

THE SHIPPING LAW  
REVIEW

EIGHTH EDITION

**Editors**

Andrew Chamberlain, Holly Colaço and Richard Neylon

THE LAWREVIEWS

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REVIEW

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# PREFACE

The aim of the eighth 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: competition and regulatory law, sanctions, ocean logistics, piracy, shipbuilding, ports and terminals, offshore shipping, 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. This year, we welcome Costa, Albino & Lasalvia Sociedade de Advogados as the new contributors of the chapter focusing on maritime law within Brazil. There are also two new jurisdictions in this edition – Israel (Harris & Co) and Mexico (Adame Gonzalez De Castilla Besil) – and Portugal makes a return, with Andrade Dias & Associados as the new contributors.

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 2019, 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), swift recovery is anticipated. 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.

Finally, mention should be made of the environmental regulation of the shipping industry, which has been gathering pace this year. At the International Maritime Organization's (IMO) Marine Environment Protection Committee, 72nd session (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 will now lead to some of the most significant regulatory changes in the industry in recent years, as well as much greater investment in the development of low-carbon and zero-carbon dioxide fuels. The IMO's agreed target is intended to pave the way for phasing out carbon emissions from the sector entirely. The IMO Initial Strategy, and the stricter sulphur limit of 0.5 per cent mass/mass introduced in 2020, has generated significant increased interest in alternative fuels, alternative propulsion and green vessel technologies. Decarbonisation of the shipping industry is, and will remain, the most important and significant environmental challenge facing the industry in the coming years. Unprecedented investment and international cooperation will be required if the industry is to meet the IMO's targets on carbon emissions. The 'Shipping and the Environment' chapter delves further into these developments.

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

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# HONG KONG

*Nicola Hui and Winnie Chung*<sup>1</sup>

## I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Hong Kong is currently the ninth-busiest container port in the world, behind Shanghai, Singapore, Busan and a few other busy Chinese ports.<sup>2</sup> In 2020, the port of Hong Kong handled an estimated 17.9 million twenty-foot equivalent units (TEUs) of containers (a slight reduction compared with the 18.3 million TEUs in 2019)<sup>3</sup> and provided about 300 container liner services per week connecting to about 420 destinations worldwide.<sup>4</sup> As at January 2021, there were more than 2,594 vessels on the Hong Kong Shipping Register (set up in 1990),<sup>5</sup> totalling more than 129.8 million gross tonnage,<sup>6</sup> making it the fourth-largest register after Panama, Liberia and the Marshall Islands.<sup>7</sup> 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.<sup>8</sup> Pursuant to the Mainland and Hong Kong Closer Economic Partnership Arrangement, Hong Kong-registered ships receive preferential rates for port charges when calling at Chinese ports.<sup>9</sup> Further, Hong Kong's profit tax rate is modest (16.5 per cent)<sup>10</sup> and the tax regime is territorial, which means that income derived from the international operation of Hong Kong-registered ships is exempt from profits tax.<sup>11</sup> Another consideration is that Hong Kong significantly increased the number of its double taxation relief agreements from just four to 45 by 2008,<sup>12</sup> with more under negotiation.<sup>13</sup>

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1 Nicola Hui is a senior associate and Winnie Chung is an associate at HFW.

2 [www.mardep.gov.hk/en/fact/pdf/portstat\\_2\\_y\\_b5.pdf](http://www.mardep.gov.hk/en/fact/pdf/portstat_2_y_b5.pdf).

3 [www.hkmpb.gov.hk/document/HKP\\_KTCT-stat.pdf](http://www.hkmpb.gov.hk/document/HKP_KTCT-stat.pdf).

4 [www.hkmpb.gov.hk/publications/34.pdf](http://www.hkmpb.gov.hk/publications/34.pdf).

5 The autonomous Hong Kong Shipping Register was set up in 1990. It is a separate system to that of the Chinese mainland and had already been in existence for some time as a British register.

6 [www.mardep.gov.hk/en/pub\\_services/pdf/mon\\_stat.pdf](http://www.mardep.gov.hk/en/pub_services/pdf/mon_stat.pdf).

7 [lloydlist.maritimeintelligence.informa.com/LL1134965/Top-10-flag-states-2020](http://lloydlist.maritimeintelligence.informa.com/LL1134965/Top-10-flag-states-2020).

8 [www.mardep.gov.hk/en/pub\\_services/reg\\_gen.html](http://www.mardep.gov.hk/en/pub_services/reg_gen.html).

9 [www.hkmpb.gov.hk/publications/29.pdf](http://www.hkmpb.gov.hk/publications/29.pdf).

10 [www.gov.hk/en/residents/taxes/taxfiling/taxrates/profitsrates.htm](http://www.gov.hk/en/residents/taxes/taxfiling/taxrates/profitsrates.htm).

11 [www.mardep.gov.hk/en/pub\\_services/reg\\_gen.html](http://www.mardep.gov.hk/en/pub_services/reg_gen.html).

12 [www.ird.gov.hk/eng/tax/dta\\_inc.htm](http://www.ird.gov.hk/eng/tax/dta_inc.htm).

13 [www.ird.gov.hk/eng/tax/dta3.htm](http://www.ird.gov.hk/eng/tax/dta3.htm).

One focus of these agreements has been shipping income.<sup>14</sup> With its many advantages, Hong Kong is well positioned to serve as the maritime service hub for the Belt and Road Initiatives<sup>15</sup> and the development of the Greater Bay Area.<sup>16</sup>

In terms of direct economic contribution, the shipping industry is important in Hong Kong being a regional logistics hub, with trading and logistics the largest of the 'Four Key Industries'<sup>17</sup> in terms of both value and employment, directly contributing more than 19 per cent of gross domestic product<sup>18</sup> and 17.5 per cent of total employment.<sup>19</sup> In the past, there was a considerable shipbuilding industry in Hong Kong; however, cheaper labour costs, and the high prices of real estate, have led to Hong Kong's shipbuilders moving across the border into mainland China.

## II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The effect of Articles 5 and 8 of the Basic Law of Hong Kong, promulgated on 4 April 1990, is that the laws that existed in 1997 are maintained for 50 years, although they can be amended by Hong Kong's Legislative Council (LegCo). Thus, Hong Kong follows the common law system (in contrast to China's civil law system). To the extent that they have not been overridden by Hong Kong case law or by LegCo, pre-1997 English cases remain good law, whereas post-1997 English and other common law cases are merely persuasive.

Further, pursuant to Article 153 of the Basic Law:

*The application to the Hong Kong Special Administrative Region of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region. International agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Special Administrative Region. The Central People's Government shall, as necessary, authorize or assist the government of the Region to make appropriate arrangements for the application to the Region of other relevant international agreements.*

As a result, most key international shipping conventions are applicable in Hong Kong.<sup>20</sup>

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14 [www.ird.gov.hk/eng/pol/dta.htm](http://www.ird.gov.hk/eng/pol/dta.htm).

15 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.

16 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.

17 The Four Key Industries are financial services, tourism, trading and logistics, and professional services.

18 [www.statistics.gov.hk/pub/B72101FB2021XXXXB0100.pdf](http://www.statistics.gov.hk/pub/B72101FB2021XXXXB0100.pdf).

19 id.

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

### III FORUM AND JURISDICTION

#### i Courts

Hong Kong has an Admiralty Court (part of the Court of First Instance). Admiralty actions are entered in the Admiralty List and prefixed HCAJ, and proceedings are governed by Order 75 of the Rules of the High Court (Cap 4A). Every action to enforce a claim for damage, loss of life or personal injury arising out of a collision or any breach of the collision regulations is assigned to the Court of First Instance's admiralty jurisdiction, and the District Court has no jurisdiction to hear such matters even if the claim value (less than HK\$3 million) would otherwise fall within the jurisdiction of the District Court rather than the High Court.<sup>21</sup> 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 (see Section VI.v). For claims in contract<sup>22</sup> and tort, the time limit is six years from the date on which the cause of action accrued or from the date the damage was suffered, respectively. For personal injury or death claims, the limitation period is three years from the date on which the cause of action occurred.

In shipping disputes, there are often conflict of laws and disputes as to the forum where the claims should be heard. In Hong Kong, where an action is brought *in personam*, the position is generally the same as in non-admiralty proceedings and will depend on whether the plaintiff should be granted leave to effect service on a foreign defendant outside Hong Kong under Order 11 of the Rules of the High Court.<sup>23</sup> In *in rem* proceedings, no such procedure exists as, generally, it will involve service of a writ on the vessel when it is in Hong Kong territorial waters (i.e., service outside the jurisdiction is not required).<sup>24</sup> Provided that the claim is one that by its nature gives rise to an action *in rem*, service of a writ on the ship is sufficient to found jurisdiction, even in the absence of any other factor connecting the case with Hong Kong.<sup>25</sup> However, even where jurisdiction has been established, through arresting in Hong Kong or service out of the jurisdiction, the court has inherent power to order a stay of proceedings in favour of another jurisdiction if it is a more appropriate forum<sup>26</sup> or where the claim is governed by an exclusive jurisdiction clause,<sup>27</sup> or in favour of arbitration where the relevant contract contains an arbitration clause.<sup>28</sup> Anti-suit injunctions will also be granted by the Hong Kong courts, for example, where cargo claimants have commenced proceedings in the country of discharge in breach of a jurisdiction clause in the relevant

21 The general financial limit of the District Court was increased from HK\$1 million to HK\$3 million from 3 December 2018: [www.info.gov.hk/gia/general/201807/06/P2018070500771.htm](http://www.info.gov.hk/gia/general/201807/06/P2018070500771.htm).

22 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.

23 *Halsbury's Laws of Hong Kong* – Vol. 38: *Maritime Law* (2nd edition, 2020) [250.041].

24 *id.*

25 *id.* In *Shijiazhuang Iron & Steel Co Ltd and others v. Hui Rong Nav Corp SA and other (The 'Peng Yan')* [2009] 1 HKLRD 144, 154, the Hong Kong Court of Appeal held that 'the founding of jurisdiction as of right usually arises upon an arrest of the ship in question or a sister ship'.

26 See, for example, *Shijiazhuang Iron & Steel Co Ltd.*

27 *The 'El Amria'* [1982] 2 Lloyd's Rep 28; *The 'Pioneer Container'* [1994] 2 AC 324.

28 Arbitration Ordinance (Cap 609), Section 20.

contract (e.g., a bill of lading). In these situations, the party seeking an anti-suit injunction should apply for the injunction as soon as possible and, in any event, avoid ‘culpable and inordinate’ delay, otherwise the injunction might not be granted.<sup>29</sup>

## 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. Under Section 14 of the Arbitration Ordinance, the Limitation Ordinance and any other Ordinance relating to the limitation of actions apply to arbitrations as they apply to actions in the Hong Kong courts. The Arbitration Ordinance is updated from time to time to reflect the latest developments in international arbitration.<sup>30</sup> Sections 22A and 22B of the Arbitration Ordinance give the Hong Kong courts power 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.<sup>31</sup> On 17 July 2015, the Arbitration (Amendment) Ordinance removed some legal uncertainties about the opt-in mechanism for domestic arbitrations under Part 11 of the Arbitration Ordinance.<sup>32</sup> On 23 June 2017, the Arbitration Ordinance was further amended to allow third-party funding of arbitration.<sup>33</sup>

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 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.<sup>34</sup> 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.<sup>35</sup> On 19 March 2021, the Arbitration Ordinance was amended to give effect to the Supplemental Arrangement.<sup>36</sup>

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. A new version of the HKIAC Administered Arbitration Rules, accompanied by a Practice Note on the

29 In *Sea Powerful II Special Maritime Enterprises (ENE) v. Bank of China Limited* [2016] 1 HKLRD 1032; [2016] 3 HKLRD 352, deliberate, inordinate and culpable delay was found on the part of the plaintiff in applying for an anti-suit injunction, thus the plaintiff’s application was dismissed.

30 [www.news.gov.hk/en/record/html/2014/02/20140220\\_151614.shtml](http://www.news.gov.hk/en/record/html/2014/02/20140220_151614.shtml).

31 Similar provisions are contained in the Hong Kong International Arbitration Centre’s administered arbitration rules.

32 [www.legco.gov.hk/yr14-15/english/ord/ord011-2015-e.pdf](http://www.legco.gov.hk/yr14-15/english/ord/ord011-2015-e.pdf).

33 [www.gld.gov.hk/egazette/pdf/20172125/es1201721256.pdf](http://www.gld.gov.hk/egazette/pdf/20172125/es1201721256.pdf).

34 [www.doj.gov.hk/en/mainland\\_and\\_macao/pdf/arbitration\\_interim\\_e.pdf](http://www.doj.gov.hk/en/mainland_and_macao/pdf/arbitration_interim_e.pdf).

35 [www.doj.gov.hk/en/mainland\\_and\\_macao/pdf/supplemental\\_arrangement\\_e.pdf](http://www.doj.gov.hk/en/mainland_and_macao/pdf/supplemental_arrangement_e.pdf).

36 [www.legco.gov.hk/yr20-21/english/ord/2021ord001-e.pdf](http://www.legco.gov.hk/yr20-21/english/ord/2021ord001-e.pdf).

Appointment of Arbitrators, took effect from 1 November 2018. The amendments to the 2013 Rules reflect developments in arbitration practice in Hong Kong and globally, such as in the areas of use of technology, third-party funding, multi-party and multi-contract arbitrations, early determination of disputes and emergency arbitrator proceedings.<sup>37</sup>

The International Court of Arbitration of the International Chamber of Commerce (ICC) opened a branch of its Secretariat in Hong Kong in November 2008 to serve ICC arbitrations in the Asia-Pacific region. Further, in September 2012, the China International Economic and Trade Arbitration Commission established its office in Hong Kong, being the first outside the mainland;<sup>38</sup> the China Maritime Arbitration Commission also set up its first centre outside the mainland in Hong Kong in 2014, providing international maritime arbitration services.<sup>39</sup> On 4 January 2015, the Permanent Court of Arbitration (PCA), based in The Hague, signed a Host Country Agreement with the government of China and a related Memorandum of Administrative Arrangements with the Hong Kong government, such that PCA-administered proceedings can be conducted in Hong Kong on an ad hoc basis, without the need for a physical presence of the PCA.<sup>40</sup> The PCA is an inter-government organisation to facilitate arbitration and other forms of dispute resolution between states. Its dispute resolution services also involve inter-government organisations and private parties.

As regards the standard of arbitration in Hong Kong, Mr Justice Hamblen of the Commercial Court (England and Wales) praised Hong Kong as 'a well-known and respected arbitration forum with a reputation for neutrality, not least because of its supervising courts'.<sup>41</sup> According to the 2018 International Arbitration Survey by Queen Mary University of London, the HKIAC was ranked as one of the top five seats of arbitration worldwide.<sup>42</sup> In 2020, 318 new arbitration cases were filed at the HKIAC.<sup>43</sup>

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. Following the amendment of the Mediation Ordinance in June 2017, third-party funding of mediation is allowed as well.<sup>44</sup>

In February 2000, the Hong Kong Maritime Arbitration Group (HKMAG) was formed as a division of the HKIAC, with the specific aim of promoting the use of maritime arbitration and mediation in Hong Kong. The MAG became an independent organisation in March 2019. It works in close cooperation with the Hong Kong Shipowners Association and publishes a list of Hong Kong maritime arbitrators.<sup>45</sup> The HKMAG Terms (2017) and Small Claims Procedure (2017), which are effective for appointments from 1 May 2017, are substantially based on the Terms and Procedure of the London Maritime Arbitrators

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37 [www.hkiac.org/news/2018-administered-arbitration-rules-1-november](http://www.hkiac.org/news/2018-administered-arbitration-rules-1-november).

38 [www.doj.gov.hk/eng/public/arbitration.html](http://www.doj.gov.hk/eng/public/arbitration.html).

39 [www.info.gov.hk/gia/general/201411/19/P201411190765.htm](http://www.info.gov.hk/gia/general/201411/19/P201411190765.htm).

40 [www.info.gov.hk/gia/general/201501/04/P201501040801.htm](http://www.info.gov.hk/gia/general/201501/04/P201501040801.htm).

41 *Shagang South-Asia (Hong Kong) Trading v. Daewoo Logistics (The 'Nikolaos A')* [2015] EWHC 194 (Comm) [37].

42 [www.hkiac.org/arbitration/why-choose-hkiac](http://www.hkiac.org/arbitration/why-choose-hkiac).

43 [www.hkiac.org/about-us/statistics](http://www.hkiac.org/about-us/statistics).

44 [www.gld.gov.hk/egazette/pdf/20172125/es1201721256.pdf](http://www.gld.gov.hk/egazette/pdf/20172125/es1201721256.pdf).

45 [www.hkmag.org.hk/home](http://www.hkmag.org.hk/home).



Association, with changes made to incorporate references to Hong Kong procedural law.<sup>46</sup> The HKMAG also administers arbitrations and produces its own Procedures for the Administration of Arbitration.<sup>47</sup>

### 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.<sup>48</sup> The Mainland Judgments (Reciprocal Enforcement) Ordinance applies to judgments requiring payment of money in commercial and civil cases. The judgment creditor must register the judgment that it wishes to enforce in Hong Kong within two years of the date of the judgment taking effect. The first reported Hong Kong decision on the Ordinance was in February 2016.<sup>49</sup> In that case, the Court of First Instance dismissed the defendant's application to set aside an order for registration of a mainland judgment in Hong Kong. The Court also refused to hold a mini-trial on the merits and reminded that partial registration of a mainland judgment was possible when that judgment was for performance in stages.

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 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 come into force after both places have completed the necessary procedures to enable implementation. Upon its commencement, the Arrangement will supersede the Choice of Court Arrangement (currently in force through the Mainland Judgments (Reciprocal Enforcement) Ordinance).<sup>50</sup>

Foreign judgments in civil and commercial matters may be enforced in Hong Kong under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319). The underlying aim of the Ordinance is to facilitate the recognition and enforcement of foreign judgments on the basis of reciprocity. The countries that have reciprocal arrangements with Hong Kong are listed in the Foreign Judgments (Reciprocal Enforcement) Order (Cap 319A), including Australia, Austria, France, Belgium and Italy.<sup>51</sup> 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. To do this, certain requirements as set out in the Foreign Judgments (Reciprocal Enforcement) Ordinance must be met. Most notably, the application must be made within six years of the

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46 [www.hkmag.org.hk/resources](http://www.hkmag.org.hk/resources).

47 *id.*

48 [www.doj.gov.hk/eng/public/enforcement.html](http://www.doj.gov.hk/eng/public/enforcement.html).

49 吳作程 *v.* 梁麗 *and others*, HCMP 2080/2015, judgment dated 16 February 2016.

50 [www.doj.gov.hk/eng/public/enforcement.html](http://www.doj.gov.hk/eng/public/enforcement.html).

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

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.<sup>52</sup> 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***

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.<sup>53</sup>

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 between contracting states. The Hong Kong courts also have discretionary power to enforce arbitration awards from countries that are not parties to the New York Convention.

Further, 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.

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

53 [www.doj.gov.hk/en/mainland\\_and\\_macao/pdf/supplemental\\_arrangementr\\_e.pdf](http://www.doj.gov.hk/en/mainland_and_macao/pdf/supplemental_arrangementr_e.pdf).

## IV SHIPPING CONTRACTS

### i Contracts of carriage

Contracts of carriage in Hong Kong are governed by the Carriage of Goods by Sea Ordinance (Cap 462), which gives 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.<sup>54</sup> Provided that one of the criteria 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.<sup>55</sup> The Bills of Lading and Analogous Shipping Documents Ordinance (Cap 440) defines what constitutes a bill of lading under Hong Kong law.<sup>56</sup> 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.<sup>57</sup>

The Hague-Visby Rules govern the rights and liabilities of both the carrier and the shipper. Hong Kong is a party to the International Convention for the Safety of Life at Sea 1974 (SOLAS), which makes the International Maritime Solid Bulk Cargoes Code (requiring a declaration to be made by the shipper on the nature of cargo) mandatory for the carriage of bulk cargoes.<sup>58</sup> This is relevant when allegations are made that a shipper has shipped dangerous goods in breach of the Rules.

Under common law in Hong Kong, a shipowner may exercise a lien on cargo, freight or subfreight (or both) in certain circumstances and if the relevant contract gives the shipowner such a right in respect of the sums due to the shipowner. A discussion of the applicable law is beyond the scope of this chapter.

Cabotage does not apply in Hong Kong. Since Hong Kong is deemed a foreign port under Chinese legislation, it is not subject to Chinese cabotage rules. As a result, Hong Kong remains an attractive trans-shipment hub for relaying cargoes to Chinese ports. That said, the Chinese cabotage restrictions have been gradually relaxed in certain parts of the mainland since 2013. It was estimated in 2016 that if the mainland's cabotage restrictions were fully relaxed, Hong Kong could lose up to 2.4 million TEUs in trans-shipment cargo, which is about 14 per cent of Hong Kong's annual total container throughput.<sup>59</sup> However, the Chinese government indicated in 2017 that a full relaxation of the laws was not planned

54 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.

55 See the Hong Kong cases of *Carewins Development (China) Ltd v. Bright Fortune Shipping Ltd & Anor* [2009] 5 HKC 160 and *Synehon (Xiamen) Trading Co Ltd v. American Logistics Ltd* [2009] 6 HKC 283.

56 See Bills of Lading and Analogous Shipping Documents Ordinance (Cap 440), Section 3. See also *Carewins Development* (footnote 54) for the court's ruling that a sea waybill is different from a non-negotiable bill.

57 *Onego Shipping & Chartering BV v. JSC Arcadia Shipping (The 'Socol 3')* [2010] 2 Lloyd's Rep 221.

58 IMO Resolution MSC.268(85) made the International Maritime Solid Bulk Cargoes Code mandatory for signatories of SOLAS from 1 January 2011.

59 [www.scmp.com/business/companies/article/2045568/relaxed-mainland-port-rules-could-slice-14pc-hong-kongs-container](http://www.scmp.com/business/companies/article/2045568/relaxed-mainland-port-rules-could-slice-14pc-hong-kongs-container).

thus far.<sup>60</sup> Various coastal ports in China, such as Qingdao, Ningbo and Guangzhou, have nevertheless been lobbying for a relaxation of their cabotage rules. The Nansha Free Trade Zone in Guangdong province has progressively introduced measures to promote trans-shipment trade, which can increase competition for Hong Kong.<sup>61</sup> In August 2019, China also expanded the Free Trade Zone in Shanghai and further relaxed its cabotage laws on foreign vessels.<sup>62</sup>

## ii Cargo claims

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

### *Contracts (bills of lading)*

#### *Who is able to sue?*

Under Section 2(2) of the Bills of Lading and Analogous Shipping Documents Ordinance, anybody who is the 'lawful holder' of a bill of lading has title to sue.<sup>63</sup> The lawful holder can be a person in possession of the bill (1) who is identified on the bill as the consignee of the goods, (2) as a result of completion, by delivery of the bill, by endorsement of the bill or by transfer of the bill, or (3) as a result of any transaction whereby he or she would have become a holder under point (1) or (2) when the transaction took place at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates. The holder must be a holder in good faith.

#### *Who can be sued?*

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,<sup>64</sup> as has the way in which the bill of lading is signed, which can also have legal consequences. In *The 'Starsin'*,<sup>65</sup> 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.

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60 [www.joc.com/regulation-policy/transportation-regulations/international-transportation-regulations/no-plans-relax-chinese-cabotage-laws\\_20170216.html](http://www.joc.com/regulation-policy/transportation-regulations/international-transportation-regulations/no-plans-relax-chinese-cabotage-laws_20170216.html).

61 [www.scmp.com/business/global-economy/article/2049041/chinas-easing-cabotage-rules-deals-serious-blow-hong-kong](http://www.scmp.com/business/global-economy/article/2049041/chinas-easing-cabotage-rules-deals-serious-blow-hong-kong).

62 <https://lloydlist.maritimeintelligence.informa.com/LL1128696/China-mulls-opening-of-coastal-trade-to-foreign-carriers>.

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

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

65 *Homburg Houtimport B.V. v. Agrosin Private Ltd and Others ('The Starsin')* [2003] UKHL 12 [2003] 1 Lloyd's Rep 571.

*Are the charter party terms incorporated into the bill of lading?*

Often, particularly when there is a voyage charter (e.g., Gencon), charter party terms are incorporated into the bill of lading (e.g., Congenbill). Whether the charter party terms are incorporated into the bill of lading will depend on the construction of the incorporation clause in the bill. It is thought that when there is a question of which charter party (when a chain exists) applies, the one with the most appropriate legal relationship to the parties will apply.<sup>66</sup> The position in Hong Kong on the incorporation of a jurisdiction clause mirrors that under English law – the mere incorporation of a charter party in a bill of lading does not bring an arbitration clause with it, unless specific words of incorporation exist to show that intention.<sup>67</sup> The legal analysis applied to determine whether other charter party terms are incorporated (e.g., terms that relate to ‘charterers’) also follows English law.

*Suing under a letter of indemnity*

Bills of lading are documents of title. Disputes can arise if cargo is released without presentation of the original bills. In the *River Globe* case,<sup>68</sup> the shipowners accepted a letter of indemnity (LOI) issued by head charterers who had, in turn, received an LOI from sub-charterers. Subsequently, the true holder of the bills brought a claim against the shipowners for the wrongful release of the cargo and threatened the arrest of the vessel. The shipowners relied on the LOI and demanded that the head charterers either put up bail or security, or pay the claim. Head charterers made a similar demand on the sub-charterers under the second LOI; the sub-charterers refused. The head charterers successfully applied for a mandatory injunction compelling the sub-charterers to provide bail or security under the LOI. In *Cargill International Trading Ltd v. Loyal Base Development Ltd*,<sup>69</sup> the Hong Kong court again enforced an LOI for delivery of cargo without presentation of original bills of lading by granting a mandatory injunction compelling the LOI provider to perform the undertakings given in the LOI.

***Time limits and time bars***

Time limits apply to any cargo claim made under the Hague-Visby Rules. Notice of loss or damage must be given by the party claiming the damage within three days of the cargo being delivered (failure to do so has evidential consequences), while any proceedings, unless an extension of time is agreed between the parties, will be substantively time-barred if they are not brought within one year of the date of delivery or the date when the cargo should have been delivered.<sup>70</sup>

If the Hague-Visby Rules do not apply, then the normal six-year time bar for contract and tort applies; however, for cargo claims, the Rules generally will apply (e.g., by virtue of a clause paramount, sub-bailment on terms or a *Himalaya* clause) and cautious claimants will respect the one-year time bar even if in doubt as to whether it applies. To protect time,

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66 *Yaoki*, HCAJ 134/2005, held that the charter party with the most appropriate legal relationship to the parties would apply.

67 *OCBC Wing Hang Bank Ltd v Kai Sen Shipping Co Ltd* [2020] HKCFI 375.

68 *Global Maritime Trust (S) Pte Ltd v. Fortress Group Ltd (The ‘River Globe’)* [2014] HKCFI 1876.

69 HCCL 12/2015, judgment dated 24 November 2015.

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

proceedings must be commenced in the correct jurisdiction.<sup>71</sup> If that is in Hong Kong, a writ must be issued and served within its validity (one year counting from the date of issuance of the writ).<sup>72</sup>

### **iii Limitation of liability**

On 3 May 2015, the Merchant Shipping (Limitation of Shipowners Liability) (Amendment) Ordinance 2005 came into effect in Hong Kong and increased the limits for personal injury and other claims from the traditional 1976 limits<sup>73</sup> to the limits provided for by the original 1996 Protocol.<sup>74</sup> Only the provisions of the Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC Convention 1976) ‘as set out in Schedule 2’ of the Merchant Shipping (Limitation of Shipowners Liability) Ordinance (Cap 434) (the LSL Ordinance) have force of law in Hong Kong (see Sections 12 to 23 of the Ordinance). The 1996 Protocol limits under the LLMC Convention 1976 were increased on 8 June 2015.<sup>75</sup> On 4 December 2017, Hong Kong applied the International Maritime Organization’s (IMO) latest amendments to the limits under the Protocol to amend the LLMC Convention 1996 (the 1996 LLMC Protocol).<sup>76</sup> These amendments significantly increased the limits of liability that were in force from 2015. 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) (up from 2 million 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 (up from 1 million SDRs) plus additional amounts for larger vessels. These increased figures can be found in Schedule 2 to the LSL Ordinance.<sup>77</sup>

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). To limit liability, a person merely has to establish that the claims in respect of which he or she is alleged to be liable fall within Article 2 of the 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 burden to overcome. The Admiralty Court (at the High Court of England and Wales (EWHC)) commented *obiter* in *Saint Jacques II*<sup>78</sup> that

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71 *The ‘Pioneer Container’* [1994] 2 AC 324.

72 As to the circumstances in which an *in rem* writ’s validity may be extended (or not as the case was), see *Shun An* [2014] HKEC 325.

73 [treaties.un.org/doc/Publication/UNTS/Volume%201456/volume-1456-I-24635-English.pdf](https://treaties.un.org/doc/Publication/UNTS/Volume%201456/volume-1456-I-24635-English.pdf) – under the Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC Convention 1976).

74 [www.imo.org/en/About/Conventions/Pages/Convention-on-Limitation-of-Liability-for-Maritime-Claims-\(LLMC\).aspx](http://www.imo.org/en/About/Conventions/Pages/Convention-on-Limitation-of-Liability-for-Maritime-Claims-(LLMC).aspx).

75 *id.*

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

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

78 *Margolle and Another v. Delta Maritime Co Ltd (The ‘Saint Jacques II’)* – QBD (Admlty Ct) (Gross J) – 28 November 2002.

‘it is likely that only truly exceptional cases will give rise to any real prospect of defeating an owner’s right to limit’.<sup>79</sup> The UK limits were successfully broken in *Atlantik Confidence*, but that decision turned on a set of unique facts.<sup>80</sup> 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* 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.<sup>81</sup>

Under Section 22(4) of the LSL Ordinance, ‘owner’ includes any part owner, charterer, manager or operator of a ship, and in *Metvale Ltd v. Monsanto International Sarl (The ‘MSC Napoli’)*, the Admiralty Court (EWHC) held that the word ‘charterer’ in the equivalent UK legislation includes a slot charterer.<sup>82</sup> This case is likely to be followed by the Hong Kong courts.

Articles 6 and 7 of the LLMC Convention 1976 explain how the (new) general limits and passenger limits are computed. A limitation fund is constituted under Article 11 and distributed under Article 12. Pursuant to Article 13, when a fund has been constituted, any person who has made a claim against the fund is barred from exercising any right in respect of his or her claim against any other assets of the person by or on behalf of whom the fund has been constituted.

## V REMEDIES

### i Ship arrest

#### *Arrest in Hong Kong*

The 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) and include claims in relation to possession or ownership of, or mortgage on, a ship, loss of life or personal injury because of a defect in a ship, damage done by or to a ship (including pollution) and loss of or damage to goods carried by ship and other claims relating to carriage of goods by ship. Claims for insurance premiums<sup>83</sup> and contracts for the sale of a ship are not included.<sup>84</sup> 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. Generally, the only precondition to an arrest in Hong Kong is that the claim falls within Section 12A(2) of the High Court Ordinance. Cases have arisen concerning a ship manager’s right to arrest: namely, *Ruby Star*, *Oriental Dragon* and *King Coal*.<sup>85</sup> The first two of these cases suggest that even when ship managers keep a running account, as long as the underlying items in that running account would give rise to an *in rem* claim, managers have a right to arrest a vessel (although only for *in rem* claims – and the security put up was reduced to

79 [2002] EWHC 2452 [18].

80 [2016] EWHC 2412; [2017] 2 CLC 268.

81 [2016] 2 HKLRD 1091.

82 [2008] 2 CLC 944; see also *Decurion* [2013] 2 HKLRD 930.

83 *Oriental Dragon* [2014] 1 HKLRD 649.

84 *Hong Ming* [2011] 5 HKLRD 139.

85 *Ruby Star* [2014] HKCU 205 and [2015] 1 HKLRD 543; *Oriental Dragon* [2014] 1 HKLRD 649; and *King Coal* [2013] 2 HKLRD 620.

the extent that the claims were not *in rem* claims). The *Ruby Star* appeal decision<sup>86</sup> clarifies that the admiralty jurisdiction has to exist at the time of commencement of the action (i.e., the issuance of the writ) – in *Ruby Star* it did not, since the appropriation of the sums to the bunker claims was not exercised at the commencement of the action but afterwards. This was fatal to the arrest, as the *in rem* right of action had to exist at the time the action was commenced.

*Oriental Dragon* suggests that managers are entitled to arrest in respect of unpaid management fees (not previously thought to be the case). *King Coal* establishes the authority that where a statutory *in rem* crew wages claim is assigned, the right to arrest is lost. This is because of the express wording of Section 12A(2)(n) of the High Court Ordinance: ‘Any claim by a Master or member of the crew’ does not provide for a party with assigned rights to make an *in rem* arrest. *Fearless I*<sup>87</sup> follows the *King Coal* decision. It is the authority that if a party that does not have a valid *in rem* claim against a vessel (in this case, the assignees of the master’s and the crew’s rights to wages) nonetheless arrests the vessel, that party should not be reimbursed from the proceeds of sale.

In *Alas*,<sup>88</sup> the Hong Kong High Court was asked whether a party could arrest, notwithstanding that the party had already obtained a London Maritime Arbitrators Association arbitration award. The Court held that as long as the claim was based on the original underlying *in rem* cause of action (under Section 12A(2) of the High Court Ordinance), and was not simply a claim to enforce an award issued by a tribunal, it could be brought. Following the *Rena K*<sup>89</sup> decision, the Court held that an action *in rem* does not merge in a judgment *in personam* but remains available as long as the award remains unsatisfied. Both the High Court and the Court of Appeal<sup>90</sup> refused the right to appeal the decision in *Alas*, confirming that a security arrest is possible in Hong Kong even after an arbitration award has been obtained in a foreign jurisdiction. However, this is not possible in respect of judgments in view of Section 5 of the Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance (Cap 46).

### **Ownership**

When exercising its admiralty jurisdiction, the court must be satisfied that the person who would be liable for the claim *in personam* was either the sole beneficial owner of the vessel or the demise charterer at the time the *in rem* action is commenced. In the *Almojil 61* case,<sup>91</sup> the Hong Kong High Court exercised its admiralty jurisdiction against the beneficial owner as stated on the (Dominican) shipping register, and the vessel was arrested and, in turn, sold. A second company (not on the register) alleged that it was the co-owner of the vessel and sought to claim proceeds of the sale. The Court held that the shipping register was of formal importance and it would not go behind the register except in exceptional or special circumstances – such as when the registration of a vessel is procured by fraud. A similar conclusion was subsequently reached in *Bo Shi Ji 393*, in which *Almojil 61* was followed and the Court refused to overlook the ownership details set out in a Vessel Ownership Registration

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86 [2015] 1 HKLRD 543.

87 [2013] 5 HKLRD 48.

88 *Alas* [2014] 4 HKLRD 160.

89 *Rena K* [1979] QB 377.

90 HCMP2315/2014, judgment dated 9 July 2015.

91 *Almojil 61* [2014] HKEC 1077; [2014] HKEC 1076.



(and was not in any event satisfied, on the evidence presented, that another individual (not the owner of the arrested sister ship) was the owner of the vessel that had sunk at the time the writ was issued).<sup>92</sup> The *Almojil 61* was subsequently appealed. The Court of Appeal disagreed with the High Court on the point of ownership. The Court of Appeal held that registered ownership is not conclusive. The Court was entitled to consider whether the registered owner held the shares in the ship (or part of the shares) on trust for another party.<sup>93</sup>

### ***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,<sup>94</sup> 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. By limiting the definition of control, the High Court has kept the test for whether or not an arrest can be made simple. A key passage of the judgment is as follows:

*[T]he court is not looking to see if a party is exercising control over a company which is the charterer but to see if it is exercising control over the ship itself. Unless the corporate veil is lifted, the separate corporate identity of the contracting party in the charter party relationship cannot simply be ignored.*<sup>95</sup>

The concepts of associated ship arrest and bunker arrest are not recognised under Hong Kong law. Depending on the circumstances, it may be possible under Hong Kong law to obtain an injunction to prevent bunkers from being used but, in view of the costs involved, this may not be an attractive option.

### ***Procedure***

A ship may be arrested if the arresting party has a cause of action that carries with it a right of arrest. A party wishing to arrest in Hong Kong must first issue an *in rem* writ against the ship in the Hong Kong admiralty jurisdiction of the Court of First Instance. 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.

Before an arrest can be made, the person who intends to arrest the vessel should check that no caveats against arrest have been entered into the caveat book<sup>96</sup> and, if not, prepare to file in court a writ of summons (and blank acknowledgment of service), warrant of arrest, *praecipe* for service of writ *in rem*, *praecipe* for warrant of arrest, undertaking and affidavit to lead to arrest (arrest papers).<sup>97</sup> The affidavit will set out the details of the claim and, as it is

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92 [2015] 3 HKLRD 424, [28].

93 [2015] 3 HKLRD 598.

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

95 *ibid.*, [67].

96 Rules of High Court (Cap 4A), Order 75, Rule 6.

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

*ex parte*, the arresting party has an obligation to make full and frank disclosure in relation to the material facts stated in it.<sup>98</sup> 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*. Once completed, the relevant arrest papers (and cheques for the applicable fees) should be taken to the bailiff. The bailiff will check to see whether a caveat is entered against the named vessel. After checking that there is no such caveat, the bailiff will endorse the arrest papers. The bailiff will then take the papers to the Registrar of the High Court, who will review the arrest papers and issue the warrant.<sup>99</sup> The bailiff will then notify the Hong Kong Marine Department that a warrant for arrest has been issued, which means that the ship will not be allowed to sail. The bailiff then travels to the ship to serve the warrant on the ship. As Hong Kong is relatively small, and most vessels are arrested while calling or anchoring at Hong Kong, we are unaware of any arrests by helicopter.

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. Further, it may be necessary to pay to bunker and provision the vessel and its crew.

### ***Wrongful arrest***

Depending on the facts and conduct of the parties, the warrant of arrest may be set aside and the owner of the arrested ship can make a claim for damages for wrongful arrest; however, the Hong Kong courts are reluctant to award damages for wrongful arrest and a claim will only succeed if the arresting party acted in bad faith or in a grossly negligent manner.<sup>100</sup> The onus is on the owner of the arrested ship to prove bad faith or gross negligence on the part of the arresting party and this requires a very high level of proof. In *The 'Hong Ming'*,<sup>101</sup> Mr Justice Reyes set aside the arrest and unusually ordered an inquiry for damages for wrongful arrest. However, this decision does not seem to have lowered the threshold, as in the subsequent judgment in *Cosmotrade Exports SA v. Owners and/or Demise Charterers of Ship or Vessel 'Jimrise'*, the same judge set aside the arrest on the basis that the demise charterers were not the demise charterers at the time of arrest but refused to order an inquiry into damages on the basis that he was 'not persuaded that Cosmotrade has shown any degree of malicious negligence to justify an inquiry into damages'.<sup>102</sup>

## **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*), regarding which see Section III.iii.

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, when a claim is defended, ordinarily the vessel will not be sold.

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

99 Rules of High Court (Cap 4A), Order 75, Rule 10.

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

101 [2011] 5 HKLRD 139.

102 [2012] HKEC 79 [38].

The situation is different when the vessel's owners are in financial difficulty. A sale *pendente lite* is possible, and an order can be made within six to eight weeks in limited circumstances when a vessel has been arrested in Hong Kong but before an award or judgment has been obtained, essentially 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).

Once a sale order is made, the vessel is confidentially appraised (normally by a ship broker and a ship surveyor agreeing a value). The bailiff then advertises the vessel for sale on two consecutive days, inviting sealed tenders with bank drafts for 10 per cent of the amount being offered. The tenders are opened on the appointed day, normally two to three weeks after the advertisements appear, and the vessel is sold to the highest tenderer, provided the amount offered is at least equal to the appraised value. Normally, about seven days after tenders are opened by the court, the sale is completed by payment of the 90 per cent balance and execution of a bill of sale.

If the appraised value is not reached, the court may still direct that the vessel be sold to the highest tenderer unless the mortgagee requests that the vessel be advertised again, in which case it will have to give an undertaking to indemnify the court if subsequent tenders are lower than those obtained in the first round. Alternatively, the court itself can decide that the vessel should be advertised again. The courts rarely order private sales of vessels.

Broadly, the order of priorities is as in England.<sup>103</sup> For buyers, the attraction of purchasing a vessel sold by the court is that it will be free of encumbrances.<sup>104</sup>

## VI REGULATION

### i Safety and port state control

The Marine Department (MD) of the Hong Kong Special Administrative Region is the main body responsible for administering the port of Hong Kong, the responsibility vesting in the Director of Marine. The Director of Marine is supported by various advisory, statutory and consultative or government bodies, such as the Port Operations Committee, Pilotage Advisory Committee, Local Vessels Advisory Committee, and Hong Kong Maritime and Port Board (the latter having been formed by the merger of the Hong Kong Port Development Council and Hong Kong Maritime Industry Council in April 2016). The MD ensures that ships are able to enter a port, load or discharge cargo and then leave the port as quickly and safely as possible. It also regulates aspects of safety and pollution.<sup>105</sup> As a key flag state, Hong Kong is mindful of the need to uphold standards and maintain an excellent safety record, and to this end most key maritime conventions are applicable.

Hong Kong signed the Tokyo Memorandum of Understanding on Port State Control in the Asia-Pacific Region 1994 (the Tokyo MOU) in December 1993 and became a member of the Port State Control Committee in the Asia-Pacific Region.<sup>106</sup> The MD carries out port state control inspections on ships visiting Hong Kong in accordance with IMO Resolution A.1119(30) and the Tokyo MOU Port State Control Manual. If any serious deficiencies are noticed, the ship will be detained and the ship's agent or owner, classification

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

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

105 [www.mardep.gov.hk/en/aboutus/functions.html](http://www.mardep.gov.hk/en/aboutus/functions.html).

106 [www.mardep.gov.hk/en/aboutus/pdf/psc.pdf](http://www.mardep.gov.hk/en/aboutus/pdf/psc.pdf).

society and flag state will be notified of the detention and told how to rectify the situation. Serious deficiencies affecting the seaworthiness of a ship or the safety of the crew, or causing damage to the marine environment, have to be rectified prior to the ship's departure.<sup>107</sup> There is an appeal mechanism against any detention under Section 66 of the Shipping and Port Control Ordinance (Cap 313). Monthly detention lists, starting from 1998, can be found on the MD website.<sup>108</sup>

On 1 July 2016, the amendments to Chapter VI of Regulation 2 of SOLAS on the weighing of containers became effective globally. This means that in Hong Kong, as in other SOLAS Member States, a packed container can be loaded onto a vessel only if its weight has been verified and communicated to the ship. The amendments were brought into effect by Section 3A of the Merchant Shipping (Safety) (Carriage of Cargoes and Oil Fuel) Regulation (Cap 369AV). Shippers in Hong Kong must submit the procedure for 'Method 2' weighing to the MD for approval whether the container has been packed in Hong Kong or not.<sup>109</sup> The penalties for a 'specified' person who breaches the regulation could be a fine of up to HK\$20,000 or imprisonment for up to two years, or both.<sup>110</sup> This could also include a master or terminal operator who loads a container without a verified gross mass figure. Hong Kong appears to be implementing the amendments to SOLAS more actively than other jurisdictions. However, there are yet to be any cases involving breaches and it is not clear how strictly the MD, as the competent authority, will enforce its powers.

## ii Registration and classification

### *Registry*

The Hong Kong Shipping Register was set up on 3 December 1990 pursuant to the Merchant Shipping (Registration) Ordinance (Cap 415).<sup>111</sup> Under Section 11(1) of the Ordinance, a ship can be registered in Hong Kong if a representative person is appointed in relation to the ship and the majority interest in the ship is owned by one or more qualified persons or the ship is operated under a demise charter by a corporation that is a qualified person (i.e., an operator register). The ship must not be registered elsewhere. Section 11(4) provides that a qualified person is (1) an individual who holds a valid identity card and who is ordinarily resident in Hong Kong, (2) a body corporate incorporated in Hong Kong, or (3) a registered non-Hong Kong company as defined by Section 2(1) of the Companies Ordinance (Cap 622). There are three types of registration: provisional, full and demise charter (bareboat charter). This means that a demise charterer can register a vessel in Hong Kong.

### *Procedure*

An application must be made to the MD Shipping Registry. The application consists of, *inter alia*, an application form and a declaration of entitlement. The Shipping Registry will approve the ship name, allot a call sign and official number, and issue the ship's marking note

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107 [www.mardep.gov.hk/en/pub\\_services/portstate.html](http://www.mardep.gov.hk/en/pub_services/portstate.html).

108 [www.mardep.gov.hk/en/pub\\_services/dlist.html](http://www.mardep.gov.hk/en/pub_services/dlist.html).

109 [www.mardep.gov.hk/en/pub\\_services/ocean/pdf/miss\\_vgm\\_guidelines.pdf](http://www.mardep.gov.hk/en/pub_services/ocean/pdf/miss_vgm_guidelines.pdf).

110 Merchant Shipping (Safety) (Carriage of Cargoes and Oil Fuel) Regulation, Section 3A(9). A maximum tolerance in weight of +5 per cent and +/-0.5 tonnes is allowed between the verified gross mass declared by shippers and the verified gross mass obtained by the Marine Department, carrier or terminal for containers' gross mass above 10 tonnes and 10 tonnes or below, respectively.

111 [www.mardep.gov.hk/en/pub\\_services/home.html](http://www.mardep.gov.hk/en/pub_services/home.html).

for the ship's master to complete. A certificate or declaration of marking is then signed by the ship's master or classification society surveyor. The applicant then submits the title certificate of ownership or encumbrance, the builder certificate or bill of sale and other documents as required by the Registry. The Registry will issue a certificate of registry (or a provisional certificate of registry) and the application is complete.<sup>112</sup> The evidence to be produced for ship registration is set out in Section 21 of the Merchant Shipping (Registration) Ordinance. The Hong Kong Shipping Register registers mortgages on full and provisional registration.<sup>113</sup>

### ***Pre-registration quality control system***

A pre-registration quality control system (PRQC) has been in place since 2004 to ensure ships joining the Register comply with applicable safety and pollution prevention standards of the relevant international conventions and promulgated by Hong Kong at the time of entry. Upon receiving an application to join the Register, the MD will assess the quality of the ship and determine whether a PRQC assessment is required. As of 9 March 2020, any PRQC assessment must be conducted by one of the classification societies recognised by the MD.<sup>114</sup> If the condition of a ship is found unacceptable, registration will be refused.<sup>115</sup>

### ***Classification societies***

The MD has authorised nine well-known classification societies to perform statutory surveys and audits and issue the related certificates for Hong Kong-registered cargo ships:

- a* American Bureau of Shipping;
- b* Bureau Veritas;
- c* China Classification Society;
- d* DNV;
- e* Korean Register of Shipping;
- f* Lloyd's Register;
- g* Nippon Kaiji Kyokai;
- h* RINA SpA; and
- i* Russian Maritime Register of Shipping.<sup>116</sup>

### **iii Flag state control**

A ship quality control system, known as the Flag State Quality Control (FSQC) System, was developed in 1999 for monitoring and maintaining the quality of ships under the Hong Kong Shipping Register. The system ensures that ship management companies perform inspections and surveys on their ships in line with international conventions. Any Hong Kong-registered ships whose quality standards appear to be doubtful will be subjected to FSQC inspections and recommendations for improvement.<sup>117</sup>

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112 See [www.mardep.gov.hk/en/pub\\_services/pdf/sr\\_handbook.pdf](http://www.mardep.gov.hk/en/pub_services/pdf/sr_handbook.pdf), p. 6.

113 [www.mardep.gov.hk/en/pub\\_services/reg\\_gen.html](http://www.mardep.gov.hk/en/pub_services/reg_gen.html); see Merchant Shipping (Registration) Ordinance, Sections 44 and 50.

114 [www.mardep.gov.hk/en/msnote/pdf/msin2007.pdf](http://www.mardep.gov.hk/en/msnote/pdf/msin2007.pdf).

115 [www.mardep.gov.hk/en/pub\\_services/qas.html](http://www.mardep.gov.hk/en/pub_services/qas.html).

116 [www.mardep.gov.hk/en/faq/surveycs.html](http://www.mardep.gov.hk/en/faq/surveycs.html).

117 [www.mardep.gov.hk/en/aboutus/hkfactsheet.html](http://www.mardep.gov.hk/en/aboutus/hkfactsheet.html).

A new FSQC system has been in force since 9 March 2020.<sup>118</sup> Under the system, a number of ships will be identified for FSQC audits based on the MD's assessment on the ships with a focus on the risk of failure in their maintenance management system, and a small number of ships will be selected randomly. The FSQC audit will concentrate on assessing the implementation of the maintenance management system. If the condition of a ship is considered deteriorated beyond reasonable quality, the MD will request an extended inspection of that ship to be carried out by a recognised organisation. If a Hong Kong-registered ship is under port state control detention, an extended inspection may be requested by the MD, followed by a FSQC audit.<sup>119</sup>

#### **iv Environmental regulation**

Hong Kong is committed to implementing the International Convention for the Prevention of Pollution from Ships 1973 (as modified by the Protocols of 1978 and 1997) (MARPOL (73/78)), which is the principal international convention aimed at preventing or minimising pollution of the environment resulting from ship operations. The Convention has six annexes:

- a* Annex I: Regulations for the Prevention of Pollution by Oil;
- b* Annex II: Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk;
- c* Annex III: Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form;
- d* Annex IV: Prevention of Pollution by Sewage from Ships;
- e* Annex V: Prevention of Pollution by Garbage from Ships; and
- f* Annex VI: Prevention of Air Pollution from Ships.

All Annexes have been implemented through the Merchant Shipping (Prevention and Control of Pollution) Ordinance (Cap 413) and its subsidiary legislation, and are applicable to any Hong Kong vessel and to all vessels while they are in Hong Kong waters.

Under Annex VI, the global sulphur content of marine fuel on the high seas had been capped at 3.5 per cent mass by mass (m/m) from 1 January 2012.<sup>120</sup> The Air Pollution Control (Ocean Going Vessels) (Fuel at Berth) Regulation (Cap 311AA) (repealed), which mandated ocean-going vessels to use clean fuels while berthing in Hong Kong, took effect on 1 July 2015. This has since been replicated by the mainland's emissions control areas (ECA) programme in neighbouring Pearl River Delta ports. Under the programme, from 1 January 2019 all vessels have to change to low-sulphur fuel (not exceeding 0.5 per cent sulphur mass/mass (m/m)) prior to entering the Pearl River Delta ECA (including Hong Kong). On 1 January 2019, the Air Pollution Control (Fuel for Vessels) Regulation (Cap 311AB) came into force, requiring vessels plying Hong Kong waters to use cleaner fuel to complement the efforts under the programme. The masters and owners of any ocean-going vessels using non-compliant fuel in Hong Kong waters, irrespective of whether sailing or berthing, and ship masters and owners who fail to keep records (for three years), will be liable to fines and imprisonment.<sup>121</sup>

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118 [www.mardep.gov.hk/en/msnote/pdf/msin2007.pdf](http://www.mardep.gov.hk/en/msnote/pdf/msin2007.pdf).

119 [www.mardep.gov.hk/en/pub\\_services/qas.html](http://www.mardep.gov.hk/en/pub_services/qas.html).

120 [www.imo.org/en/MediaCentre/PressBriefings/Pages/MEPC-70-2020sulphur.aspx](http://www.imo.org/en/MediaCentre/PressBriefings/Pages/MEPC-70-2020sulphur.aspx).

121 Air Pollution Control (Fuel for Vessels) Regulation (Cap 311AB), Sections 5, 13 and 14.

As of 1 January 2020, the limit for sulphur in fuel oil used on board ships operating outside designated ECAs is reduced to 0.5 per cent m/m under Regulation 14.1.3 of Annex VI.<sup>122</sup> Vessels entering China's inland ECAs (Yangtze River and Xi Jiang River) must use fuel with a sulphur content not exceeding 0.1 per cent m/m while operating within the ECA; the same will apply to Hainan Coastal ECA from 1 January 2022.<sup>123</sup> From 1 March 2020, carriage of fuel oil with sulphur content exceeding 0.5 per cent for use on board ships is prohibited unless a ship has installed an exhaust gas cleaning system (scrubber).<sup>124</sup>

The Hong Kong Air Pollution Control (Marine Light Diesel) Regulation (Cap 311Y), which came into effect on 1 April 2014, provides for the specifications that must be met by marine light diesel suppliers in Hong Kong.<sup>125</sup> It also provides for the requirement on importers and suppliers of light diesel to keep records. In particular, the Regulation states that sulphur content of marine light diesel must not exceed 0.05 per cent by weight.

Section 5 of the Bunker Oil Pollution (Liability and Compensation) Ordinance (Cap 605) provides that if, as a result of an incident, any pollution damage is caused in Hong Kong, the owner of the ship concerned is liable for that damage.

## v 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, although it is a defence for the person charged to prove that he or she has taken all reasonable precautions.<sup>126</sup> The decision of the Court of Final Appeal in *Kulemesin Yuriy and Tang Dock-Wah v. HKSAR*<sup>127</sup> 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*,<sup>128</sup> 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.<sup>129</sup>

The Admiralty Jurisdiction of the Court of First Instance includes the jurisdiction to hear and determine claims for damage done by a ship and claims for loss of life or personal injury.<sup>130</sup> The Merchant Shipping (Collision Damage Liability and Salvage) Ordinance (Cap 508) (the CDLS Ordinance) enacts the provisions of the (now repealed) Maritime Conventions Act 1911 (UK). Accordingly, the doctrine of proportionate fault applies with

122 [www.imo.org/en/MediaCentre/HotTopics/Pages/Sulphur-2020.aspx](http://www.imo.org/en/MediaCentre/HotTopics/Pages/Sulphur-2020.aspx).

123 [www.gard.no/web/updates/content/26771455/china-expands-its-sulphur-emission-control-areas](http://www.gard.no/web/updates/content/26771455/china-expands-its-sulphur-emission-control-areas).

124 [www.imo.org/en/MediaCentre/PressBriefings/Pages/19-Implementation-of-sulphur-2020-limit-.aspx](http://www.imo.org/en/MediaCentre/PressBriefings/Pages/19-Implementation-of-sulphur-2020-limit-.aspx).

125 That is, light diesel oil intended for use in a vessel.

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

127 [2013] 16 HKCFAR 195.

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

129 The appellant, Lai Sai-ming, applied for leave to appeal on sentencing but it was refused by the Court of Appeal on the basis that the grounds did not bear any merits: judgments of Hon Macrae and McWalters JJA, dated 12 November 2015 and 4 February 2016 in CACC 77/2015. The appellant, Chow-Chi-wai, applied for leave to appeal on costs to the Court of Final Appeal but the application was dismissed: (2016) 19 HKCFAR 515.

130 High Court Ordinance (Cap 4), Sections 12A(2)(f), (3)(b) and 12C.

respect to claims for property damage;<sup>131</sup> 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.<sup>132</sup> 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.<sup>133</sup> If it is not possible to establish degrees of fault, the liability is apportioned equally.

Collision claims will invariably be in tort, not contract. Hong Kong follows English law in that pure economic loss can be recovered only as a consequence of physical damage to, or interference with, property of the claimant.<sup>134</sup>

There is a two-year limitation period for civil claims arising out of a collision.<sup>135</sup>

### **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. There is no standard form of salvage agreement under Hong Kong law. Any salvage contracts governed by Hong Kong law would be treated in the same manner as any other contract made under Hong Kong law. Pursuant to Section 12A(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; however, the provisions of the 1989 Salvage Convention do not apply when the property involved is maritime cultural property of prehistoric, archaeological or historical interest and is situated on the seabed.<sup>136</sup>

There is a two-year limitation period for salvage claims, commencing from the day on which the salvage operations are terminated.<sup>137</sup>

### **Wreck removal**

Section 21 of the Shipping and Port Control Ordinance empowers the Director of Marine to give the owner or the master of a vessel that is stranded, abandoned or sunk in the waters of Hong Kong directions as he or she sees fit in respect of the removal, raising or destruction of the vessel, and it is an offence not to comply with those directions. The Director has wide powers to contract with tugs and salvors for this purpose. Pursuant to Section 12 of the Merchant Shipping (Limitation of Shipowners Liability) Ordinance (Cap 434), most of the provisions of the LLMC Convention 1976 have force of law in Hong Kong; however, claims in respect of the raising, removal, destruction or the rendering harmless of a ship that has been sunk, wrecked, stranded or abandoned are not subject to limitation of liability

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

132 *ibid.*, Section 4.

133 *ibid.*, Section 5.

134 In *Darya Bhakti* [2013] 1 HKLRD 543, a time charterer's claim for pure economic loss was rejected as the time charterer had no proprietary interest in the vessel. This case went on appeal but dealing with other issues.

135 Merchant Shipping (Collision Damage Liability and Salvage) Ordinance (Cap 508), Section 7.

136 *ibid.*, Schedule 1, Part II, Section 2(1)(c).

137 International Convention on Salvage 1989, Article 23.



under Hong Kong law.<sup>138</sup> The Nairobi International Convention on the Removal of Wrecks 2007 (the Nairobi WRC 2007) came into force in China on 11 February 2017, but China's ratification does not apply to Hong Kong or Macao.

### **Recycling**

There is no specific legislation governing the dismantling and recycling of ships under Hong Kong law. The Hong Kong Convention for the Safe and Environmentally Sound Recycling of Ships 2009 (the Hong Kong Convention) has not yet been ratified by China on behalf of Hong Kong.<sup>139</sup>

### **vi Passengers' rights**

The Merchant Shipping (Limitation of Shipowners Liability) Ordinance gives effect to both the LLMC Convention 1976 and the Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974 (the Athens Convention). These two conventions are set out in Schedules 1 and 2 to the Ordinance, respectively. Under the Ordinance, claims made under the Athens Convention would not affect the right of a passenger to bring a claim under the LLMC Convention 1976.<sup>140</sup>

Under the liability regime provided in the Athens Convention, a carrier is liable for damage or loss suffered by a passenger if the incident causing the damage occurred during the course of the carriage and was a result of the fault or neglect of the carrier. The Athens Convention includes limits of liability for personal injury and for loss of or damage to luggage.

The limitation period for a passenger to bring a personal injury claim under the Athens Convention is two years.<sup>141</sup>

In the context of Hong Kong, the application of the Athens Convention has been extended and also applies to 'regional carriage' (including carriage between Hong Kong and Macao or any mainland ports) by virtue of Section 3(2) of the Merchant Shipping (Limitation of Shipowners Liability) Ordinance.

### **vii Seafarers' rights**

The Maritime Labour Convention 2006 (MLC) was adopted by the International Labour Organization (ILO) to protect seafarers' right to decent employment. It contains a comprehensive set of global standards governing the working and living conditions of seafarers on board ocean-going ships in 14 areas, including minimum age, medical certification, qualifications, hours of work and rest, accommodation and food. The MLC came into force on 20 August 2013 in jurisdictions of those ILO Member States that have ratified it. Hong Kong is not a member of the ILO but the MLC has been ratified by China on behalf of Hong Kong. In December 2018, the MLC came into force, together with the relevant provisions in the Merchant Shipping (Seafarers) Ordinance (Cap 478) and its subsidiary legislation

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

139 In May 2018, the Hong Kong Shipowners Association highlighted the fact that Hong Kong and China should ratify the Hong Kong Convention for the Safe and Environmentally Recycling of Ships: [www.seatrade-maritime.com/news/asia/hksoa-urges-ratification-of-hong-kong-convention-on-ship-recycling-as-soon-as-possible.html](http://www.seatrade-maritime.com/news/asia/hksoa-urges-ratification-of-hong-kong-convention-on-ship-recycling-as-soon-as-possible.html).

140 Cap 434, Section 3(1).

141 *ibid.*, Schedule 1, Article 16.

to implement the requirements under the MLC.<sup>142</sup> All Hong Kong-registered ships of 500 gross tonnage and above engaged on international voyages must obtain a Declaration of Maritime Labour Compliance (DMLC Part I and II) and a Maritime Labour Certificate. The Amendment of 2014 to the MLC became effective on 18 January 2017.<sup>143</sup> The Amendment provides for requirements to ensure the provision of an expeditious and effective financial security system to assist seafarers in the event of their abandonment.<sup>144</sup>

Working standards and employment conditions for seafarers are specified in the Merchant Shipping (Seafarers) Ordinance (Cap 478) (MSSO) and its subsidiary legislation. In October 2018, the government proposed to amend the MSSO and its subsidiary legislation to implement standards for the working and living conditions of seafarers as set out in the MLC.<sup>145</sup> The amendments came into effect on 31 May 2019.<sup>146</sup>

The Merchant Shipping (Seafarers) (Amendment) Bill 2013 was passed on 6 November 2013<sup>147</sup> and became the Merchant Shipping (Seafarers) (Amendment) Ordinance 2013.<sup>148</sup> The Ordinance sought to align existing definitions and provisions under the MSSO with the MLC. The major amendments included amending the definition of ‘seafarer’, allowing seafarers’ organisations to provide recruitment and placement services, and to adopt the ‘direct reference approach’ in making subsidiary legislation under the MSSO for implementing the requirements of international agreements applicable to Hong Kong. There were also some miscellaneous amendments, including the removal of a provision that allows a company engaged in the supply of seafarers to recover from seafarers part of the prescribed fee paid to the government for their employment, as well as the removal of a restriction that persons aged 35 years or above cannot be registered with the MD for employment as seafarers. Sections 1, 2(1), 3(11)(c), 4 7(11), 10 and 66 of the Merchant Shipping (Seafarers) (Amendment) Ordinance 2013 became effective on 1 December 2016.<sup>149</sup>

## VII OUTLOOK

### i Current developments

#### *The Competition Ordinance*

Competition law was introduced to Hong Kong for the first time in December 2015. The Competition Ordinance contains three rules: the First Conduct Rule (aimed at preventing cartels and anticompetitive agreements); the Second Conduct Rule (aimed at preventing abuse of dominant position); and the Merger Rule (which, initially at least, only applies to telecommunications companies and, thus, does not apply to shipping).

The Competition Ordinance does not currently treat the shipping sector differently from any other sector. This is largely because the Ordinance is new and has not evolved over

142 <https://www.info.gov.hk/gia/general/201810/19/P2018101800553.htm>.

143 [www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:103578](http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103578).

144 [www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_248905.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_248905.pdf).

145 [www.info.gov.hk/gia/general/201810/19/P2018101800553.htm](https://www.info.gov.hk/gia/general/201810/19/P2018101800553.htm).

146 Merchant Shipping (Seafarers) (Ships Using Low-flashpoint Fuels) Regulation (Cap 478AK) and Merchant Shipping (Seafarers) (Passenger Ships—Training) Regulation (Cap 478AD).

147 [www.legco.gov.hk/yr12-13/english/bc/bc06/general/bc06.htm](http://www.legco.gov.hk/yr12-13/english/bc/bc06/general/bc06.htm).

148 [www.legco.gov.hk/yr13-14/english/ord/ord016-13-e.pdf](http://www.legco.gov.hk/yr13-14/english/ord/ord016-13-e.pdf).

149 [www.mardep.gov.hk/en/msnote/pdf/msin1646anx14.pdf](http://www.mardep.gov.hk/en/msnote/pdf/msin1646anx14.pdf).

time. However, it is a major concern for those in the liner shipping industry, where market organisation has traditionally favoured a variety of cooperative elements, such as (1) consortia and vessel-sharing agreements (VSAs), which are agreements that focus on a particular route, and (2) 'looser' voluntary discussion agreements (VDAs), which have no common tariff but provide a forum for members to discuss the trade and may provide recommendations for general rate increases.

On 17 December 2015, an application for a block exemption order (BEO) was made by the Hong Kong Liner Shipping Association, which made it clear that block exemptions for VDAs and VSAs were being sought. On 14 September 2016, the Hong Kong Competition Commission published a proposed BEO (and preliminary views) that exempts VSAs.<sup>150</sup> However, the proposed BEO does not propose the exemption for VDAs, citing that the rate stability and surcharge transparency as claimed did not justify an exemption. The proposed BEO is in line with the EU approach but not with the approach in the United States and Singapore, where both VSAs and VDAs are exempt. Subsequently, on 8 August 2017, the Hong Kong Competition Commission issued a BEO for VSAs between liner shipping companies. The Hong Kong Competition Commission decided not to issue a BEO for VDAs.<sup>151</sup>

The tramp shipping sector may also be affected by the Ordinance as it is not unusual in this sector for pools to be formed. In the European Union, the operators of pools tend to self-assess their arrangements to be able to prove, if challenged, that they were entitled to rely on the efficiency exemption (to the First Conduct Rule). In an attempt to mitigate the risks of the mainland liberalising its cabotage law in China and the impact of the Sino-US trade war on Hong Kong, the four major terminal operators<sup>152</sup> set up the Seaport Alliance in 2019 to work jointly to deliver more efficient services by reducing ships' waiting time, the transportation time and the number of inter-terminal trucks, while enhancing the overall competitiveness of the Port of Hong Kong across the region. This has sparked an investigation by the Hong Kong watchdog as to whether the joint alliance may constitute a contravention of the First Conduct Rule by preventing, restricting or distorting competition in Hong Kong. On 30 October 2020, the Hong Kong Competition Commission accepted a revised proposed commitment from the Seaport Alliance companies, and has terminated its investigation regarding the matters covered by that commitment.<sup>153</sup> The accepted commitment will serve as a useful reference point for the shipping industry when facing future investigation from the Commission.

## ii What next?

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. Hong Kong is no

150 [www.compcomm.hk/en/enforcement/registers/block\\_exemption/files/Notice\\_issued\\_under\\_section\\_16\\_of\\_the\\_Competition\\_Ordinance\\_of\\_a\\_proposed\\_block\\_e.pdf](http://www.compcomm.hk/en/enforcement/registers/block_exemption/files/Notice_issued_under_section_16_of_the_Competition_Ordinance_of_a_proposed_block_e.pdf). A block exemption order is subject to (1) the combined market share of the parties to the vessel-sharing agreement [VSA] not exceeding 40 per cent, (2) the VSA not authorising anticompetitive behaviour (e.g., price-fixing), and (3) parties being able to withdraw from the VSA without penalty.

151 [www.compcomm.hk/en/media/press/files/20170808\\_Competition\\_Commission\\_issues\\_block\\_exemp.pdf](http://www.compcomm.hk/en/media/press/files/20170808_Competition_Commission_issues_block_exemp.pdf).

152 Hongkong International Terminals Limited, Modern Terminals Limited, COSCO-HIT Terminals (Hong Kong) Limited and Asia Container Terminals Limited.

153 [https://www.compcomm.hk/en/media/press/files/EN\\_PR\\_CC\\_accepts\\_commitments\\_from\\_HKSA\\_20201030.pdf](https://www.compcomm.hk/en/media/press/files/EN_PR_CC_accepts_commitments_from_HKSA_20201030.pdf).

longer a major direct shipment port (given the move of manufacturers to other countries) and relies principally on its role as a trans-shipment port. Yet, free trade zones and the threat of liberalising cabotage regulation (see Section IV.i) may mean a further decrease in throughput. Hong Kong has also been caught in the crossfire of the Sino–US trade war and the spread of covid-19 globally, resulting 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.

On 14 December 2017, Hong Kong's Chief Executive, Carrie Lam, signed an agreement with the Chinese government strengthening Hong Kong's position in China's Belt and Road Initiatives. The agreement focuses on finance and investment, infrastructure and maritime transport, economic and trade facilitation as well as developing Hong Kong's place in the Greater Bay Area initiative in the Pearl River Delta.

In the 2018 Policy Address, the Chief Executive highlighted that Hong Kong should capitalise on the opportunities brought by the Belt and Road Initiatives and the Greater Bay Area development to develop high value-added maritime services. The government will implement measures to support and enhance the development, such as exploring streamlining regulation, offering facilitation and measures in support of Hong Kong's provision of reliable and good-quality dispute resolution services, providing tax reliefs to promote the development of marine insurance and injecting HK\$200 million into the Maritime and Aviation Training Fund to enhance the training and nurturing of talent for the sectors.<sup>154</sup>

In the 2019 Policy Address, the Chief Executive announced the introduction of tax concessionary measures to incentivise the development of ship leasing business and to attract more commercial principals of the maritime industry to Hong Kong.<sup>155</sup>

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,<sup>156</sup> 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 being the only common law jurisdiction in China with an up-to-date arbitration law regime with effective and enforceable interim relief (see Section III.ii).

Hong Kong also has myriad established maritime services, from ship managers, brokers, protection and indemnity clubs to consultant experts and lawyers, which will help preserve its position as a maritime hub in Asia.

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154 [www.policyaddress.gov.hk/2018/eng/policy\\_ch04.html](http://www.policyaddress.gov.hk/2018/eng/policy_ch04.html).

155 <https://www.policyaddress.gov.hk/2019/eng/highlights.html>.

156 <https://www.info.gov.hk/gia/general/202103/11/P2021031100509.htm>.

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