime law. There must be clear proof of beneficial ownership by the owner of the original ‘offending ship’ for the arrest of a sister ship to be sustained. However, such other ‘sister ship’ may not be related at all to the original ‘offending ship’ or the ship involved in a maritime claim. It will suffice if it is fully or 100 per cent beneficially owned by the owner of the offending ship (i.e., the relevant person).

The above conditions must be strictly followed by a claimant before arresting a ship, failing which the shipowner may apply to vacate a wrongful order of arrest and successfully claim damages for wrongful arrest.

Additionally, Section 5(3) of the AJA provides that a ship will be liable to arrest for a claim that constitutes a maritime lien (i.e., liens for salvage, damage done by a ship, wages of the master or member of crew, or for a master’s disbursements).

An application to arrest a vessel must be founded on an action *in rem*, which is commenced by issuing a writ *in rem* accompanied by a statement of claim and copies of every document to be relied on at the trial.²⁷ The claimant seeking to arrest a vessel is obliged to conduct a search into the caveat book to ascertain that no caveat against arrest is in force against the vessel before applying to arrest the vessel.

²⁵ Broadly, maritime claims are divided into proprietary and general maritime claims – Section 2(1) of the AJA.

²⁶ Those concerned with questions of title to, or possession of ships; mortgage claims; co-ownership disputes [in Section 2(2)(a)(i)–(iv) and Section 2(2)(b)]; as well as claims for interest arising out of all the proprietary maritime liens stated in Section 2(2)(a)–(c) of the AJA.

²⁷ Usually, the writ *in rem* together with the accompanying documents and the application for arrest are filed simultaneously as required by Order 3, Rule 1 and Order 7, Rule 1 (1) of the

An arrest application can only be brought if the ship is within Nigerian territorial waters or is expected to arrive there within three days. The territorial waters of Nigeria extend to 12 nautical miles off the coast of Nigeria, measured from the low-water mark or of the seaward limits of inland waters. It is therefore possible to serve a warrant of arrest on a vessel anywhere within the court's jurisdiction, even when the vessel is yet to enter berth.

Section 10 of the AJA entitles parties to an action *in rem* in which there is a foreign jurisdiction (or arbitration) clause to have the action stayed pending the outcome of the foreign proceedings. An order to stay the action may be granted by the court on the condition, *inter alia*, that the arrest is maintained during the period of the foreign proceedings or that suitable security is provided by the defendants in a form that would be acceptable to satisfy a foreign judgment.²⁸ However, under Nigerian admiralty practice, an arrest order will not be granted merely for the purpose of obtaining security in respect of a claim or an arbitration proceeding commenced abroad (see *M/V 'Scheep' v. M/V 'S Araz'* (2000)). As such, an action *in rem* to enforce a claim for damages must have been commenced before an application to arrest a vessel (as security in a claim or arbitration abroad) can be entertained.

ii Court orders for the sale of a vessel

Judicial sale of a vessel under arrest may be ordered by the Federal High Court before or after judgment where the vessel has been under arrest for over six months and the defendant has failed to provide security for its release and where the vessel is depreciating in value.²⁹ Where a sale is ordered by the Court, a valuation of the ship is carried out after which an advert is made in two national newspapers. The sale is conducted by the Admiralty Marshal within 21 days of the newspaper publications. The proceeds are paid to the Court³⁰ and the Admiralty Marshal files an account of sale and vouchers of the account. There are usually a few of such court-ordered sales within a year. In *The 'Leona II'*³¹ the Supreme Court criticised the direction of the trial judge to order the sale of the vessel (*Leona II*) by private treaty rather than by public auction.

VI REGULATION

i Safety

The maintenance of safety in the shipping sector in Nigeria falls under the direct purview of NIMASA, which is empowered by the NIMASA Act, MSA 2007 and other related legislation to, *inter alia*, regulate maritime safety, security, marine pollution and maritime labour.³²

AJPR 2011.

28 The Court may further lay down other supplementary orders for the purpose of preserving the ship or of the rights of other persons interested in the ship.

29 In the first situation, the plaintiff may apply for the vessel's sale (Order 9 (6) (b) AJPR 2011), whereas, in the other, either party may apply for the sale (Order 16 (3) AJPR 2011).

30 The Admiralty Marshal shall be entitled to deduct 2 per cent of the sale value of the vessel to cover his or her expenses including bank charges – Order 16 Rule (4) (2) AJPR 2011.

31 *Nigerian Shipping Cases* Volume IX, p. 434.

32 Section 1(ii) of the NIMASA Act.

Section 20 of the NIMASA Act empowers NIMASA to establish the procedure for the implementation of international maritime conventions of the IMO, the ILO and other conventions on maritime safety and security to which the government of Nigeria is a party, especially by making regulations in respect of any such implemented convention.

Some of the conventions on maritime safety that have been implemented and their corresponding regulations (where applicable) are:

- a* SOLAS;
- b* the 1988 Protocol relating to SOLAS and Annexes I to V thereto;
- c* the Search and Rescue Convention 1979;
- d* the International Labour Organization Convention concerning the Protection against Accidents of Workers Employed in Loading or Unloading Ships (Dockers Convention); and
- e* the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation 1988.

All the conventions were implemented pursuant to Section 215 of the MSA 2007.

ii Port state control

Port state control is the right of a flag state to inspect foreign-flagged ships visiting its ports to ascertain their compliance with international safety requirements and seaworthiness. NIMASA is the authority tasked with carrying out this duty in Nigeria, with powers to detain ships that fail the test upon inspection. Recent figures suggest that actual inspection of ships under the nation's port state control is low.

Nigeria facilitated the development of the Abuja MoU. Nineteen states have signed the MoU, 11 of which have deposited an instrument of ratification in respect thereof at the secretariat of the body in Lagos.³³ The Abuja MoU³⁴ had received criticism for not being active and effective, but it is noticeable that it has been increasingly active following some administrative changes.

iii Registration and classification

The Nigerian Ship Registry is maintained by NIMASA and, ordinarily, only Nigerian citizens or bodies corporate or partnerships subject to Nigerian law and having their principal place of business in Nigeria can register their interests in a vessel in Nigeria and have such vessel fly the Nigerian flag.³⁵ There is no provision for dual registration in respect of vessels as a vessel may only fly the flag of one country. Consequently, there is a requirement for vessels already registered under foreign flags to de-register their current ports or state registries in order to

33 While most of the members states of the MoU are West African countries, it is worth noting that South Africa is also a member of the Abuja MoU.

34 The Republics of Guinea Bissau and Cape Verde have accepted the Memorandum of Understanding on Port State Control for West and Central African Region (Abuja MoU) on 25 June 2015 and on 17 August 2015 respectively, thereby becoming the 15th and 16th full members of the Abuja MoU.

35 Sections 16–42 of the MSA 2007 contain provisions in respect of vessel registration under the Nigerian flag.

be registrable in Nigeria. However, the Ship Registry permits provisional registration of a vessel for six months in order to allow it to sail into Nigeria with the Nigerian flag before completing a full registration on arrival.

For the purposes of registration, the Ship Registry provides a number of different types of registration for:

- a* merchant ships;
- b* fishing vessels;
- c* ships under construction;
- d* ships on bareboat charters and other charters exceeding 12 months;
- e* licensed ships below 15 GT; and
- f* floating production, storage and offloading facilities and floating storage and offloading facilities.³⁶

It is equally important to note that the Ship Registry is also responsible for administering the Cabotage Register for vessels eligible to participate in commercial coastal and inland shipping activities.

NIMASA states in its guidelines for ship registration that an applicant should, as part of the required documentation, provide a current certificate from an approved international classification society. In this regard, NIMASA has established collaborative links with leading classification societies by signing memoranda of understanding with them. They include IACS, the International Register of Shipping and the International Naval Surveys Bureau.

iv Environmental regulation

Pursuant to the implementation of several international conventions for the prevention of pollution from ships,³⁷ some regulations have been made by the Minister of Transportation in the exercise of his powers under the MSA, aimed at regulating the marine environment. Accordingly, in 2012 and pursuant to these conventions, a set of regulations were introduced that regulate such issues as anti-fouling systems, ballast water management, dangerous or noxious liquid substances in bulk, liability and compensation; oil pollution preparedness, response and cooperation, prevention of oil pollution; and prevention of pollution by garbage.

v Collisions, salvage and wrecks

The MSA contains various provisions in respect of collisions, salvage and wrecks. The MSA mandates the observance of the Collision Regulations,³⁸ which are significantly modelled after the Colregs and that provide the practical guides for ships' conduct, *inter alia*, in anticipation and prevention of, or in reaction to, a collision. The Regulations further provide for the rights

36 Section 17(1) of the MSA 2007.

37 Section 335 of the MSA 2007 contains a list of such conventions, including MARPOL 73/78 and the Annexes thereto, the Intervention Convention, the London Dumping Convention, the OPRC Convention, the CLC Convention, and the LLMC Convention 1976 and LLMC Protocol 1996.

38 The latest version of the Collision Regulations was made by the Minister of Transportation in 2010.

of NIMASA-approved inspectors to inspect ships for the purpose of enforcing the Collision Regulations, as well as for the duty of masters of other ships and the occupants of ships with which they collide to report collisions.

The Act makes the owners of any ship that becomes a wreck responsible for removing it. This is, however, difficult to implement as most shipowners are usually insolvent at that stage. There is no legislation in respect of recycling of ships in Nigeria and it has been suggested that the best approach to ensure dedicated clearing of wrecks is for the relevant wreck removal agencies to promote the existence of recyclers with whom they can partner to remove and efficiently dispose of wrecks.

The regime for salvage in force in Nigeria is the Salvage Convention 1989, and though no regulations in respect thereof have yet been made, the provisions of the convention have been made applicable pursuant to Part XXVII of the MSA 2007.³⁹

vi Passengers' rights

The Athens Convention and its Protocol of 1990 were implemented into Nigerian law pursuant to Section 215 of the MSA 2007 but no direct rules or regulations stemming from the Convention have been made. There is, however, very minimal organised international carriage of passengers by seagoing vessels into or from Nigeria.

vii Seafarers' rights

A number of conventions on seafarers' rights⁴⁰ have been implemented pursuant to Section 215 of the MSA 2007. These include:

- a* rights with regard to their employment contracts⁴¹ (and obligations of their employers)⁴² including wages, leave benefits and discharge from service; and
- b* rights regarding general welfare, health and accommodation.⁴³

Some regulations regarding seafarers' rights pursuant to international conventions that have already been implemented in Nigeria include:

- a* the Safe Manning, Hours of Work and Watchkeeping Regulations;
- b* the Health, Protection and Medical Care of Seafarers and Crew Accommodation Regulation;⁴⁴
- c* the Placing of Seamen Convention of 1920;
- d* the STCW Convention (as amended); and
- e* International Labour Organization Convention (32 of 1932) on Protection Against Accidents of Workers Employed in Loading or Unloading Ships.

39 Section 387(1) of the MSA 2007.

40 The word used in the MSA is 'seaman', which is defined as: 'any person (except a master, pilot or a person temporarily employed on the ship while in port) employed or engaged in any capacity on board the ship.'

41 In respect of both seagoing and non-seagoing ships – Sections 95 and 96 of the MSA 2007.

42 Sections 109–112; and rights to repatriation – Section 116 of the MSA 2007.

43 Part X of the MSA 2007.

44 All made in 2010, pursuant to the powers conferred on the Minister of Transportation as provided in the MSA of the 2007.

The rights of seafarers and masters to bring an action (including for the arrest of a ship) against a shipowner for claims for unpaid wages are provided for in the AJA,⁴⁵ as general maritime claims and maritime liens.⁴⁶

In June 2013, Nigeria deposited an instrument of ratification for the Maritime Labour Convention 2006 at the ILO Secretariat in Geneva. A legal instrument backing its implementation is yet to be passed by the Nigerian Assembly.

VII OUTLOOK

The potential for the shipping industry in Nigeria remains high, although progress is slow in areas of building human and technical capacity. There is much discussion of the proposed construction of greenfield deepsea ports with draughts in excess of 14 metres, which should reduce freight costs and enhance shipping operations in the country. The initiative is being supported by the Nigerian government, which is encouraging PPP arrangements in this regard as part of a plan to address the inadequacy of capacity in the existing Nigerian ports. The leading initiative in this regard is the development of the Lekki deepsea port in which the federal and Lagos State governments have now paid their capital contributions. The first phase of the project is expected to become operational by 2017.

The much-needed intermodal supporting infrastructures such as improved road networks and rail facilities are imperative for the effectiveness of such initiatives. Further, such projects must be strategically located and their number closely monitored to avoid overcapacity and underutilisation, while their hub status and trans-shipment feasibility should be clearly projected.

The 2014 announcement by the federal government designating the Nigerian Shippers' Council as the regulator of the commercial activities at sea ports poses a number of questions given its erstwhile role as a 'protector' of cargo interests and the somewhat limited scope of its enabling Act. The anticipated passage of two critical bills – the Transport Commission Bill and the Ports and Harbours Bill – continues to be a talking point in the industry as these Acts are expected to add value and introduce more order to the management of the ports and shipping sector of the Nigerian economy and eliminate conflicts of role between the parastatals and the maritime sector.

The desire of the government to increase indigenous participation in shipping in Nigeria is reflected in two main pieces of legislation – the Coastal and Inland Shipping (Cabotage) Act and the Nigerian Oil and Gas Industry Content Development (Nigerian Content) Act – which aim to reserve coastal shipping and some level of participation in oil and gas contracts, including shipping, for Nigerians. It is envisaged that efficient implementation of both Acts will go a long way to enhancing job creation, skilled manpower and technical capacity in both the transport and energy industries in Nigeria. The passage of the long-awaited Petroleum Industry Bill is yet to become a reality. It should serve as further catalyst of growth in the oil and gas sector with anticipated benefits accruing to the maritime industry.

45 Or 'an amount that a person as employer is under an obligation to pay to a person as employee, whether the obligation arose out of the contract of employment or by operation of law, including by operation of law of a foreign country'.

46 Section 2(3)(r) and Section 5(3) of the AJA, respectively.

Chapter 34

PANAMA

Juan David Morgan Jr¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The Panama Canal is considered one of the seven wonders of the modern world. Because of the Canal, Panama is at the crossroads of some of the world's most important shipping lanes. The Canal has been serving the shipping industry since its inauguration in 1914 and, particularly since the Torrijos-Carter Treaties of 1977, has been a catalyst in the development of the country. From 1,000 ship transits in 1914, the Canal now handles about 14,500 transits each year. The Canal is run by the Panama Canal Authority (PCA), a Panamanian government agency, which took over from the Panama Canal Commission, an agency of the US government, in 2000.

Waiting time for the Canal is down substantially, there are now fewer accidents per year and revenues from the Panama Canal have risen exponentially. In 2013, 320 million tonnes of cargo went through the canal and the income generated from it was about US\$1.85 billion; profits for the country were well over US\$1 billion. In 2007, after it was approved by a national referendum, Panama embarked on an expansion project of the Canal costing US\$5.3 billion. The expansion of the Canal, with the addition of a much bigger set of locks than those now in existence, will more than double its cargo-carrying capacity. The new locks will have a 25 per cent increase in length to 1,400 feet; a 51 per cent increase in width to 180 feet; and a 26 per cent increase in draught to 60 feet. Current Panamax vessels have a maximum DWT of 80,000, while the new Panamax size will be up to 170,000 DWT. The biggest container vessels that can now transit the Canal can carry up to 5,000 TEUs, while those that will be able to transit after the expansion will be able to carry 13,000 TEUs. The expansion project includes deepening the Gatun Lake and the access channels at both sides of the Canal, besides deepening, widening and straightening the Gaillard Cut. Completion

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of the project is expected for 22 June 2016 and the expanded Canal is supposed to open for business on 26 June 2016. It is hoped that the expanded canal will further bolster the growth of the maritime sector of Panama's economy and generate record profits for the country.

The port system at both ends of the canal, particularly the privately operated container ports, are efficient and constantly growing. In this regard, Panama ranks first in Latin America and the Caribbean, having handled 6.8 million TEUs in 2012. The vast majority of cargo that comes to Panama is for trans-shipment purposes. There are currently five privately operated container ports at both ends of the canal, with a railway linking four of these ports; in effect, they constitute an integrated logistical port system. New oil terminals have also just been or are being built at both ends of the canal. In the western part of the country there is an oil pipeline linking the Atlantic and Pacific oceans, with port terminals capable of handling VLCCs. It has been in operation since 1982 and new storage tanks were recently built at both ends of the pipeline.

The maritime sector of Panama has grown substantially, fuelled by the Panama Canal. The Panama Chamber of Shipping now has over 250 members, while 20 years ago it had fewer than 30. These include regional offices of shipping companies, shipping agents, bunkering companies, shipyards, port operators, dredging companies, surveying companies, banks and insurance companies. At the end of February 2014, there were 9,024 ships registered in Panama totalling around 239.5 million GT.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Panama has a unicameral National Assembly with 71 legislators elected every five years. The main pieces of maritime legislation are the Organic Law of the PCA and the Organic Law of the Panama Maritime Authority (PMA). The Panama Canal has a special chapter in Panama's Constitution, the objective of which is to keep it as far away as possible from local politics. Panama has ratified most of the IMO conventions. Their implementation and enforcement is carried out by the PMA, which has directorates dealing with the merchant marine, seafarers, and ports and auxiliary industries. Maritime substantive law is contained in the Law on Maritime Commerce (LMC), passed in 2008 by the National Assembly to replace the old Book II of the Code of Commerce, enacted in 1917, which had hitherto contained Panama's substantive maritime laws. The Code of Maritime Procedure (CMP) regulates the two maritime courts operating in Panama and contains the procedural laws applicable to all maritime cases. The CMP has a section that incorporated the LLMC Convention into domestic law. The contents of the 1996 Protocol to that Convention have not been passed into law.

III FORUM AND JURISDICTION

i Courts

Panama has two maritime courts that have exclusive jurisdiction over all maritime judicial claims filed in Panama. Appeals are heard by the Court of Maritime Appeals, which is comprised of three justices. This is the only appeals court for maritime cases. After the relevant appellate briefs are submitted, there is a hearing in the Court of Maritime Appeals for the parties to present their cases before the justices. Under Article 19 of the CMP, the maritime courts have exclusive jurisdiction to hear and adjudicate cases that arise from within

the territory, or the territorial waters, of the Republic of Panama. As per the same article, the maritime courts also have jurisdiction to adjudicate cases arising outside of the Republic of Panama when:

- a* a vessel or other property of the defendant is arrested in Panama;
- b* the defendant is found within Panama;
- c* the involved vessels are Panamanian;
- d* Panamanian substantive law is applicable to the dispute; and
- e* the parties submit themselves, either expressly or tacitly, to their jurisdiction.

Under Article 22 of the CMP, cases arising out of Panama may be stayed in favour of a foreign forum when the court considers that the Panamanian forum is not convenient, when the parties have expressly agreed by contract to submit to the jurisdiction of a foreign forum or arbitration tribunal, and when the dispute has previously been submitted to a foreign arbitration tribunal and court and a decision is pending. The CMP was amended in 2009 to, *inter alia*, make it more difficult to stay an action in favour of a foreign forum when the relevant forum selection clause is not contained in a contract that has been negotiated by the parties. Article 22(3) of the CMP expressly states that *pro forma* or adhesion contracts are not considered 'previously and expressly negotiated'. There have been two recent Supreme Court decisions that have interpreted the modified Article 22(3) of the CMP in the context of forum-selection clauses in contracts of carriage evidenced by bills of lading. In a decision dated 30 May 2012 in *Mund & Fester GMBH & Co KG v. 'Nagoya Bay' and Nagoya Bay Inc*, the Supreme Court affirmed a ruling of the Second Maritime Court that denied a motion to stay an action based on the standard arbitration clause contained in the 1994 Congen Bill Form, which incorporated, by reference, the arbitration clause in the charterparty. More recently, in a decision dated 6 January 2014 in *Harvest Fresh Growers Inc v. Maersk Line*, the Supreme Court affirmed a ruling of the First Maritime Court that denied a motion to stay an action in favour of the English High Court based on a forum-selection clause in a standard liner bill of lading. The lower court decision was affirmed, even though the parties had negotiated a service contract that incorporated the standard terms of the Maersk bill of lading. In both cases, the Supreme Court found that there was no evidence of a prior negotiation by the parties of the corresponding forum selection clauses. It must be said that the reason behind the legislative amendment to Article 22(3) of the CMP was to prevent stay of actions based on forum selection clauses in bills of lading. If the relevant forum selection clause is contained in a charterparty or MoA, which are normally actively negotiated by the parties, the Panamanian courts would tend to enforce it.

Article 566 of the CMP contains conflict-of-laws rules. In general, in contractual claims, the maritime courts apply the substantive laws agreed on by the parties to the contract to resolve the dispute. In tort claims, the substantive law of the flag state of the relevant vessel, or the laws of the place where the tort occurs, are applied to resolve disputes.

ii Arbitration and ADR

The Maritime Law Association of Panama and the Panama Chamber of Shipping joined forces to create a maritime arbitration centre (CECOMAP). Recently, the rules and a table of fees were approved for the CECOMAP and an agreement with one of the established arbitration centres in the Chamber of Commerce or the Construction Chamber is being worked on for the CECOMAP to be able to use their facilities. CECOMAP is intended to

be an arbitration centre in which the growing number of companies in the Panama Chamber of Shipping can resolve their disputes efficiently and cost-effectively. Eventually, it is intended that the CECOMAP become an option for dispute resolution for the whole of Latin America.

iii Enforcement of foreign judgments and arbitral awards

Final foreign judgment and arbitration awards can be enforced in Panama. Before enforcement, the party seeking enforcement of its judgment or award must have it recognised and declared enforceable by the Fourth Chamber of the Supreme Court of Panama through *exequatur* proceedings. These proceedings normally last between six months and one year, depending on the opposition presented by the judgment or award debtor, who must be notified of the *exequatur* proceedings and may file opposition pleadings and evidence. The general rule is that a final judgment or award would be recognised and then enforced in Panama if the action that resulted in the judgment or award was properly and personally served on the defendant, so that it was not rendered by default, and if the obligation for which the judgment and award was sought would be considered a legal obligation in the Republic of Panama.

The only additional requirement is that of reciprocity. As per Article 424 of the CMP, if the judgment or award comes from a country that would not recognise judgments or awards rendered in Panama, Panama would not recognise judgments or awards from such country.

In 1982, Panama ratified the New York Convention. This makes the recognition and enforcement of arbitration awards issued in countries that are also parties to such convention simpler and somewhat faster than a normal *exequatur* for recognition of a foreign judgment.

One important feature of enforcing a maritime foreign judgment or arbitration award is that the maritime courts may attach assets of the judgment or award debtor, and thereby obtain security for the enforcement while the *exequatur* proceedings are pending in the Supreme Court. This is important because much of the time such assets (ships, cargoes, bunkers, etc.) would be passing through the Panama Canal or calling at our ports for only a brief period.

IV SHIPPING CONTRACTS

i Shipbuilding

The shipbuilding industry is not well developed in Panama. Ships built in Panama are basically small craft used in local trade or the local maritime service industries. There is one shipyard in Panama with a current Panamax-size dry dock, which is located at the Pacific entrance to the Panama Canal: MEC Shipyard. The facility is, however, used for maintenance and repair of vessels, rather than shipbuilding. Ship repairers have standard form contracts, which may be amended by the parties to accommodate their needs.

ii Contracts of carriage

Chapter I of Title II of the LMC contains substantive maritime law on contracts of carriage. While Panama has not ratified any of the international conventions dealing with contracts of carriage, the Chapter basically incorporates the Hague-Visby Rules, with some minor additions. Article 58 of the LMC contains the same defences available to a carrier under Article IV, Rule 2 of the Hague-Visby Rules, including the 'act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation and management of the

ship'. Article 63 of the LMC determines how any loss to cargo interests is to be calculated and includes the same limitations of liability to the carrier by package (666.67 SDRs per package) and weight (2 SDRs per kilogram). Article 57 contains the concept of when a deviation would be considered a 'reasonable' deviation. Article 58 provides liability to the carrier for damage or loss caused by delay, unless the delay was caused by one of the exempted perils. It also establishes that, unless the parties have agreed on a specific duration, there is a delay when the goods have not been delivered in the designated port or place within a 'reasonable' time. The duties of the shipper are contained in Section 3 of Chapter I and again mirror those of the Hague-Visby Rules. In general, the LMC transposes the Rules to domestic maritime law, except that it provides for carrier liability for loss or damage caused by delay.

While very modern legislation exists on contracts of carriage, the vast majority of contracts of carriage cases in Panama's maritime courts are not resolved in accordance with Panamanian substantive law. Article 566 (10) of the CMP provides that the applicable substantive law to determine the effects of contracts of carriage are those agreed on by the parties and, only when there is no governing-law clause, by the laws of the place of shipment. Since most contracts of carriage nowadays contain a governing-law clause, and it is only very seldom that the parties have agreed on Panamanian substantive law, cargo claims almost invariably end up being litigated in accordance to the substantive laws of other countries.

Article 244 of the LMC contains the list of claims that give rise to maritime liens on ships or 'preferred maritime credits'. The list contains 13 types of claims. Contract-of-carriage claims can give rise to a maritime lien against the carrying ship under items 7 and 12. Claims that give rise to liens on cargo are listed in Article 248 of the LMC. *Inter alia*, contract of carriage claims for unpaid freight and contributions to general average give rise to liens on cargo in favour of the carrier that may be exercised by possession.

iii Cargo claims

Among the claims filed in Panama's maritime courts, cargo claims are the most common. Most involve damage to containerised cargo, but there are also bulk cargo claims. Claims for damage to fruit cargoes carried from Panama and Latin America to Europe and the United States are fairly common. Under Panamanian substantive law, whichever party suffered the loss – either the shipper or the consignee – can sue the contractual carrier, the actual carrier or the servant of the carrier that was entrusted with the care and custody of the cargo when the damage occurred. Subrogated cargo underwriters have title to sue. Under Article 202 of the LMC, upon payment by an insurer to its insured, the insurer is vested with title to sue by operation of law; a formal assignment of rights is not required. In Panama, it is normally the cargo underwriter who files suit; however, when the claim is subject, for instance, to English law, a prudent litigator would always include the consignee under the bill of lading as a claimant to avoid title-to-sue issues under such law. The Panamanian courts uphold the incorporation by reference of charterparty clauses into contracts of carriage evidenced by bills of lading. The leading case on incorporation by reference is *Agrowest SA, COMEXA & Dos Valles SA v. Maersk Line*. In a decision dated 6 February 2006, the Supreme Court held that an arbitration clause in a service contract could be incorporated by reference into contracts of carriage. Since then, the maritime courts incorporate, by reference, charterparty terms into contracts of carriage. However, while the governing-law clause in a charterparty may be incorporated by reference into the contract of carriage, a forum-selection clause incorporated

by reference may be ineffective to stay an action in favour of the contractually selected forum, unless negotiation between the parties can be evinced (see discussion of the 'Nagoya Bay' in Section III.i, *supra*).

iv Limitation of liability

Panama has incorporated the LLMC Convention into domestic law, without its 1996 Protocol, almost verbatim. Procedurally, the limitation action is regulated by Articles 517 to 529 of the CMP. Some of its most important features are: that the action must be commenced within six months of the receipt of a claim in writing by the person seeking to limit; that the limitation fund may not only be constituted by a cash bond, but also through a guarantee issued by a bank or an insurance company licensed in Panama; and that the party seeking to limit may also petition the court for a finding of no liability.

For oil pollution claims, limitation of liability is regulated by the CLC Convention and its 1992 Protocol.

As previously stated, cargo claims may be limited in accordance with the package and weight limitation of the Hague-Visby Rules, which have been incorporated into the LMC.

V REMEDIES

i Ship arrest

With more than 14,000 canal transits per year and the busiest container ports in Latin America, Panama is an ideal place to arrest not only vessels, but cargoes, bunkers and any other assets that may enter the jurisdiction. The arrest procedure is fairly simple and the maritime courts are open 365 days per year and 24 hours a day for urgent matters, such as arrests or the lifting of arrests. There are three types of arrests contemplated in the CMP:

- a* Arrests merely to secure an *in personam* claim: in this type of arrest, the defendant is a company with operations in Panama and that can be served with process within the court's jurisdiction. For this type of arrest, the claimant or arrestor must post between 20 and 30 per cent of the arrest amount as counter-security with the court.
- b* Arrests to confer jurisdiction to Panamanian maritime courts over the defendant: this type of arrest has the effect of serving the complaint on the defendant, besides securing the claim. Defendants are companies that cannot be served with process within Panama – normally foreign companies with no operations in Panama or Panamanian companies that do not have any operations within Panama. For this type of arrest, only US\$1,000 is required as counter-security, irrespective of the claim amount, but *prima facie* evidence of the claim and its quantum must be filed with the complaint and arrest petition.
- c* Arrests to enforce a maritime lien or other *in rem* right: in this type of arrest, the defendant is not a person, but the vessel itself. To effect these arrests, the claimant must have a claim that gives rise to a maritime lien or other *in rem* right (for instance, a statutory right *in rem*) against the vessel. The counter-security is US\$1,000 irrespective of the claim amount, but the claimant must provide the same *prima facie* evidence requirement as in (b) above.

Most arrests in Panama fall under (b) and (c). When the complaint and arrest petition are filed, the corresponding maritime judge would review the *prima facie* evidence and, if he or she considers that it sufficiently supports the claim and its quantum, he or she immediately

issues the arrest order. The court marshal then serves the arrest order on the vessel, normally when at anchor when the vessel is waiting to transit the Panama Canal at either Balboa or Cristobal anchorages, or at any of the ports. If feasible, an arrest order may also be served by helicopter on the target vessel, provided the vessel is within Panamanian territorial waters. When the target vessel is the vessel in respect of which the claim has arisen, the claimant may also request an inspection of documents on board the vessel to obtain evidence. Inspection of documents is particularly important in arrests of bunkers or cargoes, in order to confirm that the defendant owns the bunkers or cargoes.

An arrest cannot be effected in Panama to secure proceedings in another jurisdiction. It is a requirement that substantive proceedings be commenced in Panama simultaneously with the arrest petition; however, the case can later be stayed in favour of a foreign forum. The security obtained through the arrest can be replaced with security in the foreign forum, or the security in Panama can be maintained in the maritime courts to the order of the foreign forum.

Amounts to be posted as security may be consigned to the court in the following forms:

- a* a guarantee certificate drawn on cash from the Banco Nacional de Panama (Panama's central bank);
- b* a letter of guarantee from a bank operating locally;
- c* a guarantee issued by a local insurance company; or
- d* any other form of security on which the parties may agree.

P&I LoUs, which fall under (d), are probably the most common form of security for the lifting of arrests in Panama; however, they are not accepted as a matter of law and the claimant must consent to such form of security before the maritime court will accept it to lift an arrest. The amount of security is determined by the quantum of the claim, the legal interest and the provisional judicial costs (including attorneys' fees) set by the maritime judge. If the claim amount exceeds the value of the ship, the security may be limited to such value. If, however, the parties cannot agree on the value of the ship, the court will have to order an appraisal, which could cause a substantial delay in the lifting of the arrest. Once adequate security is posted, the maritime court will promptly issue the order lifting the arrest, which the marshal of the court will serve on the master of the vessel, returning the documents removed from the vessel and removing the custodians from the vessel. The whole process could last from one to several hours, depending on the location of the vessel (Balboa or Cristobal).

In the event of a wrongful arrest, the CMP provides the aggrieved party with summary proceedings to lift the arrest. This is called *apremio*, which consists of a special motion to lift the arrest upon showing sufficient evidence that the arrest was wrongful, which, under the CMP, means it was effected:

- a* over property (ship, cargo, bunkers, etc.) not belonging to the defendant;
- b* in contravention of a previous express agreement by the parties to refrain from arrests; or
- c* when a maritime lien has been extinguished or is in-existent (*in rem* claims).

Upon the filing of an *apremio* motion with the required supporting evidence, the maritime judge will immediately consider and resolve the motion. If the motion is admitted, the judge will call the parties to a special hearing to be held in the shortest possible time (usually within one day), in which the claimant would have the burden of proving that the arrest was not

wrongful and should therefore be maintained. If it fails to carry such burden of proof, the maritime judge will order the immediate release of the vessel or other property arrested. The claimant may appeal the decision, but this does not prevent the lifting of the arrest.

ii Court orders for the sale of a vessel

A pre-judgment judicial sale of a vessel can be and is normally ordered when it becomes apparent that the defendant will not, or cannot, lift the arrest. When the judge orders the judicial sale of a vessel, he or she appoints an appraiser to issue a report on the market value of the vessel. The court then sets three dates for the judicial auction of the vessel by the marshal. On the first date, the lowest bid may be no lower than three-quarters of the appraised value of the vessel. If there are no bidders in the first auction, the lowest bid in the second auction may be half of the appraised value of the vessel. If the vessel is not sold in the second auction, there is no minimum bid in the third auction. The vessel is sold by the marshal to the highest bidder. Usually, vessels sell for less than their appraised value.

VI REGULATION

i Safety

Panama has passed SOLAS into law; this is the most important legislation on safety for Panamanian merchant vessels. It is implemented by the PMA and it relies on its recognised organisations (ROs) for the certification of the merchant vessels registered in Panama. The Colregs have also been passed into law in Panama. They apply to Panamanian merchant vessels and they are also the ‘rules of the road’ for navigating Panamanian territorial waters. The PCA has, however, adopted its own Colregs (PCA Colregs) with certain variants from the IMO Colregs, which apply to all vessels in Panama Canal waters. These include the designated anchorage areas at both sides of the Panama Canal (Balboa and Cristobal). The PCA Colregs are almost identical to their IMO counterparts, but have slightly different regulations dealing with instances when the master is required to be on bridge, navigation in the Gaillard Cut and through the locks, and lookout duties.

ii Port state control

The port state control entity in Panama is the PMA. The PMA’s Directorate of Merchant Marine and its Directorate of Ports and Auxiliary Industries execute random inspections of merchant vessels of any nationality entering Panamanian waters. Panama subscribes to and is part of the *Viña del Mar* MoU, which groups the maritime authorities of South America, Mexico, Panama and the Caribbean.

iii Registration and classification

Panama has the biggest open registry in the world. Shipowners from any nationality – except those from countries to which the UN has applied restrictions (currently North Korea and Iran) – may register their vessels in Panama. The procedure is very quick and simple. The shipowner just needs to complete a form with the ship’s particulars and present it to the Directorate of Merchant Marine of the PMA, with a copy of the minimum safe manning certificate from the previous registry – newbuilds are of course exempted from the latter

requirement. Upon payment of the registration fees and annual tonnage taxes, which vary according to the ship's type, the vessel is issued a provisional patent of navigation, valid for six months.

The registration procedure can be carried out in Panama through a lawyer or at one of the many Panamanian consulates in key ports and maritime centres throughout the world. A lawyer must always be appointed as the vessel's legal representative before the PMA. After the provisional registration, the shipowner has six months to complete permanent registration of the vessel. In order to do so, title over the vessel must be duly registered in the Registry of Titles & Mortgages of the PMA, the deletion certificate from the previous registry must be filed before the PMA and the corresponding technical certificates evidencing compliance with the various IMO conventions must be issued by the classification society or RO selected by the shipowner. For fishing and fishing support vessels (reefers that carry fish), a certificate of compliance from the Authority of Aquatic Resources of Panama must be obtained before the permanent registration of the vessel can be accomplished.

The permanent patent of navigation, issued after the foregoing requirements are met, is valid for five years, after which an application for renewal can be filed. Vessels that are continually detained by the PSC of the various MoUs can be deregistered by Panama. Upon receiving the corresponding PSC reports, the Director of Merchant Marine can commence an *ex officio* cancellation process, which may lead to the vessel's cancellation from the registry, unless the vessel is mortgaged and the mortgagee bank, which must be served with notice of such process, appears before the Directorate of Merchant Marine and opposes such cancellation. Technical certificates evidencing compliance with the various IMO conventions are issued by Panama through the classification societies and ROs authorised by Panama to issue certificates on its behalf. All members of the IACS are authorised by Panama. There are also a number of non-IACS ROs authorised by Panama. Most are Panamanian, but there are some foreign ROs authorised by Panama. There have not been any cases filed against classification societies or ROs in Panama's maritime courts, but, in principle, there is nothing in Panamanian law that would exempt them from liability for negligence in the issuance of certificates, if such negligence were to cause damage to shipowners or third parties.

iv Environmental regulation

Panama ratified MARPOL, which is the primary legislation regulating pollution from ships. The PCA also has its own regulations in place to prevent pollution from ships and to sanction those ships that cause oil pollution while transiting the Panama Canal. For severe offences, PCA fines can reach US\$1 million. Panama also has a Ministry of the Environment, whose jurisdiction includes Panamanian territorial waters. Normally, its focus is on pollution events on land, but could also fine any vessels causing pollution. In 2002, the Sydney Star had a collision with the Royal Ocean in Cristobal. As a result, one of its bunker tanks was ruptured and it spilled bunkers at the north entrance of the Panama Canal. Both the PMA and PCA fined the vessel. It was ruled by the Supreme Court that both entities could fine the vessel independently of each other but the PMA did reduce its fine, taking into account that the PCA had already levied a fine of US\$25,000 against the vessel.

v Collisions, salvage and wrecks

Collisions and salvage are regulated in Chapters I and II, respectively, of Title III of the LMC. In general, for a salvor to collect any salvage award, the salvage must be at least partially successful.

vi Passengers' rights

Panama ratified the Athens Convention and its 2002 Protocol on 7 November 2013. There have not yet been any cases litigated in the maritime courts to which the Athens Convention has been applied.

vii Seafarers' rights

Panama ratified the Maritime Labour Convention 2006 (MLC) in January 2009. There have been no detentions in Panama resulting from a breach of the MLC. Besides the MLC, Panama has a Maritime Labour Law passed in 1998 (MLL), which regulates all labour issues not dealt with in the MLC. There is a minimum compensation table for seamen who have suffered accidents on board Panamanian vessels established by virtue of Article 82 of such MLL. The maximum compensation under this table is US\$50,000 in the event of death or permanent disability; however, such compensation is considered of a labour nature and seamen could also sue the shipowner for civil liability, in which case they must prove the negligence of the shipowner in the causation of the accident. Any payment under the compensation table would be deducted from any damages arising from any civil liability. Under Article 92 of the MLL, the shipowner and the seaman may agree on any law and jurisdiction other than Panama in their contracts. In a judgment dated 26 March 2006, in *Edwin Cabungcag et al v. Diamond Camellia SA & Mitsui OSK Lines*, the Supreme Court of Panama upheld a decision from the lower labour courts dismissing for lack of jurisdiction a claim arising on board a Panamanian vessel because the parties had agreed on Philippine law and jurisdiction in the respective labour contract. Panama's two maritime courts have jurisdiction for any civil claims against a shipowner, while labour claims against shipowners of Panamanian-flagged vessels must be filed in Panama's labour courts.

Chapter 35

PARAGUAY

Juan Pablo Palacios Velázquez¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The shipping industry in Paraguay has grown steadily in the past decade, mainly as a consequence of the significance that the agro-business has for the local economy and the need to transport these commodities overseas.

Paraguay's economy is dependent on foreign trade² – it is among the five largest soya exporters in the world³ – and in the past 20 years the major international agro-commodity companies have settled in the heart of South America⁴ and with them, their shipping arms. Traditional international carriers, such as MSC, P&O Maritime, Imperial Shipping or CMA CGM, together with South American shipping companies such as UABL and Hidrovias, have invested heavily and are fully operational in Paraguay. Likewise, local carriers play their role in meeting the continuous demand for hold space for Paraguayan products.

The registered fleet size currently authorised by the Merchant Shipping Authority of Paraguay⁵ is of approximately 2,012 vessels, out of which 1,741 are barges. From the total fleet, 90 per cent of the vessels and 80 per cent of the barges have Paraguayan flags, while the rest of the ships operating in Paraguay are registered under Argentinian, Bolivian, Brazilian and Uruguayan flags.⁶ The Paraguay–Paraná waterway, a system of rivers that starts in Puerto Cáceres (Brazil), goes through Bolivia, Paraguay and Argentina, and ends in Nueva Palmira (Uruguay), is the regular route of the Paraguayan fleet.

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2 www.worldbank.org/en/country/paraguay/overview.

3 www.capeco.org.py; www.ers.usda.gov/media/1142992/ocs13g.pdf.

4 <http://capro.org.py>.

5 Created by Law No. 429 in 1957.

6 The data was provided by Centro de Armadores Fluviales y Marítimos (CAFYM), the shipowners' union in Paraguay.

In 2013, the Paraguayan fleet carried approximately 26.6 million tonnes of cargo, which can be divided into 8.5 million tonnes of grain and sub-products, 12.5 million tonnes of minerals, 3 million tonnes of fuel, 1 million tonnes of containerised cargo, 1 million tonnes of cabotage grains, 500,000 tonnes of oils and 550,000 tonnes of clinker.⁷ Paraguay's most important ports are concentrated in Asunción, Villeta, San Antonio and Encarnación,⁸ cities strategically located for river connections to the sea through Argentina, Uruguay and Brazil. Virtually all the cargo that leaves Paraguayan ports through the waterway in river carriers is trans-shipped to Argentinian, Uruguayan and – to a lesser extent – Brazilian ports, and from there transported by sea carriers to their final destinations.

With the investment of carriers, the shipbuilding industry has flourished in Paraguay in the past couple of years. Japanese giant Tsuneishi arrived in the country in 2012 to join locals Astillero Chaco SA, La Barca and Astillero Aguape SA. They remain a valid alternative to Argentinian and Brazilian shipyards, most frequently requested by shipowners in recent times.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Book III of the Code of Commerce, 'Rights and obligations arising from navigation' was the only Book of this old Argentinian statute (1889) not repealed by the current Paraguayan Civil Code.⁹ It was adopted by Paraguay in 1903 and contains the legal framework for private maritime law. Both dry and wet domestic shipping is controlled by this law, which contains provisions related to ships, shipowners, charterers, captains, crew, contracts of affreightment, charterparties, bills of lading, collisions, shipwrecks, salvage, cargo claims, general average, ship mortgage and maritime liens.

The Paraguay–Paraná River Transport Agreement adopted by Law No. 269/1993 is an international agreement entered into between Argentina, Bolivia, Brazil, Paraguay and Uruguay to regulate international river transport through the most important waterway in South America. The agreement contains five additional protocols related to customs matters, navigation and safety, insurance, equal opportunities for increasing competitiveness, and dispute resolution.

International carriage of goods by sea is governed by the Hamburg Rules, adopted in Paraguay by Law No. 2614/2005.

In the administrative sphere, the most important statutes are the Code of Fluvial and Maritime Navigation, adopted in Paraguay by Law No. 476/1957, and the Capitánias Rules, adopted by Law No. 928/1927.

Other key international legislation adopted by Paraguay includes the 1910 Collision Convention, the CLC Convention, the Criminal Collision Convention 1952, the Brussels Convention, UNCLOS, SOLAS 74/78 and the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation 1988.

7 Ibid.

8 www.mre.gov.py/v1/userfiles/file/presentacionpais/Presentacion-Paraguay-octubre2013-ESP.pdf.

9 Law No. 1183/1985.

III FORUM AND JURISDICTION

i Courts

In Paraguay there is no admiralty court or all-encompassing special jurisdiction for shipping disputes, which are normally filed in the ordinary civil and commercial courts. Admiralty accidents, such as salvage, wrecks and collisions could also lead to procedures in criminal courts to ascertain criminal liability. Further, there would normally be an open investigation to determine the administrative fault of the captain and crew before the Paraguayan coast guard (General Naval Prefecture) in the administrative court.

Domestic cargo claims – involving transport between Paraguayan ports – must be filed within a year, counted from the day on which the goods were delivered or from the day they should have been delivered. If the dispute is related to international river carriage, the time bar for initiating the claim is 18 months while, if the cargo claim concerns an international maritime transport, the time bar is the same as that contained in the Hamburg Rules: two years.

ii Arbitration and ADR

Paraguay does not have a specific maritime arbitration court, nor does it have any special procedures. The arbitration and mediation proceedings are normally directed to the Paraguayan Centre of Mediation and Arbitration, a body of the Paraguayan Chamber of Commerce,¹⁰ where specific and complex commercial disputes are resolved.

Within the legal framework of the Arbitration and Mediation Law No. 1870/2001, the centre has developed its own rules of procedure, which are far more flexible than the procedural law that regulates ordinary proceedings in the courts.

The vast majority of bills of lading and charterparties drafted by local carriers refer the resolution of disputes to the ordinary courts, which is why there is not a great deal of arbitration activity related to shipping disputes in Paraguay.

It is worth mentioning that international carriers normally prefer to litigate in foreign jurisdictions with legislation more friendly to shipowners. Hence, it is not unusual to find clauses selecting foreign courts or moving arbitration proceedings abroad. The validity of this type of clause before the Paraguayan courts has not yet been uniformly decided, but some courts have declared this sort of clause null and void¹¹ on the basis that referring the dispute to foreign courts, where the shipper or the consignee have not been in a position to negotiate the terms of the contract, is quite similar to denying justice to these claimants, and are against public policy. Time bars on starting arbitral proceedings are the same as those noted in subsection i, *supra*.

iii Enforcement of foreign judgments and arbitral awards

Local courts do not impose restrictions on the enforcement of foreign judgments and arbitral awards; however, the enforcement of foreign judgments is regulated by the Book III, Title

10 www.camparaguay.com/v3/index.php.

11 *Garantía SA de Seguros y Reaseguros v. Compañía Marítima Paraguaya SA y otros*. First instance judgment of the Civil and Commercial Court of Asunción, 11th Session. SD No. 261, 15 June 1987.

IV, Chapter II of the Civil Procedural Code (Law No. 1337/1988) and the enforcement of foreign arbitral awards is governed by Chapter VIII of Law No. 1879/2002 on Arbitrage and by the New York Convention.

Applications for the enforcement of foreign judgments and arbitral awards have to be made before the civil and commercial court of first instance of the domicile of the person against whom the award is meant to be executed, or in the place in which the property of the defendant is located. The party who wants to enforce the judgment or the award has 10 years to do so,¹² counting from the day of the ruling.

IV SHIPPING CONTRACTS

i Shipbuilding

Local shipyards have grown significantly in the past five years, with a lot of carriers buying brand-new barges to increase their fleets as a result of the high demand for space on the Paraguay–Paraná waterway.

The contract to build a ship is neither a typical nor a nominate contract in Paraguayan law. In this sense, what the parties have specifically agreed, exercising their freedom of contract, together with the general principles of Book III of the Civil Code, which regulates the law of contracts, will rule shipbuilding contracts.

Law No. 928/1927 obliges carriers to notify and obtain permission from the General Naval Prefecture for the construction of any ship. The General Naval Prefecture is in charge of navigational safety and issues most of the statutory certificates that are needed to navigate, polices the rivers and is responsible for enforcing navigational rules.¹³ In that role, the General Naval Prefecture is competent to monitor the construction of a ship that is going to be incorporated into the local fleet.

ii Contracts of carriage

Paraguay has two set of rules in force at once: one for international carriage of goods by sea and the other for the domestic carriage of goods by river.

Until 2005, the Hague Rules were in force in Paraguay by virtue of Law No. 1025/65. This was somewhat curious as Paraguay is clearly considered a cargo-owning country rather than a shipping force. In 2005, Congress adopted a radical change by approving the Hamburg Rules through Law No. 2614/2005. The Hamburg Rules, friendlier to cargo owners, are currently in force for international carriage of goods by sea. Besides the Hamburg Rules, the carriage of goods by river is governed by Book III of the Code of Commerce, which contains detailed provisions relating to contracts of carriage.

The Code of Commerce establishes a strict liability regime, with few exceptions in favour of the carrier. One could easily conclude that the legal framework of the Code of Commerce is less advantageous to the carrier than international conventions.

12 Article 659b of the Civil Code; Article 526b and 534 of the Civil Procedural Law; Article 48 of Law No. 1879/2002.

13 Law No. 1,158/85 organising the General Naval Prefecture; Law No. 928/1927 on the Capitancias Rules; and Law No. 476/1957, the Code of Fluvial and Maritime Navigation.

The carrier must transport the goods from the loading port to the port of discharge and it has to discharge the goods loaded in the same condition that they were in at the time of loading. The contract of carriage under the Code of Commerce does not envisage ‘best-effort’ obligations – namely, obligations to use diligence and to give one’s best efforts to carry out an obligation – but end results. The carrier promises a specific result and not conduct aimed at producing a result that it is not possible to assure. Hence, when the goods are not returned in the same condition – the result promised – the fault of the carrier is presumed by the courts until the latter demonstrates cause for exemption.

The carrier is liable for any damage or loss to the cargo during transport, unless it can prove: (1) an inherent flaw in the goods; (2) force majeure; or (3) the fault of the shipper. These are the only exceptions established by law in favour of the carrier. Normally, the carrier will try to argue the case through the force majeure defence; under this domestic regime, there are no exceptions covering errors in navigation or in the management of the ship.

The Code of Commerce also recognises the liability of the shipper in Articles 1,068 and 1,069. The carrier might be entitled to claim against the shipper for unpaid freight, for damage to the ship caused by the cargo, for loading dangerous or prohibited goods damaging other cargo, or, for instance, for deposit charges where the consignee fails to collect the goods. This liability is also recognised in general terms in the Civil Code.

With regard to security for the freight, Article 958 of the Code of Commerce provides that the owner is entitled to exercise a lien on freight payable on delivery, general average contributions and costs of preserving the goods. Moreover, the contract of carriage will normally contain detailed provisions entitling the owner to retain the cargo until it has been paid the sums that the lien covers, and these provisions will normally be respected by courts.

As shown, the Code of Commerce and the Hamburg Rules have significantly different regimes regarding matters including the liability of the carrier, time bars, and limitation of liability. Accordingly, it is essential to establish from the outset what law applies. In this regard, when it is proven that the damage occurred during the river leg of the transport, Paraguayan jurisprudence says that the local rules, established by the old Code of Commerce, apply instead of international conventions on sea carriage.¹⁴

In terms of charterparties, the Code of Commerce regulates the contract of carriage.¹⁵ Within that legal framework, the shipowner and charterer are otherwise free to negotiate their own terms.

As regards choice-of-law clauses (which usually opt for English or US law), it remains to be seen whether the Paraguayan courts will apply the legal regime established by the contract of carriage, superseding the regime established by local law. This appears to be banned by Article 1,901 of the Code of Commerce, although this interpretation is likely to be reviewed in the light of the new Law 5.393/2015 on the Law Applicable to International Contracts.

iii Cargo claims

In the land-locked country of Paraguay, all the cargo that reaches it arrives in two ways: by sea and by river. As a consequence of the hydrological features of its rivers, seagoing ships are

14 *Garantía SA de Seguros y Reaseguros v. Compañía Marítima Paraguaya SA y otros* (footnote 11, *supra*).

15 Articles 1,018 to 1,102.

normally unable to navigate internal waters, which is why cargo is customarily trans-shipped in Argentina or Uruguay. For both means of transport, bills of lading are issued. Bills of lading can differ not only in their terms, but in the legal parties to the contract and the rules and legislation applicable. This peculiarity raises several questions relating to the identity of the carrier, title to sue, and the terms of the contract of carriage.

The contractual parties to any bill of lading are the shipper, the carrier and the consignee. The only party that will normally remain unchanged in both bills of lading (ocean or river) is the consignee. The carrier will probably change as, in an ocean bill of lading, the carrier will be the one with whom the shipper contracted (ocean or sea carrier), while in a river bill of lading, the carrier will be the ship that took the cargo from the trans-shipment port, normally known as a feeder (river carrier). As regards the shipper, in an ocean bill of lading, it will be the supplier of the cargo, while in a river bill of lading, the shipper may be the ocean carrier. This is a normal scenario, which can, however, have another layer of complication if special agreements are made between carriers.

The consignee, as it normally appears as such in both bills of lading, is entitled to sue any of the carriers. The shipper also has title to sue; this is true under both the Hamburg Rules and the Code of Commerce. Finally, the question of who will be sued will depend on which carrier is liable, which in turn will normally depend on where the damage took place.

If the damage occurred during the river journey, the consignee *prima facie* will be entitled to sue the river carrier under the river bill of lading. The river carrier is only liable for this leg of the transport by virtue of the river bill of lading that it issues. The consignee might also be entitled to sue the ocean carrier, since under the ocean bill of lading the ocean carrier undertakes to carry the cargo from the loading port to the port of discharge (Paraguay) notwithstanding the fact that, in reality, the ocean carrier only transports the goods to the trans-shipment port. The ocean carrier contractually promises to carry the cargo into Paraguay; in this scenario the ocean carrier will normally have recourse against the river carrier.

If the damage took place during the sea leg, the consignee should only sue the ocean carrier, as the river carrier is not liable for the ocean leg of the transport: it did not carry out that leg of the transport, nor did it issue a bill of lading promising to do so.

The Code of Commerce recognises the possibility of incorporating charterparty terms to the bill of lading in Article 1,029.

iv Limitation of liability

When the Hamburg Rules apply, a carrier can limit its liability in cargo claims according to Article 6. Although highly unlikely to happen in practice, the right to limit can be lost under the circumstances cited in Article 8, which describes conduct barring limitation.

Under domestic law, Paraguay has not subscribed to any of the international conventions on limitation of liability. In that sense, neither the LLMC Convention 1976 nor its 1996 Protocol have been subscribed to. Likewise, the Brussels International Convention on the Limitation of Liability of Owners of Sea-going Ships 1957 and the 1924 Brussels Limitation Convention are not in force in Paraguay.

In this scenario, the only option that the carrier has to limit any kind of liability when the domestic rules apply is the abandonment of the ship, legislated under Article 880 of the Code of Commerce.

V REMEDIES

i Ship arrest

The rules that govern the procedure to arrest a ship are found in both the Code of Commerce and in the Civil Procedural Code. Recent jurisprudence has established that the general rules and requirements of injunctions and interim relief apply to the arrest of ships.¹⁶

To arrest a ship, the party that has a privileged¹⁷ or unprivileged¹⁸ credit against the ship can either file a specific claim for the sole purpose of obtaining the arrest or can initiate the principal claim on its merits.¹⁹ In any case, if the arrest is requested before the principal claim, the claimant has 10 days to initiate the claim on its merits, or the arrest will be lifted by the court, which might also grant damages in favour of the arrested ship.²⁰

There are other general requirements that must be met to obtain an arrest order: (1) the claimant needs to prove the verisimilitude of its right (a good arguable and accrued case); (2) the claimant needs to prove the urgency of arresting the ship (there must be a real risk of dissipation); and (3) the claimant needs to offer security to meet the costs and damages that may result if the order is granted without right. In this respect, Article 702 of the Civil Procedural Code establishes a claim for wrongful arrest when the claimant has abused or exceeded its rights in the use of the right to arrest a ship. The order granted by the court needs to be communicated to the General Naval Prefecture, the body that executes the arrest.

The arrest is considered a provisional and ancillary measure²¹ and the arrested party can always offer equivalent security to free the ship.²²

ii Court orders for sale of a vessel

The judicial sale of the ship has a similar legal regime to that of the judicial sale of real property²³ and is regulated under Articles 475 to 494 of the Civil Procedural Code.

An unpaid creditor needs to initiate a special procedure to execute a court order that recognises its right of credit. Within that procedure, the court will issue an order to sell the ship in a public auction. The debtor is entitled, before the buyer pays the price in the public auction, to release the ship by depositing the capital, interests and costs.

16 *Nautimill SA v. Naviera Chaco SRL s/ Cobro de Garantías Ordinario*, AI No. 77, 7 March 2013. Civil and Commercial Appeal Tribunal, Third Chamber.

17 Article 868 of the Code of Commerce. Maritime privileges are governed by Articles 1368–1378 of the Code of Commerce.

18 Article 869 of the Code of Commerce.

19 Article 691 of the Civil Procedural Code.

20 Article 700 of the Civil Procedural Code.

21 Article 697 of the Civil Procedural Code.

22 Article 698 of the Civil Procedural Code; and Article 870 of the Commercial Code.

23 Article 864 of the Commercial Code.

VI REGULATION

i Safety

The Paraguay–Paraná River Transport Agreement contains, in its Second Additional Protocol, a regulation related to safety and navigation. The Protocol contains detailed provisions relating to safety standards of vessels and cargo, safety of the crew, safety of navigation on inland waters, safety rules for ports and guidelines for the prevention, reduction and control of pollution of ships and boats. The Capitánías Rules also contain, in Articles 216 to 224, regulation on the safety of vessels.

Furthermore, Paraguay has also approved SOLAS 74/78, by Law No. 2367/2004, and the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation 1988.

ii Port state control

The General Naval Prefecture has jurisdiction over all port activities. As the river authority, it has competence to control the entry and exit of all vessels in order to monitor compliance with local laws and regulations. It also inspects docks and piers to monitor loading and discharging operations and determines the order of entry, departure, berthing, anchoring and the placement of vessels in port.

Among its duties, the General Naval Prefecture provides public services within ports and maintains harbours and channels, keeping them clean, safe and to depth, removing any obstacles that may interrupt navigation. The General Naval Prefecture also provides assistance to assure the rights of the Treasury when the customs authorities require their policing services. This General Naval Prefecture also executes court orders for the arrest and seizure of ships and monitors compliance with health regulations.

iii Registration and classification

The procedure for registration of ships used to be extremely bureaucratic in Paraguay. In 2014, the government issued a new regulation aiming at speeding up registration. Currently, the process starts with the Directorate General of the Merchant Marine, which issues a decision on the proposed registration. If favourable, the opinion is then elevated for the final consideration of the Ministry of Public Works and Communications, which issues the resolution incorporating the ship into the Paraguayan fleet and grants the right to use the Paraguayan flag. Once this resolution is obtained, the owner must then go to the General Naval Prefecture to gain a certificate of registration and finally, with the resolution and the certificate, the owner requests the registration of the ship ownership title before the Public Records Office.

The regime for the incorporation, registration and flagging of ships in Paraguay is regulated by the Decrees No. 1,994/2014 and No. 2,115/2014 and by the Resolution No. 1,791/2014 of the Ministry of Public Works and Communications. The regulation states all the requirements for incorporating new builds and second-hand ships, registering bareboat charters and incorporating ships under lease. By Decree No. 4,787/2016, the government restricted the incorporation of ships under lease to a maximum of six years, limiting the use of that regime of provisory incorporation to the Paraguayan flag.

iv Environmental regulation

The additional Navigation and Safety Protocol of the Paraguay–Paraná River Transport Agreement establishes detailed rules to prevent pollution accidents. Title VII contains guidelines for the prevention, reduction and control of pollution from ships and boats and regulates the carriage of dangerous substances in the waterway. In this respect, carriers are punished for the breach of their duties related to transport and dumping and they need to strictly observe the rules related to the discharge regimes. Likewise, the carriage of hydrocarbons, noxious liquid substances, harmful substances and dangerous goods is regulated.

Paraguay has not approved any of the IMO conventions on environmental regulation.²⁴ MARPOL and its protocols and annexes are therefore not in force. The same is true in respect of the Intervention Convention, the OPRC and the CLC Convention – none of these conventions applies in Paraguay.

v Collisions, salvage and wrecks

Paraguay has approved the 1910 Collision Convention, the Collision Convention 1952 and the Criminal Collision Convention 1952.

Locally, collisions are regulated by the Code of Commerce, in Articles 1,261 to 1,273. These are also regulated by the law of tort. Typically, collisions will give rise to a cause of action in negligence. There are certain points that the claimant needs to prove to obtain a favourable judgment:

- a* any damages suffered by the innocent ship;
- b* the fault of the guilty ship in the collision;
- c* that the fault caused the collision; and
- d* that the collision caused the damage.

Liability will be imposed by the court in proportion to the fault of the ships involved and if the relative degrees of fault cannot be determined, the court will apportion fault equally. To determine the fault of the ships, the Colregs will apply as they were approved as the official navigation rules by Article 46 of Protocol II of the Paraguay–Paraná River Transport Agreement. Disputes arising from collisions need to be filed within two years of the day of the accident.

The law of salvage is entirely contained in the Code of Commerce (Articles 1,303 to 1,311) as Paraguay is not party to the Salvage Convention 1989. Broadly speaking, under the local regime, the party claiming a judgment for salvage will succeed as long as it proves in court that:

- a* the salvage was in a maritime or river situation;
- b* there was a recognised subject of salvage;
- c* the subject of salvage was in a position of danger necessitating a salvage service to preserve it from loss or damage;
- d* the claimant did not have a pre-existing contractual or legal duty to save the ship; and
- e* the salvage was successful or contributed to the success of preserving the subject from danger.

24 www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx.

The quantum of the salvage award is calculated taking into account the promptness and nature of the service, the number of people and facilities involved in the service, and the danger through which the salvors went.

Wreck removal is legislated in Articles 1,283 to 1,302 of the Code of Commerce. The General Naval Prefecture is in charge of removing any wreck and initiating the administrative proceedings for establishing responsibility for the obstruction of navigation.

vi Passengers' rights

The Athens Convention has not been approved by Paraguay. The law related to the carriage of passengers by sea is restricted to Articles 1,103 to 1,119 of the Code of Commerce. The articles of the Code of Commerce are extremely outdated and inappropriate for the realities of modern transport.

vii Seafarers' rights

The legislation that regulates seafarers' rights is dispersed throughout the legal framework. In the international domain, Paraguay is not a signatory to any ILO conventions on maritime work. Some seafarers' and captains' rights are contained in the Code of Commerce and in the Fluvial Navigation Code; nevertheless, the local courts continue to apply the rules of the Labour Code (Law No. 213/93) to maritime labour disputes – something that is not entirely satisfactory as the provisions of the Labour Code were not conceived to deal with the specialised nature of this work.

VII OUTLOOK

Paraguay has started the lengthy process of adapting its legislation to the current needs of the maritime business, which is expected to continue to expand along with the balanced economy that the country has shown in recent years. Today, 90 per cent of foreign trade in or out of Paraguay passes through its rivers, a fact that demonstrates that navigation is extremely important to the country.

The current Merchant Marine Authority and the other competent bodies are making a significant effort to restructure safety regulations to responsibly accompany the continued growth of the fleet and port activities in Paraguay, applying international safety standards to the Paraguay–Paraná Waterway, on which traffic is also expected to increase.

In the current environment of economic stability in Paraguay and with the increasingly strong presence of the agro-business sector, it appears that local and foreign capital will continue to be invested in the maritime sector in Paraguay in the coming years.

Chapter 36

PHILIPPINES

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I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

There are two sides to the Philippine shipping industry, and both can only be described in superlative terms. The Philippines is an archipelagic country of over 7,000 islands and so shipping provides a vital link throughout the country. The domestic shipping industry, however, is probably best remembered for the ill-fated collision between the passenger ferry Doña Paz and the petroleum product tanker, Vector, which happened on 20 December 1987 and resulted in over 4,000 deaths – the worst disaster at sea in peacetime. As could be expected, it spawned numerous litigations in the Philippines and the United States. In 2014, the Philippine domestic fleet consisted of 20,280² registered vessels, which moved people and cargo throughout the Philippine archipelago.

On the international side, the Philippines is the largest provider of seafarers to the world's merchant marine fleet. In fact, the Philippines provides over 28 per cent of the world's seafarers.³ In 2014, the Philippines deployed 401,826 seafarers internationally⁴ and the number is projected to grow each year. In 2015, the Philippines earned over US\$25.76 billion⁵ from

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2 Maritime Industry Authority data as of June 2014. www.marina.gov.ph/infosys/1st%20sem_ves2014_web.pdf.

3 Dumlao, 'OFW remittances to increase by 8.5 per cent in 2014—Standard Chartered', *Philippine Daily Inquirer*, 13 January 2014, <http://business.inquirer.net/160057/ofw-remittances-to-increase-by-8-5-in-2014-standard-chartered#ixzz2xifc1065>.

4 Philippine Overseas Employment Administration, '2010–2014 Overseas Employment Statistics', available at www.poea.gov.ph/stats/2014%20POEA%20Stats.pdf.

5 Chipongian, 'OFW remittances reach \$25.8B in 2015', *Manila Bulletin*, 19 February 2016, www.mb.com.ph/ofw-remittances-reach-25-8b-in-2015/.

overseas Filipino workers and, of that total, over US\$5.8 billion came from Filipino seafarers employed by the world's merchant marine fleet.⁶ In 2015, the remittances of overseas Filipino workers constituted 9.8 per cent of the Philippines' GDP.⁷

The largest port in the Philippines is Manila, which is located on the island of Luzon in the northern part of the country. In the central Philippines, the Philippines' second-largest city, Cebu, serves as the main hub for the distribution of goods within the central islands of the country. Davao and Cagayan de Oro are the major ports in the southern Philippines' island of Mindanao, which is largely the source of Philippine agricultural exports.

In 2014, the Philippines imported US\$64,524 million (FOB value) worth of goods, while at the same time exporting goods worth US\$61,810 million (FOB value).⁸ This trade is almost entirely dependent on shipping, which is the vital link between the islands of the Philippines and the rest of the world.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The Philippines is a civil law country. The New Civil Code of the Philippines,⁹ which was enacted in 1949, was based on the Spanish Civil Code, but it is written in English rather than Spanish. The Philippines is no longer a Spanish-speaking country, so all enacted laws are in English and court proceedings are also conducted in English. The Philippines also has a Code of Commerce, which is again based on the Spanish Code of Commerce 1885. The Law on Obligations and Contracts is part of the New Civil Code, while the rules on domestic carriage of goods are set out in both the New Civil Code and the Code of Commerce. The latter also provides for the law on charterparties, collision and general average. Salvage is covered under a special law.

The Philippines also follows the system of judicial precedents and therefore the decisions of the Philippine Supreme Court, written in English, interpreting the provisions of the Civil Code, Code of Commerce and other legislation, have the force of law. For the carriage of goods to and from Philippine ports in foreign trade, the Philippines adopted the United States Carriage of Goods by Sea Act of 1936¹⁰ (the Philippine COGSA), which is basically the Hague Rules.

As mentioned above, the Philippines is a major provider of seafarers to the world's merchant marine fleet. More recent shipping-related legislation has tended to be with regard to overseas Filipino workers. As a result, the Philippine Congress enacted on the 13 March 2014, Republic Act 10635,¹¹ which established the Maritime Industry Authority

6 Ibid.

7 Ibid.

8 Philippine Statistics Authority, 'National Quickstat – February 2016', https://psa.gov.ph/sites/default/files/attachments/ird/quickstat/February2016_0.xls.

9 An Act to ordain and institute the Civil Code of the Philippines [Civil Code], Republic Act No. 386 (1950).

10 Carriage of Goods by the Sea Act [COGSA], Public Act No.521 (1936).

11 An Act establishing the maritime industry authority (Marina) as the single maritime administration responsible for the implementation and enforcement of the 1978 International

(Marina) as the single maritime administration responsible for the implementation and enforcement of the STCW Convention, as amended, and the international agreements or covenants related thereto.

III FORUM AND JURISDICTION

i Courts

Jurisdiction of courts

The Philippine courts' jurisdiction over shipping disputes is determined by law. Under the Judiciary Reorganization Act of 1980 (BP 129), as amended by Act No. 7691,¹² the regional trial courts have exclusive original jurisdiction over admiralty and maritime matters.

An interesting jurisdictional issue was dealt with in *Negros Navigation Co Inc v. Court of Appeals*¹³ and *Tsuneishi Heavy Industries (Cebu) Inc (THI) v. Negros Navigation Co Inc*¹⁴. THI commenced an action to enforce a maritime lien for ship repairs with the Regional Trial Court of Cebu (Cebu RTC) against the properties of Negros Navigation Co Inc (NNC). NNC subsequently commenced rehabilitation proceedings with the Regional Trial Court of Manila (Manila RTC) and prayed for the suspension of payments. The Manila RTC issued a stay order of all claims against NNC. Meanwhile, the Cebu RTC issued an arrest for NNC's vessels in the *in rem* aspect of the case. NNC sought the suspension of the proceedings in Cebu on account of the Stay Order issued by the Manila RTC. The appellate court restrained the implementation of the Manila RTC Stay Order. The Supreme Court overruled the argument of THI that the Manila RTC divested the Cebu RTC of jurisdiction acting as an admiralty court when it issued the stay order, but affirmed that the maritime lien must be upheld notwithstanding NNC's rehabilitation proceedings. The Supreme Court ruled that '[t]he Manila RTC acting as a rehabilitation court merely suspended the proceedings in the admiralty case in the Cebu RTC. It did not divest the Cebu RTC of its jurisdiction over the maritime claims of THI against NNC. The preferred maritime lien of THI can still be enforced upon the termination of the rehabilitation proceedings, or if such be unsuccessful, upon the dissolution of the corporation'.

Limitation period

Actions based on written contracts have to be filed within 10 years of the time the cause of action occurred, and four years in a case of quasi-delict, which is similar to tort under common law.

The 10-year prescriptive period is applied to contracts of carriage of goods by sea in domestic trade, but not to cases covered by the Philippine COGSA. In particular, Section 3(6) of the Philippine COGSA provides that the carrier is discharged from liability for loss

Convention on Standards of Training, Certification and Watchkeeping for Seafarers, as amended, and international agreements or covenants related thereto, Republic Act 10635 (2014).

12 An Act expanding the jurisdiction of the metropolitan trial courts, municipal trial courts and municipal circuit trial courts, amending for the purpose Batas Pambansa, Blg 129, otherwise known as the 'Judiciary Reorganisation Act Of 1980', Act No. 7691 (1994).

13 GR No. 163156, 10 December 2008.

14 GR No. 166845, 10 December 2008.

or damage of the goods unless suit is brought 'within one year after delivery of the goods or the date when the goods should have been delivered'. However, the period of time during which the goods have been discharged from the ship and given to the custody of the arrastre¹⁵ operator is not covered by the Carriage of Goods by Sea Act. The arrastre operator cannot invoke as a defence that the suit was instituted beyond the one-year limitation period.¹⁶

ii Arbitration and ADR

An international commercial arbitration concerning the carriage of goods or passengers by air, sea, rail or road, where the seat of arbitration is in the Philippines, shall be governed by the Model Law, as provided in Republic Act 9285 and its Implementing Rules and Regulations. Before the constitution of an arbitral tribunal, a party may request interim or provisional relief from the court. After the constitution of an arbitral tribunal or during the arbitration proceedings, the request may be directed to the court only to the extent that the arbitral tribunal has no power to act or is unable to act effectively. The provisional relief may be granted in any of the following instances: (1) to prevent irreparable loss or injury; (2) to provide security for the performance of any obligation; (3) to produce or preserve any evidence; or (4) to compel any other appropriate act or omission.

A party to an international commercial arbitration may petition the regional trial court for the recognition and enforcement of the international commercial award in accordance with Rule 12 of the Special Rules of Court on Alternative Dispute Resolution.

A party to a foreign arbitration may likewise petition the regional trial court to recognise and enforce the foreign arbitral award, which shall be governed by the 1958 New York Convention.

A foreign corporation not licensed to do business in the Philippines may seek recognition and enforcement of the foreign arbitral award in accordance with the provisions of the Alternative Dispute Resolution Act of 2004.

IV SHIPPING CONTRACTS

i Shipbuilding

Recognising that shipping is a necessary infrastructure and that the shipping industry plays a vital role in the country's economic development, the Philippine Congress has passed a

15 'Arrastre' is a Spanish word but is defined in the Philippines as 'the operation of receiving, conveying, and loading or unloading merchandise on piers or wharves'. Merriam-Webster.com, www.merriam-webster.com/dictionary/arrastre.

16 Insurance Company of North America vs. Asian Terminals, G.R. No. 180784, 15 February 2012.

law¹⁷ granting certain incentives to domestic or foreign corporations wishing to engage in shipbuilding within the country. Among the incentives granted¹⁸ is the tax-free importation of capital equipment to be used in the construction or repair of any vessel.

As of 2014, the Philippines ranked as the fourth-largest shipbuilding nation in the world in terms of newbuild completion volume (following South Korea, China and Japan). This was mainly attributable to the presence of industry heavyweights like Tsuneishi Heavy Industry of Japan (which owns and operates a shipyard in Balamban, Cebu) and Hanjin Heavy Industries of Korea (which owns and operates a shipyard in Subic Bay, Olongapo).

With respect to shipbuilding contracts entered into with Marina-accredited Philippine shipyards, there is no specific law governing the same. As such, they are governed by the general rules on contracts under the New Civil Code, which recognises freedom of contract. Title (as well as risk) to the vessel is passed from builder to buyer upon signing of a protocol of delivery and acceptance. With respect to dispute resolution, the parties are also free to stipulate their preferred mode. Ordinarily, parties opt for arbitration.

In practice, local counsel are able to assist foreign owners, buyers or banks (in cases where ship financing is involved) in the actual delivery of the vessel at a Philippine shipyard by having pre-agreed forms of the delivery documents and an appropriate power of attorney. Communication between a foreign owner, buyer or banks with local counsel is made easier when done through electronic means. In cases where ship financing is involved, the mortgage is usually pre-positioned at a foreign registry to be registered upon confirmation by local counsel that the protocol of delivery and acceptance has been signed.

ii Contracts of carriage

The New Civil Code, the Code of Commerce and the Philippine COGSA apply to contracts of carriage by water. The Code of Commerce and special laws apply in matters not regulated by the New Civil Code¹⁹ while the Philippine COGSA applies to the carriage of goods by sea to and from Philippine ports in foreign trade.

The Philippines has not adopted the Hague-Visby Rules, the Hamburg Rules, or the Rotterdam Rules.

The New Civil Code requires extraordinary diligence in the carriage of goods by common carriers,²⁰ while in the Philippine COGSA,²¹ the carrier is only bound to exercise due diligence. For private carriers of goods by water under the Code of Commerce, the requirement is only ordinary diligence.²²

Under the Ship Mortgage Decree, maritime liens are exercised through an action *in rem*.

17 An Act promoting the development of Philippine domestic shipping, shipbuilding, ship repair and ship breaking, ordaining reforms in government policies towards shipping in the Philippines and for other purposes [Domestic Shipping Development Act of 1994], Act No. 9295 (1994).

18 *Ibid.*, Chapter V, Section 14.

19 Civil Code, Article 1766.

20 *Ibid.*, Article 1753.

21 COGSA, Section 3(1).

22 See Code of Commerce, Article 362.

With regard to the shipowner's lien on the cargo for unpaid freight,²³ the lien can be exercised only as long as it has possession. Once the cargo is unconditionally delivered to the consignee at the port of destination, the shipowner is deemed to have waived the lien.

Under Republic Act No. 10668²⁴ promulgated on 28 July 2014, foreign vessels are now allowed to transport and co-load foreign cargoes for domestic transshipment. The Carriage of Goods by Sea Act and not the Civil Code applies in the determination of the liability of the foreign vessel for the loss of, or damage to the goods carried on board the vessel. Foreign vessels engaging in carriage conducted in accordance with Republic Act No. 10668 are neither considered common carriers with the duty to observe extraordinary diligence in the transportation of goods nor are they considered as offering public service as to fall under the provisions of the Domestic Shipping Development Act of 2004.

iii Cargo claims

There are two sets of rules for cargo claims in the Philippines. For cargo claims arising out of domestic carriage, meaning the carriage of cargo between the islands, the rules are stated in the Code of Commerce and the New Civil Code. For international carriage of goods, the applicable rules are set out in the Philippine COGSA.

For domestic carriage, notice of loss or damage to the goods must be provided by the cargo owner to the carrier within 24 hours of delivery of the goods. The 24-hour notice is a condition precedent and provided such notice is given, the cargo owner has 10 years within which to sue for the loss and damage to cargo. The duty of care for common carriers is set out in the New Civil Code and the threshold is very high: extraordinary diligence. Through judgments of the Supreme Court over the past 20 years, the lines between private carriers and common carriers have been blurred to the point of being almost indistinguishable: all cargo claims against carriers are treated as if they are common carriers. Common carriers only have three defences available and they are force majeure, inherent fault, and defects in the packaging.

For the international carriage of goods to and from the Philippines in foreign trade, the carrier's liability is based on the Philippine COGSA; however, the Philippine Supreme Court judgments have imposed a high threshold of care on common carriers, and the COGSA defences are being ignored. In the case of *Planters Products v. Court of Appeals*,²⁵ which involved a cargo of fertiliser from an overseas port to the Philippines, the Philippine Supreme Court applied the common carrier rules to the ship and that precedent has been reiterated in subsequent Supreme Court judgments. As a result of the *Planters Products* case and those that followed, the liability regime stated in the Philippine COGSA is more often disregarded by Philippine courts in favour of the common carrier regime. The only constant from the Philippine COGSA that is applied by Philippine courts is the limitation amount of US\$500 per package or customary freight unit.

As far as demise clauses are concerned, is it unlikely that such clauses would be recognised in the Philippines. In judgments that followed the *Doña Paz* tragedy, there is an indication of how the Philippine Supreme Court would deal with a demise clause. The

23 *Ouano v. Court of Appeals*, 211 SCRA 740 (1992).

24 An Act Allowing Foreign Vessels to Transport and Co-Load Foreign Cargoes for Domestic Transshipment.

25 *Planters Products v. Court of Appeals*, 226 SCRA 476 (1993).

product tanker *Véctor* had been chartered by Caltex Philippines. The owner of the passenger ferry *Doña Paz* sought indemnity from Caltex Philippines. The Philippine Supreme Court's judgment favoured Caltex Philippines²⁶ and ruled that as the voyage charterer, Caltex was not required to indemnify the ferry owner for payments made to the loss-of-life claimants and went on to say that a voyage charterer has the right to presume that the ship was seaworthy. Based on these judgments by the Philippine Supreme Court, it is unlikely that a demise clause would be enforced by a Philippine court.

iv Limitation of liability

The limitation of liability in the Philippines is based on the value of the ship and freight at risk. In collision cases, the shipowner is allowed to limit its liability for collision damage and any cargo claim that may arise. As far as cargo claims are concerned, the owner may exercise the right to abandon the ship and freight at risk to cargo interest in order to limit its liability.

The right to limit liability has been curtailed since the *Doña Paz* tragedy. Before the tragedy, the shipowner could limit liability provided that the owner was not at fault or negligent. Based on the judgment in *Aboitiz v. New India*,²⁷ the new rule is that as long as there is a finding of any kind of unseaworthiness against the vessel, the owner loses the right to limit liability, regardless of whether such unseaworthiness arose through the owner's fault or negligence.

V REMEDIES

i Ship arrest

The procedure equivalent to a ship arrest in the Philippines is through an application for the issuance of a preliminary attachment under Rule 57 of the 1997 Rules of Civil Procedure. For the effective enforcement of the writ of preliminary attachment, the court sheriff should have, previously or simultaneously with the implementation of the writ of attachment, served a copy of the summons upon the person of the defendant in order for the court to acquire jurisdiction upon him.

The party applying for a writ of preliminary attachment must provide a bond in favour of the other party to answer for damages in the event of a wrongful attachment. The party against whom the attachment was issued may lodge a counter-security to obtain the release of the levied property.

The improper or irregular issuance of a writ of preliminary attachment does not automatically warrant the award of damages. Evidence must be submitted to prove the nature and extent of the injury suffered by reason of the wrongful attachment.

Under the Ship Mortgage Decree, the mortgagor may apply ex-parte for an order for the arrest of the mortgaged vessel. The applicant must submit a sworn statement that a default in the mortgage has occurred and that the applicant files a bond executed to the adverse party in an amount to be fixed by the judge, not exceeding the applicant's claim,

²⁶ See *Caltex Inc v. Sulpicio Lines, Inc, et al*, GR No. 131166, 30 September 1999.

²⁷ *Aboitiz v. New India*, 488 SCRA 563 (2006).

conditioned that the latter will pay all the costs which may be adjudged to the adverse party and all damages which he may sustain by reason of such arrest, if the court shall finally adjudge that the applicant was not entitled thereto.

ii Court orders for sale of a vessel

During the pendency of the action, the vessel subject to a writ of attachment may be sold at a public auction and the proceeds deposited in court to await the judgment in the action upon proof that ‘the property attached is perishable, or that the interests of all the parties to the action will be served by the sale thereof’.²⁸ In *Shuhei Yasuda v. Court of Appeals and Blue Cross Insurance, Inc*²⁹ the Supreme Court allowed the sale of the vessel as it had been left to rot at the pier without a crew to guard it and that it was in grave danger of losing its value.

The court may order the sale of the mortgaged vessel in any suit *in rem* in admiralty for the enforcement of a maritime lien other than a preferred maritime lien.

After judgment, the property may be sold at public auction to satisfy the judgment.

VI REGULATION

i Safety

Safety means two things to the Philippines: safety regulations, which are applied to the domestic fleet, and the qualification and certification of Filipino seafarers who work on ships throughout the world’s fleet. The safety regulations of both domestic shipping and certificates for seafarers overseas-bound are regulated by two government entities, specifically Marina and the Philippine Coast Guard (PCG).

In domestic shipping, Marina is mandated to set the safety standards of all domestic vessels in accordance with government regulations and conventions,³⁰ including the implementation and enforcement of SOLAS and to promulgate rules and regulations to ensure compliance with these standards. To verify that the required safety standards are met, Marina is empowered to inspect vessels and all equipment on board³¹ and to accordingly impose penalties, fines, suspend or revoke certificates of public convenience or other licences.³² In June 2008, Sulpicio’s *Princess of the Stars* capsized and of the reported 851 passengers onboard, only 32 survived. The relatives of the victims filed an administrative complaint with Marina, and on 23 January 2015, Sulpicio, which owned and operated the *Doña Paz*, was prohibited from carrying/transporting passengers. On the international front, Marina was previously responsible only for keeping the registry of Filipino seafarers and issuance of their seaman books. Its role was recently expanded in view of the Philippine legislature’s enactment

28 The Ship Mortgage Decree of 1978, Presidential Decree No. 1521 (1978), Section 11.

29 *Yashuda v. Court of Appeals*, 300 SCRA 385 (2000).

30 Act No. 9295, Section 10(6). Marina is also in charge of issuing, *inter alia*, certificates of public convenience for operation of all domestic vessels, special permits for international vessels operating in the Philippine territory and certificate of inspection. With Marina’s power to issue these permits or certificates also comes the power to revoke same.

31 *Ibid.*, Section 10(8).

32 *Ibid.*, Section 10(16).

of Act No. 10635,³³ which effectively designated Marina as the single and central maritime administration tasked with ensuring effective implementation and compliance with the STCW Convention. In line with this, Marina adopted rules in administrative investigation of Filipino seafarers holding management and operational functions for acts or omissions involving violation of the Code of Ethics of Marine Deck/Engineer Officers and rules issued by Marina.³⁴

The PCG, on the other hand, is responsible for the enforcement of regulations for both domestic and international shipping relating to all relevant maritime conventions, treaties and national laws to ensure safety of life at sea within Philippine territory. The PCG also has authority to inspect merchant ships and vessels, including but not limited to inspections before departure to verify compliance with all the rules and safety standards.³⁵

ii Port state control

The Philippine Coast Guard Law of 2009 vested the PCG with the authority, *inter alia*, to enforce regulations pertaining to maritime international convention, treaties, national laws, rules and regulations for the promotion of safety of life and property at sea within the maritime jurisdiction of the Philippines; to implement port state control; to conduct vessel inspections; and to detain ships that do not comply with safety standards.

Memorandum Circular No. 01-00³⁶ was promulgated to ensure the effective implementation of the PCG's port state control functions. This Memorandum Circular applies to all foreign-flagged vessels engaged in the international trade calling at any Philippine port. The Memorandum Circular does not apply to ships of war, troop ships, government vessels not engaged in trade, fishing vessels and pleasure yachts not engaged in trade.

iii Registration and classification

Only ships registered on the Register of Philippine Ships of Marina may fly the Philippine flag or trade within Philippine waters.³⁷ The rules on registration apply regardless of the size of ship or use thereof, regardless of whether the ship is with or without power, and excluding only warships and naval ships, PCG ships, rubber craft and ships of foreign registry temporarily used in Philippine waters under special permit. All ships wishing to ply Philippine waters must apply for and be granted a certificate of Philippine registration and a certificate of ownership by Marina. Ships registered with Marina may also be deleted from the Register by the owner voluntarily or involuntarily, as in the case where Marina, after due

33 The Implementing Rules and Regulations of RA 10635 were published in the Philippines' Official Gazette on 13 March 2014 and were deemed effective 15 days after publication.

34 STCW Circular No. 2015-11 issued by the Marina on 22 July 2015.

35 An Act establishing the Philippines Coast Guard as an armed and uniformed service attaches to the Department of Transportation and Communications, thereby repealing Republic Act No. 5173, as amended, and for other purposes [Philippines Coast Guard Law of 2009], Act No. 9993, Section 3 (2010).

36 Port State Control, Philippine Coast Guard Memorandum Circular No.1, Series of 2000 (28 September 2000).

37 Marina Circular No. 2013-02 (pursuant to Presidential Decree No. 474, Executive Order No. 125, Act No. 9295 and the Philippine Merchant Marine Rules and Regulations of 1997) (18 January 2013).

process, orders the deletion of the ships for having violated government rules and regulations, or in the case of dual-flagged vessels where approval of the charter or lease contract is revoked for cause.³⁸

Currently, the International Association of Classification Society members recognised by Marina include the American Bureau of Shipping, Bureau Veritas, China Corporation Register of Shipping, Det Norske Veritas, Germanischer Lloyd, Hellenic Register of Shipping, International Register of Shipping, Korean Register of Shipping, Lloyd's Register Asia, Nippon Kaiji Kyokai, and Registro Italiano Navale. There is also a domestic classification society, the Philippine Register of Shipping, authorised to classify domestic ships for domestic trade.

iv Environmental regulation

The Philippines is a signatory to three major environmental protection conventions relating to shipping:

- a the CLC Convention;
- b MARPOL (Annexes I to V); and
- c the 1992 Protocol to the Oil Pollution Fund Convention.

On 2 June 2007, Act No. 9483, known as the Oil Compensation Act of 2007, was signed into law. This new legislation aims to give more teeth to the implementation of the provisions of the CLC Convention and the 1992 Fund Protocol. Under this law, an action for compensation due to pollution damage as a result of an incident may be filed with the regional trial courts against the owner of the polluting ship, or the insurer or person providing financial security for the owner's liability for pollution. Contributions to the Oil Pollution Compensation Fund are supposedly to be made by oil tanker operators in the country's waters, but at the time of writing, no mechanism has been propagated to establish such fund.³⁹

In August 2006, the MT *Solar I* sank off the coast of Guimaras Province in the central Philippines. The MT *Solar I* spilled over 200,000 litres of bunker fuel, damaging marine sanctuaries, the tourism industry and the livelihoods of the people of Guimaras.⁴⁰ The affected communities and individuals filed damage claims with the International Oil Pollution Compensation Fund (the IOPC Fund) and by October 2012, the IOPC Fund had released 987 million Philippine pesos in compensatory damages to 26,870 claimants.⁴¹ At the time of writing, however, there remain roughly 900 uncompensated victims as the IOPC Philippine office closed and the reason has not been disclosed.⁴² Civil cases for damages have also been filed by the unpaid claimants before the regional trial court against the oil company that chartered the MT *Solar I* as well as its owner.⁴³

38 Ibid., Section VI.

39 Cabacungan, 'House to summon Marina execs over oil pollution fund', *Philippine Daily Inquirer*, 21 December 2013, <http://newsinfo.inquirer.net/550205/house-to-summon-marina-a-execs-over-oil-pollution-fund>.

40 NCSB Factsheet, Sept. 2006 published by the National Statistical Coordination Board.

41 'Oil Spill Victims Seek Compensation', *Manila Bulletin*, 15 August 2013, <https://ph.news.yahoo.com/oil-spill-victims-seek-compensation-215341344.html>.

42 'Oil spill victims continue to ask for compensation', *Manila Bulletin*, 16 August 2015, www.mb.com.ph/oil-spill-victims-continue-to-ask-for-compensation/.

43 Ibid.

v Collisions, salvage and wrecks

The Philippines collision regime is unique and is part of the Code of Commerce. Where most of the world apportions collision liability based on the proportion of blame attributed to each vessel, this is not the case in the Philippines: it is all or nothing. If both vessels are to blame, then each vessel suffers its own loss and both vessels are jointly and severally liable for the damage to cargo and passengers of both vessels. If one vessel is 100 per cent to blame then the guilty vessel will bears its own damage and loss, and the damage and loss of the innocent vessel, including the cargo damaged or lost on both vessels, and the passengers' claim for injury and death, if any.

The Philippine Salvage Law is set out in Act No. 2616.⁴⁴ In the Philippines, salvage is no different from the concept as it exists in the United Kingdom. The party who performs the salvage must be a volunteer, there must be danger, and there must be resulting success. There is no specialised salvage arbitration forum in the Philippines like that in the United Kingdom, so most commercial salvors use the LOF salvage agreement, or for a less complicated service, the salvage is negotiated for a fixed fee. The Philippines is not a signatory to the Salvage Convention 1989.

Any person who wishes to engage in the business or operation of salvaging vessels, wrecks, derelicts and other hazards to navigation, or of salvaging cargoes carried by sunken vessels, is required to secure a salvage permit from the PCG. Under Presidential Decree No. 890,⁴⁵ a salvage operation performed without a permit is a criminal offence.

vi Passengers' rights

The Philippine government recently passed the rules and regulations concerning the Air Passengers' Bill of Rights,⁴⁶ but they have yet to pass the corresponding rules for sea passengers. Notwithstanding the absence of a comprehensive Sea Passengers' Bill of Rights, Marina rules require all ships engaged in domestic trade to secure adequate P&I insurance to cover the shipowners' or operators' liability for marine accidents including liabilities for wreck removal, pollution, loss of life or injury to passengers, third parties or seamen, collisions, damage to fixed or floating structures, and loss or damage to cargo.⁴⁷

vii Seafarers' rights

Seafarers' rights is an important topic when discussing Philippine shipping law because of the sheer number of Filipino seafarers employed worldwide, which in 2014 comprise 28 per cent of the world's seafarers.⁴⁸ The Philippine government has attempted to export Philippine law to protect its seafarers by imposing a standard seafarers' contract called the Philippine Overseas Employment Administration Standard Employment Contract (POEA SEC).

Included in the POEA SEC is a feature to ensure seafarers' rights to procedural due process. Based on this right, a seafarer who commits a wrongful act must be: (1) notified of

44 Enacted 4 February 1916.

45 Penalising the unauthorised salvage of vessels, wrecks, derelicts and other hazards to navigation as well as cargoes carried by sunken vessels, Presidential Decree No. 890 (1976).

46 DOTC-DTI Joint Administrative Order No. 1, series of 2012.

47 Marina Circular No. 2009-01, as amended (4 February 2009).

48 See Note 3.

his or her offence in writing; (2) given the right to explain him or herself, or to have a hearing; and (3) informed in writing of his or her penalty. Failure to observe procedural due process in termination cases, despite the existence of just and authorised causes under the Philippine Labour Code⁴⁹ or the POEA SEC, will result in an award of nominal damages to the seafarer. The Labour Code provisions, meanwhile, provide seafarers with the right to terminate their employment with their employers on specified grounds⁵⁰ as well as the implied right to file an illegal dismissal case should the employer dismiss them for causes not based on any of the valid and authorised grounds⁵¹ stated therein. On the other hand, the POEA SEC not only provides procedural due process and grievance mechanisms to seafarers, but also enumerates seafarers' entitlements and benefits,⁵² both monetary and non-monetary, the most important and controversial being the compensation and benefits for injury, illness and death.

Jurisdiction for claims filed by seafarers under the Labour Code and the POEA SEC falls with the National Labour Relations Commission. However, should there be a collective bargaining agreement (CBA) in place and the issue involves matters relating to the interpretation of the implementation of the CBA, the original and exclusive jurisdiction falls within the National Conciliation and Mediation Board⁵³ (NCMB).⁵⁴ Prescription of actions for claims based on the POEA SEC is three years reckoned from the date the cause of action accrues.⁵⁵

For seafarers working overseas, the most notable benefit provided by Philippine law is compulsory insurance coverage, which should be secured by the manning companies for the seafarers at no cost to them.⁵⁶

The Philippine Senate ratified the Maritime Labour Convention 2006 on 13 August 2012.

VII OUTLOOK

The outlook for the Philippine shipping industry is bright and will depend largely on how the Philippines takes advantage of its leading position as a provider of seafarers to the world fleet. There is a core of management-level officers who can be the backbone for the creation of a substantial ship-management industry in the Philippines, which could easily rival that of Hong Kong and Singapore. Unlike other business activities in the Philippines, where foreign equity is restricted, a ship-management business can be wholly owned by a foreign investor –

49 A Decree instituting a Labour Code thereby revising and consolidating labour and social laws to afford protection to labour, promote employment and human resources development and ensure industrial peace based on social justice [Labour Code of the Philippines], Presidential Decree No. 442 (1974).

50 See *Ibid.*, Article 285.

51 *Ibid.*, Articles 282–284.

52 Includes seafarers' wages, leave pay, shore leave, benefits for illness, injury and death.

53 The NCMB was created under Executive Order No. 126, issued on 31 January 1987.

54 *Estate of Nelson R Dulay represented by his wife Merridy Jane P Dulay v. Aboitiz Jebsen Maritime Inc and General Charterers, Inc*, G.R. No. 172642, 13 June 2012.

55 The POEA SEC, Section 30.

56 Rules and Regulations Implementing the Migrant Workers and Overseas Filipinos Act of 1995, Republic Act 10022 (2010), Rule XVI.

this is one of the best-kept secrets in the shipping industry. Apart from the core of potential port captains, port engineers and designated persons ashore who are available now from the officers currently sailing, the Philippines has improved the infrastructure for conducting business. In the next few years the Philippines will be able to see whether the shipping world will take advantage of its large pool of talent.

Chapter 37

RUSSIA

*Igor Nikolaev*¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

There are 67 seaports in the Register of Russian seaports that are located by 12 seas, three oceans and the Caspian Sea. The Russian seaports are distributed in five sea basins that are divided by territory: the Black Sea basin, the Baltic basin, the Caspian basin, the Pacific basin and the Northern basin. Some of these seaports have a particularly important role in seaborne exports and imports. The Baltic basin has the largest turnover of cargo. The basin under the most development is the Northern basin. All Russian ports have been developed significantly in the past 10 years and a lot of different types of cargo now pass through them. If we compare the volume of cargo that came through the Russian ports 10 years ago with the quantity today, it has multiplied a number of times. Russia is part of the international trade community and so, of course, the global economic downturn has had an effect as have the current economic sanctions. Most major container lines have offices in Russia and a fall in cargo turnover has been reflected in the quantities of cargo exported from and imported into Russia. However, the Russian economy is not fully dependent on the rest of the world. Some projects for creating seaport infrastructure have been frozen or delayed but generally the situation has not been as severe as in the United States or Europe. Signs of recovery in the maritime and shipping industry in Russia first appeared in 2010 and the cargo turnover in all ports of Russia has increased. Now the situation in the shipping industry is much better; for example, the turnover of all types of cargo for 2015 has increased by 6 per cent compared with the same period in 2014, and amounted to 680 million tonnes. The cargo handling capacity of seaports of Russia was increased and amounted to more than 23 million tonnes due to the commissioning of the first stage of a multifunctional transshipment complex of the port Bronka (in the Baltic basin), a raid transshipment complex in the port of Murmansk (in the Northern basin) and reconstruction of berths in the port of Anadyr (in the Pacific basin). Further, the infrastructure has been developed in the seaports of Murmansk, Sabetta,

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Kaliningrad, the Big port Saint-Petersburg, Ust-Luga, Petropavlovsk-Kamtchatskiy, Vanino, Vostochniy, Novorossiysk, Taman and Temriyk in 2015. Russia is developing the northern seaway (in the Northern basin) as the shortest route from Europe to Asia. There were 715 permissions to sail in the water area of the northern seaway in 2015 and 126 for vessels under a non-Russian flag.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Russia is a signatory to a number of international conventions and it has some influence on legal disputes related to the shipping industry. Generally, Russian courts are governed by national legislation that is the same across the entire territory. The principal rules are set out in the Russian Merchant Shipping Code of 1999, but if any foreign company is involved in a dispute or a court proceeding, then international conventions can be applied and will prevail over domestic law and regulations.

The customs regulations also influence the shipping industry in Russia. They were slightly changed when the Customs Code of the Customs Union came into force in July 2010 and replaced the Russian Customs Code.

The Federal Law on Seaports in the Russian Federation of 2007 regulates the structure, mechanisms and rules of operation of all seaports in Russia.

III FORUM AND JURISDICTION

i Courts

The Russian court system does not have any specific courts for shipping cases. Any disputes related to the shipping industry may be heard by one of the following forums:

- a* the Constitutional Court, which deals only with constitutional issues;
- b* the courts of general jurisdiction, which hear criminal, administrative and civil cases;²
and
- c* the state commercial courts, which now operate at four levels: regional commercial courts, regional appeal commercial courts, federal commercial circuit courts and the Supreme Court of the Russian Federation.³

Russian law governs all disputes in Russian courts.

In February 2014 a law was passed to merge the Supreme Court of the Russian Federation and the Supreme Commercial Court of the Russian Federation. The new Supreme Court of the Russian Federation was duly established and since 6 August 2014 has been the apex court in Russia.

2 Before 1 September 2002 they had jurisdiction over commercial disputes when at least one party to the dispute was a private individual (whether Russian or foreign). The courts of general jurisdiction operate at three levels: local courts, regional courts and the Supreme Court of the Russian Federation.

3 These courts deal with all commercial disputes between businesses (even where a private individual is a party in the dispute). The jurisdiction of the state commercial courts covers foreign parties.

ii Arbitration and ADR

Arbitral tribunals are a popular forum for foreign companies because the proceedings in such courts are relatively quick and the court fees are acceptable and they are independent of the state.

There are two main, well-known forums in Russia that are generally used by foreign companies: the International Commercial Arbitration Court in Moscow, which deals with general commercial disputes and the Maritime Arbitration Commission in Moscow, which deals mostly with maritime disputes. Both of these tribunals were established at the Chamber of Commerce and Industry of the Russian Federation in Moscow in the early 1930s.

The activity and establishment of international arbitral tribunals in Russia is governed by the Law on International Commercial Arbitration of 7 July 1993. Further, international arbitration in Russia is governed by a number of international conventions regarding arbitration and the enforcement of foreign arbitral awards. Russia is a party to the European Convention on International Commercial Arbitration of 1961 and the New York Convention. Russia has bilateral treaties with some other countries that include provisions relevant to arbitration and enforcement of arbitral awards (such as the Treaty on Trade and Navigation with Austria of 17 October 1955).

iii Enforcement of foreign judgments and arbitral awards

In practice, foreign companies usually prefer to have disputes with Russian counterparts in their own or other jurisdictions than Russia. It is nevertheless important to be familiar with the enforcement procedure applicable in Russia. The decisions of any arbitral tribunal in any country in the world presume that the losing party will pay voluntarily and if a Russian company lost a dispute and refused to pay, then the foreign claimant would face the problem of obtaining enforcement in Russia. Before 1 September 2002 this procedure was carried out in the courts of general jurisdiction and was governed by the Decree of the Presidium of the Supreme Soviet on Recognition and Enforcement in the USSR of Decisions of Foreign Courts and Arbitral Tribunals of 21 June 1988 and by the Law on International Commercial Arbitration of 7 July 1993.

In accordance with the Arbitration Procedure Code of the Russian Federation of 14 July 2002, the procedure for enforcement of international arbitral awards and decisions of arbitral tribunals with a location in Russia is through the state commercial courts. Presumably, the recognition and enforcement of awards of foreign courts and foreign arbitration awards will still take place through the courts of general jurisdiction (there is currently no official interpretation on this matter, but the legal procedure is approximately the same).

A petition for the enforcement of arbitral awards must be signed by the claimant or its representative and should be submitted in written form to the regional commercial court at the place of the debtor's business or the location of his property (if the place of the business is unknown). The judge of the regional commercial court should make a decision in a month from the date the petition was submitted. The judge should notify parties of the date and the time of the hearing, but the hearing will be judged regardless of whether the parties attend.

The list of grounds on which the enforcement can be denied is set out in the New Arbitration Code, which corresponds to the New York Convention and the European Convention on International Commercial Arbitration of 1961. The regional commercial court can deny the petition if the defendant proves one of the following:

- a* the arbitration clause (agreement) is invalid on the basis provided for by Russian federal law;

- b* the defendant had not been properly notified about the arbitration or appointment of an arbitrator;
- c* the award was made regarding a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the arbitration;
- d* the composition of the arbitral tribunal or arbitral procedure was not in accordance with the agreement of the parties or Russian federal law; or
- e* the award has not entered into force or was suspended by the commercial court or another Russian or foreign court.

The regional commercial court will reject a petition on the enforcement of an award if it finds that the subject of the dispute is not capable of settlement by arbitration under Russian federal law or the award is in conflict with public policy. The reasons to reject the enforcement of awards are very similar to the reasons to set aside arbitral awards.

The decision of the regional commercial court can be appealed by the claimant or defendant party participating in the arbitral tribunal within one month of the date of the decision to the federal commercial circuit court.

The writ of execution is made out by the regional commercial court in accordance with its decision. Normally, the decision of the regional commercial court becomes effective within one month of the date the decision was made or the date of the decision of the federal commercial circuit court. The writ of execution is effective for three years. The next step is to file the writ of execution with a court bailiff at the place of business of the debtor (or its property) and he or she will carry out an enforcement procedure.

IV SHIPPING CONTRACTS

i Shipbuilding

After the collapse of the Soviet Union the shipbuilding industry declined and has been at a very low level until now. However, steps are now being taken to recover and develop the industry and a governmental programme for the development of the shipbuilding industry until 2030 has been adopted by the Russian government. There are about 150 ships under construction in Russia and the government expected that they would come under the Russian flag.

Russian legislation has no particular regulations regarding shipbuilding. All shipbuilding contracts are constructed in accordance with general rules of the Russian Civil Code. The title on a vessel under construction should be registered from the date of keel laying. The harbour master of the nearest port to the shipyard keeps a register of the vessels that are under construction. The construction should be done under the supervision of the approved classification society, which is the Russian Maritime Register of Shipping.

ii Contracts of carriage

The Merchant Shipping Code regulates the carriage of goods by sea. Chapter VIII of the Merchant Shipping Code regulates all aspects of maritime carriage and it is stipulated therein that any contract of carriage must be in written form. The evidence that the contract of carriage has been concluded may be proved by a bill of lading. Russia is a signatory to the Hague-Visby Rules, one of the few international conventions that have been signed by

Russia in the sphere of the carriage of goods by sea. However, many rules from the various international conventions that have not been accepted by Russia are nevertheless reflected in the Merchant Shipping Code of 1999.

The Merchant Shipping Code of 1999 states that any trans-shipment of goods in cabotage can be done only by Russian-flagged vessels. The maritime carrier has rights to exercise a lien over the cargo until it has discharged all freight and received payment for cargo expenses.

iii Cargo claims

There are various situations that can cause problems with cargo delivered into Russia. These can be organised into two main types of problem. The first relates to problems created by the Russian authorities. The second concerns problems that arise all around the world between carriers, shippers, receivers and shipowners.

The first type of problem is characterised by the peculiarities of the quickly changing requirements of Russian legislation. As a rule, the most frequent cargo problems occur in connection with customs and the Federal Service for Veterinary and Phytosanitary Surveillance (SVPS). Such problems can occur in any country but in Russia they excite interest by many third parties who are keen to exploit a situation and to earn money from it – for example, where a cargo is partially damaged by seawater and yet the entire cargo is found by the SVPS to be completely unfit for use as a food.

Meanwhile, as regards the second type of problem, Chapter VIII of the Russian Merchant Shipping Code of 1999 regulates cargo claims. The carrier can be liable for loss, damage of the cargo or for the later delivery of it from the moment of the acceptance of the goods until the cargo is delivered to the receivers. There is a one-year time bar for cargo claims in Russia. Situations occasionally arise where cargo damages a vessel or a shore crane damages a vessel by way falling on the vessel. In such claims, the time bar is usually three years.

iv Limitation of liability

Chapter XXI of the Merchant Shipping Code is based on the LLMC Convention 1976 but does not repeat it and regulates the limitation of liability of shipowners and salvors or persons or companies for whose actions shipowners and salvors are responsible. The insurers can also apply to limit their liability in the same way as insured shipowners and salvors.

The limitation of liability can be applied when the following claims arise:

- a* claims in respect of loss of life or personal injury, or loss of or damage to property, including claims in connection with damage to port installations, water basins, navigable routes and navigational aids, which occurred on board the vessel or in direct connection with the operation of the vessel or salvage operations, as well as claims of compensation for any consequential loss resulting therefrom;
- b* claims of compensation for loss resulting from delay in delivery during the carriage by sea of goods, passengers or their luggage;
- c* claims of compensation for other loss resulting from the infringement of any rights other than contractual rights, occurring in direct connection with the operation of the vessel or salvage operations; and
- d* claims of a person other than the person liable for damage caused by the measures he or she has taken to prevent or minimise loss, for which the person liable for the loss may limit his or her liability in accordance with the regulations set out in the Merchant Shipping Code, and the further loss caused by such measures.

The limitation of liability does not apply in the following claims:

- a* reward for carrying out a salvage operation, including the payment of a special compensation or contribution in general average;
- b* compensation for damage from oil pollution from vessels;
- c* compensation for damage in connection with the carriage of hazardous and noxious substances by sea;
- d* compensation for nuclear damage;
- e* in connection with the raising, removal or destruction of a sunken vessel, including everything it has or had on board;
- f* in connection with the raising, removal and destruction or rendering harmless of the cargo of the vessel;
- g* compensation for damage caused to human life, health or property of the servants of the shipowner or salvor, whose obligations are connected with the vessel or salvage operations, as well as the heirs of the said servants, persons dependent on them or having the right to maintenance from them, if the labour contract between the shipowner or salvor and such servants is governed by the laws of the Russian Federation;
- h* compensation for loss of life or personal injury of the vessel's passengers where the shipowner and passenger are entities or citizens of the Russian Federation; and
- i* compensation for damage caused to the life, health or property of a person in direct connection with the operation of the vessel or salvage operations where the shipowner and the person or the salvor and the person are entities or citizens of the Russian Federation.

V REMEDIES

i Ship arrest

The procedure for the arrest of ships in Russia is not very complicated but there are some details that should be noted by the initiating party. The legal basis for ship arrest in Russia is the Merchant Shipping Code, which came into force on 1 May 1999, and the Arbitration Procedure Code. Russia also joined the Brussels Convention 1952 in January 1999 and the chapter of the Merchant Shipping Code on arrest of ships was constructed in accordance with the Brussels Convention and the Arrest Convention 1999.

A ship can be arrested by a court order not only as security for a maritime lien or a maritime claim but also as a security for an ordinary claim. A non-Russian flagged ship located in Russia may be subject to arrest when the arresting party argues before the court that it is the property of the defendant and the court issues an arrest order. That order should be taken to a court bailiff who issues a resolution regarding arrest of the ship indicated in the court order and that document serves as a basis for the arrest. A sister ship can also be arrested if the arresting party is able to provide evidence that both vessels belong to the same legal entity (shipowner).

The party who initiates the arrest (if it is a maritime lien or claim against the ship) first applies to a harbour master who has a right to detain the ship for 72 hours (including only working days) until the claim is brought to court.

The commercial courts give the possibility to arrest ships in Russia not only as a security for a claim that would be tried in the court that issues the arrest order, but also as

a security for a claim that will be tried in another jurisdiction. In such a case the claimant must present evidence to the judge that the claim was brought before a court in the other jurisdiction within 15 days of the date of the arrest order, otherwise the ship will be released.

The ship can be released from arrest on the provision of whatever type of security is acceptable to the claimant but if agreement cannot be reached then cash can be paid into a court deposit account. The payment must be made in roubles. The court then issues a release order cancelling the arrest of the ship. The arrested ship can only be released by the court order and that order can be as a result of the provision of security or the result of trying the case in the court (including settlement of the case). The release order of the court should be delivered to the court bailiff (as with an arrest order) and the court bailiff must issue a resolution that cancels the arrest resolution. It can take a few days while all these steps are taken.

The documents that must be presented to the court for both types of arrests: as a security for a claim in the same court and for a security arrest for the claim that will be tried in another jurisdiction or court, are the same. But the court can require counter-security on the amount of the claim and, if it is not provided, the application for the arrest can be rejected. If the arresting party provides the counter-security at the same time as the application for the security order than the security order will be granted.

A vessel can be arrested only if she called into a Russian port and an arrest order can be delivered to the master of the vessel by a court bailiff.

ii Court orders for sale of a vessel

A vessel may only be sold pursuant to a court decision. The court decision regarding the sale of the vessel should be delivered to a court bailiff who should issue his or her own order for arranging an auction for the sale.

VI REGULATION

i Safety

Russia is a member of most international safety conventions including SOLAS and the STCW Convention.

ii Port state control

Russia is a member of the Paris and Tokyo MoUs.

iii Registration and classification

The register of vessels in Russia is maintained by the harbour master of each seaport. The registration of vessels is regulated by Chapter III of the Merchant Shipping Code. The Russian government has special programme to stimulate and attract more vessels under the Russian flag after the number decreased following the collapse of the Soviet Union. The amount of ships under the Russian flag reached 904 in 2015.

The classification society in Russia is the Russian Maritime Register of Shipping. It was established on 31 December 1913 and in 1969 became a member of the IACS.

iv Environmental regulation

Russia participates in most international environmental and pollution conventions. Chapter XVIII of the Merchant Shipping Code regulates oil pollution from ships. Environmental issues are monitored by a dedicated government authority that has the right to fine the owners of vessels that have polluted in Russian waters. The shipowners will also be obliged to compensate for funds spent on the clean-up of the pollution.

v Collisions, salvage and wrecks

The legal basis for regulating the consequences of collisions in the waters of the Russian Federation lies in Chapter XVII of the Merchant Shipping Code and regulates the classification, investigation and registration of emergency situations in relation to vessels at sea. Chapter XX of the Merchant Shipping Code sets out rules on salvage of vessels and other property. Chapter VII of the Merchant Shipping Code regulates wreck removal.

Chapter XVII of the Merchant Shipping Code is based on the Salvage Convention 1910 and can be applied when a collision involves at least one seagoing vessel regardless of the place of the collision (either in international waters or the territorial or domestic waters of Russia). It applies only when damage was caused to a third party on a non-contractual basis.

Parties involved in a collision bear their own losses and are not liable for the damage of others if the collision occurs as a result of force majeure or if it is impossible to find out the reasons for the collision. However, the parties in such a collision can still be liable in accordance with Russian civil legislation to third parties who were not a party to the collision but who suffer damage as a result of it.

If the collision occurred as a result of the fault of only one vessel involved, then the owner of that vessel is liable for all damages resulting from the collision. The damage consists of expenses that all other parties have incurred to the extent required to restore them to their position before the collision. If the result of the collision is the total loss of a vessel, then the owner of that vessel has a right to recover the market price of the vessel as determined on the day of the collision.

If the cause of the collision is the fault of two or more vessels, the liability for damage to each vessel is determined in accordance with the proportion of fault of each vessel. The owners of the vessels involved in the collision are liable for damage to third parties resulting from the collision in the same proportions. If the damage caused was personal injury or death, then the victim or his or her representative can claim from any owner involved in the collision (and thereafter, that owner can claim a proportion from the owners of the other vessel or vessels).

The owner of a vessel involved in a collision is liable for damage resulting from the collision even if the collision was due to the negligence of a pilot and even if the vessel was in a compulsory pilotage area at the time. The reason for this is that the pilot is an advisor to the master and the final decision must be that of the master of the vessel. (In this situation the pilot may also be liable in accordance with Russian law but his or her liability is limited.)

The Merchant Shipping Code declares that no vessel or owner involved in a collision can be found liable for that collision until liability is proved by the claimant party.

vi Passengers' rights

The Merchant Shipping Code regulates passengers' rights in its Chapter IX. The rules set out therein mostly correspond to the Athens Convention as the Russian Federation is a participant in that convention.

vii Seafarers' rights

The rights of seafarers' on board Russian-flagged vessels are regulated by Chapter IV of the Merchant Shipping Code and by the Labour Code of the Russian Federation.

VII OUTLOOK

Like the country as a whole, the Russian shipping industry is developing. The cargo turnover is increasing from year to year. The government programme to increase the number of vessels running under the Russian flag, to promote the construction of new vessels and to develop new seaport infrastructure should also be a positive sign for the shipping industry. The legal side of the Russian shipping industry has also become more and more developed. The Russian courts now have more practice in shipping cases and accept international experience. The financial crisis and economical sanctions have an effect on the nature of legal work in the shipping sector as fewer cases have involved collisions and cargo claims and more have involved debt recovery and insolvency proceedings.

Chapter 38

SINGAPORE

Scott Pilkington, Magdalene Chew and Thuolase Venga¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

From a commercial perspective, Singapore is an extremely important shipping centre, with connections to more than 600 ports in over 120 countries.² The Singapore Registry of Ships currently has over 4,600 registered vessels and ranks among the top-five largest registries in the world.³ According to the Maritime and Port Authority of Singapore (MPA), Singapore has become the 'largest and most important bunkering port in the world'.⁴ Most recent available figures for Singapore's seaborne cargo put the volume at 581,268 tonnes,⁵ with container throughput at a notable 33,869 TEUs.⁶

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Singapore has incorporated the following IMO marine conventions into its legislative framework:

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 - 2 www.mpa.gov.sg/web/portal/home/maritime-singapore/what-maritime-singapore-offers/global-connectivity/global-transportation-network.
 - 3 Keynote address by Mr Andrew Tan, Chief Executive, Maritime and Port Authority of Singapore, at the Maritime Manpower Conference, 16 July 2015, 9.00am, Raffles City Convention Centre Singapore.
 - 4 www.mpa.gov.sg/web/portal/home/port-of-singapore/port-operations/bunkering.
 - 5 Year Book of Statistics Singapore 2015, Department of Statistics, Singapore at page 203.
 - 6 Year Book of Statistics Singapore 2015, Department of Statistics, Singapore at page 24.

- a* the 1974 International Convention for the Safety of Life at Sea (SOLAS Convention), the 1978 SOLAS Protocol (SOLAS PROT) and the 1988 SOLAS Protocol (SOLAS PROT (HSSC)), and the 1996 SOLAS Agreement (SOLAS AGR);
- b* the 1966 Load Lines Convention (the Load Lines Convention) and the 1988 Protocol (LLPROT);
- c* the 1972 Convention on the International Regulations for Preventing Collisions at Sea (the Colreg Convention);
- d* the 1969 International Convention on Tonnage Measurement of Ships (the Tonnage Convention);
- e* the 1972 International Convention for Safe Containers (the CSC Convention);
- f* the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (the STCW Convention);
- g* the 1976 Operating Agreement on the International Maritime Satellite Organisation (INMARSAT OA);
- h* the 1976 Convention on the International Maritime Satellite Organisation (INMARSAT/IMSO Convention);
- i* the 1965 Convention on Facilitation of International Maritime Traffic (the FAL Convention);
- j* the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL Convention) (Annex I to Annex V) and the 1997 MARPOL Protocol to the International Convention for the Prevention of Pollution from Ships (Annex VI) (MARPOL PROT);
- k* the 1976 and 1992 Protocols to the International Convention on Civil Liability for Oil Pollution Damage (CLC PROT);
- l* the 1992 Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund PROT);
- m* the 1976 Convention on the Limitation of Liability for Maritime Claims (the LLMC Convention);
- n* the 1988 Cospas-Sarsat Programme Agreement (COS-SAR);
- o* the 2001 International Convention on the Control of Harmful Anti-Fouling Systems on Ships (the Anti-Fouling Convention);
- p* the 1979 International Convention on Maritime Search and Rescue (the SAR Convention);
- q* the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (the SUA Convention) and the 1998 SUA Protocol (SUA PROT);
- r* the 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation (the OPRC Convention) and the 2000 Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances (HNS-OPRC);
- s* the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage (the Bunkers Convention); and
- t* the 2006 Maritime Labour Convention (MLC).

Singapore's international obligations set out in these IMO conventions are administered by the MPA through six key Singapore statutes and regulations made thereunder:

- a* the Maritime and Port Authority of Singapore Act, which regulates the functions, duties, and powers of the MPA, the employment of seamen, port regulation, and licensing, etc.;
- b* the Merchant Shipping Act, which covers the registration of ships, manning and crew matters, and safety issues;
- c* the Prevention of Pollution of the Sea Act, which empowers the MPA to take preventive measures against pollution;
- d* the Merchant Shipping (Civil Liability and Compensation for Oil Pollution) Act, which addresses liability for oil pollution;
- e* the Merchant Shipping (Civil Liability and Compensation for Bunker Oil Production) Act, which considers liability for bunker oil pollution; and
- f* the Merchant Shipping (Maritime Labour Convention) Act 2014 (Act 6 of 2014), which safeguards the well-being and working conditions of seafarers on board ships.⁷

III FORUM AND JURISDICTION

i Courts

The Supreme Court of Singapore consists of the High Court and the apex court, which is the Court of Appeal. The legal system in Singapore has its roots in the English common law system, so English case law is viewed as having persuasive authority in the Singapore courts, although the right of appeal to the Privy Council was abolished in 1994. Likewise, case law from other Commonwealth jurisdictions, in particular Hong Kong, Australia, New Zealand and Canada, are regularly cited and viewed favourably as authorities in the Singapore courts.

The High Court exercises original jurisdiction in respect of criminal matters that are of particular gravity, as defined by statute law, and tries civil matters where the subject matter in question is in excess of S\$250,000 in monetary value. All admiralty matters must be commenced in the High Court, which alone exercises admiralty jurisdiction by statute.

High Court trials and certain interlocutory applications are normally heard before a single judge (while other interlocutory applications are heard by an assistant registrar) and experts may be appointed to assist the court in various subject matters. Cases involving specialist areas of law are generally assigned to list/docket judges with experience in commercial matters. Disputes relating to shipbuilding, shipping and insurance as well as tort claims are examples of areas that are heard by Supreme Court justices with experience within that commercial field. Proceedings of a maritime nature are assigned to the Admiralty bench.

The Singapore courts take an active role in case management, particularly through regular pretrial conferences, to advance litigation proceedings to resolution, whether by trial or mediated resolutions in as cost-effective a manner as possible. Currently, civil actions that are commenced in the High Court typically take 12 to 15 months from the commencement of the suit to completion of the trial.

As part of the plan to position Singapore as the leading dispute-resolution hub in Asia, on 5 January 2015 the Singapore International Commercial Court (SICC) was constituted, following a series of legislative amendments. The judges of the SICC are the existing Supreme

⁷ www.mpa.gov.sg/web/portal/home/port-of-singapore/maritime-legislation-of-singapore.

Court justices and a panel of 11 international judges with a mixed common law and civil law background. The SICC is a division of the High Court and it is primarily designed to hear and try international commercial disputes.

The SICC has jurisdiction to hear claims or actions that (1) are international and commercial;⁸ (2) the parties have expressly submitted to the jurisdiction of the SICC by a written jurisdiction agreement; and (3) the parties to the action do not seek any relief in the form of a prerogative order. It is possible for the High Court to transfer cases to the SICC, of its own motion, if the claim satisfies the criteria and the parties have submitted to the jurisdiction of the Singapore courts.

Civil trials and certain interlocutory applications in Singapore are conducted in open court, although parties may apply for an order to seal the court documents or case file in order to keep the proceedings confidential. Decisions by a single judge of the High Court may be appealed to the Singapore Court of Appeal, subject to any written agreement between the parties to limit the right of appeal. SICC judgments are recognised as a national court judgment (Supreme Court of Singapore) and any enforcement is dependent on the recognition of foreign judgments in the relevant jurisdiction. Other key features include the possibility for parties to choose to apply alternative rules of evidence and to be represented by foreign lawyers in offshore cases, as defined in the SICC Practice Directions.⁹

ii ADR in the Singapore courts, arbitration and mediation

The Singapore courts have incorporated ADR options into the judicial process with the aim of creating a holistic judicial system which provides litigants access to both modes of resolving disputes, that is the ADR process and the trial process. The state courts of Singapore (which comprise the magistrate's courts and the district courts), in particular, actively encourage and endorse the early use of the ADR process in civil claims. The state courts try civil matters where the subject matter in question does not exceed S\$250,000 in monetary value. With effect from May 2012, the state courts implemented a 'presumption of ADR' for civil matters – that is, all civil disputes in the state courts are automatically referred to the most appropriate type of ADR, unless any party opts out of ADR. There may be subsequent costs implications for a party who opts out of ADR for unsatisfactory reasons.

The four ADR options currently available for civil claims (including non-*in rem* maritime claims) in the state courts are: (1) mediation at the State Courts Centre for Dispute Resolution (SCDDR); (2) Neutral Evaluation at the SCDDR; (3) mediation at the Singapore Mediation Centre (SMC); and (4) arbitration through the Singapore Law Society Arbitration Scheme (LSAS). Mediation at the SCDDR is the most commonly used ADR option in the state courts and is generally regarded as the default ADR option, followed by neutral evaluation. Both processes are fully confidential (that is, the matters discussed at ADR will not be disclosed to the trial judge if the matter proceeds to trial) and non-binding (unless parties opt for a binding evaluation or reach a binding settlement following the ADR process). If the ADR process is successful, particularly at an early stage, it can result in substantial savings in time and costs for parties.

More recently, the Supreme Court of Singapore too has adopted a more pro-ADR approach. The Supreme Court Practice Directions were amended in January 2014 to

8 Rules of Court (Amendment No. 6), published on 26 December 2014, Order 110 Rule 1.

9 www.sicc.gov.sg/documents/docs/SICC_Practice_Directions.pdf.

introduce a process for parties to consider using ADR at the earliest possible stage of the proceedings. As with civil proceedings and ADR in the state courts, potential adverse costs orders can be made against any party who unreasonably refuses to engage in ADR. A party who wishes to attempt mediation or any other means of ADR (e.g., neutral evaluation, expert determination, conciliation) in proceedings before the High Court or Court of Appeal should file and serve an ADR offer on the other party. If within 14 days thereafter, the other party does not serve a response to ADR offer, it would be deemed unwilling to attempt ADR without providing any reasons, and may be subject to adverse costs orders in the proceedings.

Originally established in 2004 under the umbrella of the Singapore International Arbitration Centre (SIAC), the Singapore Chamber of Maritime Arbitration (SCMA) was reconstituted and became separate from the SIAC in May 2009 in order to meet the growing needs of the maritime community, which preferred a model similar to the London Maritime Arbitrators Association where the arbitration body does not manage the arbitration process. The SCMA provides a framework for maritime arbitration; the SIAC, on the other hand, is a non-sector-specific arbitration organisation that was established in 1991.

Following the latest amendments to the SCMA Rules in October 2015, the SCMA small claims procedure now extends to cover disputes where the aggregate amount in dispute (claim and counterclaim) excluding interest and costs does not exceed US\$150,000 (up from US\$75,000 previously). Alternatively, parties can either adopt the small claims procedure regardless of the amount in dispute or exclude the application of this procedure, by agreement. Under the small claims procedure, a sole arbitrator is appointed to conduct the arbitration and the recent amendments have introduced a cap on the arbitrator's fees (US\$5,000 or, where there is a counterclaim, US\$8,000) and recoverable legal costs (US\$7,000 or, where there is a counterclaim, US\$10,000 in total for each party's lawyers). Timelines for the service of case statements are abridged to 14 days. Parties can expect the award to be issued within 21 days from either the date of the tribunal's receipt of all parties' statements of case or, if there is an oral hearing (which is not usually the case), the close of the oral hearing.¹⁰

In November 2013, the SCMA launched the SCMA Expedited Arbitral Determination of Collision Claims (SEADOCC) to provide a fair, timely and cost-effective means of determining liability for a collision through mediation in circumstances where it has not been possible or appropriate to reach such an apportionment of liability using other means of dispute resolution.¹¹ The purpose of arbitration under the SEADOCC procedure is to provide a binding decision on liability for a collision between two or more ships by a single arbitrator. The procedure is governed by the SEADOCC Terms,¹² which include directions on early termination and parties' submissions.

The SIAC's primary rules of arbitration are the SIAC Rules, but parties can also choose to adopt the UNCITRAL Arbitration Rules for the conduct of arbitration at the SIAC. While the UNCITRAL Rules are generally designed for *ad hoc* forms of arbitration, parties can still elect for institutional administration of the arbitration by the SIAC. These are both consensual regimes that respect the principle of party autonomy.

In July 2010, the SIAC introduced an expedited procedure that any party to a SIAC arbitration desiring an expeditious arbitral process can apply for. Disputes may be referred to

10 Rule 46 of the SCMA Rules, Third Edition (October 2015).

11 www.scma.org.sg/pdf/seminar20131125.pdf.

12 www.scma.org.sg/pdf/seadocc_terms.pdf.

arbitration under the expedited procedure in any of the following instances: (1) if the amount in dispute (aggregate of the claim and any counterclaim and any defence of set-off) does not exceed the equivalent of S\$5 million, (2) if all parties consent, or (3) in cases of exceptional urgency.¹³ Parties can also agree beforehand to adopt this procedure, regardless of the amount in dispute, by incorporating the SIAC Expedited Procedure Model Clause in their contract. An arbitral award under the expedited procedure must be issued within six months from the date when the tribunal is constituted, although the Registrar of SIAC can extend the time in exceptional circumstances. Further, the Chairman of SIAC retains the discretion not to apply the expedited procedure if the dispute is not suitable to be resolved in six months or where the procedure is generally not appropriate for the particular dispute.¹⁴

A further element introduced in the 2010 SIAC Rules was the appointment of an emergency arbitrator in situations where a party is in need of interim emergency relief before a tribunal is constituted. The types of emergency relief typically sought include preservation orders, freezing orders, orders permitting access to inspect property, *Mareva* injunctions and general injunctive relief. Cases in which applications for emergency relief are filed relate to disputes in a broad range of sectors including shipping, international trade and general commercial agreements. While emergency awards or orders have been passed in as little as two days, it generally takes about eight to 10 days on average for the emergency arbitrator to render its award after hearing parties' submissions. Following amendments made to the Singapore International Arbitration Act (IAA) in 2012, awards issued by emergency arbitrators in arbitrations seated in and outside of Singapore are enforceable under Singapore law.¹⁵

As of 2013, Singapore has been added as a named arbitral forum to the BIMCO Standard Dispute Resolution Clause, besides London and New York, to reflect the global spread of maritime arbitration venues. Within the new SCMA BIMCO Arbitration Clause, disputes would be resolved under the IAA, and conducted in accordance with the SCMA Rules in force at the time the arbitration proceedings are commenced, offering parties the choice of applying Singapore or English law as the governing law of the contract.

Mediation is used in tandem with court proceedings in that the court can suggest that parties refer disputes to the Singapore Mediation Centre (SMC). Mediation is voluntary, and would only be adopted by the consent of all parties involved.

The SMC offers mediation schemes such as the commercial mediation scheme, which is particularly suitable for large complex commercial disputes, as well as the med-arb scheme, which is a hybrid dispute resolution process that brings together the elements of both mediation and arbitration, and is overseen by the SMC in collaboration with the SIAC. The mediation services offered by SMC, whose panel of mediators largely comprises local mediators, generally focus on domestic disputes.

Since November 2014, mediation is also available under the auspices of the Singapore International Mediation Centre (SIMC). SIMC administers mediation under the SIAC-SIMC Arb-Med-Arb (AMA) Protocol (where disputes have been submitted to the

13 www.siac.org.sg/faqs.

14 www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-31-29/archive-2012/240-the-siac-expedited-procedure.

15 www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/420-the-emergency-arbitrator-and-expedited-procedure-in-siac-a-new-direction-for-arbitration-in-asia.

SIAC for resolution under the Singapore Arb-Med-Arb Clause or other similar clause or where parties have agreed that the AMA Protocol shall apply) or the SIMC Mediation Rules (i.e., in cases where the AMA Protocol does not apply). Under the AMA Protocol between SIAC and SIMC, settlement agreements may be recorded as consent awards. SIMC has an international panel of mediators as well as an international panel of experts from various industry sectors who can assist the mediator in complex commercial disputes involving technical questions. While the mediation services offered by SIMC focus largely on international commercial disputes, parties are free to choose whether they prefer to mediate at SMC or SIMC. For *ad hoc* mediations not administered by the SIMC in accordance with the SIMC Rules, SIMC can serve as an appointing authority for mediators or experts, subject to parties' agreement and for a prescribed fee.

iii Enforcement of foreign judgments and arbitral awards

Foreign court judgments of a Commonwealth origin readily find enforcement in Singapore, under the statutory regime of the Reciprocal Enforcement of Commonwealth Judgments Act (RECJA). This prescribes a registration method to a judgment from a gazetted Commonwealth jurisdiction whereby the applicant for registration applies *ex parte* to the High Court to obtain, first, leave to register the foreign judgment. The notice of registration of the foreign judgment is then served on the judgment debtor. The judgment debtor is given the opportunity to contest the registration of the foreign judgment, failing which that judgment can be entered as a judgment of the Singapore High Court. Under the RECJA, a time limit of 12 months from the date of the foreign judgment applies, within which that judgment may be registered under the RECJA, or such longer period as may be allowed by the High Court on application. In a similar vein, the Reciprocal Enforcement of Foreign Judgments Act (REFJA) allows the enforcement of a superior court judgment of any gazetted non-Commonwealth foreign country (which currently only comprises the Hong Kong Special Administrative Region of the People's Republic of China).

The REFJA prescribes a six-year limitation period within which the enforcement application must be brought. Both the RECJA and REFJA permit challenges to the registration of foreign judgments on narrow, specific grounds that are spelt out by statute.

Judgments from other countries that are not gazetted under either the RECJA or the REFJA may be enforced under common law. This requires an action upon the foreign judgment (i.e., the foreign judgment creditor commences a suit in a Singapore court, suing upon the original cause of action, and using the foreign judgment as evidence of the defendant's *in personam* liability on the claim). Typically, a summary judgment application is possible on a common law enforcement action.

Where enforcement of foreign arbitral awards is concerned, the centrepiece avenue under Singapore law is that of the New York Convention, to which Singapore is a signatory. The approach of the Singapore courts and, uniformly, the Commonwealth jurisdictions that are party to the New York Convention, is to be pro-enforcement when asked to enforce foreign arbitral awards under the Convention.¹⁶ The pro-enforcement purpose of the Convention is underscored by the exclusive and exhaustive grounds, under Section 31 of the IAA, by which enforcement of a Convention award may be refused.¹⁷ Consistent with the

16 See *Aloe Vera of America v. Asianic Food (S) Pte Ltd* [2006] 3 SLR 174 at [41] to [46].

17 Ibid.

legislative objective, the Singapore court has endorsed and applied a mechanistic approach to the process of enforcing foreign awards under the Convention insofar as the first stage of enforcement, which pertains to the initial grant of leave to enforce, is concerned. At this first stage, the enforcement process does not require judicial investigation by the Court in the jurisdiction where enforcement is sought and the party seeking leave to enforce the award must merely comply with the formalistic procedural requirements under Order 69A of the Rules of Court.¹⁸ The applicant must nevertheless give full and frank disclosure of the relevant facts, including the existence of any pending applications for setting aside the award or leave to appeal on a question of law, as the application for leave to enforce is made on an *ex parte* basis.¹⁹ At the second stage of the two-stage process of enforcement, which is invoked when a party against whom an award is made resists enforcement on the grounds set out in the IAA, that party must prove the grounds it relies upon on a balance of probabilities.

IV SHIPPING CONTRACTS

i Shipbuilding

Singapore has long been a leading centre for ship repair and shipbuilding. Singapore corporations Keppel Corp and Sembcorp Marine are among the world's top offshore rig builders.

A shipbuilding contract is regarded both as a contract for sale and purchase as well as a contract for the supply of workmanship and materials. There are a number of commonly used standard-form shipbuilding contracts, including SAJ (Shipbuilders' Association of Japan), AWES (Association of West European Shipbuilders) and BIMCO's Newbuildcon.

Shipbuilding disputes usually involve issues of whether the ship complies with the description and contractual specifications.²⁰ The conditions and implied warranties under the Sale of Goods Act 1979 apply if the shipbuilding contract is governed by Singapore law (e.g., there is an implied condition that the ship will correspond with the description and be reasonably fit for its intended purpose).

The parties may contract for title to pass gradually upon the progress of the construction or at certain stages or milestones. Generally, in the absence of any provisions to the contrary, the risk will pass with the title.

Typically, payment of the purchase price is made in instalments before delivery and, in return, a performance guarantee or refund guarantee will be furnished by the yard under the shipbuilding contract. Provided that the guarantee is an on-demand guarantee, the buyer would be entitled to call on the guarantee immediately without having to establish liability of the seller, provided that other conditions that entitle the buyer to call on the guarantee

18 Ibid., at [42], and more recently endorsed in *Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) v. Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd)* [2010] 3 SLR 661 and clarified in *Galsworthy Ltd of the Republic of Liberia v. Glory Wealth Shipping Pte Ltd* [2011] 1 SLR 727. Endorsed by the Supreme Court of Victoria in *Altain Khuder LLC v. IMC Mining Inc & Anor* [2011] VSC 1 at [68].

19 *AUF v. AUG* [2016] 1 SLR 859.

20 E.g., *Pacific Marine & Shipbuilding Pte Ltd v. Xin Ming Hua Pte Ltd* [2014] SGHC 102, where the issue in dispute was whether the propulsion units contracted for were defective.

are satisfied. In *Master Marine AS v. Labroy Offshore Ltd and others*,²¹ the yard failed to deliver a rig by the agreed delivery date. The buyer rescinded the contract and called on the refund guarantees furnished by the seller's banks. The yard applied *ex parte* for an injunction preventing the banks from paying out the monies or Master Marine receiving the same. The Singapore Court of Appeal held that on the true construction of the refund guarantees, the guarantees were on-demand guarantees and having satisfied that the conditions for payment under the guarantees, the buyer was entitled to payment under the refund guarantees.

The Singapore courts have not had the opportunity to consider, in any reported decision thus far, the presumption applied by the English Court of Appeal in *Marubeni Hong Kong and South China Ltd v. Mongolian Government*²² (*Marubeni*) that in construing a guarantee given outside the context of a banking instrument or by a non-financial institution, the absence of language appropriate to a performance bond or something having similar legal effect creates a strong presumption against the parties' intention to create a performance bond or on-demand guarantee (the *Marubeni* presumption). While the Singapore High Court in *China Taiping Insurance (Singapore) Pte Ltd (formerly known as China Insurance Co (Singapore) Pte Ltd) v. Teoh Cheng Leong*²³ (*China Taiping*) briefly referred to *Marubeni* as support for the general principles on the construction of guarantees and on-demand guarantees or performance bonds, on the facts of that case, the Singapore court did not have to consider the application of the *Marubeni* presumption. It therefore remains to be seen whether the *Marubeni* presumption will gain judicial support locally, bearing in mind that the English court's decision is persuasive authority in the Singapore courts.

Under Singapore law, there are two separate and distinct exceptions to a guarantor's obligations to pay promptly upon a demand being made by the beneficiary within the terms of the guarantee, irrespective of any dispute between the account party and the beneficiary – that is, fraud and unconscionability.²⁴ The fraud exception is meant to safeguard the account party from a dishonest call being made upon the guarantee by the beneficiary.²⁵ The unconscionability exception, on the other hand, was developed as it was recognised that in certain circumstances, even where the account party cannot show that the beneficiary had been fraudulent in calling on the bond, it would nevertheless be unfair for the beneficiary to realise its security pending resolution of the substantive dispute.²⁶ Therefore, under Singapore law, where a beneficiary acts fraudulently or unconscionably when calling on an on-demand guarantee or performance bond, the court can grant injunctive relief to restrain a call on or payment out under such a guarantee or performance bond.

It is, however, now possible under Singapore law for parties to incorporate a carefully worded clause in their contract to restrict the grounds on which an obligor may object to a beneficiary's call on a performance bond. The Singapore Court of Appeal recently considered the issue of whether parties could contractually restrict the right of the obligor under a performance bond to apply for an injunction (which is an equitable remedy) to restrain the

21 [2012] 3 SLR 125.

22 [2005] 1 WLR 2497.

23 [2012] SGHC 2.

24 *Arab Banking Corp (B.S.C) v. Boustead Singapore Ltd* [2016] SGCA 26 at [51].

25 *Ibid.*, at [60].

26 *Ibid.*, at [104].

beneficiary from calling on the bond.²⁷ Under the subject clause in the main contract in *CKR Contract Services*, the obligor was not entitled to restrain the beneficiary from calling on the performance bond on any ground, except in the case of fraud.²⁸ The obligor applied for an injunction, on the ground of unconscionability, to restrain payment from being made to the beneficiary. The Court of Appeal ruled that the clause merely sought to limit the obligor's right to an equitable remedy, and was not an ouster of the jurisdiction of the court or void and unenforceable for being contrary to public policy, and therefore dismissed the obligor's appeal against the decision of the judge at first instance refusing to grant the injunction (albeit on slightly different grounds). The Court of Appeal nevertheless stressed that it may still be open to the obligor to rely on the usual doctrines or principles at common law or the relevant provisions under the Unfair Contract Terms Act to argue that such a clause in unenforceable (since these issues did not arise or were not raised in *CKR Contract Services*).²⁹

To allocate the risks of delays in completion, it is also usual for shipbuilding contracts to provide for liquidated damages in the event of delay. Such liquidated damages provisions are enforceable, provided that the agreed level of compensation is a genuine pre-estimate of loss. Otherwise, the provision will be treated as a penalty clause and will be struck out.

The failure by the yard to construct or complete the ship in accordance with the terms of the contract may entitle the buyer to claim damages from the yard, which is the usual remedy. Specific performance may be ordered where the buyer can prove that damages will not be an adequate remedy.

ii Contracts of carriage

Singapore is a state party to the Hague-Visby Rules, which were enacted into domestic legislation by the Singapore Carriage of Goods by Sea Act (1998 edition), without variation.

These Rules apply by force of law to shipments of goods under a bill of lading where the port of shipment is a port in Singapore or where the requirements of Article X of the Rules otherwise apply. Under the Singapore Carriage of Goods by Sea Act (COGSA), the Rules can be contractually applied to the carriage of goods by sea under a sea waybill or straight (non-negotiable) bill of lading. The Hamburg Rules do not apply. Singapore has not acceded to or ratified the the Rotterdam Rules. Cabotage is not applicable in Singapore. The CMR Convention has not been ratified in Singapore and the liability of carriers of goods by road is governed by common law principles.

Importantly, in terms of legislation, Singapore has enacted by statute its Bills of Lading Act, which is in *pari materia* with the UK COGSA 1992. Under the Singapore Bills of Lading Act, title to sue and transfer of liabilities can be effected by mere endorsement of a negotiable bill of lading, without the requirement under the old English Bills of Lading Act 1855 that linked transfer of title to sue to transfer of property in the cargo.

Where contracts of carriage subject to the Hague-Visby Rules are concerned, the carrier's limitation of liability for any loss of or damage to or in connection with the cargo is statutorily defined as S\$1,563.65 per package or unit, or S\$4.69 per kilogram of gross weight

27 *CKR Contract Services Pte Ltd v. Asplenium Land Pte Ltd* [2015] 3 SLR 1041 ('CKR Contract Services').

28 *Ibid.*, at [5].

29 *Ibid.*, at [20] to [24].

of the goods lost or damaged, whichever is higher. The time bar for cargo claims under the Hague-Visby Rules is one year from the date of delivery or from the date when the goods should have been delivered.

In respect of contracts of carriage of goods by sea, the relevant liens applicable are: (1) the shipowner's lien on cargo, which is a possessory lien that can arise at common law in respect of freight, or in a bailee of necessity context,³⁰ or under contract for amounts payable to the shipowner under the contract of carriage; (2) the shipowner's lien on sub-freight or sub-hire, which is a contractual lien under a contract of carriage validly incorporating a charterparty lien clause; and (3) liens on the ship exercisable by an action *in rem* following arrest of the vessel. This is the claimant's statutory right of action against the ship if the claim is listed as falling within the subject matter of Admiralty jurisdiction in the High Court (Admiralty Jurisdiction) Act.

The shipper has a duty to properly identify and to pack the goods shipped. Pursuant to Article III(5) of the Hague-Visby Rules, the shipper is deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by it, and the shipper must indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in the particulars. The shipper has a strict liability at common law for shipment of dangerous goods without notice to the carrier. This strict liability regime is extended by the indemnity regime of Article IV(6) of the Hague-Visby Rules, which imposes broad liability upon the shipper for all damages and expenses directly or indirectly arising out of or resulting from the shipment of any cargo that causes or threatens to cause loss of life, damage to the ship or other cargo, delay or expense to the carrier.

The Singapore courts have handed down decisions on principle in relation to the interpretation of the Hague-Visby Rules. Notable examples are the decision of the Court of Appeal in *Sunlight Mercantile Pte Ltd v. Every Lucky Shipping Co Ltd* on the carriage of deck cargo,³¹ where the Court of Appeal declined to follow the English court decision in *The Imvros*³² on the effectiveness of a contractual exclusion of the carrier's liability for unseaworthiness; and the reasoning of the Singapore Court of Appeal in *APL Co Pte Ltd v. Voss Peer*³³ on the role of a straight consigned bill of lading and the carrier's delivery obligations there under, which has been followed by the English Court of Appeal in *The 'Rafaela S'*.³⁴

30 See *Liu Wing Ngai v. Lui Kok Wai* [1996] 3 SLR(R) 508, citing *The 'Winson'* [1981] AC 939, that where a bailor fails to take delivery of the bailed goods from a bailee, a bailment for reward can become a gratuitous bailment. Even then, the duty of care is still owed, although what is required to discharge it may be less onerous. From this relationship giving rise to a duty of care, a correlative right is vested in the gratuitous bailee to reimbursement of expenses incurred in taking measures to preserve the property.

31 [2004] 1 SLR(R) 171.

32 [1999] 1 Lloyd's Rep 848.

33 [2002] 2 SLR(R) 1119.

34 [2002] 1 Lloyd's Rep 113.

iii Cargo claims

Pursuant to Section 2(1) of the Singapore Bills of Lading Act, a person who becomes the lawful holder of a bill of lading shall have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract. Section 5(2) of the Act defines a holder of a bill of lading as:

- a a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;
- b a person with possession of the bill as a result of the completion, by delivery of the bill, of any endorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill; or
- c a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) had the transaction not been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates.

Importantly, the Bills of Lading Act also provides for the transfer of liabilities under a bill of lading or any carriage document to which the Act applies. The Bills of Lading Act covers not just the transfer of rights or liabilities of bills of lading but also covers sea waybills and ship's delivery orders. In Singapore, the transfer of bill of lading rights and liabilities is regulated by the Bills of Lading Act. This is essentially a re-enactment of the UK Carriage of Goods by Sea Act 1924. The Singapore courts take a stringent view to the principle of the bill of lading being a document of title. There is very little scope for the carrier to defend a misdelivery claim under Singapore law, as exemplified in decisions of the Singapore courts at the High Court and Court of Appeal levels.³⁵ Examples in which misdelivery claims have been successfully defended usually centre around the claimant's failure to prove title to sue.

Singapore law, again as exemplified by recent decisions of the High Court, recognises and applies common law principles of bailment and tortious duties of conversion to supplement a cargo claimant's rights to claim. This can be crucial where, in a given case, the cargo claimant is unable to prove title to sue in contract under a bill of lading.³⁶

Where incorporation of charter terms into bill of lading contracts is concerned, Singapore law generally follows English law principles on contractual incorporation of terms. General words of incorporation will suffice to incorporate terms linked to the carriage or delivery of the goods, provided that the incorporating document identifies, either expressly or implicitly, the charterparty to be incorporated. Specific words of incorporation are required to incorporate 'collateral' or 'ancillary' clauses such as law and jurisdiction or arbitration clauses. As long as the law and jurisdiction (or arbitration) clause in the charterparty is validly incorporated in the bill of lading, it is binding upon a third-party lawful holder of the bill of lading. A demise clause providing that the parties to the contract evidenced by the bill of lading are the shipper and the shipowner is generally upheld and valid.

35 See *Bandung Shipping Pte Ltd v. Keppel TatLee Bank Ltd* [2003] 1 SLR(R) 295, *BNP Paribas v. Bandung Shipping Pte Ltd* [2003] 3 SLR(R) 611 and *The 'Jian He'* [1999] 3 SLR(R) 432.

36 See *The 'Dolphina'* [2012] 1 SLR 992 and *Antariksa Logistics Pte Ltd v. McTrans Cargo (S) Pte Ltd* [2012] 4 SLR 250.

iv Limitation of liability

Singapore is party to the LLMC Convention 1976, which came into force on 1 May 2005 pursuant to Part VIII of the Merchant Shipping (Amendment) Act 2004. The Merchant Shipping Act of Singapore as amended in 2004 contains various provisions that either operate in tandem with or modify the provisions of the 1976 Convention. These provisions are found in Sections 136 to 142 of the Act.

Singapore is, however, not a party to the LLMC Protocol 1996 or the 2012 Amendments to the 1996 Protocol, and the increase in the limits of liability under the 1996 Protocol and the 2012 Amendments are therefore not applicable under Singapore law.

A ship, for the purpose of limitation, is any kind of vessel used in navigation by water and includes barges, hovercraft and 'offshore industry mobile units'. The persons entitled to limit their liability are as per Article 1 of the LLMC Convention wording, which is unamended. These include:

- a* shipowners;
- b* demise, time, voyage and slot-charterers;
- c* managers or operators of a seagoing ship;
- d* salvors;
- e* any person for whose act, neglect or default the parties listed above are responsible; and
- f* an insurer for claims subject to limitation can limit to the same extent as its assured.

The following claims are subject to limitation of liability:

- a* claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;
- b* claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;
- c* claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connection with the operation of the ship or salvage operations;
- d* claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship (but not if under contract with the person liable); and
- e* claims of a person other than the person liable in respect of measures taken in order to avert or minimise loss for which the person liable may limit his liability (but not if under contract with the person liable).

The claims are subject to limitation even if brought by way of recourse or indemnity under contract.

A person is not entitled to limit its liability if it is proven that the loss resulted from his or her personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

The limits of liability for loss of life or personal injury are:

- a* 166,667 SDRs for ships below 300 tonnes; and
- b* 333,000 SDRs for ships not exceeding 500 tonnes.

For larger ships, the following amounts are used in addition to 333,000 SDRs:

- a* 501 to 3,000 tonnes: 500 SDRs per tonne;
- b* 3,001 to 30,000 tonnes: 333 SDRs per tonne;
- c* 30,001 to 70,000 tonnes: 250 SDRs per tonne; and
- d* 70,001 tonnes and above: 167 SDRs per tonne.

The limits of liability for any other claims are:

- a* 83,333 SDRs for ships below 300 tonnes; and
- b* 167,000 SDRs for ships not exceeding 500 tonnes.

For larger ships, the following amounts are used in addition to 167,000 SDRs:

- a* 501 to 30,000 tonnes: 167 SDRs per tonne;
- b* 30,001 to 70,000 tonnes: 125 SDRs per tonne; and
- c* 70,001 tonnes and above: 83 SDRs per tonne.

Limitation proceedings can be brought by a party seeking to establish their right to limit. A party can also rely on their right to limit as a form of defence for claims brought against it that are subject to limitation. It is not necessary to constitute a limitation fund until the court has determined whether a party has the right to limit its liability. A limitation fund can be constituted by way of a cash payment into court, or bank guarantee. The likelihood is that an International Group of P&I Clubs letter of undertaking will also be acceptable to a Singapore court for the purposes of Article 11(2) of the 1976 Convention, following practical instances where this has been done in Singapore, and the approach in the English Court of Appeal decision in *Kairos Shipping Ltd v. Enka & Co LLC (The 'Atlantik Confidence')*.³⁷

Where a shipowner has obtained a limitation decree in Singapore and a claimant commences an action in a foreign jurisdiction where higher limits of liability apply, without challenging the Singapore limitation decree or participating in the distribution of the limitation fund constituted under the Singapore limitation decree, the Singapore courts can grant an anti-suit injunction to restrain the claimant from proceeding with its action in the foreign jurisdiction on account of the claimant's vexatious or oppressive conduct in effectively compelling the shipowner to set up another limitation fund when there is already an existing and properly constituted limitation fund in Singapore. The right to claim limitation in any particular forum is a right that belongs to the shipowner alone, and a claimant cannot pre-empt the shipowner's choice of forum or dictate the limitation forum, even in circumstances where the appropriate forum on the adjudication of liability was elsewhere.³⁸

On the other hand, where the Singapore courts are asked to stay proceedings commenced in Singapore on the grounds of *forum non conveniens* in actions to determine liability on collision claims, the Singapore courts take the view that the fact that the law in the alternative foreign forum may be less favourable to the plaintiff because lower limits of liability apply in that jurisdiction does not *per se* necessarily justify dismissing the stay application, if

37 [2014] EWCA Civ 217.

38 See *Evergreen International SA v. Volkswagen Group Singapore Pte Ltd* [2004] 2 SLR(R) 457, applying *The Volvox Hollandia* [1988] 2 Lloyd's Rep 361.

the claim bears greater jurisdictional connections to that foreign jurisdiction. The existence of different limitation regimes is not considered a personal or juridical advantage under the *Spiliada*³⁹ principles that the Singapore courts apply when considering a stay application.⁴⁰

V REMEDIES

i Ship arrest

The Singapore courts have developed their own jurisprudence in relation to the law of ship arrest, which is now clearly divergent from English law. Singapore has not acceded to either the 1952 or 1999 Arrest Conventions. Neither is it a signatory to the International Convention on Salvage 1989 under which an expanded jurisdiction for arrest for salvage claims is now available to signatory countries, such as the United Kingdom.

The statutory provisions for ship arrest in Singapore are primarily set out in the High Court (Admiralty Jurisdiction) Act (HCAJA) and the Rules of Court, which flesh out the procedural aspects.

Section 3(1) of the HCAJA, which was modelled after the English Supreme Court Act 1981 equivalent provisions, provides an exhaustive list of claims for which a claimant may invoke admiralty jurisdiction of the High Court.

Arrest can only be made against a ship that is owned by or demise chartered to a person who is liable for an *in personam* claim and who was, when the cause of action arose, the owner, charterer of or in possession or in control of, the same ship that gave rise to the claim.⁴¹

Sister ship arrest is possible in Singapore in circumstances where the *in personam* defendant owner of the ship that gave rise to the claim is also the beneficial owner of another vessel, so that such other vessel may be arrested for the claim.⁴² It is not possible to arrest ships in associated ownership in the same way that is permitted under, say, South African law. Maritime liens are recognised for limited categories of priority claims, such as claims for salvage, damage done by a ship (typically in collisions), crew wages, bottomry and master's disbursements. Cargo may exceptionally be arrested for priority claims such as maritime liens.

Procedure, documents and costs

An admiralty action *in rem* is commenced by the court issuing a writ *in rem*. This needs to be endorsed with a statement of claim, or at least a statement of the nature of the claim. The court fee for issuing a writ is about S\$500 to S\$1,500 depending on the size of the claim. The validity of the writ is 12 months from the date on which it was issued. The court may, at its discretion, extend the validity if there was for instance no opportunity to serve it on the ship (because it has not called at Singapore).

The documents required to be filed in court on an application for a warrant of arrest include the writ of summons (*in rem*), warrant of arrest, request to issue a warrant of arrest, supporting affidavit of the arresting party, caveat searches confirming that there are no

39 *Spiliada Maritime Corporation v. Cansulex Ltd* [1987] AC 460.

40 See *The 'Reecon Wolf'* [2012] 2 SLR 289.

41 Section 4(4)(i) HCAJA.

42 Section 4(4)(ii) HCAJA.

subsisting caveats against the arrest of the vessel, an undertaking to indemnify the Sheriff and a letter of authority or the particulars of the person effecting service of the warrant of arrest and writ. If all documents are in place a warrant of arrest order can be obtained within about half a day.

The arresting party has a duty to make full and frank disclosure to the court of all material facts in the supporting affidavit filed in its application for a warrant of arrest. In any given case, if circumstances are not clear as to, for instance, the *in personam* liability of the shipowner for the claim, or proof of ownership of the vessel to be proceeded against, the arresting party has to be careful to address and explain any such weaknesses in its case.

The Singapore Court of Appeal has clarified that although the Singapore courts will not consider the merits of a plaintiff's claim in deciding whether the plaintiff has properly invoked admiralty jurisdiction, the plaintiff must satisfy the various steps and respective standards of proof for invoking admiralty jurisdiction in Singapore under Sections 3 and 4 of the HCAJA.⁴³ In this respect, a plaintiff need not prove who 'the person who would be liable on the claim in an action *in personam*' is for the purposes of establishing admiralty jurisdiction (until and unless the defendant subsequently challenges the plaintiff's action by applying to strike out the action under Order 18 rule 19 of the Rules of Court or the inherent jurisdiction of the court), but the plaintiff must identify in its supporting affidavit for a warrant of arrest, without having to show in argument, the person who would be liable on the claim in an action *in personam*. In the event a plaintiff's invocation of admiralty jurisdiction or its arrest of the defendant's vessel is subsequently challenged, the plaintiff would need to show, in addition to the requirements under Sections 3 and 4 of the HCAJA, a good arguable case on the merits of its claim.⁴⁴

The duty to make full and frank disclosure is to disclose all material facts. The test of materiality for an arrest application is also the same as that required in other *ex parte* civil remedies. The mere disclosure of material facts without more or devoid of the proper context is in itself insufficient to constitute full and frank disclosure. Unless the document is presented to the judge, it has not been disclosed. The test of materiality is whether the fact is relevant to the making of the decision whether to issue the warrant of arrest, that is, a fact which should properly be taken into consideration when weighing all the circumstances of the case, though it need not have the effect of leading to a different decision being made. The arrest warrant is issued by the High Court on the application of the plaintiff. Civil liability will not arise should the arrest turn out to be unjustified and set aside later, unless it can be shown that the plaintiff acted with bad faith, or with gross negligence implying malice. A mistake in itself would not make an arrest wrongful, neither would a weak case for the plaintiff: actions for wrongful arrests are rare and seldom succeed. Practically speaking, a plaintiff will only face exposure for liabilities following an arrest if it can be shown that it had no reason to believe it had an arguable claim or that the ship was owned by the defendant, or was intent on abusing the court process.

In Singapore, a ship can only be arrested if it comes within the territorial waters as well as within the port limits of Singapore. The ship is arrested when the warrant of arrest is

43 *The 'Bunga Melati 5'* [2012] 4 SLR 546 at [112].

44 *Ibid* at [96].

affixed for a short time on any mast of the ship or on the outside of any suitable part of the ship's superstructure. After a vessel is arrested, it comes under the custody of the Sheriff of the Supreme Court of Singapore.

An undertaking to indemnify the Sheriff of the Supreme Court for costs of maintenance of the vessel under arrest is required, which includes the cost of a guard service. In practice, an initial deposit of S\$5,000 to S\$10,000 is usually required on account of the costs of the Sheriff. In addition, a local law firm employed to prepare and file the arrest papers and carry out the arrest usually requires a cross-undertaking from the arresting client, or funds sufficient to secure the firm's undertaking to the Sheriff. Since it will be responsible to the Sheriff, the practice is for the local law firm to ask for a payment on account of its fees and disbursements, including the Sheriff's costs.

Security

A plaintiff arresting party need not furnish any counter-security to the defendant shipowner when applying to arrest.

The defendant can, at a later stage of the court action, apply to the court to require the plaintiff to furnish security for the defendant's costs, which is the same general rule applying as for all civil litigants. The court has discretion to require security for costs of the defendant if the plaintiff is ordinarily resident out of the jurisdiction, or is shown to be financially unsound so as to be unable to meet an adverse order of costs if ordered against it. Such security if ordered is for costs only and does not cover damage suffered in other forms, for which the plaintiff will not be required to provide counter-security.

In order to avoid an arrest or to release a vessel under arrest, a defendant can provide security for the underlying claim. This typically includes bail bonds (effectively a cash deposit with the court) and guarantees or letters of undertaking from a first-class bank or underwriter, such as an International Group P&I Club. Additionally, a defendant shipowner who apprehends an arrest of its vessel calling into Singapore can file a caveat against arrest via a local law firm with the High Court, provided that the shipowner or his or her solicitors provide an undertaking to enter an appearance in any action that may be brought against that vessel, and furnish satisfactory security in the action to the plaintiff within three days of being notified that such an action has been commenced.

ii Court orders for sale of a vessel

As a corollary to an arrest in an *in rem* action, the High Court has the power to order a judicial sale *pendente lite* of an arrested vessel, if the shipowner fails to furnish security in exchange for a release. The High Court would typically permit the plaintiff arresting party to apply for a judicial sale order should the shipowner fail or refuse to provide security within, say, three weeks of the arrest. A key justification for allowing a judicial sale *pendente lite* is that otherwise, the value of the *res* as security will diminish as expenses on the upkeep of the vessel under arrest are incurred, and the condition of the vessel will deteriorate.

From the time of arrest, the main steps (in chronological order) following a successful application for judicial sale order, culminating in an actual sale to a buyer, are broadly as follows:

- a* surveying and appraisal of the vessel;
- b* advertising the sale of the vessel;
- c* time for sealed bids to be made; and
- d* acceptance of the bid to completion of sale.

A judicial sale is typically carried out by closed tender or public auction by the Sheriff of the Supreme Court, who is commissioned in all cases to undertake the appraisal and judicial sale of the arrested ship. A key guiding principle is that the court will scrutinise judicial sale applications carefully to ensure due process to best realise the market value of the arrested ship to be judicially sold. This is why the High Court has ruled in recent cases that applications for direct private sale of the arrested ship will generally not be allowed in Singapore.

In *The 'Turtle Bay'*,⁴⁵ the mortgagee bank arrested two vessels and commenced *in rem* proceedings against the defendant shipowner, later obtaining default judgment. It filed applications seeking the court's approval of a private direct sale of each vessel on terms of contract entered into with named purchasers for a specified price each. The prices were above, but not significantly higher than, the court valuation. The Court emphasised that it has to strike a balance between the two competing concerns in a judicial sale: that of accepting the highest bid price at a fairly conducted Sheriff's sale on the one hand, and weighing that concern against the purpose to be achieved by a judicial sale, which is to benefit all persons interest in the *res*. Where a party seeks to enter into a private direct sale, there is a divergence in its own interest to obtain benefits for itself, and the interest of the Sheriff acting pursuant to a commission for appraisal and sale. As a result, the court has to be circumspect when dealing with such a sale application and has to carefully scrutinise each application. The court will not allow a direct sale unless there exist 'powerful special features' or 'special circumstances', and these were lacking on the facts of the case. In *The 'Sea Urchin'*,⁴⁶ a similar situation arose, though the named buyer tabled an offer price above the value of the vessel, and had agreed to allow the vessel to sail with its cargo then on board for delivery to the sub-charterer of the vessel. The Court reaffirmed the position set out in *The 'Turtle Bay'*, and held that the costs of discharging the cargo where a vessel is under arrest is not a relevant factor to allowing a direct sale. Furthermore, the alleged special circumstance as to the impossibility of landing the cargo in Singapore and that trans-shipping would be slow and costly are in reality a typical consequence of an arrest of a cargo-laden vessel. As such, powerful special features or special circumstances justifying an order for a direct sale were lacking on the facts of this case as well.

In the distribution of sale proceeds following a judicial sale of the vessel, the Singapore Admiralty Court generally ranks the priority of claims as follows:

- a* port dues and Sheriff's commission and expenses of arrest, appraisal and sale of the vessel;
- b* arresting party's legal costs of arrest, appraisal and sale being costs of the producer of the fund;
- c* maritime lien claims (e.g., crew wages, collision and salvage claims, save for prior accruing possessory liens);
- d* possessory lien claims (i.e., shipyards in possession of a vessel after effecting repairs or conversion); and
- e* mortgagee claims.

All other maritime claims rank *pari passu* (for example, charterparty, cargo and necessaries claims).

45 [2013] 4 SLR 615.

46 [2014] SGHC 24.

VI REGULATION

i Safety

Being a major port and flag state, Singapore is a white-list country. It is party to all major IMO conventions, including the 'pillar conventions', which include the Colregs, the STCW Convention and SOLAS.

In the Singapore Straits, there is a mandatory ship reporting system (STRAITREP), which has been adopted by the IMO. STRAITREP, together with the operation of a vessel traffic information system, enhances the navigational safety for ships in transit and facilitates the movements of vessels in the Singapore Straits.

In terms of security, the ISPS Code was introduced and adopted by amendments to SOLAS. It entered into force on 1 July 2004. The ISPS Code was implemented by using the wide powers of the MPA given under the Maritime and Port Authority Act and the Merchant Shipping Act to give effect to the provisions of any international conventions in relation to shipping to which Singapore is a party.

ii Port state control

The MPA is the government agency responsible for implementing all IMO conventions. The MPA was established by the Maritime and Port Authority of Singapore Act in 1996.

Singapore is a founding member of the Tokyo MoU, which is a regional port state control organisation consisting of 18 members in the Asia-Pacific region.

The MPA performs all regulatory and administrative functions in respect of merchant shipping, marine and port matters in Singapore including port state control inspections. The MPA is responsible for, *inter alia*, port state control to ensure that ships leaving the port meet the international safety, security and pollution prevention standards. Inspections are carried out by port state control and ships that do not meet the requisite international standards may be detained. Between January and March 2016, seven ships were detained by the MPA for various deficiencies and non-conformities.⁴⁷

The MPA has wide-ranging powers. The port master may board any ship in port and issue orders and directions to ships within the port and Singapore territorial waters. Port clearance may be refused for ships that do not comply with such directions.

iii Registration and classification

In recent years, the Singapore Ship Registry, which is an open registry, has introduced several tax benefits and, as a result, has attracted a large number of foreign shipowners. It is currently ranked seventh in the world in terms of registered tonnage, with more than 3,000 registered vessels, totalling in excess of 43 million GT.⁴⁸

The Singapore Ship Registry is administered by the MPA. Nine internationally recognised classification societies are authorised to survey and issue tonnage, safety and pollution prevention certificates to Singapore-flagged ships.

47 www.tokyo-mou.org/inspections_detentions/detention_list.php.

48 www.mpa.gov.sg/sites/maritime_singapore/what_maritime_singapore_offer/global_maritime_services/quality_ship_registry.page.

The requirements and conditions for registration of ships are set out in Part II of the Merchant Shipping Act and the Merchant Shipping (Registration of Ships) Regulations 1996. The conditions for registration are relatively straightforward:

- a* Vessels that are older than 17 years of age will generally not be considered for registration, see Section 8 of the Merchant Shipping (Registration of Ships) Regulations 1996.
- b* The registered owner can be a Singapore citizen or permanent resident or a Singapore incorporated entity, which can be either locally or foreign owned.
- c* For any foreign-owned company (defined as a company incorporated in Singapore with more than 50 per cent of the equity owned by foreign interests), the company is required to have a minimum paid-up capital of S\$50,000, and the vessel must also be self-propelled and have a gross tonnage of at least 1,600. The minimum paid-up capital and tonnage requirements may be waived at the discretion of the registry.

The MPA also maintains the register of ship mortgages, which can be recorded as soon as the vessel has been entered into the registry.

iv Environmental regulation

Singapore is party to the following International Conventions relating to pollution:

- a* MARPOL 73/78 (Annex I to Annex VI);
- b* the CLC Convention;
- c* the Oil Pollution Fund Convention;
- d* the Bunker Convention; and
- e* the OPRC Convention.

These international conventions are given effect by domestic legislation:

- a* the Prevention of Pollution of the Sea Act gives effect to the International Convention for the Prevention of Pollution from Ships 1973 and the Protocol of 1978, as well as to other international agreements relating to the prevention, reduction and control of pollution of the sea and pollution from ships;
- b* the Merchant Shipping (Civil Liability and Compensation for Oil Pollution) Act gives effect to the CLC Convention and the Oil Pollution Fund Convention; and
- c* the Merchant Shipping (Civil Liability and Compensation for Bunker Oil Pollution) Act 2008 covers the liability of ships that cause bunker oil pollution in Singapore. This Act gives effect to the Bunker Convention.

The MPA coordinates operations for cleaning up spills, and monitors and enforces measures to prevent oil pollution in Singapore waters. Under the Prevention of Pollution of the Sea Act, the MPA is empowered to take preventive measures to prevent pollution, including denying entry or detaining ships.

The Singapore Straits is one of the busiest shipping routes in the world. As an illustration, between January and February 2014, three collisions occurred within Singapore waters that resulted in oil spills,⁴⁹ in addition to a recent collision that resulted in an oil spill in January 2015.⁵⁰

v Collisions, salvage and wrecks

Collisions

Singapore is party to the Colregs, which are incorporated as a Schedule to the Merchant Shipping (Prevention of Collisions at Sea) Regulations. The legal regime for collisions is governed by the Maritime Conventions Act 1911 and the Merchant Shipping Act. The Maritime Conventions Act 1911 gives effect to the International Convention for the Unification of Certain Rules Relating to Collisions between Vessels 1910, to which Singapore had acceded. Section 8 of the Maritime Conventions Act 1911 provides a two-year time bar in relation to collision and salvage claims, though the limitation period may be extended by agreement between the parties, or pursuant to Section 8(3)(b) if there has been no reasonable opportunity to arrest an offending vessel within the limitation period, or at the court's discretion under Section 8(3)(a).⁵¹

Salvage and wreck removal

Singapore is not a party to the Salvage Convention 1989. The legal regime governing salvage and wreck removal is set out in the Merchant Shipping Act and Maritime and Port Authority of Singapore Act.

The Maritime and Port Authority of Singapore has general supervision over all wrecks in Singapore.

Part IX of the Maritime and Port Authority of Singapore Act empowers the MPA to require owners of any vessel or object sunk, stranded or abandoned within the port of Singapore or approaches thereto to remove or destroy the whole or any part of such vessel or object. If the MPA's directions are not complied with, it may take possession of the vessel or object, raise, remove or destroy the vessel or object, and recover its expenses from the proceeds of the sale of the vessel or object. If the proceeds of sale are insufficient to reimburse the MPA, the outstanding amount is a debt that may be recovered from the owners.

Part IX of the Merchant Shipping Act deals with wreck and salvage and provides that the MPA is empowered to appoint any person to be a receiver of a wreck. The appointed receiver has extensive powers to deal with any ship that is wrecked, stranded or in distress

49 On 29 January 2014, the departing Hong Kong-flagged chemical tanker *Lime Galaxy* and the arriving China-flagged containership *Fei He* collided south of Jurong Island. On 30 January 2014, there was a collision between the Panama-flagged container ship *NYK Themis* and the barge *AZ Fuzhou* in Singapore's East Keppel Fairway. On 11 February 2014, the departing Liberia-flagged containership *Hammonia Thracium* and the Panama-flagged chemical tanker *Zoey* collided in the Singapore Strait, off Sebarok Island.

50 On 2 January 2015 a Libyan-registered oil tanker, *Alyarmouk* had collided with a Singapore-registered bulk carrier, *Sinar Kapuas* in Singapore waters about 11 nautical miles north-east of Pedra Branca. www.mpa.gov.sg/sites/global_navigation/news_center/mpa_news/mpa_news_detail.page?filename=nr150102aa.xml.

51 See *The 'Orinoco Star'* [2014] SGHCR 19 at [11] and [24].

at any place on or near the coasts of Singapore or within Singapore territorial waters. The receiver of the wreck may take possession and raise, remove or destroy, and sell in such manner as it thinks fit, any ship so raised or removed and any other property recovered in the exercise of his powers.

Further salvage is payable for saving life and for any service rendered to any shipwrecked, stranded or in distress vessel on or near the coasts of Singapore or in any tidal water within the limits of Singapore. If salvage is due in respect of services rendered in assisting any ship, or in saving life, cargo or apparel, the Act empowers the receiver of wreck to detain the ship, cargo or apparel until payment is made for salvage or process is issued for the arrest or detention of the property by the High Court. The receiver of wreck is also empowered to sell the detained property if payment is not made within 20 days after the amount is due or within 20 days after the decision of the High Court or the Court of Appeal, as the case may be.

vi Passengers' rights

Singapore is not a signatory to the Athens Convention or any of its protocols.

The LLMC Convention provides the limitation regime for passenger claims. Article 7 of the LLMC Convention addresses claims for loss of life and personal injury to passengers. The limitation of liability of the owners is 46,666 SDRs multiplied by the number of passengers that the ship is authorised to carry according to the ship's certificate, subject to a maximum limit of 25 million SDRs.

vii Seafarers' rights

Singapore has ratified the MLC. With effect from 1 April 2014, the Merchant Shipping (Maritime Labour Convention) Act (the MLC Act) came into force, implementing Singapore's obligations under the MLC. There are specific regulations in place dealing with matters relating to, *inter alia*, health and safety protection, repatriation, seafarer recruitment and placement services, seafarers' employment agreement, crew list and discharge of seafarers, training and certification of cooks and catering staff, and wages.

The MLC Act generally applies to all Singapore-flagged ships. Any ship of 500 grt and above is also required to carry and maintain a maritime labour certificate and a declaration of maritime labour compliance.

Port state control extends to any ship in Singapore (not being a Singapore ship) engaged in commercial activities. Like most international conventions, certificates issued by the flag state administrations are accepted as *prima facie* evidence of a ship's compliance with the requirements under the Convention. Similarly, under the MLC Act, port state inspections in Singapore will be limited to verifying that a valid maritime labour certificate and a valid declaration of maritime labour compliance are carried on board the ship. A detailed port state inspection will be carried out in, *inter alia*, the following situations: (1) when the maritime labour certificate and the declaration of maritime labour compliance are not produced or are falsely maintained; or (2) there are clear grounds for believing that the living conditions on board the ship do not conform to the requirements of the MLC Act or the Convention, or the working and living conditions of the ship constitute a clear hazard to the safety, health or security of the seafarers.

The MLC Act implements the Convention requirements for the shipowner to have in place financial security to meet any liabilities that may arise from, *inter alia*, repatriation of a seafarer, medical and other expenses incurred in connection with a seafarer's injury or sickness,

burial or cremation of a seafarer.⁵² While neither the Convention nor the implementing legislation has defined ‘financial security’ (in respect of repatriation, death or long-term disability) Singapore has indicated that an International Group P&I Club certificate of entry will be acceptable as evidence of financial security.

Ships that do not conform to the requirements of the Act or MLC may be detained, for example, when the conditions on board are ‘clearly hazardous’ to the safety, health or security of seafarers or if it constitutes a serious or repeated breach of the seafarers’ rights under the Act.

At the time of writing, there have been no known detentions in Singapore for non-conformity with the MLC. With the implementing legislation in place there is no doubt Singapore will enforce the provisions of the MLC through, *inter alia*, port state control and flag state control.

VII OUTLOOK

In recent years, Singapore has positioned itself as the jurisdiction and a forum of choice for resolution of maritime disputes, and cross-border disputes generally. The legislative and regulatory framework have evolved as a result, and steps have been taken toward greater recognition of foreign laws.

An example is the Foreign Limitation Periods Act 2012 (FLPA), which was brought into force from 1 June 2012. This has reformed the law on the application of foreign time bars in the context of Singapore court proceedings, as well as arbitral proceedings.⁵³

In essence, by virtue of the FLPA, a Singapore court must apply foreign law on limitation periods (i.e., time bars), as opposed to Singapore law on limitation, where the Singapore court, in applying Singapore conflict rules, is required to apply the law of that foreign country in the determination of the substantive matter. In short, the application of foreign law on a limitation issue will be the corollary of the application of foreign law to the determination of the substantive matter. The FLPA heralds greater consistency in the Singapore courts’ approach to the application of foreign law so that foreign time bars (which are an important aspect in proceedings) are accorded due consideration and application where the substantive case is governed by foreign law.

In tandem with the overall growth in maritime activity and trade, Singapore is taking concrete steps towards positioning itself as a key hub for maritime and trade-related arbitrations. This is evident from statistical data showing a record of number of disputes being arbitrated in Singapore, by SIAC, with 271 new cases in 2015 from parties in 55 jurisdictions – 22 per cent up on the 222 new cases in 2014; and in the SCMA – 37 new cases in 2015 – 48 per cent up on the 25 new cases in 2014, while 22 new cases have been arbitrated already in 2016.⁵⁴ This trend is likely to continue as Singapore continues to grow in importance and in overall attractiveness to the maritime industry as a venue for arbitral dispute resolution and indeed, the resolution of broader commercial disputes by litigation, with the recent establishment of the SICCC.

52 Section 34 of the Merchant Shipping (Maritime Labour Convention) Act.

53 See Section 8A of FLPA.

54 The SCMA arbitrated 25 cases in 2014, more than quadrupling the amount of cases arbitrated in 2009.

The legal framework has been enhanced to give the Singapore courts the power to grant interim remedies, specifically in support of international arbitrations. The High Court is empowered to order, where a ship or property is arrested in court proceedings in Singapore, that such arrested property be retained as security in answer to an award to be made in arbitration that is to be commenced or that is already under way in Singapore or elsewhere. Court proceedings can be stayed on the basis that provision of equivalent security is given in place of an arrested vessel for the satisfaction of any such award. With effect from January 2010, the High Court's powers to order interim measures in aid of arbitration in Singapore, or foreign arbitration, were enhanced by statutory amendment to the Singapore International Arbitration Act (IAA). The amendments allow the High Court, particularly in cases of urgency, or where an arbitral tribunal has no power or is unable for the time being to act effectively, to make orders or give directions to any party for, *inter alia*, the preservation, interim custody or sale of property that is the subject matter of the dispute, preservation of evidence, and other interim injunctive relief.

In the foreseeable future, the industry expects that current governmental policy in promoting the Singapore Registry of Ships will continue. Incentives and initiatives such as the Maritime Sector Initiative scheme have been developed by the MPA. The scheme includes the withholding tax (WHT) exemption on interest payable on loans obtained from foreign lenders to finance the purchase or construction of ships. This allows automatic WHT exemption to qualifying payments (made on or after 1 June 2011) in respect of qualifying loans (entered into on or before 31 May 2016) with foreign lenders to finance the purchase or construction of Singapore-flagged and foreign-flagged vessels.

In February 2015 a Singapore War Risks Mutual (SWRM) was established. The SWRM is managed by Standard Club Asia and is a government-backed initiative that is also supported by the Singapore Shipping Association (SSA). Cover is available to SSA members, regardless of the flag of their vessels, as well as owners of ships registered in Singapore. This is the first national war risks insurer in Singapore and it is likely to further boost the Singapore marine insurance sector having its own dedicated war risk facility, managed by a team in the same time zone as the assured.

In addition, the Lloyd's Asia platform in Singapore operates as a gateway to Asia Pacific for Lloyd's and has achieved significant growth since opening in 1999. The platform has 20 service companies with 24 syndicates and over 380 people – making it the largest hub outside of London – writing business locally and offshore from Singapore.

In terms of jurisprudence, Singapore case law in the maritime law context has continued to gain traction as a sound authority cited in other common law courts. Over the past 10 to 15 years, the decisions of the Singapore High Court and the Court of Appeal have regularly featured in the English law reports, such as the Lloyd's Law Reports, on an array of legal issues that are of topical interest to the industry, such as principles relating to bills of lading, cargo misdelivery claims and the exercise of admiralty jurisdiction.

Chapter 39

SOUTH AFRICA

*Jeremy Prain*¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The shipping industry in South Africa is, for the most part, focused on servicing the export of minerals and the import of manufactured goods. The country is the second-largest exporter in Africa, after Nigeria, and the largest African importer, with trade totalling 2.13 trillion rand. Exports are primarily unwrought gold, platinum, iron ore, concentrates, coal and motor vehicles, while petroleum is the main imported product. South Africa is the world's third-largest coal exporter and holds close to 50 per cent of the world's gold reserves.

Seaborne trade is serviced by nine national ports owned and operated by the state-owned Transnet Limited (through its various divisions including Transnet National Ports Authority and Transnet Port Terminals). Dedicated terminals handle exports of coal (Richards Bay), iron ore (Saldanha) and manganese (Port Elizabeth), while containerised and general cargo is handled, in the main, by the ports of Durban, Cape Town and Ngqura. Many of the ports have facilities for bunkering, ship repair and dry-docking. Port statistics for the 2015 financial year showed nationwide container volumes of 4.699 million TEUs, bulk tonnage of 196.4 million, break-bulk of 9.46 million tonnes and vehicle units totalling 668,322.

In terms of international tonnage, South Africa has no shipping register to speak of and the bulk of the approximately 1,455 flagged vessels are made up of fishing craft, recreational yachts, harbour craft, research and diamond-mining vessels.

The shipbuilding industry concentrates on small sailboats, motorboats and inflatable craft, 90 per cent of which are exported. South Africa is the world's second-largest catamaran producer after France. There are also a handful of builders involved in the construction of tugs, harbour craft and coastal patrol vessels (for civilian and military use) driven by demand from the West African oil and gas industry. Revenue from the export of locally built ships, boats and other floating structures in 2013 totalled 1.09 billion rand.

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II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The principal body of substantive shipping law in South Africa is contained in the Merchant Shipping Act 1951 (MSA) and the raft of regulations published under it, a number of which put into force international instruments on the construction and safety of ships, navigation and crew matters.

In addition, discrete legislation governs areas such as carriage of goods by sea, ship registration, wreck and salvage, pollution, marine traffic and marine resources.

The Admiralty Jurisdiction Regulation Act 1983 (AJRA) and the Rules Regulating the Conduct of Admiralty Proceedings create the framework for the admiralty jurisdiction and practice of the courts in South Africa. While the AJRA has its origins in English admiralty law (its predecessor being the 1890 Colonial Courts of Admiralty Act), many of its key features extend the traditional reaches of common law admiralty jurisdiction, particularly those relating to the arrest of an 'associated' ship.

III FORUM AND JURISDICTION

i Courts

There is no distinct admiralty court or admiralty judge in South Africa. Rather, each division of the High Court has the jurisdiction to determine a maritime claim at first instance. When hearing a maritime claim, the court is said to be exercising its 'admiralty jurisdiction'.

In practice, the vast majority of admiralty matters are litigated in the High Courts of Durban and Cape Town in whose geographical area most of the major ports are situated.

At first instance, High Court matters are heard by a single judge. On appeal, the matter may proceed to the full bench (of three judges of the High Court) or, as is more often the case in admiralty matters, to the Supreme Court of Appeal. On rare occasions, cases of a constitutional nature may proceed to the Constitutional Court.

Litigants are required to seek leave to appeal. Should leave be refused, parties may petition the higher court.

Provided the court has jurisdiction to determine the admiralty matter, it may exercise its jurisdiction irrespective of the place where the claim arose, the place of registration of the ship concerned or of the residence, domicile or nationality of its owner.

Other particular features of the admiralty jurisdiction are as follows:

- a* A maritime claim may be enforced by an arrest of maritime property *in rem* or by an action *in personam* against a person or juristic entity.
- b* A court may decline to exercise its admiralty jurisdiction in any proceedings if it is of the opinion that any other court, arbitrator, tribunal or body elsewhere will exercise jurisdiction in respect of the proceedings and that it is more appropriate that the proceedings be adjudicated upon by such other court, arbitrator, tribunal or body.
- c* Property may be arrested for the purposes of obtaining security for arbitration or any proceedings contemplated, pending or current, anywhere in the world.

ii Arbitration and ADR

South Africa has no specific arbitration procedure relating to maritime disputes and litigants seldom pursue maritime claims by way of arbitration, mediation or other types of ADR.

iii Enforcement of foreign judgments and arbitral awards

The AJRA provides that any foreign judgment or arbitration award made pursuant to a maritime claim (recognised as such under the AJRA) is considered to be a maritime claim in its own right and may be enforced using the normal procedures for the arrest or attachment of property without the need for the claimant to follow a process of recognition.

IV SHIPPING CONTRACTS

i Shipbuilding

There is no statutory regime governing shipbuilding in South Africa and rights and obligations of the parties are circumscribed by the terms of the contract and the principles of South African common law of contract. The structure of most shipbuilding contracts mirrors the standard provisions adopted elsewhere. That is to say, the yard undertakes to construct the vessel to specification and to deliver and pass title following completion of sea trials coupled with post-delivery warranties. The purchaser, on the other hand, undertakes to pay for the construction in instalments against the completion of specified milestones and to accept delivery and title.

ii Contracts of carriage

The rights and liabilities of parties to a contract of carriage by sea are governed by the Carriage of Goods by Sea Act 1986 (SA COGSA).

SA COGSA gives the Hague-Visby Rules force of law in South Africa and applies specifically to: the carriage of goods by sea in ships where the port of shipment is a port in the Republic of South Africa; any bill of lading that expressly provides that the Rules shall govern the contract; deck cargo (stated as being carried on deck and is so carried); or live animals, if and as far as the contract contained in the bill of lading or receipt applies to deck cargo or live animals.

Given the prevalence of foreign law and dispute resolution clauses in standard form carriage contracts (particularly English law and London arbitration), carriage disputes are seldom litigated in South Africa and consequently there is a limited body of case law on the topic, most of which is, in any event, strongly influenced by English cases.

South Africa is not a signatory to the Rotterdam Rules. Moreover, there are no liability regimes in place for carriage by road or rail in South Africa and ordinary principles of contract apply. Apart from the sea leg, carriers have the freedom to contract out of liability or impose their own limitations and exclusions in multimodal contracts.

There are presently no forms of cabotage in South Africa, but it has been a talking point by sectors of the government who believe that the introduction of protections would help to boost local shipping and ship ownership. Presently there is no clear policy to change the law in this regard.

Carriers may exercise possessory liens over cargo for claims subject to the key provisos that the carrier maintains possession of the property and that the property is owned by the debtor. Generally, the debt must relate to the property in question unless the debtor has agreed to a 'general lien' over all property owned by the debtor.

iii Cargo claims

The traditional difficulties of privity of contract and title to sue associated with bills of lading have been alleviated, to a large degree, by the Sea Transport Documents Act 2000, which legislates the transfer of rights and liabilities under bills of lading and other sea carriage documents. But for a few differences, this Act mirrors the UK Carriage of Goods by Sea Act 1992 and, to date, its provisions have not been judicially considered.

In essence, the Act makes the 'lawful holder' of the document the party who may sue and be sued, except that the shipper may have residual liability for obligations which are personal to it and which cannot, as a matter of common law, be delegated to a third party.

It is the contractual carrier, first and foremost, who would face liability under a bill of lading for the loss of or damage to cargo. The identity of the carrier and the insertion of a demise clause is not a matter to have come before our courts, but in principle, they would apply ordinary rules of construction and interpretation of the terms to determine the enforceability of such terms and in this regard would, in all likelihood, lean heavily on English precedent.

As to the incorporation of bill of lading terms into a charterparty, this would be regarded as valid provided that the words of incorporation appear legibly on the document and reasonably reflect the agreed intention of the parties.

iv Limitation of liability

In circumstances where SA COGSA applies, the limitation regime is as prescribed by the Hague-Visby Rules. In all other cases involving loss or damage to cargo, the terms of the contract should determine the applicable limitation of liability.

As regards tonnage limitation, South Africa has not adopted any of the international conventions, but rather implements its own system in terms of Section 261 of the MSA. The provision adopts the 1957 Convention's requirement to prove causative 'actual fault or privity' of the owner to break limitation. The values are set in SDR and are low. Liability for loss of life or personal injury is capped at 206.67 and property damage at 66.67 per tonne.

It is possible to plead limitation under both Section 261 and SA COGSA as a substantive defence to a cargo claim.

V REMEDIES

i Ship arrest

South Africa's liberal arrest provisions make it a favoured jurisdiction for the enforcement of maritime claims either as a means to pursue a substantive claim in South Africa or merely to obtain security for claims commenced or contemplated elsewhere.

Prerequisites

A claimant's right to arrest property is premised on the existence of a maritime claim. The AJRA recognises a wide list of 32 categories of maritime claims, which include all of those set out in Article 1 of the Brussels Convention and many others. A catch-all provision gives the court jurisdiction over any matter that, by virtue of its nature or subject matter, is a marine or maritime matter.

Other prerequisites for an arrest *in rem* are, either that the claimant has a maritime lien over the property to be arrested or that the owner of the property would be personally liable to the claimant (as in the case of an action in personam).

The property arrested

This is restricted to one or more of the following categories of property:

- a* the ship, with or without its equipment, furniture, stores or bunkers;
- b* the whole or any part of the equipment, furniture, stores or bunkers;
- c* the whole or any part of the cargo;
- d* the freight;
- e* any container, if the claim arises out of or relates to the use of that container in or on a ship, or the carriage of goods by sea or by water or otherwise in that container; and
- f* a fund constituted by the proceeds of the judicial sale of any of the above.

Procedure

Neither an affidavit nor an application to court is required. The arrest is obtained on the strength of a certificate by the claimant or his attorney. The papers are issued by the Registrar of the High Court including a warrant of arrest, which is served by the sheriff on the property arrested.

The warrant of arrest informs the defendant that the property arrested will be released upon security being provided for the amount of the claim or the value of the property, whichever is lower. Simultaneously with the issue of the warrant of arrest, a summons is issued and served. The proceedings are therefore commenced with the service of the warrant and summons commencing action and the defendant must thereafter file its defence.

Formal powers of attorney are not required in order to obtain an arrest and there is no automatic requirement obliging the claimant to furnish counter-security. A defendant would be required to bring a formal counter-application for security after the arrest, which will generally only be ordered if it can establish that the arrest was 'without reasonable and probable cause', giving the defendant a claim for damages for wrongful arrest or in respect of legal costs.

Associated ship arrests

A claimant may be in a position, within certain defined bounds, to pierce the corporate veil of 'one-ship' companies by means of the provisions in the AJRA and, in that manner, arrest an associated ship instead of the ship in respect of which the maritime claim arose.

Any maritime claim can be enforced by an associated ship arrest, save for claims relating to mortgages.

An associated ship arrest may take three forms:

- a* by the arrest of a ship in the same ownership as the ship against or in respect of which the claim lies (a sister ship arrest);
- b* by the arrest of a ship owned by a company controlled by a person who controlled the company that owned the ship concerned; and
- c* by a combination of (a) and (b) where one of the ships is owned by the beneficial owner personally and the other by him or her through the company.

The meaning of ownership and control

The meaning of the terms ownership and control have been the topic of much judicial consideration and debate. In the first instance, the AJRA provides that: ships shall be deemed to be owned by the same persons if the majority in number of, or voting rights in respect of, or the greater part in value of, the shares in the ships are owned by the same persons; and a person shall be deemed to control a company if he or she has power, directly or indirectly, to control the company.

As to the meaning of 'control', the locus classicus is the Supreme Court of Appeal case of *The M/V 'Heavy Metal'*, which held that direct control is synonymous with *de jure* control (usually through majority ownership) and that indirect control is synonymous with *de facto* control. Moreover, the form of control that is referred to in the AJRA is the power to control 'the destiny of the company' rather than its everyday operations.

Chronological criteria of ownership and control

The timing of the ownership and control is important and is referred to by some as the 'then-and-now' test. In essence, the ship concerned must have been owned by the beneficial owner at the time the claim arose, but need no longer be so owned at the time of arrest. The associated ship, on the other hand, must be owned by the beneficial owner at the time of the commencement of the action but need not have been so owned at the time the maritime claim arose.

Chartered ships

The provisions for the arrest of associated ships also apply to associated ships of a charterer who, for the purpose of such an arrest, is deemed to be the owner of the ship in respect of any maritime claim for which the charterer and not the owner, is alleged to be liable.

Arrests for security for proceedings elsewhere

A claimant who is already engaged in arbitration or legal proceedings elsewhere than in South Africa or who is contemplating such action, but who is concerned about the efficacy of a favourable decision because of his opponent's poor financial position or because of other difficulties in enforcing the decision, may in certain circumstances obtain an arrest of any property (i.e., not limited to maritime property) simply for the purposes of obtaining security pending the outcome of the proceedings elsewhere.

The requirements for a 'security arrest' (as laid down in the case of *The M/V 'Dimitris'*) are that:

- a the person seeking the arrest has a claim enforceable either by an action in personam against the owner of the property concerned, or an action *in rem*;
- b that he has a *prima facie* case in respect of such a claim, which is enforceable in the nominated country or countries of his choice; and
- c that he has a genuine and reasonable need for security.

In the case of the security arrest of ships, a claimant may invoke the associated ship provisions, giving further reach to effectiveness of the remedy.

The need for security is determined according to the usual civil standard of proof, namely, on a balance of probabilities. In *Asiatic Shipping Services Inc v. Elgina Marine Co Ltd*, the Supreme Court of Appeal held that to discharge the onus, it did not mean that it had to be proved in every case that the party whose property was arrested had or would have

insufficient assets to meet a judgment granted against it in the main proceedings. What has to be established is a genuine and reasonable apprehension that the party whose property was arrested would not satisfy a judgment or award made in favour of the arresting party. Whether a need for security is shown to exist would therefore depend upon a consideration of the particular facts of each case.

Damages for wrongful arrest

Section 5(4) of the AJRA provides that any person who makes an excessive claim or requires excessive security or without reasonable and probable cause obtains the arrest of property or an order of court, shall be liable to any person suffering loss or damages as a result thereof for that loss or damage.

ii Court orders for sale of a vessel

The court may at any time order that any property that has been arrested or attached, be sold and the proceeds held as a fund in the court or otherwise dealt with. If a vessel's owners fail to provide security, the court may order the vessel's sale after judgment by default if the proceedings are unopposed, or – in appropriate circumstances – pending the outcome of defended proceedings, on the grounds that the vessel is a wasting asset and it is in the interests of all concerned that she be sold.

Pending the sale, the ship under arrest remains in the custody of the sheriff, who is authorised to take all such steps as the court may order or as appear to him to be appropriate for the 'custody and preservation of the property including the removal and storage of any cargo and the removal, disposal and storage of perishable goods which have been arrested or attached.'

The court is empowered to give, and invariably does give, specific directions as to the terms of and the manner in which the ship shall be sold. The court will, furthermore, approve of the detailed conditions of sale under which prospective purchasers are to be invited to submit tenders or in terms of which the vessel is to be auctioned. The court will also stipulate the manner in which the purchase price is payable on the day of the sale.

After the vessel has been valued, it is put up for sale either by tender or more usually by public auction. If the highest offer exceeds the appraised value of the vessel, it will normally not be necessary to revert to the court for confirmation of the sale.

Section 11 of the AJRA imposes a statutory ranking of claims and where a fund arises from the sale of an associated ship there will be three orders of priority:

- a* first, direct claims against the ship sold;
- b* second, claims arising in respect of sister ships; and
- c* third, claims in respect of associated ships.

Interest on any claim and the cost of enforcing it are deemed to form part of the claim for the purposes of ranking.

VI REGULATION

i Safety

The MSA is the primary legislation focused on the administration of manning and safety on ships. Chapter V deals with safety of ships and life at sea and provides, as a minimum requirement, that no ship shall be allowed to leave from a South African port in an unseaworthy state.²

The Act embraces internationally accepted standards as to safety at sea as contained in international safety conventions, which include SOLAS, the ISPS Code and the STCW Convention.

The South African Maritime Safety Authority (SAMSA) is tasked with the primary responsibility for policing domestic and international safety requirements.

Finally, the ISM Code has applied to all passenger ships, oil tankers, chemical tankers, gas carriers, bulk carriers, cargo ships and mobile offshore drilling units since 2002.³

ii Port state control

SAMSA is empowered, through a variety of statutory instruments, to exercise port state control.

For example, under the MSA, SAMSA officers and surveyors have powers of inspection of South African ships and foreign vessels in South African territorial waters⁴ and powers of detention of any ship where the officer has reason to believe that the ship is unseaworthy.

Additional intervention and detention powers are granted in respect of vessels threatening pollution to prohibited zones,⁵ outstanding levies, charges or related penalties⁶ and non-compliance with maritime labour conventions.⁷

South Africa is a party to the Indian Ocean memorandum of understanding, which obliges the state to establish and maintain an effective port state control system to ensure compliance with international instruments by South African and foreign-flagged vessels calling at its ports.

iii Registration and classification

All aspects of ship registration including the formalities of registration, entitlement to register, mortgages, charges levied and offences are regulated by the Ship Registration Act 1998.

The Act establishes a single electronic register maintained by the South African Ship Registration Office under the management of SAMSA.

2 Section 240.

3 Merchant Shipping (ISM Code) Regulations 1998 as extended by the Merchant Shipping (Safety Management) Regulations R720 of 6 June 2003.

4 Section 7.

5 The Marine Pollution (Control and Civil Liability) Act 2 of 1981.

6 The South African Maritime Safety Authority Act 6 of 1998.

7 As of April 2015, the Merchant Shipping Amendment Bill 12 of 2015 is currently being tabled in Parliament, which will see the insertion of both the Maritime Labour Convention 2006, and the Work in Fishing Convention 2007, into domestic law.

Ship registration is premised on a genuine link between ship and owner and imposes stricter requirements in the case of fishing vessels in an effort to protect this industry. The Act entitles 'South African-owned ships', small non-fishing vessels wholly owned by South African nationals and ships on bareboat charter to South African nationals, to be registered.

A South African-owned ship is defined as one wholly owned by a South African national or majority owned either in part or jointly by a national.

The Act prohibits the registration of a ship already registered on another register, but does provide for the possibility of chartering-in where ships are on bareboat charter by a South African national. The Registrar has discretion to refuse registration or remove a ship from the register upon non-compliance with relevant South African legislation dealing with ship condition, safety, pollution risk or requirements as to crew safety, health and welfare.

There are no laws regulating classification societies or imposing any specific obligations on owners as regards classification. The question of liability of classification societies towards clients and third parties has not been considered by our courts. An aggrieved party should, in principle, have a claim under the common law of delict (similar in concept to tort under English law) if the claimant can meet the requirements then that classification society owed a legal duty to the claimant not to cause harm either by a wrongful act or omission. The claimant must prove that the harm was caused by the fault of the classification society and that the damages were reasonably foreseeable and not too remote.

iv Environmental regulation

South Africa has implemented a raft of legislation aimed at the prevention of pollution involving ships and other vessels.

The point of departure for the management of the environment generally is the National Environmental Management Act 1998 (NEMA), which addresses all forms of pollution on land and sea and grants wide-ranging powers to relevant authorities to prosecute transgressors on a 'polluter pays' principle. Liability can, under certain circumstances, extend to directors of companies. NEMA operates as an umbrella legislation; thus any specific environmental legislation must be read in the context of NEMA.

As regards oil pollution, in 2013 the state at long last passed enabling legislation for accession to the Oil Pollution Fund Convention and the 1992 CLC Convention.⁸ Pollution from ships in general is regulated by the Marine Pollution (Prevention of Pollution from Ships) Act 1986, which incorporates MARPOL into South African law.

v Collisions, salvage and wrecks

The legal framework for collisions at sea is the MSA, the Apportionment of Damages Act 1971, the Colregs and case law interpreting the law and regulations.

The MSA provides that where damage or loss is caused by the fault of two or more ships, liability to make good shall be in proportion to the degree in which each ship was at

8 These include: the Merchant Shipping (Civil Liability Convention) Act 25 of 2013; the Merchant Shipping (International Oil Pollution Compensation Fund) Act 24 of 2013; the Merchant Shipping (international Oil Pollution Compensation Fund) Administration Act 35 of 2013 and the Merchant Shipping (International Oil Pollution Compensation Fund) Contributions Act 36 of 2013.

fault.⁹ In collisions between a ship and non-ship one would apply the Apportionment of Damages Act, which leads to a similar result. The measure of damages will be determined in accordance with common law, which is subject to the principles of remoteness and foreseeability.

Section 347 of the MSA provides that where a party has not complied with the relevant collision regulations, he would be deemed to have been negligent and would bear the onus of proving a reasonable excuse.

The time bar for collision claims is two years from date of damage or loss being caused.

The Wreck and Salvage Act 1996 consolidates all previous legislation on wreck and salvage in South Africa and incorporates the full text of the Salvage Convention 1989 into domestic law. The Act differs from the Convention in two important respects. In relation to Article 14 on special compensation, 'damage to the environment' is extended to any place where the damage may occur and the 'fair rate' as referred to in Article 14 is deemed to include an element of profit.

Salvage is a maritime lien, both in terms of the Act and as a matter of common law and the relevant time bar for salvage claims is two years from completion of the salvage services.

In practice, most high-value salvage services are performed on an LOF (with or without a special compensation P&I clause) and claims are ultimately arbitrated in London. In the absence of agreement, the Act provides a framework for 'common law salvage', which would ordinarily be litigated in the South African High Court

The Act permits life salvage, which is payable regardless of whether the ship or wreck has been saved.

The Wreck and Salvage Act empowers SAMSA to order wreck removal and it can direct the owner or master of a distressed, wrecked or stranded ship to move the ship to a place as specified or to perform acts as specified by SAMSA in relation to the vessel.¹⁰ Should the master or owner fail to comply, SAMSA would be entitled to engage in the process itself and recover expenses from the shipowner.

Wrecks situated in port limits are subject to the jurisdiction of the National Ports Authority (NPA). The NPA has the power to search, raise, remove or destroy any wrecked, sunken, stranded or abandoned vessel within its port limits, and recover the costs of such enterprise from the shipowner or any person who had the beneficial use of the ship at the time it became stranded or wrecked.

vi Passengers' rights

South Africa has no provisions regulating passenger rights specifically and claims would, in the ordinary course, be determined by the provisions of the contract of carriage, but subject to South African consumer protection legislation under the Consumer Protection Act 2008.

The Consumer Protection Act extends certain rights to consumers including, among others, the right to cancel advance reservations, a right against overbooking and the right to fair, just and reasonable contract terms. Importantly, any provision in the contract of carriage that purports to limit the liability or degree of risk undertaken by the supplier of the service,

9 Section 255.

10 Section 18(1)(a).

or which constitutes an assumption of risk or liability by the consumer should be drawn to the attention of the consumer in a manner and form that satisfies the formal requirements of the Act.

Provisions that limit the supplier's liability for any loss attributable to the gross negligence of the supplier or his servants are expressly prohibited.

Passenger safety is regulated by the MSA and defines a passenger ship as any ship that carries more than 12 passengers. The regulations cover aspects such as health and safety, port inspections, certification and surveys.

The Athens Convention has not been ratified by South Africa.

vii Seafarers' rights

Labour law is highly regulated in South Africa and unionisation features prominently in the labour landscape. The umbrella legislation for all labour and employment matters is the Labour Relations Act 1995. This Act enshrines, *inter alia*, rights of trade union membership, collective bargaining, referral of disputes to a labour tribunal, the right to strike and the right not to be unfairly dismissed.

Set against the backdrop of the Labour Relations Act are the specific seafarer rights under MSA, which apply chiefly to crew onboard a South African ship and address issues such as wages, minimum prescribed standards for crew and employment conditions, employment contracts, ship's articles and SAMSA approvals.

On 7 June 2013 South Africa ratified the Maritime Labour Convention 2006 and the Work in Fishing Convention 2007 by depositing the instrument of ratification with the Director-General of the International Labour Organisation.

The Work in Fishing Convention 2007 addresses, among other things, the responsibility of fishing vessel owners for the safety of fishers on board the vessel and the safety of the vessel itself. It also regulates the minimum working age, certification requirements for work on board fishing vessels, hours of rest, crew lists, contractual agreements, recruitment and placement of fishers.

The Maritime Labour Convention of 2006 provides a list of comprehensive rights and duties of seafarers at work on board a vessel. It too sets out a series of minimum working conditions for seafarers relating to working hours, health and safety, accommodation and contractual agreements.

On 20 October 2015 the President assented to the Merchant Shipping Amendment Act 12 of 2015 which amends the MSA to give effect to the above-mentioned conventions through domestic legislation in South Africa. This new labour standard adopts and consolidates international labour standards in the maritime sector developed over the past 80 years.

VII OUTLOOK

The South African government has laudable aspirations to increase domestic ship ownership and to improve port infrastructure through various initiatives. They are outlined in the National Development Plan and a government-led initiative termed Operation Phakisa, which aims to accelerate the economic growth of South Africa by developing the marine economy.

These aspirations took a notable step forward in 2015 when Vuka Marine (a joint venture between Via Maritime Holdings of South Africa and K-Line of Japan) flagged in two capsized bulk carriers, mv *Cape Orchid* and mv *Cape Enterprise*, onto the SA bareboat register.

Further, in later December 2015, Transnet secured a US\$2.5 billion funding guarantee from China's Sinosure to raise funds in the market for financing infrastructure investment programmes in port, railway and pipeline projects in South Africa.

However, the downturn in commodity prices such iron ore and oil and the reduced demand for raw materials from China is having a negative impact on the country's growth aspirations. Public-private partnership plans initiated by the National Ports Authority to improve oil and gas industry facilities at the port of Saldanha appears to have been placed on hold, while private investors have withdrawn participation in a proposed commercial crude oil storage and blending terminal to be built in the same region. For as long as current economic conditions persist, we expect a low-growth environment in the maritime industry in the near term, particularly in the private sector.

Finally, while we remain optimistic that a host of draft legislation aimed at updating and improving maritime commerce will eventually be passed to bring South Africa in line with most other states but we do not anticipate dramatic changes in the legal or commercial landscape in the coming year.

Chapter 40

SPAIN

*Luis de San Simón*¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Spain has been struck by the global crisis in the last nine years. Despite the clear signs of recovery, the effects of the crisis are still felt, moreover bearing in mind the absence of a strong world economy and local political instability introduced by the absence of an agreement to form a coalition government between the two main parties.

The scarce demand for transportation in domestic traffic together with extremely low charter levels experienced in recent years has been enhanced through the increase in the exports side in the past year, with a record increase of 96 Mt (4.5 per cent).

On 17 December 2015, the General Court of the EU annulled the European Commission's decision declaring that part of the Spanish tax lease system constituted state aid incompatible with the internal market.

Moreover, the new tax lease system, approved by the Commission in November 2012, designed to facilitate the shipbuilding industry in Spain, started to operate effectively. This new scheme allows for a tax deduction for the cost of certain assets purchased by means of finance lease as from the commencement of their construction, prior to their commercial use, and regardless of whether the asset is in Spain or not. For the scheme to be applicable, goods cannot be mass-produced, and the manufacturing period cannot be less than one year.

According to the Spanish Ministry of Development² and ANAVE,³ as for the feet size, the total fleet of merchant ships controlled by Spanish companies, both under Spanish and foreign flags, comprised a total of 203 vessels, which means a notable decrease bearing in mind the 211 merchant vessels counted last year. Of the total merchant vessels counted, 117 merchant vessels operate with Spanish flag instead of the 121 merchant vessels a year before, and 86 merchant vessels under foreign flags.

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2 Puertos del Estado.

3 ANAVE.

In addition, the Spanish Register has suffered its deepest decline since its creation, made up by 119 merchant vessels, which means a decrease of seven units compared with the previous year.

The Spanish flag flies on 57.6 per cent of the overall units controlled by the Spanish shipowners. The remaining units that make up the overall merchant fleet controlled by Spanish shipowners are distributed among registries such as Malta, Panama, Madeira, Cyprus and the Bahamas.

At the end of 2015, the Spanish maritime trade registered an overall port traffic of 488 Mt of goods (+4.26 per cent). Liquid bulk totalled 167 Mt (4.33 per cent), solid bulk totalled 96 Mt (7.2 per cent) and general merchandise totalled 224 Mt (3.01 per cent).

The ranking of the busiest Spanish ports still headed by Algeciras, whose traffic increased in 2015 by a 2.6 per cent, consolidating as the first Mediterranean port. Valencia grew 6.7 per cent, and Barcelona increased a remarkable 1.5 per cent to 47 Mt. The main Spanish ports are Algeciras, Valencia, Barcelona, Bilbao, Las Palmas, Cartagena, Alicante, Castellón, Tarragona, Pasajes, Santander, Gijón, Avilés, A Coruña, Santa Cruz de Tenerife and Vigo.

Among the principal trade routes being operated by the Spanish fleet are the ones connecting North Africa and Southern Europe, one of the main routes being that linking Morocco-South of Spain-Canary Islands; the Mediterranean routes, particularly the route Italy-Spain, and those connecting to eastern Europe; and the routes in northern Spain linking Spain and Portugal to northern Europe.

Seventeen Spanish ports are connected to the rail freight transportation network. Spain is also currently supporting short-sea shipping.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The basic legal framework of Spanish maritime law is the Shipping Law 14/2014 (LNM), which was published in the Official Gazette on 25 July 2014 and came into force on 25 September 2014.

This Law covers almost all aspects of shipping, supersedes Book III of the Commercial Code and other relevant laws and gives Spain a modern general maritime legal regime.

The most relevant public law rules are the Ports Act 2/2011, the Coast Act 2/2013 and Royal Decree 1027/1989 of 28 July on Flagging Out and Ship Registration.

Regulations and directives issued by the EC are also applicable in Spain. Most international maritime conventions have also been ratified by Spain, including the Arrest of Ships Convention and the Maritime Liens and Mortgages Convention. The large number of existing conventions related to maritime safety and pollution, including SOLAS, MARPOL 73/78, the CSC, the IMDG Code, the SAR and the Colregs, are of direct applicability.

III FORUM AND JURISDICTION

i Courts

As a general principle, the commercial courts are competent in maritime issues.

Pursuant to the LNM notaries public have competence to deal with sea protests, proof of incidents, liquidation of the general average, deposits and sale of cargo and luggage for payment of freight, other expenses and passage, loss, theft, or destruction of the bills of lading and sale of cargo altered, damage or in danger of imminent damage.

Without prejudice to the provisions of the European Union, clauses of submission to a foreign jurisdiction or arbitration abroad are not valid if they have not been negotiated.

Spanish courts will apply the law expressly chosen by the parties to contractual obligations, provided that such law is connected in some way to the matter in question. A party who invokes a foreign legal provision must show evidence of its content and validity, for which the most common instrument used is the presentation of affidavits.

When the law does not provide for a specific time limit, the general time bar is five years. In the case of tort actions, the general time bar is one year. In both cases, the term starts from the date on which actions could have been brought.

Claims relating to payment of freight, demurrage, expenses and contributions to the general average have a time bar of one year. The same time limit applies to claims arising from a failure to comply with a contract of carriage in the event of loss, fault or delay. Recovery actions of the contractual carrier against the effective carrier for indemnities have also a time bar of one year from the payment of the indemnity. Claims related to towage contract have also a time bar of one year. Claims arising from salvage and collisions are time barred after two years. The same time limit applies to claims related to marine insurance. Port handling claims for damage, loss or delay of the handled cargo have also a time bar of two years. Claims related to the shipbuilding contract and the navel Hypotèque have a time bar of three years. The same period applies in the case of the pollution actions contemplated under the Convention CLC 92 and the 2001 Bunkers Convention.

Arbitration and ADR

There is no specific maritime arbitration procedure in Spain other than that established by Act 60/2003 on Arbitration, modelled on the UNCITRAL Model Law 1985. Mediation is contemplated in Act 5/2012 on Mediation in Civil and Commercial Matters, but there is no specific procedure in place for maritime controversies. Mediation has not often been used in Spain.

Enforcement of foreign judgments and arbitral awards

If the foreign judgment is issued within the European Union, its recognition and enforcement in Spain will be governed by Council Regulation (EC) No. 1215/2012. If the judgment is issued by a member state of the European Free Trade Association, the Lugano Convention will apply.

Apart from these scenarios, in the event that there is no bilateral treaty with the state in which the judgment was issued, the judgment will be recognised in Spain provided that it is issued pursuant to a personal action, that it has not been issued in default and that the object of the claim is valid in Spain; however, if the judgment has been issued in a state whose courts do not recognise Spanish judgments, it shall not be recognised in Spain.

The time limit to request recognition and enforcement of judgments and awards is five years.

IV SHIPPING CONTRACTS

i Ship building

Ship building contracts must always be made in writing. In the event of discrepancy between the construction contract and the technical specifications, the former shall prevail over the latter, and the technical specifications over the blueprints.

Ownership of the vessel under construction as well as the risk is with the builder until the moment of the delivery.

The LNM sets out indemnities for delays in the delivery beyond 30 days and the right to cancel the contract if the delay lasts more than 180 days and there is no justified cause for such delay.

Apparent defects must be repaired by the builder. Hidden defects must be declared by the client within one year of the delivery.

ii Contracts of carriage

After detailed regulation of the contract of carriage, which sets out the obligations of the parties, the LNM provides a lien on the cargo for the freight and other expenses resulting from its transport during the fifteen days following its delivery.

The legal characterisation of this fixed period of 15 days is not straightforward, but it could perhaps be considered as a limitation period for the expiry of a 'privilege'. This provision grants the carrier a right of retention and subsequent sale before a notary public of the cargo subject to the freight charge. The LNM makes a useful distinction between the retention of cargo belonging to the charterer and of cargo belonging to third parties.

As for carriage under a bill of lading regime, this is the one set out in the Hague-Visby Rules and there is a unification of the regime of liability of the carrier, be it for national or international transport.

It is worth noting that carriers' legal liability regime in carriages under bill of lading is *ius cogens* and cannot be revoked by the parties (given the little negotiation capability for carriers operating under this form of transport), whereas the legal liability of carriers in the case of charterparties is revocable, since it is assumed that shipowners and charterparties share an equally strong negotiating position.

A bill of lading in electronic form is also referred to in the LNM as the possibility of its issuance if shipper and carrier have agreed to it in writing before the uploading of the cargo onto the vessel is outlined. Similarly, the option of issuing maritime waybills is addressed, as article 268 of the LNM states that, although having the same evidential value as bills of lading, such bills, like any other non-negotiable document, are not considered documents of title.

The LNM regulates also the passage contract, granting the carrier a right of retention and subsequent sale over the hold baggage in the event of failure to pay the price of the passage. As for the liability regime of the carrier, insurance, etc., the LNM refers expressly to EU rules, as well as to the international conventions in force in Spain.

iii Cargo claims

As important novelty introduced by the LNM is the express regulation, alongside the regulation of the carrier's liability for losses and damages to the cargo, of the carrier's liability for delays in the delivery of the cargo, which, like the liability for losses and damages, is limited in nature.

The LNM demands the formulation of complaints from damages and losses to cargo, as well as for delays in its delivery. The legal consequence of a lack of complaint is the presumption that cargo has been delivered in accordance with the contents of the bill of lading. In the event of expert opinion or joint inspection of the cargo by the carrier and the receiver, the need to formulate a complaint shall be lifted.

Jurisdiction and arbitration clauses in the bill of lading do not bind the acquirer of the bill of lading. Consent to this is required.

If underwriters indemnify the assured they become subrogated in the rights and actions of the assured and therefore are the party with title to sue against those liable for the damage or loss.

The burden of proof is on the carrier, which must demonstrate that it acted with due diligence, and that the damage, loss or delay was caused due to inherent vice, force majeure or nautical fault on the part of the dependents of the carrier.

The claim can be against the issuer and signor of the bill of lading as contracting party, and against the owner by means of a tort action. The Spanish courts do not accept the demise clause if alleged to reject liability; however, it is occasionally admitted as grounds to pursue the joint liability of the owner and the effective carrier.

iv Limitation of liability

Spain is party to the LLMC, as amended by the 1996/1999 Protocols. However, some decisions of the Spanish Supreme Court establish grounds under which the limitation of liability will not be applicable in cases where a contractual relationship between claimant and defendant exists.

The new Shipping Law (14/2014 (LNM) provides a detailed procedure to limit liability. Commercial courts are the competent ones to deal with the constitution of the limitation fund.

In the case of carriage of goods by sea under a bill of lading, the carrier has the right to limit its liability for damages caused to the cargo pursuant to the Hague-Visby Rules.

Spain is also party to the CLC, the Fund Convention and the Bunkers Convention.

V REMEDIES

i Ship arrest

Spain is party to the Arrest of Ships Convention. The internal legal framework and procedure for an arrest is contained in the Shipping Law 14/2014 and the Civil Procedure Act. Ships sailing under the flag of a country that has not ratified the Geneva Convention of 1999 can, in principle, be seized for any type of credit. Spanish ships can be also seized for any type of credit if the creditor is Spanish.

An application must be filed by the claimant before the commercial courts of the port at which the vessel is located or expected. For such purpose, an application requesting the arrest of the vessel and stating the existence of the claim will suffice, together with a general power of attorney for litigation. The application must also offer the provision of countersecurity, the amount of which shall be determined by the tribunal at its sole discretion. The LNM establishes a minimum bail of 15 per cent of the total amount of the alleged claim. Once the application has been filed, the court will issue an arrest order fixing the amount of the countersecurity to be provided by the claimant. The countersecurity is held by the court in order to cover any damages and expenses resulting from the arrest were it to be declared null.

Once the counter-guarantee has been provided, the arrest is notified to the vessel. The arrest order provides the creditor a term (between 30 and 90 days) within which to validate the arrest by presenting evidence that the main proceedings have been brought before the relevant judicial or arbitral tribunal.

Arrest for bunker supplies is possible pursuant to Article 1, Section I of the Arrest of Ships Convention; however, claims are limited to those bunkers supplied to the ship owner since, under Article 3.3, arrest of a vessel that is not owned by the person liable for the claim will be allowed only if, under the law of the state in which the arrest is applied for, a judgment in respect of that claim can be enforced against that ship by judicial or forced sale of that vessel, and the Maritime Liens and Mortgages Convention does not consider the claim for bunkers as a lien.

The debtor may oppose the arrest and, in the event that the arrest is held to be illegal, the claimant may be made to pay damages and expenses.

ii Court orders for sale of a vessel

The judicial sale of vessels is ruled by the 1993 Maritime Liens and Mortgages Convention, the Civil Procedure Act and the LNM.

The general rule is that the holder of the claim against the ship or the ship owner, declared as such by a final judgment or arbitral award, may request the sale of the vessel. The competent court will be the court corresponding to the location of the vessel. The court will make a valuation of the vessel and request a certificate of liens and encumbrances granted over the vessel from the registry, since creditors have legal standing to attend the judicial sale and exercise their right of priority (third-party rights). The order of priority of the creditors over the ship is established in Articles 4, 5, 6 and 12 of the 1993 Maritime Liens and Mortgages Convention, or under the law of the vessel's flag state. Creditors of the same priority will be paid *pro rata*. The ship will be sold through public auction to the highest bidder or through a specialised company. Liens and other rights over the vessel will in principle be cancelled with the sale.

Additionally, the Spanish authorities can request the judicial sale of any ship that represents a risk to the population or to the port, or that obstructs in-port traffic or traffic in the waters under Spain's jurisdiction.

VI REGULATION

i Safety

Spain has consistently ratified amendments made to the SOLAS since its entry into force in 1980, as well as all other conventions and directives regarding safety, such as the IMDG Code, the CSC and EU Directive 93/75.

The Shipping Law and the 2011 Ports Act establish that the General Directorate of the Merchant Navy is the competent body to organise and manage general safety. The organisation and execution of the obligations undertaken by the state in relation to SOLAS and any other related national or international rules are among its competences.

ii Port state control

The inspection of foreign ships is regulated under Royal Decree 1737/2010, which incorporates Directive 2009/16/EC into the Spanish legal system.

The Spanish authority responsible for the inspection of vessels is the Ministry of Public Works, which exercises its authority through the General Directorate of the Merchant Navy.

Spain has undertaken to perform annual inspections, and must inspect all vessels that have been assigned priority level 1 that call or anchor in Spanish jurisdictional waters. Any deficiencies that are found set in motion an infringement procedure and lead to the adoption

of precautionary measures, normally consisting of the retention of the ship. In such cases, a guarantee must be set up in order to lift the precautionary measures and prevent the retention of the ship.

The Paris MoU sets out a classification in which Spain is again among the flags included on the white list.

Over the past few years, 55 per cent of inspections have been related to certification and documentation, anti-fire measures, sailing safety, and onboard working and living conditions. Deficiencies related to certificates, crew and documentation have fallen by 35.5 per cent, while deficiencies related to sailing safety have fallen by 24.6 per cent. Pollution deficiencies related to MARPOL Annex I also fell, while those related to MARPOL Annex VI rose by 22.2 per cent.

Most inspections were performed on multipurpose vessels (6,374), followed by bulk carrier vessels (3,204) and container vessels (2,066). In relation to these three types of vessel, deficiencies were found in 66 per cent, 56 per cent and 48 per cent of cases, respectively.

iii Registration and classification

Spain operates a dual registration system. Property and any civil legal circumstances are registered in the Property Registry, which is part of the Directorate General of Registries and Notaries; administrative registration or ordinary registration is effected by the Maritime Registry, which is part of the Directorate General of the Merchant Navy. Additionally, the Canarian Special Registry of Vessels and Shipowners, domiciled in the Canary Islands, offers obvious tax, labour, social, environmental and quality advantages, and is considered an official registry by port state control, putting it 'in competition' with other offshore registries.

For ordinary registration under the Spanish flag, it is mandatory to be a Spanish or EU resident. In the latter case, it is also necessary to appoint a representative in Spain. Residence is not necessary for non-commercial ships.

Shipowner companies effectively managed from the Canary Islands may request registration in the Canarian Special Registry of Ships and Shipping Companies. Shipping companies or owners must be the owners or financial lessees of the vessels for which registration is requested, or be in possession of them under a bareboat charter or any other title that entails the control of the nautical and commercial management of the ships. Furthermore, if originating from another registry, they must demonstrate compliance with the applicable Spanish safety legal provisions and with the international conventions signed by Spain. They may be thus subject to inspection prior to registration in the Special Registry, under conditions as may be determined by the Ministry of Public Works.

Vessels under the Spanish flag subject to inspections may be deregistered from the Ordinary Registry of Ships or, where applicable, from the Special Registry of Ships and Shipping Companies, if the ship has been stopped three or more times during the past 36 months, or if the ship is more than 18 years old and has been stopped twice or more in the past 36 months.

Pursuant to Article 106 of the LNM, classification societies will be contractually liable to those who contract with them for any damage or loss as a consequence of the absence of diligence in inspecting vessels and issuing certificates.

iv Environmental regulation

Spain has ratified the various conventions related to the protection of waters and to water pollution.

In terms of prevention of pollution by vessels, Spain has ratified MARPOL 73/78. In terms of liability for damages caused by marine pollution, we would highlight the CLC 92 and the Fund Convention as modified by its Protocol, as well as the Bunkers Convention, signed in London on 23 March 2001.

With respect to national legislation, the LNM regulates also civil liability arising from damages resulting from pollution from vessels in cases not covered by the scope of the above-mentioned conventions.

This liability is strict and the LNM establishes insurance as mandatory and direct actions against the insurer of civil liability up to the limit of the insured sum.

The LNM departs from the regime set by the Convention CLC/72 in one aspect as it channels liability towards the shipowners and the proprietor of the vessel at the moment in which the pollution event takes place.

Finally, in terms of environmental liability, Spain incorporated Directive 2004/35/EC into its legal system by means of Act 26/2007 of 23 October, which created an administrative regime of environmental liability characterised by unlimited liability and the principles of damage prevention and polluter-pays.

v Collisions, salvage and wrecks

Collisions are regulated by the International Convention for the unification of certain rules in collision matters, signed in Brussels on 23 September 1910.

If the vessels have pilots onboard exercising their duties, their presence does not exempt the captains from liability, but the captains have a right to receive compensation, where applicable, from the pilots.

Salvage is governed by the International Convention of Salvage of 1989 and the LNM.

Salvage claims fall under the civil jurisdiction of the Commercial Courts unless the parties agree to submit to an administrative maritime arbitration system before specialised bodies of the Navy, or unless an intervention by the Navy becomes necessary because of the type of salvage concerned (salvage of goods abandoned in the sea and of unknown property), or if an agreement is reached to submit to other tribunals.

The LNM grants power to both the master and the shipowner to sign salvage contracts on behalf of the owner of the goods on board. Salvors have a right of retention over the salvage ship and goods where no sufficient guarantee of payment has been given.

In order to guarantee environmental protection, the Shipping Law regulates the intervention of the Maritime Authority in salvage operations.

When a vessel impedes or obstructs free access to a port, canal or navigable route, or free transit throughout the same, the Marine Authority may adopt any necessary measures, including issuing orders to the captain of the vessel. Liability for removal of wrecks cannot be limited, in conformity with the LLMC Protocol of 1996.

The Director General of the Merchant Navy is responsible for adopting any necessary measures to take in a vessel that needs refuge, and it may even impose refuge if this is considered the best option for the protection of human life and the environment.

In 2009, Spain ratified the UNESCO's 2001 Convention on the Protection of Underwater Cultural Heritage.

vi Passengers' rights

Regulation (EU) No. 1177/2010 on maritime passengers' rights entered into force in Spain on 18 December 2012. The carriage of passengers by international routes is also ruled by the Athens Convention, as modified by its 1976 Protocol.

Regulation (EC) No. 392/2009 of the European Parliament and Council on the liability of carriers of passengers by sea in the event of an accident is also applicable. As a consequence of the entry into force of this Regulation, Royal Decree 270/2013 of 19 April on the certificate of insurance or bank guarantee for civil liability in passenger carriage in the case of collision was passed.

Royal Decree 270/2013 establishes that class A ships that only navigate routes between ports over which Spain has sovereignty or jurisdiction will not be bound by the obligation of having liability cover until 31 December 2014; and that class B ships, in the same circumstances, will not be bound until 31 December 2018.

vii Seafarers' rights

Spain has ratified the MLC, which entered into force on 20 August 2013. To date, 10 vessels have been stopped in Spanish ports for non-compliance with the obligations set out in the MLC.

Internally, and in compliance with the binding principles of the MLC, the legal provisions applicable to labour at sea are consistent with general labour rules. Accordingly, Royal Decree 1/1995 on the Statute of Employees, which is very protective of workers' rights, applies.

Additionally, various collective bargaining agreements contain specific rules that apply to particular sectors, companies or institutions.

Spanish law will apply for a vessel flying the Spanish flag; however, the parties may agree to apply a foreign law provided that the imperative Spanish law principles are observed.

The captain and the first watch officer must be nationals of a European Economic Area country. As for the crew, in some sectors certain nationality quotas must be observed.

The Ports Act of 2011 governs the human resources regime in state ports and the labour regime applicable to the employees of the port services that deal with merchandise and pilotage.

Claims of the crew are liens against the ship.

VII OUTLOOK

The LNM, a long-awaited and very comprehensive law, has now been in force since September 2014 and is a milestone in Spain's maritime law.

It brings together national maritime law with international conventions and European Union regulations on shipping and makes Spain one of the few countries in the world to have the vast majority of its maritime law regulated by the same legislative document, which provides legal certainty.

It is hoped that in the future this law covering almost all aspects of shipping will be developed by the courts with an appropriate interpretation of its provisions.

Chapter 41

SWITZERLAND

William Hold¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Switzerland does not immediately come to mind when considering shipping law. Nonetheless, it has been in contact with the shipping industry for many years. Swiss companies and individuals financed many voyages to the New World and a Swiss insurance company was one of the co-insurers of the *Titanic*.

Nowadays, there is a Swiss ship registry based in Basle and there are around 50 ships on the oceans under the Swiss flag. The registry came to be when the Swiss government acquired vessels during World War II to secure the supply of essential resources. In the aftermath of the war, the Swiss government wanted to ensure that a Swiss-flagged fleet would be available for that purpose in the event of emergencies and took measures to encourage the existence of a private merchant fleet.

To this day, the Swiss federal government will, under some circumstances, guarantee up to 85 per cent of the purchase price or construction price, as the case may be, of a Swiss-registered vessel.

Moreover, many goods are still shipped in and out of Switzerland along the Rhine, through the port of Basle, to or from the port of Rotterdam.

A substantial number of trading companies are also based in Switzerland, many of which regularly charter seagoing vessels; some of them own their own vessels. According to some estimates, over 20 per cent of the global transportation of commodities such as petroleum products, grains, cotton, coffee and sugar is organised out of Switzerland.²

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2 Source: Swiss Shipping and Trading Association.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The main legislative act for navigation on the high seas is the Federal Law on Navigation under the Swiss Flag (the Navigation Act), which is completed and implemented by numerous pieces of secondary legislation, including the Ordinance implementing the Federal Law on Navigation under the Swiss Flag (the Navigation Ordinance) and the Ordinance on Swiss Yachts Navigating on the High Seas (the Yacht Ordinance).

Moreover, Switzerland is a signatory to numerous IMO conventions, which are imported into Swiss law and are therefore directly applicable to vessels flying the Swiss flag.

There are also specific pieces of legislation that apply to navigation on Swiss lakes and on the Rhine.

The Swiss Ship Registry is based in Basle, and the administrative body tasked with implementing the legislation on merchant ships is the Swiss Maritime Navigation Office (the Office), which is a department of the Federal Department of Foreign Affairs. The Office also maintains a separate registry for ocean-going yachts and small boats.

III FORUM AND JURISDICTION

i Courts

Swiss courts will, as a rule, recognise choice-of-law and jurisdiction clauses in contractual matters.

In the absence of a jurisdiction clause, the Swiss courts will determine whether they have jurisdiction under the standard civil procedure rules as far as contractual matters are concerned. In general, this means that the home court of the defendant has jurisdiction.

The civil courts in Basle have mandatory jurisdiction for all actions *in rem* with respect to a vessel entered onto the Swiss Shipping Register, for all claims arising out of unauthorised acts carried out on board a Swiss seagoing vessel and for actions in connection with proceedings to limit the liability of the ship operator or for confirmation by the court of a general average adjustment.

The criminal courts in Basle have jurisdiction for offences committed under the Navigation Act or on board a seagoing vessel, unless different courts are specifically provided for in special provisions.

ii Arbitration and ADR

Switzerland does not have a specific maritime arbitration procedure. It does, however, have a very long tradition of hosting arbitrations of all sorts. In 2010, for example, there were more ICC-administered arbitrations seated in Switzerland than in any place outside France, where the ICC is based.³

Moreover, given the number of commodity traders based in Switzerland, there is a deep pool of arbitrators and experts with strong industry experience in the shipping and commodities fields. Accordingly, it is by no means unusual for commodity and shipping arbitrations to take place with a seat in Switzerland. The fact that the underlying contracts are not governed by Swiss law is no barrier at all.

3 ICC, 'ICC 2013 Statistical Report', ICC Bulletin, Vol 25, No. 1, p.13.

These arbitrations can be administered on an *ad hoc* basis or may be administered according to institutional rules, such as the ICC Rules or the Swiss Rules of International Arbitration, which were established by the Chambers of Commerce and Industry of Basle, Bern, Geneva, Lausanne, Lugano, Neuchâtel and Zurich.

Arbitration proceedings with a seat in Switzerland are governed by the Private International Law Act, which grants arbitral tribunals a large degree of discretion and broad powers.

Appeals against arbitral awards must be brought directly to the highest court – the Federal Tribunal – within 30 days of receipt of the award or interim award.

The grounds under which an appeal may be brought are the following:

- a* if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;
- b* if the arbitral tribunal wrongly accepted or declined jurisdiction;
- c* if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim;
- d* if the principle of equal treatment of the parties or the right of the parties to be heard was violated; and
- e* if the award is incompatible with public policy.

Interim awards can only be annulled on grounds (a) and (b).

The appeal is generally dealt with on the papers and is usually decided within four to six months.

Effectively, the only way an appeal can be brought against the merits of an award is under point (e), by claiming that the award is against public policy. The Federal Tribunal is as a rule extremely reluctant to allow appeals on grounds of public policy. Although no official statistics are available, the overall success rate of appeals against arbitral awards is understood to be lower than 10 per cent for all grounds combined.

Further, if none of the parties has its domicile, habitual residence or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, fully waive the right to appeal, or they may limit it to one or several of the grounds listed above. The insertion of a clause that disputes will be 'finally' heard by a given tribunal would most likely not be sufficiently explicit to achieve this result, so a more express renunciation of the right to appeal is necessary.

Mediation is also a well-accepted ADR mechanism in Switzerland. The Swiss Civil Procedure Code provides that a judge or parties may suspend proceedings in favour of a mediation attempt, and the Chambers of Commerce of Basle, Berne, Geneva, Lausanne, Lugano, Neuchâtel and Zurich also offer their services in commercial mediation based on the Swiss Rules of Commercial Mediation.

iii Enforcement of foreign judgments and arbitral awards

Arbitral awards are readily enforceable in Switzerland pursuant to the New York Convention.

Likewise, foreign commercial judgments issued in signatory states of the 2007 Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters (the Lugano Convention) are also readily recognised and enforced. The Lugano Convention binds the EU Member States, Switzerland, Iceland and Norway and closely mirrors the Brussels I Regulation. Although the Lugano Convention does not require non-EU Member States to refer questions of interpretation to the European Court of Justice, it does

require courts to take into account to decisions made by courts in other signatory states in similar matters. The interpretation of the Lugano Convention is therefore very similar to the interpretation of the Brussels I Regulation.

Both arbitral awards and foreign commercial judgments issued in signatory countries to the Lugano Convention are usually registered at the same time as the application for enforcement is made. Assuming the formal requirements for recognition are met and the foreign judgment is executory, the Swiss courts will usually register the judgment and order whatever measures the creditor is entitled to under the relevant debt-enforcement provisions.

As to civil judgments issued by courts in states that are not signatories of the Lugano Convention, the Swiss courts will recognise and register the judgment if the court that issued the judgment had jurisdiction to do so, if the judgment cannot be appealed under ordinary proceedings and if the recognition of the judgment does not conflict with Swiss public policy.

IV SHIPPING CONTRACTS

i Shipbuilding

No commercial seagoing vessels are built in Switzerland.

ii Contracts of carriage

Swiss-flagged vessels often perform contracts of carriage governed by the law of another country, usually English law.

The main Swiss legislation that deals with contracts of carriage is the Navigation Act, as supplemented by the general contract law rules found in the Swiss Code of Obligations. Swiss contract law, including the law relating to contracts of carriage, is derived from German contract law. Accordingly, in the presence of lacunae, the courts may consider the relevant position according to German case law as well as international commercial practice.

The relevant provisions are to be interpreted according to the Hague-Visby Rules and its various protocols, which have been imported into Swiss law. The Rotterdam Rules have been signed but have yet to be ratified.

During the time from the reception until the delivery of the cargo, the freight carrier will be liable for the loss, complete or partial destruction or damaging of the goods and for any delay in the delivery unless it proves that neither the carrier nor the master, the crew or other persons on duty on the vessel or persons helping the carrier to effect the transportation are responsible.

In the event that the loss, destruction or damage of goods or the delay has arisen from acts, omissions or negligence of the master, pilot or other persons working on the vessel in connection with navigating or technical operations, or if it is due to fire, the carrier will not be held liable, provided that there is no direct fault on its part. Measures that are principally taken in the interest of the cargo are not considered as falling within the scope of the technical operation of the ship.

In the event that claims for the loss, destruction or damage of the goods or delay are made against the master, the crew or other persons working on the vessel or persons helping the carrier to effect the transportation, they may rely on the exemptions from, and restrictions of, liability in the same way as the carrier, whatever legal basis the claim relies on, unless the damage was caused intentionally or through reckless carelessness.

The carrier will not be liable for the loss, destruction or damage of goods or delay if it proves that it is due to one of the following causes:

- a* force majeure, accident, dangers or incidents on sea or other navigable waters;
- b* acts of war, riots and public disturbances;
- c* official measures such as sequestration, quarantine or other limitations;
- d* a strike, lock-out or other work impediment;
- e* the saving (successful or attempted) of life or property at sea or other justified deviation from the course of travel that does not constitute any violation of the contract of freight;
- f* acts or omissions of the shipper, consignee or owner of the goods, their agents or representatives;
- g* the shrinkage of volume or weight or other damage as a result of concealed defects of the goods; special nature or peculiar condition of the goods;
- h* unsuitability of the packaging or unsuitability or inaccuracy of the markings; and
- i* concealed defects of the vessel impossible to discover by exercising normal due diligence.

The exemption from liability will not apply if it is proved that the damage was due to the carrier or his auxiliaries. 'Auxiliaries' in this sense means the master, the crew or other persons working on the vessel or persons helping the carrier effect transportation.

In the event that the charterer is responsible for the loss or complete destruction of the goods, it will be required to pay only the value of the goods at the place of destination on the day the vessel is or should be unloaded according to the freight contract. The value of the goods will be determined by the market price, or in the absence of such a value, according to the common value of the goods of the same type or character.

In the event of partial destruction, damage or delay, the charterer will be required to pay only the amount of the reduction in value of the goods without further damages, but under no circumstances more than in the event of total loss.

Subject to damage being caused intentionally or through recklessness, the carrier will in no case be liable, whatever legal basis the claim relies on, to pay damages in excess of those stipulated in the Navigation Ordinance. These amounts are calculated according to a rate determined either for every unit or other transporting unit, or for each kilogram of gross weight of the lost or damaged goods, whichever amount is higher.

The carrier may not rely upon these maximum amounts in the event that the shipper has expressly stated the particular nature and the maximum value of the goods before the start of the loading, and this value, which may be refuted by the charterer, has been entered in the bill of lading, or if maximum liability amounts have been agreed.

Any agreement in the bill of lading that has the direct or indirect purpose of excluding or of limiting the statutory liability of the carrier for the destruction or loss of, or damage to the goods, or of shifting the burden of proof for such liability will be unenforceable unless the agreement refers to the carrier's liability for the period of time before the loading of the goods and after their unloading.

In the event that a container, a pallet or a similar device is used to collect goods, every piece or transport unit mentioned in the bill of lading contained in or that is upon such a device shall be regarded as a separate piece or transport unit; in all other cases the whole device will be regarded as a piece or a transport unit.

The carrier and its auxiliary staff taken together may not be held liable for an amount in excess of the maximum amount for which the carrier alone would be liable.

Neither the carrier nor its auxiliaries may rely on the exemptions from and restrictions of liability if it is proved that they caused the loss or damage through an act or omission perpetrated with the intention of causing loss or damage, or by acting carelessly in the knowledge that loss or damage was likely to occur.

The authorised holder of a bill of lading is entitled to receive the goods from the carrier that issued the bill of lading, and therefore has title to sue the carrier if the goods are not delivered.

Whoever demands delivery of the goods will become the debtor for the freight and other debts attached to the goods, but the receiver will only be liable for demurrage and other debts that accrued at the loadport if these debts are recorded in the bill of lading, or if the receiver otherwise found out about the claims.

The provisions of the York-Antwerp Rules apply to general average claims.

iv Cargo claims

See subsection iii, above for a general overview.

It is possible to incorporate charterparty terms into other agreements, provided that the parties to the agreement have had the opportunity to find out what the charterparty terms are. Where these terms are widely available to the general public, such as for standardised charterparty forms, the standard will be somewhat lower, especially if the parties are commercially experienced.

Under these conditions, there are suggestions that parties can be held to have incorporated an arbitration clause. Whether a demise clause is enforceable probably depends on the facts. If the parties to the bill issued are experienced commercial parties, there is a good chance that the clause would be upheld.

v Limitation of liability

Under the Navigation Act, two limitations of liability are possible. First, Swiss federal law limits the liability of shipowners, as well as that of the shipper and carrier, by applying Articles 1 to 13 of the LLMC Convention 1976. Accordingly, liability may be limited for two types of claims: those for loss of life or personal injury and property claims. The limits under the LLMC Convention are based on the tonnage of the ship.

The second area of liability that is covered by the Navigation Act concerns 'loss or damage due to hydrocarbons'. This is governed, as stipulated in Article 49, by the CLC Convention.

In the case of the limitation of liability under both the LLMC Convention and the CLC Convention, the fault on the part of the shipowner, operator, charterer or carrier that justifies the exclusion of the limitation of liability must be proven by the party that asserts the existence of such fault.

In a case of limiting liability for loss, partial damage or complete destruction of goods, liability is limited to the total value of the goods lost or damaged. Inland operators (most generally in the case of barges on the Rhine) may limit their liability in accordance with the 1988 Strasbourg Convention on the Limitation of Liability in Inland Navigation, which is incorporated into Swiss federal law. The only caveat is that, in the case of push boats rigidly connected to pushed barges as a convoy set, liability will be calculated, 'according to the engine output of the push boat and the carrying capacity of the pushed barges'.

V REMEDIES

i Ship arrest

It is possible to arrest a barge on the Rhine. A popular measure that is of more general interest is the arrest of bank accounts or other assets (including debts) that are located in Switzerland.

The holder of an unsecured debt may apply for such an arrest of assets that are in Switzerland under certain conditions (the debt generally must be payable). An arrest may be granted, for example, if the debtor is preparing to flee or to conceal its assets, if the debtor is not domiciled in Switzerland (provided that the debt has a sufficient connection with Switzerland), if the creditor has a valid recognition of debt from the debtor, or if the creditor has an enforceable judgment or arbitral award against the debtor.

The creditor will have to make a plausible case that the debt exists, that the conditions for an arrest to be granted are fulfilled, and that there are assets within the jurisdiction to be arrested.

ii Court orders for sale of a vessel

A court may order the sale of a vessel within the context of winding-up or insolvency proceedings against its owner.

VI REGULATION

i Safety

Pursuant to the Navigation Ordinance, the latest version of the following international conventions shall apply to Swiss seagoing vessels, their equipment and safety, to the protection of human life at sea and of the waters of the sea as well as the training of seamen:

- a* the Load Lines Convention;
- b* SOLAS;
- c* the Colregs;
- d* the Radio Regulations annexed to the International Communication Treaty of November 1982;
- e* MARPOL, with Annexes I to VI);
- f* the STCW; and
- g* the OPRC.

These conventions are directly applicable under Swiss law, and the Office ensures that they are complied with.

ii Registration and classification

Seagoing vessels may be entered into the Swiss shipping register if they are used or intended to be used for commercial activity. To be registered, the vessel's owner must first obtain a certificate from the Office to the effect that the legal conditions relating to the owners and the operators are fulfilled.

If the owner of the vessel is a corporate entity, it must have its registered office and the actual centre of its business activities located in Switzerland. Broadly, the majority of the entity's management must be domiciled or resident in Switzerland, and must be Swiss citizens.

There are additional requirements with regards to the owner's financial resources and the origin of the funds. The requirements for operators who are not owners are similar. These restrictions reflect the strategic importance of the Swiss merchant fleet in times of crises. The idea is that the fleet remains firmly under Swiss control in times of need. Moreover, the name of the vessel must also be approved by the Office. As a general rule, the vessel must hold the highest classification of a recognised classification society.⁴

The requirements are broadly similar for ocean-going yachts, except that the owner of the vessel must be a Swiss national or a Swiss foundation that encourages pleasure boating. The vessel's home port will be Basle.

Mortgages may be entered into the shipping register provided that certain requirements on the origin of the borrowed funds are satisfied. Moreover, the liens set out in the International Convention of 10 April 1926 on the unification of rules relating to liens and mortgages on seagoing vessels rank ahead of any liens entered into the Swiss shipping register.

Bareboat charters may also be entered into the register, so that in the event that the vessel is sold, the new owner must allow the charterer to use the vessel in accordance with the provisions of the charterparty.

iii Environmental regulation

Switzerland is a signatory of the London Convention, the Bunker Convention, the 2001 Anti-Fouling Convention and the Ballast Water Management Convention.

A party who acts in breach of these conventions or any of the provisions of the Acts that deal with environmental protection would be liable to a term of imprisonment or a fine. If the act were carried out negligently, the party would be liable to a term of imprisonment for up to six months or a fine up to 20,000 Swiss francs.

iv Collisions, salvage and wrecks

In the event of a collision between two or more vessels, the provisions of the Brussels Collisions Convention determine the rights and obligations of each party. Switzerland is also a signatory of the Salvage Convention 1989, which is directly applicable. The operator of the salvaged vessel will be required to pay the costs of salvage. It may have recourse in respect of such costs in proportion to their respective shares against the persons who hold rights to the other valuables salvaged.

v Passengers' rights

The provisions of Articles 1 and Articles 3 to 21 of the Athens Convention apply to the liability of a carrier and its personnel in respect of passengers and their luggage.

⁴ There is, to our knowledge, no case law on the liability of classification societies but under the general contract law principles it is possible that a classification society would be found liable if it were found to have caused harm through a breach of its obligations.

vi **Seafarers' rights**

Seafarers' rights are governed by Articles 68 to 86 of the Navigation Act. These provisions are supplemented by the general provisions that deal with employment contracts found in the Swiss Code of Obligations and numerous provisions of the Navigation Ordinance.

In addition, Switzerland is a signatory of the Maritime Labour Convention 2006, which entered into force in Switzerland on 20 August 2013.

VII OUTLOOK

The shipping and commodity trading sectors together amount to a substantial portion of Switzerland's annual GDP. By some estimates, they contribute about as much as the tourism industry does.

Therefore, there is every chance that Switzerland will continue to have a significant presence on the shipping scene in general for a long time to come.

As for the Swiss merchant fleet, depending on the global economic circumstances, the time may come when it is most useful to be able to obtain what is effectively a state guarantee on the purchase of a vessel, as this will in any event usually have a positive impact on the financing costs.

Given the strategic importance of the merchant fleet, it is unlikely that the Swiss federal government will stop issuing guarantees for the acquisition of vessels. Moreover, if necessary, other steps may well be taken to ensure that there always will be a Swiss merchant fleet.

There is therefore likely to be a small but constant number of vessels flying the Swiss flag on the high seas for many years to come.

Chapter 42

TURKEY

Zihni Bilgehan, Ekin Dünya Şahin and Emre Ersoy¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The Turkish shipping industry and the shipping community have not escaped the impact of the credit crunch and the fall in the volume of global shipping, with the result that the Turkish fleet has been shrinking steadily. This is evident from the statistics published by the Turkish Chamber of Shipping about the current size of the Turkish commercial fleet. According to those statistics the Turkish merchant fleet consists of approximately 600 ships of 1,000 GRT and above (compared with nearly 1,500 in 2007). Of those vessels, 306 were built in Turkey while the rest were constructed in foreign shipyards, mostly in Japan, South Korea and China. The total dead weight tonnage of the Turkish fleet is over 8 million. Dry cargo vessels represent the largest share of the Turkish merchant fleet, making up 37 per cent of the total. Bulk carriers and chemical tankers follow, with 15 per cent and 10 per cent, respectively. Vessels in the Turkish merchant fleet are mainly registered with the Turkish International Ship Registry; 13 per cent of the fleet is registered with the Turkish National Registry and the rest is registered with the Turkish International Ship Registry. This preference of Turkish shipowners in favour of the Turkish International Ship Registry is caused by, *inter alia*, the financial and tax benefits and the relatively flexible rules implemented by the Turkish International Ship Registry. There is also, however, a growing trend among Turkish shipowners to opt for hoisting foreign flags instead of the Turkish flag. This is caused mainly by specific crew requirements.

According to the statistics for the past five years as provided by the Ministry of Transportation, Communication and Maritime Affairs, approximately 75,000 ships sail into Turkish ports each year. The most visited ports in Turkey are İzmit, Aliaga Ambarlı and Mersin, respectively.

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II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The Turkish Commercial Code, which contains a section on maritime law, and which came into force in July 2012, is considered as the main legislation regulating maritime transport in Turkey. It replaced the previous Commercial Code, which had been in existence since 1956. Other codes and regulations exist, however, which regulate specific areas and thus have a narrower scope. The Maritime Labour Code, the Cabotage Code for shipments between Turkish ports, the Environmental Code, the Code on the Prevention of Loss of Life and Goods at Sea and the Ports Code stand as examples of specific legislation that is referred to and relied upon frequently.

Turkey is a party to several international conventions such as the 1910, 1924 and 1926 Brussels Conventions. Furthermore, the law commission in charge of drafting the Shipping Chapter of the Turkish Commercial Code attached great importance to ensuring that the Chapter incorporated or was in compliance with international maritime conventions. As a result the Shipping Chapter was brought into complete harmony with the international documents and rules such as Hague-Visby Rules, the LLMC Convention 1976 and its 1996 Protocol, the Salvage Convention 1989, the Maritime Liens and Mortgages Convention, the CLC Convention, the Arrest Convention 1999 and the Athens Convention.

III FORUM AND JURISDICTION

i Courts

Commercial courts are competent to try all disputes relating to maritime matters and the court in the district where the incident took place (the port of discharge of the damaged cargo, the place of the collision etc.) has territorial jurisdiction over maritime disputes. However, not all commercial courts are dedicated to hearing maritime related cases, in many Turkish cities, a designated commercial court will act as the Admiralty Court.

ii Arbitration and ADR

Arbitration agreements are enforceable under Turkish law. The arbitration agreement has to be in writing and it should be unequivocal (i.e., it should demonstrate a very clear intention by the parties to opt for arbitration). An arbitration agreement providing for the jurisdiction of any court of law or for dispute resolution as an alternative to arbitration will be invalid.

Where the place of arbitration has been determined as Turkey, two sets of rules may apply in terms of procedural matters: if there is an international element to the dispute, the International Arbitration Code will apply, but if the dispute is of a domestic nature, the Procedural Code will govern the process.

Turkey has recently enacted a new code to regulate mediation called the Law on Mediation in Legal Disputes. This Law sets out the principles and procedure to be used in mediation and it is intended to encourage mediation as an alternative dispute resolution process. Mediation has rarely been practised in Turkey in the past, but with the new Law in force, the number of disputes being referred to mediation as an alternative mode of resolving commercial disputes can be expected to rise.

iii Enforcement of foreign judgments and arbitral awards

In principle, foreign court judgments and arbitral awards may be enforced in Turkey subject to certain conditions being met. For foreign court judgments to be enforced in Turkey, there

must be a bilateral agreement or a mutual *de facto* reciprocity with respect to the recognition and enforcement of their respective court judgments between Turkey and the country from which the judgment originated. Alternatively, both countries must be party to a multinational treaty providing for such recognition.

With regard to arbitral awards, Turkey is party to the New York Convention. It follows that arbitral awards rendered in a country that is party to the Convention can be enforced in Turkey provided the relevant criteria set out in the Convention are satisfied.

Having said that, it is important to note that foreign court judgments or arbitral awards enforced must not be in breach of the Turkish public policy and they must not pertain to a subject on which Turkish courts statutorily have exclusive jurisdiction, such as matters pertaining to immovable property in Turkey.

IV SHIPPING CONTRACTS

i Shipbuilding

Although Turkey is known as a shipbuilding nation with a strong and well-established shipbuilding industry, it is often the case that shipyards and buyers in general opt for shipbuilding contracts governed by English law.

There is a Registry for Ships Under Construction in Turkey created for the purpose of registering vessels under construction at Turkish shipyards. The Registry enables lenders to establish mortgages over vessels under construction and for creditors to ascertain with certainty who owns a given vessel under construction.

Pursuant to Article 1013 of the Turkish Commercial Code, shipyards may claim a right *in rem* over vessels for claims arising from their construction or repair.

If the shipyard has an outstanding debt that remains unpaid, the shipyard has the right to detain the vessel in its possession without having to apply to a court of law for an arrest order. If an arrest order exists in favour of the yard then the shipowner will be compelled to either provide security or settle the debt to procure the release of the vessel. Security has to take the form of a cash deposit in an account nominated by the arresting court or a bank letter of guarantee issued by a Turkish bank.

ii Contracts of carriage

The Code of International Private Law and Procedure provides that a contract will be governed by the law chosen by the parties to the contract. Where the parties have not chosen a law to govern the contract, the law that has the closest relationship to the contract will be applied. As far as contracts of carriage are concerned, the prevailing opinion is that in the absence of a choice of law by the parties, the law of the port of discharge will apply.

The main legislation that applies to contracts of carriage is the Turkish Commercial Code. Turkish Commercial Code underwent a material revision and update recently and the new Code entered into force in July 2012. The Hague-Visby Rules and parts of the Hamburg Rules have been incorporated into the Commercial Code; however, Turkey is not a party to the Rotterdam Rules nor has it enacted these rules with any domestic legislation.

Cabotage carriages are regulated by the Cabotage Code of 1926, which provides exclusive privilege to Turkish-flagged vessels to trade within the Turkish waters and between Turkish ports. Hence, trade between Turkish ports can only be exercised by Turkish-flagged vessels fulfilling the criteria stipulated under the Cabotage Code.

iii Cargo claims

Article 1178 of the Turkish Commercial Code provides that the carrier will be liable for loss of or any damage to the cargo occurring during the period of time the cargo is in the carrier's possession. The carrier would be deemed liable for any loss or damage to the cargo in the event of a vessel being unseaworthy, actions in breach of the duty of care to the cargo, cargo being carried on deck without any instructions from or consent by the shipper, cargo being loaded or transferred to another vessel and cargo being carried by a route other than that determined before the voyage. On the other hand, the carrier would not be held liable if the damage or loss occurred due to a fault in the technical management of the vessel (i.e., error in navigation) or fire on board if the damage and loss did not arise from the carrier's fault.

In principle, a demise clause incorporated into a bill of lading to identify the carrier is enforceable; however, a court could invalidate this clause if there is uncertainty as to the identity of the carrier. Only in cases where the carrier cannot be determined from the face of the bill of lading would the clauses on the reverse of the bill of lading be referred to.

iv Limitation of liability

The Hague-Visby Rules have been incorporated into the new Commercial Code (see Section III, *supra*). As such, the carrier's liability due to loss of or damage to the cargo is limited to 666.67 SDRs per unit or 2 SDRs per kilogram of gross weight of the cargo, whichever is higher. However, if the parties agree on the value and type of the cargo and state it on the bill of lading explicitly, then the value agreed upon by the parties will be deemed the limit.

As for tonnage limitation, although there has been a long-standing debate in Turkey on whether the LLMC Convention was ever duly and validly enacted by Turkey, the Commercial Code directly incorporates the LLMC Convention and the 1996 Protocol, and thus puts an end to the debates. Therefore, the LLMC Convention provisions are now applicable and the Admiralty Court has recently rendered a decision on establishment of a limitation fund, however, there is no precedent or know-how as to how such a fund is to be set up and operated. A commission has been set up and is in the process of investigating how this is handled in a number of selected jurisdictions, at the end of which it is expected that the applicable rules and regulations in one of those jurisdictions will form the basis of a law of usage in Turkey providing necessary guidance to the courts.

Further, the CLC Convention is also incorporated into the Commercial Code and the provisions of the same will be applied to limit a shipowner's liability where the shipowner is not at fault in the occurrence of the incident.

V REMEDIES

i Ship arrest

Ships in Turkey may be arrested to secure claims arising from maritime claims as listed in Article 1352 of the Turkish Commercial Code; the list is identical to that provided under the Arrest Convention 1999.

If the target ship flies a foreign flag, the arrest application must be made to the courts in the district where the ship has anchored, laid up or moored or, if it is in a repair yard, then in the district in which the yard is located. If the target ship is a Turkish-flagged ship, then in addition to the courts in the relevant district, the courts in the province in which the ship's port of registry is located will also be competent.

It is mandatory for the arresting party to deposit 10,000 SDRs as counter-security before the arrest application is entertained. The amount of the counter-security may be increased or decreased as per the applications of either party, provided that the arresting court is satisfied that the request has merit. The counter-security may take the form of a cash deposit into an account nominated by the arresting court or a bank letter of guarantee issued by a Turkish bank.

Once an arrest order is obtained, it must be enforced within three days. Further, the applicant is obliged to issue substantive proceedings on the merits of its claim in the competent jurisdiction within 30 days of the arrest. If the arrest order is not enforced or substantive proceedings on the merits are not commenced within the periods prescribed the arrest order will lapse *per se*.

Even though it is possible to arrest a sister ship under certain circumstances, the recovery of receivables from such sister ship is difficult. As for associated ships, if there is evidence of an 'alter ego' relationship, the corporate veil could be pierced. One should, however, bear in mind that it is generally extremely difficult to pierce the corporate veil in Turkey.

ii Court orders for sale of a vessel

Judicial sale of a vessel is enforced by bailiff's offices. As a first step, the value of the vessel has to be appraised by court-appointed experts by way of a court survey. Once the court survey report has been issued, all the creditors and the shipowner are entitled to challenge the appraised value. In such a situation, it may be necessary to conduct another court survey.

Regardless of the flag of the vessel, Turkish procedural rules will be applied. That said, if the vessel flies a foreign flag, the bailiff must inform the relevant flag state and summon the records of the vessel and the list of the encumbrances over her. Once these steps have been completed, the auction is announced in a national newspaper.

At the auction, the vessel can be auctioned off for a figure that should not be less than 50 per cent of its appraised value, and the sale price must be sufficient to satisfy the bailiff's expenses in connection with the auction and the claims of those creditors who have privilege over the creditor that requested the auction.

All concerned parties will be entitled to seek the cancellation of the auction within seven days; however, if the conditions prescribed by Article 134 of the Enforcement and Bankruptcy Code are met, a window of seven days to apply for the cancellation of the auction commences from the date that the concerned party is informed of the reason for cancellation of the auction. After one year, the cancellation of the sale cannot be requested by any means. The vessel will not be delivered to the buyer until the auction is finalised (i.e., either no objections have been filed within the prescribed period of time or following the dismissal of the objections).

The new Commercial Code introduced a new method for the sale of a vessel, which is sale via negotiations. Even though there is no precedent for such a sale taking place, the relevant article of the Turkish Commercial Code stipulates that vessels may be sold before satisfaction of the general auction conditions. Article 1386 of the Turkish Commercial Code lists the conditions for a vessel to be sold early. The purpose of the article is stated by the lawmaker as the need for rapid sale of vessels, which devalue rapidly and are dangerous to maintain. The exact procedure and the value of the sale in a sale via negotiations is yet to be determined by the courts.

VI REGULATION

i Safety

Turkey is a party to many international conventions regarding maritime safety. These include SOLAS, the Search and Rescue Convention 1979, and the ISPS Code.

The Turkish legislation for maritime safety is regulated by various codes and regulations. The Law on Protection from Loss of Life and Goods at Sea and the Turkish Search and Rescue Regulation stand as the most prominent pieces of local legislation regulating safety.

ii Port state control

The relevant authority in Turkey is the Ministry of Transportation, Communication and Maritime Affairs and the personnel conducting port state controls are the personnel of the relevant harbour master's offices. Port state personnel may detain a ship if it is considered that it has a material deficiency matters relating to security, health and environment. Detention may only be lifted if it is established that the deficiency has been cured. There are various laws regulating port state control. In this regard, the Regulation on Port State Control is the main regulation in Turkey. Further, Turkey is a party to both the Black Sea and Mediterranean memoranda of understanding on port state control and IMO Resolution No. A1052(27) on Procedures for Port State Control.

The total number of ships to be checked by the authority cannot be lower than 25 per cent of the total number of ships arriving at Turkish harbours in a year.

In relation to position of Turkish-flagged vessels in the Paris MoU listings, Turkey moved to the Grey List from the Black List in 2006 and as of 2008, Turkey has been included in the White List.

iii Registration and classification

Ships that satisfy the conditions under Article 940 of the Turkish Commercial Code for hoisting the Turkish flag may be registered with the Turkish National Ship Registry. The Registry operates on the basis of very strict rules in relation to nationality and among other requirements, only ships owned by Turkish persons or companies with Turkish majority both in the shareholding and the board membership can be registered in the National Ship Registry.

There is a second registry: the Turkish International Ship Registry. This is a registry with which ships may be registered if they are owned by a company incorporated as per the laws of Turkey or by private persons, if they reside in Turkey, regardless of the nationality of the shareholders and the board members.

There is also a special registry called the Registry for Ships under Construction.

The fourth and final registry is the registry established for commercial ships of less than 18 GT and private vessels.

Mortgages and all types of encumbrances including attachments and liens can be registered with any of the above-mentioned Turkish registries.

Turkish Lloyd stands as the sole Turkish classification society. International classification societies such as DNV GL, Bureau Veritas and ABS are all very active and duly represented through representative offices in Turkey.

Classification societies, being institutions of trust, are deemed to have non-contractual liabilities toward third parties such as shippers, cargo owners, crew and passengers under Turkish law and as per the general rules under the Code of Obligations.

iv Environmental regulation

Turkey is party to several international conventions on protection of the environment including MARPOL and the London Convention. Further, there is also detailed and rather strict local legislation.

v Collisions, salvage and wrecks

The main legislation regulating collisions at sea is the Turkish Commercial Code. The relevant provisions are based on the 1910 Collision Convention, to which Turkey is party. Article 1,286 of the Code stipulates that the collision provisions will be applied in cases where two or more ships collide and compensation is sought for physical damage to the ships, losses and damages of the respective owners of the ships and loss or damage caused to the people and the cargoes on board either or both ships. Further, Turkey is a party to the Colregs.

There is a monopoly area, which covers the Turkish Straits and important Turkish ports, with regard to the provision of salvage services to vessels using those waters. Salvage services in the monopoly area are rendered by the General Directorate of Coastal Safety. The monopoly right granted to the Coastal Safety Directorate has been debated for a long time; however, the state continues to refuse to lift the monopoly on various grounds. State salvors render salvage services pursuant to the terms and conditions of the Turkish Open Form.

From a legal perspective, salvage and wreck removal matters are regulated by the provisions of the Turkish Commercial Code. Pursuant to Article 1,300, the master of a vessel has the right to enter into a salvage agreement with the salvors on behalf of the ship and the cargo. Unless agreed otherwise, a salvage reward may only be claimed if the salvage efforts have resulted in full or partial success.

The special compensation stipulated in Article 14 of the Salvage Convention 1989 has been incorporated into the new Commercial Code.

As to recycling of ships, the Turkish parliament has ratified the Hong Kong Convention. It was intended that the Convention would come into force within 24 months of it being ratified, but the law to give the Convention the force of law in Turkey is yet to be passed by the Turkish parliament.

vi Passengers' rights

Passengers' rights are regulated by the Commercial Code although a separate and more detailed regulation is expected to be drafted and soon put into force.

Turkey is expected to become a party to the 2002 Protocol to the 1974 Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea as the said Protocol is currently on the Turkish parliament's agenda.

vii Seafarers' rights

In principle, employees' rights are regulated under the Turkish Labour Code. The Turkish Maritime Labour Code also regulates the rights of seafarers serving on board Turkish vessels. Since in practice many Turkish shipowners prefer to flag out to convenient flags, however, its application remains rather limited. Pursuant to the Maritime Labour Code, the working hours for seafarers are determined as eight hours per day and 48 hours per week. Overtime payment is due if these hours are exceeded.

Other local legislation on seafarers' rights is the Seafarers Regulation, which regulates the requirements to qualify as a seaman.

There has been a notable change in seafarers' rights in respect of social security matters. Until 2008, seamanship was deemed a job that put a significant physical strain on seamen and as such seafarers were entitled to retire early compared with other workers. The Turkish Social Security Code was, however, rewritten in 2008 and this right has been removed from seafarers.

Turkey will soon be a party to the Maritime Labour Convention 2006 as the said Convention is currently on the Turkish parliament's agenda. That said, Turkey is a party to SOLAS and the provisions for seafarers' rights under SOLAS are applicable.

VII OUTLOOK

The Turkish Commercial Code, which is the main legislation governing shipping matters and the shipping industry, and the Turkish Code of Obligations, which is also relevant for shipping matters, was enacted in 2012 and 2011, respectively. Therefore, it is not expected that there will be any significant changes to the legislation in the foreseeable future. In spite of the financial problems faced by the shipping industry, the new legislation has had a positive effect in that the Turkish legislation has been harmonised with international rules and practices.

Chapter 43

UKRAINE

Vagif Mallayev, Victoria Konograi and Inga Drobinova¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

As a maritime country with direct access to the Black Sea and the Sea of Azov, Ukraine has huge potential for the development of both internal and international shipping. On 21 March 2014, Ukraine's shipping industry was dealt a severe blow by Russia's annexation of the Autonomous Republic of Crimea.² However, the forcible takeover of Crimea is not recognised by Ukraine,³ the UN General Assembly,⁴ PACE and the OSCE Parliamentary Assembly; contradicts a resolution of the Venice Commission; and is considered a temporarily occupied territory.⁵ Effective 15 July 2014, all ports in the Autonomous Republic of Crimea were closed and all vessels and their crews that violate the occupied territory regime will be held liable under Ukrainian law.

Ukraine's maritime industry is represented today by a sophisticated network of 13 active seas, 11 rivers and two fishing ports, transloading terminals, complexes and berths of various forms of ownership. In addition, Ukraine has well-trained seafaring personnel and is the world's third-largest supplier of a marine workforce.

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2 The Federation Council of the Russian Federation ratified the interstate Treaty 'on the admission of the Republic of Crimea into the Russian Federation and creation of new sub-federal entities'.

3 Verkhovna Rada (parliament) of Ukraine, 'Declaration on the Struggle for the Liberation of the Country No. 1139-VII' of 20 March 2014.

4 www.un.org/apps/news/story.asp?NewsID=47443&Cr=Ukraine&Cr1=#.VR5Zdo5W9FN.

5 The Law on 'guaranteeing the rights and freedoms of citizens and on the legal regime on the temporarily occupied territory of Ukraine', 15 April 2014.

Shipbuilding is recognised as a priority sector in the Ukrainian economy and the sector includes nine shipbuilding and 66 ship-repair yards, 18 mechanical engineering enterprises and 30 research and development institutions (including enterprises located in the occupied territory).⁶

Almost 486 state and privately owned vessels are sailing under the Ukrainian flag. However, the fact that the Ukrainian merchant fleet is old and is inadequately provided with new vessels has resulted in the total domination of the domestic market by foreign carriers.

A great achievement of 2015 in the marine industry was the deregulation of business operation conditions in seaports and the simplification of the vessel registration procedures, which significantly speeds up the process of processing containers in seaports and considerably resembles the European practice. Such changes came about due to the work of the team of reformers led by the Head of Odessa Customs – Yulia Marushevska. Additionally, in 2015 thanks to private investors a cargo turnover has increased, the construction and the development of the port infrastructure has continued, new grain terminals have been built and equipped with the new equipment.⁷ Seaports of Ukraine processed 144.826 million tons of cargo in 2015, which is 1.4 per cent more than in 2014. The rating among seaports based on cargo turnover index is topped by Yuzhny port. Odessa, Mykolayiv, Illichivsk, Mariupol, Oktyabrsk and Izmail ports follow respectively.⁸

However, factors such as the absence of coordination of the maritime industry's development at the level of public administration, corruption, bureaucracy, obsolete technology and insufficient protection of the interests of private operators in the maritime industry prevent Ukraine from realising its full maritime potential. The reform of the marine industry in 2015 simplified control procedures, made business operation conditions more transparent, and helped new opportunities to expand business operations to arise.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The Merchant Shipping Code of Ukraine (MSC) is the country's main piece of legislation in this area, which consolidates the provisions of international laws and conventions that regulate the shipping industry. Another important statute is the Law on Seaports.

In addition to this, Ukraine, as a UN and IMO member, has ratified many international conventions and protocols thereto, the most important of which are: UNCLOS, SOLAS, MARPOL, STCW, the Arrest Convention 1952 and a number of bilateral agreements regarding marine navigation and marine transportation.

Along with specialist legal acts, the Civil Code, the Commercial Code of Ukraine, the Water Code and the regulations of the authorised bodies that mediate disputes arising from merchant shipping play an additional role and have secondary significance.

Unfortunately, the majority of state agencies are operating based on internal laws and general standards regardless of the international conventions and special norms, specifically regulating shipping matters. There are two primary reasons for this: the intentional use

6 http://fleet.sebastopol.ua/articles/SUDNOBUDUVANNYa_V_UKRAYiNI_%E2%80%94_KURS_NA_VIZhIVANNYa/printable/.

7 <http://ports.com.ua/articles/dostizhenie-goda-2015/>.

8 <http://ports.com.ua/news/nacionalnyj-morskoj-rejting-ukrainy-gruzooborot-2015/>.

of wrong acts and laws by the state agencies for the purposes of carrying out their own corruption schemes, or professional negligence and inadequate competence in the sphere of maritime law.

Since 27 April 2014 Ukraine has closed its seaports for international shipping in the occupied territory (i.e., the Crimean Peninsula), this is why the laws, rights, fundamental freedoms and lawful interests of natural persons and legal entities cannot be guaranteed in said territory. Moreover, according to amended national laws, an individual may be criminally or administratively responsible for violating the procedure of entering or departing from a temporary occupied territory of Ukraine, as well as for violating border regime. In other words, those vessels which used to enter seaports of the Crimean Peninsula may be arrested by Ukraine, and the vessel crew may be prosecuted criminally or administratively according to applicable laws of Ukraine.

III FORUM AND JURISDICTION

i Courts

Shipping disputes are within the jurisdiction of all courts of Ukraine, except the Constitutional Court. The jurisdiction is limited based on the subject matter of a dispute and the nature of existing legal relations.

Economic courts may resolve shipping disputes, if a dispute arises between economic entities (legal entities, natural persons or entrepreneurs); if a dispute involves a natural person (a seaman or sailor), it belongs to the jurisdiction of trial courts.

In case a shipping dispute results from a violation of the rights and the interests of one party by a subject of competent authority (except administrative cases), then it is necessary to appeal certain actions or non-feasance of such subjects at an administrative court.

An area of Ukraine – the Crimean Peninsula – is still occupied by the Russian Federation. Therefore, Ukraine is not responsible for those courts, which operate on the occupied territories. Such agencies are illegal according to the laws of Ukraine, and any rendered decisions are void and invalid and shall not be carried out in Ukraine or in other foreign states since they are unlawful.

The limitation period is determined for each dispute on a case-by-case basis. The general limitation period is three years, but there are a number of exceptions to this rule, for example:

- a* claims arising from contracts of carriage of goods by sea: one year;
- b* contracts of carriage for passengers and baggage, vessel chartering and marine insurance: two years; and
- c* damages caused by pollution from ships: three years.

ii Arbitration and ADR

Shipping disputes in Ukraine may be reviewed in state courts or courts of arbitration.

Maritime disputes can be resolved by the permanent specialised arbitral institution – the Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry (MAC at the UCCI).

In order to submit a claim with said court, two conditions must be met: (1) a dispute, arising out of an agreement or other civil and legal relations, related to marine trade; (2) an arbitration clause between the parties.

A state court of Ukraine (a court of general jurisdiction) cannot resolve a dispute if there is an arbitration clause signed between the parties.

Unfortunately, alternative dispute resolution is not popular in Ukraine. Sometimes, the parties attempt to resolve their disputes by means of negotiation before resorting to court, however, voluntary settlement and the performance of the requirements is quite rare. ADR such as mediation or expert determination do not have legislative foundation and are not considered to be effective. The parties to a dispute realise that such means of dispute resolution do not create consequences for a debtor, and the real protection of violated rights is possible only if the debtor will act in good faith. Due to the lack of any obligations for the parties, ADR is not promoting resolution of shipping disputes in such a manner.

iii Enforcement of foreign judgments and arbitral awards

Recognition and enforcement of foreign arbitral awards is regulated by (1) the New York Convention, which became a part of Ukrainian legislation by way of succession, (2) the Agreement on Settlement of Disputes Related to Business Activities (CIS countries, effective in Ukraine since 19 December 1992); (3) the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (effective in Ukraine since 14 April 1995); (4) bilateral agreements regarding legal assistance between Ukraine and other countries; and (5) the Code of Civil Procedure of Ukraine.

The norms and the provisions of aforementioned legal acts contain a number of discrepancies, although, disregarding the priority of generally acknowledged norms of the international law before the norms of the national law, the Ukrainian courts frequently employ the national law, specifically, the procedural codes instead of specialised legal acts of maritime law.

Generally, under the requirements of the Code of Civil Procedure as to the recognition and enforcement of arbitral awards, an involved person must submit a request made in writing to a general court located near the debtor's registration or residence address, or his property location.

The enforceability period for a foreign arbitral award in Ukraine is three years after the date of its entry into force, except for an award regarding the recovery of periodic debt payments subject to enforcement during the entire enforceability period (for the past three years).⁹

On a stage of filing a motion to recognise and execute a foreign decision, the collector may file a petition about securing a claim (interim relief) if he has grounds to believe that before the satisfaction of his motion, a debtor may act in a way which will make it impossible to carry out the decision. Thus, for example, the Russian vessel was arrested by Illichivsk city court based on a petition of the collector and not per a marine requirement, as a means of securing a claim while filing a motion for the execution of the decision of MAC at the UCCI on the territory of Ukraine.

Taking into consideration the occupation of Crimea by the Russian Federation, if a debtor resides in or is located in the territory of the Autonomous Republic of Crimea and Sevastopol city, any such decision will most likely be disregarded.

Unfortunately, the recognition of a foreign decision is always a very long process, and its real execution is a true challenge to a party.

9 Clause 391 of the Code of Civil Procedure.

IV SHIPPING CONTRACTS

i Shipbuilding

Ukraine has a well-developed ship-building industry, especially in Mykolaiv and Kherson regions. The ownership of a vessel under construction is acquired through signing of a ship-building contract, or a purchase and sale agreement and delivery of a new ship; these relationships are regulated by the Civil and Commercial Codes. The subject matter of the agreement of sale and purchase will be transfer of ship, and the subject matter of the ship-building contract is the performance of ship construction work. Under an agreement of sale and purchase, the ship builder will be the shipowner during the period of ship construction. A shipyard will provide a money-back guarantee to the buyer or shipowner in the event of the shipyard's failure to perform its obligations under the contract, but under the terms of ship-building contracts, payments made by the buyer or shipowner during the construction period will be secured by the phased transfer of ownership of ship construction deliverables. Payment for work should be arranged in such a manner that the amount of payments are approximately equal to the cost of the work performed by a certain stage, including the cost of materials. The risk of damage to or destruction of the ship under construction will be insured by the ship yard in favour of the ship owner. In case of refusal to deliver the ship under a contract, performer may be forced by court to fulfil it and even pay a fine or penalty, if such is provided by the shipbuilding contract.

ii Contracts of carriage

Carriage of goods by sea in Ukraine is regulated by, *inter alia*, the MSC, the Civil Code, the Commercial Code and the Law on Transport. On 17 April 2014 Ukraine ratified the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways, which entered into force on 1 January 2015, that cover also carriage of goods in the mixed river and sea sailing. Ukraine is not a party to the Hague Rules, Hague-Visby Rules, Hamburg Rules or Rotterdam Rules, but some provisions of the Hague-Visby Rules, for example, are incorporated into the MSC.

In addition to this, marine transportation is regulated by contracts of carriage of goods by sea that must be concluded in writing. Documents confirming the existence and content of such contracts include voyage charters, bills of lading and other written evidence. In Ukraine, there is also the concept of a multi-modal bill of lading issued by a company that is both a carrier and a forwarder; however, in the event of a multi-modal carrier's improper performance of a contract, there is a problem gathering evidence as all the shipment documents are kept by the company that issued the multi-modal bill of lading, against which all the claims will be filed.

Cabotage between the ports of Ukraine are carried out by vessels flying the flag of the state of Ukraine, as well as ships flying under foreign flag, if they obtained the permission of the Ministry of Infrastructure of Ukraine. From 25 September 2015 registration of such vessels' arrival on the normal procedure is carried out once in a calendar year during the first arrival at the Ukrainian port.¹⁰

Under Ukrainian law, shipowners are granted a right of lien over cargo carried on board their ship as security for the payment of freight or other charges. The carrier is also

10 <http://zakon2.rada.gov.ua/laws/show/z1260-15>.

entitled to sell the retained cargo through legal proceedings and satisfy his demands by the proceeds of sale with prior notification to the shipper or charterer, as well as the consignee thereof.¹¹ However, this right will be lost as soon as the cargo is delivered to the consignee or his agent. Problems arise when the owner of the cargo is not of the party of the shipping contracts. The owner of the cargo may lodge a possessory claim to the court demanding the vessel be discharged or even arrest their own property preventing it from the selling procedure. For example, in June 2015, owing to unpaid freight fees a carrier exercised his right of lien over cargo on board the *M/V Jin Zhu Hai* outside the 12nm zone Ukraine's territorial sea near the port Yuzhny, with the intention of preventing arrest by the consignees or by the owner of the cargo in the port. Ukrainian laws do not prohibit the shipowner from exercising a lien while waiting outside the port.

Cargo claims

In Ukraine most cargo disputes are settled out of court. Under Ukrainian legislation a carrier's responsibility commences at the time the goods are received for transportation and ceases at the time of its handover at destination. The carrier is liable for loss and shortage of as well as damage to the goods received for carriage under the rules of the MSC. For such damages the carrier in case of fault shall be liable for the amount of the actual value of the lost cargo and for damages, the amount by which the value of the goods decreased. The carrier is under no obligation to refund extra costs, lost profit or moral damages.

There are many situations when the consignee has not requested the goods, disposed of them, or abandoned them. In such cases, the carrier may, with notice to the shipper, deliver the goods for storage in a warehouse or in another safe place at the expense and risk of the shipper. The carriers must conclude cargo storage contracts with ports and undertake to make payments for storage thereunder. If, within two months from the date of arrival of the ship cargo is not in demand, the carrier is entitled to sell the goods. However, such cargo can be stored for years, accumulating large sums for storage, demurrage and other expenses to be paid by the shipper or consignee, which eventually have to be paid by the carrier.

According to a time charter agreement, it is the charterer who will be liable for damages caused to the cargo even if such damages or losses occurred through the shipowner failing to comply with the necessary terms of the time charter agreement. The charterer has the right to file a claim against the shipowner only after satisfaction of all the claims presented by the cargo owner. According to a bareboat charter agreement, the charterer will be considered as the shipowner during the whole term of the agreement and must take full responsibility for the cargo's transportation and integrity. Ukrainian courts primarily refer to the provisions set out in charter agreements.

Limitation of liability

The MSC and the Commercial Code contain provisions regulating the limits of shipowners' liability. Ukraine is not a party to the LLMC, but some of the MSC's provisions regarding limitation of shipowners' liability are taken from that Convention.

Shipowners' liability limits are determined by MSC¹² and set in units of account depending on vessel capacity. The higher the capacity is, the higher the shipowner's liability

11 Clause 164 of the MSC.

12 Clause 352.

limit will be. For example, the vessel owner's liability capacity not exceeding 5,000 units for pollution damage resulting from the escape or discharge of pollutants from his vessel is limited to the total amount of three million units of account, and a vessel whose capacity is greater than the above, is added to 420 units of account for each additional unit capacity.¹³

There are, however, exceptions to limitations of liability, such as in claims regarding general average contributions; by crew members and other ship employees whose duties are in relation to the vessel, as well as their heirs or other beneficiaries.

V REMEDIES

i Ship arrest

Ukraine is a signatory to the 1952 Brussels Convention since 16 May 2012. Nearly four years of practical application of the Convention has led, however, to the conclusion that vessel arrest in Ukraine is still as complicated and painstaking a process as it ever was. The main issues are as follows:

- a* violation by the courts of subject matter jurisdiction rules;
- b* some judges still do not know about existence of the Arrest Convention and do not apply its provisions at all; and
- c* judges sometimes reject requests to release arrested vessels in exchange for suitable (cash deposit) financial security, probably due to an improper understanding of the nature of the Arrest Convention.

Nevertheless, to arrest a ship, the creditor must approach the court at the location of the port at which the ship is situated or at the port of the ship's registration. Unfortunately, the legislator did not make sufficient changes in the arrest procedure, which has made implementation thereof much more complicated, especially when there is an arbitration clause; independently claimed vessel arrest cannot be grounds for reference to court without a further hearing on the merits by the same court.

A harbour master may detain a ship for three days and this is carried out through the issuance of an order upon the request of the port or the Ministry of the Environment, or a person with a maritime claim against the vessel. At the end of the three-day detention an arrest order from a court must be presented, otherwise the vessel will be immediately released as a result of the occupation of the part of Ukraine (Crimea) by Russia, a special legal regime (SLR) has been in force in that territory since 12 August 2014. Corresponding amendments have been entered into the Criminal and Administrative Codes. One vessel, the *m/v Aliot* (Moldova) has been arrested for violation of the SLR and her master has been charged with a criminal offence.¹⁴

Approximately 300 vessels have entered the closed Crimea ports in defiance of an official ban (according to the official statistics).¹⁵

13 Clause 308 of MSC.

14 www.reyestr.court.gov.ua/Review/45009503.

15 In the accordance with the data of the automatic identification system of the state department 'State Hydrographic Service of Ukraine' and according to the results of the vessel inspections

ii Court orders for sale of a vessel

Judicial sale of a vessel is realised as part of an enforcement proceeding, being a legal procedure of enforcement of a court decision. There is no specific legislative act that would regulate the judicial sale of vessel, therefore, the provisions for the sale of seized real estate are used by analogy. If the ship was pledged, her sale is to be carried out at a public auction as real estate. In other cases, the vessel should be sold at an auction (i.e., as moveable property).

Unfortunately, due to the shortcomings of the national legislation, judicial sale of a vessel guarantees the satisfaction of a creditor's demands, but causes problems for the new owner of the vessel.

Technically, the ownership right to the vessel arises from the moment of its state registration in the State Register of Vessels. As for judicial sale of vessel, the new owner can register a vessel in the Register only if the previous owner filed an application for exclusion of the vessel from the Registry. If the owner whose property was forcibly sold fails to do so, a person acquiring the vessel will not be able to register a vessel and an ownership right to the vessel will not officially arise. This practice contradicts the requirements of Article 12 of Part 5 of the International Convention on Maritime Liens and Mortgages of 1993, which came into force on 4 January 2003 for Ukraine, and is mandatory for application, with higher legal force than the domestic laws regulating registration of ownership rights after the judicial sale of vessel. Unfortunately, however, this Convention is not applied in practice by public authorities who deliberately ignore international instruments that are an integral part of the national legislation.

VI REGULATION

i Safety

Generally speaking, what concerns the sphere of shipping safety, Ukraine focuses on the international standards, norms and requirements of implemented conventions (SOLAS (1974), SAR (1979), STCW (1978)).

The system of shipping safety in Ukraine includes: human protection; environmental protection; vessels; waterways; seacoast objects.

In order to ensure effective shipping safety, a number of legal acts and executive orders have been enacted, and a number of agencies have been created, that are responsible for complying with stated laws.

On 14–18 December a Consulting Mission of the International Marine Organization (IMO) visited Ukraine. Generally, the IMO representatives positively evaluated the work of enterprises, which ensure functioning of the Marine Administration and denoted high professionalism of the officers of the Ministry, Ukrainian Marine and River Inspection and state enterprises. At the same time, the members of the mission noted that there is no uniform Marine Administration in Ukraine, which could have promoted and monitored the

at the Ukrainian ports getting by the state enterprise Ukrainian Sea Port Authority and by the non-government organisation The Maidan of Foreign Affairs https://dostup.pravda.com.ua/request/pierielik_sudien_iki_zakhodili.

international standards, as well as been responsible before other marine states and the IMO. At the moment, its functions are distributed between several organisations and are sometimes duplicated.¹⁶

It is worth mentioning that Ukraine is getting ready for a mandatory audit by the IMO scheduled for March 2018. At the present time the activity of the state-financed entity Marine Search and Rescue Service has been restored, since the performance of these functions by an unspecialised state entity, the Administration of Sea Ports of Ukraine, was ineffective (as the catastrophe with the *Ivolga* vessel on 17 October 2015 demonstrated). This optimises legislation and follows the recommendations of the consulting commission of the IMO.

The situation with the occupied territory of Ukraine, the Crimean Peninsula, remains unchanged. Since 15 July 2014 all ports in the territory have been closed and are not controlled by Ukraine, shipping in the territorial waters of the Crimean Peninsula and entering Crimean ports is dangerous and may cause uncontrolled damages to shipowners with no compensation guarantees and violates the national laws of Ukraine and the international requirements.

ii Port state control

The term port state control means the inspection of foreign vessels by the state where the vessel's port of call is located for the purposes of verifying compliance by shipowners, classification societies and vessel control administrations of the state of the vessel's flag with requirements of international maritime conventions and rectifying deficiencies before a vessel leaves the port.

Ukrmorrichinspektsiya provides the supervision of maritime safety of the water area of seaports and outside the relevant territory. The Ukrainian Seaports Authority is the state enterprise established by legislation that ensures the functioning of seaports, the maintenance and usage of port infrastructure objects under state ownership, and the performance of other tasks assigned to it directly or through its affiliates, formed in each seaport. The harbour master heads the Seaport Captain's Service at each seaport, part of the Ukrainian Seaports Authority. Also, it is the captain who has the right to detain a vessel. The primary reasons for such detention are failure to pay the applicable fees, fines and other payments, as well as the decision of authorised state agencies, and most often the decisions of ecological inspection based on the results of control of isolated ballast that is illegal. In such an unlawful manner the following vessels were detained: *Zhen Tai*, *CMB Coralie*,¹⁷ *Heilan Star*, *Alina*.¹⁸

Ukraine is not a member of the Paris MoU. Considered to be the worldwide index for flag performance, Ukraine belongs to Grey List 1 in accordance with the Paris MoU White, Grey and Black Lists.

However, Ukraine is a member of the memorandum of understanding on Port State Control in the Black Sea Region (Black Sea MoU).

At the 16th meeting of the Port State Control Committee in Batumi, Georgia, in April 2015, the memorandum of understanding on Port State Control in the Black Sea

16 <http://news.meta.ua/archive/25.12.15/cluster:46514190-Mnsterstvo-nfrastrukturi-gotutsia-d-o-auditu-Mzhnarodno-morsko-organizats>.

17 <http://mtu.gov.ua/news/22258.html?PrintVersion>.

18 <http://fru.org.ua/ua/events/v-illichivskomu-portu-cherez-protypravni-dii-ekolohiv-prodovzhuut-prostoiuvaty-dva-sudna>.

Region (BS MOU) decided to introduce a new inspection regime for selection of ships from 1 January 2016 to further harmonise its risk-based targeting and inspection system with the leading memorandums, namely the Paris MOU and Tokyo MOU, to the highest level.¹⁹

iii Registration and classification

The registration of a ship in Ukraine consists of entering data on a ship in the State Ships Register of Ukraine or the Vessel Register of Ukraine,²⁰ and obtaining a licence or a vessel's certificate. The state registration of sea vessels is carried out by harbour masters and the state registration of river vessels and vessels not supervised by a classification society is carried out by the Maritime and River Inspectorate. Upon entering of records about a permanent registration of a vessel in Ukraine, all of the previous records in registers of other states pertaining to such vessel are not recognised by Ukraine.

This registry is a traditional 'closed' registry. There are certain restrictions, in particular, limitations of the person who can exercise the right to register their ships. Pursuant to Clause 32 of the MSCU, the right of navigation under the state flag of Ukraine is given to a vessel that is the state property or in the ownership of a natural person – a citizen of Ukraine – as well as a legal person in Ukraine founded exclusively by Ukrainian owners, or a vessel belonging to these persons under a bareboat charter contract. Consequently, ships owned by a sole entrepreneur (also a business entity under Ukrainian law)²¹ or legal entities registered in accordance with Ukrainian legislation, but the founders of the entity of which is a foreign citizen or company, are not entitled to fly the national flag of Ukraine. Such restrictions, of course, are a barrier to attracting foreign investment in the development of domestic shipping. Since 2001, Ukraine has developed several versions of the draft law on the international register of ships, nevertheless, unfortunately, it has not yet been adopted.

Besides the registration of vessels, maritime mortgage records of vessels can also be entered into the aforementioned registries. The laws regulating maritime mortgages include the MSC, the Maritime Liens and Mortgages Convention and the Law on Mortgages. In Ukraine a contract of mortgage has to be notarised at the place of registration of the vessel.

The technical supervision of sea vessels and their classification is performed by the classification society chosen by the shipowner.²² The carrying out of technical supervision of vessels that have the right to fly under the flag of Ukraine, with the processing of the relevant documentation on behalf of the government of Ukraine, is entrusted to such classification societies as the Shipping Register of Ukraine,²³ the American Bureau of Shipping, Bureau

19 <https://www.parismou.org/2012-annual-report-paris-mou-psc>.

20 The Resolution of the Cabinet of Ministers of Ukraine on Approving the Procedure for the State Ships Registry of Ukraine, and the Vessel Register of Ukraine, 26 September 1997.

21 Clause 55 of the Commercial Code of Ukraine and the Clause 50 of the Civil Code of Ukraine.

22 Clause 22 of the MSC.

23 The Resolution of the Cabinet of Ministers of Ukraine on improving the technical, classification and shipping supervision on the sea and river transport, 8 June 1998.

Veritas, Germanischer Lloyd, the Hellenic Register of Shipping and Det Norske Veritas Classification.²⁴ The Cabinet of Ministers of Ukraine has identified a list of classification societies that can act on behalf of the government of Ukraine.

iv Environmental regulation

Legal regulation in the field of marine environment protection is carried out through a number of statutory instruments, among which the most important are the Water Code, the Law on Environmental Protection 1991, UNCLOS, the OILPOL Convention and MARPOL.

In Ukraine, the authority implementing state policy in the field of the marine environment is the State Environmental Inspectorate and its structural units.

For a long time Ukraine has been dealing with the problem of levying fees for dumping isolated ballast and obliging the vessel's management to produce a ship's ecological declaration at Ukrainian ports, contrary to common sense, maritime laws and international conventions.

At the end of 2014 and at the beginning of 2015 the progressive powers together with the community and the efforts of the Minister of Ecology and Natural Resources enacted a number of legal acts, which remade the national laws according to the international law. According to the changes, none of the vessels entering the ports of Ukraine were obliged to provide an ecological declaration and all vessels with a system of isolated ballast no longer have to be inspected for the chemical content of the isolated ballast.

Despite the legislative changes, the state agencies continue to inspect isolated ballast and require the ecologic declaration.²⁵ The willfulness of the state agencies has been actively protected by the corrupt courts and the upper authorities, which in any way oppose the new progressive practices and the cancellation of the corruption schemes, which for many years were the source of stable income of the representatives of the State Ecologic Inspection. Unfortunately, the Minister of Ecology and Natural Resources was removed from his position by political opponents that do not welcome changes in the country and support the corruption schemes.

On 7 July 2015 and 13 October 2015 the resolutions of the Cabinet of Ministers of Ukraine modified the Rules of Protection of Internal Sea Waters and Territorial Sea, which essentially returned the situation with the isolated ballast to the previous condition. It is stated that the inspection of the isolated ballast is possible only if visible floating parts are removed or visible oil marks oil or other polluting substances in the dump area, which resulted in the actual worsening of the water quality and a unreachable standard of cleanness for waters of isolated ballast – at a level of water quality indices of a certain area of water use. Both norms essentially create the grounds which will always be construed by inspectors not in favour of shipowners (as evidenced by practice) and on this ground the inspection of the isolated ballast is performed.

It is worth mentioning that no vessel can pass the inspection of an ecological ballast because even for drinking water the indices are 8–10 mg/l SP, whereas the indices for area

24 The Regulation of the Cabinet of Ministers of Ukraine on the technical supervision of ships entitled to fly under the flag of Ukraine, 6 March 1996.

25 <http://mtu.gov.ua/news/22258.html?PrintVersion>.

water is -2.0 mg/l SP (suspended particle), which is written by inspectors each time during the actual measurement regardless of a storm or calm conditions, so in effect this is an inspection that is impossible to pass.

In spite of this, the inspection procedure, taking of a water sample and its analysis which is determined by the Cabinet of Ministers of Ukraine, is not yet approved, which allows the captain to refuse the inspection of the isolated ballast by the inspectors. If such inspection is held, it will be impossible to prove the conformity of the isolated ballast with the norms.

v Collisions, salvage and wrecks

The MSC, the Law of Seaports, the COLREGS, the SAR and the Convention on the Protection of Underwater Cultural Heritage (2001) are the basic statutory instruments governing extreme marine events such as collisions, rescues at sea and the effects of such events in the form of raising, removal or destruction of property that has sunk at sea.

Usually in such marine events, the parties conclude settlement agreements. Nevertheless, there are still some problems, such as prolonged investigation by state agencies, a large number of parties asserting their rights and interests and the inability to determine the degree of fault of each of the parties.

According to the provisions of the MSCU, any action with a positive result relating to rescue on the sea (except people) gives the right to certain compensation. The amount of compensation is determined upon the agreement of the parties; in case there is no agreement between the parties, the amount of compensation is determined by a court, an commercial or the Maritime Arbitration Commission. The issues with the amount of compensation are common and frequent if the state agencies, that are responsible for safety on the sea, carried out the rescue operation. For example, the owner of a motor yacht *Classico* was deprived of his right to operate the yacht for six years for the duration of proceedings regarding his failure to pay a considerably high amount of compensation for the rescue of the yacht at Odessa port. Proceedings were initiated by port agencies without prior notification to the owner, who lost the case and was obligated to pay storage fees as well.²⁶

According to the provisions of the MSC, the owner of property that has sunk should inform the harbour master of the nearest Ukrainian seaport of its intention to retrieve this property and should only carry out such work with the harbour master's permission.²⁷ If, however, the property that has sunk presents a direct threat to the safety of navigation, life or health, or the environment, the port's administration is entitled to take the necessary measures for its immediate lifting or destruction of the property at the cost of the owner.²⁸ If the owner has not made a declaration of its intention to raise the sunken property within a year of the date on which it sank, or the owner has not raised the property within a certain period determined by the port, the property becomes state property.

vi Passengers' rights

The main statutory instruments in the legal regulation of the maritime transport of passengers are the Civil Code, the MSC, and the Athens Convention and its 1976 Protocol. Ukrainian

26 www.reyestr.court.gov.ua/Review/39652692.

27 Clause 122 of the MSC.

28 Clause 123 of the MSC.

legislation applies to the carriage of passengers and luggage if a ship under the flag of Ukraine, the contract of carriage was concluded in Ukraine, or the place of departure or destination is in Ukraine.

There are two types of contract that may be concluded with a passenger: a contract for carriage of passengers by sea and a sea cruise contract. Any agreements between the carrier or the organiser of the cruise and passengers that restrict the rights of passengers are invalid. Passengers have the right at any time before departure and, after beginning the voyage, at any port at which passengers will board or disembark, to withdraw from the trip and to get back the fare and the fee for baggage carriage.²⁹

Passengers are subject to compulsory insurance against accidents. The carrier is responsible in the event of death or injury to a passenger's health, as well as for the loss or damage of luggage, if the event that resulted in such incident occurred during the carriage and occurred due to the fault or negligence of the carrier, its employees or agents acting within their duties.

On 17 October 2015, the *Ivolga* passenger boat capsized and sank in the Black Sea in Odessa region due to congestion and deteriorating weather conditions. As a result, 19 people died, 20 people were hospitalised with injuries. The vessel, according to its documentation, was permitted to operate and transport 17 passengers and three crew members; however, *Ivolga* was carrying 39 people on board. The court established that the boat was not provided with a proper number of life jackets and passengers were not instructed about safety.³⁰ The criminal proceeding is currently open, the captain is under arrest and the boat has also been arrested. All victims and next of kin shall be paid compensation.

vii Seafarers' rights

The general rules of labor law are the basis of the legal regulation of seafarers' labour in Ukraine. However, due to specificity of maritime transport activity there are also special rules that governed by MSCU, statutes of marine and fishing service, general and branch tariff agreements and collective labour agreements. In addition, Ukraine is a party to a number of ILO Conventions, including the Merchant Shipping (Minimum Standards) Convention (1976), the STCW, the Repatriation of Seafarers Convention (1926) and the Medical Examination (Seafarers) Convention No. 73 (1946).

At the present time Ukraine is undergoing a number of positive changes to achieve European social standards. In particular, in 2015, Ukraine ratified the ILO Convention concerning Basic Aims and Standards of Social Policy No. 117, and on 16 March 2016 the ILO Social Security (Minimum Standards) Convention was ratified and will enter into force in Ukraine in 12 months.³¹

Currently, the ratification of the MLC, which entered into force in 2013, is a key issue for Ukraine. The problem of Ukraine's outstanding accession to the Convention was identified in the Action Plan for the Implementation of the Association Agreement between

29 Clause 190 of the MSC.

30 www.reyestr.court.gov.ua/Review/53029833.

31 This Convention will come into force in Ukraine 12 months after the date on which its ratifications were registered by the Director-General of the International Labour Office.

Ukraine and the EU, 2014–2017.³² However, despite all last year's assurances by the state authorities of the urgent ratification, a Draft Law is still not even registered by the Verkhovna Rada of Ukraine.

Although there are many conventions that have not been ratified by Ukraine, in general, the rules on seafarers' rights conform to international standards. One difference, however, is that there is no special procedure for compliance with the labour standards of seafarers in port. Also, the Labour Code of Ukraine permits work on the basis of an oral contract, does not contain any requirements for the content of the employment contract and does not oblige seafarers to have a copy of the contract on the ship.

The owner of a vessel flying under the Ukrainian flag will be liable to seafarers in the event of death, disability or other damage to health and must insure such liability in the State Social Insurance Fund against accidents. In the case of a foreign employer, the amount of compensation in the event of death, disability or other damages is based on the terms of the employment contract provided the contract does not worsen the rights of a seafarer in comparison with Ukrainian legislation, plus moral damages. However, Ukrainian courts are very demanding, tough and contradictory concerning compensation.

VII OUTLOOK

The legislation on shipping has always lagged behind existing legal practice in the sector, this is why the shipping industry has always operated according to civil, economic and customs laws instead of specialised laws. Only in recent years have a number of important laws and conventions been enacted that regulate legal relations in the sphere of shipping and are closer to international standards.

Certainly, there are a number of problems that persist – the norms of civil and economic laws are still used to regulate shipping legal relations with disregard for the specialised acts and the international conventions; flawed port reform; rampant corruption; the absence of proper legal guarantees that protect the rights and interests of business entities; the difficult economic, political and military situation in the country; a severe customs and tax climate; and total foreign exchange control.

As a result of geopolitical events (Russian–Turkish conflict), the occupation of the Crimean Peninsula and the military action on the territory of Ukraine by Russian Federation troops, many have left the Ukrainian shipping market.

Nonetheless, despite the economic, social and geopolitical factors, Ukraine is trying to reform the shipping industry, specifically, to liberate port procedures (the opportunity to begin loading or unloading straight after the mooring of a vessel (even before the start of any registration procedure)); speed up the procedure of customs filing and fight corruption through the introduction of electronic innovations that minimise human intervention (customs clearance of a vessel is done by providing electronic copies of documents without the need for state authorities to board the vessel); and to make the shipping industry more attractive for investors (with a vessel fee in favour of an owner or leaser of the mooring station).

32 <http://zakon0.rada.gov.ua/laws/show/847-2014-%D1%80/page>.

Reforms in Ukraine always follow the 'from bottom to top' scheme and the government does not always promote them, however, the public (public organisations, activists and volunteers) actively promote reforms and industry renovation.

Chapter 44

UNITED STATES

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I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

For all practical purposes, the United States is bordered on all sides by water so it has a long maritime history. Its earliest settlers came by sea. Although the US does not currently have a large international fleet, it continues to play a major role in world trade.

The United States has a US-flagged ocean-going fleet of 180 vessels, half of which are considered to be 'Jones Act' vessels entitled to engage in the protected cabotage trade. The Jones Act vessels represent about 4 million DWT and non-Jones Act about 3.5 million DWT. It is estimated that over 1 billion tonnes of cargo are carried annually in the Jones Act trade. Figures are not publicly available for foreign-flagged vessels beneficially owned by US companies.

America's 'Marine Highway System' consists of over 29,000 nautical miles of navigable waters including rivers, bays, channels, canals, the Great Lakes and open-ocean routes. The US has a large fleet of offshore vessels supporting offshore oil and gas production. It is estimated that the country's domestic trade employs 38,000 vessels.

Supporting the shipping industry and military vessel requirements is an extensive network of shipbuilding and ship-repair facilities (see Section IV.i, *infra*).

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The framework for shipping policy in the United States is an amalgam of international conventions, multilateral and bilateral treaties and domestic legislation. That combination is made more complex by the existence of both nationwide federal and, to a limited degree, individual state legislation and regulation in the maritime field.

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While the US is a party to several of what the IMO considers 'most important' or 'core' international conventions, it has opted for domestic legislative or administrative approaches to a number of areas encompassed by other conventions.

Thus, the US is a party to the IMO Convention as amended, SOLAS and Protocols, MARPOL and Protocols and the STCW Convention as amended. The US has also agreed to a number of international technical conventions such as Colregs, the Load Lines Convention, the Tonnage Convention, the OPRC Convention and the like.

The United States, however, has eschewed numerous international conventions and treaties including UNCLOS, CLC Convention, the Oil Pollution Fund Convention, the LLMC Convention 1976, the Bunker Convention, the HNS Convention, the Ballast Water and Sediments Convention and the Nairobi Wreck Removal Convention.

In many areas covered by international protocols rejected by the US, domestic legislation has filled the gap. For example, protection of the marine environment and liability for environmental violations are subject to several primary federal statutes and regulations promulgated thereunder: the Clean Water Act, the Act to Prevent Pollution from Ships, the Refuse Act and the Oil Pollution Act of 1990. The environmental programmes established by that legislation differ markedly from the programmes effectuated by the relevant international protocols. So too does the US process of limitation of liability for maritime claims, with its ease of breaking limitation based upon a shipowner's privity and knowledge of the cause or causes of the loss and its limitation fund based upon post-casualty vessel value, diverge from the process established by the LLMC Convention (see Section IV.iv, 'Limitation of liability', *infra*).

As alluded to earlier, most maritime issues are subject solely to federal legislative and administrative jurisdiction, as the result of a perceived necessity for reasonable uniformity. When the federal government has acted with a clear intent to exclusively legislate or regulate in a particular field, the individual states are blocked from legislating with respect to those issues by the doctrine of pre-emption. Only if the federal legislation leaves room for complementary state action or specifically condones additional state action, such as in the Oil Pollution Act of 1990, can the states enact such legislation. In that regard, some states have provided for cargo owner and charterer liability for oil spill damages, which is not included in the federal liability scheme.

III FORUM AND JURISDICTION

i Courts

The United States has a constitutionally based system of government. Under this system, both the federal government and the states have authority to operate their own courts. The federal government has first instance and appellate courts throughout the country. Similarly, the individual states have their own courts that operate consistent with their state constitutions and state statutes. While the federal court system is frequently a model and trend setter, the 50 different state court systems operate in ways that vary widely. The US Supreme Court sits at the top of the federal and state court systems as the final appeal court.

In the federal court system, the first instance or trial courts are called district courts. Appeals go to the courts of appeals, which are frequently called the circuit courts and are usually identified by numbers, for instance, the Second Circuit Court of Appeals located in

New York. In the main, the Supreme Court of the United States is the court of last resort for all US courts and gets to decide which appeals it will hear from the federal and state court systems.

Significantly, the US Constitution assigns primary responsibility for deciding shipping cases – at least when the dispute is viewed as having maritime or admiralty subject matter – to the federal courts. The federal courts are also given the task of deciding cases involving federal laws, treaties, and the US Constitution and have authority for handling bankruptcy, patent and copyright litigation. Certain disputes involving interstate parties and foreign persons and entities – ‘diversity cases’ – are also allowed into the federal courts by statute.

Pursuant to recent US Supreme Court rulings, a US court will be considered to have pervasive personal jurisdiction over a corporate entity (sufficient to allow the court to adjudicate all claims against that entity – even those entirely unrelated to the defendant’s contacts with the forum state) only in very limited circumstances. This exercise of unlimited personal jurisdiction will only be permissible where the corporate entity’s contacts with a US forum are ‘so ‘continuous and systematic’ as to render [it] essentially at home in the forum State’. Previously, general jurisdiction had been treated as available for lawsuits in federal and state courts wherever foreign entities had regular or extensive commercial presence in the United States. Now, the concept of general jurisdiction is limited to the defendant’s ‘home’ locations, which are presumptively ‘the place of incorporation and the principal place of business’.

Personal jurisdiction in the US courts will now more clearly be governed by the concept of specific jurisdiction, which ‘depends on an ‘affiliatio[n] between the forum and the underlying controversy’. It also requires a ‘minimum contacts’ analysis that looks at the linkage between the claims, the forum, and the defendant. Specific jurisdiction has been said to depend upon whether the defendant corporation ‘purposefully avails itself of the privilege of conducting activities within the forum State’. Notably, due to the above-mentioned purposeful conduct requirement, US port calls may not be significant contacts by a shipowner, where it is the charterer that has directed a ship to call at the US port or ports.

The initial court pleading, typically a complaint, must simply give the opposing party notice of the grounds for the claim or claims and ‘state a claim to relief that is plausible on its face’. As a result, litigation in the United States can usually be commenced without the support of detailed evidentiary submissions or witness statements.

In the federal and state courts, the parties’ attorneys are primarily responsible for all factual investigation (discovery). Discovery in the US courts includes not only party-controlled documents but also oral questioning of potential witnesses (depositions) and access to third-party records. Documentary discovery and depositions are allowed as to all non-privileged matters that are relevant to the claims and defences in the litigation. Protections based upon time, cost and burden are also built into the system.

Facts and law are treated separately. Fact finding is primarily done by a trial-based system at which oral testimony and documentary evidence are presented. A single judge presides at trial and decides all questions of procedure, law and evidence. Evidentiary rules do not generally require original documents, but do include the ‘hearsay rule’, detailed requirements for expert opinion evidence and a requirement for testimony under oath based upon personal knowledge. While US courts frequently use juries to decide factual matters, in federal maritime cases – with the exception of certain seaman’s injury claims – the fact-finding is done by the presiding judge.

The appellate courts are composed of panels of three or more judges. Their decisions are made based upon the record as it existed before the lower court – additional evidence is not a standard part of appellate review. Primarily they decide whether the rulings of the first instance court are consistent with the applicable law. Factual and evidentiary rulings are reviewable, but are presumptively valid in the absence of clear error.

US courts respect conspicuous and unequivocal provisions selecting foreign forums and law, even in cargo and passenger cases. In *Atlantic Marine Construction Co. v. United States District Court*,² the US Supreme Court determined that valid forum-selection clauses must be enforced by the federal courts consistent with the long-standing doctrine of *forum non conveniens* and that transfers among the federal district courts should be freely granted on the basis of such clauses. Otherwise, choice-of-law matters will depend upon a multi-factor interest analysis that gives great weight to the law of the flag (particularly for claims involving the shipowner) and tends to emphasise the law most strongly linked to the location of the alleged wrongful action or the defendant's relevant business location.

US courts generally apply forum law for time limitation issues, except that foreign statutes of repose or similar substantive prohibitions can be applied on a choice-of-law basis. Cargo and personal injury or death claims have statutory time limits of one and three years respectively. However, there are no generally applicable statutes of limitations for maritime contract and tort claims. Instead, delay with prejudice is the test under the doctrine of laches.

ii Arbitration and ADR

The arbitration of maritime disputes has a long history in the US. New York's Society of Maritime Arbitrators, Inc (SMA) has existed for over 50 years and *ad hoc* maritime arbitrations took place in New York for many years before that. Arbitration has now taken hold in other US port cities as well.

Legislative guidance for arbitration in maritime and other commercial cases is contained in the Federal Arbitration Act.³ The Act provides for judicial proceedings to compel arbitration and for the issuance of a stay when a dispute asserted in a lawsuit is subject to arbitration. The Act largely refrains from dictating or determining the procedures to be followed during an arbitration, although it does provide for the issuance of arbitral subpoenas in certain situations. Under the Act, a prevailing party must file a petition to confirm an arbitration award and have judgment entered thereon within one year after the award is issued, but a motion to vacate must be filed within three months. Grounds for vacatur are quite narrow and may not be enlarged by party agreement.

The United States has ratified the New York Convention, but it is not applicable when all parties to a dispute are US entities. This holds true even when the arbitration is to occur in another country that has adopted the Convention.

The SMA and other private organisations, such as the American Arbitration Association, have established rules governing practice and procedure in proceedings to which their rules apply. In the absence of such rules, parties may agree on their own rules for the conduct of an arbitration.

Although a much more recent development than arbitration, mediation of maritime disputes is also well established in the United States. Some states require that commercial

2 571 US —, 134 S.Ct. 568 (2013).

3 9 USC Section 1 et seq.

disputes be mediated before they can go to trial. While this is not a uniform national rule in the federal courts, where most maritime disputes are litigated, mediation is often strongly encouraged by judges there too. Commercial mediation services have rosters of trained mediators and established procedures or parties may choose freelance mediators (often maritime lawyers), who then establish the procedure to be followed in the mediation.

iii Enforcement of foreign judgments and arbitral awards

Although some US bilateral treaties have judgment enforcement terms, the doctrine of comity governs most efforts to enforce foreign judgments in the federal courts. Assuming the foreign court was jurisdictionally competent, the proceedings were not procedurally or substantively tainted, and the results do not violate US policy or the legal rights of a US resident, foreign judgments will be enforceable. In addition, most states have statutory terms that allow for the enforcement of foreign judgments in a manner consistent with the federal comity doctrine. Of course, the judgments that will be enforced are generally commercial. Judgments relating to taxation and criminal or penalty matters in a foreign nation will not generally be enforceable in the United States.

Foreign judgment creditors had great hope for expanded judgment enforcement in New York after the state Court of Appeals ruling in *Koehler v. Bank of Bermuda*.⁴ Koehler held that a bank subject to personal jurisdiction in New York could be ordered to transfer a customer's foreign bank-held assets to New York for turnover to a judgment creditor. However, in *Motorola Credit Corp. v. Standard Chartered Bank*,⁵ the Court of Appeals ruled that the state's 'separate entity rule' of banking practice severely limits the application of *Koehler*.

The United States is a party to the New York Convention and the Pan-American Arbitration Convention. Under these treaties and the Federal Arbitration Act's provisions making these conventions mandatorily applicable in the federal and state courts, foreign arbitration awards are readily enforceable in the US courts. Challenges to enforcement can be based upon lack of personal jurisdiction and the strictly limited convention vacatur defences. Challenges to an arbitration decision based on merits-related matters are not authorised.

Somewhat paradoxically, a plaintiff must show the existence of personal jurisdiction to enforce a foreign arbitral award in the US but, under the majority rule, need not establish personal jurisdiction to maintain proceedings to enforce a foreign judgment.

IV SHIPPING CONTRACTS

i Shipbuilding

The Shipbuilders Council of America has 85 member shipyards, building vessels ranging from nuclear submarines and aircraft carriers to barges and shrimp boats. There is substantial US government building (US Navy, US Coast Guard, etc.), tankers and container ships (in the protected cabotage trade), tugs and barges (offshore and an extensive brown-water fleet within the US) and a very strong offshore rig construction segment. Shipbuilding and ship repairing directly employ over 100,000 personnel and represent \$36 billion in GDP.

4 12 NY 3d 533 (2009).

5 24 NY 3d 149 (2014).

Private US shipyards build, repair, maintain and modernise the US commercial fleet of approximately 38,000 vessels.

Disputes clauses are subject to negotiation, but it is usual that shipbuilding or ship repair contracts contain either an agreement to arbitrate or to litigate in a specified forum. Arbitration may be pursuant to rules of associations such as the SMA, the Houston Maritime Arbitration Association or the American Arbitration Association (located nationwide). The venues for litigation usually reflect the locale of the shipyard, such as California, Louisiana or Mississippi.

ii Contracts of carriage

Contracts of carriage are governed largely by two statutes – the Harter Act, enacted in 1893, and the Carriage of Goods by Sea Act (COGSA), enacted in 1936. Of less importance but also relevant is the Federal Bill of Lading Act, commonly known as the Pomerene Act.

Due to the enactment of COGSA, Harter's applicability today is much more limited than when the statute first became law. Today, Harter applies as a matter of law to transportation between US ports, to on-deck carriage and to the period before loading and after discharge when the ocean carrier is still legally responsible for the goods. Harter prohibits use of broad exculpatory clauses in bills of lading and requires a shipowner to exercise due diligence to provide a seaworthy vessel and to properly care for and deliver cargo. If the shipowner can satisfy its due diligence obligation with respect to vessel seaworthiness, then it can rely on certain defenses to cargo claims, such as error in navigation and error in management. Because Harter does not have limitation of liability or time-bar provisions, operators in the US domestic trades to which Harter would otherwise apply usually provide for their contracts of carriage to be governed by COGSA.

Harter became the basis of the Hague Rules, which were adopted legislatively in the US as COGSA in 1936. COGSA largely mirrors the language of the Hague Rules, with its requirement that an ocean carrier 'properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried' and exercise due diligence to provide a seaworthy vessel. COGSA also includes the laundry list of exceptions to liability (i.e., defences) found in Section 4(2) of the Hague Rules. COGSA differs from the Hague Rules, however, with respect to its limitation of liability provisions. Under COGSA, a carrier may limit its liability to \$500 per package or freight unit.

The COGSA limitations and defences will be lost if the carrier commits an unreasonable deviation from the contract of carriage. Although the law varies somewhat from circuit to circuit, it is generally the rule throughout the country that unauthorised on-deck stowage and unreasonable geographic deviations constitute deviations that will oust the contract of carriage. Although not called a deviation, issuance of a fraudulent bill of lading will have the same effect, leaving the carrier liable as an insurer of the goods.

An issue extensively litigated in recent years has been the responsibility of cargo interests for fires or explosions that have caused damage to vessels and other cargo. Under US law, a shipper can be liable to the ocean carrier (and other cargo interests) for damage sustained because of the shipper's negligence. Likewise, the shipper will bear strict liability for damage caused by its goods when the carrier had neither actual nor constructive pre-shipment knowledge of their dangerous nature.

The courts have had to resolve interesting issues concerning the law applicable to cargo loss occurring on land when the goods are moving under intermodal bills of lading. For some time, lower courts held that such losses were governed by state law. However, in its landmark

decision in *Norfolk Southern Railway Co v. Kirby*,⁶ the Supreme Court ruled that the bills of lading at issue there were maritime contracts even though the final transportation leg, where the damage occurred, was by rail. The Court ruled further that the railroad could rely on the 'Himalaya' clauses and the COGSA limitation provisions found in bills of lading issued by an NVOCC and the ocean carrier, even though the railroad was not in privity of contract with the NVOCC. A different issue arose in *Kawasaki Kisen Kaisha Ltd v. Regal-Beloit Corp.*,⁷ where the Supreme Court ruled, in another train derailment case, that a foreign forum clause was enforceable because a through bill of lading issued overseas by an ocean carrier can apply to the US inland rail portion of a movement and that the Carmack Amendment, which governs the terms of bills of lading issued by domestic rail carriers, can be ousted by the terms of the ocean carrier's intermodal bill. Increasingly, judicial enforcement of 'exoneration clauses' (also known as 'covenants not to sue') is preventing cargo claimants from recovering from railroads for damage to intermodal shipments, even when the railroads are clearly at fault.

The Pomerene Act applies to bills of lading issued in the United States for domestic transportation and for export shipments. Among other things, the Act defines the characteristics of negotiable and non-negotiable bills of lading, establishes requirements for negotiation as well as the title and rights affected by negotiation, codifies a carrier's lien for unpaid charges due under a bill of lading, establishes the circumstances for delivery under a straight or non-negotiable bill of lading, and addresses carrier liability for non-receipt, misdescription and improper loading or misdelivery of goods.

The United States has not adopted the Visby Amendments to the Hague Rules or the Hamburg Rules, but it may ultimately adopt the Rotterdam Rules.

iii Cargo claims

Claims for cargo damage or loss in the United States are often settled out of court by adjusters for subrogated cargo insurance underwriters and ocean carriers or their P&I clubs. When litigation is necessary, smaller cases are often filed in state court, as allowed by the Saving to Suitors Clause in the US Constitution. Larger cases are filed in federal court and all cases in which a vessel is named as an *in rem* defendant must be filed there.

The rules on real party in interest in maritime cargo cases in the US are rather liberal. Thus, cargo claims may be filed in the name of the assured or in the name of the subrogated underwriter. There are very few limitations on who may be named as a defendant. In a major casualty, cargo claimants may sue the vessels, NVOCCs, shipowners, charterers and other relevant parties, such as shipyards. Although the law in some jurisdictions provides that there can be only one 'carrier' with respect to a shipment, that is not the law in the United States, where there may be multiple carriers. Demise clauses are generally unenforceable under US law. 'Both to blame' collision clauses are generally not enforceable under US law but there is authority that they are valid in cases of private carriage.

COGSA prevents carriers from including provisions in bills of lading that tend to lessen the carriers' liability below the floor set by the statute. For decades, US courts relied on this provision to avoid enforcing foreign forum clauses in bills of lading. However, in 1995, the Supreme Court ruled that the enforcement of such clauses does not violate COGSA as

6 543 US 14 (2004).

7 561 US 89 (2010).

long as they are reasonable. Since then, some carriers have revised their contracts of carriage to shift cargo litigation away from the US, which seems odd given the very favourable package and freight unit limitations available to carriers under COGSA.

Arbitration clauses found in charterparties that are incorporated by reference in bills of lading may be enforced against parties to the bills of lading or holders thereof. The arbitration clause itself need not be specifically referenced in the incorporation; it is sufficient if the charter itself is properly referenced. Thus, cargo claims filed in a US court may end up being arbitrated in this country or in some other jurisdiction.

Damages in cargo cases are usually calculated on the basis of sound market value. Thus, in a damage case, the cargo plaintiff may seek to recover the difference between the cargo's sound market value at destination and its value as damaged. Plaintiffs may also seek to recover the reasonable costs of repair and reconditioning when they are less than the diminution in market value and do not exceed the cargo's value before the damage. Interest is usually allowed from the time lost goods should have been delivered or damaged goods are delivered at destination. Claims for consequential damages in cargo cases usually fall victim to the foreseeability requirement in *Hadley v. Baxendale*.

iv Limitation of liability

The limitation of liability scheme in the US is based not on an international convention but on domestic legislation that dates back to 1851. Only registered owners and bareboat charterers may seek to limit; ship operators or managers and time and voyage charterers may not. The quantum of the limitation fund is based on the vessel's market value at the conclusion of the casualty voyage plus pending freight. The amount of the fund is calculated differently, however, in certain situations involving personal injury and death claims.⁸

The Limitation Act provides for a stay of actions outside the limitation proceeding (referred to as a concursus). Upon the filing of a petition for limitation, within six months after 'written notice of a claim,' a stay will be issued covering 'all claims and proceedings against the owner related to the matter in question.' This restraint protects the shipowner from having to defend multiple claims in numerous jurisdictions arising from the same casualty.

Limitation will be denied unless the owner (or bareboat charterer, as the case may be) can prove that the act or condition causing the casualty or injury occurred without its privity or knowledge. Thus, in terms of burden of proof in a limitation action, the initial burden is upon the claimants to prove facts sufficient to establish liability before the burden shifts to the owner to prove a lack of privity or knowledge of the relevant act or condition.

V REMEDIES

i Ship arrest

An *in rem* maritime arrest action may be commenced against a particular vessel or her freights, for the purpose of enforcing any maritime lien or preferred ship mortgage or to obtain security for a claim which, by agreement, must be submitted to arbitration. In the

⁸ Limitation of liability with respect to individual cargo claims is explained in subsection ii, 'Contracts of carriage', *supra*.

United States, these are *in rem* actions and they may only be brought against the specific vessel or property to which a lien has attached. Sister ship arrests, which are allowed in certain other jurisdictions around the world, are not available in American courts. *In rem* vessel arrest actions must be brought in the federal court system.

Under US law, a maritime lien is a special non-possessory property right granted to a vessel's creditors as security for claims against or debts incurred by the vessel. A maritime lien attaches to a vessel and follows her, regardless of changes in ownership, until the lien is discharged or extinguished through a judicial sale of the vessel in an *in rem* proceeding.

As a general rule, US law recognises a greater number and variety of maritime liens, enforceable through *in rem* process, than most other nations. Consequently, in many cases, a choice of law inquiry into whether a particular claim is governed by US law will determine whether it gives rise to a maritime lien enforceable by a vessel arrest. In cases where multiple parties allege liens arising out of one transaction, the shipowner may in an appropriate case file an interpleader action to deposit the funds at issue with the court to require the claimants to pursue their lien claims in one proceeding, with the shipowner being discharged from any further payment obligation.

Certain disputes involving maritime liens may, by written agreement of the parties, be subject to arbitration. The Federal Arbitration Act provides a statutory framework for the arbitration of claims arising out of 'maritime transactions' which, in the absence of a written arbitration agreement, would ordinarily fall within the federal courts' admiralty jurisdiction.

The Arbitration Act provides that if the cause of action could otherwise have been brought as an *in rem* proceeding, the claimant may commence its arbitration proceeding by an *in rem* vessel arrest. The court will supervise the posting of sufficient security for the claim, direct the parties to proceed to arbitration and retain jurisdiction over the matter in order to enter judgment on the arbitration award.

The procedure for vessel arrest proceedings is provided in Rules C and E of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure. Additionally, each federal district court will issue its own local rules, to amplify and elaborate on the procedural requirements provided in the Supplemental Rules.

ii Court orders for sale of a vessel

In the event security is not posted after a vessel has been arrested or attached pursuant to Supplemental Rules B or C, the vessel or property will remain in the custody of the marshal or an alternate custodian and may be subject to a judicial sale.

Under certain circumstances, the court, on application by the plaintiff or marshal, may order an interlocutory sale before a final judgment in the action. This may occur if it can be shown that the vessel is susceptible to deterioration during its detention, that the expense of maintaining it in custody is excessive or disproportionate or that there will be an unreasonable delay in securing its release. Proceeds from an interlocutory sale are deposited with the court to abide final judgment, with claims now attaching to the sale proceeds instead of the vessel. Subject to local rules issued by the federal judicial district within which the arresting or attaching court is located, public notice of the judicial sale of the vessel, whether interlocutory or otherwise, must be published. The notice must include the vessel's description and specifications along with the terms of the sale as ordered by the court.

Judicial sales generally take the form of an auction by open bidding. The court order directing the sale will require the successful high bidder to immediately deposit 10 per cent

of the bid, in cash or by certified check, with the marshal. Upon confirmation of the sale by the district court and payment by the successful bidder of the remainder of the purchase price, the marshal will issue a bill of sale conveying title to the vessel to the successful bidder.

A vessel judicially sold in an *in rem* Rule C arrest action is conveyed free and clear of liens and encumbrances. The sale of a vessel pursuant to an *in personam* Rule B attachment proceeding, however, will merely transfer the former owner's interest in the vessel, subject to any existing liens or encumbrances.

Following final judgment, the proceeds of the judicial sale will be applied first to the custodial expenses and fees allowed and costs taxed by the court before being applied to the claims which were timely filed. Claims are paid according to the priorities assigned to maritime liens under the law. Any remaining balance will be paid to the former owner of the vessel.

iii Attachment

The provisional remedy of attachment is available in federal and state courts. The state attachment requirements and procedures vary widely – some are permissive but most are strict and may require a particularised showing of wrongdoing and dissipation risks. In the federal courts, the local state's attachment procedures will be applicable. But, for claims that arise from contracts or incidents within the maritime subject matter jurisdiction of the federal courts, the claimant will also have the option of using a maritime attachment procedure famously known by its rule designation, 'Rule B'. By its own terms, a maritime attachment under Rule B can take place in any location where the target defendant cannot be 'found'. Essentially, this means that a maritime attachment under Rule B will be available if the target entity or person does not have a presence in locations where an attachment is contemplated. For practical purposes, presence is frequently equated to the existence of an office or telephone listing which is maintained in the name of the target. However, determining where a defendant can be found will actually depend upon US concepts of personal jurisdiction, so there will be nuances. In any event, a corporate registration for authority to do business in a forum state is considered good protection from Rule B attachments. The registered entity will not be subject to Rule B attachments in that state.

Aside from the jurisdictional presence issue, Rule B also has a service of process requirement. In order to be found within a district (and therefore not be subject to Rule B attachments) the target must be both jurisdictionally present and available for service of process in the district.

The Rule B requirements concerning the kind of property that can be attached have recently become more restrictive. For a period of time, Rule B attachments were permitted to reach electronic funds transfers (EFTs) while they were passing through US banks. Based on current decisional law, EFTs cannot be attached. The property to be attached must actually be owned by the target entity and the target must also have some recognised interest or control in the property or funds at the place and time of the attachment. However, there is not a limited list of the types of property, funds or credits that are subject to attachment (i.e., Rule B simply refers to 'the defendant's tangible or intangible personal property'). This means that Rule B attachments remain viable in places in the US where a target entity has some recognised interest in property, funds, or credits/receivables – for instance, a time charterer's ownership interest in the bunkers aboard a chartered vessel calling at a US port – does not otherwise have a jurisdictional presence with a locally accepted method for service of process.

VI REGULATION

i Safety

The United States Coast Guard (USCG) is the primary maritime safety agency in the US. Its jurisdiction encompasses commercial vessels, mobile offshore drilling units, recreational craft, maritime personnel and shoreside marine facilities. USCG safety activities include maritime search and rescue, mariner licensing, drug and alcohol testing programmes, vessel and facility inspection, plan review and approval for ship construction, repair and alteration, aids to navigation establishment and maintenance, vessel traffic service operations, the International Ice Patrol in the North Atlantic shipping lanes, maritime casualty response and investigation, fisheries management and protection and maritime safety education programmes and publications.

The USCG is currently implementing its 'Marine Safety Enhancement Plan', a multi-year, comprehensive programme to enhance marine safety systems, knowledge and processes in order to effectively and efficiently promote safe, secure and environmentally sound maritime commerce.

The USCG Office of Investigations and Casualty Analysis at Headquarters in Washington, DC leads the USCG investigation programme, with the goals of promoting safety, protecting the environment and preventing future accidents. The USCG conducts investigations with respect to commercial vessel casualties, marine pollution incidents, recreational boating accidents, port and waterways safety, personnel licensing and civil penalty issuance. While conducting such investigations, if the USCG encounters evidence of criminal activity or liability, it can and will refer the matter to appropriate prosecutorial authorities and provide the prosecutor with the evidence developed during the USCG investigation.

USCG investigations are conducted by either an investigating officer or a marine board of investigation. In appropriate instances, the USCG will conduct joint investigations with other agencies concerned with the subject matter, such as the National Transportation Safety Board (NTSB). USCG investigations are conducted to the maximum extent possible in accordance with the IMO Code for Investigation of Marine Casualties and Incidents.⁹

Investigating officers and marine boards have subpoena powers and can compel production of evidence and oral testimony or written, signed statements. Parties to a USCG investigation have a right to legal representation, may participate in the questioning of parties and witnesses and are entitled to copies of evidence introduced into the record. Witnesses testifying at an investigation also have a right to legal counsel.

The investigation report, containing findings, conclusions and recommendations, requires approval through the USCG chain of command up to and including the Office of the Commandant. In the US, the findings, conclusions and recommendations of a USCG investigation cannot be introduced as evidence in any civil judicial proceeding.

Any challenge to final USCG investigatory action is met with the US Administrative Procedure Act's difficult burden of proof; the court must find the USCG's action 'arbitrary and capricious, an abuse of discretion or otherwise not in accordance with the law'. It is also difficult to impose liability on the US for USCG action due to the limited waiver of sovereign

9 IMO Resolution MSC.255(84), 2008.

immunity contained in the US Suits in Admiralty Act and judicial decisions interpreting the scope of the government's 'discretionary function defence' for government employee decisions or actions.

While better known for investigation of aviation accidents, the NTSB also investigates significant marine casualties and issues reports containing safety recommendations based upon its findings and conclusions. Its investigatory functions, processes and authorities are essentially similar to those of the USCG. Like USCG investigation reports, NTSB investigation reports are inadmissible in US civil judicial proceedings.

The USCG and NTSB maintain extensive archives of marine investigation reports that are accessible at their respective websites.

ii Port state control

In the United States, the federal government agency assigned port state control duties and powers is the USCG. In that capacity, the USCG undertakes activities to enforce regulations under three principal international protocols: SOLAS, MARPOL and the ISPS Code.

During 2014, the last year for which data is currently available, slightly more than 9,000 individual vessels made some 79,000 port calls in the United States. The USCG conducted 9,232 combined SOLAS safety and MARPOL environmental protection inspections and 8,562 ISPS examinations on those vessels. A total of 143 vessels were detained for SOLAS/MARPOL deficiencies and 10 ships were detained for ISPS shortcomings. Generally, non-US-flagged vessels calling in the US are examined no less than once a year. The USCG selects vessels for port state control boardings and examinations pursuant to internally developed 'compliance targeting matrices'. These standards include factors such as flag state detention ratio, vessel compliance history, ship particulars (type, age, etc.), ship management compliance history and classification society detention ratio. In this regard, as of February 2015, the USCG had designated 21 ship management companies as 'targeted' for increased scrutiny.

A unique facet of the USCG's port state control regime is its Quality Shipping for the 21st Century programme (Qualship 21). Based upon prior compliance history and documentation submissions, flag state administrations and individual vessels can obtain programme eligibility, with less frequent and reduced scope examinations. As of May 2016, 1,456 vessels (about 10 per cent of the non-US-flagged vessels calling at US ports) had qualified for the programme. In 2015, 26 flag states were found eligible for Qualship 21 status, while 16 other administrations were considered substandard, thereby subjecting their fleets to heightened scrutiny by the USCG. In March 2016, the USCG presented preliminary data for Qualship 21 showing that only 16 flag administrations had thus far made the grade for 2016. Not included were Liberia and Panama, while the Marshall Islands remained qualified.

Emerging areas of attention during US port state control boardings and inspections include: compliance with the Anti-Fouling Convention; ballast water management programmes to prevent introduction of non-indigenous species into US waters; and enforcement of the low-sulphur vessel fuel requirements of the North American and Caribbean Emission Control Areas under MARPOL.

iii Registration and classification

Vessel registration in the United States is primarily a function of the USCG, although it shares certain responsibilities with US Customs and Border Protection; both agencies operate

within the Department of Homeland Security. In addition, the Maritime Administration, an agency within the Department of Transportation, has a role in promoting US shipping interests.

The carriage of cargo and passengers between points in the United States – the coastwise trade – is strictly reserved for vessels built in the United States, and owned and crewed by US citizens. The laws with respect to the determination of citizenship (often referred to in the aggregate as the ‘Jones Act’) are complex and nuanced, and opportunities for foreign participation in US domestic shipping are very limited as a result. While vessels can be registered without coastwise privileges, they can perform only foreign voyages and this is a very small segment of the market.

A foreign lender may, however, hold a preferred ship mortgage on a US vessel, including a vessel with coastwise privileges.

A foreign ship mortgage, if created under the law of the vessel’s flag and registered in a public register at the vessel’s port of registry or in a central office, is enforceable as a preferred ship mortgage in the United States, although the liens of suppliers of necessities in the United States will, by statute, rank ahead of it.

In the US, the potential liability of a classification society is not regulated by treaty or statute. For parties contracting with classification societies, contractual obligations, defences, and immunities are enforceable. In addition, contractual terms will govern as to parties that qualify for third-party beneficiary status under the applicable law (usually that selected by the contract). US law will also respect flag-state immunity, which can serve to limit the liability of a classification society.

When a choice-of-law analysis shows that US law should govern the conduct challenged by the plaintiff’s claims, a classification society’s non-contractual liabilities can depend upon US tort concepts. However, a classification society’s liabilities to third parties, based upon a negligence standard of care, are severely limited under US law. They arise when the claimant is viewed as having a special relationship with the classification society and can show causative reliance upon the classification society’s negligent misrepresentations, conduct, or advice.

On the other hand, a recent court of appeals decision declined to adopt a district court’s ruling that classification societies have no liability for their allegedly reckless actions. The court of appeals’ decision treated the potential recklessness liability as conceptually distinct from liability based upon negligence. That decision, which considered Spain’s oil spill claims arising from the ‘Prestige’ casualty, found that the challenged rule-related conduct did not amount to recklessness and concluded that no liability arose under US law.

iv Environmental regulation

Oversight and enforcement of international conventions and national laws and regulations concerning environmental protection come within the jurisdiction of a triumvirate of federal agencies: the USCG, the Environmental Protection Agency (EPA) and the US Department of Justice (DoJ).

Traditionally, the USCG takes the lead in the maritime area and considers itself the primary steward for protection of the marine environment. This stewardship includes enforcing laws intended to protect that environment by safeguarding US waters, sensitive marine habitats, sea life and endangered species.

The USCG enforces marine resource management and protection programmes designed to foster and maintain healthy stocks of fish and other living marine resources. For

example, it patrols fisheries located in US territorial waters, the 200-mile exclusive economic zone (EEZ) and, per international fisheries agreements, waters beyond the EEZ. The USCG also enforces the laws preventing the introduction of non-indigenous invasive species into US waters.

The USCG administers laws that protect US waters from discharges of oil, hazardous substances and refuse. This includes inspection and testing of vessel machinery and equipment, examination of crew licences and documentation and review of vessel records for required entries. This is accomplished by, for example, annual tank vessel examinations intended to assure compliance with environmental standards and to eliminate substandard vessels and vessel operators from the US petroleum trade. The USCG also enforces Vessel Response Plan regulations and oversees the Certificate of Financial Responsibility programme.

When a prohibited discharge occurs in US waters, the USCG provides command and control support for organisations responding to an environmental disaster. This includes emergency response, containment and pollutant recovery operations, oversight and coordination of response operations with USCG captains of the port acting as pre-designated 'federal on-scene coordinators', management of 'mystery spill' responses (i.e., where no responsible party has been identified) and administration of the Oil Spill Liability Trust Fund (the current balance of which is about \$4.0 billion) by the USCG National Pollution Funds Center.

Finally, as regards criminal prosecution of marine environmental law violators, the USCG frequently acts as the eyes and ears of the federal prosecutors in the maritime arena. USCG personnel and commands, as the result of their routine interactions with vessels and crews calling at US ports, are often the first to encounter evidence of criminal behaviour and, after appropriate internal USCG review, will decide whether to refer the matter to criminal prosecutors for further action. In 2014, the USCG accepted a vessel owner's self-reporting of MARPOL violations occurring in US and international waters under its Voluntary Disclosure Program and declined to recommend US prosecution.

In recent years, the EPA has become more active in marine environmental protection and enforcement. The three principal areas where EPA has taken the lead are: (1) water pollution from land-based sources; (2) routine operational discharges of substances from ships in US waters via the Vessel General Permit for Discharges programme; and (3) compliance with the air pollution requirements of Annex VI of MARPOL, especially in the North American and Caribbean Emission Control Areas designated by the IMO.

The EPA is considered by repute to be an 'activist' agency and there is widespread speculation in the US maritime community that EPA will seek to expand its marine environmental presence in the years to come.

The third prong of the US marine environmental trident is the DoJ, acting principally through its Environmental Crimes Section at the DoJ headquarters in Washington, DC.

Since the late 1990s, the DoJ has engaged in what it terms the Vessel Pollution Initiative involving a vast array of criminal prosecutions of individuals and companies connected with maritime transportation. As of the end of fiscal year 2014, the Initiative had yielded more than \$344 million in criminal fines; it had also resulted in more than 27 years of confinement sentences for convicted individuals.

In fiscal year 2015, prosecutions continued unabated in US courts throughout the country. In a recent Florida federal prosecution, the owner and the operator of a vessel pleaded guilty to illegal overboard discharges and witness tampering for having crew members lie to federal investigators. The two defendants were fined a total of \$1.5 million and placed on

five years' probation. The offending vessel was banned from trading in the US for five years.¹⁰ And, on 8 April 2016, an owner was fined \$2.5 million and placed on three years' probation for MARPOL violations as a result of operating a crude oil tanker without a functioning oily water separator. Four engine department officers on that vessel received jail sentences of between two and six months and face the loss of their licences.

Many of the US prosecutions are initiated with reports of environmental violations and, at times, evidence furnished to the authorities by vessel crew whistle-blowers. Under the informant award provision of the US Act to Prevent Pollution from Ships, such whistle-blowers may be awarded up to half the amount of the penalty imposed. A sole whistle-blower in a one-vessel prosecution received a US Treasury cheque for \$2.2 million; and 12 whistle-blowers in a fleet prosecution shared about \$6 million. There have been numerous calls by the industry to rein in such awards as unwarranted, counter-productive of environmental protection programmes and, in some instances, based upon fabricated evidence and testimony.

In September 2013, the DoJ suffered a significant setback when a federal court jury acquitted a shipowner in a 'magic pipe'¹¹ by-passing case. The jury rejected the DoJ's position on the shipowner's vicarious liability for the actions of the ship's crew based upon the respondeat superior doctrine. That doctrine has been a lynchpin of most DoJ prosecutions and the impact of this contrary decision upon the Vessel Initiative has yet to be fully measured.

In *United States v. Fafalios*, No. 15-30146, Fifth Circuit, 14 March 2016, the Court of Appeals in New Orleans reversed the conviction of a chief engineer for failing to maintain an accurate oil record book under the US Act to Prevent Pollution from Ships, a standard DoJ charge in 'magic pipe' and other overboard discharge prosecutions. On this particular charge, the court ruled that the chief engineer was not 'the master or other person having charge of a ship' subject to prosecution in the regulation's language. The court rejected several other arguments proffered by the government to support the conviction. The industry will have to see how the US government reacts to this new setback to the Vessel Initiative of criminal prosecutions.

On 20 April 2010, some 50 miles off the coast of Louisiana, the BP Macondo well and the drill ship *Deepwater Horizon* were hit with a blowout, explosions and an uncontrolled fire. Eleven rig workers died, the drill ship sank and the well continued to spew oil until 15 July 2010, by which time, approximately 3.2 million barrels of oil had entered the Gulf of Mexico.

Over the course of the following six years, the largest and most complex environmental case in US history unfolded. The cases against BP and the other parties involved in the well-drilling operation were pursued by a special task force composed of federal and state authorities. Myriad private party claimants sought recoveries either through a BP-funded settlement programme or via litigation. Finally, the parties involved in the well-drilling operation filed claims and counterclaims among themselves.

BP, Transocean, Anadarko, Moex, Halliburton and others accepted civil and, in some instances, criminal liabilities for their actions. The claims ranged from tort liability for property damage and economic losses to natural resource damages and liability for punitive

10 N.D. Fla, Case No. 15-cr-00074, 15 March 2016.

11 A mechanism permitting the illicit discharge of oily water while by-passing the oily water separator.

damages. Additionally, BP pleaded guilty to 11 criminal counts of felony manslaughter in connection with the deaths of rig personnel. Various individuals involved were also criminally prosecuted.

All litigation was referred to a special court that is part of the Federal District Court in New Orleans.¹² These matters were tried, without a jury, in several phases. Rulings included quantification of total oil spilled at 3.19 million barrels and findings that the disaster resulted from gross negligence and wilful misconduct on the part of BP and from simple negligence on the parts of Transocean and Halliburton. The trial judge assessed fault at BP, 67 per cent; Transocean, 30 per cent; and Halliburton, 3 per cent.

Various Deepwater Horizon matters have already been appealed to the Fifth Circuit Court of Appeals and to the US Supreme Court. The parties' total liabilities for response costs, claim payments, defence costs, and civil and criminal penalties are currently estimated to exceed \$60 billion. With the \$20 billion settlement of the federal and state claims against it, which was approved by the Deepwater Horizon court on 4 April 2016,¹³ BP estimated its total costs for penalties, remediation, restoration, natural resource damages and claims as in excess of \$54.5 billion.

v Collisions, salvage and wrecks

The law governing marine collision liability in the United States derives from both statutory and regulatory enactments that define specific duties in the navigation and operation of vessels and common law tort principles that have developed under the general maritime law of the United States.

The primary statutory regime governing the safe navigation of vessels is the Colregs, which were ratified by the United States in 1977. There also exists a separate body of navigational rules promulgated by the USCG for vessels operating inshore of certain boundaries, separating the high seas (where the Colregs apply) and US inland waters. While there are several differences between the Colregs and the Inland Rules, by and large they are consistent with one another.

The common law of marine collision is the general maritime law, which has evolved from traditional common law doctrines and judicial modifications of those rules and includes general tort law doctrines, such as the standards of reasonable care and prudent seamanship. The general maritime law provides a number of important rules that govern the determination and allocation of liabilities arising out of marine collisions and casualties. As a general proposition, liability for collision or casualty damage is fault-based. In mutual-fault situations, collision liability is apportioned pursuant to the general tort principle of comparative fault (allocating liability according to the parties' respective degrees of fault), as adopted in maritime cases by the US Supreme Court in its landmark decision in *United States v. Reliable Transfer Co.*

While concepts of 'intervening negligence' and 'last clear chance' have no place in this comparative fault regime, under proper circumstances, liability for damages caused by

12 This court recently issued judgments in favour of Deepwater Horizon oil spill responders based upon OPA 90 statutory responder immunity as well as derivative immunity for government directed activities under the US Clean Water Act and Federal Tort Claims Act. Deepwater Horizon, MDL No. 2179 (E.D. La., 16 February 2016).

13 Consent Decree available at www.justice.gov/opa/file/838231/download.

instances of ‘superseding negligence’ may be deemed to be the sole cause of a casualty – even where mutual fault exists. This doctrine may come into play where the damage to a plaintiff’s vessel is caused by an independent and unforeseeable act of negligence that supersedes any earlier negligence and breaks the chain of causation flowing from such prior negligent acts or omissions. See *Exxon Co, USA v. Sofec, Inc.*¹⁴

Certain legal presumptions may affect a court’s determination of the cause of a marine collision or casualty, or its initial finding of fault. Under the ‘Pennsylvania’ rule, if a vessel is found to have violated a clear and mandatory duty imposed by a marine safety statute or regulation or navigational rule of the road (i.e., the Colregs or Inland Rules), its owner can only avoid liability by proving that the violation in question could not have been, within the bounds of reasonable probability, the cause of the collision. This rule is largely unique to US law and does not exist within the Collision Convention 1910, which the United States has never ratified.

While the ‘Pennsylvania’ rule involves presumptions of causation, application of The ‘Oregon’ rule can raise a presumption of fault on the part of a vessel moving under her own power when she collides with an anchored vessel or other fixed object. To rebut this presumption of fault, the moving vessel has the burden of establishing its freedom from fault in the collision.

Generally speaking, the measure of an injured party’s collision damage, when its vessel has been rendered a total loss, is the vessel’s pre-collision market value, plus pending freight, but less the vessel’s salvage value. If not a total loss, the vessel’s owner may recover the reasonable cost of restoring the vessel to her pre-collision condition plus the profits lost during the time she is out of commercial service for repairs. Where the vessel is a total loss, lost profits are restricted to the voyage being performed at the time of the collision. Recovery of consequential collision damages are also limited by their reasonable foreseeability. US law bars any recovery of purely economic collision damages when claimed by parties (such as charterers) that have no proprietary interest in the damaged vessel.

Salvage and liability for the removal of sunken vessels obstructing navigable waters are topics closely related to any consideration of collision law. With regard to salvage, the United States is a party to the 1989 London Salvage Convention, which was incorporated into United States law on 14 July 1996. While parties to a formal contract for the performance of salvage services, such as an LOF or a comparable standard American salvage agreement, may agree to terms that are inconsistent with the 1989 Convention, situations involving ‘pure salvage’ (no pre-existing salvage agreement) or those performed under an agreement containing a formal choice of US law provision will be governed by the 1989 Convention. US law provides a maritime lien for successful salvage services.

Under the US Rivers and Harbors Act, the owner of a vessel that has sunk and become a navigational hazard in US navigable waters must mark and remove the sunken wreck, regardless of whether the owner was negligent in causing the vessel’s sinking. Consistent with this duty, the owner of the sunken vessel is liable to the United States for all costs incurred by the government in marking and removing the wreck. A claim by the United States to recover wreck removal expenses is not subject to limitation of liability under the US Limitation Act. See *In re Southern Scrap Material Company, LLC*.¹⁵ A failure to timely mark and remove the

14 517 US 830 (1996).

15 541 F.3d 584, 595 (5th Cir. 2008); cert. denied, 556 US 1152 (2009).

wreck may also give rise to liability towards third parties whose property is damaged as a result of the sunken vessel's presence in navigable waters. The United States is not a party to the Nairobi Wreck Removal Convention.

vi Passengers' rights

Shipowners generally owe a duty toward passengers lawfully aboard their ship to exercise reasonable care under the circumstances of the particular case. The warranty of seaworthiness, which is available to crew members, has not yet been applied to passengers. In a recent ruling, the United States Court of Appeals for the Eleventh Circuit overruled a long-standing precedent (i.e., the *Barbetta* rule), which had previously precluded passengers from suing cruise lines as defendants in medical malpractice actions to recover for the negligent acts of a ship's doctor committed aboard a cruise ship. In *Franza v. Royal Caribbean Cruises, Ltd.*¹⁶ the Court recognised the right of cruise ship passengers who become victims of medical malpractice by shipboard doctors and nurses to hold the cruise line vicariously liable.

The US has not ratified the Athens Convention. There are, however, several statutes that relate to passenger death, injury or damage claims. Liability is imposed on the carrier, the vessel's master, or officers when a passenger dies or is injured as a result of negligence or failing to comply with certain vessel inspection or manning requirements, or as a result of certain known defects. The Death on the High Seas Act applies to injuries occurring outside of the territorial waters of the United States and bars claims for non-pecuniary damages. Cruise ships touching US ports, including non-US-flagged vessels, must comply with the Americans with Disabilities Act. Concerns about increased crime aboard cruise vessels also lead to the enactment of the Cruise Vessel Security and Safety Act of 2010, which mandates certain safety, security and record-keeping requirements.

The *Costa Concordia* tragedy, and other recent incidents involving power and sanitation systems failures aboard cruise vessels, has led to proposed legislation introduced in both the US Senate (S. 1673) and House of Representatives (H.R. 3142) as the Cruise Passenger Protection Act, which is designed to further protect cruise passengers' rights. The legislation has not been enacted yet but has been referred to the appropriate committees. Both the Senate and House versions direct the US Department of Transportation to determine whether any of the enumerated rights in the international cruise line passenger bill of rights (adopted by the members of the Cruise Lines International Association (CLIA)) is enforceable under federal law. The Senate's version of the bill would require that the statute of limitations identified in the passage contract for commencing suit against the owner of the passenger vessel be no shorter than three years.

Passenger tickets are maritime contracts and thus governed by the general maritime law. Forum selection clauses are generally enforceable, unless found not to have been reasonably communicated to the passenger or deemed to be fundamentally unfair. Forum selection clauses limited to a particular federal forum, or requiring a mandatory arbitral forum, have also been enforced; clauses depriving a passenger the right to a jury in a personal injury case have been held to be unenforceable. Choice-of-law provisions are also enforceable.

A shipowner engaged in transporting passengers from or to a port in the US is prohibited from including a provision in its contract limiting its liability to passengers for injury or death as a result of the negligence or fault of the owner or the owner's employees

16 772 F.3d 1225 (11th Cir. 2014).

or agents. Contractual limitations requiring a passenger to give notice of a claim for personal injury or death within less than six months or to commence civil suit in less than one year from the date of injury or death are also barred by statute.

A cruise line may also be held liable for damage to or loss of a passenger's luggage; however, reasonable limitations on the right to recovery may be inserted in a passenger ticket and a 10-day notice requirement and a six-month limitation period for commencing an action have been enforced.

Owners may bear strict liability for the sexual misconduct of their employees.

A fertile area for litigation has centered around cruise line liability for injuries suffered during excursions off the vessel on theories of negligent selection of the tour operator, or on agency or negligent failure to warn theories.

vii Seafarers' rights

General maritime law and statutory (Jones Act) remedies

In the event of injury or death suffered during employment in the service of their ship, seamen have three potential remedies including actions for: (1) maintenance and cure; (2) unseaworthiness of the vessel; and (3) negligence under the Jones Act, 46 USC Section 30104.

'Seaman' status depends upon an employment-related connection to a vessel in navigation that is substantial in terms of its duration and nature. It does not require that the employee's duties contribute to navigation, but does demand contribution to accomplishment of the vessel's mission.¹⁷

Maintenance and cure

Maintenance and cure is comprised of three elements: maintenance, which is the right to food and lodging expenses during illness or injury; cure, which is the right to reasonable medical treatment until the point of 'maximum recovery'; and wages, which are the salary, overtime and bonuses that would have been earned from the time of injury, or onset of illness, until completion of the voyage. The obligation to pay maintenance and cure is imposed in personam on the seaman's employer. The vessel itself is also liable *in rem*. Unsatisfied maintenance and cure obligations give rise to a maritime lien of the highest priority and wilful failure to pay may subject an employer to liability for attorneys' fees and punitive damages. Maintenance and cure does not require proof of negligence. The injury need not occur on the ship and the illness may be due to a pre-existing medical condition unrelated to the seaman's job duties; but it must manifest itself while the seaman is in the service of the vessel. The contributory fault of the seaman will not reduce an award under comparative fault principles.

17 Injury or death of dockers and harbour workers who may work aboard vessels but are not seamen are covered under a separate statutory workman's compensation scheme, the Longshore and Harborworkers' Compensation Act. They can bring a third-party action against the vessel for negligence, where they are injured by the negligence of the vessel.

Unseaworthiness

Vessel owners,¹⁸ demise charterers and the vessel itself may be liable to seamen for injuries or death caused by the unseaworthiness of the ship or a failure to supply or keep in order the 'appliances appurtenant to the ship'. Defective shore-based equipment does not give rise to the cause of action. The warranty of seaworthiness extends to manning the vessel with a competent master and crew. The warranty is absolute and non-delegable. It does not require a finding of negligence but is imposed on a strict liability basis. However, the test for unseaworthiness is whether the vessel or its appurtenances were 'reasonably fit for their intended use', which does not require perfection or an accident-free vessel. To recover, a seaman must show that the unseaworthy condition was the proximate cause of injury or death. A seaman's contributory negligence in creating the unseaworthy condition will not bar the cause of action, but will reduce recovery in proportion to the degree of comparative fault. A recent *en banc* decision of the US Fifth Circuit Court of Appeals has held that seamen and their families cannot recover punitive damages in personal injury and wrongful death litigation under the maritime doctrine of unseaworthiness.

Negligence

The Jones Act provides seamen with an in personam negligence cause of action against their employers for injury or death suffered during the course of employment. A Jones Act seaman's injury or death action against his employer is limited to the recovery of pecuniary losses and a recent Fifth Circuit case has held that neither a seaman nor his survivors can recover punitive damages in personal injury or wrongful death actions under the Jones Act. Jones Act claims may be brought in federal court under either admiralty jurisdiction, or 'at law' under federal question jurisdiction (in the former case, there is no right to a jury trial). Jones Act claims may also be brought in state court under the Saving to Suitors Clause (in which case there is a right to a jury trial, but federal law principles will apply). Claims under the general maritime law for maintenance and cure and for unseaworthiness are often joined with Jones Act claims. Such joinder will permit the seaman to obtain a jury trial not only on his Jones Act claims, but also on the other two general maritime law claims as well. The standard of care imposed on an employer under the Jones Act is the ordinary duty to exercise reasonable care under the circumstances. However, the seaman's burden of showing that the employer's negligence caused the injury is a reduced causation standard often referred to as a 'featherweight burden'. The Jones Act may apply to a foreign seaman if, after a choice of law analysis performed under the general maritime law, sufficient contacts are found with the United States to justify application of the statute.

Maritime Labour Convention 2006

The US has not approved the Maritime Labour Convention 2006 (MLC) even though many laws and regulations in the US are the functional equivalents of MLC requirements. Since the US has not ratified the MLC, the USCG will not take enforcement action under the terms of the MLC against US or foreign-flagged vessels. However, because of the 'no more favourable treatment' clause in the MLC, which could expose US-flagged vessels to port state control detention in jurisdictions that have acceded to the MLC, the USCG has issued a

18 If a vessel owner bareboat chartered the vessel to another party, it will not be liable for unseaworthy conditions that arise subsequent to the vessel going on charter.

Navigation and Vessel Inspection Circular providing guidance on implementing the MLC. This Circular permits US shipowners to participate in a voluntary inspection programme to show compliance and obtain a statement of voluntary compliance – maritime labour certificate, which may be issued by a recognised international classification society after inspection and compliance is demonstrated.

VII OUTLOOK

Shipping is undergoing a major shift as the United States evolves from an energy importer to an energy exporter. The United States now exports crude oil as well as LNG. Due to environmental requirements in the waters off the coast, LNG is becoming the fuel of choice for new builds as well as for conversions. This is a boon to US shipyards.

Chapter 45

VENEZUELA

*José Alfredo Sabatino Pizzolante*¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Shipping and port activities are of paramount importance to the Venezuelan economy, bearing in mind that the country's population (with nearly 30 million inhabitants), relies very much on the importation of bulk and manufactured goods as well as the export of oil and steel-related products. According to last figures held by the national shipping registry, the domestic fleet over 500 GT comprises approximately 461 vessels totalling 1.47 million GT. The state remains as the principal shipowner since in addition to the tanker fleet of *Petróleos de Venezuela, SA (PDVSA)*, it has acquired by expropriation *Conferry*, the firm in charge of transport services between the mainland and Margarita Island; and in 2011 also the state incorporated by Presidential Decree No. 7,677 the *Corporación Venezolana de Navegación, SA (Venavega)* a shipping company serving the riverine, coastal and international seagoing market. More recently, through Executive Decree No. 769 dated 5 February 2014, all maritime cargo transportation functions of the public administration have been centralised and will be performed by *Venavega*. Therefore, the private fleet is rather modest. It is worth mentioning that in recent years *PDVSA* has embarked on a renovation and expansion programme of its fleet, to be able to carry at least 45 per cent of all exports and to diversify its clients, with China at the forefront, although the programme is to some extent delayed.

The port system involves petrochemical terminals in the eastern and western parts of the country (*La Salina, El Tablazo, Puerto Miranda, Amuay, Cardon, José, etc.*) under control of *PDVSA*; bulk terminals in the Orinoco river (*Sidor, Ferrominera, etc.*) under administration of *Corporación Venezolana de Guayana*; and the public ports (*Puerto Cabello, La Guaira, Maracaibo, Guanta, etc.*) under control of *Bolipuertos, SA*, a state-owned company exclusively in charge of the warehouse and storage facilities. Stevedoring services within public ports, however, are performed both by this public agency and private port

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operators. Few private marine terminals operate port facilities. Unfortunately no recent cargo and traffic figures have been released by Bolipuertos, SA; nevertheless, due to the rigid exchange control in place and huge decline in oil prices, there has been a significant reduction in cargo volumes, said to reach 80 per cent nationwide. The construction of the Container Terminal at Puerto Cabello by China Harbour Engineering Company, at a cost of US\$520 million and with the capacity to handle 700,000 TEUs in its first phase has been currently stopped, due to the lack of funds. Fortunately, the expansion and modernisation of the port of La Guaira, entrusted to the Portuguese Teixeira Duarte Consortium has been completed, and the container terminal is now operative.

The main shipyard and dry-docking facilities in the country are Diques y Astilleros Nacionales, CA and the Ucocar. Although these are mainly linked to the Ministry of Defence, rendering services to the Navy and PDVSA ships, they also serve private ships. Dianca designs, builds, repairs, modifies and maintains ships, naval structures of steel and aluminium up to 30,000 DWT; and Ucocar up to 1,000 DWT. Both have entered into strategic associations with Damen Group and Navantia for the constructions of some tugs and patrol vessels.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

A comprehensive set of laws governing the maritime business was enacted in 2001. The new legal framework includes the Organic Law of Aquatic Spaces, the General Law on Merchant Marine and Related Activities, the General Law on Ports, the Law on Maritime Commerce, the Fishing Law, the Coastal Law, the Law on Maritime Procedures and the adoption of the 1965 Facilitation Convention. Besides, the country has adopted the principal IMO instruments. At least four instruments deserve particular comments.

The Organic Law of Aquatic Spaces (last amendment published in Official Gazette Extraordinary No. 6,153 of 18 November 2014) reorganises the Maritime Administration and creates the maritime jurisdiction, setting out the general principles governing the shipping and port business throughout the country. The Law provides that maritime authority will rest with the Ministry of Infrastructure through a national body named the National Institute of Aquatic Spaces (INEA), based in Caracas, that will exercise its functions locally through the port captaincies. The General Law on Merchant Marine and Related Activities (last amendment also published in Official Gazette Extraordinary No. 6,153 of 18 November 2014) sets out the rules for the administrative regime of navigation and seafarers; activities of national ships in domestic and international waters; the general principles applicable to the merchant marine; and the coordination of the public and private sectors' involvement in the industry. The Law on Maritime Commerce (Official Gazette No. 38,351 of 5 January 2006) incorporates into domestic legislation the main international conventions, repealing the old maritime rules inserted in the Commercial Code. It incorporates the provisions governing aspects of private law, such as maritime jurisdiction, carriage of goods, limitation of liability, arrest of vessels and salvage, based on the international conventions not ratified by Venezuela. Finally, the General Law on Ports (Official Gazette No. 39,140 of 17 March 2009) aims at forming a national port system by introducing general principles related to the ports regime and infrastructure, governing public and private ports nationwide, to ensure coordination in order to consolidate a modern and efficient port system. Title IV of the Law introduces provisions related to the liability regime of port operators and port administrators, based on the 1991 United Nations Convention on Liability of Operators of Transport Terminals in

International Trade; however, some of the provisions have been reviewed to adjust them to particular Venezuelan port practices, whereas others have been introduced to cover situations that the Convention does not contemplate.

III FORUM AND JURISDICTION

i Courts

Shipping disputes are litigated in the maritime courts and governed by the procedural rules introduced with the enactment of the Law on Maritime Procedure, published in the Official Gazette Extraordinary No. 5,554, dated 13 November 2001. Oral and abridged proceedings are the main features of the specialised jurisdiction. Appeals are heard by the Superior Maritime Court, whose decisions are reviewed by the Supreme Court of Justice. The First Instance Maritime Court and the Superior Maritime Court are both unipersonal, corresponding to the Venezuelan jurisdiction to hear without any derogation whatsoever cases regarding contracts of carriage of goods (bills of lading under liner traffic) or persons that enter the national territory. While provisions related to the carriage of goods are compulsory, those related to charterparties are complementary to the will of the contracting parties, and so enforcement of foreign arbitration clauses inserted in the charterparty are allowed by maritime courts. Nevertheless, it has been ruled by the Constitutional Chamber of the Supreme Court of Justice that for a tacit renunciation of the arbitration clause, the defendant must avoid any initial activity in the proceedings other than to invoke the lack of jurisdiction of the arbitration (*Astivenca v. Oceanlink Offshore III AS*).²

Nevertheless, maritime courts do not deal with a significant number of maritime-related matters, including drugs, pollution, personal injuries and customs fines, which are assigned to criminal, environmental and taxation courts.

ii Arbitration and ADR

The Centre for Commercial Conciliation and Arbitration (CEDCA) and the Chamber of Commerce, Industry and Services of Caracas through its Arbitration Centre both have proven experience in the field. The arbitration procedures are conducted in accordance with the rules set up by each arbitration centre, and in the absence of rules, the procedure specified in the Law for Commercial Arbitration enacted in 1998 should apply. Few cases on maritime matters referred to conciliation or arbitration are known in the domestic forum; however, a decision worth mentioning is an interim measure by way of arrest granted by CEDCA, allowing the mortgagee (a bank) to enter in possession and exploitation of the vessel due to default in payment by the mortgagor, pursuant to Article 141 of the Law on Maritime Commerce (CEDCA – File No. 070-12). On the assessment of the facts and the solvency of the petitioner, arbitrators agreed to place the ship in the possession of the mortgagee without requesting any guarantee, but holding the bank responsible for the damages that such measure might cause to the defendants or third parties.

2 Constitutional Chamber – Supreme Court of Justice – File No. 09-0573.

iii Enforcement of foreign judgments and arbitral awards

Foreign judgments are only enforceable in Venezuela after obtaining the *exequatur* from the Supreme Court of Justice, pursuant to the provisions of the Code for Civil Procedure (Article 850). Nevertheless, the *exequatur* may be denied pursuant to Article 851, for instance, if the judgment deprives domestic courts of jurisdiction or if it falls within one of the scenarios provided for by the civil procedural rules, such as a judgment contrary to public policy or one resulting from proceedings that have not been properly served to the defendant or one where his or her right to defence was not guaranteed.

With regard to arbitral awards, Venezuela is a signatory to the Convention for the Recognition and Execution of Foreign Arbitration Awards (since 1994) as well as the Commercial Arbitration Law (published in the Official Gazette Extraordinary No. 36,430 dated 7 April 1998), of which Article 48 allows the execution of a final arbitration award before the competent court of first instance, wherever it is issued, without requiring the *exequatur*.

IV SHIPPING CONTRACTS

i Shipbuilding

No significant shipbuilding takes place in Venezuela, since the existing shipyards are mainly involved with maintenance and repairs. However, the PDVSA has embarked in the expansion of its fleet by entering into strategic associations with Japan, China and South Korea for the constructions of Suezmax, Aframax and VLCC vessels. Some agreements have also been concluded with Spain, Brazil and Argentina. The navy has done the same with Spain. In these cases financing has been granted by foreign governments and bankers in the context of said agreements.

ii Contracts of carriage

Venezuela is not a signatory of either the Hague, Hague-Visby or the Hamburg Rules. Instead, the Law on Maritime Commerce adopts a mixed regime for the regulation of the carriage of goods by water, making it clear that these provisions shall apply whatever the nationality of the ship, carrier, actual carrier, shipper, consignee or any other interested person. However, these provisions do not apply to charterparties, unless a bill of lading is issued pursuant to the charterparty that governs the relationship between the carrier and the holder of the bill of lading that is not the charterer. It follows that any shipment to or from Venezuela under liner traffic will be subject to these provisions in terms of, *inter alia*: liability regime, exoneration from and limitation of liability and time bar, irrespective of the nationality of the ship, being cargo claims under jurisdiction of the domestic maritime courts, whether the goods are moved in international trade or cabotage.

All actions derived from the contract of carriage of goods by water are subject to a one-year time bar, counted from date of delivery of the merchandise by carrier to the consignee, or the date when the merchandise should have been delivered. Domestic law adheres to the period of responsibility, exoneration and limitation of liability as stated in the conventions.

It is important to point out that the carrier is not entitled to retain goods on board to guarantee his or her credits; however, pursuant to Article 259 of the Law on Maritime Commerce and to safeguard the payment of freight, use of containers, demurrage,

contribution to general average and signature of the bond, the carrier through an order of a maritime court may place the goods in the hands of a third party (warehouse). Should the carrier guarantee the corresponding fiscal credit and in the absence of anyone claiming the goods, these will be taken to court auction. The carrier may also exercise a lien upon the cargo for freight, demurrage, costs for loading and unloading operations as well as other costs derived from the contract of carriage and the charterparty. This lien, however, shall cease if the action is not brought within 30 days following the discharge, provided cargo has not passed to the hands of a third party.

With regard to the liabilities of the shipper, the Law on Maritime Commerce prescribes in Article 229 that the former (including the servant or agent) is not liable for loss sustained by the carrier or by the ship, unless it was caused by the shipper's fault. Specific provisions are set out in connection with dangerous goods, imposing upon the shipper the obligation to suitably mark or label dangerous goods as such and to inform the carrier about the dangerous nature of any cargo and the precautions to adopt. Should the shipper fail to do so, the carrier may at any time unload or destroy the cargo, without payment of compensation and irrespective of the damages owed by the shipper towards the carrier (Article 231). Likewise, according to the General Law on Ports (Article 101) a port operator in charge of warehouses and container yards who has not been informed about the dangerous nature of goods, may also destroy or dispose of the cargo without payment of compensation to its owner and is entitled to have its costs reimbursed by the person who was obliged to notify the port operator of the dangerous nature of the cargo.

iii Cargo claims

As in the Hamburg Rules the Law on Maritime Commerce defines the consignee as the person entitled to receive the goods, so domestic provisions allocate the title to sue on the former (Article 249). As to who can be sued, Article 197 states that for the purposes of the law, 'carrier' means 'any person who by himself or through another person acting on his behalf has concluded a contract of carriage of goods by water with a shipper'; whereas 'actual carrier' means 'any person to whom the carrier has entrusted the performance of the carriage of goods by water or of part of it'. Consequently, in the light of the maritime provisions the owners will be the carrier if they have the direct exploitation of the ship, whereas charterers will be regarded as the carrier if undertaking the commercial operation of the ship and issuing the bills of lading. In other words, the responsible party for the execution of the contract of carriage is the one issuing the bill of lading.

The provisions related to bareboat charters as well as charterparties (time and voyage) are complementary to the will of the parties (Article 150). It follows that dispute resolution clauses would be acceptable.

iv Limitation of liability

The Law on Maritime Commerce has incorporated the provisions of the LLMC Convention 1976. Shipowners and their insurers are thus allowed to contractually limit liability in the same manner and in accordance with the limitation figures prescribed by Articles 2 and 6 of the Convention.

Anyone seeking to limit liability (shipowners, charterers, insurers, salvors, etc.) may appear before a maritime court and request the commencement of a proceeding to constitute a limitation fund (Articles 52 to 74 of the Maritime Law); this is made through the submission of a petition indicating the circumstances giving rise to the damages in respect

of which limitation is invoked; the maximum amount of the limitation fund calculated in accordance with the Maritime Law; the list of creditors known by the petitioner and the definite or provisional amount of their credit and its nature; together with any documentation to support the constituted fund, which may take the shape of cash, financial instruments or securities issued or guaranteed by the state. Any precautionary measure (arrest) upon a ship will be suspended once the limitation fund is constituted.

V REMEDIES

i Ship arrest

The arrest of ships in Venezuela is mainly governed by the provisions of the Arrest Convention, incorporated in the Law on Maritime Commerce, to the extent that Article 93, following the Convention, sets out the list of maritime claims giving rise to a ship arrest. Similarly, the governing provisions allow the arrest of the ship in respect of which the maritime claim arose, as well as the arrest of a sister ship. The maritime courts shall grant the arrest for a maritime claim when this is founded in: a public document or a private document recognised by the other party, accepted invoices, charterparties, bills of lading or any other document proving the existence of the maritime claim. Otherwise, the court may request from the claimant the submission of a guarantee in the amount and subject to the conditions determined by the court before granting an arrest. The defendant, however, may oppose the arrest or request the lifting of it, if in the opinion of the court sufficient security has been provided, save in cases in which the ship has been arrested for any dispute as to the possession of the ship or any dispute resulting from a contract of sale. Under domestic provisions the action for the arrest of the ship must be brought against the ship and her master at the same time, as prescribed by Article 15 of the Law on Maritime Commerce, otherwise the action will be dismissed.³

In practical terms an arrest is executed through an order forwarded by the court to the port captaincy via fax or e-mail, resulting in the withholding of clearance to sail by the maritime authority. Consequently, an arrest order granted upon an unberthed ship within Venezuelan jurisdictional waters would be possible, although no precedents are known.

ii Court orders for sale of a vessel

Domestic provisions allow the anticipated auction of a ship. Thus, Article 106 of the Law on Maritime Commerce states that after 30 continuous days following the arrest of the ship, if the shipowner fails to attend proceedings, at the request of the claimant, the court may order the auction of the ship, subject to the claimant submitting sufficient guarantee, provided the claim exceeds 20 per cent of the value of the ship and it is exposed to ruin, obsolescence or deterioration. Mortgagees and holders of maritime privileges may also request the forced sale of the ship. In all cases the court will arrange the sale subject to the publication in national press of a notice of auction, with indication of the parties involved, description of the ship, estimated price, time and date for the sale and identification of the port where the ship is. In the case of a forced sale or execution the court will notify the competent authorities of the flag state, the owners, beneficiaries of mortgages and holders of maritime privileges. In the court sale of MV Josefa Camejo the defendants attempted to obtain an injunction, arguing that

3 First Instance Maritime Court – File No. 2005-000059.

the ferry performed a public service, an argument rejected by the Supreme Court of Justice upon assessing the facts, as it was found that the vessel had been anchored for several years without carrying out any activities and was therefore not performing any public service due to the lack of continuity in its activity.⁴

VI REGULATION

i Safety

Venezuela has adopted the main IMO safety instruments, namely: the Load Lines Convention, Colregs, SOLAS, Convention on the International Maritime Satellite Organization, Torremolinos International Convention for the Safety of Fishing Vessels, the STCW Convention and SAR. Compliance with these safety conventions is monitored by the INEA through its Safety Department and the various port captaincies, as well as the coastguard exercising its port state control functions.

ii Port state control

Venezuela is a signatory to the Viña del Mar MoU of 1992, by which port state control was implemented in Latin America. Port state control is carried out in Venezuela by the coastguard, a branch of the navy and which is in charge of the documentary and physical inspection of vessels. In the event of substandard conditions or deficiencies being noted, the coastguard inspectors will produce a report, notifying this to the port captaincy. It is for the latter to instruct a surveyor to determine the extent of the deficiencies. Once deficiencies have been corrected then the port captaincy will send a surveyor to check this and will then inform the coastguard of whether the vessel should or should not be detained. Inspectors check for compliance with the principal IMO instruments, with the most common deficiencies being a lack of the certificates prescribed by MARPOL, Load Lines Convention and SOLAS. Nevertheless, under Venezuelan legislation the coastguard has no power to detain vessels and to that end the cooperation of the port captaincy is required to refuse port clearance to a vessel and to open the corresponding administrative file to apply for any potential fines. Therefore, due to the lack of a comprehensive legal framework governing the activities of different agencies in the maritime field, in many instances port state control is confused in its implementation, occasionally causing serious delays to ships. According to available statistics, an average of 1,500 vessels are inspected by the port state control authorities each year, resulting in 20 to 25 detentions. Figures held by the secretariat of the Viña del Mar MoU show that the port of Puerto Cabello conducted 60 per cent of the inspections carried out in Venezuela, putting Venezuela in third place in numbers of inspections carried out, after Brazil and Argentina.

iii Registration and classification

The ship registration process has improved significantly in the last decade and a half, since the dual registration procedure (requiring inscription of documentation with the maritime authority as well as the public registry) was repealed by the now enacted legislation. Thus, the office of the Venezuelan Shipping Registry (Renave), is now located within the INEA with

4 Constitutional Chamber, Supreme Court of Justice – File No. 06-1803.

branches in the different port captaincies. Existing ships or ships under construction with a tonnage equal to or over 500 GT will be registered with the Renave office located in Caracas. Vessels under 500 GT will be registered in the particular branch of Renave located in the respective port captaincy where the ship will be registered.

It is important to point out that according to Article 108 of the Organic Law of Aquatic Spaces, cabotage is regarded as the carriage of cargo, as well as persons, between Venezuelan ports. Therefore, trans-shipment of cargo (either internal or in transit) between domestic ports comes under this category. Article 111 of the same law defines domestic navigation as any activity different from cabotage, carried out within jurisdictional waters of a particular port captaincy, such as fishery, dredging, leisure and scientific navigation. Cabotage and domestic navigation are restricted to ships registered in Renave. Despite this the INEA shall grant, at the request of the interested party, and by way of exception, a special permit (waiver) to ships of foreign registry to carry out cabotage or domestic navigation. The grant of such a permit is dependent on a certification by INEA that the ship complies with the requirements of national and international legislation regarding safety, and that there is no available tonnage in the shipping registry. Even so, irrespective of the granted waiver, the ship must comply with the process for temporary admission with the customs office before arrival.

A ship may be wholly owned by foreign parties; the only requirement is the incorporation of a domestic company, but once again 100 per cent of the shares may be wholly owned by a foreign interest. Also a foreign-registered ship bareboat chartered for up to or over one year to a Venezuelan company may be registered with Renave. The basic documentation to be submitted is:

- a* an application for inscription of the vessel with Renave, which must be submitted through the INEA website;
- b* a copy of the articles of incorporation of the company acting as owner or charterer;
- c* evidence of the deletion or suspension of the previous registration or equivalent document;
- d* the vessel's document of ownership or bareboat or leasing agreement as the case might be, duly translated into Spanish; and
- e* plans and technical characteristics of the ships, including former gross tonnage certificate.

Customs procedure is a critical aspect of shipping registration in Venezuela, so the choice of the port of registry and so the customs office is an important issue. In the case of vessels under bareboat or leasing agreements, since they will not be a definitive importation then it is generally accepted that the applicable customs regime will be that of a temporary admission, whereby the import duties will be suspended.

An important aspect in connection with flag registration is also the inspection and certification. There is no specific age requirement, but vessels over 10 years old are subject to a special inspection regime for registry with Renave. In general terms, once the flagging process has advanced, the inspection and certification of the ship by an appointed flag surveyor is needed. Note that maritime administration allows up to three months for the homologation of the certified original, at which time the Venezuelan documents ones should be issued. Homologation must also be carried out for the ISM Code documentation within three months.

iv Environmental regulation

Venezuela is a signatory to the CLC Convention 1969, as amended in 1976 and 1984, as well as the 1992 Protocol. Therefore, shipowners bear strict liability for damages resulting from an oil spill, unless such damage has been caused by the events specified in the Convention. Shipowners are entitled to limit liability in accordance with the Convention, following the procedural rules set out in the Law on Maritime Commerce.

Venezuela has also enacted the Organic Law on the Environment (Official Gazette No. 5,833 Extraordinary of 22 December 2006) and the Criminal Law on the Environment (Official Gazette No. 39,910 of 2 May 2012), prescribing provisions concerning air and sea pollution. The first is a comprehensive set of provisions intended to establish the guiding principles for the conservation and improvement of the environment. It declares the conservation and improvement of the environment a matter of public utility and general interest, including within the activities capable of degrading the environment those which directly or indirectly pollute or cause a deterioration of the atmosphere, water, seabed, soil, or subsoil, or which have an unfavourable impact on fauna or flora. The second law defines those acts that violate the legal provisions for environmental conservation, imposing heavy penalties such as imprisonment, arrest and fines. A significant number of offences are set out, including: discharge of pollution in lakes, the coast and marine environment as a result of non-compliance with the technical rules in force; pollution of the marine environment resulting from leaks or discharges of oil and other products during transportation, exploration and exploitation on the continental platform and in the Venezuelan exclusive economic zone; construction of works without authorisation or breach of the technical rules that are capable of causing contamination to the lakes, coast and marine environment; and breach of the international conventions on oil pollution.

Additionally, the captain, shipowner or operator that negligently caused the polluting incident will be subject to imprisonment of between one and three years. A captain's failure to give notice of a polluting accident within the national waters will be subject to imprisonment from four to eight months, and the responsible ship can be detained by court order. On the other hand, Article 96 states that anyone emitting or allowing the escape of gases or biological or biochemical agents of any nature capable of deteriorating or polluting the atmosphere or air in breach of the technical rules applicable to the matter will be subject to imprisonment from six months to two years and a fine of between 600 and 2,000 tributary units.

v Collisions, salvage and wrecks

Rules relating to collision are included in the Law on Maritime Commerce, based on the Collision Convention 1910. In this sense 'collision' does not solely refer to violent physical contact between two or more vessels, since the domestic rules also extend to repair of damage caused by a vessel, even if a collision has not actually taken place and the damage is caused as a result of a negligent manoeuvring (e.g., without physical contact). In cases of damage to the port infrastructure, including fenders, the port authority may request a guarantee to cover the repairs. P&I club letters of undertaking are usually accepted, with the guarantee remaining in place until the costs are paid or the responsibility is determined; nevertheless, the guarantee must be executed within the six months following the incident. Legal actions in connection with collisions are subject to a two-year time bar.

The main provisions of the Salvage Convention 1989 are also incorporated into domestic legislation. The master and the shipowner are free to enter into contracts of salvage, but even so such contracts can be annulled by the maritime court if they were executed under

undue pressure, influence or danger or if the conditions are not fair and the agreed reward is excessively high in relation to the services rendered. With regard to the criteria for fixing the reward, domestic provisions follow Article 13 of the Convention. Any action relating to payment under salvage operations shall be subject to a two-year time bar.

Regarding wrecks, the Law on Merchant Marine and Related Activities (Article 92) sets out provisions regarding navigation channels, which also apply to wreckages in general. Thus, the obstruction of a navigation channel due to grounding of a vessel, collision, allision or sinking will impose upon the shipowner a number of obligations aimed at giving prompt notice of the incident to the maritime authority through the port captaincy in order to take measures to reduce the risks for other ships sailing nearby and to remove the wreckage if necessary. Following casualties the maritime authority will set up an investigation committee that besides determining the causes, may recommend steps to be taken, including the publication of a warning to mariners in the press. In such cases, the authorities expect full cooperation from the shipowner or insurers in taking the necessary measures for marking, surveillance and eventual removal of the wreck; however, should they fail to do so, the maritime authority may take such measures, in which case the shipowner is obliged to reimburse the costs incurred by a third party appointed by the authorities to this end.

vi Passengers' rights

The main provisions of the Athens Convention have been included in the Law of Maritime Commerce. These provisions apply both to the carriage of passengers in both international and domestic traffic. Pursuant to Article 278 'carriage of passenger' comprises the following:

- a* In respect of a passenger and his or her cabin luggage, the period aboard the vessel or on any vehicle or means of access to come aboard or disembark, and that period in which the passenger and his or her cabin luggage are carried by water to or from the vessel and always when the price of this service is included in the passenger's ticket or the vehicle used to perform this carriage has been put at the disposal of the passenger by the carrier.
- b* In respect of the passenger, the period of carriage does not include that period when the passenger is at a terminal, maritime station, berth or any other port premises.
- c* In respect of luggage that is not cabin luggage, this includes the period starting when the carrier, his employees or agents have taken care of the luggage while ashore or on board through to the time when this luggage is returned to the owners.

Provisions state that the carrier must hand to the passenger a ticket as proof of the contract and a bill of transport wherein that luggage that is not cabin luggage is properly described. The omission of these obligations shall prevent the carrier from exercising a limitation of liability in respect of damages to the passengers and their luggage, whichever were the documents that the carrier omitted to deliver (Article 279).

The indemnity paid by the carrier in cases of death or personal injury to a passenger shall not exceed 46,666 special drawing rights per voyage (Article 298), whereas the limits of liability both for contractual and non-contractual liability of the carrier in respect of loss or damages suffered by the luggage are regulated by Article 299, in any case not exceeding the following limits:

- a* in the case of cabin luggage – 833 special drawing rights per passenger and per voyage;
- b* in the case of vehicles, including luggage carried inside or on top of vehicles – 3,333 special drawing rights per vehicle and per voyage; and

c in the case of all other luggage – 1,200 special drawing rights per passenger and per voyage.

The time-bar provisions set out in domestic legislation are similar to those of Article 16 of the Convention.

vii Seafarers' rights

Labour provisions for domestic shipping can be found in the Organic Law on Labour (Official Gazette No. 6,076 Extraordinary of 7 May 2012), which is generally regarded as having generous provisions towards seafarers. Article 346 of the Law sets out the obligations of shipowners to provide seafarers with minimum standards on board, such as clean accommodation; healthy, nutritional and sufficient food; medical care, hospitalisation and medicines where social security does not provide them; repatriation and travel for boarding expenses; notification to the authorities of any accident at work; granting licence for the exercise of electoral rights; and accommodation and food ashore when the ship is abroad for repairs and seafarers cannot remain on board.

The provisions of the Organic Law on Working Conditions and Accident Prevention (Official Gazette No. 38,236 of 26 July 2005) also have a significant impact on shipping, in case of loss of life or personal injury accidents. The Law prescribes a number of sanctions for the employer in case of accidents suffered by employees that may happen during working hours, should the employer fail to properly instruct and warn the worker about the nature of the risks he is exposed to, as well as to provide him with the safe means to perform his job. These sanctions may take the shape of fines or even imprisonment if it is proven that the employer was aware of the danger to which the employee was exposed at the time he was performing his work. It should be borne in mind that accidents involving loss of life or personal injuries on board the ship could well be the result of the employer's failure to instruct and warn the seafarers about the risks concerned with the assigned task. It follows that in case of occurrence of an accident at work or occupational illness as a consequence of an employer's violation of legal regulations in respect of safety and health at work, the employer will be obliged to pay indemnification to the worker or his or her heirs, in accordance with the degree of fault and the injury. Claims brought by seafarers for personal injuries or occupational illness are generally founded on the provisions of this law.

On the other hand, Venezuela has not ratified the Maritime Labour Convention 2006, although PDVSA has announced that its fleet has already been voluntarily certified; the first Venezuelan shipowner to comply with this instrument.

VII OUTLOOK

In the past decade, there have been a significant number of reported drug cases involving the conviction of seafarers and the arrest of ships. Cases are mainly related to drugs attached to the vessel's hull or placed inside the rudder stock spaces, specifically affecting tankers and bulk carriers; however, it is important to point out that container ships are also targeted either by placing drugs on the superstructure or in loaded or empty containers. These cases are exclusively handled by the criminal courts and the corresponding investigations by the Prosecutor's Office have proved to be very cumbersome and time-consuming. It has been recommended that ships take precautionary measures such as underwater inspections and

extra security services when calling at domestic ports, but even so, due to the increase in drug trafficking through Venezuelan territory, this seems to be a recurrent problem to be taken into account by anyone trading with Venezuela.

Moreover, the lack of clear legal provisions and guidelines from the Customs Office may result in the application of huge fines for cargo shortage or over-landing and especially for shipping containers remaining within the national territory for longer than the permitted 90 days after arrival. This situation has become even more critical due to recent amendments to the Organic Customs Law (Official Gazette Extraordinary No. 6,155 of 19 November 2014), increasing the fines and restricting the time limit to notify shortages and over-landings.

Owing to the current economic situation and a shortage of dollars driven by the decline in oil prices, pilotage and towage services as well as port tariffs have suffered a huge increase because these tariffs now being payable in US dollars, among other reasons. Despite this scenario, the government has recently manifested its willingness to back fisheries as a fundamental objective for the national economy. To this end, the executive branch announced the creation of the Ministry of Fisheries and Aquaculture to resolve issues related to this sector and to double the fishing production capacity of the country, for which the national oceanic fishing fleet is shortly expected to receive funding and the necessary assistance to modernise it.

Finally, the implementation of Executive Decree No. 769 assigning to Venavega the performance of cargo transportation for the different public agencies, now backed by the cargo reservation provisions prescribed by the 2014 amendments to the General Law on Merchant Marine and Related Activities, still remains on paper, with no impact on the transport services sector.

Appendix 1

ABOUT THE AUTHORS

GAMAL A ABOU ALI

Abou Ali Law Firm & P&I Correspondents

Gamal A Abou Ali is a licensed attorney in Egypt and the State of New York, and is a senior associate at Abou Ali and its affiliate firm, Hassouna & Abou Ali. He holds an LLB from Cairo University, an LLM from Indiana University, and an LLM from the University of Chicago. He has also attended accredited law courses at Duke University, the University of Notre Dame, and the University of Cambridge. He is a CEDR-accredited mediator. He represents and works on various matters on behalf of multinational and local clients as well as matters referred by top-tier international law firms. His areas of expertise include corporate and business laws and transactions, construction projects and dispute resolution, employment regulation and dispute resolution, and shipping law, transaction and dispute resolution. He is an active member in a number of national and international law and business associations.

TAREK ABOU ALI

Abou Ali Law Firm & P&I Correspondents

Tarek Abou Ali, a licensed attorney in Egypt, joined Abou Ali in 1986 and is currently the claims director. He holds a bachelor of commerce degree from Ain Shams University, postgraduate studies in business administration from the American University in Cairo, and an LLB from Cairo University. Mr Abou Ali has vast experience in shipping-related claims including pollution, collisions, salvage, total loss, groundings, shipboard fires and environmental claims. He regularly represents clients' interests in matters involving port authorities, the Suez Canal Authority, government agencies and departments and the Environmental Affairs Agency. In addition to his marine, shipping and ports-related work, he is trained and qualified as a legal accountant and has worked extensively in the financial aspects of shipping operations and claims.

ADEDOYIN ADELOYE

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Adedoyin Adeloye is a partner in the firm. He graduated from the Obafemi Awolowo University, Ile-Ife, Nigeria (2000) and holds a master's degree (LLM) in maritime law from the University of Swansea, Wales (2010).

Mr Adeloye has practiced commercial law for over 13 years, advising local and international clients on various aspects of maritime and shipping law, offshore services and related contracts, corporate and secretarial practice in Nigeria. He represents clients before the superior courts and ADR tribunals in Nigeria.

He is a member of the Maritime and Transport Committee of the IBA and the Maritime Committee of the Business Law Section of Nigeria Bar Association (NBA). Adedoyin is also co-facilitator of the Nigeria Maritime Law Association (Nigerian Affiliate of CMI) Young Members' Forum.

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Dwi Meitiara Pratiwi Bakrie joined ABNR as an associate in August 2013. She graduated *cum laude* in 2012 from the Faculty of Law of Padjadjaran University (UNPAD), majoring in international and commercial law. As a student, she was active in various moot competitions including the 2012 Willem C Vis (East) International Commercial Arbitration Moot and the 2011 International Maritime Law Arbitration Moot, in which her team won the Sarah Derrington Achievement Award, and which brought her the position of head of the international moot division of UNPAD's Moot Court Society. At ABNR, her principal practice areas are maritime and shipping, banking and finance, commercial arbitration, mergers and acquisitions, foreign investment, and general corporate practice.

ZIHNI BILGEHAN

Ersoy Bilgehan Lawyers & Consultants

Zihni Bilgehan is a senior partner of Ersoy Bilgehan. He is a qualified barrister at law admitted to the Bar of England and Wales as a member of the Honourable Society of the Middle Temple, London and a qualified lawyer admitted to the Cyprus Turkish Bar Association. After a career as a lawyer in London spanning nearly 10 years, he became a partner at Bilgehan Law Office in Cyprus where he held responsibility for company, commercial, maritime and insurance work between 1995 and 1998. He moved to Turkey and founded Ersoy Bilgehan in 1999 with a view to serving the needs of his global clients having interests and presence in Turkey. Mr Bilgehan holds an LLB from the University of Birmingham and an LLM from University College London (University of London).

He specialises in shipping, ship and project finance, insurance and reinsurance as well as international arbitration. In addition to his extensive expertise in these fields, he advises a wide range of blue-chip clients with their investments in Turkey in the forms of start-ups, joint ventures or acquisitions. Mr Bilgehan also advises bidders on major public tenders organised by Turkish authorities in relation to infrastructure projects. He was adviser to the Japanese EPC contractor and the Japanese financiers of the Izmit Bay suspension bridge, the second-longest suspension bridge in the world, now under construction.

SIMON BLOWS

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Simon Blows acts in complex commercial litigation cases and international arbitrations, and advises on contract wordings. His clients are engaged worldwide in the transportation, trading and insurance of goods and commodities, the construction and design of ships, and the offshore industry.

Mr Blows has been involved in shipbuilding cases for more than 20 years and has conducted substantial arbitrations and court actions involving shipbuilding and offshore for shipyards, banks, and for buyers, and has advised on many cancellations and renegotiations.

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Jonathan Bruce specialises in marine and energy insurance and reinsurance, as well as shipping. He acts mainly for insurers, reinsurers, energy companies, shipowners, P&I and charterers. He has significant experience in Latin American matters (he speaks Spanish and Portuguese, having lived in Brazil), and he has also worked extensively with eastern Europe, including Russia.

On the marine side, Mr Bruce acts in coverage and recovery and defence claims arising from losses worldwide, including hull and machinery damage; groundings and collision; salvage and towage; GA; and defective bunkers. He also acts in charterparty and bill-of-lading disputes. As to energy insurance, he acts in coverage and subrogation claims involving property and business interruption; pipeline damage and pollution; general liability; builders' risks and CAR, DSU and control of well in both onshore and offshore energy; and extending also to the power, mining and industrial sectors, often in claims involving Latin America.

RAYMOND J BURKE JR

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Raymond J Burke Jr is a partner in the firm of Burke & Parsons. He practises in both the dry and wet areas. He has an extensive arbitration practice in New York, both as counsel and as arbitrator. He has handled numerous high-profile casualty matters in the US and around the world. In 2016, he was awarded the Outstanding Friend of Seafarers Award by Seafarers International House in New York City.

JEAN CAO

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Jean Cao is a PRC-qualified lawyer with eight years of practice in shipping and insurance law. Before joining Holman Fenwick Willan in 2009, she worked for China P&I as a claims executive for six years, where she gained extensive experience of marine claims handling, and a local firm for eight years.

She graduated from Dalian Maritime University, and was also awarded a master of laws degree from the University of Southampton.

CAMILA MENDES VIANNA CARDOSO

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Camila Mendes Vianna Cardoso is a senior partner of the firm with over 25 years of experience in shipping, foreign trade and oil and gas. She has given legal advice to shipowners, charterers, carriers, P&I clubs, insurers, maritime agents, terminals and port operators, shipyards, cargo owners and trading companies, shippers and consignees, and has experience in maritime,

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Jennifer E Cerrada specialises in corporate law and taxation. She has almost 14 years of experience working on special projects to create appropriate corporate structures to maximise tax benefits for foreign corporations and individuals wishing to do business in the Philippines. In addition, she is active in ship deliveries, registration and de-registration of ship mortgages.

She completed her BSc in management majoring in legal management and a minor in French studies at the Ateneo de Manila University, and obtained her bachelor of laws at the Arellano School of Law.

SHELLEY CHAPELSKI

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Shelley Chapelski is a partner and co-leader of the firm's maritime practice group and the western vice president of the Canadian Maritime Law Association. Her practice encompasses all aspects of maritime law, including maritime contracts, torts, creditor's remedies and marine insurance matters. She drafts and advises on charter parties, contracts of carriage, moorage contracts, insurance policies and other agreements that arise in maritime and transportation law. She has dealt with dozens of vessel arrests and many maritime limitation of liability proceedings. Shelley is frequently called upon by vessel owners and operators, P&I clubs and marine insurers, harbours and maritime service providers for practical and creative solutions to their legal issues.

MAGDALENE CHEW

AsiaLegal LLC

Magdalene is a partner at AsiaLegal LLC and has accumulated experience in both contentious as well as non-contentious work in her years of practice in general commercial litigation as well as more specific areas of litigation practice such as insolvency, shipping and admiralty. She has handled and advised on cargo claims, demurrage claims, claims for charterhire and freight, crew claims, detention of cargo disputes, charterparty disputes, collision claims, Mare del Nord orders and general average claims. She has independently advised on and attended to the closure or completion of many sale and purchase and ship financing transactions, both local and international.

In 2012, she was appointed and appeared in an London arbitration as an expert witness on the registration of ship mortgages under Singapore law. From 2013 to 2015, she was nominated for the *Euromoney Legal Media Group Asia Women in Business Law Awards* under the shipping practice area. In 2015 she was elected as President for the Singapore chapter of the Women's International Shipping and Trading Association.

THOMAS E CHRISTENSEN

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Thomas E Christensen, born 1989, is an assistant attorney with Gorrissen Federspiel. He graduated with a Master's Degree from the University of Copenhagen in 2013, having also studied at the Ruprecht-Karls University in Heidelberg in 2012. Thomas has worked mainly in matters relating to real estate as well as shipping, offshore and transportation. He has contributed to various publications on international private law as well as shipping law.

AMIR COHEN-DOR

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Amir Cohen-Dor is a partner at S Friedman & Co and head of the admiralty department. He has been with the firm for more than 20 years and his practice is focused on representing vessel interests and all of the major P&I clubs, in maritime litigation and dispute resolution.

He has vast experience in structuring, negotiating and drafting joint venture charter and slot charter agreements between shipping interests. Mr Cohen-Dor has been engaged on behalf of vessel interests in the areas of marine insurance law and related issues such as, GA, salvage and related arbitrations and litigation, regularly advising P&I clubs and foreign insurers on various issues related to Israeli law. He is experienced acting for clients in front of the Haifa Admiralty Court and regularly conducts arbitrations before the LMAA.

Mr Cohen-Dor acts as the legal adviser to the Chamber of Shipping of Israel and in said capacity represents the Chamber and its members in various regulatory matters versus the legislature and governmental bodies and officials, as well as against the antitrust authorities.

Mr Cohen-Dor was educated at Tel Aviv University (LLB), and was admitted to practise in Israel in 1989. He is a member of the Israel Bar Association and is a member in the Israel Maritime Law Association (holding the position of vice president). He speaks Hebrew, English, Spanish and Italian.

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Mona Dejean has been an associate at Holman Fenwick Willan for seven years and specialises in shipping and transport.

As a French *avocat*, her job consists of providing advice on legal risks, assisting with or carrying out settlement negotiations, legal representation in arbitration or before the commercial, administrative and criminal courts.

She has broad experience in resolving disputes arising out of charterparties, contracts of carriage, freight forwarding, marine insurance and shipbuilding contracts, and deals with the legal and practical issues arising out of maritime casualties. Ms Dejean has handled numerous matters involving cargo claims, most notably *The Rokia Delmas*, which grounded off the Île de Ré on the French Atlantic coast after a power blackout in October 2006 and required immediate on-the-spot dismantling.

Her litigation experience also includes arresting and releasing vessels (including in jurisdictions of developing country) and judicial sale of ships.

Ms Dejean studied law at the University Paris V – René Descartes, where she obtained a master's degree in French contracts and torts law, as well as a master's degree in international business law.

Ms Dejean is a member of the French Shipping Law Association, Wista France and the Paris Propeller Club.

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Valeriano Del Rosario, managing partner of VeraLaw, has extensive education and business experience in the United States and Europe. He was admitted to the Philippine Bar in 1982. He obtained a master's degree in maritime law from the University of Wales, followed by three years' work experience at a prestigious shipping law firm in the City of London.

He is a shipping law specialist and has acted for the 4,000 victims of the Doña Paz. Lately, he has been active in ship pollution claims on behalf of owners.

He was president of the Maritime Law Association of the Philippines in 2000.

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Christopher H Dillon is a partner in the firm of Burke & Parsons. He has over 30 years of legal experience in shipping matters and considerable knowledge on debtor/creditor, bankruptcy, lien, and insurance issues. Mr Dillon regularly handles contract-based matters relating to wet, dry, and containerised cargoes, and ship construction, chartering and operation disputes. This includes arbitrating, litigating, and settling ship and cargo incidents with an emphasis on expert analysis and evidence.

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Matthew Dow is an associate in Holman Fenwick Willan's London office. He has spent time in the firm's shipping, insurance and reinsurance, and energy, resources, infrastructure and commodities teams, as well as completing secondments in the firm's Dubai office and the FD&D department of an IG P&I Club. His shipping experience includes advising on both wet and dry shipping matters. He has acted on salvage, groundings, collisions, unsafe port claims as well as a variety of charterparty-based disputes. Mr Dow has experience of English Commercial Court proceedings, English Admiralty Court proceedings, as well as international arbitration proceedings.

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Inga is an associate in the Odessa office of Lexcellence, where she is a member of the firm's shipping and litigation practices. Her practice encompasses a wide variety of shipping and litigation matters, including personal injuries and loss of life claims, ship arrest and pollution.

Inga studied for her master of laws at the Odessa National Academy of Law in 2013. She has more than 40 articles published in various Ukrainian law magazines. She is fluent in Ukrainian, Russian and English.

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Catherine is a member and a former chair of the legal advisory panel to the aviation working group to the Unidroit Convention on International Interests in Mobile Equipment. She was a member of the first advisory group to the Irish Maritime Development Office set up to promote and assist the development of Irish shipping and shipping services. Catherine is a non-executive director on the board of directors of Irish Continental Group PLC, an Irish ferry and container company. She is recommended in a number of legal publications and directories including *Best Lawyers*; *PLC Which Lawyer?*; *IFLR*; *Who's Who Legal*; *The Legal 500*; *Chambers Europe* and *Chambers Global*. She is also recommended in *Who's Who Legal: Aviation 2015* as one of the 10 most highly regarded individuals globally in aviation finance.

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Catherine Emsellem-Rope specialises in transactional work with a particular emphasis on the logistics sector. Before joining Holman Fenwick Willan, she spent nine years in the logistics sector working for a leading global air freight, ocean freight and contract logistics service provider and a major UK logistics specialist, where she was senior counsel. She has extensive experience in contract drafting and negotiation with major blue-chip customers on a pan-European basis. Ms Emsellem-Rope has handled commercial and insured disputes and dealt with a number of corporate transactions, including acquisitions and disposal of businesses and multi-jurisdictional joint ventures. She is bilingual in French and English.

EMRE ERSOY

Ersoy Bilgehan Lawyers & Consultants

Emre Ersoy is an associate at Ersoy Bilgehan. He graduated from Istanbul Bilgi University in 2011, was admitted to the Istanbul Bar Association in 2012 and he obtained his LLM degree from UC Berkeley in 2014.

He focuses on shipping and ship finance matters. He has been involved in wet and dry work and assisting with regard to cargo claims, collisions, salvage and general average claims.

He has also been practising ship finance work representing foreign and local banks with regard to drafting and execution of loan and security documents as well as establishment of certain securities such as pledges, assignments and mortgages.

He speaks Turkish and English.

ANN FENECH

Fenech and Fenech Advocates

Ann Fenech qualified in Malta 1986 and immediately joined Holman Fenwick and Willan in London, specialising in disputes arising out of charterparties and bills of lading. In 1991 she moved to New Orleans and worked with Chaffe McCall, Phillips Toler and Sarpy specialising in wet work.

In 1992 she returned to Malta and created the marine litigation department of Fenech and Fenech Advocates, and in 2008 she was elected the managing partner of the firm.

She deals exclusively with maritime issues and handles a cross-section of shipping disputes ranging from collisions to ship repair contracts, from salvage and explosions on board vessels to arrest, judicial sales and court approved private sales.

She has been involved in a number of the more important cases during the past 25 years including the 'Poker' cases, *Finaval SpA v. Scorpio Ship Management*, *The 'Northeastern Breeze'* and *The 'Hope 1'*.

She is the president of the Malta Maritime Law Association, a Council Member of the European Maritime Law Organisation; she was appointed Honorary Patron of the Malta Law Academy of the Malta Chamber of Advocates in October 2013. In June 2014 she was elected to the Executive Council of the Comité Maritime International and currently chairs the International Working Group on Ship Finance Security Practices and is a member of the International Working Group on Illegal Arrests; in December 2015 she was appointed to represent the Malta Maritime Law Association on the Board of the Malta Maritime Forum and in April 2015 appointed to represent the Malta Maritime Law Association on the Government Agency Malta Marittima.

She lectures extensively on her subjects both in Malta and abroad, and lectures on shipping law at the University of Malta and the International Maritime Law Institute.

In 2012, 2013 and 2014 she was awarded 'Best in Shipping and Maritime' at the Euromoney 'European Women in Business Law Awards.' For the past three years she has been identified as the only 'Star Individual' in the shipping section for Malta in *Chambers Europe*. In *The Legal 500*, 2016 edition she is listed as 'the number-one expert in maritime matters in Malta'.

SIMON GAMBONI

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Simon Gamboni deals with dispute resolution including large-scale, multinational litigation and arbitration in the shipping, transport and international trade sectors. He also advises on non-contentious matters for clients, including in relation to trade sanctions, commodities trading and shipping contracts. Simon has experience in enforcement proceedings, focussing on arrests of vessels, both domestically and abroad, and has acted for both government departments and vessel owners/operators in relation to cargo claims and casualty incidents.

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Maria Theresa Gonzales is a partner in the law firm of Veralaw. She has almost 17 years of legal experience with four practice areas: intellectual property law, commercial and maritime litigation, recognition and enforcement of foreign arbitral awards and foreign judgment, and construction arbitration. She obtained her law degree from San Beda College of Law and her masters in international commercial law at the University of Nottingham.

Ms Gonzales was the chair of the board of trustees of the Maritime Law Association of the Philippines in 2011 and president in 2010. She was a member of the Technical Working Group of the House Transportation Committee of the Philippine Congress in drafting the Proposed Maritime Code. She is regularly invited as a speaker on ship arrest, most recently at the Lloyd's Maritime Academy in London. As a maritime litigator, she handles cargo claims, ship arrest and foreclosure of ship mortgages. She regularly advises foreign clients on a variety of wet and dry maritime matters.

JAMES GOSLING

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James Gosling specialises in shipping, including collisions, salvage, fire and explosion, total loss, piracy, limitation of liability, wreck removal and both civil and criminal pollution liabilities. He also advises on marine insurance and coverage and other shipping-related commercial and contractual disputes. Mr Gosling is an acknowledged piracy expert.

In December 2013, he was recognised, for the third year, as one of the most influential lawyers in the Lloyd's List annual 'Top 100 Most Influential People in Shipping' report, and in 2012, he won the Lloyd's List Global Awards Maritime Lawyer of the Year for his work in the area of piracy.

Mr Gosling is consistently praised in *Chambers* and the *Legal 500* as being 'an industry expert' who is 'very knowledgeable, accessible and swift to respond to any demand'. *Chambers UK 2013* reported sources say 'his knowledge surpasses any other lawyer – he is perfect for putting in front of clients and always knows how to put his point across'.

DAPHNE RUBY B GRASPARIL

VeraLaw (Del Rosario Raboca Gonzales Grasparil)

Daphne Ruby B Grasparil has 16 years' experience in various area of law, including corporate law, focusing on establishment of shipping enterprises and obtaining its government licences and regulatory approval, and crew claims where she acts for shipowners, P&I clubs and crewing companies for disability claim and termination cases before the National Labour Relations Commission.

She is currently the internal vice president for resource development of the Maritime Law Association of the Philippines (MARLAW) and previously occupied the positions of vice president for internal relations in 2011 and vice president for legal education and training in 2010.

Ms Grasparil obtained her BA in economics and *juris doctor* degrees both from Ateneo de Manila University. She was admitted to the Philippine Bar in 1996.

OLAF HARTENSTEIN

Dabelstein & Passehl

Olaf Hartenstein is a partner at Dabelstein & Passehl. His particular areas of practice are private international law, international commercial law, international process law and arbitration, multimodal and maritime contracts of carriage, as well as inland waterway shipping.

He qualified as a German lawyer in 2004 having studied in Freiburg im Breisgau, Paris and Kiel, and after postgraduate studies (DEA) in private international law and international commercial law at the Sorbonne (Paris I), he taught German legal terminology and German law at the Parisian Institute for Comparative Law. He wrote his doctoral thesis in comparative private international law (French, German and Italian law) and obtained a master of laws (LLM) in French, European and international business law at the Panthéon-Assas University (Paris II).

ANDREAS HAVIARAS

Haviaras & Philippou LLC

Andreas Haviaras was admitted as lawyer to the Cyprus Bar Association in 1977. A law graduate of the Law Faculty of the University of Athens in 1975 and of University College

London in 1976, he was admitted to the Cyprus Bar Association in 1977. He ran his own practice until 1987, which then merged with one of the oldest law firms in Cyprus. Since 2008 he has been the managing partner of Haviaras & Philippou LLC.

Mr Haviaras has been a member of the following permanent committees of the Cyprus Bar Association: the permanent advisory committee for offshore companies and tax planning, the permanent committee for the revision of legislation, the permanent committee for the rules of etiquette, the permanent committee for the Cyprus Stock Exchange, the advisory committee for the revision of the Civil Procedure Rules and the permanent shipping committee.

KEITH W HEARD

Burke & Parsons

Keith W Heard is a partner in the firm of Burke & Parsons. His areas of concentration include cargo damage and loss, general average and charterparty disputes. Mr. Heard was named the 'Best Lawyers' Admiralty and Maritime Lawyer of the Year for New York for 2016. He is a past chairman of the Admiralty Committee of the Association of the Bar of the City of New York and is a past chair of the Committee on Arbitration & ADR of the Maritime Law Association of the United States. He is also an associate editor of *American Maritime Cases*.

MINAKO IKEDA

Yoshida & Partners

Growing up in island countries such as the United Kingdom, Singapore and Japan, Minako has always felt a strong connection to the ocean. She has a unique personal history, having graduated from the University of Tokyo, studied at Michigan Law School, passed the New York Bar, and then finally passed the Japanese Bar. She handles a variety of maritime cases, both wet and dry, as well as non-marine cases.

L CHIDI ILOGU

Foundation Chambers

Mr L Chidi Ilogu, Senior Advocate of Nigeria, graduated LLB (Hons) from the University of Ife (now Obafemi Awolowo University), Nigeria and holds a master's degree (LLM) in maritime law from Cardiff Law School, University of Wales. He is the principal counsel of Foundation Chambers, a foremost maritime law firm based in Lagos, Nigeria, and has over 40 years' experience in legal practice.

He is a consultant to the International Maritime Organization on legal matters; member of the Chartered Institute of Arbitrators (UK), the Association of International Petroleum Negotiators, International Bar Association and the Nigerian Bar Association. He is second vice president of the Nigerian Maritime Law Association and serves on the advisory board of the Maritime Arbitrators' Association of Nigeria. He is the author of *Essays on Maritime Law and Practice* and *'Foundation of Carriage of Goods by Sea – The Nigerian Perspective'*. He has also published several articles in local and international journals on shipping and maritime law.

RICHARD JOHNSON-BROWN

Holman Fenwick Willan LLP

Richard Johnson-Brown is an associate at Holman Fenwick Willan's Piraeus office. He specialises in both 'dry' shipping matters (e.g., charterparty, bills of lading, ship management and shipbuilding disputes) and 'wet' matters (e.g., collisions, groundings and salvage). He is fluent in English, French and German and has intermediate proficiency in Greek.

WILLIAM HOLD

Holman Fenwick Willan Switzerland LLP

William Hold is a solicitor in Holman Fenwick Willan's Geneva office. He regularly acts for trading companies in charterparty disputes and trade disputes involving a range of physical commodities. He has acted in arbitrations governed by the Swiss Rules of International Arbitration, as well as the rules of the ICC, the SIAC, the RSA and the DIS.

Mr Hold also has a non-contentious practice and he often advises lenders and borrowers on commodity finance matters, and other parties on general commercial issues, which are usually related to commodities trading.

Before joining Holman Fenwick Willan, he practised for several years as an avocat in Geneva and spent several further years in Singapore practising as a foreign lawyer in the shipping and trade department of one of the largest firms in South-East Asia.

TESSA JONES HUZARSKI

Holman Fenwick Willan LLP

Tessa Jones Huzarski is an associate in Holman Fenwick Willan's London office. She has spent time in the firm's shipping, insurance and reinsurance, and energy and resources teams, as well as completing a six-month secondment in the firm's Singapore office and a three month secondment to an IG P&I Club. Her shipping experience includes advising on both wet and dry shipping matters. In particular, she has acted on salvage, wreck removal, groundings, collisions, fires and unsafe port claims. Ms Jones Huzarski has experience of both English Commercial and Admiralty Court proceedings, as well as international arbitration proceedings, including LMAA, SIAC and UNCITRAL arbitration.

JEREMY M JOSEPH

Joseph & Partners

Jeremy M Joseph is the principal partner and founder of Joseph & Partners, which is now one of the premier maritime law firms Malaysia has to offer. He has a Master's degree in maritime law from the University of Southampton and a recipient of the Chevening Scholarship from the British High Commission.

Originally a marine insurance broker, Jeremy has knowledge of the shipping and insurance industry. His first position in law was at the Singapore office of the international firm Holman Fenwick & Willan where he worked as an associate for several years until he set up Messrs Joseph & Partners in Kuala Lumpur. His firm has been consistently ranked in the top category every year since 2010 as a leading Malaysian shipping law firm by international law publications, such as *The Legal 500* and *Chambers Asia*. The firm has also bagged the prestigious 'ALB Malaysia Law Awards' for Maritime Law Firm of the Year for three consecutive years. The awards are hosted by Asian Legal Business and Thomson Reuters.

Jeremy regularly works as counsel and co-counsel in various shipping, insurance and arbitration matters. Some of the court cases have become important legal precedents in the Malaysian shipping scene.

Jeremy currently advises all sorts of companies and organisations from shipowners and P&I clubs, to insurers, banks, shipyards, charterers, and a variety of other commercial establishments.

In addition, he has authored numerous maritime law articles that have been subsequently published in the *Malayan Law Journal* and other international publications like *Getting the Deal Through – Shipping*, *Getting the Deal Through – Shipbuilding* and *The Shipping Law Review*. He has also written the shipping, insurance and carriers volumes of *Halsbury's Laws of Malaysia* and co-authored the Lexis Nexis *Malaysian Encyclopaedia of Forms and Precedents for Marine Insurance and Shipping*. He was the former Chairman of the Shipping & Admiralty Committee for the Malaysian Bar and is the current Secretary of the International Malaysian Society of Maritime Law.

PARIS KARAMITSIOS

Vgenopoulos & Partners Law Firm

Paris Karamitsios is head of litigation at V&P's Piraeus office. He specialises in Greek civil litigation, including insurance, shipping, transportation, commercial and banking law matters. He is fluent in Greek, English and German.

ALEX KEMP

Holman Fenwick Willan LLP

Alex Kemp works in the admiralty team of the shipping group. He works predominantly on wet disputes including salvage, wreck removal, groundings, collisions, fires and piracy, having been involved in over 50 hijackings. Such disputes often require advice in respect of limitation of liability, jurisdiction, insurance coverage and interlocutory applications.

Mr Kemp is also involved in advising on more general shipping matters including charterparty disputes and off hire claims where either LMAA arbitration or representation in the High Court is required. He has been involved in a number of reported High Court cases.

He has spent time in the firm's Dubai office and has recently finished a secondment to the legal department of an oil major.

Mr Kemp is an associate member of the Association of Average Adjusters, having recently passed the requisite examinations. He regularly lectures and writes articles, including the firm's biannual marine insurance case update. He is involved in the UK Chamber of Shipping's working group on general average.

TAE JEONG KIM

Bae, Kim & Lee LLC

Tae Jeong Kim is a partner in BKL's insurance and maritime practice group. Mr Kim has provided a wide range of services in shipping practice, ranging from traditional shipping and trade matters to dispute resolution involving charterparties or shipbuilding. He is also active in insurance practice as well, with a particular emphasis on trade insurance.

Recently, he successfully dealt with various ship arrest cases, LMAA arbitration cases for a Korean shipbuilder against foreign buyers and various disputes under Korean law.

Mr Kim received an LLB degree from Seoul National University College of Law in 1999. During his practice in BKL, he studied at the University of Southampton (an LLM in maritime law, no degree) in the UK in 2009–10.

JOHN KNIGHT

Chapman Tripp

John Knight is a partner in the Wellington office of Chapman Tripp. He advises on all types of insurance law issues and has a broad range of maritime law experience ranging from environmental regulatory aspects of maritime activity through to cargo claims, collisions, groundings and vessel securities, including enforcement processes and vessel arrests.

Mr Knight is a member of the New Zealand Insurance Law Association (NZILA) and is on the committee of the Maritime Law Association of Australia and New Zealand (MLAANZ).

He has been listed in both the *Best Lawyers International Guide* and *Chambers Asia Pacific* for maritime law for a number of years. According to *Chambers Asia Pacific 2013*, Mr Knight is ‘widely respected by his peers, he is accounted “a strong, able maritime lawyer”’.

Among his notable roles, Mr Knight advised the New Zealand government on specialist maritime law aspects concerning the grounding of the cargo vessel MV *Rena* and acted for Maersk in High Court declaratory judgment proceedings regarding the coastal shipping provisions of the Maritime Transport Act 1994.

VICTORIA KONOGRAI

Lexcellence Law Office

Victoria is a senior associate in the Odessa office of Lexcellence, where she is a member of the firm’s shipping practice. She studied for her master of laws at the Odessa National Academy of Law in 2010. Victoria also passed a one-year international business and management training course at Hanze University Groningen (the Netherlands) in 2012. Since January 2015 she has been an attorney at law and a member of the Ukrainian National Bar Association. Her practice encompasses a wide variety of shipping matters, including personal injuries and loss of life claims, cargo claims and ship arrest. Victoria is fluent in Ukrainian, Russian and English.

STEPHEN P KYNE

Burke & Parsons

Stephen P Kyne is a partner in the firm of Burke & Parsons. He specialises in casualty matters. Steve also practises in the maritime environmental area, representing various interests in connection with significant oil and hazardous material discharges in the United States and abroad. In recent years, he has acted for shipowners and operators involved in US criminal investigations and prosecutions arising from MARPOL violations. He also conducts environmental audits of fleets and companies, with a view to preventing such violations.

MARCO LOPEZ DE GONZALO

Studio Legale Mordiglia

Marco Lopez de Gonzalo has worked in the profession since 1982, acquiring in-depth knowledge in various fields of international commercial shipping. His expertise covers ship purchase and sale operations, re-flagging and construction, financing and debt restructuring. In the energy sector, Mr Lopez offers consultancy for the construction of regassification plants and trans-shipment plants. He has been appointed as an arbitrator by clients and courts both in Italy and abroad. Mr Lopez has been professor in maritime law at the University of Milan since 2001, and he has been a key speaker at many conventions and has authored a number of

publications, including two research monographs, a university textbook and various articles. He is the chief editor of *Diritto Marittimo*, member of the editorial committee of *Diritto del Commercio Internazionale*, and he is on the scientific committee for *Diritto del Turismo*.

KIM MACNAMARA

Holman Fenwick Willan Hong Kong

Kim Macnamara is an associate Holman Fenwick Willan's Hong Kong office. She specialises in international commercial dispute resolution and maritime law.

Her litigation experience includes advising shipowners, charterers and their P&I clubs on both wet and dry matters including collisions and salvage (acting for both owners and salvors); arrest in Hong Kong waters; cargo claims; charterparty disputes; unsafe port claims and other claims arising out of contract of carriage disputes. Ms Macnamara has experience in both High Court litigation matters and LMAA arbitrations.

Ms Macnamara also has experience dealing with non-contentious matters, in particular, advising on aspects of regulatory law, ship sale and purchase and ship finance.

WILLIAM MACLACHLAN

Holman Fenwick Willan LLP

William MacLachlan is a senior associate advising a wide variety of companies and financial institutions on a range of transactional shipping matters in both the commercial shipping and yachting industries. He has particular expertise in shipbuilding contracts, ship repair contracts, and sale and purchase of vessels, and spent eight months seconded to a leading European shipbuilder. William also has extensive experience of work in the field of private security and complex environments, acting for shipowners, PMSCs and other stakeholders, including advising on and drafting contracts for the provision of security services, advising on standard operating procedures and rules for the use of force, drafting stand-alone agreements in respect of the provision of bespoke security services to the offshore industry and advising PMSCs and their logistics providers on the full spectrum of contractual, compliance and licensing issues.

AMITAVA MAJUMDAR

Bose & Mitra & Co

Amitava Majumdar (Raja) is the managing partner of Bose & Mitra & Co. Mr Majumdar regularly advises the government of India on incorporation of international conventions into Indian law and has been part of the Indian delegation representing the Legal Committee Meetings in the IMO. He has also recently been appointed trustee of the Maritime Training Trust, chaired by DG Shipping.

He has been involved in a number of international commercial arbitrations in London, Singapore and India. Mr Majumdar regularly appears in shipping and international trade related litigations before the Supreme Court of India and various high courts and district courts of coastal states in India. He is a fellow of the Indian Council of Arbitration and has also recently been appointed as a committee member of the maritime committee of the Indian Council of Arbitration and a member of the governing counsel of the Singapore Chamber of Maritime Arbitration.

Over the past few years, Mr Majumdar has consistently been highly recommended by *Chambers & Partners* and the *Legal 500* in the field of shipping law. Mr Majumdar has been awarded the Shipping and Maritime Lawyer Award by Legal Era.

VAGIF MALLAYEV

Lexcellence Law Office

Vagif is the head of the firm's shipping, international trade and insurance practice. Vagif has been involved in a wide range of both dry and wet shipping disputes on behalf of P&I clubs and owners. His broad experience in dry shipping includes charterparty, bill of lading, ship building, and he also has experience of handling claims on the wet side: collision, general average, personal injury or loss of life, and pollution. Vagif is an attorney at law and a member of the Ukrainian National Bar Association, the Odessa Bar Association and the International Bar Association. Before law he worked for seven years in the insurance sector. He graduated from the faculty of law (LLB) of Mechnikov's Odessa National University in Odessa, Ukraine; the faculty of psychology (LLM) of the International Academy for Psychology in Saint Petersburg, Russia, and undertook postgraduate study in taxes at the School of Business and Administration in Warsaw (Poland).

LUCAS LEITE MARQUES

Kincaid – Mendes Vianna Advogados Associados

Lucas Leite Marques is a partner of the firm with over 10 years of experience in maritime, insurance and international law, with emphasis on litigation and arbitration. He has advised shipowners, charterers, carriers, P&I clubs, insurers, maritime agents, terminals and port operators, shipyards, cargo owners and trading companies, shippers and consignees, and has experience in maritime, commercial and civil law and in the insurance, environmental, administrative and litigation areas. He has a law degree from the Pontificia Universidade Católica (Rio de Janeiro); a postgraduate degree in civil procedural law (IAVM/UCAM) and an LLM in transnational commercial practice (CILS, 2013). He is a Professor of Maritime Law at FGV and a member of the Brazilian Bar Association; Brazilian Association of Maritime Law (ABDM); Iberoamerican Institute of Maritime Law (IIDM/BR); International Association of Young Lawyers (AIJA); Director of the Vice-Presidency of Maritime and Port Law of the Brazilian Centre for Mediation and Arbitration (CBMA) and Secretary of the Maritime and Port Law Commission of the Member of the Brazilian Bar Association.

DANIEL MARTIN

Holman Fenwick Willan LLP

Daniel Martin read law at Downing College, Cambridge, and has been a partner in Holman Fenwick Willan LLP since April 2013. He advises shipowners, operators, freight forwarders, insurers and brokers on a host of regulatory and compliance issues, including international trade sanctions, export controls, customs and anti-corruption legislation. He advises on all aspects of the EU and UK legislation, and he is also familiar with the application of US sanctions to non-US persons.

Mr Martin initially specialised in advising clients on disputes arising from charterparties, bills of lading, marine insurance and logistics operations, and he uses that experience and expertise to provide detailed, practical advice that is tailored to clients in the shipping, logistics and marine insurance sectors.

As well as advising clients on the impact of international trade sanctions in particular circumstances, including ways to engage effectively with regulators, he also advises on compliance procedures and controls that shipowners, logistics companies, banks, insurers and brokers should adopt to minimise risk. He regularly presents to insurers and others on recent developments in sanctions legislation and enforcement, and contributes to industry publications.

Mr Martin also advises extensively on anti-corruption legislation, and clients include the industry's Maritime Anti-Corruption Network (MACN).

GABRIELLA MARTIN

Holman Fenwick Willan LLP

Gabriella Martin is an associate in Holman Fenwick Willan's London office. Gabriella specialises in international trade, acting in particular for trading companies, banks, producers, charterers, traders, and insurers. She has experience in litigation and arbitration arising from international sale contracts, charterparties, bills of lading and energy agreements. Gabriella's undergraduate degree was Mandarin Chinese. She spent a year studying at Zhejiang University in Hangzhou, China and spent six months working in the firm's Hong Kong office.

JENS V MATHIASSEN

Gorrissen Federspiel

Jens V Mathiasen, born 1971, is a partner of Gorrissen Federspiel. He graduated with a Master's Degree in Law from the University of Copenhagen in 1996. In 1997 he became Master of Laws (LLM) at University of Southampton and worked as an attorney at Gorrissen Federspiel until 2001. In 2001 he was admitted to the Norwegian Bar, and in 2001–2003 he worked at Wiersholm, Mellbye & Bech, Norway. In 2003 he returned to Denmark and was admitted to the Danish High Court in 2005. Jens works with all aspects of shipping and ship finance. He is co-author of the Danish annotated 'MSA', 2012, and contributor to a number of other publications. He is a member of Comité Maritime International (CMI), Danish branch and the Danish Association of Banking and Finance Law.

JUAN DAVID MORGAN JR

Morgan & Morgan

Juan David Morgan Jr obtained his bachelor of arts degree from Ohio Wesleyan University, having completed his junior year at Heidelberg University in Germany, and his juris doctor degree with concentration on maritime law from Tulane University Law School in 1990. He joined Morgan & Morgan that same year and became a partner in 1997. He handles all kinds of maritime cases, dry and wet. He was a director and secretary of finance of the National Bar Association (1995 to 1997), a director of the Panama Maritime Chamber (2001 to 2005), a director of the Panamanian-German Chamber of Commerce and Industry (2004) and its president (2006–2008), a director of the Panama Maritime Lawyers Association (2004–2010) and its president (2009–2010). He is listed by *Chambers & Partners Global* and *Latin America* as a Leading Individual in Shipping Litigation (Band 1). He speaks Spanish, English and German.

THOMAS MORGAN

Holman Fenwick Willan Hong Kong

Thomas Morgan is a registered foreign lawyer in Holman Fenwick Willan's Hong Kong shipping and transport department. He specialises in international commercial dispute resolution with a focus on both wet and dry shipping matters.

Mr Morgan acts regularly for shipowners, charterers, salvors, P&I clubs and port terminal operators. He has advised on claims involving charter hire, liquefaction, unsafe ports, cargo damage, redelivery, stowage, collisions, salvage, and other claims arising from

bills of lading. This has involved advising on disputes brought before the English High Court and Court of Appeal and before the Federal Court of Australia and in LMAA and ICC arbitrations.

Mr Morgan was admitted as a solicitor in England and Wales in 2013 and has spent time in Holman Fenwick Willan's London and Melbourne offices. He has also recently undertaken a secondment with an International Group P&I Club, acting as counsel in their Asia claims department.

JUAN DAVID MORGAN JR

Morgan & Morgan

Juan David Morgan Jr obtained his bachelor of arts degree from Ohio Wesleyan University, having completed his junior year at Heidelberg University in Germany, and his juris doctor degree with concentration on maritime law from Tulane University Law School in 1990. He joined Morgan & Morgan that same year and became a partner in 1997. He handles all kinds of maritime cases, dry and wet. He was a director and secretary of finance of the National Bar Association (1995 to 1997), a director of the Panama Maritime Chamber (2001 to 2005), a director of the Panamanian-German Chamber of Commerce and Industry (2004) and its president (2006–2008), a director of the Panama Maritime Lawyers Association (2004–2010) and its president (2009–2010). He is listed by *Chambers & Partners Global* and *Latin America* as a Leading Individual in Shipping Litigation (Band 1). He speaks Spanish, English and German.

MUHAMMAD MUSLIM

Ali Budiardjo, Nugroho, Reksodiputro

Muhammad Muslim joined ABNR as an associate in April 2010. He graduated in 2007 from the Faculty of Law, University of Indonesia, majoring in civil law. He earned his LLM degree from the University of Southampton, majoring in maritime law. At ABNR, he has worked in teams of lawyers on maritime, corporate and investment projects, and has extensive regulatory knowledge in these practice areas.

TETSURO NAKAMURA

Yoshida & Partners

Tetsuro Nakamura is an ex-mariner and a Harvard Law School graduate, specialising in shipping matters, especially wet or casualty matters, heavy cargo claims and defence, and piracy and hijacking. He has handled many of the recent serious casualty cases involving Japanese interests and many Somali and Nigerian piracy cases. At present, he is a counsel to the Japanese Maritime Law Association and a member of, or counsel to, various marine-related associations and organisations.

IGOR NIKOLAEV

IN Law Office

Igor Nikolaev started his legal practice as an in-house lawyer in the Students Trade Union Association in 1991. Following this he worked in the St Petersburg Property Fund.

In 1995 he left the position as head of the legal department and joined the St Petersburg City Bar Association. In 1995 he participated in a legal programme organised by the Law Society of England and Wales and practised in different solicitors' firms in England.

In 1997 he worked for Herbert Smith in London in a project group. From January 1998 until May 2001 he worked as an in-house lawyer at Rothmans in St Petersburg. He dealt with a large range of legal work including customs issues, arbitration and litigation in local Russian courts and voluntary tribunals.

From May 2000 until April 2002 he was the only Russian lawyer who ran Clyde and Co's office in Russia (St Petersburg). He was involved in a number of different types of maritime, insurance, debt recovery, P&I and general practice cases related to Russian law and international issues. Since April 2002 he has run his own law practice in St Petersburg.

JUAN PABLO PALACIOS VELAZQUEZ

Palacios, Prono & Talavera

Juan Pablo Palacios Velázquez is a senior associate at Palacios, Prono & Talavera. His main areas of practice are maritime law, corporate law, contracts and litigation.

He works for the shipping and transport department of the firm, and advises ports and terminals, shipowners, charterers, P&I clubs and local insurers. He has experience in both dry and wet shipping and intervenes actively in cargo claims, general average claims, casualties and salvage claims, and marine insurance policy disputes.

He was educated at the Universidad Católica Nuestra Señora de la Asunción (law, first-class honours, 2010), the Universidad Nacional de Brasilia (2009) and the University of Southampton (LLM in maritime law with merits, 2011). He is a former clerk of the Supreme Court of Paraguay and speaks Spanish, English and Portuguese.

PIETRO PALANDRI

Studio Legale Mordiglia

Pietro Palandri has been a qualified lawyer since 1983. He is an expert on shipping and intermodal transportation, insurance, tourism and passenger transportation. In the past 10 years he has been asked by shipowners and insurance companies to deal with some prominent casualty claims. He also assists shipowners and banks with the purchasing, building and financing of ships. He has acted as an arbitrator in many foreign arbitration and judicial proceedings, and he often provides affidavits on issues regarding Italian legislation for foreign judicial proceedings. Mr Palandri is on the board of directors of the Italian Association of Maritime Law, he has written many articles for the specialist magazine *Diritto Marittimo* and for Lloyd's of London and he is often invited to speak at conventions, both in Italy and abroad.

SCOTT PILKINGTON

Holman Fenwick Willan Singapore LLP

Scott is a partner in HFW's Singapore office. He has a broad practice in maritime litigation and arbitration, international trade disputes, and offshore, including charterparty, COA, CVC, slot sharing, sale and purchase contract disputes, and a wide range of cargo disputes. He also drafts charterparties, sale and purchase contracts and other industry agreements.

Scott has worked on numerous high-profile casualties, including collisions, groundings, total loss and fires at sea. He also has particular experience of offshore disputes involving OSVs and PSVs, tug and tow, and shipbuilding disputes.

He lectures frequently, including for leading industry groups. Scott is qualified in England and Wales and Hong Kong.

VINCENT POWER

A&L Goodbody

Dr Vincent Power is a senior partner in A&L Goodbody's corporate department and is head of EU, and competition and procurement. An experienced lawyer for over 25 years, his practice spans transport (particularly shipping), EU, competition and procurement matters.

He is the author of Lloyd's Shipping Law Library's *EU Shipping Law*, which won the CMI's Albert Lilar Prize for the best shipping law book in the past five years worldwide. It is recognised as the leading work on the topic globally.

He is recognised for his work in all the leading directories of lawyers worldwide. He is the author or editor of seven books including *Competition Law and Practice* and *Irish Competition Law*. He has been invited to speak on EU, competition and transport matters around the world. He has a master's degree and a doctorate from Cambridge University where he was an Evan Lewis Thomas Law Student. He was granted the distinguished alumnus award from University College Cork where he was also a College Scholar. He is adjunct professor of law at University College Cork and visiting professor of EU Law at Dalhousie University in Canada. He has chaired, been a member of and advised four governmental commissions or bodies including the review group that led to the establishment of the Marine Casualty Investigation Board. He is the Comité Maritime International's EU Law Rapporteur.

NICHOLAS POYNDER

Holman Fenwick Willan LLP

Nicholas Poynder is a partner in the Shanghai office of Holman Fenwick Willan, where he has been based for eight years. He works principally on shipping matters, specialising in charterparty, bill of lading, memorandum of agreement and shipyard disputes, acting for both mainland Chinese and overseas clients.

JEREMY PRAIN

Bowman Gilfillan

Jeremy Prain is a partner in the maritime and transport department of Bowman Gilfillan and has expertise in admiralty dispute resolution (arrests or attachments); emergency response (ship collisions, groundings, salvage, etc.); shipping finance; ship sale and purchase; carriage of goods; marine insurance; road and rail transportation; commodities and regulatory advice.

He joined Bowman Gilfillan in 2005, having previously worked as a solicitor in England, and was promoted to partner in 2009. He is dual-qualified as a lawyer in South Africa and England and Wales and holds a master's degree in shipping from the University of Cape Town.

Mr Prain is listed in *The Legal 500*, which describes him as 'knowledgeable', 'embedded in the maritime industry' and is 'comfortable with working in cross-border matters'.

MARCO REMIORZ

Dabelstein & Passehl

Marco Remiorz is the vice-managing partner of Dabelstein & Passehl. His special areas of activity are international commercial law, carriage by road, merchant shipping law (with emphasis on P&I, charterparty disputes and recovery) and freight forwarding law. Dr Remiorz frequently drafts and negotiates supply, transport, project and logistic contracts. His clients include globally operating freight forwarders, manufacturers and insurance companies.

Dr Remiorz qualified as a German lawyer in January 2001. After studying law at Bonn University and University of Lausanne he worked with the legal department of

a major German sub-contractor for the automotive industry and thereafter moved to an international law firm in Fresno, California. He was employed at a transport and insurance law-oriented law firm in Hamburg from 2001 until 2004. He obtained his legal doctorate at the Technical University of Dresden in 2005 after having joined Dabelstein & Pässehl in April 2004. He became a partner in 2008, was president of the transport law commission of AIJA from 2008 to 2011 and was appointed as co-vice chair of the American Bar Association International Transportation Committee in August 2011. Dr Remiorz teaches insurance law at the University of Hamburg and transport law at the Helmut-Schmidt-Universität. He lectures regularly at international congresses and seminars.

MICHAEL RITTER

Holman Fenwick Willan LLP

Michael Ritter is an associate within the Holman Fenwick Willan shipping and transport team. He advises predominantly on issues arising from marine casualties including collisions, fires, groundings and wreck removals, covering issues including issues of limitation of liability, jurisdiction and underlying liabilities both in tort and any underlying contracts of carriage. He is adept at dealing with practical, legal and compliance issues arising in casualty response scenarios, both those above and also maritime piracy and onshore kidnap events. In particular, he has advised on issues relating to the payment and reimbursement of ransoms, the impact of the Terrorism Act 2000, and the risks faced by companies operating in difficult environments. This has included assisting owners in a significant number of Somali cases, and more recently in six Nigerian cases between February and April 2016, both during the period of the hijack and following the crew's release in attending the port of refuge to debrief the crew and collect evidence as well as in handling the subsequent commercial litigation.

EILEEN ROBERTS

A&L Goodbody

Eileen Roberts is a senior partner in the litigation and dispute resolution department at A&L Goodbody. She is an experienced commercial litigator with considerable expertise in transportation disputes in particular in relation to maritime and aviation disputes including collision claims, contractual disputes, cargo claims, ship arrest and judicial sale of vessels.

She represented the claimant in the first-ever commercial court proceedings in Ireland under the Cape Town Convention successfully securing the removal of third-party registered interests over commercial aircraft.

She has represented shipowners and claimants for many years in various maritime disputes in relation to fishing vessels, oil tankers, cargo transporters and leisure cruisers.

She is ranked as a tier-one litigator by *Chambers Global* and *The Legal 500*, where she is described as a 'stand-out specialist'. She is recommended by *Legal Experts Europe, Middle and East Africa, Legal 500, Chambers Global, Best Lawyers in Ireland 2015* and *PLC Which Lawyer?*

RICARDO ROZAS

Jorquiera & Rozas Abogados

Awarded the ILO Client Choice Awards 2011, nominated in *Who's Who Legal: Shipping* (2010–2012) and *Who's Who Legal: Insurance & Reinsurance* (2011–2015) and recommended as a 'Leader in [his] Field' for *Chambers Latin America 2014*, Ricardo Rozas is very experienced

in all aspects of transportation, charterparties, bills of lading, cargo claims, admiralty law, pollution, personal injuries, ship finance, ship repair contracts, arrest of vessels, and marine insurance and non-marine insurance and reinsurance.

He is chair of the Maritime and Land Transport Committee of the International Bar Association (IBA). In addition, he is a member of the Insurance Committee of the IBA; of the Maritime Committee of the IBA; of the Latin American Maritime Law Institute; of the International Association of Insurance Law; and of the Chilean Maritime Law and Bar Associations.

He is a graduate of the School of Law of the Catholic University of Chile (LLB) and holds a master of laws (LLM) from Southampton University. He is a regular speaker at different insurance and transport conferences around the world and author of several publications.

LAWRENCE RUTKOWSKI

Seward & Kissel LLP

Lawrence Rutkowski is a partner in Seward & Kissel's corporate finance department. He has practised law since 1979.

Mr Rutkowski is head of the firm's maritime and transportation finance group. In this capacity, he has worked on matters ranging from the formation of joint ventures, asset finance transactions, secured and unsecured lending, registered and unregistered securities transactions, mergers and acquisitions and cross-border leases to restructurings and bankruptcy. Mr Rutkowski's practice also includes considerable experience in equipment finance and in the energy and mining fields.

He is a member of the Association of the Bar of the City of New York, the American Bar Association and the Maritime Law Association of the United States (vice chair, committee on maritime bankruptcy and insolvency).

Mr Rutkowski has been cited in *Euromoney's* 'Best of the Best', *Chambers USA* and *Chambers Global*, *The Best Lawyers in America* and *Who's Who Legal 2009: Shipping and Maritime*. He has also been recognised by *Best Lawyers* in the practice of admiralty and maritime law from 2006 to 2014, inclusive. Most recently, he was named one of the top-10 lawyers in Lloyd's List One Hundred 2014 – 'The Most Influential People in the Shipping Industry'.

He has made appearances on national media regarding piracy off the coast of Somalia.

DESI RUTVIKASARI

Ali Budiardjo, Nugroho, Reksodiputro

Desi Rutvikasari joined ABNR as an associate in December 2009. She obtained her law degree from the University of Indonesia, majoring in international law. She earned her LLM degree from the University of Southampton majoring in maritime law. At ABNR, she has assisted clients in non-contentious matters such as general corporate matters, land acquisition and environmental law. She has also been involved in commercial litigation, alternative dispute resolution and arbitration. In the maritime practice area, she has handled matters such as cargo claims and disputes arising out of collisions and seafarer agreements.

JOSÉ ALFREDO SABATINO PIZZOLANTE

Sabatino Pizzolante Abogados Marítimos & Comerciales

José Alfredo Sabatino Pizzolante holds a law degree from the University of Carabobo (Venezuela). He studied at the University of Wales, College of Cardiff, where he obtained

an MSc in port and shipping administration and an LLM in maritime law. Currently he is a partner at Sabatino Pizzolante Abogados Marítimos & Comerciales, the managing director of Globalpandi, SA (P&I correspondents) and a professor at the Universidad Experimental Marítima del Caribe (Caracas). He is also a legal adviser to the Venezuelan Shipping Association, vice-president of the Venezuelan Association of Maritime Law, executive vice-president of the Venezuelan Association of Port Law and a titular member of the Comité Maritime International and the Iberoamerican Institute of Maritime Law. He has written extensively on the subject of Venezuelan maritime law, attending many international seminars and congresses as a speaker.

EKIN DÜNYA ŞAHİN

Ersoy Bilgehan Lawyers & Consultants

Ekin Dünya Şahin is a senior associate at Ersoy Bilgehan. She graduated from Istanbul Bahcesehir University in 2006 and was admitted to the Istanbul Bar Association in 2007.

She advises P&I clubs, H&M underwriters, shipowners, charterers, brokers and agents in cargo claims, collisions, salvage, general average, ship arrests, charterparty and bill of lading disputes, personal injury and death on board vessels' and recognition and enforcement of foreign judgments and arbitration awards.

She also assists local and foreign banks and financial institutions in ship finance, restructuring of loans, foreclosure and execution matters.

She speaks Turkish and English.

LUIS DE SAN SIMÓN

San Simón & Duch

Luis de San Simón has been a practising lawyer since 1978, specialising in maritime, transport and insurance law. He has dealt with a wide range of cases, including the *Sea Harrier*, *Castillo de Bellver* and *Prestige* cases, and is also an arbitrator.

His professional activity, experience and prestige have seen him present cases in all types of court and judicial affairs, arbitration, and conduct extensive national and international advisory work.

Mr de San Simón is a full member of the International Maritime Committee, as well as a member of the Spanish Association of Maritime Law, the Ibero-American Institute of Maritime Law and the International Bar Association. He is also an honorary member of the Centre of Law Studies of Salzburg. He was also a former member of the Advisory Committee of the Latin Law Institute and Tulane Law School, the chair of the A1 Subcommittee and an adviser to Spain at the IMO.

He is the creator and founder of the International Maritime Law Seminar, which is held annually in London. Mr de San Simón also teaches several master's degrees in maritime law. He has published various articles in both national and international journals, and authored and contributed to several publications. He has also delivered many lectures both in Spain and abroad.

He is the president of the Maritime and Transport Law Section of the Madrid Bar Association.

MICHAEL SAFRAN

S Friedman & Co

Michael Safran is a partner at S Friedman & Co, specialising in shipbuilding, ship sale and purchase and shipping finance.

Mr Safran's experience includes shipbuilding, ship sale and purchase and related finance, negotiating, structuring and drafting complex cross-border financial transactions, cross-border asset-backed finance, lending and syndicated lending, restructuring and rescheduling of debt and complex lease and lease-back arrangements for marine containers finance.

Mr Safran was educated at the Law School of College of Management, Tel Aviv (LLB), and is a member of the Israel Bar Association. He speaks Hebrew and English.

TOMOI SAWAKI

Yoshida & Partners

Tomoi Sawaki has handled many maritime cases, not only wet cases, but also dry cases such as cargo claims or defence and charterparty disputes. She also dealt with many cases arising from the Great East Japan Earthquake in 2011.

SIMON SHADDICK

Holman Fenwick Willan

Simon Shaddick deals with contentious shipping and marine matters, with a particular focus on disputes in the offshore energy sector, and has broad experience in maritime dispute resolution. He has handled a wide range of shipping and offshore cases, including claims relating to marine casualties, charterparties, shipbuilding contracts, marine insurance, bills of lading, cargo damage and pollution. He has represented a variety of domestic and international shipping and offshore energy interests in litigation, arbitration, mediation and commercial negotiations. Simon is qualified in both Australia and England, and worked for several years in the firm's London office.

SAHAT SIAHAAN

Ali Budiardjo, Nugroho, Reksodiputro

Sahat Siahaan joined ABNR in July 1996 and became a partner in January 2010. He graduated from the University of Indonesia, majoring in law on economic activities. In 1996, he earned his graduate diploma in legal studies from the University of Canberra and, in 2002, his LL.M degree from the University of Western Australia in Perth. His practice areas have included shipping, litigation, corporate, investment, transportation and insurance laws. He handles ship-financing projects, cargo claims, collisions, marine insurance and other related shipping law matters.

ANDREW STAINER

Bull Housser & Tupper LLP

Andrew Stainer is an associate in the firm's dispute resolution and litigation, insurance and maritime groups. His practice focuses on maritime, commercial and insurance disputes and he also advises on maritime commercial agreements. He has extensive experience with matters involving casualty response, maritime collisions and claims, bodily injury, and property loss. He represents a diverse array of clients including underwriters, shipowners, P&I clubs, corporate bodies, and individuals. Prior to joining Bull Housser, Andrew practiced in Toronto where he focused on transportation and commercial litigation. He has also worked in the Shanghai offices of a leading British shipping and insurance firm.

VANESSA TATTERSALL

Holman Fenwick Willan LLP

Vanessa Tattersall advises shipowners, shipyards, charterers and cargo interests in maritime, international trade and general contractual disputes, with a focus on claims arising under shipbuilding contracts, charterparties and bills of lading. She acts predominantly in multi-jurisdictional commercial litigation and arbitrations and also advises on contract wordings, including advising shipowners and shipyards on renegotiating shipbuilding contracts and refund guarantee wordings, and advising on charterparty wordings and amendments.

CAROLINE THOMAS

Holman Fenwick Willan Hong Kong

Caroline Thomas is a senior associate in Holman Fenwick Willan's Hong Kong office. She specialises in competition, insurance, maritime, telecoms, trade and regulatory law.

Her litigation experience includes advising on cargo claims (some involving jurisdictional disputes); arresting and releasing vessels (including in developing country jurisdictions); charter hire claims; claims under ship-management agreements; debt recovery; and bringing and defending insurance claims under cargo; CAR; D&O; hull; liability; jewellers block and Welcar policies. She also works on high-value trade litigation (including ICC arbitration).

On the non-contentious side, Ms Thomas has also assisted in the drafting of reinsurance and retrocession agreements and drafted various commercial contracts (including for the supply of bunkers). She advises on various regulatory issues including for insurance and telecoms clients and on competition law.

She has written several articles including on insurance and competition law in Taiwan; time bars in insurance and reinsurance; on marine cargo insurance and on competition law and insurance/transport.

Ms Thomas was admitted as a solicitor in England and Wales (2008) and Hong Kong (2010).

GAVIN VALLELY

Holman Fenwick Willan

Gavin Vallely has more than 20 years' experience advising on contentious and non-contentious matters concerning commercial shipping, offshore oil and gas, and international trade. His work in the shipping sector includes advising on all forms of charterparties, ship sale and purchase and construction, Australian regulatory schemes (including HSE, coastal shipping and customs) and port and terminal operations. He has acted for the operators of vessels, offshore installations and terminals in respect of numerous casualty and pollution incidents, managing the response to investigations by government authorities and the defence of any related criminal and civil proceedings. He has also acted in several major claims in respect of damage to cargo (including petroleum products, chemicals, fertiliser and grain cargoes), berth damage, ITF boycotts, OH&S prosecutions and port state control issues.

DIMITRI VASSOS

Holman Fenwick Willan LLP

Dimitri is the managing partner of Holman Fenwick Willan's Piraeus office. He specialises in shipping, focussing mainly on dispute resolution arising from charterparties, bills of lading, shipbuilding, collisions, fire and explosion, salvage, general average, groundings, total

loss, towage, offshore and limitation and international trade contracts. He is consistently recommended in legal directories, such as *The Legal 500* and *Chambers*. He is fluent in both English and Greek.

THUOLASE VENGA

AsiaLegal LLC

Thuolase has been involved in both contentious and non-contentious matters in various areas of law including shipping, admiralty, arbitration and insolvency. Her experience in shipping and admiralty work includes regularly advising and acting for a wide range of stakeholders including shipowners, charterers, cargo interests, shipmanagers, mortgagee banks, P&I and H&M Clubs, bunker suppliers and underwriters in claims relating to charterparties, bills of lading, ship-management contracts, demurrage, cargo, collisions, pollution and international trade and commodities disputes.

GODOFREDO MENDES VIANNA

Kincaid – Mendes Vianna Advogados Associados

Godofredo Mendes Vianna is a senior partner of the firm with over 25 years of experience in shipping, foreign trade and oil and gas. He has advised shipowners, charterers, carriers, P&I clubs, insurers, maritime agents, terminals and port operators, shipyards, cargo owners and trading companies, shippers and consignees, and has experience in maritime law, commercial, civil, tax, corporate, insurance, environmental and administrative law as well as litigation. He has a law degree from the Pontifícia Universidade Católica (Rio de Janeiro). He is a Professor of Maritime Law at FGV and Member of the Brazilian Bar Association, Brazilian Association of Maritime Law (ABDM); Iberoamerican Institute of Maritime Law (IIDM/BR); Vice-President of the Transport Law Commission of the International Bar Association and President of the Maritime and Port Law Commission of the Member of the Brazilian Bar Association.

MICHAEL J WALSH

Burke & Parsons

Michael J Walsh is a partner in the firm of Burke & Parsons. He has significant experience defending an international classification society in large casualty litigation in a variety of federal and state courts, and has also counselled third-party inspection services and other design professionals involved in professional negligence or breach of contract claims. He has also handled arbitrations under both SMA and AAA rules.

REBECCA WARDER

Holman Fenwick Willan LLP

Rebecca Warder is responsible for knowledge management for the Holman Fenwick Willan shipping group. She produces a variety of client publications, provides training both to clients and to lawyers within the firm and has also advised clients on their own knowledge management systems. Ms Warder has particular expertise in relation to environmental regulation and co-edits the firm's 'Green Shipping Bulletin'.

Before moving into her professional support lawyer role, she practised as a senior shipping litigator, advising on a wide variety of multi-jurisdictional and high-value shipping disputes. Her cases primarily involved charterparty, bill of lading and shipbuilding and rig-building disputes, although she also advised on marine insurance litigation and on the

drafting of dispute resolution clauses. Ms Warder worked on international arbitrations including LCIA, LCIA-DIFC and ICC cases as well as LMAA arbitrations, and has handled both mediations and expert determination.

MATTHEW WILMSHURST

Holman Fenwick Willan LLP

Matthew is an associate in Holman Fenwick Willan's London shipping department. Matthew works with shipowners, NVOs and transport operators, cargo interests and insurers on logistics and supply chain related disputes and projects. Matthew's dispute resolution and litigation practice includes claims arising out of the carriage of goods, which encompasses defence work, cargo recovery, and salvage and general average claims; representing ports and terminal operators on third-party liability, property damage and business interruption claims; and marine insurance policy and commercial disputes. Matthew also provides advisory services to transport operators on standard terms and conditions and contracts of carriage, and to insurers on products and policy wordings. Matthew is ranked in *Chambers UK* 2014 and 2015 as an 'associate to watch'. He 'attracts a great deal of praise for his work in salvage claims'. Clients say that, 'He knows the industry and the way it works.'

MARCUS WEBERSBERGER

Dabelstein & Passehl

Marcus Webersberger is an associate at Dabelstein & Passehl. His areas of practice include shipping law, national and international carriage by road and air and freight forwarding law.

Dr Webersberger qualified as a German lawyer in 2014. He has studied law at the Universities of Bayreuth and Augsburg and did his legal traineeship at the Higher Regional Court of Bamberg with stations at Dabelstein & Passehl and a German law firm with focus on transport and commercial law. He was awarded his legal doctorate for his thesis on exclusion of liability clauses in bills of lading throughout the 19th and 20th century.

ANTHONY WOOLICH

Holman Fenwick Willan LLP

Anthony Woolich read law at Jesus College, Cambridge, and has been a partner in Holman Fenwick Willan LLP since May 2009. He specialises in competition law, public procurement, trade sanctions, anti-bribery and anti-corruption, regulation, state aid, data protection and privacy, commercial contracts, joint ventures, intellectual property and information technology.

He is a member of the City of London Solicitors Company's Committee on Commercial Law and the Steering Committee of the Procurement Lawyers Association, as well as the Law Society's Competition Section, the UK Association for European Law and the Competition Law Association.

He is recommended in *Chambers 2016* which refers to him as the head of department at Holman Fenwick Willan LLP. Clients provide an array of praise. 'He is very experienced, with good instincts and a highly professional manner. He closely managed every stage of our project through to the end,' says one. Another stated: 'His technical knowledge is second to none.' Chambers has previously recommended him as a 'notable practitioner, earning acclaim for his 'in-depth knowledge' of a wide number of industries', and reported clients as saying that he is 'measured in his approach', according to impressed interviewees. Clients

appreciate that 'he takes the time to consider and evaluate all details' and is able to 'think on his feet when it comes to linking the item for discussion with relevant issues'. He is 'incredibly responsive and available, and always meets deadlines', and has 'excellent client service'. *The Legal 500* 2015 says that 'the 'highly intelligent, experienced, knowledgeable and responsive' Anthony Woolich assists purchasers and suppliers in regulatory and commercial issues.' Legal 500 has previously quoted clients as saying that 'he knows the answers, knows the market, and gives pragmatic, commercial advice', that he is 'experienced and business minded', and that he 'exercises good judgement'. He is also recommended as an expert in *Who's Who Legal*, which quotes commentators referring to his 'first-class know-how' in sanctions.

Appendix 2

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Appendix 3

GLOSSARY OF TERMS

INTERNATIONAL LEGISLATION

Abuja MoU – Memorandum of Understanding on Port State Control for West and Central African Region 1999

Anti-Fouling Convention – International Convention on the Control of Harmful Anti-Fouling Systems in Ships 2001

Arrest Convention 1999 – International Convention on Arrest of Ships 1999

Athens Convention – Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974

Athens Convention Protocol 2002 – Protocol of 2002 to the Athens Convention

Ballast Water Management Convention – Convention for the Control and Management of Ships' Ballast Water and Sediments 2004

Barcelona Convention – Convention for the Protection of the Mediterranean Sea Against Pollution 1976

Black Sea MoU – Memorandum of Understanding on Port State Control in the Black Sea Region 2000

Brussels Convention – International Convention Relating to the Arrest of Sea-Going Ships 1952

Bunker Convention – International Convention on Civil Liability for Bunker Oil Pollution Damage 2001

CLC Convention – International Convention on Civil Liability for Oil Pollution Damage 1969

CMR Convention – Convention on the Contract for the International Carriage of Goods by Road 1956

Collision Convention 1910 – Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910

Collision Convention 1952 – International Convention for the Unification of Certain Rules relating to Civil Jurisdiction in Matters of Collision 1952

Colregs – International Regulations for Preventing Collisions at Sea 1972

Criminal Collision Convention 1952 – International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision and Other Incidents of Navigation 1952

Directive 93/75/EEC – Council Directive 93/75/EEC of 13 September 1993 concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods

Directive 2009/16/EC – Directive 2009/16/EC of 23 April 2009 of the European Parliament and the Council on Port State Control

FAL Convention – Convention on Facilitation of International Maritime Traffic 1965

Hague Rules – The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924

Hague-Visby Rules – Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968

Hamburg Rules – UN Convention on the Carriage of Goods by Sea 1978

HNS Convention – International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996 as revised by the Protocol of 2010 to the Convention

Hong Kong Convention – Hong Kong Convention for the Safe and Environmentally Sound Recycling of Ships 2009

Immunity of State-Owned Ships Convention – 1926 International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Vessels and 1934 Additional Protocol

INMARSAT Convention – Convention on the International Mobile Satellite Organization 1976

Intervention Convention – International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969

Intervention Protocol – Protocol relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil 1973

LLMC Convention 1976 – London Convention on Limitation of Liability for Maritime Claims 1976

LLMC Protocol 1996 – Protocol to amend the LLMC Convention 1996

Load Lines Convention – International Convention on Load Lines 1966

London Dumping Convention – Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972

Maritime Cabotage Regulation – Regulation (EEC) No. 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (Maritime Cabotage)

Maritime Liens and Mortgages Convention – International Convention on Maritime Liens and Mortgages 1993

MARPOL (73/78) – International Convention for the Prevention of Pollution From Ships 1973 (as modified by the Protocol of 1978)
IBC Code – International Code for the Construction and Equipment of Ships carrying Dangerous Chemicals in Bulk

Mediterranean MoU – Mediterranean Memorandum of Understanding 1997

Nairobi WRC 2007 – Nairobi International Convention on the Removal of Wrecks 2007

New York Convention – Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

Nuclear Convention – Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material 1971

Oil Pollution Fund Convention – International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992

OILPOL Convention – International Convention for the Prevention of Pollution of the Sea by Oil 1954

OPRC Convention – International Convention on Oil Pollution preparedness, response and cooperation 1990
OPRC-HNS Protocol – Protocol on the Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances 2000

Rotterdam Rules – UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009

Paris MoU – Paris Memorandum of Understanding on Port State Control 1982

1910 Salvage Convention – Brussels 1910 Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea

1989 Salvage Convention – International Convention on Salvage 1989

Search and Rescue Convention 1979 – International Convention on Maritime Search and Rescue 1979

SOLAS – International Convention for the Safety of Life at Sea 1974
IMDG Code – International Maritime Dangerous Goods Code 2004
IMSBC Code – International Maritime Solid Bulk Cargoes Code 2011
INF Code – International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes on Board Ships 2001
ISM Code – International Safety Management Code 1998
ISPS Code – International Ship and Port Facility Security Code 2004

STCW Convention – International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1995

SUA – Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation 1988

Tokyo MoU – Tokyo Memorandum of Understanding on Port State Control in the Asia-Pacific Region 1994

Tonnage Convention – International Convention on the Tonnage Measurement of Ships 1969

UNCLOS – United Nations Convention on the Law of the Sea 1982

Viña del Mar MoU – Latin American Agreement on Port State Control of Vessels 1992

ORGANISATIONS

CAMP	Paris Arbitral Chamber for Maritime Matters
EU	European Union
IACS	International Association of Classification Societies Ltd
ICS	International Chamber of Shipping
ILO	International Labour Organization
IMO	International Maritime Organization
LMAA	London Maritime Arbitrators Association
SCMA	Singapore Chamber of Maritime Arbitration
SIAC	Singapore International Arbitration Centre
UNCITRAL	United Nations Commission on International Trade Law

ABBREVIATIONS

CIF	cost, insurance and freight
DWT	deadweight tonnage
FOB	free on board
FSU	floating storage unit
GA	general average
GRT	gross registered tonnage
GT	gross tonnage
LDT	light displacement tonnage
LOF	Lloyd's Open Form
LoU	letter of undertaking
MoA	memorandum of agreement
MTPA	million tons per annum
NRT	net registered tonnage
NVOC	non-vessel operating carrier
NVOCC	non-vessel operating common carrier
P&I	protection and indemnity
Ro-Ro	roll-on, roll-off (vessels)
RT	revenue ton
SDRs	special drawing rights
TEU	twenty-foot equivalent unit
VLCC	very large crude carrier