# THE SHIPPING LAW REVIEW

SEVENTH EDITION

**Editors**
George Eddings, Andrew Chamberlain and
Holly Colaço

THE LAWREVIEWS

# THE SHIPPING LAW REVIEW

SEVENTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in June 2020
For further information please contact Nick.Barette@thelawreviews.co.uk

**Editors**
George Eddings, Andrew Chamberlain and
Holly Colaço

THE LAWREVIEWS

PUBLISHER
Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGER
Joel Woods

SENIOR ACCOUNT MANAGERS
Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS
Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Gavin Jordan

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Katrina McKenzie

SUBEDITOR
Helen Smith

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk



ISBN 978-1-83862-503-0

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

# ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

A&L GOODBODY

A KARITZIS & ASSOCIATES LLC

ASIALEGAL LLC

BAE, KIM & LEE LLC

BLACK SEA LAW COMPANY LTD

BLOOMFIELD LAW PRACTICE

FRANCO & ABOGADOS ASOCIADOS

GAUCI-MAISTRE XYNOU

GORRISSEN FEDERSPIEL

HESKETH HENRY

HFW

IN LAW OFFICE

JORQUIERA & ROZAS ABOGADOS

JTJB-TAIPEI

MAPLES GROUP

MESTRE ABOGADOS

MORGAN & MORGAN

PALACIOS, PRONO & TALAVERA

PPT LEGAL

PROMARE | RABB CARVALHO ADVOGADOS ASSOCIADOS

SABATINO PIZZOLANTE ABOGADOS MARÍTIMOS & COMERCIALES

SEWARD & KISSEL LLP

STUDIO LEGALE MORDIGLIA

TMI ASSOCIATES

VERALAW (DEL ROSARIO RABOCA GONZALES GRASPARIL)

# CONTENTS

# PREFACE

The seventh edition of this book aims to continue to provide those involved in handling shipping disputes with an overview of the key issues relevant to multiple jurisdictions. We have again invited 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 of *The Shipping Law Review*, we begin with cross-jurisdictional chapters looking at the latest developments in important areas for the shipping industry: competition and regulatory law, sanctions, ocean logistics, piracy, shipbuilding, ports and terminals, offshore shipping, marine insurance, environmental issues and decommissioning. A new chapter on ship financing is also included, which seeks to demystify this interesting and fast-developing area of law.

Each jurisdictional chapter gives an overview of the procedures for handling shipping disputes, 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 the authors 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, security and counter-security requirements, and the potential for wrongful arrest claims are also included.

The authors review the vessel safety regimes in force in their respective countries, along with port state control and the operation of both registration and classification locally. The applicable environmental legislation in each jurisdiction is explained, as are the local rules in respect of collisions, wreck removal, salvage and recycling. Passenger and seafarer rights are examined, and contributors set out the current position in their jurisdiction. The authors have then looked ahead and commented on what they believe are likely to be the most important developments in their jurisdiction during 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 about 5 per cent of global trade overall. More than 90 per cent of the world's trade is still transported by sea. The law of shipping remains as interesting as the sector itself and the contributions to this book continue to reflect that.

The maritime sector continues to take stock after experiencing a bumpy ride during the past few years and, while the industry is looking forward to continued recovery, there is still uncertainty about the effects of trade tariffs and additional regulation. Under the current US administration, the sanctions picture has become ever more complex and uncertain.

With a heightened public focus on the importance of environmental issues, a key issue within the shipping industry remains environmental regulation, which is becoming ever more stringent. At the IMO's MEPC 72 in April 2018, it was agreed that international shipping carbon emissions should be cut by 50 per cent (compared with 2008 levels) by 2050. This agreement has led to some of the most significant regulatory changes in the industry in recent years and is likely to lead to greater investment in the development of zero carbon dioxide fuels, possibly paving the way for phasing out carbon emissions from the sector entirely. This IMO Strategy, together with the stricter sulphur limit of 0.5 per cent m/m introduced in 2020, has generated significant increased interest in alternative fuels, alternative propulsion and green vessel technologies.

Brexit continues to pull focus. Much has been printed about the effects of Brexit on the enforcement of maritime contracts. However, the majority of shipping contracts globally will almost certainly continue to be governed by English law, as Brexit will not significantly effect enforceability. Arbitration awards will continue to be enforceable under the New York Convention and it seems likely reciprocal EU and UK enforcement of court judgments will be agreed.

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

**George Eddings, Andrew Chamberlain and Holly Colaço**
HFW
London
May 2020

Chapter 20

# ENGLAND AND WALES

*George Eddings, Andrew Chamberlain, Holly Colaço and Isabel Phillips*[1]

## 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 at December 2019, the UK Ship Register was ranked 24th on world fleet tonnage volume statistics, with a gross tonnage of 10.5 million.[2] In economic terms, shipping accounts for 95 per cent of exports and imports and is reported to help support £37.4 billion in gross value added each year in the UK. The wider maritime sector also contributes approximately £14.5 billion and 185,000 jobs to the UK economy every year.[3] According to the most recent statistics, total port freight traffic through the UK's major ports between April and June 2019 was 476 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 developed primarily by decided cases, although there are statutes in key areas. The Merchant Shipping Act 1995 (the MSA 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 the major international maritime conventions.

While the United Kingdom remains a member of the European Union, regulations and directives made by institutions of the European Union have either a direct or indirect effect in the jurisdiction of England and Wales. A referendum on the UK's membership of the European Union was held in June 2016, in which the majority voted to leave the European Union. Following the triggering of Article 50 in March 2017, the UK left the EU in January 2020 and is currently in a transition period, which ends on 31 December 2020. During the

1 George Eddings and Andrew Chamberlain are partners, Holly Colaço is a professional support lawyer and Isabel Phillips is an associate at HFW.

2 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879362/shipping-fleet-statistics-2019.pdf.

3 Maritime and Coastguard Agency Business Plan 2019–2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/790357/MCA_Business_Plan_2019_-_2020.pdf.

4 UK port freight quarterly statistics: April to June 2019, www.gov.uk/government/statistics/port-freight-quarterly-statistics-april-to-june-2019.

transition period, EU regulations continue to apply in the UK. After 31 December 2020, EU regulations will not have effect in the UK unless expressly implemented into UK law. Unlike EU directives, which are left to Member States to implement by way of national legislation, regulations are automatically and directly applicable in Member States. UK legislation dealing with matters covered by directives could therefore remain substantively unaltered, as the UK laws passed to implement them will remain in place, potentially requiring only minor changes. However, any critical gaps currently covered by regulations will need to be addressed by new domestic legislation. While the outcome of negotiations between the United Kingdom and the European Union is impossible to predict, Brexit could potentially affect a number of areas. These could include the return of border controls, the loss of the right for UK entities to perform cabotage services throughout the European Union and the loss of 'passporting' rights for the UK's marine insurance and ship finance sectors.

## 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 13 judges attached to the two 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 specific rules and practice directions 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 *The Arctic*[7] (consideration of charterers' requirement to keep the vessel in class at all times), *The Renos*[8] (determination on which costs to include in owners' constructive total loss calculation), *The Lady M*[9] (judgment on the exemption of liability under the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules) for deliberate acts), *The Tai Prize*[10] (on the interpretation of 'clean on board' in the draft bill of lading), *The Grand Fortune*[11] (on identifying

5 Ministry of Justice website, www.gov.uk/guidance/admiralty-and-commercial-court-judges.

6 The current edition is the 10th edition, updated in January 2018.

7 *Silverburn Shipping (IOM) Ltd v. Ark Shipping Co LLC (The Arctic)* [2019] EWHC 376.

8 *The Swedish Club and others v. Connect Shipping Inc and another (The Renos)* [2019] UKSC 29.

9 *Glencore Energy UK Ltd and Glencore Ltd v. Freeport Holdings Ltd (The Lady M)* [2019] EWCA Civ 388.

10 *Priminds Shipping (HK) Co Ltd v. Nobel Chartering Inc (The Tai Prize)* [2020] EWHC 127.

11 *Americas Bulk Transport Limited (Liberia) v. COSCO Bulk Carrier Ltd* [2020] EWHC 147.

parties to a charter party), *The CMA CGM Libra*[12] (on the legal test for unseaworthiness, the limits of a carrier's obligation to exercise due diligence, and the repercussions of defective passage planning), *The Ocean Victory*[13] (safe port warranties, restoring the traditionally understood position), *The Maersk Tangier*[14] (a significant Hague-Visby Rules judgment on package limitation for containerised cargoes), *The Aqasia*[15] (judgment on the non-applicability of the package or unit limitation to bulk cargoes under the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (the Hague Rules)), *The Aconagua Bay*[16] (on the interpretation of the 'always accessible' warranty in voyage charters), *The Songa Winds*[17] (judgment confirming previous decisions on letters of indemnity for delivery of cargo without production of the original bills of lading), *The Alhani*[18] (on the applicability of the Hague Rules time bar to a misdelivery claim), *The Yangtze Xing Hua*[19] and *The Maria*[20] (on construction of the terms 'act' and 'a similar amendment' in the context of the inter-club agreement), *The Pacific Voyager*[21] (on owners' obligation to proceed approach voyage with utmost dispatch under a charter with no ETA or ERTL at load port), *Volcafe*[22] (Supreme Court case reversing the Court of Appeal position and clarifying the scope of the burden of proof on carriers seeking to rely on the Hague Rules' inherent vice exemption), and *The New Flamenco*[23] (limiting the scope of what will be regarded as acts of mitigation). 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. The Supreme Court 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.[24]

The Recast Brussels I Regulation[25] (the Recast Regulation) covers jurisdiction as between courts of different EU Member States and replaces the 2001 Brussels I Regulation (the Brussels I Regulation).[26] The Recast Regulation took effect on 10 January 2015 and applies

12 *Alize 1954 v. Allianz Elementar Versicherungs AG (The 'CMA CGM LIBRA')* [2020] EWCA Civ 293.

13 *Gard Marine & Energy Limited v. China National Chartering Co Ltd and another (The Ocean Victory)* [2017] UKSC 35.

14 *AP Moller-Maersk t/a 'Maersk Line' v. Kyokuyo Co Ltd (The Maersk Tangier)* [2018] EWCA Civ 778.

15 *Vinnlustodin HF Vatryggingafelag Islands HF v. Sea Tank Shipping AS (formerly known as Tank Invest AS) (the 'Aqasia')* [2018] EWCA Civ 276.

16 *Seatrade Group NV v. Hakan Agro DMCC (the 'Aconcagua Bay')* [2018] EWHC 654 (Comm).

17 *Songa Chemicals AS v. Navig8 Chemicals Pool Inc and Glencore Agriculture BV (Songa Winds)* [2018] EWHC 397 (Comm).

18 *Deep Sea Maritime Ltd v. Monjasa A/S (the 'Alhani')* [2018] EWHC 1495.

19 *Transgrain Shipping (Singapore) Pte Ltd v. Yangtze Navigation (Hong Kong) Co Ltd ('Yangtze Xing Hua')* [2017] EWCA Civ 2017.

20 *Agile Holdings Corporation v. Essar Shipping Ltd ('Maria')* [2018] EWHC 1055 (Comm).

21 *CSSA Chartering and Shipping Services SA v. Mitsui OSK Ltd (the 'Pacific Voyager')* [2018] EWCA Civ 2413.

22 *Volcafe Ltd and others v. Compania Sub Americana De Vapores SA* [2018] UKSC 61.

23 *Globalia Business Travel SAU v. Fulton Shipping Inc (The New Flamenco)* [2017] UKSC 43.

24 *PST Energy 7 Shipping LLC and another (Appellants) v. OW Bunkers Malta Limited and another (Respondents)* [2016] UKSC 23.

25 Regulation (EU) No. 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.

26 Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

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 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, and the court 'first seized' 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 seized of the dispute. This provision will apply even if no party to the dispute is domiciled within the European Union. This provision helps to give more certainty to commercial contracts, but significant concerns remain. First, 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. Second, the Recast Regulation is unclear on whether a Member State court is bound to uphold an exclusive jurisdiction agreement that nominates a court outside the EU. Given these issues, the question of where to commence proceedings will continue to require careful thought.

Following the post-Brexit transition period, which ends on 31 December 2020, the Recast Brussels regime will cease to apply unless the UK government and the European Union agree otherwise. The UK government would also be free to adopt the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 1988, 2007 (the Lugano Convention) or the Hague Convention on Choice of Court Agreements 2005. There will also be a knock-on effect on the service of proceedings as the EU Service Regulations will cease to apply.

***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 on the Carriage of Passengers and their Luggage by Sea 1974 (the Athens Convention);

*c* two years for salvage claims under the International Convention on Salvage 1989 (the 1989 Salvage Convention);

*d* two years for collision claims under Section 190 of the MSA 1995;

*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);[27]

*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);[28] and

*h* 12 years for 'upon speciality' claims, for instance, for claims based upon deeds.[29]

27 Sections 11 and 12 of the Limitation Act 1980 (LA 1980).

28 Sections 2 and 5 of the LA 1980.

29 Section 8 of the LA 1980.

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 and the vast majority of international shipping arbitrations are currently dealt with in London.[30] For a dispute to be subject to arbitration there must be an arbitration agreement, which may be either written in the contract under which the dispute arises or agreed between the parties after the dispute has arisen.

The London Maritime Arbitrators Association (LMAA) is an association of specialist maritime arbitrators operating in London. In 2019, the LMAA received approximately 2,952 new arbitration appointments and published 529 arbitration awards.[31]

LMAA arbitration is frequently used to determine commercial shipping disputes, such as charter party 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).

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 2017, and apply to all LMAA arbitrations commenced on or after 1 May 2017.

Several forms of ADR are used within England and Wales, including expert determination, early neutral evaluation, early intervention 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.

### iii Enforcement of foreign judgments and arbitral awards

#### *Foreign judgments*

There are currently 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, Iceland, Norway and Switzerland. Enforcement of judgments from these countries is relatively

30 www.hfw.com/downloads/001161-HFW-The-maritime-arbitration-universe-in-numbers-One-Year-On-May-19.pdf.

31 LMAA, www.lmaa.org.uk/event.aspx?pkNewsEventID=208da443-7800-4720-84b3-7f4f3f5fc9ce.

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. Reciprocal enforcement of judgments will potentially be affected by Brexit after the transition period, depending on the ultimate position once the Brexit negotiations are complete.

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 Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (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. Brexit will not affect enforcement of arbitration awards as London arbitration awards will continue to be internationally enforceable after Brexit in the same way as they are now, under the New York Convention.

## 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 'Shipbuilding' chapter 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 UN Convention on the Carriage of Goods by Sea 1978 (the Hamburg Rules) or the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (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 regarding 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 if 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 or her agent before or at the time of the receiver removing the goods into his or her 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 its 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 on which 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 of these classes has a defined means of enforcement. A common characteristic of 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).

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 charter party 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*[32] case 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 charter party in a charter party chain. Salvors may exercise possessory liens over salved 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 charter parties, bills of lading are a fundamental element of 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 to care for the cargo properly.

Pursuant to the Carriage of Goods by Sea Act 1992, 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 in good faith, that is, a consignee or endorsee (following a valid endorsement, or chain of

32 *Dry Bulk Handy Holding Inc and another v. Fayetter International Holdings and another* [2013] EWCA Civ 184.

endorsements) in possession of the bill. The Court of Appeal 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.[33]

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 in the absence of 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 and 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 charter party, by expressly incorporating terms of the charter party into the issued bills of lading. Provisions incorporating charter-party 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 charter party 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 charter party into the bill of lading. This will, however, only be successful if (1) the wording purporting to incorporate the charter-party terms is wide enough, (2) the term of the charter party 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.[34] It is important when trying to incorporate charter-party terms into a bill of lading to refer to the exact charter party 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 charter party in a chain is being incorporated in the bill of lading, the head charter party is incorporated, but that presumption is subject to several exceptions.

Cargo claims can also be brought under charter parties. 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 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).

33 *Standard Chartered Bank v. Dorchester LNG (2) Ltd (The 'Erin Schulte')* [2015] 1 Lloyd's Rep 97.

34 Eder, Bennett, Berry, Foxton and Smith, *Scrutton on Charter parties and Bills of Lading* (23rd Edition, 2015), pages 109 and 110.

### 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. Subsequent legislation seeks to strike a balance between a claimant's right to be adequately compensated in allowed situations and a shipowner's requirement for the insurance costs of an adequately high limitation fund to be affordable.

The Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC Convention 1976) was given effect in the United Kingdom by virtue of the MSA 1995 and is enclosed in Schedule 7 thereof. The Protocol to amend the LLMC Convention 1996 (the LLMC Protocol 1996) was given effect in the United Kingdom by Statutory Instrument 1998 No. 1258, which varied the LLMC Convention 1976 (and Schedule 7 of the MSA 1995) to the extent set out in the LLMC Protocol 1996. 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.[35]

#### *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'.[36] Charterers are entitled to limit their liability,[37] as are slot charterers,[38] 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 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

35 www.imo.org/en/MediaCentre/PressBriefings/Pages/24-LLMC-limits.aspx; www.imo.org/en/About/Conventions/ListOfConventions/Pages/Convention-on-Limitation-of-Liability-for-Maritime-Claims-(LLMC).aspx.

36 *McDermid v. Nash Dredging and Reclamation Co Ltd* [1987] AC 906 and *CF Turner v. Manx Line Ltd* [1990] 1 Lloyd's Rep. 137.

37 *CMA CGM SA v. Classica Shipping Co Ltd (The CMA Djakarta)* [2004] 1 Lloyd's Rep. 460, at page 465.

38 *Metvale Ltd v. Monsanto International Sarl (The MSC Napoli)* [2008] EWHC 3002 (Admiralty).

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. However, indemnity claims in respect of salvage contributions as between owners and cargo interests are limitable.[39]

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 that 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).[40] 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.[41]

### *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 CPR 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,[42] and second, bringing England in line with many other jurisdictions, a limitation fund can now be constituted by way of a letter of undertaking,[43] which offers owners and insurers a significant cost saving.

### *Summary*

States across the world have enacted the provisions of the LLMC Convention 1976 and the LLMC Protocol 1996 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) 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.

39 *The Breydon Merchant* [1992] 1 Lloyd's Rep 373.

40 Lord Hoffmann in *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.

41 Griggs, Williams and Farr, *Limitation of Liability for Maritime Claims* (4th Edition, 2004), pages 3 to 6.

42 *Seismic Shipping Inc v. Total E&P UK Plc (The Western Regent)* [2005] EWCA Civ 985.

43 *The Atlantik Confidence* [2016] EWHC 2412.

## 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) to (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 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*

Pursuant to 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 or her 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 he or she must provide an undertaking as to the arrest expenses of the Admiralty Marshal.

Security may be provided by the defendant 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 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 through gross negligence. In practice, satisfying these criteria is very difficult.

***Requirement to pursue claim on merits or possibility of arrest 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 the Admiralty Marshal's discretion.

**ii Court orders for sale of a vessel**

The Admiralty Court has the jurisdiction to order the sale of a vessel that 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 illustrated in *The Union Gold*,[44] any order for sale must be preceded by an appraisement 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, appraisement 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 the best possible price unless there is an exceptional reason to deviate. In the case of *The Union Gold*, the 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.

44 *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 United Kingdom. The MCA fulfils a number of maritime safety functions, including coordinating a 24-hour maritime emergency response service, monitoring the quality of vessels operating in UK waters, promoting and managing the UK Ship Register and working to minimise the environmental effects of shipping.

The MCA is also responsible for ensuring that the United Kingdom implements and adheres to the key international conventions regarding maritime safety to which it is a party, which include:

*a* the International Convention for the Safety of Life at Sea 1974 (SOLAS);
*b* the International Regulations for Preventing Collisions at Sea 1972 (COLREGs), as amended;
*c* the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 (the STCW Convention); and
*d* the International Convention on Maritime Search and Rescue 1979 (the Search and Rescue Convention 1979).

### ii Port state control

England is a party to the Paris Memorandum of Understanding on Port State Control 1982 (the Paris MOU). The provisions of the Paris MOU were incorporated into EU law through the EU Council Directive on Port State Control.[45] 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 2009/16/EC 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

45 Directive 95/21/EC.

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 before the vessel is permitted to leave the United Kingdom.

In 2018, the MCA's ship surveyors carried out 2,916 inspections, including 1,272 port state control inspections, and 40 subsequent detentions.[46]

### 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;
*b* British dependent territory citizens;
*c* British overseas citizens;
*d* companies incorporated in one of the European Economic Area (EEA) countries;
*e* citizens of an EU Member State exercising their rights under Article 48 or 52 of the EU Treaty in the United Kingdom;
*f* companies incorporated in any British overseas possession that have their principal place of business in the United Kingdom or in that British overseas possession; or
*g* European economic interest groupings.[47]

Where none of the qualified owners is resident in the United Kingdom, a representative person must be appointed who may be either an individual resident in the United Kingdom or a company incorporated in an EEA country with a place of business in the UK.[48]

The UK flag is currently ranked among the top performing flags on the Paris MOU and the Tokyo Memorandum of Understanding on Port State Control in the Asia-Pacific Region 1994 (the Tokyo MOU) 'white lists'.[49] 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 operating qualifying ships that are 'strategically and commercially managed in the UK'.[50]

46 Maritime and Coastguard Agency Business Plan 2019–2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/790357/MCA_Business_Plan_2019_-_2020.pdf.
47 UK Ship Register, Guide to Registration, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/799033/2019_April_A_Guide_to_Registration_V4.pdf.
48 ibid.
49 ibid.
50 HMRC website, www.gov.uk/hmrc-internal-manuals/tonnage-tax-manual/ttm01010.

***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:[51]

*a* ABS Europe Ltd;
*b* Bureau Veritas;
*c* Class NK;
*d* DNV GL;
*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.[52]

**iv Environmental regulation**

The United Kingdom is a party to the major international conventions regulating air and sea pollution.

The International Convention for the Prevention of Pollution from Ships 1973 (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). From 1 January 2020, the limit for sulphur content of fuel oil used by ships outside ECAs is reduced to 0.5 per cent mass by mass (m/m) (the previous limit was 3.5 per cent m/m).[53] In relation to the reduction of SOx, compliance with Annex VI is normally attained via the use of low-sulphur fuel or approved equivalents such as exhaust gas cleaning systems known as 'scrubbers'. From 1 March 2020, it is prohibited to carry fuel oil exceeding 0.5 per cent m/m sulphur content on board. 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 now have to comply with more stringent Tier III standards

51 Maritime and Coastguard Agency website, www.gov.uk/uk-authorised-recognised-organisations-ros.

52 [1995] 2 Lloyd's Rep 299.

53 www.imo.org/en/MediaCentre/HotTopics/GHG/Documents/2020%20sulphur%20limit%20FAQ%202019.pdf.

if operating within the North American and Caribbean ECA-NOx.[54] Ships built on or after 1 January 2021 (or those fitted with non-identical replacement engines or additional engines on or after this date) must comply with Tier III standards if operating in the Baltic Sea and North Sea ECAs.[55]

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 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 International Convention on Civil Liability for Oil Pollution Damage 1969 (the CLC Convention) was incorporated into English law by the Merchant Shipping (Oil Pollution) Act 1971, subsequently Sections 152 to 170 of Chapter III of the MSA 1995. This Convention imposes strict liability on tanker owners for damage caused by oil spills and requires compulsory liability insurance.

The International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (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 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (the Oil Pollution Fund Convention) and the Supplementary Fund Protocol 2003 also apply. These provide for the payment of supplementary compensation if the funds available under the CLC Convention are not sufficient.

On 13 February 2004, the International Maritime Organization (IMO) adopted the International Convention for the Control and Management of Ships' Ballast Water and Sediments (the Ballast Water Management Convention). This was in response to the growing concern about the spread of invasive species as a result of them being carried 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. It is hoped this goal will be achieved by introducing various regulations to manage both the transfer and discharge of ballast water. The Convention has been in force since 8 September 2017.[56]

54 Lloyd's Register Marine, www.lr.org/en/air-emissions/.

55 www.imo.org/en/OurWork/Environment/PollutionPrevention/AirPollution/Pages/Nitrogen-oxides-(NOx)-%E2%80%93-Regulation-13.aspx.

56 www.imo.org/en/About/conventions/listofconventions/pages/international-convention-for-the-control-and-management-of-ships%27-ballast-water-and-sediments-(bwm).aspx.

### v Collisions, salvage and wrecks

#### *Collisions*

Several international conventions relating to collision claims operate in England and Wales. The Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910 (the Collision Convention 1910) was implemented into English law by the Maritime Conventions Act 1911 (repealed and replaced by the MSA 1995). The Collision Convention 1910 sets out the basic rules regarding civil liability for collisions between vessels. Further, the COLREGs also apply to all foreign ships sailing in UK territorial waters and to all UK 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 are updated from time to time by reference to IMO Regulations.

#### *Salvage*

The 1989 Salvage Convention applies in England and Wales. There is no mandatory form of salvage agreement, but the Lloyd's Open Form (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 2020 and, with the 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.[57] 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 MSA 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 International Convention on the Removal of Wrecks (the Nairobi WRC 2007), adopted in 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, as amended) (WSR). The WSR 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

57 www.hfw.com/LOF-2020-an-update-to-the-worlds-oldest-and-most-commonly-used-salvage-contract-Feb-2020.

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 an 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 gross tonnage (GT) are repealed as a result of the EU Regulation on Ship Recycling.

The EU Regulation on Ship Recycling (No. 1257/2013) entered into force in England and Wales on 30 December 2013 and applied from December 2015. The Regulation is 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 ship recycling is subject to environmentally sound management (Article 1). The Regulation also aims 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 for the Safe and Environmentally Sound Recycling of Ships 2009 (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* by 31 December 2020, all ships of 500 GT or over, that are EU-flagged and non-EU flagged 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* as of 31 December 2018, owners of EU-flagged ships have had to ensure that their ships are only recycled in recycling facilities that have been approved and included in a 'European List', the latest version of which was published on 22 January 2020.[58]

### 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).

58 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2020.018.01.0006.01.ENG&toc=OJ:L:2020:018:TOC.

The Athens Convention was incorporated into English law via Section 183 of the MSA 1995. The Athens Convention renders a carrier liable for damage or loss suffered by a passenger in the event that 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 special drawing rights (SDRs) per carriage; however, under Article 7, England increased the limit 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 United Kingdom having been the 41st International Labour Organization (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 its aim is 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 wholly or substantially employed in the United Kingdom may also benefit from the protection 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's reputation as a centre of excellence for the resolution of international maritime disputes continues to go from strength to strength. The majority of shipping contracts are governed by English law, and London continues to be the leading shipping arbitration centre, measured by the number of annual arbitrator appointments.[59] In addition, the specialist courts that 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 60 per cent of cases heard in the English Commercial Court in 2018 and 2019 involved litigants based outside England and Wales.[60]

London also continues to be a major centre for mediation, with a total value of cases mediated each year of around £11.5 billion, including many shipping cases. Mediation remains attractive as settlement rates continue to be high, with mediators reporting an aggregate settlement rate of around 89 per cent of all cases in an audit conducted by the Centre for Effective Dispute Resolution in 2018.

Following the Brexit referendum, Lloyd's insurance market confirmed that it would be opening an office in Brussels to secure 'passporting' rights into EU countries. Other insurers have indicated that they are following suit. Questions have been raised about whether the maritime industry will continue to choose English law to govern shipping contracts and the extent to which English judgments and arbitration awards will continue to be enforceable after the United Kingdom exits the European Union. However, while the coming years may see some changes to the established order of the London maritime world, it seems likely that the majority of financial institutions and insurers will continue to see the benefits of being located in London. Given the sophistication of English shipping law and the high level of trust placed in the dedicated Commercial and Admiralty Courts, it is generally expected that English law will remain the first choice of the industry for shipping contracts. Arbitration awards will remain internationally enforceable and London is therefore likely to remain the leading maritime arbitration centre.

**Appendix 1**

# ABOUT THE AUTHORS

## GEORGE EDDINGS

*HFW*

George Eddings advises on all aspects of maritime and offshore energy law, including charter parties, bills of lading and construction contracts. In the past year, George has been running a lively shipping practice, including dealing with the tragic loss of a very large bulk carrier. George has also been involved in researching the caseload volume of the main maritime arbitration centres and published a pioneering briefing on this area.

George is also part of HFW's emergency response team, with particular experience in the contractual aspects of general average and issues arising from groundings, collisions, salvage and the carriage of dangerous goods by sea.

He has headed teams arbitrating many issues arising from ship and drilling rig construction disputes and has drafted multimodal bills of lading with some of the world's leading container companies. George has strong industry connections, in particular in South Korea, Japan, Scandinavia and Latin America.

He has regularly been listed as a leading shipping lawyer in *Chambers* and *The Legal 500*, with one source citing his 'excellent reputation' (*The Legal 500* 2016).

## ANDREW CHAMBERLAIN

*HFW*

Andrew Chamberlain is a partner at HFW and is the global head of admiralty and crisis management. He is a former Royal Navy officer and specialises in 'wet' shipping cases, including salvage and wreck removal (acting for salvors as well as owners and their underwriters), collisions, fire and explosion, total loss and wreck removal. He also advises on both civil and criminal pollution liabilities, marine insurance coverage disputes and the full range of other shipping-related commercial and contractual disputes.

Andrew served at sea with the Royal Navy and had a stint with the Hong Kong Squadron before qualifying as a lawyer. As a partner at HFW since 2003, he has been heavily involved in many of the largest casualties of recent years, including MSC *Napoli* (2007), MSC *Chitra* (2010), *Costa Concordia* (2012), *Smart* (2013), *Norman Atlantic* (2014), *Eastern Amber* and *Maersk Seoul* (2015), *Burgos* (2016) and *Sanchi* and *Maersk Honam* (both 2018 and ongoing).

Andrew lectures regularly on salvage, wreck removal and casualty response and is an acknowledged expert in the field. He has been invited to be chairman of the Lloyd's Salvage and Wreck Removal conference in London (the leading global industry event) every year

since 2013. He is consistently recommended in *Chambers* and *The Legal 500* for his work on shipping and casualty matters, with one source commenting, 'What he doesn't know about shipping isn't worth knowing' (*Chambers* 2016).

**HOLLY COLAÇO**

*HFW*

Holly Colaço is responsible for knowledge management for the HFW shipping group. She produces a variety of client publications, provides training both to clients and to lawyers within the firm and has advised clients on their own knowledge management systems.

Before moving into her professional support lawyer role, Holly practised as a senior shipping litigator, advising on a wide variety of multi-jurisdictional and high-value shipping disputes. Her cases concerned both wet and dry shipping matters, including charter party and bill of lading disputes, collisions, groundings, salvage, and unsafe port claims. She has also advised on marine insurance litigation and has undertaken a number of related secondments with International Group of P&I Club members, handling a wide variety of P&I and defence claims, and with a major London insurer.

She has experience of English Commercial and Admiralty Court proceedings, and international arbitration, including LCIA, ICC and LMAA.

**ISABEL PHILLIPS**

*HFW*

Isabel Phillips is an associate in HFW's shipping group, specialising in regulatory and compliance work linked to international trade. She advises shipping and logistics clients on EU and UK sanctions legislation, export controls, customs matters and anti-corruption legislation. Isabel has recently advised a shipyard on compliance with the EU General Data Protection Regulation and an insurance provider on provisions of the UK Bribery Act 2010. Isabel also has experience of charter party, shipbuilding and offshore drilling disputes.

**HFW**

Friary Court
65 Crutched Friars
London EC3N 2AE
United Kingdom
Tel: +44 20 7264 8000
Fax: +44 20 7264 8888
andrew.chamberlain@hfw.com
holly.colaco@hfw.com
george.eddings@hfw.com
isabel.phillips@hfw.com
www.hfw.com

an LBR business

ISBN 978-1-83862-503-0