

THE SHIPPING LAW
REVIEW

NINTH EDITION

Editors

Andrew Chamberlain, Holly Colaço and Richard Neylon

THE LAWREVIEWS

THE SHIPPING LAW
REVIEW

NINTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in June 2022
For further information please contact Nick.Barette@thelawreviews.co.uk

Editors

Andrew Chamberlain, Holly Colaço and Richard Neylon

THE LAWREVIEWS

PUBLISHER
Clare Bolton

HEAD OF BUSINESS DEVELOPMENT
Nick Barette

TEAM LEADER
Katie Hodgetts

SENIOR BUSINESS DEVELOPMENT MANAGER
Rebecca Mogridge

BUSINESS DEVELOPMENT MANAGERS
Joey Kwok and Juan Hincapie

BUSINESS DEVELOPMENT ASSOCIATE
Archie McEwan

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Leke Williams

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Felicia Rosas

SUBEDITOR
Caroline Fewkes and Sarah Andreoli

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
© 2022 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at May 2022, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed
to the Publisher – clare.bolton@lbresearch.com

ISBN 978-1-80449-079-2

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:

ADAME GONZÁLEZ DE CASTILLA & BESIL

A KARITZIS & ASSOCIATES LLC

ASIALEGAL LLC

BLACK SEA LAW COMPANY LLC

BLOOMFIELD LP

BOSE & MITRA & CO

BUDIDJAJA INTERNATIONAL LAWYERS

CHANDLER MHM LIMITED

CHOI & KIM

COSTA, ALBINO & LASALVIA ABOGADOS

D L & F DE SARAM

DZUNGSRT & ASSOCIATES LLC

GAUCI-MAISTRE XYNOU

GORRISSEN FEDERSPIEL

HARRIS & CO MARITIME LAW OFFICE

HESKETH HENRY

HFW

IN LAW OFFICE

JORQUIERA & ROZAS ABOGADOS (JJR LAW FIRM)

MAPLES GROUP

MESTRE ABOGADOS SLP

MORGAN & MORGAN

PALACIOS, PRONO & TALAVERA

PPT LEGAL

SABATINO PIZZOLANTE ABOGADOS MARÍTIMOS & COMERCIALES

STUDIO LEGALE MORDIGLIA

TMI ASSOCIATES

VERALAW (DEL ROSARIO RABOCA GONZALES GRASPARIL)

VILLAGRAN LARA

CONTENTS

PREFACE.....	vii
<i>Andrew Chamberlain, Holly Colaço and Richard Neylon</i>	
Chapter 1	SHIPPING AND THE ENVIRONMENT 1
<i>Thomas Dickson and Johanna Ohlman</i>	
Chapter 2	INTERNATIONAL TRADE SANCTIONS 14
<i>Daniel Martin</i>	
Chapter 3	COMPETITION AND REGULATORY LAW 23
<i>Anthony Woolich and Daniel Martin</i>	
Chapter 4	OFFSHORE 33
<i>Paul Dean, Alistair Loweth and Nicholas Kazaz</i>	
Chapter 5	OCEAN LOGISTICS..... 41
<i>Catherine Emsellem-Rope</i>	
Chapter 6	PORTS AND TERMINALS 48
<i>Matthew Wilmshurst</i>	
Chapter 7	SHIPBUILDING 54
<i>Vanessa Tattersall and Simon Blows</i>	
Chapter 8	MARINE INSURANCE 65
<i>Jonathan Bruce, Alex Kemp and Jenny Salmon</i>	
Chapter 9	PIRACY 76
<i>Michael Ritter and William MacLachlan</i>	
Chapter 10	DECOMMISSIONING IN THE UNITED KINGDOM 86
<i>Tom Walters and Johanna Ohlman</i>	

Chapter 11	SHIP FINANCE	97
	<i>Gudmund Bernitz and Anna Papadopoulou</i>	
Chapter 12	AUSTRALIA.....	107
	<i>Gavin Vallely, Simon Shaddick, Tom Morrison and Carlita Bloecker</i>	
Chapter 13	BRAZIL.....	126
	<i>Geoffrey Conlin, Bernardo de Senna and Carolina França</i>	
Chapter 14	CAYMAN ISLANDS	138
	<i>Sberice Arman and Christian La-Roda Thomas</i>	
Chapter 15	CHILE.....	149
	<i>Ricardo Rozas</i>	
Chapter 16	CHINA.....	165
	<i>Nicholas Poynder and Jean Cao</i>	
Chapter 17	CYPRUS.....	179
	<i>Antonis J Karitzis and Katerina Kefaloniti</i>	
Chapter 18	DENMARK.....	227
	<i>Peter Appel and Thomas E Christensen</i>	
Chapter 19	ECUADOR.....	241
	<i>Leonidas Villagran</i>	
Chapter 20	ENGLAND AND WALES.....	252
	<i>Andrew Chamberlain and Holly Colaço</i>	
Chapter 21	FRANCE.....	269
	<i>Mona Dejean</i>	
Chapter 22	GREECE.....	282
	<i>Paris Karamitsios, Dimitri Vassos and Eliza Eliades</i>	
Chapter 23	HONG KONG	294
	<i>Nicola Hui</i>	
Chapter 24	INDIA.....	305
	<i>Amitava Majumdar and Tripti Sharma</i>	

Chapter 25	INDONESIA..... <i>Stefanny Simorangkir</i>	338
Chapter 26	ISRAEL..... <i>Yoav Harris and John Harris</i>	350
Chapter 27	ITALY <i>Pietro Palandri and Marco Lopez de Gonzalo</i>	360
Chapter 28	JAPAN..... <i>Jumpei Osada, Masaaki Sasaki and Takuto Kobayashi</i>	374
Chapter 29	MALTA..... <i>Jean-Pie Gauci-Maistre, Despoina Xynou and Deborah Mifsud</i>	384
Chapter 30	MEXICO <i>Ramiro Besil Eguia</i>	401
Chapter 31	NEW ZEALAND..... <i>Simon Cartwright, Zoe Pajot and Lydia Sharpe</i>	413
Chapter 32	NIGERIA..... <i>Adedoyin Afun</i>	433
Chapter 33	PANAMA..... <i>Juan David Morgan Jr</i>	451
Chapter 34	PARAGUAY..... <i>Juan Pablo Palacios Velázquez</i>	461
Chapter 35	PHILIPPINES <i>Valeriano R Del Rosario, Maria Theresa C Gonzales, Daphne Ruby B Grasparil and Jennifer E Cerrada</i>	471
Chapter 36	RUSSIA <i>Igor Nikolaev</i>	487
Chapter 37	SINGAPORE..... <i>Toby Stephens, Pooja Kapadia, Magdalene Chew, Edwin Cai and Vanesse Koh</i>	496

Chapter 38	SOUTH KOREA	526
	<i>C J Kim</i>	
Chapter 39	SPAIN.....	538
	<i>Anna Mestre and Lluís Gomez</i>	
Chapter 40	SRI LANKA.....	550
	<i>Nadine Puvimanasinghe, Sachitra Abeywardane and Gayani Rambukwella</i>	
Chapter 41	SWITZERLAND	564
	<i>William Hold</i>	
Chapter 42	THAILAND	573
	<i>Nathee Silacharoen, Ittirote Klinboon, Rawi Meckvichai and Chonlawat Rojanaparpal</i>	
Chapter 43	UKRAINE.....	587
	<i>Evgeniy Sukachev and Anastasiya Sukacheva</i>	
Chapter 44	UNITED ARAB EMIRATES	601
	<i>Yaman Al Hawamdeh and Tariq Idais</i>	
Chapter 45	UNITED STATES	618
	<i>James Brown, Michael Wray, Thomas Nork, Chris Hart, Alejandro Mendez, Melanie Fridgant and Svetlana Sumina</i>	
Chapter 46	VENEZUELA.....	643
	<i>José Alfredo Sabatino Pizzolante</i>	
Chapter 47	VIETNAM.....	656
	<i>Dang Vu Minh Ha and Tran Trung Hieu</i>	
Appendix 1	ABOUT THE AUTHORS.....	667
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	699
Appendix 3	GLOSSARY.....	705

PREFACE

The aim of the ninth edition of this book is 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, including ocean logistics, piracy, shipbuilding, ports and terminals, marine insurance, environmental issues, decommissioning and ship finance.

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 Conference on Trade and Development (UNCTAD) estimating that the operation of merchant ships contributes about US\$380 billion in freight rates within the global economy, amounting to about 5 per cent of global trade overall. Between 80 per cent and 90 per cent of the world's trade is still transported by sea (the percentage is even higher for most developing countries) and, as of 2021, the total value of annual world shipping trade had reached more than US\$14 trillion. Although the covid-19 pandemic has had a significant effect on the shipping industry and global maritime trade (which plunged by an estimated 4.1 per cent in 2020), the recovery was swift. The pandemic truly brought to

the fore the importance of the maritime industry and our dependence on ships to transport supplies. The law of shipping remains as interesting as the sector itself and the contributions to this book continue to reflect that.

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.

Andrew Chamberlain, Holly Colaço and Richard Neylon

HFW

London

May 2022

HONG KONG

*Nicola Hui*¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Hong Kong is currently the ninth-busiest container port in the world,² handling over 17.7 million twenty-foot equivalent units (TEUs) of containers in 2021.³ As at January 2022, there were more than 2,500 vessels on the Hong Kong Shipping Register, with a gross tonnage of over 130 million,⁴ making Hong Kong the fourth-largest register after Panama, Liberia and the Marshall Islands.⁵ In addition, Hong Kong remains a major centre for ship management, finance, insurance, logistics, terminal operations, maritime arbitration and legal services.

Several factors make Hong Kong attractive.⁶ Pursuant to an agreement with Mainland China, Hong Kong-flagged ships receive a 30 per cent reduction in Chinese port dues.⁷ Furthermore, in addition to Hong Kong's modest tax rate (16.5 per cent),⁸ Hong Kong has a competitive tax regime to support shipping activities. Income derived from international carriage of goods and towage for Hong Kong-registered ships and charter hire for international operations are exempt from profits tax.⁹ Following the introduction of a concessionary profit tax regime in 2020, qualifying ship lessors and managers would either be exempted from paying profits tax on qualifying profits or be entitled to pay profits tax on qualifying profits at a significantly reduced rate.¹⁰ Another consideration is that Hong Kong substantially increased the number of its double taxation relief agreements from just four to 55 as at November 2021.¹¹ Most key international shipping conventions are applicable in Hong Kong.¹²

1 Nicola Hui is a senior associate at HFW.

2 www.mardep.gov.hk/en/fact/pdf/portstat_2_y_b5.pdf.

3 www.hkmpb.gov.hk/document/HKP_KTCT-stat.pdf.

4 www.mardep.gov.hk/en/pub_services/pdf/mon_stat.pdf.

5 www.hkmpb.gov.hk/document/mic_report.pdf.

6 www.mardep.gov.hk/en/pub_services/reg_gen.html.

7 www.hkmpb.gov.hk/publications/29.pdf.

8 www.gov.hk/en/residents/taxes/taxfiling/taxrates/profitrates.htm.

9 www.hkmpb.gov.hk/en/competitive-tax-regime.html#:~:text=Shipping%20incentives,-Hong%20Kong%20practises&text=Income%20from%20international%20carriage%20of,nationality%20of%20the%20ships%20concerned.

10 Cheung, P., Chow, C., Wong, T. and Sian, K., 2020. Eligible for Ship Leasing Tax Concessions in Hong Kong?. www.hfw.com/downloads/002515-HFW-Eligible-for-Ship-Leasing-Tax-Concessions-in-HK.pdf.

11 www.ird.gov.hk/eng/tax/dta_inc.htm.

12 See, for example, <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx> at 'Ratifications by State' for a list.

The Sale of Goods (United Nations Convention) Ordinance, which adopts the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Hong Kong, is expected to come into effect by the third quarter of 2022.¹³ This would enhance Hong Kong's status as an international trade centre.

With its many advantages, Hong Kong is well positioned to serve as the maritime service hub for the Belt and Road Initiatives¹⁴ and the development of the Greater Bay Area.¹⁵

II FORUM AND JURISDICTION

i Courts

Hong Kong has an Admiralty Court, which handles claims regarding damage, loss of life or personal injury arising out of a collision or any breach of the collision regulations. The admiralty jurisdiction also includes claims in respect of liability falling on the International Oil Pollution Compensation Fund, limitation actions, salvage claims and claims *in rem* for damage done by a ship.

The Limitation Ordinance (Cap 347) applies to most maritime claims except collisions, for which two years applies. For claims in contract¹⁶ 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.

ii Arbitration and ADR

The Arbitration Ordinance (Cap 609) came into force in Hong Kong on 1 June 2011. It incorporated the majority of the UNCITRAL Model Law on International Commercial Arbitration and replaced the previous Arbitration Ordinance (Cap 341), thereby providing a clearer framework. The Hong Kong courts are empowered to enforce emergency orders or relief granted by an emergency arbitrator, whether the relief was initially granted by an arbitral tribunal within Hong Kong or elsewhere.¹⁷ On 23 June 2017, the Arbitration Ordinance was further amended to allow third-party funding of arbitration.¹⁸

On 1 October 2019, the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region came into effect. The Arrangement allows

13 https://www.doj.gov.hk/en/featured/un_convention_on_contracts_for_the_international_sale_of_goods.html.

14 The Belt and Road Initiative refers to the Silk Road Economic Belt and 21st Century Maritime Silk Road, a significant development strategy launched by the Chinese government with the intention of promoting economic cooperation among countries along the proposed Belt and Road routes connecting Asia, Europe and Africa.

15 The Greater Bay Area comprises the two Special Administrative Regions of Hong Kong and Macao, and the nine municipalities of Guangzhou, Shenzhen, Zhuhai, Foshan, Huizhou, Dongguan, Zhongshan, Jiangmen and Zhaoqing in Guangdong Province.

16 Hong Kong has ratified the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading as amended by the Brussels Protocols of 1968 and 1979 (the Hague-Visby Rules); thus, for cargo claims, a one-year contractual time bar modifies the statutory limitation period.

17 Sections 22A and 22B of the Arbitration Ordinance (Cap 609). Similar provisions are contained in the Hong Kong International Arbitration Centre's administered arbitration rules.

18 www.gld.gov.hk/egazette/pdf/20172125/es1201721256.pdf.

any party to arbitral proceedings seated in Hong Kong and administered by the Hong Kong International Arbitration Centre (HKIAC) or another qualified arbitral institution to apply to the relevant mainland Chinese courts for interim measures in relation to the arbitral proceedings, prior to the issuance of an arbitral award.¹⁹ On 27 November 2020, the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region was signed to amend the existing Arrangement by, among other things, allowing simultaneous applications for enforcement to the courts of both the mainland and Hong Kong, and clarifying that the court may, before or after accepting the application for enforcement of an arbitral award, impose preservation or mandatory measures pursuant to an application.²⁰ The Supplemental Arrangement came into effect on 19 May 2021, further bolstering Hong Kong's standing as an international legal centre.²¹

According to the 2021 International Arbitration Survey by Queen Mary University of London, Hong Kong was ranked as one of the top five most preferred seats for arbitration in all regions.²² Hong Kong's main arbitration body is the HKIAC, which has been designated as the appointing body under the Arbitration Ordinance to appoint arbitrators and to determine the number of arbitrators when the parties to a dispute are unable to agree. In 2021, 277 new arbitration cases, with an aggregate amount in dispute exceeding HK\$54.5 billion, were submitted to the HKIAC.²³

Hong Kong is also a centre for mediation in Asia. The Mediation Ordinance (Cap 620), which came into force on 1 January 2013, provides a regulatory framework for standards in the conduct of mediation.

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 civil and commercial judgments between Hong Kong and the mainland is governed by the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned, signed on 14 July 2006, and the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597), which came into force on 1 August 2008.²⁴ The Mainland Judgments (Reciprocal Enforcement) Ordinance applies to judgments requiring payment 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.

On 18 January 2019, the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region was signed by the Supreme People's Court and the Hong

19 www.doj.gov.hk/en/mainland_and_macao/pdf/arbitration_interim_e.pdf.

20 www.doj.gov.hk/en/mainland_and_macao/pdf/supplemental_arrangement_e.pdf.

21 www.doj.gov.hk/en/community_engagement/press/20210518_pr1.html.

22 arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf.

23 www.hkiac.org/news/hkiac-releases-statistics-2021.

24 www.doj.gov.hk/eng/public/enforcement.html.

Kong government. The Arrangement widens the existing scope for reciprocal recognition and enforcement of civil judgments in Hong Kong and the mainland. It is expected to be implemented by local legislation (consultation on the legislative proposal was conducted in early 2022). Upon its commencement, the Arrangement will supersede the Choice of Court Arrangement (currently in force through the Mainland Judgments (Reciprocal Enforcement) Ordinance).²⁵

Foreign judgments in civil and commercial matters may be enforced in Hong Kong under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319). The countries that have reciprocal arrangements with Hong Kong are listed in the Foreign Judgments (Reciprocal Enforcement) Order (Cap 319A) and include Australia, Austria, France, Belgium and Italy.²⁶ A judgment creditor with a foreign judgment for the payment of a sum of money from a country listed under the Order can make an *ex parte* application to the Court of First Instance to register that foreign judgment after fulfilling certain requirements under the Foreign Judgments (Reciprocal Enforcement) Ordinance. The application must be made within six years of the date of the judgment, or, if there has been an appeal against the judgment, of the date of the last judgment given in those proceedings.²⁷ 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 do so, fresh proceedings must be brought by the judgment creditor in a 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 proceed to trial.

Arbitration awards

Hong Kong is an arbitration-friendly jurisdiction, as well as enforcing arbitration awards. If parties fail to appeal against, set aside or refuse enforcement of arbitration awards, the court will usually order cost on an indemnity basis, subject to exceptional circumstances.²⁸

25 www.doj.gov.hk/eng/public/enforcement.html.

26 Foreign Judgments (Reciprocal Enforcement) Order, Schedules 1 and 2.

27 Foreign Judgments (Reciprocal Enforcement) Ordinance, Section 4(1).

28 *A v. R (Arbitration: Enforcement)* [2009] 3 HKLRD 389 and approved by the Court of Appeal in *Grand Pacific Holdings Ltd v. Pacific China Holdings Ltd (in liq) (No.2)* [2012] 4 HKLRD 569 and in *Gao Haiyan v. Keeneye Holdings Ltd* [2012] 1 HKLRD 627.

Enforcement between Hong Kong and the mainland is governed by the Arrangement Concerning Mutual Enforcement of Arbitration Awards between the Mainland and the Hong Kong Special Administrative Region, signed in June 1999, and amended by the Supplemental Arrangement, signed on 27 November 2020.²⁹

Hong Kong, as part of the People's Republic of China, is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), which provides for the mutual enforcement of arbitration awards in over 160 contracting states.³⁰ The Hong Kong courts also have discretionary power to enforce arbitration awards from countries that are not parties to the New York Convention.

Furthermore, the Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards between the Hong Kong Special Administrative Region and the Macao Special Administrative Region 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 the grounds set out in the New York Convention. This Arrangement 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 the Arrangement already in place between Hong Kong and mainland China.

III SHIPPING CONTRACTS

i Contracts of carriage

Contracts of carriage in Hong Kong are governed by the Carriage of Goods by Sea Ordinance (Cap 462), giving the full force of law to the Protocols 1968 and 1979 to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (the Hague-Visby Rules), which has been ratified by Hong Kong.³¹ The Hague-Visby Rules govern the rights and liabilities of both the carrier and the shipper. Provided that one of the criteria that are set out in the Hague-Visby Rules applies (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 Although the Hague-Visby Rules do not apply to charter parties *per se*, they are frequently incorporated in charter parties by agreement by way of a clause paramount.³³

ii Cargo claims

In Hong Kong, cargo claimants generally plead on three bases: in contract (bill of lading), in tort or in bailment.

29 www.doj.gov.hk/en/mainland_and_macao/pdf/supplemental_arrangementtr_e.pdf.

30 www.hkmpb.gov.hk/publications/hkMaritime_EN_2021.pdf.

31 Neither the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008 (the Rotterdam Rules) nor the UN Convention on the Carriage of Goods by Sea 1978 (the Hamburg Rules) have been ratified by Hong Kong and are not expected to be in the near future.

32 See the Hong Kong cases of *Carewinds 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 *Onego Shipping & Chartering BV v. JSC Arcadia Shipping (The 'Socol 3')* [2010] 2 Lloyd's Rep 221.

Under Section 2(2) of the Bills of Lading and Analogous Shipping Documents Ordinance (Cap 440), anybody who is the 'lawful holder' of a bill of lading has title to sue.³⁴ The lawful holder can be a person in possession of the bill:

- a who is identified on the bill as the consignee of the goods;
- b as a result of completion, by delivery of the bill, by endorsement of the bill or by transfer of the bill; or
- c as a result of any transaction whereby he or she would have become a holder under point (a) or (b) 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; and
- d The holder must be a holder in good faith.

It is 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 may exist between the shipowner or demise charterer and the shipper. The demise clause will have to show a clear intention to act in such a manner. This has been the subject of previous (English) case law,³⁵ as has the way in which the bill of lading is signed, which can also have legal consequences.³⁶

There are time limits for any cargo claim made under the Hague-Visby Rules, which will generally apply (e.g., by virtue of a clause paramount, sub-bailment on terms or a *Himalaya* clause). 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 if they are not brought within one year of the date of delivery or the date when the cargo should have been delivered.³⁷ If the Hague-Visby Rules do not apply, then the normal six-year time bar for contract and tort applies.

iii Limitation of liability

On 4 December 2017, with the Merchant Shipping (Limitation of Shipowners Liability) (Amendment) Ordinance 2005 coming into effect, Hong Kong applied the International Maritime Organization's (IMO) latest amendments to the limits of liability under the 1996 Protocol to amend the Convention on Limitation of Liability for Maritime Claims 1996 (the 1996 LLMC Protocol).³⁸ In respect of loss of life and personal injury claims for ships not exceeding 2,000 tonnes, the new limit is 3.02 million special drawing rights (SDRs) plus additional amounts for larger vessels; in respect of any other claims for ships not exceeding 2,000 tonnes, the new limit is 1.51 million SDRs plus additional amounts for larger vessels.³⁹

34 The Hong Kong equivalent to the UK's Carriage of Goods by Sea Act 1924.

35 See *Hector* [1998] 2 Lloyd's Rep 287; *Flecha* [1999] 1 Lloyd's Rep 612; and *Starsin* [2000] 1 Lloyd's Rep 85.

36 In *The 'Starsin'* [2003] UKHL 12 [2003] 1 Lloyd's Rep 571, the House of Lords decided that the printed demise clause on the reverse of the bill was overridden by specific provisions of the bill (e.g., the signature) on its front and the bill was evidence of a contract with the charterer.

37 The Hague-Visby Rules, Article III(6).

38 Merchant Shipping (Limitation of Shipowners Liability) Ordinance [Cap 434], <https://www.elegislation.gov.hk/hk/cap434>.

39 *ibid.*, Article 6 of Schedule 2.

Under Hong Kong law, a person may limit his or her 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), so long as the claims in respect of which he or she is alleged to be liable fall within Article 2 of the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC Convention 1976) as set out in Schedule 2 of the LSL Ordinance. Once this is established, he or she will be entitled to a decree limiting his or her liability, unless any person opposing the making of the decree proves that his or her conduct bars entitlement to limitation. Article 4 provides that a person liable shall not be entitled to limit his or her liability if it is proved 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'. This is a high obstacle to overcome. In a 2016 case, *Floata Consolidation Limited v. Man Lee Hing (Hong Kong) Vehicles Limited and others*, the Hong Kong Court of First Instance cited *Saint Jacques II*⁴⁰ to confirm in *obiter* that the LLMC Convention 1976 imposes a 'very heavy burden' on the party seeking to break the limit under Article 4.⁴¹

IV REMEDIES

i Ship arrest

Arrest in Hong Kong

The International Convention Relating to the Arrest of Sea-Going Ships 1952 (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 (Cap 4). One can arrest a vessel in Hong Kong for the purpose of obtaining security in aid of foreign proceedings. A ship under any flag may be arrested in Hong Kong and security arrests are permitted.

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.

Sister ship arrests

By virtue of Section 12B(4) of the High Court Ordinance, 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 the *Decurion* case,⁴² the Hong Kong High 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.

40 *Margolle and Another v. Delta Maritime Co Ltd (The 'Saint Jacques II')* [2002] EWHC 2452 [18].

41 [2016] 2 HKLRD 1091.

42 *The Decurion (No. 2)* [2013] 2 HKLRD 930.

The concepts of associated ship arrest and bunker arrest are not recognised under Hong Kong law. It may, however, be possible under Hong Kong law to obtain an injunction to prevent bunkers from being used.

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. No counter security is required, although the arresting party has to provide an undertaking (usually in the form of a solicitor's undertaking) to pay the bailiff's expenses of the arrest and the costs of maintaining the ship under arrest.

The person who intends to arrest the vessel should file in court a writ of summons and the arrest papers, which include an affidavit to lead to arrest.⁴³ 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.⁴⁴ The affidavit is the only evidential requirement for arrest and the arresting party need only establish a *prima facie* right to arrest, in good faith, as reaffirmed in *Bo Shi Ji 393*.

The party applying to arrest the vessel bears the cost of maintaining the vessel while it is under arrest. Further security will be charged daily. The party applying to arrest the vessel will also be liable for the bailiff's expenses and any overtime. Furthermore, 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 if the owner of the arrested ship could prove that the arresting party acted in bad faith or in a grossly negligent manner,⁴⁵ which is a very high level of proof.

ii Court orders for sale of a vessel

Court orders for the sale of a vessel can be obtained either *pendente lite* or upon judgment, the former being more common. The latter method relates to enforcement (e.g., by way of a writ of *feri facias*).

When *in rem* claims are defended, ordinarily the vessel's owners (or their protection and indemnity club) will put up security to allow the vessel to depart with the claim to be litigated in an appropriate forum. Thus, the vessel will generally not be sold.

However, if the vessel's owners are in financial difficulty, a sale *pendente lite* is possible. 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, essentially

43 *ibid.*, Order 75, Rules 3, 5, 8 and 23A.

44 On full and frank disclosure see *Oriental Phoenix* [2014] 1 HKLRD 649 and *King Coal* [2013] 2 HKLRD 620.

45 See *The Evangelismos* (1858) 12 Moo PC 352 [775].

to stop asset wastage pending a judgment. The court will require a good reason to make such an order (e.g. when the costs of maintaining the arrest may exceed the value of the claim, thereby diminishing the value of the plaintiff's security).

Broadly, the order of priorities is as in England.⁴⁶ For buyers, the attraction of purchasing a vessel sold by the court is that it will be free of encumbrances.⁴⁷

V REGULATION

Collisions, salvage and wrecks

Collisions

The Merchant Shipping (Safety) (Signals of Distress and Prevention of Collisions) Regulations (Cap 369N) gives the International Regulations for Preventing Collisions at Sea 1972 (COLREGs) force of law in Hong Kong. It is an offence under the Shipping and Port Control Ordinance (Cap 313) to contravene any of the COLREGs, unless the person charged proves that he or she has taken all reasonable precautions.⁴⁸ The decision of the Court of Final Appeal in *Kulemesin Yuriy and Tang Dock-Wah v. HKSAR*⁴⁹ 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*,⁵⁰ a coxswain was sentenced to eight years' 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 loss of 39 lives.

The doctrine of proportionate fault applies with respect to claims for property damage;⁵¹ however, where loss of life or personal injury is suffered by a person on board a vessel owing to the fault of that vessel or of any other vessel, the liability of the owners of the vessels is joint and several.⁵² Rights of contribution between the owners of the vessels concerned are preserved. A vessel is not liable for damage or loss to which it has not contributed.⁵³ 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.⁵⁴

Salvage

The provisions of the International Convention on Salvage 1989 (the 1989 Salvage Convention) applies in Hong Kong by way of Section 9 of the CDLS Ordinance. 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(2)(i) of the High Court Ordinance, the Admiralty Jurisdiction of the Court of First Instance has jurisdiction to hear and determine any claim under the 1989 Salvage Convention, any claim under any contract for or in relation to salvage services, or any claim in the nature of salvage.

⁴⁶ *The Sparti* [2000] 3 HKLRD 561, 564.

⁴⁷ Meeson, *Admiralty Jurisdiction and Practice* (5th edition, 2017), page 180.

⁴⁸ Shipping and Port Control Ordinance (Cap 313), Section 10.

⁴⁹ [2013] 16 HKCFAR 195.

⁵⁰ *HKSAR v. Chow Chi-wai and Lai Sai-ming* [2015] HKCFI 267.

⁵¹ Merchant Shipping (Collision Damage Liability and Salvage) Ordinance (Cap 508), Section 3.

⁵² *ibid.*, Section 4.

⁵³ *ibid.*, Section 5.

⁵⁴ *ibid.*, Section 7.

There is a two-year limitation period for salvage claims, commencing from the day on which the salvage operations are terminated.⁵⁵

Wreck removal

Section 21 of the Shipping and Port Control Ordinance empowers the Director of Marine to order the removal of stranded, abandoned or sunken vessel in the waters of Hong Kong and impose punishment for non-compliance. 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 (Cap 434), most of the provisions of the LLMC Convention 1976 have force of law in Hong Kong; however, claims in relation to the cost of wreck removal are not subject to limitation of liability under Hong Kong law.⁵⁶ This was confirmed in *Perusahaan Perseroan (Persero) PT Pertamina v. Trevaskis Ltd*,⁵⁷ where the party was not allowed to limit its wreck removal claim. Although the Nairobi International Convention on the Removal of Wrecks 2007 (the Nairobi WRC 2007) came into force in China on 11 February 2017, it does not apply to Hong Kong.

VI OUTLOOK

Hong Kong's geographical location and proximity to the mainland has always cemented its position as a major maritime hub in the region. It is now facing challenges on its doorstep from the rise of container ports such as Shenzhen, Nansha and Shanghai, as well as the spread of covid-19 globally that resulted in a contraction of exports.

As governments and businesses around the world continue to grapple with the disruptive pandemic, the shipping industry may expect a recovery in global trade and take advantage of the opportunities. It is more important now than ever that the government and the key commercial principals in the maritime trade continue to work collaboratively towards strategic planning for the sustainable growth of the industry and to capitalise on its unique advantage in the region. The Chief Executive thus emphasised in her latest Policy Address the importance of developing a 'Smart Port' with the industry.⁵⁸ The application of digital technology in marine operations and port industry would be a major development in this direction.⁵⁹

Furthermore, China's National 14th Five-Year Plan, released in March 2021, continues to reinforce and advance Hong Kong as a centre for international legal and dispute resolution services in the Asia-Pacific region,⁶⁰ which is an important support to the national development of economic activities in the mainland. This is given Hong Kong's strategic location at the heart of the Asia-Pacific region and its being the only common law jurisdiction in China with an up-to-date arbitration law regime with effective and enforceable interim relief.

55 International Convention on Salvage 1989, Article 23.

56 Cap 434, Section 15, unless an order has been made under Subsection 15(1).

57 [2021] 2 HKLRD 4.

58 www.policyaddress.gov.hk/2021/eng/p43.html.

59 *ibid*.

60 www.info.gov.hk/gia/general/202103/11/P2021031100509.htm.

Hong Kong's high value-added maritime services, consisting of ship finance, marine insurance and maritime legal and arbitration services, would be another focus.⁶¹ Following the introduction of a concessionary profit tax regime and expansion of overseas maritime service network,⁶² Hong Kong will grasp the opportunities offered to utilise its capability and expand its market globally, which will help preserve and strengthen its position as an international maritime hub.

61 www.policyaddress.gov.hk/2021/eng/p43.html (footnote 79).

62 *ibid.*

ABOUT THE AUTHORS

NICOLA HUI

HFW

Nicola Hui is a senior associate in HFW's Hong Kong shipping, offshore and logistics department. She has extensive experience in maritime and trade disputes, and acts for clients in Hong Kong and English High Court proceedings and in arbitrations in the Hong Kong International Arbitration Centre, the China International Economic and Trade Arbitration Commission, Singapore International Arbitration Centre and the London Maritime Arbitrators Association, as well as in local proceedings relating to ship arrests, winding up, recognition and enforcement of arbitration awards and criminal cases (maritime and environmental liabilities).

HFW

Level 39, Bourke Place
600 Bourke Street
Melbourne, VIC 3000
Australia
Tel: +61 3 8601 4500
Fax: +61 3 8601 4555
gavin.vallely@hfw.com
simon.shaddick@hfw.com
tom.morrison@hfw.com
carlita.bloecker@hfw.com

4th Floor, Building 7
18 Gongping Road
Hongkou District
Shanghai 200082
China
Tel: +86 21 2080 1000
Fax: +86 21 2080 1177
jean.cao@hfw.com
nicholas.poynder@hfw.com

25–27 rue d'Astorg

75008 Paris
France
Tel: +33 1 44 94 40 50
Fax: +33 1 42 65 46 25
mona.dejean@hfw.com

83 Akti Miaouli & Flessa Street
6th Floor
Piraeus 185 38
Greece
Tel: +30 210 429 3978
Fax: +30 210 429 3118
dimitri.vassos@hfw.com
anna.papadopoulou@hfw.com

15th Floor, Tower One
Lippo Centre
89 Queensway
Admiralty
Hong Kong
Tel: +852 3983 7788
Fax: +852 3983 7766
nicola.hui@hfw.com

30 Raffles Place, #24-01
Singapore 048622
Tel: +65 6411 5300
Fax: +65 6411 5355
toby.stephens@hfw.com
pooja.kapadia@hfw.com
Cours de Rive 13–15
6th Floor
1204 Geneva
Switzerland
Tel: +41 22 322 4800
Fax: +41 22 322 4888
william.hold@hfw.com

Level 8, Building 6
Emaar Square
Sheikh Zayed Road
PO Box 53934
Dubai
United Arab Emirates
Tel: +971 4 423 0555
Fax: +971 4 425 7941
yaman.alhawamdeh@hfw.com
tariq.idais@hfw.com

Friary Court
65 Crutched Friars
London EC3N 2AE
United Kingdom
Tel: +44 20 7264 8000
Fax: +44 20 7264 8888
gudmund.bernitz@hfw.com
simon.blows@hfw.com
jonathan.bruce@hfw.com
andrew.chamberlain@hfw.com
holly.colaco@hfw.com
paul.dean@hfw.com
thomas.dickson@hfw.com
eliza.eliades@hfw.com
catherine.emsellem-rope@hfw.com
nicholas.kazaz@hfw.com
alex.kemp@hfw.com
alastair.loweth@hfw.com
william.maclachlan@hfw.com
daniel.martin@hfw.com
richard.neylon@hfw.com
johanna.ohlman@hfw.com
michael.ritter@hfw.com
jenny.salmon@hfw.com
vanessa.tattersall@hfw.com
tom.walters@hfw.com
matthew.wilmshurst@hfw.com
anthony.woolich@hfw.com
5151 San Felipe
Suite No. 400
Houston, TX 77056
United States
Tel: +1 713 917 0888
Fax: +1 713 953 9470
james.brown@hfw.com
melanie.fridgant@hfw.com
chris.hart@hfw.com
alex.mendez@hfw.com
thomas.nork@hfw.com
svetlana.sumina@hfw.com
michael.wray@hfw.com

www.hfw.com

ISBN 978-1-80449-079-2