THE SHIPPING LAW REVIEW

TENTH EDITION

Editors
Andrew Chamberlain, Holly Colaço and Richard Neylon

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PREFACE

The aim of the tenth edition of this book is to provide those involved in handling shipping disputes with an overview of the key issues relevant to multiple jurisdictions. As with previous editions of *The Shipping Law Review*, we begin with cross-jurisdictional chapters looking at the latest developments in important areas for the shipping industry, including international trade sanctions, ocean logistics, offshore, piracy, shipbuilding, ports and terminals, marine insurance, environmental and regulatory issues, decommissioning and ship finance.

We have 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.

Each of these jurisdictional chapters 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, as are the key provisions of local law in relation to shipbuilding contracts, contracts of carriage and cargo claims.

In addition, the authors 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 also examined. The authors have then looked ahead and commented on what they believe are likely to be the most important developments in their jurisdiction in the coming year.

The shipping industry continues to be one of the most significant sectors worldwide, with the United Nations Conference on Trade and Development estimating that the operation of merchant ships contributes about US$380 billion in freight rates to the global economy, amounting to about 5 per cent of global trade overall. The significance of maritime logistics in facilitating trade and development has become increasingly apparent in the past year. Heightened and unstable freight rates, port closures, congestion and evolving shipping requirements as a result of covid-19 and the Ukraine conflict have all had far reaching effects beyond the shipping sector itself. As the international shipping industry is responsible for the carriage of over 80 per cent of world trade, with over 50,000 merchant ships trading internationally, the elevated shipping expenses and challenges to global logistics we have experienced this year have exacerbated inflation and supply chain disruptions, adding to the ongoing global crisis and hampering the maritime industry's covid-19 recovery. We have seen

global maritime trade, which plunged by approximately 4 per cent in 2020, recover at an estimated rate of 3.2 per cent. In 2021, shipments reached 11 billion tonnes, a value slightly below pre-pandemic levels.

The disruption caused by the pandemic and the war in Ukraine have brought to the fore the importance of the maritime industry and our dependence on ships to transport supplies. The law of shipping remains as interesting as the sector itself, and the contributions to this book continue to reflect that.

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

Andrew Chamberlain, Holly Colaço and Richard Neylon
HFW
London
May 2023

Chapter 1

SHIPPING AND THE ENVIRONMENT

Thomas Dickson and Johanna Ohlman[1]

I ENVIRONMENTAL AWARENESS

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

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. It is essential that the global shipping industry is ready and willing to take quick and decisive action to ensure that this challenge is met head on.

II MARPOL

In 1973, the IMO adopted the International Convention for the Prevention of Pollution from Ships 1973 (MARPOL). Currently formed of six Annexes, MARPOL attempts to address major environmental issues that affect shipping, with a view to improving safety at sea and protection of the marine environment. The Annexes specify operational restrictions for which the responsibility of enforcement falls to individual Member States. Disciplinary measures for infringements vary widely between Member States. The IMO's Marine Environment Protection Committee (MEPC) meets (in usual times) twice a year to review and update MARPOL provisions, and to review and address the growing number of environmental issues that the industry faces. Most recently, the 79th MEPC session (MEPC 79) was held between 12 and 16 December 2022.

i Annex I – oil

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

1 Thomas Dickson and Johanna Ohlman are associates at HFW.

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

The IMO's response to tackling incidents of oil pollution (both accidental and operational) has been the formulation of MARPOL Annex I, which is intended to improve tanker safety. Annex I entered into force on 2 October 1983, encapsulating provisions relating to the monitoring and handling of oily water and the segregation of ballast tanks, as well as crude-oil washing systems.

After the *Exxon Valdez* casualty and the ensuing public scrutiny, the IMO amended Annex I to require double hulls on tankers over 5,000 deadweight tonnage ordered after 6 July 1993.[2] The implementation of the double-hull requirement was initially envisaged as a gradual phasing out of the single-hulled fleet, with the inspection of old tonnage and the progressive adoption of new measures. However, these plans were accelerated after the *Erika* casualty of 2001. A new schedule brought measures prohibiting the carriage of heavy-grade oil by single-hull tankers into effect as of 5 April 2005.

Recent changes have focused on increasing the regulation of operations in polar areas. With the opening of new polar shipping routes, and with considerable mineral deposits and oil and gas reserves being found within the polar territories, investment in these regions is likely to be extensive. The high level of care required in these waters will be reflected in a correspondingly in-depth regulatory regime. The IMO has adopted the International Code for Ships Operating in Polar Water (the Polar Code) to address this issue. The Polar Code covers a full range of requirements, including, but not limited to, design, construction, equipment, operations, training, and search and rescue, as well as environmental issues. MARPOL Annex I, Chapter 9, Regulation 43 prohibits the use of heavy fuel oil in the Antarctic. At MEPC 79, the IMO adopted new Regulation 43A to MARPOL Annex I, which prohibits the use and carriage (for use as fuel) of heavy fuel oil by ships in Arctic waters on and after 1 July 2024.[3]

ii Annex II – noxious liquids in bulk

The carriage of noxious liquids by sea poses a substantial environmental risk, addressed by MARPOL Annex II, which entered into force on 2 October 1983. This contains provisions attempting to reduce the likelihood of damage to the marine environment by accidents arising out of the transport of prescribed chemicals. It sets out restrictions and conditions relating to the design, construction, equipment and operation of chemical tankers.

Annex II compels operators of chemical tankers to enter in a cargo record book all operations in connection with noxious liquids being carried. There are also various mandatory conditions that must be followed to ensure that the designated liquids are contained safely and received into certain reception facilities, that discharges are diluted and that these discharges are limited. There is a general prohibition of discharges within 12 nautical miles of the nearest land.[4] The Antarctic is designated a special area of protection under MARPOL Annex II.[5] At MEPC 74, the MEPC adopted amendments to Annex II to strengthen, in specified sea areas, discharge requirements for cargo residues and tank washings containing persistent

2 MARPOL Annex I, Regulation 19.

3 https://www.imo.org/en/MediaCentre/MeetingSummaries/Pages/MEPC76meetingsummary.aspx.

4 MARPOL Annex II, Regulation 5(1).

5 id., Regulation 5(14).

floating products with a high viscosity or a high melting point that can solidify under certain conditions (e.g., certain vegetable oils and paraffin-like cargoes), following concerns about the environmental impact of permissible discharges.[6] These amendments entered into force on 1 January 2021.

iii Annex III – harmful substances in packaged form

Annex III requires the identification of harmful substances as marine pollutants, to ensure they are packed and in a manner appropriate to minimising accidental pollution. There is an obligation to use clear marks to distinguish these from less harmful substances. A harmful substance for the purposes of the provision is defined as being a substance that was identified as a marine pollutant in the International Maritime Dangerous Goods Code, or that meets the criteria in the Appendix of Annex III.[7] Annex III came into force on 1 July 1992 and the MEPC adopted a revised MARPOL Annex III on 13 October 2006.

Annex III prohibits jettisoning cargo that has been identified as harmful, other than in circumstances where it is necessary to do so for the purpose of securing the safety of the ship or life at sea. In addition, owners have to take appropriate measures based on the physical, chemical and biological properties of harmful substances to regulate the washing of leakages overboard, provided that compliance with those measures does not impair the safety of the ship or the persons on board.[8]

iv Annex IV – sewage

MARPOL Annex IV requires ships to have systems and controls in place to deal with human sewage, for governments to have port reception facilities[9] and a requirement for survey and certification.[10] Annex IV entered into force on 27 September 2003; a revision entered into force on 1 August 2004.

Every ship is required to have a sewage system up to an approved standard with a comminution and disinfection system, and both a temporary storage tank and a holding tank of an appropriate capacity.[11]

Annex IV prohibits the discharge of sewage into the sea except at a distance of not fewer than three nautical miles from the nearest land when the ship is discharging comminuted and disinfected sewage using an approved system and not fewer than 12 nautical miles from the nearest land where the sewage has not been comminuted and disinfected.[12] Furthermore, untreated sewage must not be discharged instantaneously, but instead should be moderately released during the course of the vessel's voyage at a rate of not less than 4 knots,[13] while not producing any visible floating solids or discolouration in the surrounding water.[14]

6 www.imo.org/en/MediaCentre/MeetingSummaries/MEPC/Pages/MEPC-74th-session.aspx.
7 MARPOL Annex III, Regulation 1.
8 id., Regulation 7.
9 MARPOL Annex IV, Regulation 12.
10 id., Regulations 4 and 5.
11 id., Regulation 9.
12 id., Regulation 11.
13 Discharge rate is calculated according to the terms of Paragraph 3 of Resolution MEPC 157(55).
14 MARPOL Annex IV, Regulation 11 (see Resolution MEPC 157(55)).

As of January 2013, the MEPC has designated a zone of enhanced limitation in the Baltic Sea (the Special Area).[15] These amendments established additional requirements for passenger ships operating within the Special Area. The discharge of sewage from passenger ships within the Special Area is generally prohibited other than when it has been appropriately treated,[16] with the additional requirement that a vessel's sewage treatment equipment must meet certain nitrogen and phosphorus-removal standards[17] when tested for its certificate-of-type approval.

v Annex V – garbage disposal

The revised MARPOL Annex V, which entered into force on 1 January 2013, attempted to revolutionise the way in which the shipping industry regarded its waste disposal management. Annex V sets out obligations as to crew training and vessel garbage management plans on board, as well as vessel garbage record books. There is a general prohibition on the discharge of garbage into the sea except in some limited circumstances. Annex V imposes a complete ban on the disposal at sea of plastics, domestic waste and cooking oil, and other operational waste.

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

Amendments to Annex V came into force on 1 March 2018. From this date, the responsibility for determining whether or not a cargo is hazardous to a marine environment will fall on the shipper with cargo to be classified in accordance with the criteria of the UN Globally Harmonized System of Classification and Labelling of Chemicals. Vessels are also required to keep a garbage record book, documenting both the disposal of cargo residues and the disposal of garbage generated on board (including electronic waste items, known as e-waste). At MEPC 79, the IMO adopted amendments that make it mandatory for smaller ships, of 100 gross tonnage and above and less than 400 gross tonnage, to keep a garbage record book.

vi Annex VI – prevention of air pollution from ships

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

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

16 See Resolution MEPC 227(64).

17 See Resolution MEPC 227(64), Paragraph 4(2).

18 MARPOL Annex V, Regulation 1(1).

19 Sulphur oxide (SOx) and nitrogen oxide emission control areas (ECAs) are currently in place on the North American coastline and US Caribbean, and SOx ECAs are in place in the North Sea and Baltic Sea.

As of 1 January 2020, the limit for sulphur in fuel oil used on board ships operating outside designated ECAs was reduced to 0.5 per cent mass by mass (m/m) (the previous limit outside ECAs was 3.5 per cent m/m). Within the IMO-designated ECAs (the Baltic Sea area, the North Sea area, the North American area and the United States Caribbean Sea area) the limit is stricter, at 0.10 per cent m/m. The 2020 0.50 per cent m/m sulphur limit was confirmed by the MEPC 70 on 27 October 2016, ending years of uncertainty surrounding the effective date. At MEPC 79, the IMO adopted amendments to Annex VI to designate the entire Mediterranean Sea as an ECA for SOx and particulate matter. The new sulphur limit is expected to take effect from 1 May 2025.

Enforcement, compliance with and monitoring of the 2020 sulphur limit are the remit and responsibility of states that are a party to MARPOL Annex VI. To meet the sulphur regulations, most ships are now using new blends of fuel oil with a very low sulphur content (VLSFO) or compliant marine gas or diesel oil.[20] In 2019, the IMO produced a set of guidelines regarding the technical and safety implications of the new requirement for maximum 0.50 per cent sulphur fuels. Included within the guidelines is a template for a Fuel Oil Non-Availability Report, to accommodate instances in which compliant fuel is unavailable. In addition, a number of shipping, refining, fuel supply and standards organisations have collaborated to produce joint industry guidance on the supply and use of 0.5 per cent sulphur marine fuel, released on 20 August 2019.

On 1 March 2020, the 'carriage ban' on non-compliant fuel oils entered into force. Pursuant to the ban, it is prohibited to carry fuel oil that is non-compliant with MARPOL Annex VI for combustion purposes for propulsion or operation on board a ship, unless the ship is fitted with an exhaust cleaning system, or scrubber.[21]

The options for emissions compliance fall under fuel-based and technology-based solutions. Low and ultra-low distillates are available on the market, although these are more expensive than conventional heavy fuel oil, and questions have been raised regarding reliability and how they affect fuel systems that are more suited to conventional fuels. Alternatively, scrubbers allow vessels to burn (in most cases, cheaper) conventional fuel by cleaning exhaust gases. The attractiveness of installing scrubbers is therefore intrinsically linked to the premium on ultra or low sulphur fuel oil when compared to conventional fuel. It may also depend on the size of the vessel, where it may be less cost-efficient to install a scrubber on a smaller vessel with lower fuel consumption. A certain category of scrubbers known as 'open loop scrubbers' has been criticised on environmental grounds owing to concerns about the effects of waste water being dumped into coastal waters. On the basis of information gathered by BIMCO, scrubber wash water discharges have been banned at a series of major ports in China, India, France, Germany, Norway, Singapore, the United States and Saudi Arabia as well as Fujairah in the United Arab Emirates. Furthermore, Egypt has banned all such discharges in the Suez Canal. The IMO commissioned a review of its 2015 guidelines for scrubbers, to be carried out by the Pollution, Prevention and Response Sub-Committee. The revised guidelines were adopted at MEPC 77.[22]

20 www.imo.org/en/MediaCentre/HotTopics/Documents/Joint_Industry_Guidance.pdf.

21 Resolution MEPC.305(73) https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/MEPCDocuments/MEPC.305%2873%29.pdf.

22 Annex 1 to the report of MEPC 77 (MEPC 77-16-Add.1 - Report Of The Marine Environment Protection Committee On Its Seventy-Seventh Session (Secretariat) (1).pdf).

BIMCO has released model industry clause wording to accommodate these regulations, including a 2020 Marine Fuel Sulphur Content Clause[23] (to replace the BIMCO Fuel Sulphur Content Clause 2005) and a 2020 Fuel Transition Clause for Time Charter Parties.[24]

MARPOL Annex VI also imposes NOx emission limits for diesel engines. The limits depend on the engine's maximum operating speed and are categorised into three levels of acceptable NOx emissions depending on the vessel's age or the engine installation date.[25] The emission levels are Tier I (applicable from 1 January 2000), Tier II (applicable from 1 January 2011) and Tier III (applicable from 1 January 2016, in NOx ECAs only). In November 2014, reversing its previous decision for a five-year postponement, MEPC 66 affirmed the 2016 implementation date for Tier III. The Tier III levels will be enforced in the North American ECA, the US Caribbean ECA and any subsequently designated NOx ECAs.

Ships completed on or after 1 January 2016 will have to comply with more stringent Tier III standards if operating within the North American and US Caribbean NOx ECAs.[26]

There is a general prohibition under MARPOL Annex VI on the emission of ozone-depleting substances from vessels.[27]

III OIL POLLUTION LIABILITY REGIMES

i The Civil Liability Convention

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

Under the CLC Convention, a shipowner[30] is permitted to limit the level of its liability for oil pollution incidents based on a reference to the tonnage of the vessel. The Convention furthermore obliges owners of ships covered by the Convention to maintain insurance equivalent to their maximum liability for one incident.

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

a for a ship not exceeding 5,000 gross tonnage (GT), liability is limited to 4.51 million special drawing rights (SDRs);

23 2020 Marine Fuel Sulphur Content Clause for Time Charter Parties (bimco.org) and HFW was the only external law firm on the sub-drafting committee responsible for producing this clause.

24 2020 Fuel Transition Clause for Time Charter Parties (bimco.org) and HFW was the only external law firm on the sub-drafting committee responsible for producing this clause.

25 MARPOL Annex VI, Regulation 13.

26 id.

27 id., Regulation 12.

28 CLC Convention, Article I.

29 id., Article II.

30 id., Article I(3); the Merchant Shipping Act 1995 defines 'owner' as 'registered owner' at Section 153A(7).

b for a ship of between 5,000 GT and 140,000 GT, liability is limited to 4.51 million SDRs plus 631 SDRs for every additional gross tonne over 5,000; and

c for a ship over 140,000 GT, liability is limited to 89.77 million SDRs.

ii The US Oil Pollution Act 1990

The oil pollution liability regime in the United States is set out in the Oil Pollution Act 1990 (the OPA 1990).[31] Liability will attach to a 'responsible party' of a vessel or facility when there is a substantial threat or actual discharges of oil into or on the navigable waters and shoreline of the United States.[32] For the purposes of the OPA 1990, the responsible party of a vessel can be the operator, owner or demise charterer of the vessel, excluding any federal or state government bodies. A manager of everyday activities will also most likely be considered to be an operator, and therefore a responsible party within the scope of the Act.[33]

The OPA 1990 extends to all oil pollution in the United States, including incidents occurring within its territorial sea[34] and the EEZ,[35] as per the US admiralty jurisdiction.

The Act imposes strict liability for the discharge of oil on the responsible parties, with no *de minimis* principle;[36] as such, any oil spill can result in liability. There is no provision for joint and several liability in the OPA 1990, but in light of judicial interpretation of the Clean Water Act 1972, this principle is likely to apply.[37]

The OPA 1990 allows damages to be recovered from the responsible parties in relation to:

a compensation and loss resulting from the loss of natural resources;

b damages for injury to and economic loss arising from destruction of real or personal property;

c damages for loss of subsistence use of natural resources (available to all who use the natural resources, regardless of ownership);

d loss in revenue resulting from loss of property;

e loss of profit or earning capacity resulting from the injury or destruction of real property, personal property or natural resources; and

f damages for the increased net costs of providing increased and additional public services during or after removal activities.

Punitive damages for maritime claims are also applicable under the OPA 1990, with a cap placed at a ratio of 1:1 punitive-to-compulsory.[38]

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

32 Oil Pollution Act 1990 [OPA 1990], Section 1002.

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

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

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

36 *In re 'Jahre Spray II'*, 1996 WL 451315 (DNJ); 1997 NMC 845 (DNJ1996).

37 De La Rue and Anderson (op. cit., footnote 31), p. 197.

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

IV BALLAST WATER MANAGEMENT

The unregulated discharge of ballast water was previously recognised as enabling the transfer of potentially invasive foreign species between marine environments and consequently posing significant environmental harm. The effects of such a discharge can be harmful to localised food webs and result in the potential extinction of indigenous organisms. In an attempt to minimise these environmental effects, the IMO has formulated the Convention for the Control and Management of Ships' Ballast Water and Sediments 2004 (the Ballast Water Management Convention (BWMC)). To date, 79 countries representing more than 80.94 per cent of the world's tonnage have ratified the BWMC.

The BWMC came into force on 8 September 2017 but, because of a two-year extension granted by the IMO in July 2017, vessels that have already been built will be required to install a ballast water management system by their first International Oil Pollution Prevention renewal survey after 8 September 2019. Since this survey is required once every five years, some vessels will not be obliged to install ballast water management systems until September 2024. All newly built vessels will be required to be delivered with a ballast water management system.

In this regard, vessels are now required to:

a have a ballast water management plan;

b keep on board a ballast water record book and a ballast water management certificate;

c conduct any permissible ballast water exchange in line with the IMO'S D1 Standard; and

d have on board an approved ballast water treatment system in line with the IMO's D2 Standard.

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

In terms of the practicalities of implementation (and given that the BWMC remains in its early stages), the industry can look to the United States for an indication of how these provisions may work in practice. Ballast water management legislation is already in force there, and the United States Coast Guard Final Rule dated 23 March 2012 on Standards for Living Organisms in Ships' Ballast Water Discharged in US Waters (the US Rules) require vessels calling at US ports to treat ballast water when operating within US territorial waters, or to carry out an exchange of ballast waters before entering the US EEZ. In addition to the US Rules, which came into force in June 2012, individual states have also passed legislation, which has proven in places to be more onerous than the federal framework.

It was always envisaged that amendments would necessarily be made to the BWMC (the months following implementation have been referred to as the 'experience gathering phase') to improve the methodology of data gathering and analysis. At MEPC 79, the Ballast Water Review Group was established and revised unified interpretations of the BWMC were approved. This will hopefully clarify and provide guidance on how to comply with the BWMC, including record-keeping and reporting as well as implementation of ballast water management systems.

V GREENHOUSE GAS EMISSIONS

In April 2018, the IMO MEPC (convening at MEPC 72) adopted the IMO Initial GHG Strategy,[39] which aims for a reduction in carbon intensity of international shipping (to reduce CO2 emissions per transport work, as an average across international shipping, by at least 40 per cent by 2030, pursuing efforts towards 70 per cent by 2050, compared to 2008 levels) and for total annual GHG emissions from international shipping to be reduced by at least 50 per cent by 2050 compared to 2008 levels. Many are of the view that a reduction of 50 per cent by 2050 is an inadequate target, given the gravity of the challenges faced, and that the industry should instead set sights on reaching net zero by 2050 (which accords with the EU's aim in their 'Fit for 55' package (see below)).

The IMO Initial GHG Strategy divides the IMO's aims to reduce GHG emissions from ships into a set of candidate short-, medium- and long-term measures within a series of specified time frames. The IMO intends to incorporate the various candidate proposals into a more concrete Revised Strategy to be implemented at MEPC 80 in 2023. The candidate measures have been divided as follows:

a short-term measures to be implemented between 2018 and 2023, which include proposed improvements to the existing energy efficiency framework;

b medium-term measures to be implemented between 2023 and 2030, which include implementation programmes for the effective uptake of alternative low-carbon and zero-carbon fuels; and

c long-term measures to be implemented beyond 2030, which include the development and provision of zero-carbon or fossil-free fuels to enable the shipping sector to assess and consider decarbonisation in the second half of the century.

If implemented appropriately, this strategy will lead to some of the most significant regulatory changes in the industry in recent years and 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 MEPC is supported by an Intersessional Working Group, whose role is to progress matters and maintain momentum in between each meeting of the MEPC.

The short-term measures are based on data collected through the Fourth IMO Greenhouse Gas Study (the Fourth Study), which was commissioned to gather historical emissions estimates for international shipping for the period 2012 to 2018, and seeks to predict possible scenarios for future international shipping emissions (2018–2050). The Fourth Study was issued on 4 August 2020[40] and concluded that, based on historical emissions and projections, the target of a 50 per cent reduction in carbon emissions across global shipping by 2050 is feasible.

The short terms measures are housed within MARPOL Annex VI. In addition to the measures discussed in Section II.vi, vessel operators have, since 2013, been obliged to comply with the Energy Efficiency Design Index (EEDI) and Ship Energy Efficient Management Plan (SEEMP) rules. The EEDI requires all new builds to achieve efficiency greater than an

39 Note by the International Maritime Organization [IMO] to the United Nations Framework Convention for Climate Change Talanoa Dialogue, 'Adoption of the initial IMO strategy on reduction of GHG emissions from ships and existing IMO activity related to reducing GHG emissions in the shipping sector'.

40 See IMO, https://www.imo.org/en/OurWork/Environment/Pages/Fourth-IMO-Greenhouse-Gas-Study-2020.aspx.

industry average reference line calculated on a five-year basis. The SEEMP requires all vessels to have an on-board energy efficiency plan. The rise of imposed efficiency standards has led to increased scrutiny of vessel design and technological innovation, not only to achieve compliance but also to save operational costs.

As the short-term measures have developed, MARPOL Annex VI has been further strengthened to focus on energy efficiency requirements for existing ships, speed requirements and other technical and operational measures. MEPC 76 adopted new carbon-emission specific measures[41] in two categories, namely:

a technical: the Energy Efficiency Existing Ship Index (EEXI), requiring existing ships to meet a specific energy efficiency benchmark (depending on a ship's age, type and design), came into force on 1 November 2022. The EEXI is based on a required reduction factor (expressed as a percentage relative to the EEDI baseline). From 1 January 2023, the EEXI must be calculated and verified for ships of 400 GT and above. Once a ship's EEXI has been verified, it will be issued with a new energy efficiency certificate; and

b operational: the carbon intensity indicator (CII), which applies to ships of 5,000 GT and above. The CII will determine the annual reduction factor needed to ensure continuous improvement of a ship's operational carbon intensity by applying a specific rating level. Ratings will be on a scale from A to E and will be based on previous operational carbon intensity and the improvements year by year. The first annual reporting on CII will be completed in 2023, with CII ratings issued for the first time in 2024.

The IMO is conscious that these measures risk having a disproportionate effect on smaller nations, particularly island nations that rely heavily on maritime trade. The effect of the short-term measures on these states (based on factors such as geographical remoteness and connectivity to main markets) is currently being assessed. Maritime transport cost models and trade flow models are being used to ascertain how certain measures would affect a country's gross domestic product. The agreed procedure contains four steps:

a initial impact assessment;

b submission of commenting documents (if any);

c comprehensive response to commenting documents (if required); and

d comprehensive impact assessment.

The amendments also include a review clause that requires the IMO to review the implementation of the EEXI and CII by 1 January 2026 and develop and adopt any necessary further amendments following this review.

BIMCO has released model industry clause wording for time charter parties to address the EEXI (in the form of the EEXI Transition Clause for Time Charter Parties 2021)[42] as well as the CII (with the CII Operations Clause for Time Charter Parties 2022). The clauses are intended to allocate the risks and costs for compliance with the IMO's carbon intensity measures between shipowners and charterers as well as address any issues affecting rights and responsibilities under other clauses in the charter party (including provisions for technical modifications to the vessel, proceeding with due dispatch and the vessel's technical description).

41 https://www.imo.org/en/MediaCentre/MeetingSummaries/Pages/MEPC76meetingsummary.aspx.

42 EEXI Transition Clause for Time Charter Parties 2021 (bimco.org) and HFW was the only external law firm on the sub-drafting committee responsible for producing this clause.

As is clear from the above, much of the discussion to date has centred around the short-term measures. Recent MEPC meetings have also discussed further mid- to long-term measures in more detail, including measures aimed at incentivising the uptake of low-carbon or zero-carbon fuels (e.g., biofuels or synthetic fuels such as hydrogen or ammonia). The Intersessional Working Group on Reduction of GHG Emissions from Ships have also considered how to integrate both technical (such as a GHG fuel intensity standard) and economic (such as implementing a carbon 'levy') elements in a 'basket' of candidate mid-term measures. Further details on the IMO's plans to progress mid- and long-term measures are expected to be provided at MEPC 80.

VI LOOKING TO THE FUTURE

Decarbonisation is the most significant challenge that the shipping industry currently faces, as highlighted by the COP26 summit in Glasgow with the Clydebank Declaration's commitment to at least six green shipping corridors (available to zero-emissions vessels) by 2025 with more to follow by 2030. COP26 also saw momentum built behind the call for a revised IMO target of zero GHG emissions from shipping by 2050, to better align with the Paris Agreement's goal of capping global heating to 1.5°C. There is now a clear expectation on the IMO to echo this enthusiasm by developing and maintaining a firmer stance on regulating the operation of vessels if its own carbon emission targets are to be met. Steps must be taken quickly and decisively if this vast environmental challenge is to be solved. In addition to IMO-led MARPOL amendments, the IMO is eager for states to collaborate and share as much information and technology as possible to enable the industry to rise to and meet this challenge through voluntary measures. Such measures that are currently being discussed at the time of writing this text are as follows.

Proposals for market-based measures (MBMs) to support research and development, including The International Maritime Research and Development Board (IMRB)[43] and IMO Maritime Research Fund (IMRF).[44] These initiatives are led by shipping's key global bodies to provide US$5 billion over the course of 10 years to fund key research and development into the decarbonisation of shipping. The IMRB is to be funded by the industry itself, through a levy of US$2 per tonne on bunker fuel, although certain nations consider this to be far too low and a US$100 per tonne levy to be more appropriate to match the level of funding that will be necessary. The IMRF would similarly be funded by mandatory contributions from ships, based on their carbon emissions.[45] The IMRB and IMRF were discussed at MEPC75, MEPC76 and MEPC77 but have to date not been adopted, despite support from some Member States. Without the IMO and industry working together on this issue, the likely result is that the financial risk associated with green investment will remain high. It is therefore hoped that the IMO will prioritise progress on this issue.

43 https://www.ics-shipping.org/press-release/shipping-industry-welcomes-imo-decision-to-give-further-consideration-to-usd-5-billion-fund-to-accelerate-decarbonisation/.

44 https://www.ics-shipping.org/press-release/international-chamber-of-shipping-sets-out-plans-for-global-carbon-levy/.

45 https://www.ics-shipping.org/imrf-prototype/.

National action plans[46] are part of an IMO-led initiative to encourage states to pursue and develop (and share information in relation to pursuing and developing) voluntary plans with a view to improving implementation of IMO instruments and developing vessel efficiency on a national level. On 20 November 2020, the MEPC adopted Resolution MEPC.327(75) to encourage Member States to develop and submit voluntary national action plans to address GHG emissions from ships. To date, seven countries – Finland, India, Japan, the Marshall Islands, Norway, Singapore and the United Kingdom – have submitted national action plans.

MEPC 74 adopted Resolution MEPC.323(74) to encourage voluntary cooperation between the port and shipping sectors to contribute to reducing GHG emissions from ships. Accordingly, the MEPC agreed to establish a voluntary multi-donor trust fund (the GHG TC-Trust Fund)[47] to provide a dedicated source of financial support for technical cooperation and capacity-building activities to support the implementation of the IMO Initial Strategy on reduction of GHG emissions from ships. For example, the trust fund funded an assessment of the impact of the EEXI and CII on states, with particular focus on the least developed countries and small island developing states.[48]

Regional initiatives have also developed, with the European Union playing a leading role. The EU Commission submitted its 'Fit for 55' package on 17 July 2021, which consists of several legislative proposals aimed at ensuring EU legislation is in line with the European Union's climate goals under the European Green Deal.[49] The European Green Deal is the European Union's strategy to reach its binding target to achieve climate neutrality by 2050 while the 'Fit for 55' package aims to achieve a cut of 55 per cent in emissions (compared to 1990 levels) by 2030. The maritime industry was not initially included as part of 'Fit for 55' but, following a provisional agreement on the legislative text being agreed by the EU Parliament in December 2022 and having been passed by a subsequent EU Parliament vote on 18 April 2023, carbon emissions from maritime transport will now be included in the EU Emissions Trading System (EU ETS) from 2024 and a new Fuel EU Maritime regulation that aims to regulate the carbon intensity of maritime fuels will take effect from 2025.[50] EU ETS will apply to 100 per cent of GHG emissions from ship voyages between EU ports and 50 per cent of emissions from voyages between an EU port and a non-EU port. The EU ETS is a 'cap and trade' carbon market, whereby participants purchase or are allocated emission allowances that can be traded with other participants. An allowance entitles the holder to emit one tonne of CO^2 and each year participants must surrender the requisite amount of allowances corresponding to their verified annual emissions for the previous calendar year. Failing to surrender the requisite amount of allowances will require the difference to be made up and will attract a financial penalty. Questions have arisen as to how the EU ETS will apply in the shipping industry, including which entity will ultimately be responsible for the cost

46 https://www.imo.org/en/OurWork/Environment/Pages/RELEVANT-NATIONAL-ACTION-PLANS-AND-STRATEGIES.aspx#:~:text=The%20Initial%20IMO%20Strategy%20on,guidelines%20to%20be%20developed%20by.

47 https://www.imo.org/en/OurWork/Environment/Pages/Technical-Co-operation.aspx.

48 https://www.imo.org/en/OurWork/Environment/Pages/IMO%E2%80%99s-Multi-donor-GHG-Trust-Fund.aspx.

49 https://www.consilium.europa.eu/en/policies/green-deal/eu-plan-for-a-green-transition/.

50 https://ec.europa.eu/clima/eu-action/eu-emissions-trading-system-eu-ets/revision-phase-4-2021-2030_en.

of allowances and how the EU ETS, being a regional regulation, will be reconciled with the IMO's existing carbon emission regulations and proposals to regulate GHG emissions from shipping at the global level.

Recognising a global desire for a carbon-neutral supply chain, many shipowners and industry stakeholders are taking their own steps towards decarbonising shipping. For example, Maersk, the Danish shipowner, has committed to all newbuild vessels being installed with dual-fuel technology, enabling either carbon-neutral operations or operations on standard very low sulphur fuel oil.[51] Maersk also launched the Maersk Mc-Kinney Møller Center for Zero Carbon Shipping to lead research and development into technological solutions for decarbonisation.[52] In June 2019, the Poseidon Principles for Financial Institutions were launched by a group of global shipping banks with the aim of providing a framework for ensuring that banks' ship finance portfolios are aligned with the IMO's goal of reducing annual GHG emissions by at least 50 per cent by 2050 (compared to 2008 levels).[53] The initiative currently has 30 signatories. In December 2021, the Poseidon Principles for Marine Insurance were launched, which extends the principles to marine insurance portfolios.[54] Whether the necessary changes arise from the private sector, from international regulations, or (most likely) from a combination of both, will become clear in due course. Needless to say, extensive cooperation between, and a willingness by, all of international shipping's many stakeholders will be required to solve this very immediate global problem.

51 https://www.maersk.com/news/articles/2021/02/17/maersk-first-carbon-neutral-liner-vessel-by-2023.

52 https://www.zerocarbonshipping.com/about.

53 https://www.poseidonprinciples.org/finance/about/.

54 https://www.poseidonprinciples.org/insurance/.

Chapter 2

INTERNATIONAL TRADE SANCTIONS

Daniel Martin[1]

At the turn of the century, the area of international trade sanctions was niche and of limited interest to the great majority of commercial organisations. Fast-forward to today and they have become a board-level issue for almost every company engaged in international commerce because of the number of countries targeted by sanctions, the breadth of the restrictions and the consequences if they are breached. In particular, the importance of international trade sanctions as an area of law has greatly increased following the illegal Russian invasion of Ukraine on 24 February 2022. There have been a number of high-profile enforcement actions in the recent past, with fines running into millions and billions of US dollars.

The use of sanctions as a diplomatic tool is expected to continue, given the ongoing situation in Ukraine. Recent developments with respect to Iran, where sanctions were seen as a key factor in bringing about an agreement to resolve the issues surrounding its nuclear programme, also remain topical. There are also measures in place against Venezuela and North Korea. New sanctions are likely to be imposed in response to other diplomatic issues. It is also anticipated that there will be increased enforcement of the sanctions already in place.

I BASIS FOR INTERNATIONAL TRADE SANCTIONS

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

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

The European Union adopts sanctions and other restrictive measures pursuant to the Common Foreign and Security Policy and, in particular, Article 25 of the Treaty on European Union and Article 215 of the Treaty on the Functioning of the European Union. National legislation sets the penalties for breaching sanctions.

1 Daniel Martin is a partner at HFW.

2 UN Charter, Article 24.

3 id., Article 25.

To achieve specific foreign policy and national security objectives,[4] the United Kingdom implements its own domestic sanctions and other restrictive measures through a combination of statutory instruments and primary legislation (discussed in more detail below). Penalties for breaching sanctions can be either criminal or civil: the maximum criminal penalties include up to seven years' imprisonment and unlimited fines;[5] and civil monetary penalties can be up to £1 million or 50 per cent of the estimated value of the funds that breach the sanctions. Deferred prosecution agreements are also available in respect of sanctions breaches.

On 31 March 2016, the UK's Office of Financial Sanctions Implementation (OFSI) was established. The OFSI has a twofold mandate: to help ensure that financial sanctions are properly understood, but also to ensure that the sanctions are properly implemented and enforced. The UK's Export Control Joint Unit ensures that trade sanctions are properly implemented and enforced. There is more information about enforcement in Section V.

II EXTENT OF INTERNATIONAL TRADE SANCTIONS

As at 13 March 2023, there were EU and UK restrictions in place against companies and individuals in or connected with more than 30 countries (including Libya, Venezuela and Sudan). The restrictions that were likely to have most impact on businesses engaged in shipping and international commerce were those restrictions imposed pursuant to the sanctions relating to Russia, Iran, Syria and Venezuela.

Following Russia's illegal invasion of Ukraine, the United Kingdom, European Union and United States have significantly expanded their Russian sanctions programme. Financial sanctions target key individuals and entities who are connected to the Russian government or who operate in key sectors of the Russian economy. Trade sanctions target key sectors of the Russian economy (such as the Russian oil and gas industry). There are also restrictions on how Russian vessels can enter ports under UK, EU and US sanctions.

In January 2016, in a hugely significant development, a large number of the restrictions affecting Iran were suspended, pursuant to the Joint Comprehensive Plan of Action (JCPOA). The JCPOA, commonly referred to as the Iran Deal, was the culmination of many months of negotiation between Iran and the P5+1,[6] and is considered in more detail in Section VI. Following a period of sanction relief, many of the US sanctions against Iran were reimposed in August and November 2018 (see Section VI).

In January 2019, existing US restrictions on the government of Venezuela were extended to include the Central Bank of Venezuela and Petroleos de Venezuela SA (PdVSA). In addition, PdVSA was added to the US Specially Designated Nationals (SDN) List. These restrictions prohibit US persons from conducting virtually all dealings with these entities and have the potential to affect non-US persons (see Section III for further discussion of US sanctions and their impact on non-US persons). The US Secretary of State also has the remit to designate anyone (including non-US persons) determined to operate in the following

4 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/961516/General_Guidance_-_UK_Financial_Sanctions.pdf.

5 Per the UK Policing and Crime Act 2017 and the European Union Financial Sanctions (Enhanced Penalties) Regulations 2017.

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

sectors of the Venezuelan economy: gold, oil, defence and security and financial.[7] In June 2020, a number of tankers and owning companies that had engaged in Venezuela trades were added to the US SDN list for operating in the Venezuelan oil sector. Some of these designations were quickly removed through owner cooperation with the Office of Foreign Asset Controls (OFAC).

III SCOPE OF APPLICATION OF INTERNATIONAL TRADE SANCTIONS

UN sanctions do not apply directly to companies or individuals, whereas EU sanctions have direct effect on EU companies and individuals, as well as applying to any legal person, entity or body in respect of any business done in whole or in part within the European Union. UK sanctions have direct effect on the actions of UK companies and individuals (anywhere in the world) and acts by anyone that take place in the United Kingdom. Branches of UK incorporated companies are also subject to UK sanctions, irrespective of where their activities take place.

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

IV NATURE OF RESTRICTIONS

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

The designated entities frequently include politicians (e.g., government ministers) and members of the military and intelligence services, but they may also include prominent businessmen who are supporting the regime via their business activities, and the spouses and children of high-ranking politicians. For example, under the Libya sanctions, the European Union designated not only Muammar Gaddafi but also his daughter and several sons, and there are businessmen designated under the Syria and Ukraine-related sanctions.

Funds and economic resources are defined very broadly in sanctions legislation (e.g., in Article 1 of Council Regulation (EU) No. 267/2012 concerning restrictive measures against Iran) and will include virtually any asset that has any economic value. In particular, 'funds' includes not only cash, cheques and deposits at banks but also performance bonds, letters of credit and bills of lading. 'Economic resources' means assets of every kind, whether tangible or intangible, movable or immovable, that are not funds but may be used to obtain funds, goods or services.

In addition, many of the programmes include bans on trading in specific items. Some bans are common to many programmes (such as the prohibition on the supply to

7 US Executive Order 13850.

the sanctioned country of military and dual-use equipment, and equipment for internal repression), but other bans are specific to the sanctions programme and demonstrate a more targeted approach.

By way of example, as of 13 March 2023, it is 'prohibited to sell, supply, transfer or export' to Syria identified equipment, technology or software that may be used for the monitoring or interception of internet or telephone communications.[8]

Sanctions imposed against North Korea in April and May 2016 in response to the nuclear test conducted by North Korea on 6 January 2016 and the rocket launch conducted on 7 February 2016 specifically targeted shipping. In particular, they restricted the provision of vessels and crew to North Korea, restricted access by Korean vessels to EU ports and restricted the supply of insurance, vessel registration and vessel classification services to North Korean vessels.[9] There are also export bans on commodities such as gold, coal, iron, lead, other metals and seafood.[10]

Finally, the sanctions against Syria include wide-ranging restrictions on the availability of finance and insurance, and the sanctions relating to Ukraine include restrictions on certain Russian entities' access to debt, equity and capital markets, new loans and credit. These latter restrictions, commonly referred to as 'sectoral sanctions' require businesses to conduct due diligence not only on their counterparties (to see whether they are included on the list of entities that are subject to sectoral sanctions) but also on the specific transaction (to see whether it includes any prohibited activities).

V ENFORCEMENT OF SANCTIONS

While the majority of high-profile international sanctions enforcement has been by US authorities, and particularly OFAC within the US Treasury, other nations such as the United Kingdom, Switzerland and EU Member States are increasing their investigation and enforcement activity.

Notable examples of OFAC enforcement include fines imposed or penalties agreed with a host of international banks, including BNP Paribas,[11] HSBC,[12] Commerzbank,[13] ING,[14] Credit Suisse,[15] Barclays,[16] Société Générale,[17] UniCredit Bank AG[18] and Standard

8 Council Regulation (EU) No. 36/2012 concerning restrictive measures in view of the situation in Syria (as amended), Article 4.

9 Council Regulation (EU) No. 2017/1509 (as amended), Articles 39 and 43.

10 id., Articles 3, 16a and 16b.

11 www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial.

12 www.treasury.gov/press-center/press-releases/Pages/tg1799.aspx.

13 https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20150312.

14 www.treasury.gov/press-center/press-releases/Pages/tg1612.aspx.

15 www.treasury.gov/press-center/press-releases/Pages/tg452.aspx.

16 https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20100818.

17 https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20181119_33.

18 https://home.treasury.gov/news/press-releases/sm658.

Chartered Bank.[19] In addition, penalties were imposed against businesses involved in shipping and international trade, including PdVSA,[20] the American P&I Club,[21] Dr Cambis/Impire Shipping[22] and Eagle Shipping International (USA) LLC.[23]

The enforcement actions against banks generally relate to their involvement in processing payments in breach of US sanctions against the likes of Iran, Sudan and Cuba. By way of example, according to the settlement agreement that Commerzbank reached with OFAC in March 2015 and pursuant to which Commerzbank agreed to pay US$259 million to OFAC to settle its potential civil liability for apparent violations of US sanctions regulations, the bank:

a processed thousands of transactions through US financial institutions that involved countries, entities or individuals subject to the sanctions programmes administered by OFAC;

b engaged in payment practices that removed, omitted, obscured or otherwise failed to include references to US-sanctioned persons in SWIFT[24] payment messages sent to US financial institutions and bank employees;

c deleted or omitted references to Iranian financial institutions;

d replaced the originating bank information with Commerzbank's name; and

e later created a process to route payments involving Iranian counterparties to a payment queue requiring manual processing by bank employees rather than routine, automated processing.

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

PdVSA was penalised for supplying two cargoes of reformate to Iran between December 2010 and March 2011. The penalties imposed on PdVSA prohibited the company from competing for US government procurement contracts, from securing financing from the Export-Import Bank of the United States, and from obtaining US export licences. These penalties did not apply to PdVSA subsidiaries and did not prohibit the export of crude oil to the United States by PdVSA.

19 www.treasury.gov/resource-center/sanctions/CivPen/Documents/20190408_scb_webpost.pdf.

20 https://2009-2017.state.gov/r/pa/prs/ps/2011/05/164132.htm.

21 https://home.treasury.gov/system/files/126/20130509_american_club.pdf.

22 https://2009-2017.state.gov/r/pa/prs/ps/2013/03/206268.htm.

23 https://home.treasury.gov/system/files/126/20200127-eagle-settlement.pdf.

24 The Society for Worldwide Interbank Financial Telecommunication (SWIFT SCRL).

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

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

In March 2017, Zhongxing Telecommunications Equipment Corporation, a telecommunications corporation established in China, agreed to pay US authorities more than US$100 million to settle potential liability for more than 250 apparent violations of US sanctions against Iran. The violations concerned direct or indirect sale or supply of goods from the United States to Iran and the re-exportation of controlled US-origin goods from a third country with knowledge that the goods were intended specifically for Iran.[25]

In January 2020, Eagle Shipping International (USA) LLC, a ship management company registered in the Marshall Islands, agreed to pay US authorities US$1.1 million to settle potential liability for 36 apparent violations of US sanctions against Myanmar. The violations concerned dealings by Eagle Shipping's Singapore affiliate with Myawaddy Trading Limited, formerly a US SDN listed entity, both before and after its application for an OFAC licence was denied.[26]

On 31 March 2016, the OFSI was established. Part of the OFSI's mandate is to ensure that sanctions are properly implemented and enforced. The March 2015 Budget[27] referred to the UK government's intention to create the OFSI and included the following indication of the direction this might take:

> *The government will review the structures within HM Treasury for the implementation of financial sanctions and its work with the law enforcement community to ensure these sanctions are fully enforced, with significant penalties for those who circumvent them. This review will take into account lessons from structures in other countries, including the US Treasury Office of Foreign Assets Control.*

The Policing and Crime Act 2017 includes, at Section 146 onwards, powers for HM Treasury to impose monetary penalties for sanctions breaches. The penalties can be up to £1 million or, if the relevant offence involves a breach of the asset freeze, up to 50 per cent of the value of the relevant funds or economic resources, whichever is the higher. Rather than having to satisfy the criminal burden of proof (beyond reasonable doubt), HM Treasury needs only to

25 https://home.treasury.gov/system/files/126/20170307_zte_settlement.pdf.

26 https://home.treasury.gov/system/files/126/20200127-eagle-settlement.pdf.

27 www.gov.uk/government/publications/budget-2015-documents.

satisfy the civil standard, namely that HM Treasury is satisfied on a balance of probabilities that there has been a breach of the EU sanctions. OFSI published guidance on the new powers in April 2017.[28]

In January 2019, OFSI announced that a monetary penalty of £5,000 (reduced from £10,000) had been imposed on Raphaels Bank for breaching the EU sanctions against Egypt by dealing with funds (only £200) that belonged to a target of the asset freeze.[29]

In March 2019, OFSI announced that a monetary penalty of £10,000 had been imposed on Travelex UK for dealing with funds of the same asset freeze target in breach of EU sanctions against Egypt.[30]

In September 2019, OFSI announced that Telia Carrier UK Ltd had been issued with a monetary penalty of £146,000 (reduced from £300,000) for facilitating phone calls to SyriaTel, a designated entity under the EU Syria regime.[31]

On 7 February 2020, the Limburg Court in the Netherlands imposed penalties of €600,000 and €4 million, respectively, on the Dutch company Euroturbine BV and its Bahrain-based subsidiary Euroturbine SPC for breaching EU and Dutch export controls on Iran.[32] The penalties represented the value obtained by each entity as a result of the illegal transport of gas turbine components to Iran without an export licence. The Court found that Euroturbine BV structured the Iranian trades via its Bahrain subsidiary in an attempt to circumvent national and international export control legislation, with Euroturbine SPC acting as the crucial link for the delivery of the goods and receipt of payment in most instances.

On 18 February 2020, the Limburg Court convicted Euroturbine BV and its subsidiary for exporting gas turbine parts to Iran without a licence and imposed further fines of €500,000 and €350,000, respectively.[33] It also imposed custodial sentences on two individuals.

In March 2020, OFSI's £20.47 million penalty on Standard Chartered Bank was upheld. The penalty was reduced from £31.5 million and was imposed in respect of Standard Chartered's breach of EU financial sanctions on Sberbank and its former subsidiary Denizbank AS.[34]

New OFSI guidance on monetary penalties for breaches of financial sanctions[35] applied as of 15 June 2022. The new guidance takes a wide view of OFSI's jurisdiction and powers, which may indicate a more robust approach towards enforcement of financial sanctions in future.

28 www.gov.uk/government/uploads/system/uploads/attachment_data/file/605884/Monetary_penalties_for_breaches_of_financial_sanctions.pdf.

29 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781275/21.01.2019_Penalty_for_Breach_of_Financial_Sanctions.pdf.

30 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/804021/Travelex_monetary_penalty.pdf.

31 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/842548/Telia_monetary_penalty.pdf.

32 www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Limburg/Nieuws/Paginas/Terugbetaling-voordeel-na-illegale-uitvoer-gasturbineonderdelen-naar-Iran.aspx.

33 www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Limburg/Nieuws/Paginas/Veroordelingen-voor-het-zonder-vergunning-uitvoeren-van-gasturbineonderdelen-naar-Iran-.aspx.

34 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876971/200331_-_SCB_Penalty_Report.pdf.

35 Microsoft Word - 070622 Monetary Penalty Guidance – published (publishing.service.gov.uk).

VI RUSSIA SANCTIONS – UKRIANE INVASION

Since Russia's illegal invasion of Ukraine on 24 February 2022, there has been a very significant increase in the scope and extent of Western sanctions against Russia.

These have included asset freeze measures targeting not only significant individuals and commercial entities but also major Russian banks,[36] restricting virtually all payments into and out of Russia. Trade restrictions include export and import bans that not only target an unprecedented range of goods and commodities, from coal, oil and petroleum products to luxury goods and a wide range of finished goods,[37] but also include novel concepts such as the price cap for the transport of oil and petroleum products to third countries.[38]

Restrictions have also been imposed on the supply of a range of services to legal persons, entities or bodies established in Russia, including bans on accounting, auditing, bookkeeping and tax consulting services, management consulting, public relations services, architectural and engineering services, legal advisory services (with certain exemptions) and IT consultancy services.[39]

There has been extensive cooperation and information-sharing between a coalition of nations, including the United Kingdom, the United States, Australian, Canada, Switzerland and the European Union.

VII SANCTIONS – IMPACT OF BREXIT

The United Kingdom left the European Union on 31 January 2020. EU sanctions continued to have a direct effect on UK companies and individuals during the transition period, which ended on 31 December 2020. EU sanctions no longer have any direct effect on UK companies or individuals. Instead, UK sanctions regimes are currently in force under the Sanctions and Anti-Money Laundering Act 2018, the Counter Terrorism Act 2008 and the Anti-Terrorism, Crime and Security Act 2001.

It is not anticipated that these changes will have a major effect on UK businesses, as the UK measures adopted under the Sanctions and Anti-Money Laundering Act 2018 are intended to deliver substantially the same policy effects as the regimes derived from EU law (in a manner analogous to the approach that Norway and Switzerland currently adopt). The UK and EU regimes are not identical, however, with divergence already in the language used in UK legislation, the scope of the UK's global human rights sanctions, and as the United Kingdom did not implement designations corresponding to the EU's misappropriation sanctions (imposed in respect of Egypt, Tunisia and Ukraine).

Although it is possible that UK sanctions could diverge further from EU sanctions in particular areas (if, for example, the United Kingdom considers that the economic cost to the nation of adopting additional restrictions is outweighed by the benefits of those measures), it seems unlikely that wholesale differences will emerge, given the United Kingdom's long-standing support for EU sanctions, including those against Iran and Russia.

In accordance with international law, the United Kingdom will regardless implement UN sanctions into UK domestic law.

36 Council Regulation 269/2014 (as amended), Article 2.

37 Council Regulation 833/2014 (as amended), Articles 3h, 3k, 3j, 3m and others.

38 Council Regulation 833/2014 (as amended), Article 3n.

39 Council Regulation 833/2014 (as amended), Article 5n.

While the United Kingdom's underlying sanctions policy mirrors that of the European Union in relation to Russia, there are divergences in how UK sanctions are applied against Russia when compared to how EU sanctions are applied against Russia.

VIII COMPLIANCE WITH INTERNATIONAL TRADE SANCTIONS

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

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

Chapter 3

COMPETITION AND REGULATORY LAW

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I INTRODUCTION

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

II COMPETITION LAW

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

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

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

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

The Commission is also responsible for regulating state aid within the European Union.

1 Anthony Woolich and Daniel Martin are partners at HFW.

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

3 id.

i The prohibition of anticompetitive practices between competitors

This prohibition appears at Article 101(1) of the Treaty on the Functioning of the European Union (TFEU). It applies to all agreements, decisions and concerted practices between companies that may affect trade between EU Member States, and that have the object or effect of negatively affecting competition within the EU's internal market. It potentially applies to both anticompetitive practices between direct competitors (horizontal agreements, for example, through a liner consortium) and companies at different levels of the supply chain (vertical agreements, for example, between a liner company and a shipper). Examples of anticompetitive practices include price-fixing, an agreement to divide markets or customers, or an agreement to place limits on production. Any agreement that contravenes the prohibition will be automatically void and unenforceable,[4] subject to the possibility of being able to sever non-infringing aspects of the agreement. Parties may be subject to heavy fines (up to 10 per cent of group worldwide turnover): in February 2018, the Commission imposed a total fine of €395 million against four maritime car carriers for participation in a cartel.[5] In addition, third parties that can show loss may sue for damages. Some practices may also be criminal offences.

The anticompetitive practices must have the object or effect of preventing, restricting or distorting competition within a particular market. Hardcore cartels, including agreements for the exchange of information on prices, will be deemed to have the object of restricting competition.

It is not necessary to find written evidence of anticompetitive practices for a determination that a contravention of Article 101 of the TFEU has occurred; parallel market behaviour between companies may be enough to evidence a breach if it can be determined that companies have knowingly substituted practical cooperation between them for the risks of competition. This issue arose in the Commission's investigation into price signalling in the liner shipping industry, which was initiated as a result of the Commission's concerns that the industry practice of publishing intended future rate increases could have contravened the Article 101 prohibition. Following its investigation, the Commission adopted a decision in July 2016 that did not conclude that the conduct investigated infringed competition law, but required the carriers under investigation to adhere to legally binding commitments in respect of price announcements for three years.[6]

Article 101(3) of the TFEU accepts that some practices that appear to be anticompetitive, and therefore a breach of Article 101(1), are good for competition if they allow greater efficiency and technical progress to be made, provided that customers are able to benefit from these improvements to a fair extent; for example, through lower prices or more regular services, and any restrictions are indispensable to achieve the benefits, while not eliminating competition.

Owing to the large economies of scale that exist within the liner shipping industry, a special block exemption regulation (BER)[7] applies to liner shipping consortia, which allows them to pool resources and certain information, allowing for greater efficiency. The BER was

4 Treaty on the Functioning of the European Union, Article 101(2).

5 http://europa.eu/rapid/press-release_IP-18-962_en.htm.

6 http://europa.eu/rapid/press-release_IP-16-2446_en.htm.

7 Commission Regulation (EC) No. 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty [establishing the European Community] to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia).

prolonged most recently in March 2020 and will apply until at least 25 April 2024.[8] The Commission found in its evaluation that the BER results in efficiencies for carriers that can better use vessels' capacity and offer more connections. These efficiencies result in lower prices and better quality of service for consumers. The Commission's evaluation showed that both costs for carriers and prices for customers per 20-foot equivalent unit (TEU) have decreased in recent years by approximately 30 per cent, and quality of service has remained stable.

The BER does not, as its name might suggest, exclude shipping consortia from the scope of Article 101 of the TFEU – rather, it details what types of agreements shipping consortia may make that will satisfy the Article 101(3) exemption criteria. It allows practices such as the joint operation of port facilities, fixing timetables and calling points, and obliging members of the consortium only to charter space on vessels owned by the consortium in certain circumstances. However, 'hardcore restrictions', such as price-fixing, market allocation or capacity limitation that is not in line with market demand, are still prohibited. Additionally, the BER is only available to consortia whose members (within and outside the consortium) have an aggregate share of 30 per cent or less of a relevant market,[9] and that do not impose penalties on members that wish to withdraw from the consortium. If the members of a consortium have a share of more than 30 per cent of a relevant market, the consortium will have to self-assess whether its operations comply with competition law on that market.

Given that there are now only three major liner shipping consortia on deep-sea routes, that the number of major deep-sea carriers has reduced as a result of consolidation within the industry and the bankruptcy of Hanjin Shipping, and that nearly all major deep-sea carriers belong to one of the consortia, the BER has arguably become less relevant. But on 25 January 2023, Maersk and MSC, the two largest container lines, announced that they would discontinue the present 2M alliance with effect from January 2025. Currently, at least one of the major consortia may be expected to have a market share of more than 30 per cent in any particular deep-sea market. The Hong Kong Competition Commission has included a market share threshold of 40 per cent within its block exemption order, issued on 8 August 2017 and renewed on 7 July 2022 until 8 August 2026, for vessel sharing arrangements, which has common features with the BER.

Although there is no ability for a liner shipping consortium to gain prior regulatory clearance in the European Union (unlike in certain other jurisdictions, such as the United States), the Commission has not yet objected to the formation of one of the three major alliances that are currently operating (2M, Ocean Alliance and THE Alliance).

ii Abuse of a dominant market position

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

8 Commission press release IP/20/518 (https://ec.europa.eu/commission/presscorner/detail/en/ip_20_518, last accessed 16 April 2021).

9 Calculated by reference to the total volume of goods carried in freight tonnes or TEUs. Commission Regulation (EC) No. 906/2009 OJ L256/31, 28 September 2009, Article 5(1).

If a company (including a group of companies) holds a stable share of 50 per cent or more of a relevant market, there is a rebuttable presumption that it holds a dominant position,[10] although a market share of 39.7 per cent has been found to constitute a dominant market position.[11]

A particular concern for the shipping industry is that Article 102 of the TFEU applies to collective abuse of a dominant market position as well as abuse by an individual company. Although this would seem to replicate the position under Article 101, EU jurisprudence has stressed that the two Articles address different situations.[12] In *TACA*,[13] a case involving a liner conference, the EU courts found that the level of integration between companies in a liner conference was such that the conference was able to act as an independent single entity in the market. Liner consortia with large market shares should be aware of the risks of potentially infringing both Article 101 and Article 102.

iii Merger control

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

The EU Merger Regulation,[14] which operates in addition to, and potentially to the exclusion of, the individual merger control regimes of EU Member States, applies where two or more previously independent companies merge, where a company acquires control of the whole or part of another company on a lasting basis, or where a full-function joint venture is formed, and financial thresholds are exceeded. A 'full-function joint venture' is defined as one that has resources to act as an autonomous market player, is not set up as temporary and has functional autonomy from its parent companies. The Regulation only applies to mergers involving companies with turnovers that exceed certain global and EU-wide thresholds and that have a significant amount of business in more than one EU Member State.

Mergers that meet the thresholds should be notified to and cleared by the Commission before implementation, as the European Union has the power to fine the parties up to 10 per cent of their aggregate worldwide turnover if they do not do so. Parties should be aware that merger clearance can be an expensive and lengthy procedure. Further information about the EU merger control process, including the current turnover thresholds, may be found on the Commission's website.[15]

The Commission has reviewed the acquisitions of Hamburg Süd by Maersk[16] and OOIL by COSCO Shipping,[17] and the creation of Ocean Network Express through a joint venture between three Japanese lines.[18] Although the latter two transactions were cleared unconditionally, Maersk committed to terminate the participation of Hamburg Süd in

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

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

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

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

14 Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L24/1, 29.1.2004).

15 See http://ec.europa.eu/competition/mergers/legislation/legislation.html.

16 https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8330.

17 https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8594.

18 https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8472.

five consortia. Had the commitments not been offered, the Commission found that links between previously unconnected consortia would have been created, and that these links would have resulted in anticompetitive effects on particular trade routes. This analysis is consistent with the Commission's approach to the acquisitions of Neptune Orient Lines (NOL) by CMA CGM[19] and of United Arab Shipping Company by Hapag-Lloyd,[20] where similar commitments were required. The European Commission blocked (currently subject to appeal) the proposed merger in the shipbuilding sector between Hyundai Heavy Industries and Daewoo Shipbuilding & Marine Engineering[21] and had referred for a Phase 2 review the proposed merger between Fincantieri and Chantiers de l'Atlantique, which was subsequently abandoned.[22]

The United States has a complex merger control regime administered by the Federal Trade Commission and the Department of Justice's (DOJ) Antitrust Division. It is applicable to joint ventures in certain situations. Parties should pre-notify a merger in the United States if it meets the applicable thresholds using the procedure set out in the Hart–Scott–Rodino Antitrust Improvements Act.

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

iv State aid

State aid is any advantage granted by a public authority of an EU Member State through state resources on a selective basis that distorts competition and may affect trade between EU Member States. The grant of state aid is generally prohibited unless it has received prior approval from the Commission. The Commission has produced sector-specific guidelines regarding the application of the state aid regime to the maritime transport sector.[23] A large number of state aid cases have concerned the maritime sector, including the Commission's investigation into the Maltese tonnage tax regime, which resulted in Malta committing to amend the regime in December 2017 to bring it into line with state aid rules.[24] On 2 May 2018, for example, the Commission announced that it had decided under EU state aid rules to approve the grant of restructuring aid by Croatia to support the shipping company, Jadroplov.[25] On 16 December 2019, the Commission approved maritime transport support schemes in Cyprus, Denmark, Estonia, Poland and Sweden.[26] On 2 March 2020, the Commission cleared state support for several Italian ferry services but found other measures constituted illegal state aid.[27]

19 https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7908.

20 https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8120.

21 https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9343.

22 https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9162.

23 http://ec.europa.eu/competition/sectors/transport/legislation_maritime_state_aid.html.

24 http://europa.eu/rapid/press-release_IP-17-5361_en.htm.

25 Commission Daily News MEX/18/3647.

26 Commission press release IP/19/6780 (https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6780, last accessed 16 April 2021).

27 Commission press release IP/20/367 (Cases SA 15631, SA 32014, SA 32015 and SA 32016) (https://ec.europa.eu/commission/presscorner/detail/en/ip_20_367, last accessed 16 April 2021).

III ANTI-BRIBERY CONTROLS

Since 2000, there has been a substantial increase in international cooperation and harmonisation to combat bribery and corruption. This has been led largely by the efforts of two organisations: the Organisation for Economic Co-operation and Development (OECD), whose Anti-Bribery Convention has now been adopted by the 36 OECD Member States[28] and eight non-member countries;[29] and Transparency International, which publishes the hugely influential annual Corruption Perceptions Index (a survey that, in 2019, rated perception of public sector corruption in 180 countries and territories).

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

Enforcement is handled by national authorities, such as the Serious Fraud Office (SFO) in the United Kingdom and the DOJ in the United States.

i OECD Anti-Bribery Convention

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

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

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

ii Legislation in the United Kingdom and the United States

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

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

The UK Bribery Act (UKBA) was passed on 8 April 2010, following criticism of the existing UK legislation by the OECD, and entered into force on 1 July 2011. The UKBA had two main objectives: to codify and consolidate existing UK legislation and to create a new offence, directed at commercial organisations that fail to prevent bribery being carried out by

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

29 Argentina, Brazil, Bulgaria, Colombia, Costa Rica, Peru, Russia and South Africa.

their agents. As a result, it is a criminal offence to pay a bribe,[30] to receive a bribe[31] or to bribe a foreign public official.[32] It is also an offence for a company to fail to prevent others paying a bribe on its behalf;[33] this is considered in more detail in Section III.iv.

iii Comparison between the FCPA and the UKBA

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

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

iv Facilitation payments and failure to prevent bribery

Facilitation payments are typically small, unofficial payments (sometimes called 'grease payments') made to secure or expedite a routine or necessary government action by a government official. In the maritime context, these might include gifts of cartons of cigarettes to pilots, cash given to inspectors to issue a certificate that holds are clean, and payments to officials to ensure that ships are called to berth in sequence, rather than being sent to the back of the queue. The UK authorities have stressed repeatedly that facilitation payments are bribes and are therefore illegal.

The corporate offence of failure to prevent bribery[34] is a new offence, created by the UKBA. In essence, Company A will have strict liability if Person B, associated with Company A, bribes Person C, intending to obtain or retain business or an advantage in the conduct of business for Company A. There is a defence under which Company A can show that it had in place adequate procedures designed to prevent persons associated with it from paying bribes.

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

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

30 UK Bribery Act [UKBA], Section 1.
31 ibid., Section 2 of the UKBA.
32 ibid., Section 6 of the UKBA.
33 ibid., Section 7 of the UKBA.
34 id.

v Compliance with the UKBA

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

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

vi OECD monitoring

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

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

vii UK enforcement

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

In December 2014, the SFO reported on successful prosecutions of two individuals under the UKBA[35] and one corporate under older legislation.[36] At the end of 2015, we saw the first UK settlement with enforcement agencies for a contravention of Section 7 of the UKBA and the first court-approved deferred prosecution agreement (DPA). Two corporates were sentenced in the first quarter of 2016: Smith & Ouzman Ltd and Sweett Group plc (which is the first company to have been convicted under Section 7 of the UKBA).

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

In September 2015, Brand-Rex Limited agreed a settlement with the Scottish enforcement authorities for a contravention of Section 7. Brand-Rex is a supplier of IT network hardware, headquartered in Scotland. The company employed a rewards scheme for its independent installers, who would sell Brand-Rex products to customers. Having achieved a certain level of sales, the installers would be entitled to various rewards from Brand-Rex, including vouchers for foreign holidays.

35 Serious Fraud Office [SFO], 'City directors sentenced to 28 years in total for £23m green biofuel fraud', https://www.sfo.gov.uk/2014/12/08/city-directors-sentenced-28-years-total-23m-green-biofuel-fraud/.

36 SFO, 'UK printing company and two men found guilty in corruption trial', https://www.sfo.gov.uk/2014/12/22/uk-printing-company-two-men-found-guilty-corruption-trial/.

However, without Brand-Rex's knowledge, one of these installers offered his holiday vouchers to the decision maker of one of his customers, who was then alleged to have been influenced to purchase Brand-Rex hardware as a result.

Having discovered the scheme, Brand-Rex appointed solicitors and forensic accountants to perform a detailed investigation, following which it self-reported to the Scottish Crown Office. Brand-Rex avoided criminal prosecution and paid a civil recovery order of £212,800, a sum calculated on the profit the company had made as a result of the bribes.

Standard Bank plc agreed a DPA in respect of an indictment alleging failure to prevent bribery (i.e., a breach of Section 7 of the UKBA), which was approved by the Crown Court on 30 November 2015.[37] The charge (which has been suspended pursuant to the DPA) concerned a US$6 million payment by a former sister company (Stanbic Bank Tanzania) to a partner in Tanzania that the SFO alleged was intended to induce local politicians to show favour to Stanbic Bank Tanzania and Standard Bank's proposal for a US$600 million private placement to be carried out on behalf of the government of Tanzania. Under the DPA, Standard Bank plc agreed to pay a US$16.8 million financial penalty, a US$8.4 million disgorgement of profits, a further US$7 million in compensation and the SFO's costs.

Smith & Ouzman Ltd was sentenced in January 2016[38] for conduct that took place between November 2006 and December 2010 (i.e., before the UKBA came into effect). A confiscation order of almost £900,000 was made against the company, representing the gross benefit that accrued to the company as a result of the bribes that were paid to public officials in Kenya and Mauritania to secure contracts for the provision of ballot papers for elections.

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

In the case of *Smith & Ouzman*,[39] which fought and lost the case, the multiplier was 300 per cent, reflecting the high degree of culpability on the part of the company, which used its dominant market position to bribe foreign public officials for substantial gain over a sustained period.

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

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

In January 2017, the SFO entered into a DPA with Rolls-Royce plc in respect of 12 counts of conspiracy to corrupt, false accounting and failure to prevent bribery.[40]

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

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

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

40 https://www.sfo.gov.uk/2017/01/17/sfo-completes-497-25m-deferred-prosecution-agreement-rolls-royce-plc/.

The conduct spanned three decades and involved Rolls-Royce's Civil Aerospace and Defence Aerospace businesses and its former Energy business and concerned the sale of aero engines, energy systems and related services. The conduct covered by the UK DPA took place across seven jurisdictions, namely Indonesia, Thailand, India, Russia, Nigeria, China and Malaysia.

As part of the DPA, Rolls-Royce agreed to pay £497.25 million plus interest and the SFO's costs of £13 million. At the same time, Rolls-Royce reached an agreement with the DOJ and a leniency agreement with Brazil's Federal Public Ministry. In total, these agreements resulted in the payment by Rolls-Royce of approximately £671 million (including US$170 million to the United States and US$25 million to Brazil).

A DPA with Tesco Stores Limited, entered into on 10 April 2017, was revealed in January 2019 following the lifting of reporting restrictions.[41] The DPA concerns the use of illegal practices by Tesco between February and September 2014 to meet accounting targets. As part of the DPA, Tesco agreed to pay £129 million and investigation costs of £3 million. The company was also required to implement a compliance programme during the three-year term of the DPA, which ended on 10 April 2020.

In July 2019, the SFO entered into a DPA with Serco Geografix Ltd, pursuant to which Serco paid a financial penalty of £19.2 million and the SFO's investigative costs of £12.8 million, and took responsibility for three fraud offences and two false accounting offences. The offences were committed via a scheme to dishonestly mislead the Ministry of Justice as to the true extent of its parent company's profits between 2010 and 2013.[42]

In January 2020, the SFO entered into a DPA with Airbus SE, which agreed to pay €991 million in the United Kingdom in connection with five counts of failure to prevent bribery. The UK sum comprised disgorgement of profits (£491 million), a financial penalty (£333 million) and the SFO's costs (£6 million). These sums made up part of a record-breaking €3.6 billion total (the DPA also involved the US and French authorities) relating to conduct between 2011 and 2015 in Sri Lanka, Malaysia, Indonesia, Taiwan and Ghana (in each case, bribes paid in respect of aircraft orders).[43]

In October 2020, the SFO entered into a DPA with Airline Services Limited (ASL), pursuant to which ASL is required to pay £2,979,685.76 (consisting of a financial penalty and disgorgement of profits representing the gain of the criminal conduct) and a contribution of £750,000 towards the SFO's costs. ASL accepts responsibility for failing to prevent bribery arising from the company's use of an agent to win three contracts (together worth more than £7.3 million) to refit commercial airliners for Lufthansa. The agent also worked for Lufthansa and abused his position to provide a competitive advantage to ASL.[44]

Enforcement action can also be taken against individuals. This action can include substantial fines and prison sentences. For example, on 27 June 2019, Carole Ann Hodson was sentenced to two years in prison and ordered to pay a confiscation order of £4,494,541.46 as a result of suspected bribery and money-laundering.[45]

41 https://www.sfo.gov.uk/cases/tesco-plc/.

42 https://www.sfo.gov.uk/cases/serco/.

43 https://www.sfo.gov.uk/2020/01/31/sfo-enters-into-e991m-deferred-prosecution-agreement-with-airbus-as-part-of-a-e3-6bn-global-resolution/.

44 https://www.sfo.gov.uk/2020/10/30/sfo-enters-into-deferred-prosecution-agreement-with-airline-services-limited/.

45 https://www.sfo.gov.uk/2019/06/27/former-company-director-sentenced-for-12-million-bribery-scheme/.

Chapter 4

OFFSHORE

Paul Dean, Allie Loweth and Nicholas Kazaz[1]

I INTRODUCTION

The development of the offshore oil industry in the 20th century gave rise to the need for specialised contracts for the hire of vessels in this technical (often highly technical) sector of shipping. Beginning with SUPPLYTIME in the mid 1970s, there are now numerous very specific charter parties for use within the industry. These include HEAVYCON 2007, a voyage charter party for the heavy-lift trade that contains a 'knock-for-knock' regime for semi-submersible vessels carrying cargo, such as jack-up rigs on deck, WINDTIME, a time charter party for high-speed personnel craft used in the offshore wind sector, and BARGEHIRE, a time charter party for the hire of non-self-propelled barges. BIMCO continues to update and introduce new forms for use by the offshore industry, including revisions in 2021 of TOWCON, TOWHIRE and BARGEHIRE, and the introduction of ASVTIME, a time charter party for accommodation support vessels.

These contracts, and the many others used in offshore shipping, have had to develop significantly over time to keep abreast of the advancing technologies and changing issues facing the industry. This has resulted in an increasingly complicated contractual matrix surrounding the exploitation of offshore natural resources. In this chapter, we provide a short overview of some of the most frequently used contracts in the field of offshore shipping, and make some general comments about their characteristics and nature.

II SUPPLYTIME

In the wake of the growth in offshore activities in the 1970s, and oil exploration in particular, there was a significant increase in demand for offshore service vessels. Originally these service contracts were based on standard time charter party forms or in-house forms produced by tug owners. Increasingly, the industry felt that it needed a specialist contract, and so the Baltic and International Maritime Council (BIMCO) was approached to draw up a suitable solution. This led to the creation of the SUPPLYTIME form in 1975 (SUPPLYTIME 75). Its purpose was to regulate the relationship between owners and charterers when chartering tugs and offshore service and supply vessels on a time charter basis. Similarly to the widely used NYPE and BALTIME forms, the owners were paid a daily rate in exchange for use of the vessels.

1 Paul Dean is a partner and Allie Loweth and Nicholas Kazaz are senior associates at HFW. The information in this chapter was accurate as at May 2021.

As the industry continued to specialise, a number of revisions were made to SUPPLYTIME in the form of SUPPLYTIME 89. In particular, the aim of the revised version was to strike a more equal balance between owners and charterers and to avoid the use of extensive rider clauses, which had become common with SUPPLYTIME 75. One of the key features introduced by SUPPLYTIME 89 was the knock-for-knock regime between owners and charterers (discussed further in Section II.i), which had been a feature of the 1985 versions of TOWCON and TOWHIRE (see Section III).

SUPPLYTIME 89 became the industry standard form contract for offshore activities. In 2005, a further review was undertaken (largely because of criticism of the early termination mechanism in Clause 26, which was the source of much litigation) and led to the creation of SUPPLYTIME 2005. Following the 10th anniversary of the 2005 form, BIMCO reviewed the contract and a new version came into force in 2017.

Given that the revised 2017 form appears broadly similar to its 2005 predecessor, we highlight and discuss some of the key changes contained in SUPPLYTIME 2017.

i Clause 14 of SUPPLYTIME 2017: liabilities and indemnities (knock-for-knock)

SUPPLYTIME 2005 reinforced the principle that the apportionment of liability should be on knock-for-knock terms, whereby the owners and charterers each assume liability for loss of or damage to their own property and that of their contractors and subcontractors, as well as for injury to their own personnel and that of their contractors and subcontractors, regardless of which party caused the loss, damage or injury. However, the 2005 form contains numerous owner-friendly exceptions whereby the knock-for-knock regime does not apply (e.g., if damage is caused by undisclosed dangerous or explosive cargo, or liability is incurred as a result of the owners' suspension of the vessel's service).

The 2017 form serves to level the playing field by removing the majority of these exceptions. The three remaining exceptions (down from 16) relate to:

a owners' and charterers' towing wire;
b limitation of liability at law; and
c salvage of charterers' property.

The reduction in the number of the available carve-outs has extended the scope of the knock-for-knock regime. This is a trend that has been supported by the amended definitions of 'charterers' group' and 'owners' group', which now include reference to 'clients (of any tier)' (for charterers' group) and 'affiliates' (being those legal entities under the corporate control of owners, charterers or charterers' clients or co-venturers). The expanded definitions address previous uncertainty as to whether these defined terms include other participants in a project further along the contractual chain. However, the amended definitions are still not without their problems and there may still be scope for claims from some parties to fall outside the knock-for-knock regime. Accordingly, thought should be given to appropriate amendments to the 2017 form to ensure that an effective knock-for-knock regime will apply.

In addition to expanding the scope of the knock-for-knock regime, SUPPLYTIME 2017 incorporates amendments to the included losses that fall within the regime. Clause 14(a) now includes reference to 'non-performance' so that parties are protected for losses arising from a total failure to perform the charter party. These amendments ensure that 'radical breaches' of

the charter party, such as deliberate non-performance, fall within the scope of the knock-for-knock regime.[2] The SUPPLYTIME 2017 form is now consistent with other recent forms in the offshore shipping sector, such as WINDTIME.

The knock-for-knock regime continues to be supported by reciprocal indemnities. In addition, charterers assume liability for the property and personnel of their co-venturers and of their clients (of any tier). This is necessary as charterers often hire a vessel as part of a wider project to which the chartered vessel is providing services.

ii Clause 14(b)(ii): consequential damages

Clause 14(b)(ii) of SUPPLYTIME 2017 excludes liability for any consequential loss. Under the 2005 form, this term was widely understood to incorporate an exclusion for loss of use, loss of production, loss of profits and similar losses. The problem was that, under English law, the word 'consequential' has a very specific meaning, restricted to losses that do not flow naturally from the breach. In addition, English courts have traditionally construed exclusion clauses restrictively pursuant to the *contra proferentem* rule.[3]

In *Ferryways NV v. Associated British Ports*[4] (and a number of earlier decisions), it was held that exclusions of 'indirect or consequential' losses were effective only for excluding losses that did not flow naturally from the breach in question. However, exclusion clauses in commercial contexts between sophisticated parties are increasingly being given their ordinary meaning rather than the traditional narrow interpretation. Thus, in the more recent *Star Polaris* case,[5] the court held that 'consequential losses' had the wider meaning of financial losses, as the words are typically used by commercial parties. Therefore, there was uncertainty as to whether losses of production and losses of profits that follow naturally from a breach of contract would be excluded under the 2005 form.

SUPPLYTIME 2017 addresses this uncertainty by including a separate head of excluded loss under Clause 14(b)(i), which expressly identifies excluded losses as including loss of use, loss of profits, loss of product and loss of business, inter alia. By including these specific heads of losses, the 2017 form removes uncertainty and aligns itself with the wording of TOWCON 2008, TOWHIRE 2008 and WINDTIME.

iii Clause 10: fuel

SUPPLYTIME 2017 contains updated provisions concerning the payment for fuel that more closely reflect current industry practice. The previous regime provided that charterers would purchase the fuel on board at the time of delivery and owners would purchase the fuel on board at redelivery (at the price prevailing at the relevant port).

The 2017 form allows for a more flexible regime that details two payment alternatives:

a the parties can pay for fuel in a manner consistent with the 2005 form, but the price to be paid must be supported by evidence obtained at the most recent bunkering operation; or

2 *A Turtle Offshore SA v. Superior Trading Inc (The 'A Turtle')* (2009) 1 Lloyd's Rep 177.

3 The rule requires (broadly) that the clause is to be construed against the party who proposed the relevant clause.

4 [2008] 1 Lloyd's Rep 639.

5 *Star Polaris LLC v. HHIC-PHIL Inc* [2016] EWHC 2941 (Comm).

b the difference in quantity of fuel on board between delivery and redelivery is paid at a pre-agreed rate or a rate substantiated by evidence from the vessel's most recent loading of fuel.

The vessel's chief engineer can stop the loading of fuel should the owner reasonably believe that the charterer is loading fuel that does not comply with the specifications and grades agreed with the owner. Importantly, the vessel remains on hire during any stoppage of loading under Clause 10.

iv Clause 34: termination

The termination provisions in SUPPLYTIME 2017 have been clarified to avoid disputes regarding what constitutes an event of termination. Requisition, confiscation, loss of vessel and *force majeure* are now stated to be events of termination. Conversely, bankruptcy and owners' failure to acquire insurance only provide the innocent party with a right of termination.

The right of termination, after a stipulated period, in the event of vessel breakdown has been removed in the 2017 form. Breakdown is now referred to solely within the off-hire regime and is accompanied by a termination right linked to prolonged off-hire for a single continuous period or cumulative separate periods.

v Clause: maintenance and dry-docking

Under SUPPLYTIME 2017, owners will no longer be compensated for unused maintenance allowance unless such an allowance has remained unused at the charterers' request. Uncertainty still remains as to whether the owner can use maintenance as a defence against off-hire.

The 2017 form removes the owner-friendly provision that stipulated that the vessel remains on-hire during transit to and from the dry-dock facility. The vessel will now be off-hire once it is placed at the owners' disposal, a position that is more consistent with industry standards.

III TOWCON

Towage has been a maritime activity for centuries. The first recorded tug on the River Thames is said to be the *Lady Dundas* in 1832. A further example of early towing can be found in William Turner's painting of *The Temeraire* being towed to a breaker's yard in 1839. Since those formative years, towage has developed to assist with the arrival and departure of ships at ports, with offshore activities, and with salvage operations. Until relatively recently, however, there was a plethora of different towage contracts in use, such as the UK Standard Conditions for Towage and many other forms drafted by the tug owners themselves.

The International Salvage Union, which includes many of the major international towage and salvage contractors, approached BIMCO in the 1980s to produce a standard form international towage contract. The aim was to redress the perceived imbalance arising from the use of tug owners' agreements for ocean towage, which often contained exceptions favouring the tug. There was also inconsistent use of the American Conditions, which used a simple risk allocation between tug and tow, with each party bearing the risks incidental to their vessel, which was then laid off through insurance.

Accordingly, a subcommittee of the documentary committee of BIMCO debated with the International Salvage Union and the European Tugowners Association and produced two standard form contracts for international ocean towage services. The aim of the group was to

produce a more balanced contract based on the American Conditions that did not unfairly favour the tug. The result was the publication of the TOWCON and TOWHIRE forms in 1985, introducing the knock-for-knock liability regime.

The TOWCON form is a contract for the service of a tug for a particular voyage. It is a voyage charter designed for towage between specified locations and, accordingly, the remuneration is on a lump sum basis. In return for this lump sum (which may be payable in several instalments), the tug will bear the majority of the risks in respect of time and delay.

As already discussed, under a typical knock-for-knock regime, parties agree that the loss lies where it falls, irrespective of fault and without recourse to other parties (i.e., 'your people, your property, your problem'). Its purpose is to strike a balance between the tug owner and the hirer. It also offers contracting parties certainty, reducing insurance costs and avoiding the time, expense and difficulties in attributing fault and causation. In essence, each party is responsible for and agrees to indemnify the other contracting parties against injury to, or death of, its own personnel, loss of or damage to its property, and any other specified losses (such as consequential loss or environmental liability).

In 2008, the 1985 version of the TOWCON form was amended to clarify the period to which the regime applies (i.e., from arrival of the tug at the place of departure until disconnection at the place of destination) and to exclude liability for direct or indirect financial loss, except for breaches of permits, tow-worthiness of the tow, seaworthiness of the tug and termination by the hirer or tug owner.

Recent interpretations of the term 'consequential loss' in exclusion clauses have cast doubt on the scope of such clauses (see discussion at Section II.ii). As with SUPPLYTIME 2017 and WINDTIME, TOWCON 2008 avoids this potential pitfall by setting out separate exclusions for loss of profit and similar losses (Clause 25(c)(i)) and 'any consequential loss or damage whatsoever' (Clause 25(c)(ii)).

One further interesting point in the context of Clause 25 is the operation of the knock-for-knock regime in circumstances where a tug and a tow part and the tow are subsequently successfully salved. An argument could be made that in the wording of Clause 25, liability for the salvage operation will not be covered by the knock-for-knock regime and the tug owners may be liable. Such an eventuality assumes that the situation has arisen as a result of a breach of contract by the tug owners. If a successful claim is made, then this will be subject to applicable limitation provisions in the usual way.

The 2008 version of the TOWCON form has been revised with the release of TOWCON 2021. Changes include a reordering of the sequence of clauses and, for the first time in TOWCON, a SUPPLYTIME-style 'group' definition has been introduced. This definition is used in the liability and indemnity provisions. Similar to SUPPLYTIME 2017 (discussed above), the 'group' definitions in TOWCON 2021 are still not without problems. Accordingly, thought should always be given to appropriate amendments to the 'group' definitions to ensure that the liability and indemnity regime applies as intended.

As regards the liability and indemnity regime, TOWCON 2021 has adopted broadly the same consequential loss (described as 'excluded losses') clause at Clause 22(c) as Clause 14(b) of SUPPLYTIME 2017 (described above). Although parties may still wish to make minor amendments to the language for the tug and tow context, broadly this is a beneficial change.

Although the consequential loss clause has been updated by reference to the like provision in SUPPLYTIME 2017, the remainder of the liability and indemnity provisions in TOWCON 2021 have not. This is surprising, given that the inclusion of the SUPPLYTIME 2017 language in Clause 22(c) of TOWCON 2021 (which achieves, inter

alia, the 'regardless-of-cause' effect), contrasts somewhat starkly with the absence of such language elsewhere raising questions as to the intended scope of those other knock-for-knock provisions.

Unlike TOWCON 2008, salvage is now expressly referenced in the knock-for-knock regime.

IV TOWHIRE

While TOWCON is a contract for a specific voyage, TOWHIRE is used for the hire of towage services for a certain period. The TOWHIRE 2008 and TOWHIRE 2021 forms follow the same format as TOWCON 2008 and TOWCON 2021, save that the basis of remuneration is a daily rate of hire rather than a lump sum payment. There are no demurrage provisions, as the daily rate continues to be payable while the vessel is in service.

V PROJECTCON

This charter party form is specially designed for the transport of large project cargoes, often loaded either by a roll-on, roll-off method or using a semi-submersible barge. The form is generally used to cover a single venture involving the use of a barge and tug to transport special or project cargo (such as project components and other complex cargoes that cannot be containerised). It was produced in an attempt to avoid the difficulties of amending and adapting existing offshore shipping contracts, which are not suitable for this specialised service.

VI HEAVYCON 2007

There are many similarities between the PROJECTCON and HEAVYCON forms, but their primary uses differ. HEAVYCON has been adapted for use in the heavy-lift sector. The HEAVYCON form is used almost exclusively for the carriage of deck cargoes on semi-submersible vessels with a single cargo. Again, as with most prominent contracts in the offshore sector, the HEAVYCON form contains a knock-for-knock risk allocation provision that is specific for its intended use.

VII HEAVYLIFTVOY

HEAVYLIFTVOY is drafted for the carriage of multiple heavy-lift shipments carrying cargoes both above and below deck. Unlike the other contracts discussed here, liability is not allocated on a knock-for-knock basis but according to the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (the Hague Rules) and the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules). BIMCO advised in its explanatory notes to HEAVYLIFTVOY that the form is drafted to be sufficiently flexible to cover 'various loading and discharging methods, single or multiple loading and discharging ports, on or under deck stowage'.

VIII DISMANTLECON

On 23 September 2019, BIMCO published its first standard form decommissioning contract. DISMANTLECON has been drafted as a flexible agreement for significant or multiple stages of decommissioning work offshore, as well as more defined removal operations. The agreement makes provision for price and time adjustment on an ongoing basis as it is often difficult to determine the scope of work at the outset. Coupled with this, it uses adjudication as a form of fast-track interim dispute resolution mechanism with the intention of avoiding delay and reducing costs. It adopts a knock-for-knock liability regime similar to the other agreements in the BIMCO suite of offshore documents. For further details in relation to this contract, see the Decommissioning chapter.

IX LOGIC

The most recent addition to the LOGIC suite of contracts, which has been a long-standing feature of the offshore industry, is the LOGIC decommissioning standard form contract. This has been drafted for use in the dismantling, removal and transport to shore of offshore facilities and infrastructure. For further details in relation to this contract, see the Decommissioning chapter.

X RECENT DEVELOPMENTS

Boskalis Offshore Marine Contracting BV v. Atlantic Marine and Aviation LLP (the 'Atlantic Tonjer')

The High Court of England and Wales handed down its first decision in relation to a SUPPLYTIME 2017 time charter party in *Atlantic Tonjer*,[6] an appeal of an arbitration decision, concerning the interpretation of the payments clause thereof, Clause 12(e), and whether the charterers were permitted to withhold payment of an invoice disputed after the due date. The decision emphasises the need to comply strictly with the time limits under Clause 12(e).

Pursuant to a SUPPLYTIME 2017 time charter party, the charterers chartered the multi-purpose support vessel *Atlantic Tonjer* from the owners, Atlantic Marine. Under the charter party, invoices were to be issued 14 days in arrears and payment of hire was to be made 21 days after that. The payment clause, Clause 12(e), was in unamended form and provides as follows:

> *Payments – Payments of hire, fuel invoices and disbursements for the Charterers' account shall be received within the number of days stated in Box 24 from the date of receipt of the invoice . . . in full without discount or set-off to the account stated in Box 23… If payment is not received by the Owners within five (5) Banking Days following the due date the Owners are entitled to charge interest . . .*

6 *Boskalis Offshore Marine Contracting BV v. Atlantic Marine and Aviation LLP (the 'Atlantic Tonjer')* [2019] EWHC 1213 (Comm).

> *If the Charterers reasonably believe an incorrect invoice has been issued, they shall notify the Owners promptly, but in no event no later than the due date, specifying the reason for disputing the invoice. The Charterers shall pay the undisputed portion of the invoice but shall be entitled to withhold payment of the disputed amount.*

Between 16 June 2018 and 13 July 2018, the owners issued invoices for hire, meals, accommodation and other services in the amounts of €1,475,029.26 and £42,683.04. As at the date of the hearing, those invoices remained unpaid.

Interpreting Clause 12(e) of SUPPLYTIME 2017, the High Court stated that the language 'is clear and unambiguous', concluding that a reasonable person would understand the wording to require 'prompt payment or prompt identification of any issue preventing payment' within the context of the time limits agreed by the parties. The clause is not analogous to a time bar, limitation of liability or exclusion of liability warranting further enquiry and (on occasion) permitting the implication of terms. Properly construed, the clause required the charterers to dispute the invoice within 21 days of receipt. Boskalis' failure to dispute the invoice within that time precluded their defences to the invoice but did not prevent a counterclaim in respect of financial loss resulting from that payment nor did it prevent a claim by way of their rights of audit under Clause 12(g).

XI CONCLUSION

There are a number of situation-specific offshore charter parties, each with its own unique set of situation-specific provisions. As the industry continues to develop, these contracts will likewise evolve to suit the needs of the contracting parties. This is a growing body of law and users of these contracts should ensure that they are aware of changes to the legal environment around the chartering of offshore support vessels and assets.

Chapter 5

OCEAN LOGISTICS

Catherine Emsellem-Rope[1]

I INTRODUCTION

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

The transportation of goods by sea involves numerous different parties operating across the supply chain. This inevitably gives rise to a number of contractual arrangements and relationships. In broad terms, when goods are transported by sea, the transportation contract governing the carriage is known as a contract of affreightment. These contracts appear in several different forms, which are generally divided into two categories: the charter party and the bill of lading. We examine both, but our focus is on the latter.

II CHARTER PARTIES

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

There are several types of charter party, the most common of which are as follows:

a the demise (or bareboat) charter party: this operates as a lease of the vessel itself for an agreed period in exchange for the payment of hire. With a demise charter, the charterer will usually provide the crew and operate the vessel technically and commercially;

b the time charter party: this is a contract for the use of the ship and her crew for a specified period in exchange for the payment of hire during the period of use. Hire is usually calculated daily or monthly, according to the vessel. It is therefore not affected,

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by the number of voyages during the period of hire, or the amount of cargo transported. This type of charter party is often used by carriers seeking to increase their fleet for a certain period; and

c the voyage charter party: this is a contract for the use of the vessel and her crew to carry an agreed cargo on an agreed voyage in consideration of the payment of freight. Freight is calculated in accordance with the number of tonnes or cubic metres carried, or as a lump sum.

In addition to the foregoing, there are several hybrid forms of charter party, which are combinations of a voyage and a time charter party. One such hybrid is the trip charter, under which a vessel is time chartered for a specific cargo voyage. Another is the slot charter, according to which a fixed number of container spaces are chartered per voyage and a set price is payable per slot. Finally, under a consecutive voyage charter, a vessel may be chartered for a specific period, but the vessel is required to fulfil a number of voyages between fixed ports during the period of hire.

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

Over the years, a number of standard-form charter parties have been developed by various organisations and are commonly used throughout the shipping industry. In particular, BIMCO[2] has developed a number of well-known standard forms, such as the Standard Bareboat Charter (BARECON 2001 and 2017) for demise charter parties and the Standard Time Charter Party for Container Vessels (BOXTIME 2004). For voyage charter parties, the BIMCO Uniform Charter (1922, as revised in 1976 and 1994) (GENCON) is commonly used for all types of goods. There is also the New York Produce Exchange Time Charter (1946, as revised in 1993 and 2015) for time charter parties and the SHELLVOY (Shell's standard form tanker voyage charter party), which has also been adopted by the market.[3] BIMCO also created SLOTHIRE (1993) as a standard form to be used for slot chartering.

It is important to note that a long chain of different charter parties may develop. This will arise in circumstances where a shipowner charters his or her vessel to a charterer who in turn sub-charters the vessel to another charterer and so on. The terms of the charter parties running up and down the chain may be 'back-to-back' (i.e., materially the same), or they may

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

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

be different. In the case of a charter party dispute, careful attention will need to be paid to the terms of the charter party and consideration will need to be given to the question as to whether it is possible to pass the claim up or down the contractual chain.

III BILLS OF LADING AND WAYBILLS

i Overview

A bill of lading is the transport document issued in relation to liner shipping when the vessel is used to carry the goods of any person. It is an important commercial document and it is pivotal in international trade, as illustrated below. In broad terms, the bill of lading serves three functions within the context of international trade. First, it acts as evidence of the contract of carriage. The bill of lading is not the actual contract of carriage since the contract is usually made before the bill of lading is signed and delivered; however, it provides evidence of the terms of the contract of carriage. Second, the bill of lading acts as a receipt for the goods received or shipped. Bills of lading usually contain statements as to the description, quantity and nature of the goods received into the carrier's care and similar matters. By signing the bill of lading (which is often completed by the shipper), the carrier acknowledges receipt of the goods so described. It constitutes *prima facie*[4] evidence of the goods so described. Finally, the bill of lading acts as a document of title. This means that the bill may be made deliverable to a named person or to an order or 'to order'. Bills of lading making goods deliverable to order are negotiable[5] instruments. If a bill is negotiable, it will allow transfer of title, which will be effected by endorsement. Order bills will entitle any lawful holder of the bill to possession of the goods. Bills of lading that are not negotiable instruments are sometimes known as 'straight bills'. Although not negotiable, a straight bill of lading is, as a matter of English law, a document of title. Under a straight bill of lading, cargo is deliverable only to the named consignee. The fact that the bill of lading is a document of title differentiates it from other transport documents that may also be issued, such as waybills or forwarders' certificates of receipt, neither of which are documents of title, though they may appear to be so on their face.

The bill of lading will be issued when the cargo has been loaded on board the vessel. The front of the bill of lading includes all the relevant details regarding the shipment (such as the name of the shipper, carrier or owner, the consignee, the description of the cargo). The reverse of the bill contains the detailed terms and conditions governing the carriage. It is also important to note that the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (the Hague Rules) or the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules) will often apply to contracts of carriage covered by a bill of lading, or any similar document of title. These rules provide the carrier under the bill of lading with a number of important defences and limitations when faced with a cargo claim under the bill. The Hague and Hague-Visby Rules are examined in more detail in other chapters of this book.

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

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

ii Different types of bills of lading

There are various types of bills of lading, the most important of which are those described below.

Liner bills and charter bills

Liner bills are issued by shipping lines and contain very detailed, densely typed terms and conditions on their reverse face. Charter bills (those issued in relation to goods on a chartered vessel, for example, the 'Congenbill' (1994 as revised in 2007 and 2016), which would be issued in relation to GENCON charter parties), contain only a small number of conditions, but should incorporate the terms of the charter party into the bill of lading.

Received bills of lading and shipped bills of lading

When goods have been received into the carrier's charge at the quay or in the warehouse and are not loaded, a document called a 'received for shipment bill' will be issued. Once the goods have been loaded on board the ship, the received bill may be exchanged[6] or converted into a shipped bill containing the same representations. To obtain documentary credit, banks will only accept shipped bills of lading (not received bills of lading).

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

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

a the through-transport bill, in which the named carrier contracts as principal for the stage during which it is the performing carrier but as cargo interests' agent for the other legs. This will be expressly stated in the small print on the reverse of the bill of lading; and

b the combined-transport bill, in which the named carrier contracts as principal for all stages of the movement, regardless of whether it is the performing carrier. This inevitably leads to subcontracting.[7]

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

A combined-transport bill needs to address the liability of the carrier in relation to the different modes of transport that will be used for the carriage of the goods covered by the bill of lading. This is because there is no single international convention applicable to multimodal transport. The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (the Rotterdam Rules) was adopted in December 2008

6 Against surrender of the received bill.

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

by the UN General Assembly and was designed to regulate multimodal transport. However, very few countries have ratified the Rotterdam Rules and therefore they seem unlikely to enter into force internationally in the near future.[8]

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

iii Contracting directly with shipping lines

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

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

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

iv Buying from freight forwarders and non-vessel operating carriers

A shipper may decide that it wishes to use a freight forwarder when buying ocean freight.

The term 'freight forwarder' has several meanings. In the traditional sense, a freight forwarder is someone employed by the shipper to enter into contracts of carriage with

8 As of March 2022, only four countries (Spain, Togo, the Congo and Cameroon) had ratified the Rotterdam Rules, and one country has acceded to the Rotterdam Rules (Benin). The Convention will not come into effect until at least 20 countries have ratified it.

shipowners, but as agent only (i.e., on behalf of the shipper), without liability as a carrier. The role of the freight forwarder was limited to booking space on behalf of the shipper, preparing the bill of lading, arranging for the goods to be brought alongside and generally acting as a point of contact in relation to the goods.

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

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

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

Contractual capacity of freight forwarders

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

In general, in common law countries such as the United Kingdom, a freight forwarder acting as agent will have no liability to its customer for cargo loss or damage, or delay. However, a freight forwarder will still have obligations and potential liabilities; for instance, a freight forwarder acting as an agent has a duty to use reasonable care in employing the carrier, and may be liable for delay resulting from its negligence or for failing to pass on instructions concerning the goods to the carrier.

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

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

A key factor that is taken into consideration when determining the contractual capacity of the freight forwarder is the method of charging. The fact that a freight forwarder charges an all-in rate, rather than for the freight at cost plus a commission, can be evidence that the parties did not intend for the freight forwarder merely to be an agent. However, this is not

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

conclusive evidence as it is possible, at least under English law, for the parties to agree that the agent should be remunerated based on the profit that the agent makes on the all-in rate (in practice, a lot of freight forwarders trade on this basis).

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

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

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

Standard terms used by freight forwarders

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

When a freight forwarder acting as a carrier or NVOC also issues a house bill of lading, there may again be two sets of terms and conditions that apply to the same shipment. Ideally, the STCs should make it clear which terms and conditions will prevail; the absence of an express statement to that effect will cause difficulties as the courts will need to decide on this matter.

IV CONCLUSION

Continued trade volume growth is likely to lead to further containerisation and an increased use of multimodal or combined transport. It is unlikely that the existing general structure of contractual relationships will dramatically change but there is likely to be increasing use of more sophisticated arrangements, such as framework agreements. As the participants in the supply chain move increasingly towards more formal types of contracts, it will be interesting to see what liability regimes are agreed. The majority of contracts will need to be revisited and rewritten in the event that the Rotterdam Rules are eventually ratified; however, whether this occurs in the near future remains less than certain.

10 UK-based freight forwarders generally trade on the British International Freight Association Standard Trading Conditions (2021 edition) or the Conditions For Use by Freight Forwarders, Series 400, developed by the Through Transport Club. Other examples are the Netherlands Association for Forwarding and Logistics Forwarding Conditions used by Dutch-based freight forwarders, the National Association of Freight and Logistics Standard Trading Conditions used by many UAE freight forwarders, the Singapore Logistics Association Standard Trading Conditions used by Singapore freight forwarders and the Hong Kong Association of Freight Forwarding and Logistics Trading Conditions 2008 used by Hong Kong-based freight forwarders.

Chapter 6

PORTS AND TERMINALS

Matthew Wilmshurst[1]

I INTRODUCTION

i Historical and economic context

The United Kingdom was once a manufacturing powerhouse, exporting goods across the globe. The advent of containerisation in the middle of the past century led to a significant change in the UK economy, and the United Kingdom has become a net importer of manufactured products, bringing in US$773.6 billion of physical goods annually.[2]

Being an island nation, terminals are a vital cog in the United Kingdom's economy – 95 per cent of UK imports and exports arrive and depart by sea. In 2020, UK ports handled 438.9 million tonnes of cargo, of which approximately 63 per cent was inbound traffic,[3] a significant proportion of which would have been manufactured goods destined for the shelves of UK retail outlets.

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

The change in the ownership and operational structure in the United Kingdom has been mirrored across the world, with most developed and developing nations recognising that terminals are an important driver of national economies and looking to the private sector to provide funds for infrastructure development to facilitate cross-border trade; whether through the full privatisation model adopted by the United Kingdom, or the Landlord Port Authority model under which states retain control of waterways and grant concessions to international operators to run and develop the terminals. This has led to the globalisation of terminals, with a small number of big players; in 2018–2019, the 21 main global terminal operators had an 80 per cent share of global capacity and throughput.[4]

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1 Matthew Wilmshurst is a partner at HFW. The information in this chapter was accurate as at March 2023.

2 Department for International Trade, 'UK Trade in Numbers', February 2023, https://www.gov.uk/government/statistics/uk-trade-in-numbers/uk-trade-in-numbers-web-version.

3 Department for Transport, 'UK Port Freight Statistics: 2020', https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1014546/port-freight-annual-statistics-2020.pdf.

4 Source: Drewry (2019), Global Container Terminal Operators Annual Review and Forecast 2019 – see https://unctad.org/system/files/official-document/rmt2019_en.pdf, p. 69 and Table 2.14.

ii Terminal operators' liability

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

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

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

II CONTRACTUAL CLAIMS AGAINST TERMINAL OPERATORS

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

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

English law restricts the extent to which a party can exclude or limit its liability under its written standard terms of business – clauses seeking to do so will be subject to the test of reasonableness contained in the Unfair Contract Terms Act 1977. Failure to comply with this legislation can result in the entirety of an exclusion or limitation clause being struck out by the court. Terminal operators therefore usually include in their TSAs and STCs defences and limits of liability that are similar to those found in international shipping conventions or other industry-standard conditions, which have previously been held to be reasonable by the English courts.

III NON-CONTRACTUAL CLAIMS AGAINST TERMINAL OPERATORS

Terminal operators commonly face claims from cargo interests with whom they do not have a direct contractual relationship. These claims can be brought in tort or in bailment but are often pursued as both. Non-contractual claims against a terminal operator can be attractive to

a cargo interest because they often offer an opportunity to recover more against a carrier than may be possible under the terms provided for in its standard trading conditions or a bill of lading (although note that there is no recovery for pure economic loss when bringing a claim in tort, whereas in contract, loss of the bargain or the expectation interest can be recoverable).

i Claims in tort (negligence)

A cargo interest bringing its claim in negligence must fulfil the following requirements:

a it was owed a duty of care by the terminal operator;

b there was a failure on the part of the terminal operator to exercise that duty of care; and

c the terminal operator's breach of that duty of care caused the loss complained of.[5]

The burden of proof is on the cargo claimant to demonstrate that it has fulfilled these requirements (and the existence of at least a duty of care is normally fairly easy to establish in the context of loss or damage occasioned by a terminal operator). Of more difficulty to the cargo interest bringing a claim in negligence is the requirement that it either owned the goods at the time of the breach or had possessory title to them.[6]

ii Bailment

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

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

iii Defeating non-contractual claims through contract

Although the enterprising cargo claimant may be able to bring a non-contractual claim against a terminal operator in the hope of avoiding defences, exclusions and limits of liability, a terminal operator facing such claims may find assistance in the terms of its contract with its contractual counterparty. There are three clauses that are commonly used by a terminal operator to defeat or limit non-contractual claims: the *Himalaya* clause, the liberty to subcontract clause and the circular indemnity clause.

Himalaya clause

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

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5 For a detailed analysis of the tort of negligence, see *M Jones, Clerk & Lindsell on Torts* (Sweet & Maxwell, 23rd Edition, 2014), Chapter 7.

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

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

For a *Himalaya* clause to be enforceable, it must satisfy the four-part test laid down by Lord Reid in *Midland Silicones*,[8] in that the following must be clear:

a the subcontractor is intended to be protected by the clause;

b the carrier contracted as agent for the subcontractor;

c the carrier has authority from the subcontractor to enter into the *Himalaya* clause (although later ratification would suffice); and

d difficulties regarding consideration moving from the stevedore must be overcome.

A *Himalaya* clause typically reads:

> *every such person [subcontractor] or vessel shall have the benefit of every right, defence, limitation and liberty of whatsoever nature . . . as if such provisions were expressly for his own benefit and in entering into this contract, the carrier . . . does so not only on his own behalf but also as agent . . . for such person or vessel.*

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

Liberty to subcontract clause

When a sub-bailee receives goods from a bailee pursuant to a contract between those two parties, it is in certain circumstances entitled to rely on the terms of that contract when facing a claim in bailment from the original bailor of the goods, through the doctrine of sub-bailment on terms. The leading case on sub-bailment on terms is often cited as *The 'KH Enterprise'*,[11] in which the Privy Council held that a subcontracted carrier could rely on the terms and conditions in its own bill of lading in a claim for bailment because, through a liberty to subcontract clause in the contract of carriage between the owner of lost goods and the first carrier, the owner of the goods had consented to subcontracting on any terms.[12] The clause typically reads: 'The carrier shall be entitled to subcontract on any terms the whole or any part of the . . . carriage.'

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

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

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

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

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

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

Circular indemnity clause

A circular indemnity clause prevents cargo claimants from bringing a claim against a bill of lading issuing a carrier's subcontractors for more than would be recoverable from the carrier itself. The clause typically reads:

> *The merchant undertakes that no claim or allegation shall be made against any person whomsoever by whom the carriage is performed . . . other than the carrier . . . and if any such claim or allegation should nevertheless be made, the merchant will indemnify the carrier against all the consequences thereof.*

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

Election of terms

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

> *[T]he mere fact that such a [Himalaya] clause is applicable cannot, in their Lordships' opinion, be effective to oust the sub-bailee's right to rely on the terms of the sub-bailment as against the owner of the goods. If it should transpire that there are in consequence two alternative regimes which the sub-bailee may invoke, it does not necessarily follow that they will be inconsistent; nor does it follow, if they are inconsistent, that the sub-bailee should not be entitled to choose to rely upon one or other of them as against the owner of the goods: see Mr AP Bell's 'Sub-Bailment on Terms', ch. 6,*

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

pp. 178–180, of Palmer and McKendrick, Interest in Goods (1993). Their Lordships are therefore satisfied that the mere fact that a Himalaya clause is applicable does not of itself defeat the shipowners' argument on this point.

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

IV CLAIMS IN OTHER JURISDICTIONS

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

Chapter 7

SHIPBUILDING

Vanessa Tattersall and Simon Blows[1]

I OVERVIEW

Shipbuilding is a cyclical business. Its patterns of boom and bust have been illustrated vividly in the past 15 years. In the heady days before the 2008 financial crash, the upward march of newbuild prices looked unstoppable as shipyards struggled to meet the seemingly insatiable appetite of shipowners for new tonnage, fuelled by the boom in world trade and soaring commodity prices. Many new shipyards sprang up too, particularly in China. The crash of 2008 and its aftermath produced a sobering market adjustment as the freight market collapsed, leading to high-profile insolvencies, and inevitably reduced demand for new tonnage. Since then, the market has remained a period of shipyard overcapacity characterised by defaults, deferrals and renegotiations. Shipyard consolidation became a major issue, especially in Korea, even among the big yards.

The covid-19 pandemic led to construction delays for newbuilds, particularly at Chinese and European yards, and seems to have dented newbuild orders (although perhaps not as much as some expected). However, the full and long-term effects of the pandemic on demand for new ships and the industry in general remain to be seen. The effect of delays resulting from the pandemic is considered in Section IV, below.

Asia continues to dominate shipbuilding. According to statistics for 2020,[2] published by the Shipbuilders' Association of Japan (SAJ), of the 1,084 worldwide recorded orders for new ships of more than 100 gross tonnage (GT) during the year, 659 (just under 61 per cent) were placed with the big three Asian shipbuilding nations: Japan, South Korea and China. China accounted for 323 of those orders, almost a third of the world total. When these statistics are analysed in terms of GT, the imbalance towards Asia remains striking. Of the world total of more than 33 million GT ordered in 2020, about 30 million GT was with shipyards in the big three Asian shipbuilding nations, with South Korea and China accounting for more than 11.8 million GT and 14.5 million GT, respectively; together, about two-thirds of the world total. (For China in particular, new orders in terms of GT remained similar to 2017, 2018 and 2019 figures, despite order numbers having fallen, showing the demand for fewer but larger ships at Chinese yards.)

Despite this shift to the East, English law and London arbitration are still crucially important for shipbuilding. International buyers remain reluctant to experiment with Chinese law and arbitration for contracts involving Chinese shipyards. Other key interests in Asia and elsewhere remain happy to use English law and London arbitration. English law

1 Vanessa Tattersall is a partner and Simon Blows is a consultant at HFW. The information in this chapter was accurate as at May 2021.

2 These are provisional figures.

gives a large degree of certainty in respect of the meaning and effect of shipbuilding contract provisions, particularly those on the commonly used forms. Furthermore, Asian shipyards are used to and comfortable with English law, making it unusual to see them push back on an English law clause. This must reflect the continuing strength and depth of the London legal market for maritime law. Of the emerging jurisdictions, only Singapore seems to present a serious alternative to London as a centre for dispute resolution, which may be a result of its similarities with English law and procedure.

II SHIPBUILDING CONTRACTS

There are a number of standard shipbuilding contracts. The most widely used remains the SAJ Form, which is used throughout Asia, including Korea and China. It is frequently adapted and the versions used in China are developing a particular character. Amended SAJ forms are used by Chinese shipyards despite the publication of the new Chinese Maritime Arbitration Commission form in 2011.[3]

The SAJ Form was drafted by an influential shipbuilders' trade association so it is not surprising that in its unamended form it is thought to favour the shipyard. Many of the amendments that are most frequently seen are made by buyers to redress this perceived imbalance. The Baltic and International Maritime Council (BIMCO) has produced its own form of shipbuilding contract, the Newbuildcon.[4] BIMCO is a shipping industry trade association with many shipowner members, so it is also perhaps not surprising that the Newbuildcon is a much more buyer-friendly contract. Although it is a more modern contract, the Newbuildcon does not seem to have caught on and it is not often encountered in practice, presumably because of shipyard resistance.

For high-value and complex projects in the offshore industry (such as for floating production storage and offloading units, and floating storage and offloading units), engineering, procurement and construction contract forms are sometimes used. These types of contracts originate from the engineering industry rather than shipbuilding and differ in a number of respects from the mainstream shipbuilding contract forms. Care should be taken when using these contract forms – they will usually need to be adapted to work for a shipbuilding project. Shipbuilding contracts are different from other types of contract in terms of the provisions required and how they are interpreted by English courts and arbitration tribunals.

III DEVELOPMENTS IN SHIPBUILDING LAW

The downturn of 2008 led to many disputed shipbuilding contract cancellations as collapses in asset values and chartering revenues forced buyers to reassess their order books and shipyards sought to hold reluctant buyers to their contracts. Because arbitration (often under the rules of the London Maritime Arbitrators Association) rather than court jurisdiction remains the most common choice for dispute resolution under shipbuilding contracts, the

3 The Chinese Maritime Arbitration Commission form is designed for use in international sales by Chinese shipyards.

4 The most recent version was issued in 2007.

details of disputes are largely confidential. However, a number of important cases have come before the courts, some as appeals from arbitration awards, which English law permits in some circumstances.

Disputes involving delays in construction remain important for both buyers and shipyards. *Adyard Abu Dhabi v. SD Marine Services Limited*[5] involved a disputed cancellation and clarified some issues concerning the relationship between claims by a shipbuilder for extensions of time under contractual *force majeure* provisions and claims for extensions of time based on allegations that delay had been caused by the buyer's breaches – the 'prevention principle'. In *Adyard*, the buyers cancelled for delay, following (among other things) a dispute about the terms for compulsory modifications. Adyard did not give notices claiming an extension of time under the contractual *force majeure* provisions, which contained general words allowing extensions for 'any other delays of a nature which under this contract permits postponement of the delivery date'. Instead, it alleged that the buyers' failure to agree terms for the modifications was a breach of the contract that prevented completion of the ship.

The judge found for the buyers and upheld their cancellation. He decided that Adyard's failure to give *force majeure* notices disqualified it from claiming any extension to the delivery date. The judge's decision seems to reflect a concern to keep the parties within the four corners of the express contractual regime for claiming extensions of time, so that where a claim for an extension to the delivery date can be made under the contract's *force majeure* provisions, those provisions must be used.

This approach makes it more difficult for shipyards to raise generalised delay claims long after the event. Requiring shipyards to use *force majeure* provisions (which almost invariably require prompt notices specifying details of the delays and what is said to have caused them) ensures that the parties know where they stand at the time they have to make difficult decisions about tender of delivery and termination.

The *Adyard* approach has been followed in a number of subsequent cases, including a decision in 2020 by the Commercial Court at the High Court of England and Wales.

Zhoushan Jinhaiwan Shipyard Co v. Golden Exquisite & ors[6] was an appeal from an arbitration award in the buyers' favour. This decision analyses in more detail the issues that are likely to arise under SAJ-type contracts.

A Chinese shipyard disputed the buyers' cancellation by alleging that delays had been caused by the buyers' breaches of the inspection and supervision regime under Article IV of the contract. They alleged that the buyers' supervisors worked unreasonably short hours so were not available to attend tests or inspections promptly. The shipyard claimed that the resulting delays should be taken into account in determining whether the buyers were entitled to cancel for excessive delay, citing the principle that a party should not profit from its own breach.

The judge (like the arbitrators) disagreed. The contract did not say that delays caused by a breach of Article IV postponed the delivery date or gave rise to permissible delays; by contrast, a breach of other provisions was expressly said to create permissible delay and postpone the delivery date. According to the judge's analysis, Article IV gave the buyers' supervisors the right to attend tests and inspections, but also allowed tests and inspections to be conducted in their absence if they did not attend. He was troubled that the shipyard's arguments, if correct, would allow them to claim for delays without giving notice to the

5 [2011] EWHC 848 (Comm).

6 [2014] EWHC 4050 (Comm).

buyers at the time. The judge thought these matters outweighed any general principle against construing the contract in a way that enabled the buyers to profit by their own breach, and for those reasons upheld the buyers' cancellation.

Jiangsu Guoxin Corporation (formerly known as Sainty Marine Corporation Ltd) v. Precious Shipping Public Co Ltd was an appeal from two partial final awards in the buyers' favour made in arbitration pursuant to shipbuilding contracts for two ships on materially identical terms.[7] The buyers had purchased a series of bulk carriers from the shipyard to be built in China. The first two ships were delivered and accepted. The buyers purported to terminate the contracts for the next four ships based on alleged defective design and construction. The buyers then purported to terminate the contracts for the next two ships when they said it became clear that the ships would not be delivered by the contractual delivery dates. The shipyard argued that the buyers' alleged wrongful termination of the contracts for ships three to six prevented it from constructing and delivering the remaining ships, as the rejected ships remained at the yard and were taking up the berths needed for others. Therefore, the shipyard argued that the buyers were not entitled to delivery of ships seven and eight by the contractual dates in line with operation of the prevention principle. The shipyard did not give notice of its prevention claims.

The judge found that a term was implied into the shipbuilding contracts that neither party should prevent the other performing its contractual obligations, although the term only applied to wrongful acts and to the active prevention of performance, and 'probably' did not extend to passivity in the face of action from a third party. However, the judge also found that neither the implied term nor the prevention principle applied in this case, again because the contract included machinery to extend time, in particular the *force majeure* provision, in Article VIII.1, which was widely drafted to include 'other causes beyond the control of the seller or its sub-contractors', and therefore included any wrongful acts of the buyers in terminating contracts three to six. The shipyard's argument failed because, among other things, it had not given notice of permissible delay claims in accordance with the requirements of Article VIII.2 of the contract.

The judge also said that, even if he was wrong to find that the situation fell within Article VIII.1, the requirement for the shipyard to give notice of *force majeure* events in Article VIII.2 was wide enough to apply to a prevention claim. He suggested that, because all the situations that entitled the shipyard to an extension of time under the contracts required timely notification, that should also be the case for claims for buyer-induced delays and prevention. This part of the judgment will inevitably be cited against shipyards claiming prevention at delivery to excuse delays as an additional rebuttal of prevention arguments.

There are also now several decisions by London arbitrators in shipbuilding cases in which there has been a marked reluctance to allow shipyards to rely on prevention, including the partial final awards in the *Precious Shipping* case, referred to above, and an anonymised award reported in summary form in 2013,[8] in which London arbitrators held that a shipyard's attempts to step outside the notice provisions of a shipbuilding contract to claim extensions for delayed approval of construction drawings by the buyers would produce uncommercial and unworkable results. This decision is based on similar reasoning to that in *Precious*

7 The appeal hearing took place via video link because of the covid-19 pandemic and the judge commented on the effectiveness of the virtual hearing in his judgment.

8 'London Arbitration 9/13', *Lloyd's Maritime Law Newsletter*, 29 May 2013.

Shipping: the tribunal observed that doing this would deprive the parties of the information needed to make an informed evaluation of their respective positions, and the buyers might have no idea that delay was being claimed until much later.

The approach to the prevention principle adopted in *Adyard* was followed in *Saga Cruises BDF Limited & Others v. Fincantieri SpA*.[9] In that case, the Commercial Court held that the principle only applied to trigger the yard's contractual liability to pay liquidated damages in the case of concurrent delays (for some of which the yard was responsible and for others the buyers were responsible) when it was the delays for which the shipyard was responsible that had caused actual delay beyond the contractual delivery date. The judgment again limited the scope of the prevention principle so that it could not be used as a get-out-of-jail-free card by shipyards whose actions have delayed delivery.[10]

The tension between the application of the express scheme of the shipbuilding contract and common law principles was a factor in *Stocznia Gdynia SA v. Gearbulk Holdings Ltd*,[11] a decision by the England and Wales Court of Appeal (EWCA) in 2009. In that case, the buyers terminated shipbuilding contracts for delay, exercising express contractual provisions entitling them to rescind. The buyers demanded and received refunds of instalments under refund guarantees given on behalf of the shipyard. However, the buyers did not limit their claims to contractual termination and refund of the instalments. They also sought to treat the shipyard's conduct as a repudiatory breach and claimed damages. In response, the shipyard argued what was then a widely held view of many practitioners and commentators – that the termination and refund provisions of the shipbuilding contracts amounted to a comprehensive code so that the buyers' exercise of these rights amounted to a waiver of their rights to treat the shipyard as being in repudiatory breach and to claim damages for loss of bargain at common law.

The EWCA found in favour of the buyers, deciding that the contracts did not clearly exclude their common law rights and that the buyers' words and conduct when terminating the contracts did not amount to a binding election to exercise only their contractual rights. As a result, the buyers were free to exercise their common law rights. The familiar provisions in shipbuilding contracts for liquidated damages to be paid by the shipyard in the event of delay and specified shortfalls in performance by the ship as built, which only came into effect if the ship was delivered, did not exclude the buyers' right to claim damages if the ship was never delivered.

Although the decision of the EWCA gives some buyers potentially valuable additional rights against shipyards, in practice its scope may be limited. This is because, unlike the contract in *Stocznia Gdynia*, many shipbuilding contracts contain an express stipulation that refund of instalments discharges the obligations of all parties.[12] A clause of this kind should prevent a claim for damages for repudiation. Even where there is no clause of this nature,

9 [2016] EWHC 1875 (Comm).

10 Judge Cockerill QC concluded: 'Unless there is a concurrency actually affecting the completion date as then scheduled the [shipyard] cannot claim the benefit of it.'

11 [2009] EWCA Civ 75, CA. This was an appeal from an arbitration award on a number of preliminary issues.

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

great care will be needed to formulate the notice in a way that both exercises contractual rights of termination and accepts a repudiation, giving rise to the right to recover damages for breach.[13]

It is not unknown for shipbuilding contracts, or for events occurring under them,[14] to be backdated to avoid the effect (and cost) of new regulatory requirements. One of the issues in *Crescendo Maritime Co and Alpha Bank AE v. Bank of Communications Company Ltd & Ors*[15] was that the underlying shipbuilding contract was backdated to circumvent the application of the amendments to the International Convention for the Safety of Life at Sea 1974 (SOLAS) concerning tank coatings that applied to vessels built under shipbuilding contracts signed after 8 December 2006. The shipbuilding contract was cancelled and there was a demand under the refund guarantees. In concurrent London arbitrations under the shipbuilding contract and the refund guarantee, Bank of Communications Company (BOCC), the respondent refund guarantors, alleged that the backdating of the shipbuilding contract was a fraud on it, and that the fraud had induced it to issue the refund guarantees. After a procedural decision by the London tribunal to allow Alpha Bank (which had a security assignment of the shipbuilding contract from the buyer) to join the arbitration, BOCC stopped its participation in the arbitrations and commenced proceedings in China, seeking declarations that the conduct of the other parties in the arbitrations had been fraudulent. The buyers won the arbitrations and applied to the London court for anti-suit injunctions restraining BOCC from pursuing the proceedings in China. These complicated circumstances gave rise to a number of legal and procedural issues on which the buyers and Alpha broadly succeeded. Although the judge was not able to grant Alpha the anti-suit injunction it sought, he made a declaration of non-liability in Alpha's favour.

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

In most shipbuilding contracts, it is the shipyard's responsibility to use reasonable skill and care to design the ship. There can be disputes about design liability when the ship complies with the technical specification in the contract but fails to meet the required performance criteria. Whether (1) the shipyard's compliance with the contract specification or (2) the buyers' right to receive a ship capable of achieving the performance criteria prevails is always a matter of construction of the contract terms, but the approach of the English courts has been that compliance with specification does not excuse failures to comply with performance criteria.

This principle has been restated in a Supreme Court case involving wind farm foundations.[16] The contractor agreed to build to specified standards, which incorporated class-approved calculations that were later found to be incorrect. As a result, the wind farm was constructed with foundations incapable of lasting for 20 years, which was an express

13 For an example of a contractual termination where this was not done and a helpful and thorough review of the relevant authorities, albeit in a different commercial context, see the Judgment of Baker J in *Phones 4U Limited (in administration) v. EE Limited* [2018] EWHC 49 (Comm).

14 For example, the date of keel laying.

15 [2015] EWHC 3364 (Comm).

16 *MT HØJGAARD A/S v. Renewables Robin Rig East Ltd and Another* [2017] UKSC 59.

contractual requirement. The contractor argued that it had exercised reasonable skill and care and had complied with the specification. The court disagreed, on the basis that even if the requirement to build in accordance with the specified standards and for the foundations to last 20 years were inconsistent, the balance of authorities favoured the specified performance criteria over compliance with the specification.

How the specification and required performance criteria interact will vary from contract to contract. In the final analysis, this will always be a matter of construction.

IV COVID-19

There are currently no reported covid-19-related shipbuilding cases – shipbuilding disputes tend to be legally, factually and technically complex and take time to reach trial or a hearing. Furthermore, delay disputes usually fully manifest upon delivery because it is often only then that delay to delivery can be properly assessed. It is safe to say, however, that covid-19 has had a significant effect on shipbuilding projects, most notably in terms of delay. Numerous sub-contractors and suppliers are involved in these projects and equipment and personnel are required to attend shipyards from overseas. Travel and transport restrictions have therefore been felt. In addition, increased hygiene and sanitation requirements at some yards, introduced to limit the spread of covid-19, have created extra work and distractions for shipyard workers.

It has been widely accepted that the pandemic can be a *force majeure* event when *force majeure* clauses include (1) 'pandemic' or 'epidemic' as defined *force majeure* events or (2) catch-all wording to include events beyond a shipyard's control. *Force majeure* events will usually entitle a shipyard to permissible delay, which extends the contractual delivery date. However, shipyards will need to prove more than that if they are to succeed with covid-related permissible delay claims to avoid liquidated damages or buyer termination for delay.

Covid delay disputes have so far tended to focus on the more factual issues of causation and mitigation; that is to say, whether the actual cause of delay is covid-19 or another event that does not give rise to permissible delay, and whether the shipyard could have, but failed to, take steps to mitigate any resulting delay. Therefore, it is important for buyers and shipyards to keep up to date with relevant covid-19 rules and restrictions, to discuss the consequences of any such rules and restrictions and whether delays can be reduced or avoided with their site teams, sub-contractors and suppliers, and to keep written evidence and proper records of construction delays to ensure that they have evidence to support their position in a later dispute.

Shipyards will also need to take care to properly notify buyers of *force majeure* or permissible delay claims resulting from covid-19. Subject to the terms of the contract, as the permissible delay and prevention cases referred to in Section III emphasise, the right to claim can be lost if notice is not given in time.

V POST-DELIVERY WARRANTIES

Commercial shipbuilding contracts almost invariably contain a guarantee or warranty provision, warranting the condition of the ship on delivery and providing a limited remedial regime under which the shipyard agrees to repair specified types of defects in design and construction that manifest themselves within (usually) a year of delivery. Many contracts are designed to make the one-year warranty the buyers' sole remedy for post-delivery problems.

The restrictive nature of this regime is entrenched within the industry and is usually justified by the need to strike a balance between the parties' respective interests so that the buyers obtain rights to have repair work done (or paid for) by the shipyard and the shipyard can limit its potential liability, both as to the type of defects covered and the period for which it is exposed to the risk of remedying them.

The court's willingness to construe warranty provisions in a strict way is illustrated by *Star Polaris LLC v. HHIC-PHIL Inc*.[17] About eight months into the warranty period, *Star Polaris*, a capesize bulker, suffered a serious engine breakdown, which was caused in part by a breach by the yard and in part by negligence by the ship's chief engineer. The question that arose on appeal to the Commercial Court from an arbitration award was whether the exclusion of 'consequential or special losses, damages or expenses' in the warranty provision excluded all financial losses caused by the defects, above and beyond the cost of replacement and repair of physical damage. The court upheld the arbitrators' decision that the wording of the warranty provision[18] covered the cost of repair or replacement of the main engine damage caused by the shipyard, but excluded the broader financial consequences that the remedial work entailed.

VI REFUND GUARANTEES

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

There were virtually no reported decisions involving shipbuilding contract refund guarantees until 2002, when the EWCA considered whether refund guarantees given on behalf of a Spanish shipyard were payable on demand or only after the shipyard's liability (if any) had been decided in arbitration under the shipbuilding contract.[19] In contrast, in recent years, there have been several important decisions concerning refund guarantees, which could reflect the fact that buyers are having to claim under them more frequently (or that banks are more willing to take points to resist demands).

An extreme example is the case of *Sea Emerald SA v. Prominvestmentbank*,[20] in which the buyers paid some US$17 million to a Ukrainian shipyard in respect of one of a number of ships being built there. The Ukrainian government eventually withdrew financial support to the shipyard, the shipbuilding contract was rescinded and the buyers claimed a refund of instalments under the refund guarantee. The Ukrainian refund guarantor bank alleged that, as a matter of Ukrainian law, the bank official who signed the refund guarantee lacked the

17 [2015] EWHC 2941 (Comm).

18 A bespoke modification of the SAJ warranty clause.

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

20 [2008] EWHC 1979 (Comm).

authority to do so, that the bank had not subsequently ratified the refund guarantee, and was not bound by it so had no liability to pay. The Commercial Court in London (reluctantly) agreed with them and the buyer was left with no remedy.

The decision of the Supreme Court of the United Kingdom in *Rainy Sky SA and others v. Kookmin Bank*[21] concerned refund guarantees and has broad general significance for English law principles of contract interpretation.

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

Rainy Sky concerned the interpretation of refund guarantees[22] given in respect of six shipbuilding contracts and whether an insolvency event affecting a shipyard entitled buyers to refunds under them. The shipbuilding contracts permitted the buyers to terminate and to recover refunds of instalments for delay and for specified shortfalls in performance. They also provided that the buyers were entitled to refunds on an insolvency event although, curiously, the buyers had no right to terminate the contracts for insolvency. The buyers contended that an insolvency event had occurred and demanded refunds of instalments under the guarantees, but the bank refused to pay.

The refund guarantees promised to pay on demand 'all such sums due to [the buyers] under the contract'. The question the Supreme Court had to decide was what the words 'such sums' meant. On the basis of Paragraph 2 of the guarantees, the buyers argued that all pre-delivery instalments were covered. However, on the basis of Paragraph 3, the bank argued that these words were to be construed more narrowly and covered only refunds payable following a termination, not refunds triggered by insolvency (for which the contracts gave the buyers no termination rights). The guarantees were ambiguous and both constructions were arguable.

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

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

21 [2011] UKSC 50.

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

We have already seen an example of refund guarantors commencing defensive proceedings in their home jurisdiction, notwithstanding English law and London arbitration provisions in the refund guarantee itself in the *Crescendo Maritime Co* case mentioned in Section III, above. Similar events occurred in *Spliethoff's Bevrachtingskantoor BV v. Bank of China Limited*,[23] another anti-suit injunction case involving ships being built in China and a Chinese refund guarantor bank.

In this case, buyers cancelled two shipbuilding contracts for delay, won the resulting London arbitrations and claimed under refund guarantees. The bank resisted the demands for payment, relying on judgments obtained in China by the shipyard and, later, the sellers of the ships restraining payment under the refund guarantees based on allegations that the buyers and the engine manufacturers had fraudulently supplied defective second-hand engines and concealed from the shipyard that the engines were not new.[24] The Chinese judgments were enforceable in China.[25]

The refund guarantor was in a difficult position. It had never been a party to the Chinese proceedings, but orders had been made restraining payment of the refunds that buyers were demanding. The Chinese judgment had been obtained in breach of English law and London arbitration provisions in the shipbuilding contracts and in breach of an anti-suit injunction granted by the English court restraining the sellers from continuing with the proceedings in China. Nonetheless, the refund guarantor was a Chinese bank. At the same time, the refund guarantor was being sued to judgment in London under the express terms of its refund guarantees based on London arbitration awards obtained under the shipbuilding contracts.

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

Chinese shipyards frequently require buyers' payments of future instalments to be secured by a performance guarantee. A dispute under a payment guarantee of this kind following cancellation of a shipbuilding contract has been considered by the English courts,[26] which first had to decide whether the guarantee was payable on demand or only after the buyers' liability had been determined in arbitration. The payment guarantee had similar features to the wording of the refund guarantees in *Caja de Ahorros* and, although the first instance judge found for the guarantor bank, the EWCA determined that it was payable on demand.

The potentially far-reaching consequences of on-demand guarantees are illustrated by a subsequent decision of the EWCA in the same case.[27] The shipyard was entitled to retain substantial sums paid under the payment guarantee even though the arbitration tribunal

23 [2015] EWHC 999 (Comm).

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

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

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

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

appointed under the shipbuilding contract subsequently ruled that the shipyard had no right to receive the instalment in respect of which it had made its demand. This was because the demand was made in good faith and was valid when made, and there were no grounds to say that the payment was subject to a trust in favour of the guarantor bank if the instalment was found later not to be due.

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

As a footnote, structured finance mechanisms such as interest rate and currency swaps are increasingly a feature of newbuild finance. As with many derivative-type contracts, they have generated disputes.[28]

28 See, for example, *Sixteenth Ocean GMBH & Co v. Société Générale* [2018] EWHC 1731 (Comm).

Chapter 8

MARINE INSURANCE

Jonathan Bruce, Alex Kemp and Jenny Salmon[1]

I INTRODUCTION

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

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

Lloyd's can be considered as consisting of two parts: the Market (which, as at 31 December 2020, was home to 50 managing agents and 76 syndicates) and the Corporation of Lloyd's. The Corporation oversees the Market, provides the Market's infrastructure, including services to support its efficient running, and protects and maintains its reputation.[3] The Lloyd's Market effectively provides a place at which underwriters (acting together in syndicates) can sell their insurance products to those wishing to buy them. It is a very dynamic and commercial environment where those looking for insurance are able to talk directly to the decision makers at each syndicate, and negotiate with them as to the terms of cover and the premium that will be paid for the risk in question. Competing quotes and alternative terms can be obtained from competing syndicates by simply crossing the floor and talking to another underwriter.

In November 2018, Lloyd's began a new chapter in its history by opening Lloyd's Insurance Company SA (also known as Lloyd's Europe and Lloyd's Brussels), a Europe-wide operation authorised and regulated by the National Bank of Belgium and regulated by the Financial Services and Markets Authority.[4] This permits it to underwrite non-life European business now that the United Kingdom has left the European Union. Lloyd's Europe is a

1 Jonathan Bruce and Alex Kemp are partners and Jenny Salmon is a senior associate at HFW. The information in this chapter was accurate as at May 2022.

2 www.lloyds.com.

3 https://www.lloyds.com/about-lloyds/what-is-lloyds/lloyds-market (data as at 1 April 2022).

4 https://lloydseurope.com/about/.

subsidiary of Lloyd's of London and has 17 branches in the European Union and one in the United Kingdom. In November 2020, the High Court of England and Wales[5] approved an insurance business transfer scheme, the purpose of which was to avoid disruption of service to policyholders within the European Economic Area (EEA) whose policies were not written by Lloyd's Europe. Pursuant to the scheme, with effect from 30 December 2020, the policies underwritten at Lloyd's between 1993 and 2020 (inclusive) and that have a risk situated or a policyholder resident in the EEA were transferred to Lloyd's Europe. The intention is to allow the transferring policies to be serviced and paid by Lloyd's Europe without the members of the various Lloyd's syndicates breaching any legal or regulatory insurance authorisation requirements in the EEA after the end of the Brexit transition period.

Anyone wanting to place risk at the Lloyd's Market needs to do so via an approved Lloyd's broker. The broker acts as the customer's agent and is the main source for much of the business placed in the Market. The broker has experience in dealing with a multitude of underwriters and can use that experience to place a client's risk with an underwriter best suited to write it, and on the best terms. Brokers are integral to the way in which the Market provides a competitive environment for the placing of risk.

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

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

Given the extensive history of the English marine insurance market, there are a considerable number of English judicial decisions on matters of marine insurance dating back several hundred years. Although England is still a common law legal system (i.e., the law is applied and developed by the courts via a binding system of precedent), the law of marine insurance was codified in 1906 by the Marine Insurance Act, which for many years was the touchstone not only of marine insurance but of insurance law in general. It has had substantial influence internationally and has been adopted in several Commonwealth Member States. However, the legislative landscape for insurance law in England, Wales and Scotland changed significantly when, following a long period of consultation by the Law Commission and the Scottish Law Commission, the Insurance Act 2015 came into force on 12 August 2016. Because that Act only applies to contracts and contract variations entered into after 12 August 2016, claims arising from policies written before 12 August 2016 are governed by the old law (and these are still going through the courts). However, many of the provisions of the Marine Insurance Act 1906 relating purely to marine insurance were unaffected by the Insurance Act 2015 and remain in force. Furthermore, some policies contract out of all or part of the Insurance Act 2015 or specify that the Marine Insurance Act 1906 is to apply instead. We therefore deal with both regimes in this chapter.

In addition to the legislative framework, it can still be necessary to consider judicial precedents (known as case law) dating from before 1906 – some case law before this time allows identification of the principles behind the legislation or deals with elements that have

5 *Society of Lloyd's, Re (Part VII of the Financial Services and Markets Act 2000)* [2020] EWHC 3266 (Ch).

not been codified. Since 1906, case law has continued to develop as new issues of interpretation and application of the Marine Insurance Act 1906, more recently the Insurance Act 2015, and other new points of marine insurance law arise, and the highly experienced Commercial Court in London issues judgments on marine insurance disputes and will continue to do so.

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

One of the most common forms of marine insurance placed in the London market is hull and machinery insurance. The Institute Time Clauses – Hulls 1983 (the 1983 Clauses) adopt a named perils approach that is usual under English law (though we note that Institute Cargo Clauses A (but not B and C) operate an 'all-risks' approach). The perils that are covered by the policy are listed in Clause 6 and are broadly split into two categories: the first allows recovery simply where the loss is caused by one of the specified insured perils, and the second limits recovery where the loss is caused by a specified peril and where the loss or damage has not resulted from want of due diligence by the assured, owners or managers. This latter category of perils is set out in a clause known as the *Inchmaree* Clause and was included in the 1983 Clauses as a result of a judgment in a case of the same name.[6] The *Inchmaree* Clause seeks to widen the cover and includes, for example, the negligence of a ship's master, officers, crew or pilots. The 1983 Clauses then subject the enumerated cover to various exclusions, in Clauses 8, 23, 24, 25 and 26. The 1995 revision to the Institute Time Clauses – Hulls introduced a widening of the *Inchmaree* Clause such that the want of due diligence was extended to cover acts by the 'superintendents or any of their onshore management', as well as the assured, owners or managers.

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

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

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

Finally, during the Somali piracy epidemic in particular, there was an uptake in kidnap and ransom insurance. These policies pay out the costs of securing a vessel's release from detention by pirates as a priority, and often also facilitate the provision of expert assistance in crisis management and hostage negotiation.

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

II CLAIMS

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

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

Brokers are crucial cogs in the wheel of a marine insurance policy, both in terms of placing the risk and managing claims. It is likely that a broker will have the closest relationship with the assured and will be the assured's first point of contact should a claim ever arise. He or she will be able to provide immediate advice in the event of a claim, and guide the assured on the best way to present that claim to the insurers. He or she will provide reassurance to insured parties that their claims are being managed correctly and will ensure that underwriters receive all the information they need to pay any claims. This is where the Lloyd's Market comes into its own, and the face-to-face interaction between the decision makers at the insurer and the brokers can be hugely important. This personal interaction is a feature that is unique to the Lloyd's Market.

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

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

III KEY LEGAL PRINCIPLES OF ENGLISH MARINE INSURANCE UNDER THE MARINE INSURANCE ACT 1906

i Duty of utmost good faith

The general principle of the duty of utmost good faith is laid out in Section 17[7] of the Marine Insurance Act 1906, which provides that: 'A contract of marine insurance is a contract based upon utmost good faith and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.' This has the same practical effect as rescinding

7 Now substantially omitted by Sections 14(3)(a) and 23(2) of the Insurance Act 2015.

the contract (i.e., the aggrieved party can nullify the contract so that everything done is liable to be undone, so no losses are paid by the insurer and the premium is returned to the assured). The duty of utmost good faith is reciprocal but is often less relevant to the insurer than the assured, who is much better informed about the subject matter to be insured.

The Marine Insurance Act 1906 placed a positive duty on the assured to disclose material information to the insurer prior to the contract being concluded. This is a reflection of the asymmetry of information between the insurer and the would-be assured; however, under Section 18(3),[8] it is not required to disclose any circumstance:

a that diminishes the risk;
b that is known or presumed to be known to the insurer;[9]
c in which information is waived by the insurer; and
d that it is superfluous to disclose by reason of express or implied warranty.

Section 20 of the Marine Insurance Act 1906 provides that any material representation made by the assured or its agent to the insurer during negotiations for the contract, and before the contract is concluded, must be true. If it is untrue, the insurer may avoid the contract. A representation is material when it would influence the judgement of a prudent insurer in fixing the premium, or determining whether or on what terms it will take the risk.

If an assured or his or her agent makes a statement of fact (or of opinion if it is made by someone with expertise in the matter) and this representation is false and has induced the resulting transaction, then this can result in rescission (the unwinding of the contract), regardless of whether the misrepresentation is fraudulent, or negligent or innocent.

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

ii Warranties

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

Under Section 34,[10] it is no defence if a breach of warranty is subsequently remedied before the loss in question has occurred.

In the event of non-compliance with a warranty, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred before that date.[11] The effect of Section 33(3) is strict and applies irrespective of whether the breach of the warranty in question was the cause of the loss being claimed.[12]

8 id.

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

10 Now omitted by Sections 10(7)(b) and 23(2) of the Insurance Act 2015.

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

12 *De Hahn v. Hartley* (1786) 1 Term Rep 343 99 ER 1130; the Insurance Conduct of Business rules provide special exceptions for consumer insurance. Now omitted by virtue of Sections 10(7)(a) and 23(2) of the Insurance Act 2015, although the remaining provisions of Section 33 are still in force.

Although the parties are free to narrow the scope and application of warranties by amending the wording in the policy, in the absence of such steps, the insurer is entitled to construe warranties strictly. If the insurer wishes to allege breach of a warranty, the burden is on the insurer to demonstrate that the warranty has in fact been breached.[13]

The Marine Insurance Act 1906 implies certain warranties into policies. The most important of these are to be found in Section 39 (which remains in force), which states that in a voyage policy there is an implied warranty that at the commencement of the voyage, the ship should be seaworthy for the purpose of the particular adventure. This can be contrasted with the position under a time policy (which the majority of modern insurance policies are), which is outlined in Section 39(5). In a time policy, there is no implied warranty that the ship should be seaworthy at any stage; however, if, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness. It should be noted that Section 39(5) is not a warranty but acts as a defence for the insurer if it can be proven. As such, if the proximate cause of the loss is found to be any of the specified perils in the policy, it is arguable that the Section 39(5) defence cannot arise.[14]

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

iii Constructive total loss and notice of abandonment

Section 56 of the Marine Insurance Act 1906 states that a loss may be either partial or total: a total loss may be either actual or constructive. The Act defines both types of total loss:

> *Section 57 Actual total loss*
> *(1) Where the subject-matter is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.*
>
> *Section 60 Constructive total loss defined*
> *(1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.*

These provisions remain in force and are unaffected by the Insurance Act 2015.

In essence, if the subject matter insured is no longer available to the assured, there is an actual total loss, whereas if this is not the case, but avoidance of total loss appears impossible or is only achievable by expense exceeding the subject's value, then there is a constructive total loss.[15]

In the event that the assured wishes to claim for a constructive total loss (but not an actual total loss), it must give notice of abandonment to its insurer whereby it abandons all

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

14 *Versloot Dredging v. HDI-Gerling (The 'DC Merwestone')* [2013] 2 Lloyd's 131.

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

interest in whatever is left of the insured vessel subject to payment for a constructive total loss. If the assured does not wish to abandon its interest in the insured vessel, its claim may be treated as a partial loss rather than a total loss.[16]

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

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

It is standard practice for insurers to reject notices of abandonment as they tend to have little interest in owning, running and managing ships. Instead, the insurer will agree with the assured to treat them as though they had issued proceedings in the applicable jurisdiction as at the date of the notice of abandonment.[17] This agreement is necessary because, according to English law, the notice of abandonment must be justified on the facts not only at the time the notice of abandonment is given, but also at the time proceedings are commenced.

What is important from the insured owner's perspective is that once the notice of abandonment has been issued, and regardless of whether it has been rejected, the assured must not do anything that is inconsistent with the intention to continually and unconditionally abandon the insured property to the insurers. Therefore, for example, it is arguable that continuing to crew, manage, commercially operate a vessel or, indeed, sell a vessel[18] could be taken as contrary to the intention to abandon, and thus relegate the assured to claiming for a partial loss rather than a constructive total loss. One way around this may be for the insurer and assured to enter into a temporary agreement with each other, whereby the assured continues to operate the vessel to the benefit and order of the insurers and without prejudice to its right to claim for a constructive total loss.

IV THE INSURANCE ACT 2015

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

16 Marine Insurance Act 1906, Section 62.

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

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

The provisions of the Insurance Act 2015 reflect the feeling that the law of marine insurance did not always mesh with the practice in other classes of business, and that modernisation of the laws would bring UK practice into line with other jurisdictions. Significant changes have been made in the areas of disclosure, misrepresentation and warranties.

i The duty of fair presentation

Section 3(1) of the Insurance Act 2015 provides that an assured needs only to volunteer a 'fair presentation of the risk' before the contract is entered into. This presentation needs to be in a manner that would be 'reasonably clear and accessible to a prudent insurer'.[19] This has replaced the duties regarding disclosure and representations that are contained in Sections 18, 19 and 20 of the Marine Insurance Act 1906. The assured must disclose 'every material circumstance which the insured knows or ought to know' or must provide sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing material circumstances. Section 7(3) of the Insurance Act 2015 provides that a circumstance is material if it would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms. In practice, this will mean that the obligation will be on the insurer to ask any further questions to which it wishes to have answers before accepting the risk. Sections 4 to 6 deal with knowledge and introduce new legal and factual tests for determining the attribution of knowledge for the purposes of the duty of fair presentation. This is a complex issue under the Act and is likely to require clarification by the courts in due course. Agents of the assured (most notably brokers) no longer have a separate duty of disclosure.

The first case to consider the duty of fair presentation,[20] *Young v. RSA*,[21] was heard in Scotland in the Outer House of the Court of Session in 2019 and, on appeal, by the Inner House of the Court of Session in 2020. The Court was asked to consider whether the insurer had waived the non-disclosure of the insured and it confirmed that the Insurance Act 2015 does not alter the law on waiver.

ii Remedies for breach of the duty of fair presentation

In circumstances where the duty of fair presentation has been breached, under Section 8(1) the insurer must show that it would have acted differently had it received a fair presentation. There is a range of remedies available,[22] depending on the nature of the breach and how the insurer would have acted in its absence. If the breach was deliberate or reckless, the insurer can avoid the policy and keep the premium. If the breach was neither deliberate nor reckless, the remedy depends on what the insurer would have done had it received a fair presentation; if the insurer would have entered into the contract but on different terms, it can elect to treat the contract as having been entered into on those terms, and if it would have charged a higher premium, it will be permitted to reduce claims proportionately.

19 Insurance Act 2015, Section 3(3)(b).

20 Although we note that the courts have been willing to consider the concept of a 'fair presentation of risk' enshrined in the Insurance Act 2015 when ruling on disputes involving allegations of material non-disclosure arising out of policies written before 12 August 2016. See *Axa Verischerung AG v. Arab Insurance Group* [2017] EWCA Civ 96.

21 [2019] CSOH 32 and [2020] CSIH 25.

22 Set out in Part 1 of Schedule 1 to the Act.

iii Warranties

The Insurance Act 2015 lessens the harsh effect of warranties. It repeals the second sentence of Section 33(3) and all of Section 34 of the Marine Insurance Act 1906, which had conclusively discharged an insurer's liability following a breach of warranty. Instead, a breach of a warranty will suspend an insurer's liability from the time of the breach until the breach is remedied. Again, it was felt that allowing the insurer to be discharged from liability as from the date of the breach is a disproportionately harsh remedy in circumstances where, for example, the warranty was being complied with at the time of the loss in question.

Section 11, headed 'Terms is not relevant to the actual loss', applies to any contractual term (including warranties, but excluding any term that defines the risk as a whole) if compliance with that term would tend to reduce the risk of loss of a particular kind, or at a particular location or at a particular time. Subject to Section 10, insurers can still rely on breach of such a term unless the assured can show that its non-compliance with the term could not have increased the risk of the loss that actually occurred in the circumstances in which it occurred.

The Insurance Act 2015 also introduces a prohibition on 'basis of contract clauses', at Section 9.

iv Fraudulent claims

The Insurance Act 2015 changes the law regarding fraudulent claims by removing avoidance as a remedy. Section 12 states that if a fraudulent claim is made, the insurer is not liable for it, and can terminate the contract and refuse liability for any subsequent claim, but it will not affect any previous claims, regardless of whether they have been paid. However, it deliberately does not deal with the definition of a fraudulent claim, nor refer at all to fraudulent devices, as the Law Commissions considered that this should be determined by the courts.

Fraudulent devices, used in connection with presentation of an insurance claim, were considered by the courts in *Versloot Dredging BV v. HDI Gerling Industrie Versicherung*.[23] In this case, the insurers argued for a fraudulent device defence, in that a crew member had deliberately or recklessly given a false account of the casualty in a letter to the insurers' solicitors. The account was to the effect that the crew had not investigated the bilge alarm that had sounded shortly after the ingress of water because the vessel was rolling in heavy weather at the time. It later emerged that the bilge alarm had not sounded, and therefore the explanation as to why the alarm had not been investigated was false. The High Court of England and Wales found that this evidence was false and misleading and that the crew member in question had no reason to believe it was true, and that he was reckless in his actions. The Court also found that the false account was intended to promote the claim.

Accordingly, the judges at first instance and in the Court of Appeal[24] rejected the owners' claim. An important reason for both decisions was the public policy justification of dissuading fraud by assureds. The judge at first instance had expressed regret at having to do so since he considered that the owners' fraudulent conduct was only mildly culpable. It was a reckless untruth told on one occasion only and abandoned well before the case went to trial. The judge in this case considered that the forfeiture of the claim was disproportionately harsh in the circumstances, and expressed the view that a more flexible test of materiality should be

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

24 *Versloot Dredging BV v. HDI Gerling Industrie Versicherung AG and others* [2014] EWCA Civ 1349.

adopted, which would permit the courts to consider whether it was just and proportionate to deprive an assured of its substantive rights in light of all the circumstances of the case. In a decision that was of significant interest to all participants in the insurance market, the UK Supreme Court[25] found in favour of the owners, ruling that when an assured tells a 'collateral lie' in the presentation of an otherwise sound claim, the lie does not taint the claim and the insurer is not entitled to repudiate the claim and avoid the policy. Although the lie itself is dishonest, because it is otherwise immaterial to the validity of the claim, in telling it the assured has not made a recovery to which it would not otherwise have been entitled.

Section 16 permits the parties to a non-consumer policy to contract out of all the material provisions of the Insurance Act 2015 (save for Section 9) if sufficient steps have been taken by the insurer to draw the disadvantageous term to the attention of the assured before the contract is entered into or the variation agreed and the relevant terms are clear and unambiguous. It was anticipated by the Law Commissions at the consultation stage that certain sophisticated markets would choose not to apply some of the changes made by the Act. Among others, the members of the International Group of P&I Clubs have opted to contract out of some of the provisions, on the basis that they are generally happy with their well-established practices.

v Amendment to the Third Parties (Rights Against Insurers) Act 2010

Section 20 of the Insurance Act 2015 amends the Third Parties (Rights Against Insurers) Act 2010; the latter came into force on 1 August 2016, replacing the Third Parties (Rights Against Insurers) Act 1930. Similar to its predecessor, the purpose of the 2010 Act is to protect a third party to whom an assured had incurred an insured liability in circumstances where the assured becomes insolvent. It provides that the insurance money can be paid to the third party rather than becoming an asset in the insolvency, and transfers to the third party some of the insolvent assured's rights under the insurance policy, allowing the third party to bring proceedings directly against the insurer. The key change in the 2010 Act is that a third party can now bring proceedings directly against the insurer or seek information about the insurance position at an early stage, without first establishing the liability of the assured.

V INTRODUCTION OF THE RIGHT TO DAMAGES FOR LATE PAYMENT

Part 5 of the Enterprise Act 2016 inserts a new Section 13A into the Insurance Act 2015, which provides that it will be an implied term in all insurance contracts entered into after 4 May 2017 that any claim will be paid within a reasonable time. This issue had been considered by the Law Commissions in their consultation but not originally included in the Insurance Act 2015.

The introduction of the right to damages for late payment caused a considerable amount of comment in the market; however, the extent to which assureds will be able to recover damages remains to be seen. 'A reasonable time' includes time to investigate and assess the claim, taking into account the type of insurance, the size and complexity of the claim, compliance with any relevant statutory or regulatory rules or guidance and any factors outside the insurer's control. Breach of the implied term will provide the assured with a claim for damages for uninsured losses flowing from the breach. Section 13A has recently

25 *Versloot Dredging BV v. HDI Gerling Industrie Versicherung AG and others* [2016] UKSC 45.

been considered by the Commercial Court, which held that as the claim in question had not been paid within a year from the Notice of Loss on 14 February 2019, the insurers were in breach of s13A(1). However, Section 13A(4) gives insurers a defence to any such breach if they can show that there were 'reasonable grounds for disputing the claim'. The judge in that case noted that while the insurers had disputed the claim for reasons that ended up being wrong, and thus pursued unnecessary investigations, this was not, alone, enough to render the grounds for disputing the claim unreasonable. Therefore, no damages were awarded in that case.[26] It is clear that the analysis in each case will be highly fact sensitive.

VI CONCLUSION

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

It is as yet too soon to provide concrete comment on the effect of the Insurance Act 2015 on English marine insurance law. However, it is perhaps worth noting that the Act came into force at a time when conditions in the insurance market generally were fairly soft, and brokers and assureds were in a relatively strong negotiating position in relation to policy terms, which may lead to enhanced protection for assureds in relation to the areas of the Act that are less clear (what exactly constitutes a fair presentation, for example).

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

26 *Quadra Commodities SA v. XL Insurance Company SE & Ors* [2022] EWHC 431 (Comm) (4 March 2022).

Chapter 9

PIRACY AND COMPLEX ENVIRONMENTS

Michael Ritter, William MacLachlan and Richard Neylon[1]

I INTRODUCTION

Piracy is defined in Article 101 of the United Nations Convention on the Law of the Sea 1982 (UNCLOS) as 'any illegal act of violence or detention . . . committed for private ends by the crew . . . of a private ship . . . directed . . . against another ship . . . or against persons or property on board such ship' on the high seas or in a place outside the jurisdiction of any state. This leaves open the issue as to whether incidents such as the hijack of the *Fairchem Bogey* from off the Salalah breakwater or of tankers from West African anchorages are piracy incidents under the UNCLOS. As a matter of English law, according to *The 'Andreas Lemos'*,[2] there is 'no reason to limit piracy to acts outside territorial waters'. It therefore appears apt that 'piracy' is used as an overarching label covering Somali or Gulf of Aden attacks and West African and South East Asian incidents, albeit that they are different in nature and that the legal definition of piracy may depend on the insurance policy or contract in question.

As at April 2023, the last successful hijack of a major commercial vessel off the Somali coast was the *Smyrni* on 10 May 2012. A combination of armed guards, increased naval presence and adherence by owners to the Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea (BMP 5, published June 2018) are often cited as the chief drivers behind the drop in the number of incidents. There has also been some improvement in stability and capacity building onshore in Somalia. The continued decline of the piracy threat in this region prompted the co-sponsors of the BMP to reduce the boundary of the high-risk area (HRA) to longitude 65° E latitude 5° S. This reduction was mirrored in part by the Joint War Committee in December 2015 when it adjusted its HRA to longitude 65° E latitude 12° S.[3]

The Indian Ocean/Gulf of Aden HRA was further reduced in March 2019 (the changes came into effect on 1 May 2019). Subsequently (as of 1 January 2023), the Indian Ocean HRA was removed. This reflected the decline in risk, although the need to follow BMP 5 remains and the Joint War Committee has maintained its listing.

That is not to say that piracy and other security risks in the region are no longer a concern: the costs in terms of routing, additional premiums and hardening measures and who pays for them – the owners or the charterers – are a subject of daily debate. There were also reports of pirate attacks in April 2019 against a Yemeni dhow and Korean and Spanish fishing vessels off the Somali coast[4] and, in December 2018, United Kingdom Maritime Trade

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2 [1982] 2 Lloyd's Rep 48.

3 www.lmalloyds.com/lma/jointwar.

4 As reported by the European Union Naval Force Somalia.

Operations reported an armed security team firing on a number of skiffs near Point A of the International Recommended Transit Corridor. In some cases, the aggressors are believed to have come from Yemen rather than Somalia.

As a response to incidents in the Southern Red Sea and Bab al-Mandeb, and threats arising from the Yemeni conflict, the International Chamber of Shipping, BIMCO[5] and Intertanko published Interim Guidance,[6] which includes steps for defending against water-borne improvised explosive devices. Furthermore, an additional Maritime Security Transit Corridor was established, as shown on the revised British Admiralty Chart Q6099. This remains in place.

The southern Red Sea and Bab al-Mandeb are not the only areas of potential risk for shipping in the region. On 12 May 2019, *Andrea Victory*, *A Michel*, *Amjad* and *Al Marzoqah* were victims of a coordinated attack at Fujairah anchorage; on 13 June 2019, *Front Altair* and *Kokuka Courageous* were attacked while en route through the Persian Gulf; and, on 19 July 2019, *Stena Impero* was boarded and subsequently detained in Iran. This marks a worrying trend that may well trigger liabilities under both contracts of carriage and insurance policies. The potential involvement of state actors or connections with Iran also potentially brings into play a greater political element than in piracy issues, as well as potential sanctions issues.

In response to the foregoing, the Joint War Committee acted quickly to issue JWLA-024 and added Oman, the United Arab Emirates and the Arabian Gulf to the listed HRAs. There was also a marked increase in international naval presence. The area remains one of concern, with vessels reporting approaches, and further detentions, including *Rabigh 3* briefly detained by suspected Houti rebels in November 2019 and SC *Taipei* reportedly boarded in April 2020. Furthermore, *Syra* was reportedly attacked at Bir Ali, Yemen, in October 2020, *Hankuk Chemi* was seized by Iranian forces (reportedly in response to funds frozen pursuant to sanctions held in Korean banks).

The Joint War Committee has also maintained the following HRA in the Gulf of Guinea: on the west, from the coast of Togo 6° 06' 45" N, 1° 12' E; south, to high seas point 0° 40' S, 3° E; and east, to Cape Lopez Peninsula, Gabon 0° 40' S, 8° 42' E.

That said, there was a marked downturn in piracy incidents in the Gulf of Guinea during 2022, with the International Chamber of Commerce's International Maritime Bureau Piracy Reporting Centre reporting only 19 incidents in 2022, down from 35 in 2021 and 82 in 2020. In part, this may be a result of projects such as Deep Blue. However, there seems to have been a recent spike in activity, with two kidnappings in December 2022 and March 2023, and a cargo theft incident in April 2023. Any owner affected by a kidnapping incident should also be aware of Nigeria's recent legislative changes in the area , including the Terrorism (Prevention and Prohibition) Act 2022 and the Money Laundering (Prevention and Prohibition) Act 2022, and the impact these have on the payment of ransom.

In view of these incidents, BMP West Africa, launched in March 2020,[7] should continue to be followed. A number of large shipping interests are becoming more vocal in their calls for action. It is hoped this will prompt an improvement in the security situation.

5 The Baltic and International Maritime Council.

6 https://www.ics-shipping.org/wp-content/uploads/2018/01/interim-guidance-on-maritime-security-in-the-southern-red-sea-and-bab-al-mandeb.pdf.

7 https://www.ics-shipping.org/publication/best-management-practices-to-deter-piracy-and-enhance-maritime-security-in-the-red-sea-gulf-of-aden-indian-ocean-and-arabian-sea/.

The fourth hotspot remains South East Asia, where mainly small tankers and fishing vessels continue to be targeted. The boarding vessels either steal possessions or cargo or kidnap the crew. In many cases, the pirates appear to go relatively unchecked. Worryingly, many of these incidents have reportedly been perpetrated by Abu Sayyaf (an ISIS affiliate). This type of 'terrorist' incident gives rise to many more issues than a standard 'criminal' kidnap.

II PRACTICAL RESPONSE

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

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

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

III COMPLIANCE AND LEGAL

Under English law, the payment of ransoms to pirates is not unlawful. This has been affirmed by the Court of Appeal in *Masefield AG v. Amlin*,[8] in which Lord Justice Rix held that 'there is no legislation against the payment of ransoms, which is therefore not illegal' nor is there any 'universal morality against the payment of ransom, the act not of the aggressor but of the victim of piratical threats, performed in order to save property and the liberty or life of hostages'. It is also widely accepted that 'if the crews of the vessels are to be taken out of harm's way, the only option is to pay the ransom' (Justice Steel, at first instance).[9] Unfortunately, the payment of a ransom is invariably the only viable option to secure the safe release of vessel, cargo and crew. However, as the judgment acknowledges, the position may be different in relation to terrorism. There are also sanction regimes in place that can have an effect.

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

Despite rhetoric from certain quarters, no substantiated link between Somali pirates and al-Shabaab has been made. Indeed, Dr Campbell McCafferty[10] confirmed in June 2011, when Somali piracy and ransom payments were at their peak, that 'there has not been any

8 [2011] EWCA Civ 24.

9 [2010] 1 Lloyd's Rep 509.

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

evidence of a link between the pirates and al-Shabaab, the terrorists in Somalia'.[11] However, owners considering paying a ransom must nonetheless carry out due diligence in each case to ensure that they have no reasonable cause to suspect terrorist involvement.

In July 2018, the Supreme Court of the United Kingdom considered the meaning of 'reasonable cause to suspect' under Section 17(b) of the Terrorism Act 2000, in *R v. Lane and Letts*.[12] The Court held that 'the requirement that there exist objectively assessed cause for suspicion focuses attention on what information the accused had. As the Crown agreed before this court, that requirement is satisfied when, on the information available to the accused, a reasonable person would (not might or could) suspect that the money might be used for terrorism'.

The Proceeds of Crime Act 2002 also falls for consideration in this respect; however, in our view, the narrow definition of 'criminal property' under Section 340 means it is likely to be of very limited application. As is made clear in *R v. GH*,[13] the Section 327, 328 and 329 offences are not triggered until the property alleged to be criminal property is in fact 'criminal property'. To quote the Supreme Court:

> *it is that pre-existing quality which makes it an offence for a person to deal with the property, or to arrange for it to be dealt with, in any of the prohibited ways. To put it in other words, criminal property for the purposes of Sections 327, 328 and 329 means property obtained as a result of or in connection with criminal activity separate from that which is the subject of the charge itself. In everyday language, the sections are aimed at various forms of dealing with dirty money (or other property). They are not aimed at the use of clean money for the purposes of a criminal offence, which is a matter for the substantive law relating to that offence.*

Additionally, the Counter Terrorism and Security Act 2015, which came into force on 16 February 2015, makes it an explicit offence (as per Section 17A of the Terrorism Act 2000) for insurers to reimburse a payment made by the assured to a person when they have reasonable cause to suspect that the money paid by the assured was handed over in response to a demand made wholly or partly for the purposes of terrorism. This makes it even more important for the assured to ensure they carry out appropriate due diligence on any hostage taker.[14] With incidents off Yemen and in South East Asia involving potentially terrorist actors, this due diligence is as important as ever when there is an English nexus to an incident in these areas. However, even for Nigerian incidents, this due diligence should be carried out to avoid the contravention of English law.

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

11 www.publications.parliament.uk/pa/cm201012/cmselect/cmfaff/1318/11062902.htm.

12 [2018] UKSC 36.

13 [2015] UKSC 24.

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

coast of Somalia. As amended, this Order names various individuals and one organisation (al-Shabaab). By a notice of 7 April 2023, President Biden extended Executive Order 13536 for a further year.[15]

There has also been one decision by the High Court of England and Wales that is relevant to post-release litigation. In late 2020, the Court considered litigation arising from the hijack of the *Polar* in 2010.[16] Specifically, the ability of owners to recover general average contributions from cargo interests in circumstances where certain insurance policies were in place in respect of the risk of piracy and paid for by charterers (by attempting to draw an analogy to the *The Evia (No. 2)* and *The Ocean Victory* rulings). The Court held that although this prevented a recovery from charterers, it did not prevent a recovery from cargo interests. The Court of Appeal dismissed the appeal,[17] holding that any agreement not to sue by virtue of charterers' payment of the premium under the charter was not incorporated into the bills of lading so as to apply to the bill of lading holder. To hold otherwise the Court held, would be to allow cargo underwriters to escape liability for a risk that they had agreed to insure. A further appeal to the Supreme Court is pending.

IV SHIPPING OPERATIONS

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

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

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

In the absence of any specific contractual right, the owners are obliged to proceed via the quickest or shortest route unless they can demonstrate that the charterers' orders would jeopardise the safety of the vessel in accordance with the common law principles set out in *The 'Hill Harmony'*.[18] Otherwise, it is likely that the owners will be found to have breached their duty to proceed with utmost despatch and so be liable for damages.

15 https://www.federalregister.gov/documents/2023/04/10/2023-07692/continuation-of-the-national-emergency-with-respect-to-somalia.

16 [2020] EWHC 3318 (Comm).

17 [2021] EWCA Civ 1828.

18 [2001] 1 Lloyd's Rep 147.

In the piracy context, the High Court of England and Wales (EWHC) offered guidance on the Conwartime 1993 clause in *The 'Triton Lark'*,[19] holding that the owners could refuse such an order only if there was a real risk of a piracy event occurring in respect of that specific vessel. Before refusing such an order, the owners are required to carry out an assessment of the risk to the vessel and whether this risk could be mitigated by adopting suitable anti-piracy measures. If a real likelihood of a risk of a piracy event occurring is established, the owners are entitled to take an alternative route at the charterers' expense. This will not amount to a deviation.

The 'Paiwan Wisdom'[20] considered the Conwartime 2004 clause. The EWHC held that there was no requirement that the level of piracy or war risk had to have grown between the date of execution of the charter party and the voyage orders being issued before the owners were entitled to refuse a routing order. Furthermore, while naming the Gulf of Aden committed the owners to proceeding via the Gulf, it did not automatically commit them to calling at unnamed ports in the region, in that case Mombasa.

Whether a vessel is on-hire or off-hire has also been the subject of litigation. Again, this depends on the terms of the charter party. To claim that the vessel is off-hire, the burden is on the charterer to show they come within the listed events. As a result of *The 'Saldanha'*,[21] piracy is not an off-hire event under an unamended NYPE[22] 1946 Clause 15, although the addition of 'whatsoever' to the clause may lead to a different result. However, following *The 'Captain Stefanos'*,[23] it is clear that piracy is highly likely to be caught by a 'capture/seizure' provision under an amended NYPE 1946.

The leading piracy case in 2014 was *The 'Longchamp'*,[24] in which Stephen Hofmeyr QC sitting as a Deputy High Court judge held that various expenses, including crew wages and bunkers consumed during the period of the hijacking, were recoverable as part of an owner's general average claim. This was a departure from average adjusting practice. The decision was successfully appealed to the Court of Appeal of England and Wales (EWCA),[25] with the crew and bunker costs being disallowed from the owners' general average claim on the basis that there was no true alternative course of action and a delay (and so the crew and bunker costs) would have resulted in any event. The Supreme Court[26] has since considered the case and overturned the EWCA (by a majority of 4:1), holding that the bunkers and crew wages were recoverable by the owners as substituted expenses under Rule F of the York-Antwerp Rules 1974.

Finally, in 2019, in *Eleni Shipping Limited v. Transgrain Shipping BV*,[27] the EWHC looked again at off-hire in the context of the Somali hijack of the *Eleni P* over a period of about seven months. In short, Mr Justice Popplewell held that (1) 'capture' in the context of the off-hire events only applies to a capture by an authority (and not pirates), but that (2) under Clause 101 of the charter (the piracy clause), the obligation to pay hire is suspended when a vessel is kidnapped by reason of piracy.

19 [2011] EWHC 2862 (Comm) and [2012] EWHC 70 (Comm).
20 [2012] EWHC 1888 (Comm).
21 [2010] EWHC 1340.
22 New York Produce Exchange form.
23 [2012] EWHC 571 (Comm).
24 [2014] EWHC 3445 (Comm).
25 [2016] EWCA Civ 708.
26 [2017] UKSC 68.
27 [2019] EWHC 910 (Comm).

V RECOVERY

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

When a ransom has been paid to secure the release of a vessel, cargo and crew, the owners will often seek to recover this and their associated release expenses in general average (GA) from cargo interests. Case precedent stretching back to *Hicks v. Pallington* in 1590 confirms that ransom payments can be the subject of GA. Furthermore, the EWCA, in *The 'Lehmann Timber'*,[28] held that an owner is entitled to require a GA bond and GA guarantee before releasing the cargo and (overturning the first instance decision) that they can recover their reasonable costs of exercising a lien until security is provided, including the cost of storage. The arbitration award (as referenced in the first instance judgment) also allowed the cost of the tow to Salalah, in addition to the ransom, in GA.

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

Cargo interests will often allege that the owners failed to exercise due diligence to make the vessel seaworthy (e.g., by effecting appropriate training and vessel hardening) and therefore that the hijack was a result of actionable fault by the owners. As a result, they argue no GA contribution is payable. For this reason, it is important for the owners to secure evidence of the measures in place at the beginning of the voyage and the witness evidence. This unseaworthiness argument is yet to succeed before the English courts.

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

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

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

28 [2013] EWCA Civ 650.

VI ARMED GUARDS

The use of privately contracted armed guards on merchant vessels was key in reducing the number of attacks off Somalia and in the Indian Ocean. While the risk of attack from groups based in Somalia and Yemen is perhaps reduced, it remains real and unpredictable, and many owners still engage armed guards on their vessels as standard practice, particularly as fierce competition among private maritime security companies (PMSCs) has kept rates low. However, demand for PMSCs in this region is reducing over time and many owners, having already reduced the number of armed guards on board, are increasingly questioning whether they still need to incur the expense and administrative burden of carrying them at all. These questions must be decided case by case and, as long as the risk remains, it is up to each owner to conduct a risk assessment for each transit and secure each vessel as it deems appropriate.

Despite the continued threat in West Africa, the successful East African model cannot simply be transferred to the Gulf of Guinea. Nor can it be replicated in South East Asia, where there is little scope for the operation of PMSCs and demand for their services is accordingly limited. PMSCs are in demand in West Africa, particularly in the Gulf of Guinea; however, the operational difficulties and risks they face in this region are much greater. In the Gulf of Guinea, where only local constabulary and military forces[29] are permitted to carry weapons, the model commonly adopted is for a PMSC to procure the deployment of a vessel protection detachment (VPD) from the applicable local force either on board the merchant vessel or alongside in an escort vessel (as local law dictates); and, where permitted, a security officer engaged by the PMSC to act as a liaison officer between the ship and the VPD and local authorities.

The security officer will have no formal control over the local VPD (who will operate in accordance with their own command structure and their own rules of engagement). Various detentions in Nigeria have shown that extreme caution should be exercised when taking VPDs on board and deploying security officers. There should be no suggestion that the security officers are mentoring or training the VPD. Close attention should also be paid to the visas used by any security officer. Real care should also be taken regarding the way in which the VPD and any escort vessels are contracted. In Nigeria, this should be only through a local company holding a valid memorandum of understanding (MOU) with the Nigerian Navy. The Nigerian Navy periodically revises the terms of its MOU, most recently making explicitly clear that the MOU should not be transferred to another company without the Navy's express consent; and that no company holding an MOU may merge with another not holding an MOU without the express consent of the Navy.

Owners operating in Nigeria should ensure that their PMSC has engaged a local company with a valid MOU and that the company is operating in compliance with the terms of its MOU. No matter the jurisdiction, owners should ensure that the VPD has been drawn from the constabulary or military authority with appropriate jurisdiction and authority over the waters in which the vessel is to pass and that all necessary permits and permissions have been obtained by the PMSC and remain up to date. Even if the owners believe they have the correct permits and permissions in place for the carriage of a VPD, matters can be further complicated by competing government agencies and officials, as was demonstrated by the

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

arrest of the crew and armed guards of the *Myre Seadiver* for alleged arms smuggling, the detention by Nigerian authorities of certain vessels and the arrest of private security personnel for alleged illegal activity.

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

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

In response to what, at the time, was a rapid growth in the number of PMSCs offering services on a wide array of contracts, in March 2012, BIMCO launched its Standard Contract for the Employment of Security Guards on Vessels, known as Guardcon. This quickly became BIMCO's second-most used standard contract. It set a benchmark for the provision of security services, which was rapidly adopted by the shipping industry. However, Guardcon is unsuitable for use in West Africa without considerable amendment (see further below).

In preparing BIMCO's Special Circular No. 1 – 20 February 2014, which sets out recommended amendments to Guardcon when used in West Africa, BIMCO's drafting subcommittee considered a number of issues, fundamental to which was the structured knock-for-knock liability regime and corresponding PMSC insurance provisions of Guardcon. The key issue was whether Guardcon could cover the liabilities and indemnities for the actions of the local forces as the need arose by means of the PMSC's cover for liabilities and contractual indemnities under its own contract. Although, when operating in West Africa, some owners may prefer to go directly to a local agent to procure local guards, the advantage of using an established PMSC is that it is likely such a PMSC will take on some of the owner's risk by including local forces as part of its group for the purposes of the knock-for-knock regime and for the purposes of the PMSC's insurances. In addition, it can assist with the owner's due diligence and further 'de-risk' the situation by sourcing the local personnel itself using its expertise and contacts. The International Group of P&I Clubs have taken this exercise one step further and have produced their own version of the contract called 'GUARDCON West Africa', which incorporates the recommended amendments.

To coincide with the 10th anniversary of the publication of Guardcon, BIMCO launched its new Standard Contract for Security Escort Vessels, known as SEV-Guardcon.[30] Following many of the principles of Guardcon, SEV-Guardcon is aimed at circumstances

30 HFW's Elinor Dautlich was part of the Guardcon drafting committee and supported BIMCO in the drafting of SEV-Guardcon, together with broad representation from the shipping, insurance and maritime security communities.

where owners hire the services of a security escort vessel on which are carried security guards authorised by the relevant littoral state, for example when transiting the Gulf of Guinea. The insurance provisions follow closely the market standard arrangements set out in original Guardcon; while the liabilities and indemnities provisions reflect provision of the services by an independently operated security escort vessel, as opposed to a security team carried on board the transiting merchant vessel.

As a final note, a recurring question for the industry has been the use of VBAs in the Red Sea and the Gulf of Aden. Although the UK's Export Control Office, part of the Department for International Trade, began approving VBAs for use by licensed PMSCs in 2013 case by case, it continues to be up to each PMSC to ensure that it has done its due diligence and that the VBA is operated in compliance with all applicable laws, including those of its flag state. It is worth noting that many flag states do not allow vessels registered with them to be used as floating armouries.

VII WAR RISKS AND THE WAR IN UKRAINE

Although not piracy, it would be remiss not to briefly touch upon the war in Ukraine, given the relevance to owners and war risk insurers.

The invasion of Ukraine (and the subsequent declaration of martial law) meant the cessation of port activities, departure permissions for vessels being withdrawn or withheld, pilots becoming unavailable, the laying of sea mines around the coast of Ukraine and increased naval activity in the Black Sea. The result was that many commercial vessels became stranded in Ukrainian ports. This grim situation was exacerbated by several commercial vessels being physically damaged as a result of missile, rocket and projectile strikes with, in some cases, the unfortunate loss of life to seafarers. In the same way as certain piracy hotspots are listed by the Joint War Committee, JWLA 29 and 30 published in 2022 added Russia and Sea of Azov and Black Sea waters, plus Ukrainian inland waters, as Listed Areas.[31]

Immediate response was required (from across the shipping, insurance, risk management and legal communities) to deal with this initial situation. This immediate response included evacuating crews from many of the vessels that were stranded (moving the crews out of Ukraine), backfilling evacuated vessels with skeleton or replacement crews, and dealing with those vessels that had been physically damaged.

It also involved the analysis of legal rights and liabilities, and taking actions to manage those. Discussions and disputes quickly emerged across many of the contractual chains and insurance policies (involving those stranded vessels and their cargoes), and these largely focused around legal themes such as frustration, *force majeure*, off-hire, unsafe port and implied indemnities.

The establishment of the Black Sea Grain Initiative, signed in July 2022, allowed for vessels in the ports of Odessa, Yuzhny and Chornomorsk (which were carrying foodstuffs and ammonia cargoes) to leave. It also allowed for vessels to enter Ukraine and trade foodstuffs from those three ports. The establishment of the initiative took many commentators by surprise (particularly as it relied upon cooperation between Ukraine and Russia) and it has proved successful, albeit not quite as far-reaching as many had hoped. It did not allow for all stranded vessels to depart from Ukraine. Those vessels that were not loaded with foodstuffs,

31 https://www.lmalloyds.com/lma/jointwar.

which were not able to load foodstuffs and which were not in those three ports, were not able to depart. At time of writing, many of those vessels remain stranded, particularly those in the Bug River.

For many of those remaining stranded vessels, 24 February 2023 was an important date as the first-year anniversary of the war was the trigger on which owners will or will likely seek to rely on to claim a constructive total loss (CTL) under the terms of their policies. This, in turn, may give rise to discussion, debate and potentially dispute, as to whether policy conditions have been met, whether any sue and labour requirements have been met, and if the CTL and notice of abandonment is accepted, whether insurers wish to exercise their entitlement under section 63(1) of Marine Insurance Act 1906, to take over the assured's interest in the vessel, and if so on what terms. This may give rise to opportunities for other parties to purchase vessels at a potential discount.

Chapter 10

DECOMMISSIONING IN THE UNITED KINGDOM

Tom Walters and Johanna Ohlman[1]

I OVERVIEW

The UK oil and gas industry continues to make a substantial contribution to the country's energy security and economy. However, the UK Continental Shelf (UKCS) is a mature oil-producing basin and has been heavily affected by the sustained period of low oil and gas prices since 2014. Following the outbreak of the covid-19 pandemic, Brent crude oil prices dropped in April 2020 to their lowest level since 2002 (US crude oil prices went negative for the first time since records began in 1983). As a result, decommissioning of UKCS infrastructure has been put firmly on the agenda for many operators seeking to reduce their balance sheet liabilities.

According to the latest report from Offshore Energies UK (formerly Oil and Gas UK),[2] there was an overall reduction in decommissioning expenditure in 2020 with work placed on hold or deferred until 2022 as a result of the covid-19 pandemic. Notwithstanding this, expenditure in 2020 was £1.1 billion, only around 20 per cent less than the year prior. From 2022, Offshore Energies UK expects the decommissioning industry to return to normal rates of operation. Over the next decade (2021–2030), it is anticipated that 1,782 wells will be plugged and decommissioned, 125 topsides will be lifted and removed, 115 structures will be dismantled and 16,661 concrete mattresses will be removed as well as 349 kilometres of pipeline.

With the volume of decommissioning that is required, there are opportunities for the offshore industry to step in as efforts are made to continue to drive down costs. The cost of decommissioning is decreasing with well decommissioning costs having steadily been reduced during the past five years. For example, the cost of decommissioning a platform well has been reduced from £2.89 million per well in 2017 to £2.44 million per well in 2020.

Total expenditure on decommissioning between 2021 and 2030 in the UKCS is expected to be in the region of £16.6 billion, with an average spend of £1.5 billion per year.

Decommissioning is an obligation and liability rather than an activity with intrinsic value to the operator. It is complex and fraught with legal and regulatory challenges, not just around establishing and approving decommissioning plans, but also in relation to funding the costs, allocating liabilities under joint operating agreements, asset transfers, litigation risks with contractors, and the need to comply with all the relevant EU, international and local environmental regulations. The coming years will likely see further focus on the role of

1 Tom Walters is a partner and Johanna Ohlman is an associate at HFW.

2 The UK Oil and Gas Industry Association Limited (trading as OEUK) Decommissioning Insight Report 2022: https://oeuk.org.uk/wp-content/uploads/woocommerce_uploads/2022/11/Decommissioning-Insight-2022-OEUK-nglyb1.pdf.

decommissioning in the wider energy transition strategy, which was highlighted by the UK Oil and Gas Authority changing its name to the North Sea Transition Authority (NSTA) in March 2022.[3] The UK government has also emphasised the role of decommissioning in energy transition and decarbonisation efforts in the North Sea Transition Deal (published in March 2021) as well as the Decommissioning Strategy (published in May 2021).

The unit costs for decommissioning are falling, in part because the industry is building up knowledge and learning from each project, but future cost savings will come from maximising efficiencies in the decommissioning process, which means standardising contracts, vessels, rules and procedures and adopting technological advances.

The recent market conditions have also provided a reminder that decommissioning needs to be flexible and adaptable so that when conditions change, operators and contractors can respond accordingly.

In the coming decades, significant investment will be required to retire North Sea oil and gas fields. Investment in decommissioning will have to be even more carefully managed but the United Kingdom still has the potential to build expertise in safe and responsible decommissioning of platforms and pipelines that can be exported around the world, for example, to the Gulf of Mexico.

II OVERSIGHT OF DECOMMISSIONING ACTIVITY

In response to the decline in production from the UKCS, the UK government commissioned a review of the UK offshore oil and gas recovery and regulation, led by Sir Ian Wood. The UKCS Maximising Recovery Review Final Report was published in February 2014 (the Wood Report). Following the report, the government set out its proposals for implementing the Wood Report's recommendations. As part of this, the Oil and Gas Authority (now called the North Sea Transition Authority or NSTA) replaced the Department for Energy and Climate Change as the entity responsible for petroleum licensing and regulation of the upstream oil and gas sector, including:

a oil and gas licensing;
b oil and gas exploration and production;
c oil and gas fields and wells;
d oil and gas infrastructure; and
e carbon storage licensing.

The NSTA (earlier the OGA) was established as a fully independent regulator in April 2015 and a government-owned company was set up, with the Secretary of State for Business, Energy and Industrial Strategy as the sole shareholder.

The strategy for maximising economic recovery in the United Kingdom (MER UK) was implemented as part of the recommendations in the Wood Report. This required that 'all stakeholders should be obliged to maximise the expected net value of economically recoverable petroleum from relevant UK waters, not the volume expected to be produced'.

The consequence of this is that, if a relevant party decides not to maximise the possible production from a particular field, it must allow others to seek to take over, to maximise the

3 The North Sea Transition Authority press release 21 March 2022: North Sea Transition Authority: Oil and Gas Authority changes name to North Sea Transition Authority - 2022 - News - News & publications (nstauthority.co.uk).

recoverable hydrocarbons from the field by divesting the licence or asset 'to other financially and technically competent persons'. This is intended to ensure that decommissioning activity is not undertaken too early. MER UK further requires an operator who is unable to raise suitable finance to proceed with operating an installation, or whose returns are unsatisfactory and cannot divest itself of the asset, to relinquish the licences after a reasonable period.

The NSTA's 2021 Decommissioning Strategy (the Decommissioning Strategy)[4] builds on the original 2017 strategy and sets out the authority's remit from 2021 to 2024. The Decommissioning Strategy has identified four focus areas:

a planning for decommissioning;
b commercial transformation;
c supporting energy transition from late life into decommissioning; and
d technology, processes and guidance.

Overall, the Decommissioning Strategy aims for the adoption of cost-efficient decommissioning plans, encouraging collaboration across the market and promoting investment in new decommissioning technologies to reduce greenhouse gas emissions (with a view to moving the industry towards net zero emissions) as well as costs.

III REGULATION OF DECOMMISSIONING ACTIVITIES

The Department for Business Energy and Industrial Strategy (BEIS) is the competent authority responsible for establishing the framework and implementing the policies set out in MER UK. It is responsible for petroleum licensing and regulation of the upstream oil and gas sector, including:

a decommissioning of offshore oil and gas installations and pipelines; and
b enforcing environmental legislation as it applies to upstream oil and gas activities.

The Secretary of State has overall responsibility for the activities of BEIS and its policies, and for exercising many of the powers under the Petroleum Act 1998 and related legislation. A number of these powers were transferred to the NSTA by the Energy Act 2016 upon it coming into force in May 2016 and have implications for those engaged in and undertaking decommissioning activities in the UKCS.

The NSTA works with BEIS to assess individual decommissioning programmes and considers the costs, and future or alternative use, and encourages collaboration to help drive down the costs of decommissioning. Once the NSTA has carried out its review and undergone appropriate stakeholder scrutiny, the decommissioning programme is submitted to BEIS as part of the consultation process before receiving final approval.

The Offshore Petroleum Regulator for Environment and Decommissioning (OPRED) is responsible for regulating environmental and decommissioning activity for offshore oil and gas operations in the United Kingdom and is part of BEIS. OPRED regulates the planning and execution of offshore oil and gas decommissioning and has two core objectives:

a to ensure that decommissioning plans are consistent with the UK's regulatory obligations; and
b to protect the taxpayer from paying for the full cost of decommissioning.

4 North Sea Transition Authority: Decommissioning Strategy - 2021 - Publications - News & publications (nstauthority.co.uk).

In March 2021, BEIS published the North Sea Transition Deal (NSTD) between the UK government and the oil and gas industry (represented by Offshore Energies UK).[5] The NSTD sets out a long-term strategy to prepare and implement the UK government's goal of transitioning the energy sector to net zero carbon by 2050. The NSTD sets out mutual commitments from the UK government and the industry to, among other things, supply decarbonisation through emissions monitoring and reporting, deliver offshore electrification and apply initiatives from decommissioning to carbon capture usage and storage.

IV HEALTH AND SAFETY AND DECOMMISSIONING

As part of the oil and gas life cycle, decommissioning activities in the UKCS are underpinned by the UK health and safety legislative regime. The primary piece of legislation is the Health and Safety at Work Act 1974 (HSWA74). This imposes criminal liability on both companies and individuals who are in breach of the HSWA74. Penalties include unlimited fines and imprisonment.

There are additional regulations that apply to the oil and gas industry that sometimes impose strict liability and can also trigger civil liability, including the Offshore Installations (Offshore Safety Directive) (Safety Case etc) Regulations 2015 (SCR) and the Control of Major Accident Hazards Regulations (which came into force on 1 June 2015, revoking the 1999 Regulations).

The Health and Safety Executive's (HSE) Energy Division is responsible for overseeing health and safety arising from work activity in the offshore oil and gas industry on the UKCS.

The HSWA74 imposes strict criminal liability on all employers, who are under a duty to ensure the health and safety of all those affected by the conduct of an employer's operations, so far as is reasonably practicable. This duty therefore applies to all employees, contractors and third parties (including visitors and members of the public). If an employer can demonstrate that it has taken all reasonably practicable steps to avoid a breach, it will be afforded a complete defence to any charge or breach of the HSWA74. Individual officers, managers and directors whose neglect, consent or connivance contributed to the breach can also be prosecuted under the HSWA74 and imprisoned if convicted. Under the HSWA74, it is the duty of every employee while at work to take reasonable care for the health and safety of himself or herself and of other persons who may be affected by his or her acts or omissions.

The *Piper Alpha* disaster in 1988 led to a number of wide-ranging changes in the oil and gas regulatory regime as part of the report following Lord Cullen's public inquiry. This placed responsibility on the 'duty holders' to:

a prepare a safety case that demonstrates they have the ability and means to control major accident risks to an extent that is acceptable to the HSE;

b consult the installation's safety representatives in the preparation, revision or review of the safety case;

c operate the installation in compliance with the arrangements described in the current safety case;

d implement effective measures to prevent uncontrolled releases of flammable or explosive substances;

e maintain the integrity of the installation's structure, process plant, temporary refuge and all other equipment;

5 The North Sea Transition Deal: North Sea Transition Deal - GOV.UK (www.gov.uk).

f maintain the integrity of the wells and the pipelines throughout their life cycle (this applies to well operators and pipeline operators); and
g prepare a plan for dealing with an emergency, should one occur.

The SCR now require the operator or owner of every offshore installation to prepare a safety case and submit it to the regulator for acceptance. The Regulations now incorporate additional requirements of the EU Offshore Safety Directive (OSD),[6] and BEIS has issued its own guidance to the SCR.

As such, oil and gas operations in external waters in the UK's territorial sea or designated areas within the UKCS are required to submit a safety case. Activities in internal waters (e.g., estuaries) will continue to be covered by the Offshore Installations (Safety Case) Regulations 2005 and its guidance L30.

The purpose of the SCR is to reduce the risks from major accident hazards, increase the protection of the marine environment and coastal economies against pollution, and to ensure improved response mechanisms in the event of such an incident.

V OTHER REGULATIONS

The following regulations are also central to the offshore regulatory regime:
a the Offshore Installations (Management and Administration) Regulations 1995 (as amended);
b the Offshore Installations (Prevention of Fire and Explosion and Emergency Response) Regulations 1995; and
c the Offshore Installations (Design and Construction) Regulations 1996 (DCR).

However, there are many other relevant regulations, such as:
a the Management of Health and Safety at Work Regulations 1999;
b the Control of Major Accident Hazards Regulations 1999; and
c the Provision and Use of Work Equipment Regulations 1999.

The DCR are relevant to decommissioning activities. The Regulations are in two parts.

The first section deals with integrity, workplace environment and other miscellaneous matters. This places an obligation on the duty holder to ensure that an installation possesses such integrity as is reasonably practicable at all time. The duty holder must ensure that an installation is designed and built so that, so far as is reasonably practicable:
a it can withstand the forces acting on it as may be reasonably foreseeable;
b its layout and configuration, including the plant and machinery fitted, do not prejudice its integrity;
c fabrication, transportation, construction, commissioning, operation, modification, maintenance and repair can take place without prejudicing its integrity;
d it can be decommissioned and dismantled safely; and
e in the event of damage to the installation, it will retain sufficient integrity to enable action to be taken to safeguard the health and safety of the personnel on it or operating nearby.

6 Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC.

The second section requires the duty holder to ensure that suitable arrangements are in place for maintaining the integrity of the installation, including suitable arrangements for:

a periodic assessment of its integrity; and

b the carrying out of remedial work in the event of damage or deterioration that may prejudice its integrity.

These obligations continue to apply throughout the decommissioning of an installation and need to be considered when undertaking decommissioning activities.

VI THE PETROLEUM ACT 1998 AND DECOMMISSIONING

The decommissioning of offshore oil and gas installations and pipelines on the UKCS is overseen by BEIS' Offshore Decommissioning Unit and is underpinned by the legislation set out in the Petroleum Act 1998 (PA98), as amended by the Energy Act 2008 (EA08) and the Energy Act 2016 (EA16).

The 1992 Convention for the Protection of the Marine Environment of the North East Atlantic (the OSPAR Convention) sets out the UK's international obligations on decommissioning. OSPAR Decision 98/3 on the Disposal of Disused Offshore Installations further sets out and clarifies the obligations on a state to deal with offshore infrastructure. This states that dumping or leaving an offshore installation in whole or in part is prohibited but recognises that derogation from the prohibition may be permitted case by case for the removal of large steel jacket footings or concrete installations. Notwithstanding this, OSPAR Decision 98/3 indicates as follows:

a the topsides of all installations must be returned to shore;

b steel installations with a jacket weight of less than 10,000 tonnes must be completely removed for reuse, recycling or final disposal on shore;

c for steel structures with a jacket weight greater than 10,000 tonnes, it is possible to consider whether the footings of the offshore installation may remain in place;

d for concrete installations, it is possible to seek derogation for those left in place in whole or in part;

e all installations installed after 9 February 1999 (when OSPAR Decision 98/3 came into force) must be completely removed; and

f exceptions may be considered for other structures when there are exceptional and unforeseen circumstances resulting from structural damage or deterioration or other reasons that would prevent the removal of a structure.

OPRED has overall responsibility for ensuring that decommissioning programmes submitted for approval in accordance with the PA98 also meet the principles set out in MER UK for cost savings, future alternative use and collaboration.

Decommissioning obligations on an operator arise when the Secretary of State serves a Section 29 Notice issued in accordance with Section 29 of the PA98. This requires the operator of the field and each one of the licensees to submit a decommissioning programme. In the first instance this would include parties to joint operating agreements for installations, and owners for pipelines. It is usual for the party that has physical control over the installation to take the lead but all the parties remain jointly and severally liable for the costs of decommissioning the installation.

The Section 29 Notice will either specify the date by which a decommissioning programme for the installation or pipeline is to be submitted or, as is more usual, provide for it to be submitted on or before such date as the Secretary of State may direct. This usually occurs on or before the cessation of production.

The decommissioning programme sets out the measures to decommission disused installations and pipelines and will describe in detail the methodology to be engaged for the removal of the asset. When it is proposed that an installation or pipeline (or part thereof) is to remain in position, it must also state what provisions will be put in place for monitoring and maintaining the remaining structure.

After the decommissioning programme has been approved, the Section 29 Notice holders are legally obliged to carry out the work. The Secretary of State has powers to require remedial action to be taken if a programme is not carried out, or its conditions are not complied with, and failure to comply with any such notice is an offence under the PA98. In extremis, the Secretary of State can carry out the remedial action and recover the costs from the person to whom the notice was given.

The government has been keen to ensure that UK taxpayers do not foot the bill for an operator's decommissioning costs and so legislative changes implemented by the EA08 and EA16 have broadened the parties on whom a Section 29 Notice can be served. This currently includes not just the current licensees but any person who has or who has had an interest (financial or otherwise) in the installation or pipeline. This includes any parent or associated companies of a licensee.

OPRED has served Section 29 Notices on additional stakeholders when it has considered the decommissioning arrangements proposed by the operator and licensees to be unsatisfactory. The Secretary of State's power to do this is set out in Section 34 of the PA98. It follows that the Secretary of State cannot send a Section 29 Notice to a person if that person has never been entitled to derive any benefit (financial or otherwise) from an installation and they are a licensee or a party to a joint operating agreement (or similar agreement) but have never been in one of the other categories of persons to whom a Section 29 Notice can be served.

A Section 29 Notice holder will remain liable for the decommissioning of an installation or pipeline unless the Section 29 Notice is withdrawn. As discussed above, the obligation to carry out the approved decommissioning programme is joint and several.

When an asset changes hands as a result of a decision by the licensee to sell the asset as a going concern or as a result of MER UK, the Secretary of State may release a former licensee from its Section 29 obligations. This is usually done in circumstances where OPRED is satisfied that there is adequate financial security to cover the decommissioning liabilities. Security in the form of a decommissioning security deed (to which the Secretary of State may be a party and can draw down on), letter of credit or facility agreement with a third-party financier will usually ensure that the new licensee can discharge its decommissioning liability. However, even if a former licensee is discharged from its Section 29 obligations, either by agreement with OPRED or otherwise under contract, the Secretary of State can reimpose liability on a party under Section 34 of the PA98. Therefore, any company that has been a licensee at any time since development of a field is potentially liable for the decommissioning of that field until decommissioning is complete.

Since decommissioning is an inherent cost and a liability for an operator as a result of operating on the UKCS, there is tax relief for decommissioning costs. This is given at the point the costs are incurred and the decommissioning carried out.

In response to pressure from the industry, in September 2013 the government introduced decommissioning relief deeds, which are agreements entered into between the government and oil and gas investors providing tax relief for investors for decommissioning expenditure in certain circumstances.

VII ORDERS

OPRED works with the HSE to implement the OSD. The Offshore Safety Directive Regulator is the competent authority responsible for implementing the requirements of the OSD. OPRED can issue a variety of notices and sanctions against appointed installation and well operators, non-production installation owners and operators of oil handling facilities (pipelines), which includes permit holders, or holders of consents who may be engaged in certain offshore oil and gas activities.[7] Depending on the nature of the breach, OPRED may:

a issue a letter if there has been a minor contravention or if action is required to comply with a notice or to take some specific action;

b serve an enforcement notice: this informs the party that it has breached, or is likely to breach, the requirements of relevant legislation. The enforcement notice will allow for compliance with the prescribed conditions;

c serve an improvement notice: this informs the party that it is in contravention of one or more statutory provisions, or one or more provisions and that the contravention is likely to continue. The improvement notice sets out the steps that must be taken and the period within which they must be carried out;

d serve a prohibition notice: this is served when there is the imminent risk of serious pollution and will specifically prohibit the activity giving rise to the risk, specifying the steps to be taken and the period within which they must be carried out. A prohibition notice may also withdraw or impose additional conditions on an operation under a relevant permit; or

e revoke a permit: the Secretary of State may revoke a permit when a party is in breach of any conditions attached to a permit.

In addition to the powers set out above, OPRED can use the Offshore Environmental Civil Sanctions Regulations 2018 to impose a fixed monetary penalty or a variable monetary penalty (discussed in further detail in Section VIII).

The HSE also has wide-ranging enforcement powers under the HSWA74 and other regulations. An HSE inspector may enter any workplace, including docks and offshore installations, to inspect health and safety conditions and to investigate accidents to personnel working in a port or while loading or unloading a ship. An inspector can similarly investigate accidents occurring to a ship's crew.

Enforcement may include:

a serving notices on duty holders;

b withdrawing approvals;

c varying licences, conditions or exemptions;

d issuing simple cautions;

e prosecution; and

7 BEIS Enforcement Policy: Offshore Petroleum Regulator for Environment and Decommissioning – January 2020.

f providing information or advice, in person or in writing.

The Maritime and Coastguard Agency (MCA) is responsible for enforcing all merchant shipping regulations in respect of occupational health and safety, the safety of vessels, safe navigation and operation (including manning levels and crew competency).

Sometimes the jurisdiction of the HSE, MCA and the Marine Accident Investigation Branch overlaps and they will agree who takes the lead for a given activity, depending on whether the activity is within the internal waters or territorial sea of Great Britain or the UKCS. This excludes responsibility for health and safety enforcement activities offshore.

VIII FINES AND PENALTIES

The NSTA has powers to issue fines of up to £1 million (EA16, Section 45). It may also order the removal of the operator of a licence and ultimately revoke a licence for one or all of the licence holders in the event of non-compliance with applicable requirements. For example, ConocoPhillips (UK) Limited was fined £3 million (plus more than £150,000 in costs) in February 2016 for its failure to carry out an adequate risk assessment for an offshore installation, and Transco plc was fined £15 million in 2005 for its failure to prevent an explosion from a leaking gas main.

In addition to these, as of 1 October 2018, OPRED is responsible for enforcing the Offshore Environmental Civil Sanctions Regulations 2018 (the OECS Regulations). Prior to enactment of the OECS Regulations, breaches of environmental legislation were usually dealt with by criminal prosecution. Following consultation, and in an effort to reduce the administrative burden on the courts, it was decided to introduce civil sanctions to impose fines for certain offences under existing environmental regulations as an alternative to a criminal prosecution. A fine under the OECS Regulations will be either a fixed monetary penalty, ranging from £500 to £2,500, or a variable monetary penalty up to a maximum of £50,000 when there are 'aggravating factors' such as a history of non-compliance. Civil penalties will now be issued for breaches of the following regulations (among others):

a the Offshore Combustion Installations (Pollution Prevention and Control) Regulations 2013;
b the Offshore Petroleum Activities (Oil Pollution Prevention and Control) Regulations 2005;
c the Offshore Installations (Emergency Pollution Control) Regulations 2002;
d the Offshore Chemicals Regulations 2002; and
e the Merchant Shipping (Oil Pollution Preparedness, Response and Co-operation Convention) Regulations 1998.

An operator or contractor undertaking decommissioning activities in the UKCS needs to ensure that it works within the various regulations set out above. Failure to do so may result in a fine and prosecution.

IX MANAGING RISK IN CONTRACTS

One of the most important areas that needs to be given thought is the contractual allocation of risk between the parties. As with any contract, particularly those intended for use in the offshore environment, clarity of responsibility is important, from both a financial and an operational perspective.

Given the increasing frequency and complexity of the decommissioning operations that are being carried out, there has been an attempt by the industry to provide guidance and standardisation in relation to the contracts that govern these operations. With this said, this is very much a new area and the documentary framework is accordingly in its relative infancy. Many of the projects that have been undertaken have been on bespoke terms put forward by the operator. Depending on the commercial bargaining power of the parties, it may be that a contractor is able to push back on some of the fundamental terms as they will invariably be drafted in favour of the operator. As with any contract, the parties should both seek legal advice in relation to the specific terms to understand the extent and entirety of their exposure.

To date, two contracts have been developed with the technical challenges of decommissioning in mind: the BIMCO[8] DISMANTLECON contract launched in September 2019; and the LOGIC Decommissioning Contract.

i DISMANTLECON

The BIMCO drafting subcommittee, made up of expert legal, insurance and technical practitioners in the area, has developed the DISMANTLECON contract to grapple with the significant challenges and peculiarities associated with a decommissioning project.

The two-part form adopted for this contract is reminiscent of the other documents in the BIMCO pro forma suite. The foundations of the contract are based on the WRECKSTAGE 2010 contract, with amendments reflecting the specific nature of the project. The contract is intended to be used for a wide variety of structures (pipelines, topsides, mattresses, etc) but not for the plugging and abandonment of wells, nor for onshore disposal, which remains with the operator to deal with as the contract ends at the time of delivery. Throughout the contract, title remains with the operator and is not transferred to the contractor. This reflects the obligation on the operator under the PA98. It is anticipated that an amended version of BIMCO's RECYCLECON will be modified for use with onshore disposal to allow users the option of extending the services by contract to deal with full disposal of the property.

The extent and scope of decommissioning work on offshore structures are often difficult to determine at the outset. Accordingly, DISMANTLECON provides for an extensive variation regime that allows for price and time adjustment on a continuing basis. The parties must carefully negotiate and define 'technical information', 'rely upon information' and 'assumptions', as these determine how and when variation orders may be triggered.

A further important principle adopted in DISMANTLECON is an offshore knock-for-knock liability and indemnity regime, whereby each party takes responsibility for loss, damage or injury to their people and property in certain situations, regardless of cause.

Finally, DISMANTLECON uses adjudication as a form of fast-track interim dispute resolution with the intention of avoiding delay and reducing costs.

8 The Baltic and International Maritime Council.

ii LOGIC

The LOGIC contract was drafted by Offshore Energies UK's Decommissioning Working Group, which is made up of operators, contractors and professional advisers. The form is based on the LOGIC Maine Construction Form and, like other contracts in the LOGIC suite, it is structured with specific conditions in Section II of the contract. The intended scope of the contract is for the dismantling, removal and transport of the asset to shore. The contract can be used for any element of offshore infrastructure, whether topside or subsea.

As with the DISMANTLECON contract, title in the property remains with the operator.

X INSURANCE

There is an obligation under both DISMANTLECON and LOGIC for the parties to maintain appropriate insurance. Given the specialist nature of the operations, thought should be given to the inter-relationship between the different insurance policies that a contractor may have in place for the proposed services. Typically, a contractor's protection and indemnity policy is unlikely to provide adequate cover for decommissioning operations and so the contractor should seek to obtain an extension to its existing cover or procure specialist insurance.

Some operators may consider taking out a decommissioning all risks (DAR) policy for the duration of the project. In these circumstances, a contractor should also consider what additional cover might be needed over and above the operator's DAR insurance arrangements.

XI CONCLUSION

Decommissioning in the North Sea presents a significant opportunity for the offshore marine contracting community at a time when the oil and gas industry has been hit particularly hard by a number of factors. There are also opportunities in energy transition and decarbonisation, where decommissioning is expected to play a key role in achieving the UK government's net zero emissions targets. Decommissioning is an interesting and developing area of law that will be subject to significant scrutiny and change in the coming years since the nature of the work will inevitably generate a significant number of legal problems. To mitigate the possibility for potential disputes, careful drafting and allocation of risks in the contract together with insurance can undoubtedly make a difference and help to avoid complications for the parties involved in the future.

Chapter 11

SHIP FINANCE

Gudmund Bernitz[1]

I INTRODUCTION

The financing of ships is as ancient as international trade itself, but the way that financing is carried out has continuously evolved over history and continues to change today – maybe at a faster pace than ever. The types of financing products available have become increasingly diverse and the financiers offering them include banks, leasing houses and private equity funds, as well as bond and equity markets.

However, when providing financing against the security of a ship, it remains as important as ever to understand the nature of the secured asset and the legal landscape in which she operates.

II THE SHIPPING LOAN AGREEMENT

In its simplest form, a shipping loan agreement is fundamentally a contract documenting the lender's obligation to advance the loan (if certain conditions are met) and the borrower's obligation to repay that loan with interest. The loan agreement is designed to ensure that the loan is used for its proper purpose and to protect the lender's security in the ship that is being financed.

Consequently, the lender's obligation to lend is its only material obligation and, as far as the lender is concerned, the loan agreement will chiefly concern itself with the manner in which the loan is advanced and how the lender deals with information concerning the borrower. However, the borrower's obligation to repay the loan will be augmented by other obligations to preserve the lender's security and to keep the lender informed about the borrower, the borrower's business and the operation of the ship.

A shipping loan agreement can be divided into three constituent parts:

a the commercial terms;
b the key operative provisions; and
c the boilerplate clauses.

The following discussion is based on a bilateral term loan agreement between one lender and one borrower; club or syndicated shipping loans come with additional considerations beyond the scope of this chapter.

1 Gudmund Bernitz is a partner at HFW.

i Commercial terms

The commercial terms in a loan agreement include the tenor of the loan (i.e., the term of repayment) and, closely related to the tenor, the repayment schedule of the loan (including the distribution of the repayments – for example, whether the loan is amortised and the size of any balloon repayment at the end of the term of the loan).

Other important commercial terms include any fees that might be paid to the lender (although these may also be set out separately in confidential fee letters if the loan is syndicated), the interest rate (usually expressed as the margin above the interbank lending rate or the lender's cost of funds) and the availability of the funds.

ii Key operative provisions

Many of the operative provisions in a shipping loan agreement are general in nature and would be recognisable to general finance practitioners, whereas others are very specific to shipping loans and, in some cases, specific subsectors of the shipping industry.

These key operative provisions include the following:

a representations on and warranties of the borrower's condition and that of any other obligor, and its respective assets and businesses at the time the loan agreement is signed and, in respect of some representations and warranties, other agreed points during the tenor of the loan (often at each drawdown and at the beginning of each interest period);

b conditions precedent that must be satisfied by the borrower before it is entitled to draw on the loan. These conditions precedent protect the lender from having to advance the loan before it is comfortable with the condition of the borrower and all other obligors (including providers of security), and their respective assets and business; for example, the lender will want evidence that the borrower has good legal title to the ship, that the ship has been adequately insured and that she has all relevant trading certificates and, if the transaction has a project financing element, that the ship is employed under an acceptable charter for the duration of the loan;

c covenants on the borrower (and in some cases, some or all other obligors) whereby the borrower undertakes to do (or not to do) certain things throughout the tenor of the loan. These are designed to ensure the borrower (and some or all other security parties) maintains itself and its asset and business in a condition that remains acceptable to the lender. From the borrower's perspective, however, they should not be too onerous to fulfil since they would usually be aligned with what a prudent shipowner should be doing anyway;

d events of default, which delineate the circumstances in which the lender may demand its money back. The key event of default would be a failure to repay the loan or pay interest on time; however, there are other defaults that indicate that the borrower (or other obligors, or both) has failed to make payments to other creditors on time or failed to maintain itself and its ship and business in the required manner, or when the borrower has failed to perform its other obligations under the loan agreement (or other finance documents); and

e mandatory prepayment events whereby the borrower is obliged to repay the loan immediately (or after an agreed grace period) but with the respective event not being treated as a breach by the borrower, usually because it would be outside the borrower's control. Some examples of mandatory prepayment events include the total loss of the ship, the sale of the ship, a change of control or ownership of the borrower, it becoming illegal for the lender to maintain the loan and, in the case of pre-delivery financing, the

non-delivery of the ship or the termination of the shipbuilding contract. Whether an event is an event of default (which may trigger cross-default provisions in other facilities the borrower or other group companies may have) or a mandatory prepayment event is commonly a matter of discussion between the parties.

iii Shipping-specific operative provisions

As a ship is subject to a variety of risks during its operations and is (by virtue of the ship mortgage) normally the most important piece of the lender's security package, the lender will want to ensure that the ship is adequately and appropriately insured and operated. Therefore, most shipping loan agreements will contain extensive vessel-specific undertakings, some of which relate to the insurance arrangements of the ship and others to the operation of the ship.

The loan agreement will contain insurance undertakings whereby the borrower undertakes to insure the ship for certain types of risks and, in respect of some insurances, the minimum amount for which the ship should be insured. This minimum amount is usually linked to the agreed value of the ship, which is determined by the valuations that the borrower is expected to procure (often from brokers agreed in advance with the lender) annually or semi-annually.

The lender will also expect the borrower to undertake, among other things, to pay premiums punctually and trade the ship within any limits set by her insurers. The insurance undertakings will also deal with what happens if the ship becomes a total loss or suffers a major casualty, and the borrower would usually undertake not to settle any claim in respect of these events without the prior consent of the lender.

The lender will also have a direct interest in ensuring that the ship is operated by the borrower in a prudent manner, both for reputational reasons and because the value of its security may decrease if the ship is poorly maintained. In that regard, the borrower will undertake to keep the ship in a good and seaworthy state of repair, and procure that the ship is kept in class. The lender will also want the borrower to undertake to ensure that the ship is not used for any illegal purpose and, in some cases, the lender will want the borrower to obtain its consent before employing the ship on certain types of charters (such as demise charters).

Apart from giving vessel insurance and operation undertakings, the borrower will further be required to undertake to keep the lender apprised of developments in respect of the ship and her employment and to provide the lender with material information about the ship, such as any arrest of the ship or any material incident involving the ship.

iv Boilerplate provisions

The boilerplate provisions are usually not negotiated at length and commonly include the following non-exhaustive list:

a a further assurance clause that obliges the borrower to do anything that may be required to perfect the lender's position under the loan agreement and security documents;

b a severability clause to deem unenforceable provisions to be deleted without impinging on the validity of the rest of the loan agreement;

c a governing law and jurisdiction clause that sets out, among other things, the dispute resolution mechanism and the governing law of the loan agreement;

d the notices provisions, which set out the methods of communication between the parties; and

e the transferability of the loan and security.

III SECURITY

In the context of taking security in a ship financing, there are various characteristics of ships to consider and these factors will dictate the structure of a typical security package given in favour of a lender and distinguish ship financings from other forms of finance.

Ships are movable assets and as such it is required that they maintain a national character. Broadly, this means that they must be registered with a nation state. Each state maintains its own public shipping register (or registers) that typically records ownership and security interests (most notably mortgages) over ships registered with that state. This is fundamental when taking security in connection with a ship financing, as shipping registers will generally provide prospective lenders with (1) a reliable source showing registrable encumbrances over a ship, and (2) a fairly straightforward way of perfecting registrable security interests over a ship.[2]

Other important considerations include the fact that ships are wasting assets with a limited economic life and that their market value and earning capacity are prone to fluctuation. Factors that determine the security interests that will be of practical value to a lender include:

a ships can be lost or completely destroyed or damaged beyond economic repair;
b they can be compulsorily requisitioned by their flag state;
c they can be captured by pirates or hostile states; they are potential sources of pollution; and
d they are subject to various regulatory regimes that may prevent them from navigating.

The security package will vary from deal to deal, depending on factors such as the bargaining position of the parties, regulatory considerations, the ownership structure of the ship, whether the ship is chartered out and current market conditions, as well as the condition of the ship itself. Nevertheless, most secured ship financings will include most, if not all, of the following security documents:

a ship mortgage (and collateral deed of covenants where relevant);
b assignment of insurances;
c assignment of earnings;
d assignment of charter rights;
e account security;
f shares security; and
g subordination undertakings from managers and charterer.

Given that ships tend to be owned by single-purpose companies, the lender may also seek a parent company guarantee (or a personal guarantee from an individual shareholder).

2 Aside from maintaining their respective registers, national ship registries administer regulatory oversight over ship operations. This generally covers technical and maintenance requirements, rights of seafarers, the tax treatment of ships and their earnings, and ship ownership requirements, which are of particular interest when discussing security. Some registries may require that a ship is owned by a locally registered entity.

i Ship mortgage

A ship mortgage is fundamental to any secured ship financing, as it provides the lender with the power of sale and the power to take possession of a ship to satisfy the borrower's loan obligations. A ship mortgage will be governed by the laws of the flag state, which determine both perfection requirements and the rights conferred by the mortgage. Any potential lender is able to inspect the public register maintained by the flag state to determine whether a ship is subject to other mortgages. The aim is to provide a lender with a degree of certainty with respect to where its mortgage will rank in comparison with competing mortgages (if any). Not all interests that attach to ships are registrable (some of which will take priority over a mortgagee's rights) and, as such, a lender is unable to ascertain with absolute certainty whether a ship is free from all encumbrances.

Apart from the laws of the flag state, the lender's rights and remedies are contained in the mortgage instrument (in the case of a 'long form' mortgage) and, where appropriate, a separate deed of covenant that supplements the mortgage instrument (in the case of a 'statutory' mortgage). Whether a long form or statutory mortgage is appropriate depends on the ship's flag state. As discussed in Section IV, the lender's right to take possession of a ship can be important in the event of enforcement.

ii Assignment of insurances

The operation and navigation of a ship in international trade exposes it to perils, unlike most other asset classes. Hence, the terms of the loan agreement will impose an obligation on the borrower to maintain appropriate insurance for the ship. The type of insurance will depend on, among other factors, the type of ship, her intended use and where she will be employed.

Recourse to insurance proceeds of a ship is a key component of a secured ship financing. For instance, if the vessel has suffered damage, the lender will want to see that the insurance proceeds are applied in repairing the ship. Furthermore, if the ship becomes a total loss, the lender will want to be able to directly apply the insurance proceeds in prepayment of the loan.

An assignment of insurances will generally also include an assignment of any requisition compensation, which is payable by a flag state to a shipowner in the (unlikely) event that the flag state appropriates title to the ship.

Pursuant to English law, there are various requirements to perfect a legal assignment.[3] In the context of security documentation, of particular relevance is the requirement to give notice to the other party to the assigned rights,[4] which, in the case of an assignment of insurances, will be the relevant insurer. In addition to the notice, a lender will usually require a letter of undertaking from the insurer in which the insurer typically undertakes to notify the lender of any material changes to the ship's coverage (for example, should coverage cease or the borrower not make premium payments), confirms that the lender's interests are noted and undertakes to pay out in accordance with the agreed loss payable clause (which notes the lender's interest).

3 Law of Property Act 1925, Section 136.

4 Should a legal assignment be defective because the notice requirement has not been satisfied, the assignment will be equitable in nature.

iii Assignment of earnings and accounts security

Similar to other assets, commercially operated ships derive most of their value based on their capacity to generate earnings. Since ships tend to be owned by single-purpose companies, the ship's employment earnings are commonly the only way that a borrower can satisfy its loan obligations. As earnings are so important in a ship financing, it is desirable for a lender to have a degree of control over them, and this often takes the form of an assignment of earnings in favour of the lender.

As part of the security package, the loan agreement will generally provide that the borrower must procure that the ship's earnings are paid into a specified account or series of accounts in its name, held with the lender, over which the lender will take security. The account will typically not be blocked unless a default has occurred but the borrower will be under an obligation to apply the ship's income in a predetermined way, possibly by distributing funds to specific blocked accounts to satisfy certain loan obligations; for example, interest payments.

iv Assignment of charters

When a ship is employed on a long-term charter (rather than being employed on the spot market), it is not unusual for the lender to require a specific assignment of the owner's rights under that charter. This is to give the lender a degree of control over the charter to be able to preserve it should the borrower fail to do so.

Just as in the context of assignments of insurances and earnings, notice is required to perfect an assignment of a charter. Although an acknowledgment is not required to ensure that the assignment is perfected, a lender often requires this from the charterer and includes a contractual obligation for the borrower to obtain this from the charterer. This acknowledgment from the charterer to the lender creates a direct contractual link between the lender and charterer and often includes additional rights in relation to the charter (for example, a right for the lender to step in and perform the charter) or obligations (for example, an obligation for the charterer to notify the lender directly of any breaches by the borrower) rather than the lender relying solely on its rights as an assignee.

The content of such notices and acknowledgements will depend on the commercial agreement between the parties and agreement with the charterer.

v Shares security

Another common requirement by lenders is security over the shares in the borrower. The typical ownership structure of a ship, in which she is owned by a single-purpose company, is advantageous here for a lender, as it effectively provides the option to take control of a ship in the capacity of shipowner in the case of an event of default, without exercising a ship mortgage. One risk of exercising share security, however, is that liabilities in connection with the ship can attach to the owner, which can inadvertently expose a lender to certain claims (for example, certain environmental liabilities).

vi Subordination undertakings from managers and charterers

As a result of the commercial operation of a ship, there are potentially numerous third parties that may have claims against the borrower or the ship, which, in the event of the borrower's insolvency or other default, may compete with (and may rank higher than) claims of the lender. To minimise the risk of competing claims against the borrower, the lender may request

that certain third parties provide undertakings that subordinate their claims to those of the lender arising under the finance documents, and only once the borrower's obligations to the lender are satisfied may those third parties commence enforcement.

Typically, these undertakings are given by charterers, ship managers (both commercial and technical managers where relevant) and other co-assureds to the ship's insurance policies. Whether subordination undertakings form part of the security package will depend on the parties involved and their respective bargaining positions.

IV DEFAULT AND ENFORCEMENT

Other than as specified in the loan agreement, a lender does not normally have a right to demand early repayment of the amounts outstanding under a term loan. Therefore, the loan agreement will specify certain events of default (i.e., events, circumstances or conditions that would give the lender the right to demand early repayment of amounts outstanding under the loan agreement).

The loan agreement may provide the borrower with the opportunity to remedy some defaults, particularly in respect of matters that are of comparatively less importance to a lender. Only with the expiry of the relevant grace period would the lender be able to exercise its rights and remedies under the loan agreement and to enforce its security.

Even so, when an event of default has occurred, in practice the lender is likely to reserve its rights in the first instance while it assesses its options. The earliest decisions that the lender will have to make include whether to negotiate with the borrower or to enforce its security. What the lender will choose to do often hinges on the state of the shipping market, the nature and severity of the default, the strength and outlook of the borrower, among other things.

i Negotiation

If the lender chooses to remain in the loan, instead of enforcing its security, it has a number of options:

a not to do anything (e.g., if it expects an upturn in the market); or

b reschedule or restructure the loan; for example, by agreeing a moratorium on the principal, extending the maturity date of the loan (and agreeing a balloon payment at the end of the maturity period), or advancing more funds to the borrower as working capital with the intention that the borrower will get back on its feet and service its debt properly again.

ii Enforcement of the ship mortgage

The lender's most valuable security is the mortgage over the ship. Therefore, although the lender has the option of appointing a receiver and the right of foreclosure, in practice the lender will commonly exercise one of the following options:

a arrest the ship and realise its security by way of a judicial sale;

b arrange a private sale; or

c take possession and operate the ship.

The viability of arresting a ship depends on where the default is effected. Each jurisdiction will have its own characteristics and the lender will want to consider carefully the procedure for arrest, the efficiency of the judicial system, the procedure for a judicial sale (including how

long it would take for sale proceeds to be released) and, importantly, the relative ranking of different creditors. The lender should also consider the timing of the arrest – whether the ship is laden with cargo and whether she is currently chartered out.

A judicial sale has a number of advantages: first, the borrower will find it difficult to allege that a proper price has not been paid; and second, the buyer of the ship will obtain good title, free of maritime liens and encumbrances. However, the procedure can be costly and may take some time, depending on the jurisdiction.

However, a private sale can be a more timely and cost-effective option (relative to arrest proceedings). The lender could either request that the borrower sells the ship itself or, depending on the jurisdiction, exercise its power of sale under the mortgage. In the case of a private sale, any maritime liens will follow the vessel and this may negatively affect the price that the lender can achieve.

Finally, the lender could simply take possession of the ship and operate it. This may be a temporary measure taken prior to selling the ship in a more favourable location, or the lender may choose to wait for an upturn in the market. Either way, however, the lender has certain obligations as a mortgagee in possession; for example, the lender becomes liable to pay the expenses incurred in the future operation of the ship (including any crew wages earned).

V RECENT DEVELOPMENTS

This new decade continues to be eventful with the shipping industry having to deal with the impact of the covid-19 pandemic, armed conflict and dramatic shifts in the oil price. However, even as the world grapples with widespread disruption, the market will have to address the discontinuance of a number of interbank lending rates and the growth of interest in environmental, social and governance (ESG) considerations.

i Discontinuance of interbank lending rates

Current position

Several major interbank lending rates (otherwise known as screen rates) used as benchmarks for the setting of interest rates under shipping loans have now been discontinued, including the majority of London Interbank Offered Rates (LIBOR) tenors. One, three, six and 12 month USD LIBOR will continue to be published until 30 June 2023, but since June 2021 the Alternative Rates Committee has recommended that no new loan products referencing USD LIBOR should be issued. In November 2022, the UK Financial Conduct Authority (FCA) proposed maintaining the publication of an unrepresentative 'synthetic' one, three and six USD LIBOR until the end of September 2024, after which publication would end entirely. This is undergoing a consultation process at the time of writing.

Lenders have therefore been actively transitioning existing loans away from LIBOR. The Secured Overnight Lending Rate (SOFR) published by the Federal Reserve Bank of New York is the recommended alternative to USD LIBOR. To facilitate a transition in the syndicated loan market, the Loan Market Association published exposure drafts and recommended forms of facility agreement that incorporate provisions for either a switch to risk-free rates (RFRs) or day one use of RFRs. These have been widely used by banks in the London loan market as the basis for documenting new USD loans referencing SOFR and re-documenting existing loans to reference SOFR instead of USD LIBOR. These forms can also be used for documenting bilateral USD loans that use SOFR, if amended appropriately. A key feature of amendments for transitioning loans is credit adjustment spreads. As LIBOR

represents the higher risk to lenders of lending over a term period, compared to the lower risk of an overnight rate, credit adjustment spreads allow for a fair conversion of LIBOR to SOFR without the lender having to accept a lower overall interest rate. On new loans, the credit adjustment is built into the margin.

Alternative reference rates for US dollars

As noted above, SOFR has been selected as the recommended alternative to USD LIBOR. Unlike LIBOR, which is a forward-looking term rate, SOFR is a backward-looking overnight rate. This means that a methodology for using SOFR to calculate the interest rate that applies to each interest period of a loan needs to be adopted. SOFR can be applied in the following ways:

a SOFR compounded in arrears;
b SOFR compounded in advance;
c simple daily SOFR in arrears; and
d term SOFR.

There are other possible alternatives to USD LIBOR, which include fixed rates, base rates and 'credit sensitive rates' (e.g., AMERIBOR and the Bloomberg Short Term Bank Yield Index).

Fixed rate and base rate referencing loans could be more appropriate for smaller loans where borrowers are not familiar with RFRs as such rates avoid the complexity associated with using RFRs such as SOFR, particularly when the compounding in arrears methodology is used.

Some US regional banks have been reluctant to use SOFR and have been using credit sensitive rates such as AMERIBOR. However, for UK regulated banks, the FCA has warned that it does not want to see transition to these rates because there is doubt as to whether they adequately address the problems identified in relation to LIBOR.

SOFR compounded in arrears

Compounding in arrears is the most common way in which SOFR and other RFRs have been applied. This approach is encouraged by both the Alternative Reference Rates Committee (ARRC) and the Sterling Working Group as being the most robust, being based on actual overnight rates.

While the ARRC encourages the use of SOFR compounded in arrears for most loans, there are some disadvantages. The main disadvantage as against term rates such as LIBOR is that it is not possible at the start of the interest period to calculate the interest payment that will be due at the end of the interest period. This has obvious implications for the borrower in terms of managing cashflows. Furthermore, the drafting required to document the use of a compounding in arrears methodology is considered by many to be more complex than the provisions used to document LIBOR based loans. This method of calculating interest can also give rise to operational issues (and additional costs) for lenders in terms of their preparation for issuing loans that use SOFR compounded in arrears. SOFR compounded in arrears is most commonly used in syndicated loans (and, in particular, where these have linked interest rate hedging), as the higher liquidity of the overnight market compared to the Term SOFR derivatives market generally results in lower costs for obtaining hedging.

SOFR may be compounded in advance using rates observed over a specified period prior to the start of the interest period. As with LIBOR, this allows the interest amount that

will be payable at the end of the interest period to be calculated at the start of the interest period. However, this may be unattractive to lenders as it will not reflect fluctuations in SOFR that occur through the interest period and may be perceived as being stale.

It is for this reason that SOFR compounded in arrears is most commonly found in syndicated loans incorporating interest rate hedges, with the hedging product providing the borrower with protections against adverse interest rate fluctuations.

Term SOFR

To avoid some of the disadvantages of using backwards looking RFRs compounded in arrears, much discussion has centred around the possibility of constructing term rates from overnight RFRs, which work in a similar way to LIBOR based loans. These are based on derivatives traded in the market that reference the relevant RFR. Such term rates would represent a market expectation of the average value of the relevant RFR over a designated tenor.

Term SOFR is published by CME Group and was endorsed by ARRC in July 2021 for business loans, particularly for multi-lender loans, mid-market loans and trade finance. The ARRC does, however, continue to encourage the use of overnight SOFR given its robustness. Notably, different regulators have differing approaches to the use of forward-looking RFR linked term rates, including Term SOFR, which may have contributed to the much slower uptake of Term SOFR in European syndicated loan markets in comparison to the equivalent US markets. Term SOFR is also still less widely used because lenders may have already made changes to loans prior to July 2021, before Term SOFR had been launched. Lenders may well be reluctant to incur costs in making further amendments.

Where suitable for use, the FCA has indicated that ARRC recommended practice for Term SOFR would be relevant for lenders undertaking USD business in London. The LMA published an exposure draft of its developing markets form of facility agreement that incorporate Term SOFR, noting that there was a particular demand for the use of Term SOFR in USD loans to entities in developing markets. The exposure draft, however, needs to be amended or supplemented, or both, to cover for certain eventualities, for example regarding fallback provisions in the case of the unavailability of SOFR.

ii ESG criteria

The general rise of impact investing has also led to the growth of interest in ESG criteria within the shipping industry, where many lenders are taking an increasingly close interest in the way borrowers' businesses are run. This in part is leading the rapid development of the kinds of environmental undertakings in loans, as well as the stringency of such undertakings. For instance, it is becoming increasingly commonplace for borrowers to undertake to ensure ships are recycled in an environmentally responsible fashion (commonly known as green recycling) and to provide lenders with data on carbon dioxide emissions that is specific to the financed vessel. At the time of writing, a total of 12 European financiers are now members of the Responsible Ship Recycling Standards (RSRS) for banks. These were drawn up by three Dutch banks in 2017 to create standards for responsible ship recycling, which their borrowers will have to sign up to. In addition to conventional vessels, mobile offshore units, such as oil and gas platforms, are now also included in the scope of the RSRS. Further, access to finance may also be conditional on compliance with the Poseidon Principles. Established in 2019 and now with 18 signatories, they create a commitment between the finance and shipping sectors to implement the International Maritime Organization's policies on climate change into ship

financing transactions. Compliance with these standards in exchange for lower margins for borrowers is becoming increasingly common. Shipowners who fail to adapt will increasingly have a competitive disadvantage in terms of access to financing on competitive terms.

Sustainable finance is now part of the European Union's Green Deal, which links the credit rating of financial institutions to ESG performance of their portfolio companies. Through more concrete regulations and principles, environmental considerations will become an integral part of loans and a key consideration for financial institutions, which will lead to shipping companies having to implement more rigid internal policies and encourage compliance with these policies.

It remains to be seen whether the role of ESG criteria and the rise in sustainability-linked loans will mark the next stage in the evolution of ship finance. Nevertheless, we would expect both to be key factors going forward.

iii Russia and Ukraine

Since 24 February 2022, numerous vessels have become stranded in Ukrainian ports following the imposition of navigation restrictions or the risk of seizure or attack by Russian forces. This serves as a reminder to financiers (and all other interests) of the need to carefully review each vessel's insurance cover (including war risks) and, where appropriate, require their borrowers to take out loss of hire insurance.

Chapter 12

AUSTRALIA

Gavin Vallely, Simon Shaddick, Tom Morrison and Carlita Bloecker[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The shipping industry is vital to Australia's economy, with approximately 80 per cent of Australia's imports and exports being carried by sea.[2] In terms of its ocean freight requirements, Australia has the 'fifth-largest shipping task in the world – a task that is forecast to double over the next 15 years'.[3] Notwithstanding the global economic downturn as a consequence of the covid-19 pandemic, some areas of the mining resources sector have maintained strong export levels, and China reopening to trade will inject confidence into the mining and agricultural export sectors. In recent years, Australia has had 'the world's fastest-growing cruise industry',[4] with passenger numbers increasing by an average of almost 20 per cent per year since 2008.[5] Per capita, Australia has had more cruise passengers than any other nation, once being the fourth-largest cruise market in the world.[6] Owing to the increased cost of operating Australian-flagged tonnage relative to international-flagged vessels, the national fleet has continued to decline, with only a small number of large cargo vessels flagged on the Australian Register, the majority of which are employed on Australian coastal trading services, access to which is restricted by federal cabotage legislation. Notwithstanding the cabotage restrictions, about 65 per cent of Australian coastal trading cargo is carried on international-flagged vessels.

i Vessels registered on Australian shipping registers

As at March 2023, the Australian Maritime Safety Authority (AMSA) ceased to report regularly on the number of ships on Australia's registry. However, there are currently 7,066 vessels listed as being entered on the Australian shipping register.[7] In terms of vessel types, they can be grouped generally as follows: roughly 230 cargo vessels, 325 passenger-carrying vessels, 4,000 pleasure craft, 1,740 fishing vessels and 500 specific purpose-type vessels.[8]

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1 Gavin Vallely and Simon Shaddick are partners and Tom Morrison and Carlita Bloecker are senior associates at HFW.

2 https://nationalindustryinsights.aisc.net.au/industries/transport/maritime.

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

4 PwC Australia, 'The economic contribution of the Australian maritime industry', prepared under instruction for the Australian Shipowners Association, February 2015.

5 Cruise Lines International Association, 'Cruise Industry Source Market Report', 2017.

6 https://nationalindustryinsights.aisc.net.au/industries/transport/maritime.

7 Australia Maritime Safety Authority (AMSA), 'List of Registered Ships', www.amsa.gov.au/vessels/shipping-registration/list-of-registered-ships/. All 7,066 vessels are on the Australian General Shipping Register and there are no vessels listed on the Australian International Shipping Register.

8 Note that approximately 259 of these vessels are tugs.

Of those vessels, only 707 hold International Maritime Organization (IMO) numbers,[9] comprising approximately 76 cargo vessels, 38 passenger-carrying vessels, 34 pleasure craft, 153 fishing vessels and 300 specific purpose-type vessels.[10]

ii Australian coastal trading

Australia has a substantial coastal sea freight task, which in 2020–2021 was reported to be 48.1 million tonnes, a 6.14 per cent decrease from 2019–2020. In 2018–2019, severe drought on the east coast resulted in an atypical 3.1 million tonne increase in coastal grain, mostly from western Australia to the east coast. In 2019–2020, this west-east coastal grain flow started to fall, and by 2020–2021 it had disappeared. Further, owing to the closure of the Kwinana petrol refinery in 2021, between 2019 and 2021 there was a fall of 1 million tonnes in coastal cargoes of petroleum.[11] To date, petroleum and dry bulk products remain the largest tonnage component of coastal freight. As at December 2022, there were approximately 75 vessels operating with a temporary licence[12] and, as at October 2022, there were 127 vessels operating under a general licence.[13]

All vessels that had transitional general licences granted have since surrendered their licences or the licence has expired.[14]

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

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

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

NOPSEMA reported that, in 2021–2022, it conducted 112 inspections of offshore facilities in Australia, which is a slight decrease in the number of inspections it carried out in 2020-2021.[15]

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

10 Of these, seven are floating production storage and offloading vessels.

11 Department of Infrastructure, Transport, Regional Development and Communications and the Arts, 'Australian Infrastructure and Transport Statistics – Yearbook 2022' (2022), https://www.bitre.gov.au/sites/default/files/documents/bitre-yearbook-2022.pdf.

12 Department of Infrastructure, Transport, Regional Development and Communications and the Arts, available at https://www.infrastructure.gov.au/department/media/publications/list-temporary-licences-granted-december-2022

13 Department of Infrastructure, Transport, Regional Development and Communications and the Arts, available at https://www.infrastructure.gov.au/department/media/publications/general-licences-granted.

14 https://www.infrastructure.gov.au/infrastructure-transport-vehicles/maritime/business/coastal_trading/licencing/granted/transitional.

15 NOPSEMA, 'Annual Report 2021–2022', available https://www.nopsema.gov.au/about/planning-and-reporting/annual-report.

iv Foreign-registered vessel calls to Australia

Data in relation to the exact number of foreign ships visiting Australia is limited; however, the Australian Maritime Safety Authority (AMSA) indicates that, in 2021, 6,170 foreign-registered vessels (an increase of 1.5 per cent) called at Australian ports. The average age of foreign-flagged ships calling at Australia was 11 years old.[16]

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

An important characteristic of the Australian legal system is the distinction between federal and state or territory laws, both of which are relevant to shipping. From a constitutional perspective, the Commonwealth (i.e., the federal level of Australian government) has the power to make laws with respect to trade and commerce, which extends to laws relating to navigation and shipping.[17] However, this does not preclude the six states[18] and two territories[19] from also making laws relating to shipping; the primary constraint is that, in the event of inconsistency between Commonwealth and state or territory law, Commonwealth law prevails to the extent of the inconsistency.[20]

From a territorial perspective, Australia has ratified the United Nations Convention on the Law of Sea 1982 (UNCLOS) and the Commonwealth exercises sovereign jurisdiction with respect to the territorial sea (i.e., 12 nautical miles seaward of the low-water mark or any proclaimed territorial sea baseline).[21] Again, this does not preclude the states and territories from legislating with respect to their coastal waters[22] and adjacent territorial sea, provided there is no inconsistency with Commonwealth law. The Commonwealth also exercises jurisdiction with respect to Australia's exclusive economic zone (EEZ).[23]

At the Commonwealth level, the primary legislation regulating shipping in Australia is the Navigation Act 2012 (Cth), which was redrafted and re-enacted in place of the 1912 Act that preceded it. One of the main functions of the 2012 Act is the restructuring of the regulation of Australian vessels and seafarers, and accommodating the removal into new legislation of the overhauled cabotage scheme for coastal trades in Australia.[24] The Navigation Act 2012 and other Commonwealth legislation also give effect to a wide range of international maritime conventions and treaties to which Australia is party. State and territory laws typically regulate recreational vessels, ports and harbours, and other maritime infrastructure located within state boundaries.

16 AMSA, 'Port State Control Australia: 2021 Report', https://www.amsa.gov.au/port-state-control-australia-2021-annual-report/year-review.

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

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

19 The Northern Territory and the Australian Capital Territory.

20 Commonwealth of Australia Constitution Act, Section 109.

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

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

23 See footnote 21.

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

III FORUM AND JURISDICTION

i Courts

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

In practice, however, most shipping and maritime disputes are litigated in the Federal Court of Australia. One of the main reasons for this is that the Federal Court has jurisdiction with respect to much of the shipping-related legislation in Australia, such as the Navigation Act 2012, and other Commonwealth legislation giving effect to international conventions.[25] The Federal Court also frequently exercises jurisdiction in admiralty, pursuant to the Admiralty Act 1988 (Cth). That Act provides for the commencement of proceedings *in personam* and *in rem* with respect to a wide range of categories of 'maritime claim'.[26] It is also fair to note that the Federal Court has developed greater experience in dealing with maritime litigation.

With regard to choice of law and jurisdiction, it is important to appreciate that there is no single common law of Australia, rather a separate common law in each state and territory. Accordingly, it is not appropriate for parties to stipulate that an agreement is governed by 'Australian law' and the law of a particular state or territory should be selected. Similarly, should contracting parties wish to submit to the jurisdiction of Australian courts, they should specify the courts of a particular state or territory. Finally, two shipping cases have confirmed that Australian courts will exercise jurisdiction over appropriate subject matter unless a party can positively establish that Australia is a 'clearly inappropriate forum'.[27]

ii Arbitration and ADR

Contracting parties are at liberty to agree to resolve their disputes by arbitration or other means of alternative dispute resolution, and Australian courts will give effect to such agreements. In particular, there is comprehensive legislation at both the Commonwealth and state or territory levels aimed at encouraging and facilitating the arbitration of commercial disputes. These laws regulate matters such as the commencement of arbitration, composition of tribunals, arbitral procedure, awards, appeals and enforcement. The legislation also addresses the extent to which Australian courts may intervene in the arbitral process, including an obligation to stay court proceedings in favour of arbitration in certain circumstances.[28]

Maritime arbitration in Australia is usually conducted pursuant to the International Arbitration Act 1974 (Cth), which regulates commercial arbitration in Australia between parties with places of business in different states. That Act gives effect to the most recent

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

26 Admiralty Act 1988 (Cth), Section 4. Admiralty jurisdiction is discussed further in Section V.

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

28 See, for example, International Arbitration Act 1974 (Cth), Section 7(2).

version of the UNCITRAL Model Law on International Commercial Arbitration.[29] It is noted that Australian courts generally recognise the related arbitration law principles of separability and competence,[30] and this has been confirmed in a shipping decision concerning an arbitration clause in a draft bill of lading.[31]

Although there is no provision for maritime-specific arbitration under Australian law, parties may agree to resolve their disputes pursuant to the arbitration rules and procedures of the Australian Maritime and Transport Arbitration Commission.[32] Those rules are intended to supplement the UNCITRAL Model Law.

There is also legislative provision for domestic arbitration in Australia, that is, arbitration between parties that have their place of business within Australia.[33] However, because of the large number of foreign participants in the Australian shipping industry, there is unlikely to be any significant amount of domestic maritime arbitration.

Mediation is frequently used as a means of alternative dispute resolution in Australia, including in shipping cases, and court case management procedures often require parties to mediate before the hearing of a dispute.

iii Enforcement of foreign judgments and arbitral awards

Certain foreign judgments may be enforced in Australia pursuant to the Foreign Judgments Act 1991 (Cth). A judgment creditor must apply to court to have a foreign judgment registered and the requirements for registration include that the judgment is 'final and conclusive' and, generally, that it is a money judgment and not for payment of foreign taxes, fines or penalties.[34] Registration is usually available in respect of judgments made in the countries listed in the Foreign Judgments Regulations 1992 (Cth), which include, for example, the United Kingdom but not the United States.

The Australian courts will generally recognise foreign arbitral awards and do so without significant delay. Australia is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), which is given local effect in the International Arbitration Act 1974 (Cth). Accordingly, foreign awards to which the New York Convention applies are generally recognised by and enforceable in Australian courts. The court may refuse to enforce a foreign award in certain circumstances, including the usual reasons (for example, relating to a defect in the composition of the tribunal)[35] as well as where an award concerns a dispute that would not be capable of resolution by arbitration under Australian law or where enforcement of the award would be contrary to public policy.[36]

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

30 Or 'severability' and kompetenz-kompetenz. See, e.g., Hancock Prospecting Pty Ltd v. Rinehart (2017) 350 ALR 658.

31 *Degroma Trading Inc v. Viva Energy Australia Pty Ltd* [2019] FCA 649, in which HFW acted for the successful shipowners.

32 The Australian Maritime and Transport Arbitration Commission is an industry association affiliated with the Australian Centre for International Commercial Arbitration; see further at www.amtac.org.au.

33 Uniform Commercial Arbitration Act legislation was enacted in each state and territory between 2010 and 2012.

34 Foreign Judgments Act 1991 (Cth), Section 5.

35 International Arbitration Act 1974 (Cth), Section 8(5).

36 ibid., Section 8(7).

In particular, an Australian court may refuse to enforce a foreign arbitral award where the award itself, or the underlying contractual agreement, is considered invalid under Australian law, notwithstanding that it is valid under the law governing the substantive dispute. This was the case in a first instance decision of the Federal Court of Australia, which refused to enforce a London arbitration award on a claim under a voyage charter party on the basis that the charter party in respect of which the award had been obtained was subject to mandatory Australian choice-of-law and jurisdiction provisions under federal legislation that rendered the award otiose in Australia.[37]

IV SHIPPING CONTRACTS

i Shipbuilding

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

ii Contracts of carriage

The Carriage of Goods by Sea Act 1991 (Cth) (COGSA) contains important, mandatory provisions concerning choice of law and jurisdiction in relation to contracts of carriage. Certain contracts for the carriage of goods from places in Australia to places outside Australia (outbound carriage) are deemed subject to Australian law (i.e., that of the state of the port of shipment). Any agreement to the contrary is invalid, as is any agreement that seeks to restrict the jurisdiction of Australian courts with respect to such a contract.[38] COGSA also invalidates any agreement that seeks to restrict jurisdiction with respect to carriage from places outside Australia to places in Australia (inbound carriage).[39] However, these mandatory provisions do not apply to sea carriage between Australian ports, with the somewhat curious consequence that parties are free to contract pursuant to foreign law and jurisdiction for such voyages (but not for outbound carriage).[40] This may, however, be an area for legislative reform in the near future.

The purpose of these provisions is to give local cargo interests the protection of Australia's laws and judicial system. The provisions are regularly relied on by parties who may otherwise have to pursue a carrier in a less favourable jurisdiction or under a less favourable cargo liability regime. As discussed in Section III.iii, they can also be relied on, for example, to resist local enforcement of a foreign judgment or arbitration award obtained pursuant to an agreement that contravenes the mandatory provisions.[41]

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

38 Carriage of Goods by Sea Act 1991 (Cth), Section 11(2), Paragraphs (a) and (b).

39 ibid., Section 11(2)(c).

40 *The 'BBC Nile'* [2022] FCAFC 171.

41 See, for example, the decisions referred to in footnote 37.

An important consequence of these mandatory provisions is that, when a contract of carriage is subject to Australian law through the operation of COGSA and in certain other cases in which an Australian court has jurisdiction, cargo liability may be regulated by a modified version of the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules) (the Modified Rules).[42] These Rules primarily apply to contracts for outbound carriage.[43] They also apply in respect of sea carriage between Australian ports, except when carriage is between ports within the same state or territory.[44] Further, the Modified Rules apply in respect of inbound carriage if another international cargo liability regime does not otherwise apply by agreement or law.[45]

The Modified Rules regulate cargo liabilities in respect of 'sea carriage documents' (defined as including bills of lading and certain types of consignment note, sea waybills and ship delivery orders),[46] which need not necessarily be documents of title. The Modified Rules apply, therefore, to a broader range of shipping documents than the Hague-Visby Rules. A decision of the Full Court of the Federal Court of Australia, however, has held that a voyage charter party is not a sea carriage document, thereby largely resolving a point of law that had given rise to considerable uncertainty in Australian maritime law.[47]

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

iii Cargo claims

The question of title to sue under bills of lading, sea waybills and ship delivery orders is the subject of uniform legislation in each Australian state and territory,[48] based on the Bills of Lading Act 1855 (UK). In the case of a bill of lading, for example, a cargo interest will need to prove that it is the lawful holder of the bill to have title to sue the carrier under the contract of carriage evidenced by the bill.[49]

A cargo interest with title to sue must establish, based on the proper construction of the contract of carriage and the mandatory provisions of COGSA, which cargo liability regime regulates its claim. This can be a complex inquiry that will depend on the circumstances of each case. However, there is a range of circumstances in which the Modified Rules will apply to a cargo claim brought in Australia.[50]

The obligations and immunities of the carrier under the Modified Rules are generally consistent with the Hague-Visby Rules, with three important qualifications. First, the period of the carrier's responsibility under the Modified Rules commences when goods are delivered

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

43 ibid., Section 10, and Schedule 1A, Article 10(1).

44 ibid., Section 10, and Schedule 1A, Article 10(4).

45 ibid., Schedule 1A, Article 10(2).

46 ibid., Schedule 1A, Article 1(1)(g).

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

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

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

50 The application of the Modified Rules is discussed generally in Section IV.ii.

to the carrier within a port, and ends with delivery to the consignee within the destination port.[51] This extension is most relevant to containerised cargo, which is generally delivered to and by the carrier at the container terminal. If cargo is shipped on a free in/free out basis, delivery to and by the carrier at both ends occurs on board, in which case the mandatory period of responsibility is limited to the 'tackle-to-tackle' period. Second, the Modified Rules apply generally to the carriage of goods on or above deck.[52] Third, the Modified Rules contain additional provisions that render the carrier liable for delay in certain situations.[53]

With regard to the carrier's right to limit liability, the Modified Rules incorporate the amendments to the Hague-Visby rules effected by the Protocol of 1979 to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the SDR Protocol 1979). Accordingly, the carrier is generally entitled to limit its liability to the greater of 666.67 special drawing rights (SDRs) per unit or 2 SDRs per kilogram, unless the nature and value of the goods is declared.[54] As with the Hague-Visby Rules, the Modified Rules incorporate a one-year time bar for bringing suit against the carrier.[55] Finally, in the event that the Modified Rules apply, the carrier is not usually permitted to contract out.[56]

iv Limitation of liability

Australia is party to, and has incorporated into domestic legislation, the Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC Convention 1976) and the Protocol to amend the LLMC Convention 1996 (the 1996 LLMC Protocol) (the Limitation Convention).[57] The 2012 Amendment to the 1996 Protocol (which increases the limits of liability) entered into force in Australia on 8 June 2015.[58]

Accordingly, an owner, charterer, manager, operator and salvor of a ship are entitled to limit liability with respect to certain maritime claims in accordance with the Limitation Convention, including the increased limits of liability under the 2015 amendments. Australia is also party to, and has incorporated domestically, the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (the Bunker Convention),[59] which preserves the right to limit liability under the Limitation Convention with respect to certain claims concerning bunker oil pollution damage.[60]

There have been a number of Australian court decisions concerning the application and interpretation of the Limitation Convention. In one decision, for example, the Federal Court of Australia decided (apparently, for the first time in relation to the Limitation Convention) that claims for pure economic loss are subject to limitation.[61] In another decision, the same Court determined that the facts of a marine casualty gave rise to two 'distinct occasions',

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

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

53 ibid., Schedule 1A, Article 4A.

54 ibid., Schedule 1A, Article 4(5).

55 ibid., Schedule 1A, Article 3(6).

56 ibid., Schedule 1A, Article 3(8). See, however, Articles 6 and 6A.

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

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

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

60 International Convention on Civil Liability for Bunker Oil Pollution Damage 2001, Article 6.

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

with the result that a shipowner was required to constitute two limitation funds in respect of the casualty.[62] It should be added that shipping incidents have generated some controversy surrounding a shipowner's right to limit liability, and the issue may be the subject of further political and media attention in the event of a serious casualty in Australian waters.[63]

If a claimant seeks to argue that a shipowner is guilty of conduct barring limitation under Article 4 of the Limitation Convention, the shipowner may be required to provide security for claims in excess of the limitation amount, even if the claimant's argument is very unlikely to succeed.[64]

Australia is also party to, and has incorporated into domestic legislation, the International Convention on Civil Liability for Oil Pollution Damage 1969 (the CLC Convention) and the Protocol of 1992 and the further amendments of 2000 (the Civil Liability Convention).[65] A shipowner is therefore entitled to limit liability with respect to certain claims for oil pollution damage in accordance with the Civil Liability Convention, including the increased limits of liability under the 2000 amendments.[66]

An important issue arising under both the Limitation Convention and the Civil Liability Convention concerns the application of these conventions to a ship. The former contains no definition of 'ship' and the latter contains a definition that is often regarded as convoluted and ambiguous.[67] The vexed question of exactly what amounts to a ship in these conventions, and in other maritime legislation, is especially relevant in Australian waters, where a range of unique offshore craft is engaged in the exploration and production of oil and gas. The issue creates considerable uncertainty for many participants in the offshore marine sector and remains the subject of debate.[68] For instance, in the context of ship arrest, which is addressed in Section V.i, the Federal Court of Australia has held that a remotely operated vehicle was not a ship and, therefore, could not be subject to arrest.[69]

V REMEDIES

i Ship arrest

Australia is an 'arrest-friendly' jurisdiction, in which ships can be arrested quickly and efficiently. Although Australia is not a signatory to the international conventions on ship arrest, the Admiralty Act 1988 (Cth) largely gives effect to the regime of the International Convention Relating to the Arrest of Sea-Going Ships 1952 (the Brussels Convention). The Act also provides for the admiralty jurisdiction of certain Australian courts, and sets out other rules for arrests and *in rem* proceedings. It is widely accepted, however, that the Act does not permit the arrest of bunkers separately from the ship on which they are loaded.[70]

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

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

63 As with, for example, the case of *The 'Pacific Adventurer'* in the State of Queensland in 2009.

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

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

66 IMO Resolution LEG.1(82) adopted on 18 October 2000.

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

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

69 *Guardian Offshore AU Pty Ltd v. Saab Seaeye Leopard 1702 ROV Lately On Board The Ship 'Offshore Guardian'* [2020] FCA 273.

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

a a common law maritime lien in respect of the ship;[71]

b a defined 'proprietary maritime claim' concerning the ship, which includes claims relating to possession, title, ownership and mortgage;[72] and

c a defined 'general maritime claim', where, in most cases, the owner of the ship must be the same when the claim arises and when *in rem* proceedings are commenced.[73]

The 'general maritime claims' listed in the Admiralty Act are broader in scope than the claims set out in the Brussels Convention. For example, the Admiralty Act permits arrest for claims in relation to services supplied to a ship[74] and claims for insurance premiums or protection and indemnity club calls in relation to a ship.[75] The Federal Court of Australia, however, has decided that a claim under a forward freight agreement was insufficiently connected to the carriage of goods to permit an arrest.[76]

Further, although a claim in respect of bunkers supplied to a ship would fall within the definition of 'general maritime claim',[77] it would be necessary for the claimant to establish a cause of action directly against the shipowner (rather than against a time charterer). In a decision of 2016,[78] the Full Court of the Federal Court unanimously rejected a physical bunker supplier's arrest based on a foreign law maritime lien for necessaries, although no such lien exists under Australian law. Four of the five judges adopted the majority's approach in *Bankers Trust International Ltd v. Todd Shipyards Corporation (the Halcyon Isle)*,[79] in which it was held that the foreign right should be 'classified and characterised by reference to the law of the forum'. This decision confirms that the Australian law position in respect of maritime liens arising under foreign law is in line with English and Singaporean law.[80]

The Admiralty Act also provides for the arrest of a sister ship in the event of a 'general maritime claim'.[81] To proceed against a sister ship, a claimant must establish that the interest in the ship on which the claim arises is also the owner of the sister ship at the time of arrest. Although 'owner' is not defined, it has been decided that the term is not restricted to the registered owner and may extend to a beneficial owner in certain circumstances.[82] However, beneficial ownership cannot be established simply by reason of a company being a subsidiary or related company of another and, accordingly, the concept of 'associated ship arrest' that exists in some jurisdictions does not apply in Australia.[83]

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

72 ibid., Sections 4(2) and 16.

73 ibid., Sections 4(3) and 17.

74 ibid., Section 4(3)(m).

75 ibid., Section 4(3)(s).

76 See *Transfield ER Futures Ltd v. The Ship 'Giovanna Iuliano'* (2012) 292 ALR 17.

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

78 See *'Sam Hawk' v. Reiter Petroleum Inc* [2016] FCAFC 26.

79 [1981] AC 221.

80 See further: www.hfw.com/Arrest-of-the-SAM-HAWK-October-2016.

81 Admiralty Act 1988 (Cth),Section 19, in which the term 'surrogate ship' rather than 'sister ship' is used.

82 See *Malaysia Shipyard v. 'Iron Shortland' as surrogate for the 'Newcastle Pride'* (1995) 131 ALR 738.

83 The court will only pierce the corporate veil when there is evidence of fraud. See further *Comandate Marine Corp v. The Ship 'Boomerang I'* (2006) 234 ALR 169, *Safezone Pty Ltd v. The Ship 'Island Sun'* (2004) 215 ALR 690, and the decision in *Korea Shipping Corporation v. Lord Energy SA* [2018] FCAFC 201, in which HFW acted for the successful appellant.

An arresting party is not required to pursue its substantive claim in Australia, and so an arrest can be effected purely to obtain security for a claim.[84] However, an arresting party must give full and frank disclosure of all known facts material to the arrest,[85] provide a deposit up front and give an undertaking in respect of the Admiralty Marshal's costs and expenses relating to the arrest.[86] The level of deposit to be provided depends on the place of arrest but is usually in the region of A$10,000. Finally, an arresting party may be liable in damages for 'unreasonably and without good cause' demanding excessive arrest security, obtaining an arrest or failing to consent to release from arrest.[87]

ii Court orders for sale of a vessel

The Admiralty Rules 1988 (Cth) empower the court, at any stage during *in rem* proceedings, to order that an arrested ship be valued or sold (or both).[88] Usually, the order is made on the application of a party to the proceeding; however, the Admiralty Rules also provide that the court may, *ex officio*, order the sale of an arrested ship that is 'deteriorating in value'.[89] Experience suggests that the Federal Court, which most frequently exercises *in rem* jurisdiction, is generally amenable to granting prompt orders for the valuation and sale of an arrested ship.[90]

The Court has a wide general discretion to make an order for valuation or sale,[91] and may order a sale by auction, public tender or any other method, in each case to be conducted by the Admiralty Marshal.[92] To obtain an order for valuation or sale, the applicant must give an undertaking in respect of the Admiralty Marshal's costs and expenses relating to the order made.[93]

VI REGULATION

i Safety

The marine safety regulation regime in Australia is based on the International Convention for the Safety of Life at Sea 1974 (SOLAS) and other international conventions that adopt various international maritime safety standards.[94] Australia's obligations under SOLAS extend to the 'verified gross mass' regulations, which are implemented through Marine Order 42 (carriage, stowage and securing of cargoes and containers) 2016, which commenced on 1 July 2016.

84 Admiralty Act 1988 (Cth), Section 29.

85 See *Atlasnavios Navegacao LDA v. The Ship 'Xin Tai Hai'* (No. 2) (2012) 301 ALR 357.

86 Admiralty Rules 1988 (Cth), Rule 41.

87 ibid., Section 34.

88 ibid., Rule 69.

89 ibid., Rule 69(5).

90 See, for example, *Bank of China Ltd v. The Ship 'Hai Shi'* (No. 2) [2013] FCA 225, and *Dan-Bunkering (Singapore) Pte Ltd v The Ship 'Yangtze Fortune'* [2022] FCA 1556

91 See *Marinis Ship Suppliers Pty Ltd v. The Ship 'Ionian Mariner'* (1995) 59 FCR 245.

92 Admiralty Rules 1988 (Cth), Rule 70.

93 ibid., Rule 69(4).

94 See, for example, the International Convention on the Tonnage Measurement of Ships 1969 and the International Convention on Load Lines 1966.

In particular, Australia's marine safety regime incorporates IMO codes,[95] industry-recognised codes[96] and other relevant marine safety convention requirements. In some cases, however, a higher degree of safety regulation compliance is required under Australian law and those requirements are expressly implemented by way of specific regulations.

In 2013, the marine safety regulatory regime in Australia was restructured.[97] AMSA at that point became the national marine safety regulator for all commercial vessels and now regulates a much greater number of coastal vessels than previously.[98] The state and territory marine regulators have retained responsibility for marine safety regulation of recreational vessels only.

The legislation implementing the marine safety regulation structure are the Navigation Act 2012 (Cth) and the Marine Safety (Domestic Commercial Vessel) National Laws Act 2012 (Cth). This legislation enables marine safety regulations and marine orders[99] to be created for regulatory purposes. Although marine safety compliance provisions can be found in both Acts and their associated regulations, specific safety compliance details are generally prescribed by way of marine orders.

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

ii Port state control

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

The legislative provisions empowering AMSA to inspect foreign ships, issue notices for deficiencies and detain foreign vessels as a result of marine safety issues are found in Chapter 8, Part 4 of the Navigation Act 2012 (Cth).[100]

Australia has a rigorous system of port state control. In 2021, of the 26,400 ship visits to Australia (by 6,170 foreign-flagged vessels), AMSA performed 2,820 port state control inspections.[101] As a result, 6,242 deficiencies were found (a decrease of 2.3 per cent on the previous year); 159 vessels were detained because of the severity of those deficiencies.[102] In

95 Examples include the International Maritime Dangerous Goods Code 2004 (the IMDG Code), the International Maritime Solid Bulk Cargoes Code 2011 (the IMSBC Code), the Code of Safety for Special Purpose Ships, the International Safety Management Code 1998 (the ISM Code) and the International Code of Signals.

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

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

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

99 Marine Safety (Domestic Commercial Vessel) National Laws Act 2012 (Cth), Section 163; Navigation Act 2012 (Cth), Section 342.

100 Environmental enforcement powers are dealt with separately.

101 AMSA, 'Port State Control Australia, 2021 Report', https://www.amsa.gov.au/port-state-control-australia-2021-annual-report/year-review.

102 ibid.

general, the deficiencies on detained vessels concerned international safety management, emergency systems, life-saving appliances, fire safety, water-tight or weather-tight conditions and increasingly public examples of underpayment of crew.[103] In the past year, AMSA used its power to ban four vessels from entering Australian ports for three to six months for underpayment of crew and sustained poor performance of the ship operator.

AMSA no longer publishes monthly detention lists on its website and are now found on the Tokyo Memorandum of Understanding on Port State Control in the Asia-Pacific Region 1994 (the Tokyo MOU) website. These lists identify the particulars of a detained vessel: its registered owner, the International Safety Management Code (the ISM Code) manager and classification society, and a description of the deficiencies found. In some cases, images of deficiencies are provided.

Australia has entered into port state control memoranda with the Indian Ocean Memorandum of Understanding (IOMOU) and the Tokyo MOU.

In maintaining its rigorous port state control inspection strategies, AMSA also participates in 'focused inspection campaigns' in cooperation with port state control MOU groups. Industry is advised publicly of any planned focused inspection campaign one month before it commences through the issuance of an Australian notice to mariners.[104] Following a number of highly publicised instances of containers being lost during weather events known as 'east coast lows' on the Australian Eastern Seaboard, AMSA has issued a further marine notice to remind vessel owners, operators and masters of the importance of stowing and securing cargo containers in accordance with Chapter VI of SOLAS. AMSA are presently engaged in an inspection campaign focused on livestock vessels.

iii Registration and classification

The primary legislation governing ship registration in Australia is the Shipping Registration Act 1981 (Cth) (SRA), with its associated regulations.[105] The SRA sets out the conditions for ship registration and the granting of Australian nationality to ships. Once registered, the SRA imposes obligations on the owner or registered agent to ensure the register remains current.

The SRA also established the Australian Shipping Registration Office (located within the Canberra office of AMSA), the responsibilities of which include the establishment of the ownership of ships, the granting of certificates, the issuing of continuous synopsis records to ships required to carry them and providing public access to the information held in Australia's ship registries.[106]

Australia has two registers: the Australian General Register (AGR) and the Australian International Shipping Register (AISR). The AGR is primarily used for domestic vessels and internationally certified Australian vessels. The AISR is intended to record international trading ships that meet specific criteria.

103 ibid., page 6.

104 Notices to mariners are available on the AMSA website.

105 The Australian Shipping Registration Regulations 1981 (Cth).

106 Extract from the AMSA website: www.amsa.gov.au/vessels-operators/ship-registration.

A guide to registering ships in Australia can be found on the AMSA website.[107] All Australian-owned commercial ships of 24 metres or more in tonnage length capable of navigating the high seas must be registered.[108] All other craft, including government ships, fishing and pleasure craft need not be registered, but may be if the owners desire.[109]

Any ship demise chartered to an Australian-based operator, or any craft under 12 metres in length, owned or operated by Australian residents, nationals or both, can be registered if the owner or operator wishes.[110]

It is important to note that the AGR and the AISR only contain matters required or permitted by the SRA to be entered in the register. Registers no longer include details regarding mortgages, liens and other financial or security interests in a vessel. Any financial or security interests must be registered on the Personal Property Securities Register (PPSR), which is an entirely separate register operated by a separate government body.[111] The interest of an owner or bareboat charterer may also be registered on the PPSR.[112]

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

iv Environmental regulation

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

The principal marine environmental convention enacted into Australian law is the International Convention for the Prevention of Pollution from Ships 1973 (as modified by the Protocol of 1978) (MARPOL (73/78)). Other relevant environmental legislation prohibits pollution by ship anti-fouling paint[113] and the introduction of invasive marine species from contaminated ballast water.[114]

107 AMSA, 'Guide to the Registration of a Ship'; see also www.amsa.gov.au/vessels-operators/ship-registration/australian-international-shipping-register.

108 Shipping Registration Act 1981 (Cth), Sections 12 and 13.

109 ibid., Sections 13 and 14.

110 ibid., Sections 9 and 14.

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

112 See Personal Property Securities Act 2009 (Cth), Section 13, relating to a 'PPS Lease'.

113 Protection of the Sea (Harmful Anti-fouling Systems) Act 2006 (Cth) and Marine Order 98 – Marine pollution Anti-fouling systems, which give effect to the International Convention on the Control of Harmful Anti-Fouling Systems on Ships 2001.

114 Ballast Water Act 2015 (Cth). The 'Australian Ballast Water Management Requirements' information is available from the Department of Agriculture and Water Resources, which align with the International Convention for the Control and Management of Ships' Ballast Water and Sediments (the Ballast Water Management Convention).

Ship operational pollution prevention obligations under MARPOL are enacted in Australia under the Navigation Act 2012 (Cth) and Marine Orders.[115] These obligations are applicable to Australian vessels anywhere in the world, as well as foreign vessels within Australian waters. The federal enforcement legislation relevant to pollution events is the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 (Cth) (MARPOL legislation), which include provisions giving effect to components of the IMO 2020 regulations.

Each state or territory also has its own applicable enforcement legislation used for ship operational pollution events.[116]

In its 2014–2015 annual report, AMSA indicated that within the reporting year it had secured one successful prosecution for breach of the MARPOL legislation.[117] However, since then, no successful MARPOL prosecutions have been reported by AMSA.

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

a the container carrier ANL *Kardinia*, prosecuted under the MARPOL legislation for offences concerning disposal of rubbish near the Townsville coast;[118]

b the container carrier MSC *Carla*, prosecuted under the Marine Pollution Act 1987 (NSW) for oil pollution in the port of Botany Bay;[119]

c the tugboat *Wato* prosecuted under the Marine Pollution Act 1987 (NSW) for oil pollution into Newcastle Harbour;[120] and

d the container carrier *Pacific Adventurer*, prosecuted under the Transport Operations (Marine Pollution) Act 1995 (QLD) for oil pollution off the shore of Moreton Island, Queensland.[121]

In Australia, as in other countries, the new global upper limit on the sulphur content of ships' fuel oil set out in IMO 2020: Consistent Implementation of MARPOL Annex VI has come into effect. In 2020, one vessel, the MV *Chiyotamou*, received a formal warning letter from AMSA for a defective exhaust gas cleaning system and insufficient compliant fuel for

115 Marine Order 91 – Oil; Marine Order 93 – Noxious liquids substances; Marine Order 94 – Packaged harmful substances; Marine Order 95 – Garbage; Marine Order 96 – Sewage; and Marine Order 97 – Air pollution.

116 Legislation includes: the Marine Pollution Act 2012 (NSW), the Protection of Marine Waters (Prevention of Pollution from Ships) Act 1987 (SA), the Pollution of Waters by Oil and Noxious Substances Act 1987 (WA), the Pollution of Waters by Oil and Noxious Substances Act 1986 (Vic), Marine-related Incidents (MARPOL Implementation) Act 2020 (Tas), the Environment Protection Act 1970 (Vic), the Transport Operations (Marine Pollution) Act 1995 (Qld) and the Marine Pollution Act 1999 (NT).

117 AMSA, 'Annual Report 2015–2016', page 33. The prosecution was in relation to the *ANL Kardinia* for disposal of food waste into the sea in the Great Barrier Reef Marine Park, February 2015.

118 https://www.amsa.gov.au/news-community/news-and-media-releases/master-and-owner-found-guilty-illegal-garbage-disposal-great.

119 (1 September 2009) *Filipowski v. Hermania Holdings SA*; *Filipowski v. Rajagopalan (No. 2)* [2009] NSWLEC 104.

120 *Newcastle Port Corporation trading as Port Authority of New South Wales v Dudgeon*; *Newcastle Port Corporation trading as Port Authority of New South Wales v Svitzer Australia Pty Limited* [2015] NSWLEC 139.

121 (14 October 2011) Indictment No. 2355 of 2010, *The Queen v. Bernardino Gonzales Santos and Ors* [2011] QDC 254.

the voyage. This is despite the vessel reporting the failure through a Fuel Oil Non-Availability Report. Other examples include AMSA's inspections uncovering high-sulphur fuel being stored on board vessels after the 1 March 2020 carriage ban.

v Collisions, salvage and wrecks

Collisions

Australian Commonwealth and state or territory maritime legislation[122] give effect to the International Regulations for Preventing Collisions at Sea 1972 (COLREGs). The application of the Commonwealth and state or territory legislation giving effect to the COLREGS will depend upon the type of vessel concerned and the location of the relevant collision.

Domestic commercial vessels and recreational craft must comply with the COLREGs that apply to them through state or territory legislation when a vessel is within the legislative jurisdiction[123] of that state or territory.[124]

Wrecks

Legislation relating to wrecks and salvage is set out in Chapter 7 of the Navigation Act 2012 (Cth) and in various pieces of state or territory legislation that confer miscellaneous powers on port authorities and harbour masters in relation to wrecks and salvage. Part 2 of Chapter 7 of the Navigation Act 2012 (Cth)[125] applies only to regulated Australian vessels and foreign vessels, and places a mandatory obligation on the owner and master to notify AMSA of a wreck.[126]

For domestic commercial vessels, the Marine Safety (Domestic Commercial Vessel) National Laws Act 2012 (Cth) does not contain a provision expressly for wrecks but confirms the continuing application of state or territory laws on this matter.[127]

Following the loss of containers off the New South Wales coast from the YM *Efficiency* in 2018 and the APL *England* in 2020, the Department of Infrastructure, Transport, Regional Development and Communications commenced a consultation process with select stakeholders to determine whether Australia would benefit from adopting the Nairobi International Convention on the Removal of Wrecks 2007 (Nairobi WRC 2007). While the consultation has closed, the Department has not yet released its report.

AMSA brought proceedings against the owners of the YM *Efficiency*[128] in the Federal Court of Australia in 2020, and the proceedings were settled on an undisclosed basis August

122 See for example, Navigation Act 2012 (Cth); Marine Order 30 – Prevention of Collisions (Cth); Marine Safety Act 2010 (Vic); Marine Safety Regulations 2012 (Vic); Transport Operations (Marine Safety) Act 1994 (Qld) and Transport Operations (Marine Safety Regulations 2016 (Qld).

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

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

125 Relating to wrecks.

126 Navigation Act 2012 (Cth), Section 232.

127 Marine Safety (Domestic Commercial Vessel) National Laws Act 2012 (Cth), Section 6(2)(b)(viii).

128 *Australian Maritime Safety Authority v. The 'YM Eternity' as a surrogate ship*, Federal Court No. NSD121/2020.

2021. The proceedings would have been a test case on the jurisdictional reach of AMSA's powers to recover costs arising from combating pollution, including container retrieval operations in relation to the containers that are lost overboard in Australia's EEZ. Among other things, the circumstances of the case have highlighted potential complications resulting from the differences between the Nairobi WRC 2007 and the Navigation Act 2012 (Cth), in particular how the definition of 'wreck' in the Act does not extend to goods or cargo that have been lost overboard from a ship, unless the ship is also 'wrecked, derelict, stranded, sunk, abandoned, foundered or in distress', whereas the Nairobi WRC 2007 includes 'any object that is lost at sea from a ship and that is stranded, sunken or adrift at sea'[129] where there has been a 'maritime casualty', which is defined as 'a collision of ships, stranding or other incident of navigation, or other occurrence on board a ship or external to it, resulting in material damage or imminent threat of material damage to a ship or its cargo'.[130]

Salvage

Australia has adopted the International Convention on Salvage 1989 (the 1989 Salvage Convention) into Australian law but not all its articles. At present, only certain Articles are adopted through marine regulations permitted by Part 3 of Chapter 7 of the Navigation Act 2012 (Cth). The adopted Articles are listed in Regulation 17 of the Navigation Regulation 2013 (Cth), which also adopts the Convention's common understanding for Articles 13 and 14.[131]

vi Passengers' rights

In November 2017, the Australian government released a discussion paper concerning the Carriage of Passengers and their Luggage by Sea. This discussion paper was prepared as part of a consultation process on Australia's possible ratification of the Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974 (the Athens Convention). The matter was under consideration as a consequence of, among other things, a significant increase in the number of international cruise passengers visiting Australia in recent years. The purpose of the consultation process was to assess the adequacy of the current legal framework regarding the international carriage of passengers by sea, particularly the compensation and liability regime for passengers, and the commercial implications if Australia were to ratify the Athens Convention. After a lengthy consultation with relevant stakeholders, on 28 October 2020, the government decided that Australia would not accede to the Athens Convention.[132] It appears, therefore, that Australia is unlikely to become a party to the Convention in the near future.

A shipowner is obliged to report to AMSA any incident that involves the death or serious injury of a person, including a passenger, and failure to do so is an offence.[133]

A passenger's passage money is treated as being equivalent to freight. Therefore, the master has a lien on the passenger's luggage for unpaid passage money. If the ship is lost before the contracted voyage commences, the passage money is returnable. Once a voyage

129 Nairobi International Convention on the Removal of Wrecks 2007, Article 1(4).

130 ibid., Article 1(3).

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

132 See https://ris.pmc.gov.au/2020/11/18/athens-convention.

133 Navigation Act 2012 (Cth), Section 185(2).

has commenced, passage money is generally not returnable. If the voyage is a pleasure cruise, however, the loss of a ship may give rise to a claim for breach of contract on the basis of the distress and disappointment caused by the loss.

Claims for death or personal injury sustained in consequence of a defect in a ship or its equipment, or arising out of an act or omission by the shipowner (or any person for whose actions the shipowner or charterer is vicariously liable) are general maritime claims for the purposes of federal jurisdiction. Alternatively, claims for loss of life or personal injury may be brought in the Australian state courts. These claims are generally claims in contract or in tort in favour of the affected passenger or his or her estate. The carrier owes a duty to passengers to take reasonable care in respect of their safety.

Passenger claims for loss of life or personal injury brought by a person carried in a ship under a contract of passenger carriage[134] are subject to a limitation of liability in the amount of 175,000 units of account multiplied by the number of passengers the ship's certificate authorises it to carry.[135]

vii Seafarers' rights

The Maritime Labour Convention 2006 (MLC) came into force in Australia on 20 August 2013.

Pursuant to the Navigation Act 2012 (Cth), Marine Order 11 (among other Marine Orders, which are legislative instruments under the Navigation Act) and the Marine Safety (Domestic Commercial Vessel) National Law Act 2012 (Cth), many aspects of the MLC are mandatory for regulated Australian vessels.[136]

The MLC applies to all seafarers with few exceptions.[137] When the MLC is not applicable, the provisions of the Fair Work Act 2009 (Cth) operate to require minimum terms and conditions for seafarers.

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

AMSA has the power to detain vessels or refuse access to Australia for failure to comply with the MLC and has done so as recently as March 2023, when the Dutch-flagged bulk carrier *Flevogracht* was refused access to Australia for three months.[138] AMSA reported it found sustained poor performance of the ship operator as a result of multiple detentions of the company's ships.

134 LLMC Convention 1976, Article 7(2)(a). Or who, with the consent of the carrier, is accompanying a vehicle or live animals covered by a contract for the carriage of goods (Article 7(2)(b)n).

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

136 As defined by the Navigation Act 2012 (Cth), Section 15.

137 As defined by the Navigation Act 2012 (Cth), Section 14.

138 https://www.amsa.gov.au/vessels-operators/port-state-control/refusal-access-list-and-letters-warning-list.

VII OUTLOOK

Despite becoming the world's largest producer and exporter of liquefied natural gas (LNG) in 2019, parts of Australia are still experiencing significant energy supply issues, with consequent increases in both wholesale and retail domestic energy prices. To address this growing problem, some local energy companies have been considering the possibility of importing cheaper foreign products, such as LNG and liquefied petroleum gas, for domestic use. In addition to an increase in shipping activity, these projects would require the construction and operation of appropriate import terminals, with connections to existing distribution networks. At least three operators have been actively considering using a floating storage and regasification unit (FSRU). Construction for an FSRU terminal at Port Kembla (NSW) commenced in 2021, and other FSRUs have been proposed for Newcastle (NSW) and Corio Bay (VIC). These projects, if they proceed, are expected to give rise to a range of novel operational, regulatory and commercial considerations, as no FSRU has previously operated in Australia.

In relation to maritime safety, AMSA continues to exercise its powers to ban vessels that experience repeated breaches resulting in detentions from Australian ports, on the basis that they pose an increased risk to seafarers, vessels or the environment.[139] We expect this practice to continue. Five vessels were banned in 2020 for at least three months and in 2021, one vessel was banned for 24 months. Foreign-flagged vessels will need to ensure that they remain in compliance with all relevant regulations, including MLC requirements as discussed in Section VI.vii, to avoid significant delays and the associated cost implications. It is also expected that the government and the International Transport Workers' Federation will continue to take a strict approach against vessels that underpay foreign crew while working in Australian waters, in accordance with Australia's Coastal Trading rules.[140]

With the election of the Australian Labor Party in May 2022, there continues to be discussions regarding the possible changes to a yet to be defined 'strategic shipping fleet'.

IMO 2020, which is prescribed in the Protection of the Sea (Prevention of Pollution from Ships) Act 1983, came into effect in Australia on 1 January 2020. AMSA has powers of enforcement and they have indicated that Australia will adopt a strict approach to fulfilling its obligations to enforce compliance with IMO 2020.

139 AMSA, Annual Report 2020.

140 'Shipping company in court for allegedly underpaying seafarers by $255,000', Fair Work Ombudsman (April 2017), www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/april-2017/20170408-transpetrol-litigation.

Chapter 13

BRAZIL

Geoffrey Conlin, Bernardo de Senna and Carolina França[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Brazil is the largest country in Latin America. It has a population of approximately 211 million people and a total land mass larger than America, excluding Alaska. It has in excess of 8000km of coastline and 20,000km of navigable river. Brazil has the 12th largest GDP in the world.

In 2022, Brazil had 0.663 per cent of the world's merchant fleet value, by flag of registration, with a total fleet of approximately 5.5 million deadweight tonnage (DWT) and 0.655 per cent DWT under Brazilian ownership. Approximately 50 per cent of this tonnage is oil tankers, 12 per cent bulk carriers, 2 per cent general cargo vessels, 14 per cent container ships and 22 per cent are 'other types'.

In 2022, Brazil reaffirmed its position as a leading producer and exporter of commodities, including: soybeans (US$38.6 billion), amounting to 49.5 per cent of exported soya beans globally; iron ore (US$25.7 billion); crude petroleum (US$27 billion mainly to China); raw sugar (US$9.2 billion); and frozen bovine meat (US$8 billion). The United States remains Brazil's leading commercial partner, amounting to 23 per cent of all exports, being closely followed by China, which saw an increase of 5 per cent in exports compared to 2021. Trade between Brazil and Russia decreased by 15 per cent, which may be a consequence of the conflict involving Russia and Ukraine. In South America, Argentina remains Brazil's most relevant commercial partner, being responsible for 5.6 per cent of all exported cargo.[2]

Although port movement of cargo suffered a small decrease of 0.43 per cent, including cabotage and long-haul, inland navigation increased by 7 per cent in 2022, moving 116 tonnes of cargo, mostly solid bulker, including soy and corn.

There are approximately 178 coastal and river ports in Brazil. Of these, approximately 34 are public and 144 are private. Public ports are administered by state-run dock companies or by concession and leasing agreements. Private ports account for approximately two-thirds of all cargo movement in Brazil.[3]

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The legislative framework for shipping is scattered across many different statutes. Key legislation is contained in the Brazilian Federal Constitution, the Brazilian Commercial Code dated 1850 and the Brazilian Civil Code dated 2002, which regulates contracts of carriage.

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2 Brazilian Waterway Transport Agency Yearbook 2022.

3 id.

There are also other uncodified statutes, such as Federal Law 2,180/1954, which regulates the Admiralty Court and its jurisdiction, Decree-Law 116/1967 addressing, inter alia, limitation for cargo claims in shipping disputes, and Federal Law 7,542/1986, which regulates wreck removal.

Federal Law 10,233/2001 created the Brazilian Waterway Transportation Agency (ANTAQ), whose mandate includes the regulation of domestic and international waterway carriage of people and goods, offshore platform and port supply navigation, ports and terminals and the exploitation of the federal waterway infrastructure.

Federal Law 9,537/1997 regulates waterway safety in Brazilian territorial waters, Federal Law 9,432/1997 provides the statutory framework regulating waterway transportation, while Federal Law 9,611/1998 regulates multimodal transportation.

Federal Law 14,301/2022 (the Cabotage Act), which was enacted on 7 January 2022, has brought necessary and long-awaited innovations, seeking to facilitate investment, especially from overseas.

Brazilian Navigation Companies (EBNs) will be allowed to bareboat charter foreign vessels, as well as time charter vessels from their foreign fully owned subsidiaries or foreign fully owned subsidiaries of other EBNs. Chartering is subject to the provisions of the Cabotage Act. Among other new rules, EBNs are now permitted to charter foreign vessels without the need for proof of correlated Brazilian tonnage. Under the previous regime, EBNs' ability to charter foreign vessels was limited by ANTAQ Regulations.

EBNs applying to the new regime must provide evidence of their compliance with federal taxes and agree to periodically present information on the scope of their activities, improvements in the quality of their service, their level of local employment, sustainability and transparency regarding the costs of freight.

The Brazilian Navy, which acts as the Brazilian Maritime Authority, has an active role in shipping matters. It presides on the procedures tried before the Admiralty Court and issues norms, which are mandatory law within Brazilian jurisdictional waters, known as NORMAM.

In terms of international conventions, Brazil is not a signatory to the Hague, Hague-Visby, Hamburg or Rotterdam Rules. However, Brazil has ratified most of the conventions on marine safety, such as the Convention on International Regulations for Preventing Collisions at Sea 1972 (COLREGS), the International Convention on Safety of Life at Sea 1974 (SOLAS) and the International Convention on Salvage.

Brazil has also ratified the International Convention on Maritime Liens and Mortgages.

In practical terms, the statutory framework outlined above is designed to protect and develop the local shipping market.

III FORUM AND JURISDICTION

i Courts

Shipping disputes are litigated before either the state or federal courts of Brazil.

Under the Brazilian Constitution, federal courts have jurisdiction, inter alia, in cases involving the federal union, its agencies and companies; claims between foreign states or international organisations and a person domiciled in Brazil; claims arising from international treaties; and crimes committed on board vessels.

State courts have jurisdiction over all other cases, save for military, electoral and labour disputes, which are usually referred to specialised courts.

First instance judgments, handed down by a single judge, may be appealed to a second instance Court of Appeal and, in limited circumstances, to the Superior Court of Justice, the highest court of the land for non-constitutional matters, or the Supreme Federal Court, the country's highest court.

The Admiralty Court has jurisdiction to try parties involved in navigation incidents and to establish administrative liability. The Admiralty Court is an administrative tribunal, whose functions include imposing administrative sanctions (e.g., fines, licence suspensions and cancellations). The Admiralty Court aims to ascertain the root cause of an accident, assisting the Brazilian Maritime Authority in preventing similar casualties in the future. The Admiralty Court has no jurisdiction to determine the payment of damages between private parties. Decisions rendered by the Admiralty Court can be filed in federal and state courts as qualified evidence. The Admiralty Court is a specialised tribunal, and recognising its relevance, the Brazilian Code of Civil Procedure obliges regular lawsuits to be halted for up to one year, in case the same matter is subject to discussion at the Admiralty Court.

Brazilian courts have jurisdiction over cases:

a where the defendant is a Brazilian resident;
b if the obligation is to be performed in Brazil;
c if the case arises from an act or fact that occurred in Brazil;
d involving consumers, when these consumers are residents in Brazil; or
e if the parties submit to Brazilian jurisdiction, whether expressly or tacitly.

Brazilian courts have consistently disapplied foreign law and jurisdiction provisions, especially in circumstances where the contract is a contract of adhesion; namely, where the parties to the contract have unequal bargaining power. If the parties choose arbitration, their freedom to agree the law applicable to the arbitration should be upheld.

Limitation periods are set in the Brazilian Civil Code and other statutes. Disputes in tort usually have a three-year limitation period. Contractual disputes usually have a 10-year limitation period. Cargo disputes usually have a one-year limitation period, counting from discharge. Insurance disputes usually have a one-year limitation period, counting from the date on which the assured had knowledge of the claim.

ii Arbitration and ADR

Since 2014, it has been increasingly common to see parties referring maritime disputes to arbitration. Many people hold the view that disputes can be settled more quickly in arbitration than in court proceedings, by qualified maritime arbitrators, with perceived cost savings, while maintaining confidentiality over the dispute.

This has resulted in the creation of a number of local specialised maritime chambers, including the Brazilian Centre for Maritime Arbitration (CBAM), which was created as a joint initiative of the Trade Union of Shipping Agencies of Rio de Janeiro (SindaRio) and the Brazilian Association of Maritime Law (ABDM).

There are also non-sector specific chambers in which sector-specialised arbitrators can be appointed by the parties in dispute, including the Brazilian Centre of Mediation and Arbitration (CBMA), the Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC), the Chamber FGV of Mediation & Arbitration (Chamber FGV), and the Chamber of Conciliation, Mediation and Arbitration Ciesp/Fiesp.

Mediation is likely to be a significant area of future growth, owing to the uncertainty in many areas of Brazilian commercial law, potentially high amounts of interest and monetary correction on claims, the application of lawyer's fees, time incurred on interlocutory applications and the length of time to judgment or award.

Although conciliatory hearings are strongly encouraged in the context of court proceedings, these are rarely taken as seriously as they should be. It is unusual to resolve disputes in Brazil by reference to final and binding neutral evaluation by an independent expert.

iii Enforcement of foreign judgments and arbitral awards

In July 2002, Brazil became a member state of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. Prior to its ratification, the key provisions of the New York Convention were incorporated into the Brazilian Arbitration Act of 1996 (BAA).

Enforcement of a foreign arbitral award in Brazil is a two-phase process consisting of the following:

a recognition proceedings before the Superior Court of Justice (SCJ); and

b actual enforcement proceedings, before a federal court.

It is a prerequisite to recognition and enforcement that the award is final, binding and unappealable.

The applicant must file an application before the SCJ. The application must observe the formal requirements of the New York Convention, the BAA, the Brazilian Code of Civil Procedure and the internal rules of the competent court. All documents must be legalised and, if necessary, translated into Portuguese by a sworn translator.

The SCJ will issue an order for service of process to the federal court with personal jurisdiction over the defendant. Upon service, the defendant will have a limited time frame of 15 days to file a challenge, based on one or more limited grounds to resist recognition. These can be procedural or substantive (i.e., with minor differences, the same as the reasons listed in Article V (1) and (2) of the NYC).

If the application for recognition is not challenged, jurisdiction to hear it lies with the Chief Justice of the SCJ. If a challenge is made, jurisdiction moves to the Special Chamber and a reporting justice is appointed to conduct the proceedings and present the case to the other members of the Court. The applicant can file a reply, also within a limited time frame. After the parties have filed their submissions, the reporting justice usually notifies the Federal Public Attorney's Office, which is asked to issue its opinion on compliance with formal evidence requirements by applicant. This is sent to the reporting justice who presents his own opinion. This can take several months, after which a hearing date is set.

During the hearing, the reporting justice will present his own assessment of the case, casting his vote against or in favour of partial or full recognition. The counsel of each of the parties has a short time frame to present their arguments to the Special Chamber. In the majority of cases, the other justices will simply follow the reporting justice.

The final decision will be published in the Official Gazette. After publication, the parties have five days to file a motion for clarification or 15 days to file an extraordinary appeal with the Supreme Federal Court, under very exceptional circumstances.

After the final decision recognising the award, the competent court will issue a writ of enforcement. At this stage, the foreign arbitral award acquires full efficacy within Brazil. In

this sense, the arbitral award will have the same effect on the parties as a judgment rendered by a state or federal court. If it includes an obligation for payment, it shall constitute an enforceable instrument.

If payment is not volunteered when the validity of the arbitral award or judgment is recognised, the judgment creditor will need to commence enforcement proceedings, at the federal court that has jurisdiction over the defendant, aiming to attach the defendant's assets and to secure payment.

The court reviews the submission and, if the requirements are met and the request is in line with the award, the court will order service of the enforcement proceedings on the debtor, requiring payment within 15 days. The judge may rely on a court-appointed expert accountant to review the figures.

If payment is not effected in the 15-day period, the debt is increased by a fine of 10 per cent, plus additional lawyers' fees of 10 per cent, both on the amount of the total outstanding debt.

The enforcement judge may order the defendant to present to the court, within five days, a list of its assets subject to attachment, their value and their location. If the defendant does not comply with the order, it will be in contempt of court and subject to severe economic penalties.

It is possible to challenge the enforcement proceedings. However, any challenge must be made within a limited time frame and the grounds are very limited in scope; for example, defective service, lack of standing and jurisdictional challenge of the enforcement proceedings. The SCJ has the power to issue interim or conservatory measures in the course of recognition proceedings and Brazilian courts are entitled to order, via a unified Brazilian central bank system, the online freezing of any monies deposited in any bank accounts in the debtor's name. Such orders are very swift and effective.

IV SHIPPING CONTRACTS

i Shipbuilding

In the absence of specific rules, the express terms and conditions of the Brazilian Civil Code provide the contractual framework of a shipbuilding contract.

Ancillary requirements are scattered throughout other statutes, which cover issues such as the rules on transfer of title, ownership registration, effect on rights of third parties and mortgages. For example, Federal Law 7,652/1988 establishes that ownership rights and security interests over Brazilian vessels must be registered with the Admiralty Court, if the vessel has more than 100 gross tonnes, while smaller vessels are registered at the port captaincy with jurisdiction over the port where the vessel is located.

The registration of maritime property (RPM) is mandatory whenever the vessel's owner is domiciled in Brazil, or is a government or private entity subject to Brazilian law. Non-compliance of these rules may render ineffective the transfer of title. The RPM validates the ownership title and secures the flag. Application to obtain the RPM must include the deed of acquisition or, in the case of a new build, the respective licence and evidence of payment of the price to the shipyard.

Brazilian vessels are also eligible for registration in the Special Brazilian Registration regime (REB). This provides incentives such as tax cuts and special financing rates. Registration of shipbuilding contracts with the Admiralty Court may entitle the shipping

company, as owner, and the Brazilian yard, as contractor, to a provisional enrolment in REB of vessels under construction with a Brazilian shipyard, for the purposes of taking advantage of tax and financing incentives.

Brazilian companies operating a foreign vessel may provisionally register a vessel to fly the Brazilian flag within the REB regime. The suspension of a vessel's original flag and the provisional utilisation of the Brazilian flag during the relevant period the vessel is in contract in Brazil is subject to compliance with specific requirements provided for in both Federal Law 9,432/1997 and Decree 2,256/1997.

If a vessel is delivered to the buyer with instalments still due to the shipyard, the buyer can apply for an RPM and request the registration of liens in the Admiralty Court for the unpaid balance, subject to the production of evidence.

ii Contracts of carriage

Generally, the authorities have opted to safeguard Brazil's position as a cargo country, as opposed to a carrier country. As such, Brazil is not a signatory to the main international conventions that limit the liability of carriers as regards cargo interests. Brazil has not ratified the Hague Rules, the Hague-Visby Rules, the Hamburg Rules or the Rotterdam Rules.

Brazilian courts have treated bills of lading as contracts of adhesion. As such, they tend to disapply any foreign law, jurisdiction and limitation of liability clause. Brazilian courts refer primarily to the Brazilian Commercial Code and the Brazilian Civil Code, case law precedent and scholarly commentary.

The obligation of a carrier is generally considered to be an obligation of result as opposed to a duty of due diligence or best efforts.

The issue of liens is regulated by the Brazilian Commercial Code, dated 1850 and by the Brussels Convention on Maritime Liens and Mortgages dated 1926. The Convention has been ratified and adopted via Decree 351/1935, which means maritime liens can be exercised in Brazil for, inter alia, the collection of federal taxes, payment of crew and captain's wages, salvage indemnities, port fees and general average contributions.

Multimodal transport is regulated by Federal Law 9,611/1998, which determines that a licensed Multimodal Transport Operator (OTM), is the principal party contracted to perform the multimodal transport of cargoes from origin to destination, using its own means or those of third parties, potentially under a single bill of lading.

Foreign vessels can act in cabotage, provided they are chartered by EBNs if they meet the criteria set forth in Federal Law 9,432/1997.

iii Cargo claims

A party who sustains damage arising out of a breach of a contract of carriage has title to sue, provided a Letter of Protest is issued within 10 days from the date of discharge. Some experts are of the view that the claimant can frame a claim against any of the participants in the transportation services' chain, namely charterers, sub-charterers, owners and non-vessel-operating common carrier (NVOCC), each of whom is arguably jointly liable to the cargo owner. Demise clauses are usually not enforceable.

If cargo owners and carriers have contracted with equal bargaining power (e.g., if cargo owners are multinational corporations heavily involved in the international carriage of goods market, such as manufacturers of large commoditised goods), then the tendency of the courts is to uphold the written terms of the contract. This approach is encouraged by the Charter of Economic Freedom, under federal law.

Claimants are often subrogated local insurers. Service of a party not domiciled in Brazil can be effected via its local maritime agents.

iv Limitation of liability

Brazil has not yet ratified the Convention of Limitation of Liability for Maritime Claims 1976, although it has ratified the International Convention for Unification of Certain Rules, relating to the Limitation for Liability for Owners of Sea-Going Vessels 1924. However, the Brazilian courts frequently do not apply its provisions.

Civil liability is therefore usually determined under the Brazilian Civil Code, which provides for contractual liability (Article 389) and liability in tort (Article 927).

The Brazilian Civil Code provides a strict liability regime in circumstances where the activity, normally performed by the party who causes damage, implies by its very nature, a risk to the rights of others. This is particularly relevant for claims arising in tort, when carriers are the tortfeasor, irrespective of who the victim is (e.g., another vessel or a terminal in the case of collision).

In terms of the contractual liability of carriers, Brazilian courts have ruled that liability for the correct and timely delivery of the cargo is strict.

However, strict liability, whether in contract or in tort, is excluded if, for example, carriers can evidence that the damage arises from *force majeure* or the victim's exclusive actions, or the exclusive acts of third parties (e.g., shipper's incorrect packaging).

As a general rule, Brazilian courts do not usually uphold the limitation of a carriers' liability in respect of cargo owners. A Brazilian court is likely to hold charterers, sub-charterers, owners and NVOCCs jointly and strictly liable for damage to cargo owners. However, they each retain their right to seek recourse against the party who actually caused the damage.

The ordinary measure of damages under Brazilian law is usually upheld by the courts in cargo disputes. In practical terms, all damages that are sustained (whether physical damage or damages that arise from reasonable loss of profits and business interruption) would potentially be indemnifiable. Punitive damages are not available and indirect and consequential losses are excluded from the ordinary measure of damages, save if the parties agree otherwise.

As stated above, in circumstances where the case involves sophisticated parties, with equal bargaining power, as opposed to consumers, and assuming the contract is not considered to be an adhesion contract, Brazilian law will usually uphold the parties' freedom of contract. As such, the parties' express contractual position on the allocation of liability for certain categories of damages should supersede the default position under Brazilian law.

V REMEDIES

i Ship arrest

Brazil is not a party to the two main international conventions on ship arrest, namely the International Convention relating to the Arrest of Sea-Going Ships, dated 1952, and the International Convention on Arrest of Ships, dated 1999. The matter is therefore regulated by the rules of the Brazilian Commercial Code, the Brazilian Civil Code and the Brazilian Code of Civil Procedure, which provide for two types of arrests:

a to secure the payment of a debt due to the risk of the debtor potentially not paying a future award or judgment against them; and

b to enforce the payment of a debt already granted by an award or judgment that the debtor has not paid.

The arrest described in (a) is available on an interim basis, as an injunction or precautionary measure. If the creditor's application is successful and the vessel is arrested and the debtor does not pay, then the creditor has to file a substantive action to seek an award or judgment in its favour. The ordinary requirements for injunctions and precautionary orders apply.

For the arrest described in (b), a final decision is necessary, and the creditor must have exhausted other forms of collecting the amount awarded in its favour. A Brazilian court is extremely unlikely to grant an arrest in a case where Brazilian courts do not have jurisdiction to decide on the merits of the substantive claim.

In terms of procedure, to file a claim in Brazil, a party must send a power of attorney to Brazilian-registered lawyers, signed by representatives duly authorised to do so under the company's by-laws or articles of incorporation, which must be translated and notarised. Brazil is a signatory to the Apostille Convention, which expedites the preparation of these documents.

Claimants may be ordered to provide counter-security at the court's discretion, for damages potentially arising from a wrongful arrest. If an arrest is ordered and subsequently lifted on the basis that it was wrongful, then the damaged (arrested) party may claim compensation. Parties domiciled abroad, depending on whether or not their country of origin has signed a bilateral cooperation treaty with Brazil, may also be required to post security for costs, pursuant to Article 83 of the Brazilian Code of Civil Procedure.

Once a court issues an arrest order, it is forwarded to the relevant Brazilian Navy's port captaincy. The port captaincy will enforce the arrest, usually by withholding the vessel's exit pass. An interested third party (e.g., owners) may intervene in order to try to lift the arrest, for instance by presenting a guarantee to secure the release of the vessel.

Brazilian law recognises the distinction between *in personam* arrests and *in rem* arrests. *In personam* arrests aim to secure payment of debts incurred by the owners or charterers, whether they have been incurred in relation to the specific vessel being arrested or not. *In rem* arrests aim to secure payment of privileged debts incurred by the specific vessel being arrested, regardless of whether such vessel is currently run by different sets of companies. *In rem* arrests usually arise from maritime liens.

Brazilian law does not address the issue of arrest of sister ships. Sister ship arrests are less likely to succeed if the arrest is sought *in rem*, based on a maritime lien. *In personam* arrests of sister ships may be granted. In terms of the arrest of bunkers, this is uncommon and not expressly provided for in statute, and therefore cases would follow the general procedure described above. Bunkers are considered a maritime lien as a matter of Brazilian law.

ii Court orders for sale of a vessel

Court orders for sale of vessels are available under the same rules as those for public auctions and asset bidding, more commonly used for the sale of real estate. The court order will include the minimum bid value, and the auction will be conducted by a court appointed auctioneer, who charges a percentage fee of the proceeds of the sale. The vessel cannot be sold below the minimum bid value in the first auction. However, it can be sold at any price in the second auction.

Once the sale is concluded and ratified by the court, the highest bidder will be able to register its ownership of the vessel with the Admiralty Court, which keeps a record of the ownership of vessels. Pursuant to Article 477 of the Brazilian Commercial Code, all prior debts and liens are extinguished by the judicial sale and the transaction is considered to be

equivalent to a first acquisition. However, an amount from the price obtained in the auction, sufficient to cover pre-existing liens should be deposited and cannot be withdrawn until this lien is time-barred. The purchaser is allowed to post a guarantee to secure the withdrawal of the price.

VI REGULATION

i Safety

Article 178 of the Brazilian Federal Constitution states that the law will establish the rules regarding navigation and transport of goods and passengers by sea, while abiding by the international conventions signed by Brazil.

The main statute addressing marine safety is Federal Law 9,537/1997 (the Waterway Transport Safety Law, also known as LESTA). This is regulated by Decree 2,596/1988 (also known as RLESTA). Both statutes provide safety rules, including for pilotage and seafarers, and penalties for infractions.

Brazil does not have a coastguard, and the Brazilian Navy acts as the Brazilian Maritime Authority, pursuant to Article 17 of Federal Complementary Law 97/1999. The Maritime Authority also enacts safety regulations via the issuance of NORMAM (see Section II, above), by the Brazilian Navy's Directorate of Ports and Coasts.

If a breach of safety recommendations results in an accident, the Maritime Authority will be responsible for opening a formal inquiry to investigate the cause of the accident. The investigation may lead to an administrative procedure at the Admiralty Court, where administrative liability will be ascertained.

As regards international conventions on safety, Brazil is a signatory to COLREGS and SOLAS.

ii Port state control

Port state control inspections of foreign-flagged vessels aim to verify if the conditions of the vessel and its equipment comply with the requirements established by Brazilian law and applicable international conventions.

The inspections' objective is restricted to the safeguarding of human life and the safety of navigation, whether in open waters or in inland waterways. Port state control inspections also focus on the prevention of environmental pollution from ships, fixed platforms or their support vessels.

After the port state control's inspection, the Maritime Authority issues a Declaration of Conformity to Operate in Brazilian Jurisdictional Waters, which certifies that the vessel is compliant with the applicable legislation. Qualified and authorised marine inspectors carry out the inspection, as determined by NORMAM 4 (Norms for Recognition of Classification Societies to Act on behalf of the Brazilian Government), issued by the Directorate of Ports and Coasts.

Brazilian port state controllers follow the International Maritime Organization's Port State Control Procedures of 2017. Brazil is also a party to the Latin American Agreement on Port State Control of Vessels of 1992, known as the Viña del Mar Agreement.

iii Registration and classification

Federal Law 7,652/1988 regulates the registration of vessels. Brazilian vessels, except those owned by the Brazilian Navy, must be registered with the port captaincy with jurisdiction over the area where the owner is domiciled, or where the vessel will operate. The registration of the property in the Admiralty Court is mandatory if the vessel has a gross tonnage greater than 100.

According to Federal Law 7,652/1988, a vessel may be acquired while under construction or by any other means already established by Brazilian law. However, property is only transferred effectively, once the title is duly registered at the Admiralty Court or the respective port captaincy.

The Admiralty Court is responsible not only for the registration of the property of vessels but also for the registration of ship owners and *in rem* guarantees, as well as any relevant contracts or changes to the vessel's characteristics, such as change of company name, charter contracts, changes to the vessels structure and engines. Complimentary to the registration of property, the Admiralty Court is also responsible for the registration of vessels under the Brazilian Special Registry, which is a regime that grants advantages to its adherents, mainly fiscal. The temporary suspension of flags, if the vessel is bareboat chartered, is also registered at the Admiralty Court.

Classification societies are recognised organisations with delegated powers conferred by the Brazilian Maritime Authority, pursuant to NORMAM 6. The Directorate of Ports and Coasts maintains a list of the classification societies approved by the Brazilian Maritime Authority.

The classification societies' activities are varied and include classifying ships and maritime units, representing the Maritime Authority, certifying compliance with environmental regulations, and health and safety regulations, and providing technical consulting services.

iv Environmental regulation

Brazil's environmental legal framework is onerous and complex. It is encompassed in a series of different statutes. There are a number of environmental agencies with overlapping jurisdiction. Owing to Brazil's federative structure, environmental agencies may be federal, state or municipal entities, each with its own structure and mandate.

Environmental liability is several and strict, and as such, liability will be ascertained regardless of fault or negligence. Environmental liability has three main areas, namely administrative, civil and criminal liability, which can all operate on a simultaneous basis.

In June 2021, the Brazilian Congress approved Draft Bill 3,729/2004, which regulates environmental licensing. The new environmental legal benchmark, which is currently being reviewed by the Senate, stipulates new rules for port construction and reform, aiming to facilitate and speed up the licensing process.

Brazil has ratified a limited number of international conventions on environmental matters, such as MARPOL (73/78), the International Convention on Civil Liability for Oil Pollution Damage (CLC 1969) and the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC Convention 1990). Brazil has not ratified most of the subsequent Protocols, meaning that conventions such as MARPOL are not up to date with current amendments.

Brazil has not signed relevant international conventions, such as the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001. However, in 2022, Brazil ratified the Convention for the Control and Management of Ships' Ballast Water and Sediments 2004.

v Collisions, salvage and wrecks

Brazil has signed the following international conventions regarding the liability of shipowners and carriers, in relation to collisions and salvage:

a the International Convention of Private Law (Bustamante Code), signed in 1928;
b the Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea (Brussels 1910);
c the United Nations Convention on the Law of the Sea 1982;
d the International Convention on Regulation for Preventing Collisions at Sea 1983; and
e the International Convention on Salvage 1989.

Brazil is not a signatory of the Nairobi International Convention on the Removal of Wrecks. The domestic legal framework regarding wreck removal comprises Federal Law 7,542/1986 and NORMAM 10. These regulations allow the Brazilian Maritime Authority to order the wreck to be removed by the responsible party, in circumstances where the wreck poses a danger or an obstacle to safe navigation, a threat to the environment or a threat of damage to a third party. When ordering a removal, the Maritime Authority may request a Letter of Undertaking by a first class insurance company or a protection and indemnity Club, in case the wreck is not successfully removed and damage occurs.

vi Passengers' rights

Brazil is not a signatory of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974.

Brazilian courts have held that Federal Law 8,078/1990, known as the Consumer Protection Code (CDC), applies to passengers. The carriage of passengers by sea is considered to be a service under Brazilian law and passengers are treated as consumers – the final recipients of the service.

The Brazilian Civil Code has a specific chapter on transport contracts, which could potentially supersede the provisions of the CDC, on the basis that the Civil Code specifically addresses the issue of transport, where the CDC does not.

Nevertheless, the prevailing tendency of the courts, when judging cases involving passengers, is to apply the CDC. The CDC has stringent provisions on service providers, ranging from extended limitation periods to shifting the burden of proof to the defendant.

vii Seafarers' rights

Under Brazilian law, all those who work in open sea navigation, maritime support, port support and inland navigation are deemed seafarers. This definition covers both crew members in charge of operating the vessel and the workers who carry out activities that do not involve the operation of the vessel, such as waiters, nurses and cooks.

The Consolidation of Labour Laws, which is the Brazilian equivalent of a Labour Law Code, governs the rights and duties of workers in general, and is also applicable to seafarers.

However, they contain very limited provisions that specifically address this type of work. The very particular conditions of seafarers' work and the lack of specific regulations generate significant scope for legal uncertainty.

Seafarers are also governed by Federal Law 9,537/1997 and Decree 2,596/1998. Brazil is also a signatory of the Maritime Labour Convention 2006, which was enacted into law on 7 May 2021, under Decree 10,671/2021. The following conventions of the International Labour Organization (ILO) have also been ratified by Brazil:

a Convention No. 07 (Convention on the Minimum Age for Admission of Minors in Maritime Work);
b Convention No. 146 (Convention Relating to the Annual Paid Vacations of Seafarers);
c Convention No. 163 (Welfare of Maritime Workers at Sea and in Port);
d Convention No. 164 (Health Protection and Medical Assistance to Maritime Workers);
e Convention No. 166 (Repatriation of Maritime Workers);
f Convention No. 147 (Minimum Standards of Merchant Marine); and
g Convention No. 178 (Convention on the Inspection of Living and Working Conditions of Sea Workers).

VII OUTLOOK

In 2022, the Brazilian port sector, including both public ports and private terminals, handled 1.209 billion tonnes of cargo. This number represented a decrease of 0.40 per cent compared to 2021, according to a survey carried out by ANTAQ. Regarding the main cargo handled, iron ore continues to lead the list in terms of quantity: 361 million tonnes were handled in 2022.

The port movement of the North Region was a regional highlight in 2022. This is shown by the 2022 annual balance of ANTAQ. According to the data, port facilities in the region moved 138.4 million tonnes in 2022. The number represents an increase of 12 per cent compared to the 2021. Both state-owned ports and private use terminals in the North Region showed growth. Terminals moved more than 100 million tonnes – an increase of 12.37 per cent compared to the previous year. The region's organised ports moved 38.3 million tons – an increase of 11.16 per cent compared to 2021.

Brazil is the largest exporter of soya beans and corn, much of which is grown in central Brazil, especially the states of Mato Grosso and Goiás. Bottlenecks in the heavily over-burdened ports located in the south of Brazil, aligned with a proximity to the Northern Hemisphere, have resulted in the consolidation of the Northern Arc as one of the main grain export gateways.

The Northern Arc includes the Brazilian ports and cargo handling facilities along the Amazon River and its tributaries, from Porto Velho (Rondonia) in the west to Sao Luis in the east (Maranhão), including Manaus, Santarém, Belém and Santana. The expressive increase in trading in the Northern Arch has proven to be a lucrative gateway for solid bulk cargo being exported to Europe and North America, and for the import of oil and its derivatives, reducing freight fees and optimising costs owing to the geographical proximity to final end markets. It is expected that the Brazilian government will continue to invest in the region.

The federal government's intention to advance the plans to privatise the main ports in Brazil is still uncertain. The Cabotage Act encourages these investments in port infrastructure, as a larger number of vessels will require modern port facilities. The Port of Vitoria was privatised in 2022, being the first state-owned port to be fully transferred to the private sector.

The Port of Santos's privatisation plans were also well developed. However, under the new Brazilian government elected in October 2022, the general expectation is that privatisation will progress at a slower pace.

The enactment of new legislation on the decommissioning of platforms and other vessels has opened a new horizon of local opportunities. A large portion of production units have reached the regulatory 25-year limit of usage, meaning these vessels do not have the technology to remain operating. The National Agency of Petroleum, Natural Gas and Biofuels Resolution 817 aims to incentivise the decommissioning of these vessels locally, creating a market to deal with an ever-growing demand.

Chapter 14

CHILE

Ricardo Rozas[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

According to information provided by the Chilean Maritime Authority,[2] as at December 2021, there were 113 shipowners with approximately 261 Chile-flagged merchant ships.

The top five shipping companies in terms of tonnage are Naviera Ultranav Ltda, Compañía Marítima Chilena SA, CSAV Austral SA, Empresa Marítima SA (Empremar) and Transportes Marítimos Kochifas SA. To register a ship in Chile, the legal requirements are very demanding. Merchant vessels may be registered by Chilean nationals or citizens. If the owner is a corporation, it must meet the following requirements to be deemed Chilean:

a have its registered offices and true and effective headquarters in Chile;

b the president, manager and majority of directors or administrators, as the case may be, must be Chilean; and

c the majority of the equity capital must be owned by Chilean individuals or bodies corporate.

Special vessels may be registered in Chile by foreign natural persons as long as they are domiciled in the country and their main place of business is located locally (this rule does not apply to fishing vessels).

According to the Chilean Maritime Authority, the tonnage moved through Chilean ports in 2020 was 62,778,657 metric tonnes in export cargo and 53,023,445 metric tonnes in import cargo. Chile's seaports have connections with practically all the world's ports.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The legislative framework is constructed from various regulations and laws, for which the main sources are as follows:

a Book III of the Chilean Code of Commerce, 'About Navigation and Maritime Trade' (Articles 823 to 1250), which includes general provisions and specific chapters on vessel ownership, liens, shipowners, masters, ship agents, navigation contracts, navigation risks, marine insurance and procedural issues;

b Navigation Law (Decree Law 2222/78);[3]

c Merchant Navy Law (Decree Law 3059/79);

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2 2022 Annual Statistical Bulletin of the General Directorate of Maritime Territory and Merchant Marine, available at https://www.directemar.cl/directemar/site/edic/base/port/boletin_maritimo.html.

3 Published in the *Official Gazette*, dated 31 May 1978.

d international conventions, such as the UN Convention on the Carriage of Goods by Sea 1978 (the Hamburg Rules), the International Convention for the Safety of Life at Sea 1974 (SOLAS), the Maritime Labour Convention 2006 (MLC) and the International Convention on Civil Liability for Oil Pollution Damage 1969, replaced by the 1992 Protocol (the CLC Convention); and

e regulations issued by the Chilean Maritime Authority.

III FORUM AND JURISDICTION

i Courts

Article 1203 of the Chilean Code of Commerce establishes the general principle that the resolution of all maritime disputes, including those relating to marine insurance, is subject to mandatory arbitration. In short, all maritime disputes must be resolved by an arbitrator.

However, the ordinary civil courts may hear maritime disputes in certain cases, including:

a if the parties mutually agree to this (either by including it in the contract from which the dispute originates or by prior written agreement);

b if a criminal action could arise from the same facts (in this case the civil action can be filed before either the criminal court or an arbitrator);

c claims in respect of oil pollution as set out under Paragraph 4, Title IX of the Navigation Law;

d claims in which the state harbour or customs agencies are involved; and

e claims in which the amount at stake is less than 5,000 units of account (special drawing rights (SDRs), as defined by the International Monetary Fund), provided that the claimant submits its claim before the ordinary courts.

In addition, specific petitions for the appointment of an arbitrator and ship arrest are heard by ordinary civil courts.

As regards limitation periods, the general principle under Chilean law is that any action in respect of maritime disputes is time-barred after two years. However, actions concerning passage contracts, freight, general average and contributions are time-barred after six months. In addition, in collision actions, the two-year period is extended to three years if the responsible vessel was not arrested or detained while in Chilean jurisdictional waters, provided that the vessel leaves Chilean jurisdictional waters without calling at a Chilean port after the collision.

As regards time extensions, the progress of the appropriate limitation period can be interrupted by a declaration in writing to the claimant by the person who benefits from it. Time extensions can be granted several times but the limitation period will start again from the date of the most recent declaration.

ii Mandatory arbitration

The resolution of maritime disputes is subject to mandatory arbitration. The key principle is that the applicable rules are those to which the parties have agreed in writing. If the parties reach no agreement, the matter is subject to the rules set out by the Tribunal Code and the Civil Procedure Code.

Special powers of maritime arbitrators

The Code of Commerce establishes special powers for maritime arbitrators as follows:

a ample freedom to admit any evidence that the arbitrator may deem relevant;
b a proactive role for the avoidance of delays within the trial; and
c the ability to consider the evidence under the 'rule of the sane critic', which allows the arbitrator to assess the evidence according to his or her own criteria.

Pre-judicial measures and special liens

If pre-judicial measures (whether preparatory, precautionary or evidential) or special liens need to be enforced before the arbitration tribunal is established, the interested party can petition for these before the competent ordinary civil court under the rules of the Tribunal Code or the Code of Commerce.

iii Enforcement of foreign judgments and arbitral awards

Foreign judgments and arbitral awards are enforced through the *exequatur* process. This is considered in the Civil Procedure Code, under which judgments issued in a foreign country shall be given force in Chile by existing treaties. For a foreign judgment to be enforced, the procedures set out in Chilean law shall be followed unless they have been modified by existing treaties. If there are no treaties concerning the matter in question, Chile shall grant to the judgment the same force as granted to Chilean judgments by the jurisdiction in which the judgment was made. If the judgment comes from a jurisdiction that does not enforce Chilean judgments, it shall not be enforced in Chile. If none of the previous rules may be applied, foreign judgments shall be enforced in Chile provided that:

a they contain nothing contrary to the laws of the Republic, except that procedural rules to which the case would have been subject in Chile shall not be considered;
b they are not contrary to national jurisdiction;
c the party against whom enforcement is sought was duly served with process, except that the party may still be able to allege that, for other reasons, it was prevented from making a defence; and
d they are not subject to appeals or further review in the country of origin.

A duly legalised copy of the judgment – officially translated into Spanish, if necessary – must be presented to the Chilean Supreme Court to begin the *exequatur* process. In the event of an arbitral award, its authenticity must be certified by attestation of a high court of the originating jurisdiction.

Notice of the enforcement request must be served on the party against whom it is sought. That party must respond within 15 days (which may be extended depending on where the party is domiciled). An opinion from an independent court official is also requested by the Supreme Court.

The Supreme Court considers the matter in a hearing at which the parties may make oral statements.

After enforcement is allowed, the judgment must be presented to the competent civil court to commence an executive proceeding (under which the defendant's assets can be foreclosed, if applicable).

In respect of foreign arbitral awards, a law on international commercial arbitration – based on the UNCITRAL Model Law – was passed in 2004.[4] Article 35 of that Law regulates

4 Law No. 19,971, published in the *Official Gazette* dated 29 September 2004.

the recognition and enforcement of foreign arbitral awards and Article 36 lists the defences that can be asserted against enforcement and regulates orders of stay. Chile is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). In this respect, Chilean courts have enforced all foreign arbitral awards that comply with the rules set out in the Law for enforcement. In addition, Article 9 of the Law makes it possible to request from a local court any of the interim measures set forth under Chilean procedural regulations, such as attachments or goods retention, to protect the outcome of a foreign arbitration award. This criterion has already been tested in the context of international arbitration proceedings relating to a shipping dispute.

IV SHIPPING CONTRACTS

i Shipbuilding

Chile does not undertake a significant amount of shipbuilding.

ii Contracts of carriage

In 1982, Chile ratified the Hamburg Rules, which entered into force internationally as of 1 November 1992. Additionally, the Chilean legislature included the provisions of the Hamburg Rules in the Chilean Code of Commerce in 1988,[5] with minimal changes.

Cabotage

A cabotage reservation system is in force under the Merchant Navy Law (Decree Law 3059/79). The Law implies that only Chilean vessels are permitted to provide maritime or fluvial transport services (of cargo or passengers) within the national territory or the exclusive economic zone. On exceptional occasions, foreign vessels may participate in cargo cabotage when:

a cargo volumes exceed 900 tonnes, and when a previous public bid has been carried out by the user in advance; or

b cargo volumes are equal to or less than 900 tonnes when Chile-flagged vessels are not available (provided that authorisation has been obtained from the Maritime Authority).

In addition, passengers cabotage on foreign cruise vessels is allowed provided that the vessel:

a has transport capacity equal to or greater than 400 passengers;

b has facilities on board for overnight stays; and

c performs the transportation of passengers for tourism purposes.[6]

Liens

Chilean law recognises the concept of maritime privileges (see Section V.i, below).

5 Paragraph 3 of Title V of Book III.

6 Law No. 21,138, published in the *Official Gazette* dated 26 February 2019, which modified the Merchant Navy Law (Decree Law 3059/79) to allow passengers cabotage on foreign cruise vessels. The passengers cabotage restriction does not apply for calls at either the Archipelago of Juan Fernandez or Easter Island.

How the duties and liabilities of the shipper are addressed

In accordance with the adoption of the Hamburg Rules by Chile, 'shipper' means 'any person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier, and any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea'. In line with Chilean practice, the scope of this definition includes both the person concluding the contract of carriage of goods by sea and the person actually delivering the cargo, provided they are not the same person.

The shipper is deemed to have guaranteed to the carrier the accuracy of particulars concerning the general nature of the goods, their marks, number, weight and quantity as furnished by him or her for inclusion in the bill of lading. The shipper must indemnify the carrier against any loss resulting from inaccuracies in these particulars. The shipper remains liable even if the bill of lading has been transferred by him or her. The right of the carrier to such indemnity in no way limits his or her liability under the contract of carriage by sea to any person other than the shipper.

Operation of multimodal bills of lading

The main rules regarding multimodal transport can be found in Article 1041 et seq. of the Chilean Code of Commerce, which are based on the United Nations Convention on International Multimodal Transport of Goods (Geneva, 24 May 1980). Article 1041 defines the main applicable concepts: multimodal transport, contract of multimodal transport and operator of multimodal transport. Furthermore, Article 1043 sets out the regime of liability applicable in multimodal transport. The relevance of this Article is that, under Chilean law, the liability of all those involved in any part or parts of the multimodal transport is joint. Similarly, the Hamburg Rules must be taken into consideration when dealing with multimodal transport, especially in connection with the limitation of responsibility set out by the Rules, since Chile is a signatory.

iii Cargo claims

Carriage of goods by sea

Under the Chilean adoption of the Hamburg Rules, any party may be subject to the provisions of the Rules regarding carriage of goods by sea if:

a the port of loading or discharge as provided for in the contract of carriage by sea is located in Chile;

b the bill of lading or other document evidencing the contract of carriage by sea (such as the sea waybill, or through bills of lading or short-form bills of lading) stipulates that the contract will be governed by Chilean law (such as through a clause paramount); or

c one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and that port is located in Chile.

Chilean regulations are compulsorily applicable regardless of the nationality of the ship, carrier, actual carrier, shipper, consignee or any other interested person. In this respect, clauses paramount have been held as unwritten by the Supreme Court[7] as they would be contrary to public policy.

7 *AJ Broom v. Exportadora*, Supreme Court of Chile, Case No. 683-98.

The Chilean regulations are applicable to all contracts of carriage by sea and it is not a condition that they are necessarily evidenced in a bill of lading or other document of title, such as a sea waybill or short-sea note. In respect of combined transport bills or through bills of lading, the regulations are applicable only to the corresponding sea-leg carriage.

Charter parties

The Chilean adoption of the Hamburg Rules does not apply to charter parties. Nonetheless, a bill of lading issued in compliance with a charter party falls under the Rules if it governs the relation between the carrier and the holder of the bill of lading other than the charterer. For contracts providing for future carriage of goods in a series of shipments during an agreed period (e.g., tonnage or volume contracts used for cargo projects), the Rules apply to each shipment. However, if a shipment is made under a charter party, the Rules do not operate, other than with the aforementioned exception.

Demise clauses

Chilean law recognises a basic distinction between the carrier (also known as the contractual carrier) and the actual carrier. The former is defined as 'any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper' and the latter as 'any person to whom the performance of the carriage of the goods, or part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted'.[8]

The above distinction has very much simplified the problem of identifying the carrier as anyone who issues a bill of lading as a principal may be treated as a contractual carrier. This applies even to freight forwarders if they issue their own 'house' bill of lading and many cargo claims are based on these documents. In this regard it is important to note that, under Chilean practice, demise clauses have no effect.

If the performance of the carriage or part thereof has been entrusted to an actual carrier, the carrier nevertheless remains responsible for the entire carriage. In this respect, the carrier is jointly and severally responsible, in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his or her servants and agents acting within the scope of their employment. Additionally, all the provisions governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him or her.[9]

iv Limitation of liability

Tonnage limitation

Chilean regulations that refer to tonnage limitation (i.e., Articles 889 to 904 of the Code of Commerce) are inspired by both the International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships, and Protocol of Signature 1957 and the Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC Convention 1976). With respect to the tonnage limitation figures, the Code of Commerce follows

8 Chilean Code of Commerce, Article 975 Nos. 1 and 2 (based on Hamburg Rules, Article 1.1).

9 ibid., Articles 1006 to 1008 (based on Hamburg Rules, Articles 10.1 and 10.2).

the lines of the LLMC Convention 1976. In addition, note that the Code of Commerce establishes a specific set of procedural provisions in connection with the constitution and distribution of the corresponding limitation fund.

The types of claims subject to limitation are as follows:

a death or personal injury and damage to property on board;

b death or personal injury caused by any person for whom the owner is responsible, whether on board or on shore (in the latter case, his or her acts must be related to the operation of the ship or to the loading, discharging or carriage of the relevant goods);

c loss or damage to other goods, including the cargo, caused by the same person or people, grounds, places and circumstances as given in point (b); and

d resulting liability concerning the damage caused by a vessel to harbour works, dry docks, basins and waterways.

The people entitled to limit liability pursuant to this regime are as follows:

a the shipowner as defined by Chilean regulations;

b the shipowner's staff;

c liability insurers;

d the operator, carrier, charterer and the ship's proprietor, if a different person or entity from that specified in point (a); and

e individual employees of any person specified in point (d), including the master and members of the crew, if sued.

Limitation in connection with civil liability for damage derived from spillage of hydrocarbons and other hazardous substances

The spillage of hydrocarbons from seagoing vessels carrying oil in bulk as cargo is subject to the CLC Convention 1992. However, the spillage of hydrocarbons from vessels not carrying oil in bulk as cargo, or spillage of other hazardous substances, is subject to the terms of the CLC Convention 1969 and supplementary norms set forth by the Chilean Navigation Law (among other things, it extends the limitation benefit to the owner, proprietor and operator).

Carriage of goods by sea

Chilean law draws a distinction between lost or damaged goods and delayed goods. In the former case, the carrier's liability is limited to an amount equal to 835 SDRs per package or other shipping unit, or 2.5 SDRs per kilogram of gross weight, if the latter is higher. In the event of delayed goods, the carrier's liability is limited to an amount equivalent to 2.5 times the freight payable for the goods delayed, but not exceeding the total sum of the freight payable under the contract of carriage by sea. The aforementioned rules do not include either the interest on the value of the damaged goods or judicial costs.

Passengers

Under the Chilean regulations that refer to passage contracts,[10] liability can be limited in the following cases:

10 ibid., Articles 1,044 to 1,077.

a death or personal injury of a passenger: the maximum liability amount is obtained by multiplying 46,666 SDRs by the number of passengers that the vessel is authorised to carry, up to a maximum equal to 25 million SDRs; and

b damage to property on board: up to 1,200 SDRs unless higher limits have been agreed in writing.

V REMEDIES

i Ship arrest

Key rules

Chile has not ratified any international conventions regarding the arrest of ships. However, the fundamental regulations applicable to ship arrest that are found in Book III, Title VIII, Paragraph 5 of the Code of Commerce (About the Procedure to Arrest Vessels and its Release)[11] are loosely based on the principles set forth under the International Convention Relating to the Arrest of Sea-Going Ships 1952 (the Brussels Convention).

Under Chilean law, a vessel may be arrested if the requesting party has a credit that entitles it to do so. These credits may be of two types:

a privileged credits as set forth by Articles 844, 845 and 846 of the Chilean Code of Commerce (listed below); and

b credits other than those mentioned in point (a).

Under Chilean law, there is no statutory definition for privileged credits. However, they may be defined as those that give rise to a maritime lien and allow for requesting an arrest pursuant to the special rules set forth by Book III, Title VIII, Paragraph 5 of the Code of Commerce. Articles 844, 845 and 846 of the Code of Commerce establish and distinguish the following groups of privileged credits.

Article 844 credits

a Legal costs and other disbursements caused by reason of a suit, in the common interest of the creditors, for the preservation of the vessel or for its forced alienation and distribution of the yield;

b the remuneration and other benefits arising from the contracts of embarkation of the vessel's crew, in accordance with labour regulations and civil law that regulate the concurrence of these credits, together with the emoluments paid to the pilots at the service of the vessel. This privilege applies to the indemnities that are due for death or bodily injury of the servants who survive ashore, on board or in the water, and always provided that they stem from accidents related directly to the trading of the vessel;

c the charges and rates of ports, channels and navigable waters, as well as fiscal charges in respect of signalling and pilotage;

d the expenses and remunerations due in respect of assistance rendered at sea and general average contribution. This privilege applies to the reimbursement of expenses and sacrifices incurred by the authority or third parties, to prevent or minimise pollution

11 ibid., Article 1,231 et seq.

damage or hydrocarbon spills or other contaminating substances to the environment or third-party property, when the limitation fund has not been constituted as established in Title IX of the Chilean Law of Navigation; and

e the indemnities for damage or loss caused to other vessels, to port works, piers or navigable waters or to cargo or luggage, as a consequence of a collision or other accident during navigation, when the resulting action is not susceptible to being founded upon a contract, and the damage in respect of bodily injury to the passengers and crew of these other vessels.

Article 845 credits

Mortgage credits on large vessels (i.e., those over 50 gross tonnage (GT)) and secured credits on minor vessels (i.e., vessels up to 50 GT).

Article 846 credits

a In respect of the sale price, construction, repair and equipping of the vessel;

b in respect of the supply of products or materials that are indispensable for the trading or conservation of the vessel;

c arising from contracts of passage money, affreightment or carriage of goods, including the indemnities for damages, lack and short deliveries in cargo and luggage, and the credits deriving from damages in respect of contamination or the spilling of hydrocarbons or other contaminating substances;

d in respect of disbursements incurred by the master, agents or third parties, for account of the owner, for the purpose of trading the vessel, including agency service; and

e in respect of insurance premiums concerning the vessel, be they hull, machinery or third-party liability.

The privileged credits of Article 844 enjoy privilege over the vessel in the order enumerated in Article 844 credits, above, with preference over mortgage credits and the privileged credits of Article 846. Mortgage credits are preferred to those of Article 846, which in turn follow the rank indicated under Article 846 credits, above.

In this respect, the privileged credits established by the aforementioned provisions have preference over and exclude all other general or specific privileges regulated by other legal bodies, when referring to the same goods and rights. However, the rules regarding priorities and privileges in matters of pollution or for avoiding damage from spills of hazardous substances, which are established in international treaties in force in Chile and in the Navigation Law, have preference over the provisions of Book III, Title III of the Code of Commerce (About Privileges and Naval Mortgage) in the specific matters to which they refer.

Procedure for ship arrest

An arrest order is usually granted quickly if the arrest petitioner supplies the court with sufficient supporting documents to justify the arrest petition, such as invoices, bills of lading, contracts and survey or loss reports.

Arrest or retention of a vessel is served by the Chilean Maritime Authority when the vessel lies or by official letter or notification to the Director General of the Maritime Territory and the Merchant Marine if the vessel is not in the jurisdiction of the court that decreed the measure. Prior notification to the person against whom the measure is requested is unnecessary.

In urgent cases, the court may communicate arrest via telegram, telex or other reliable means. In a preliminary proceeding, the person against whom the arrest is requested must also be notified within 10 days of the resolution that granted the measure. This may be extended by the court for good reason. If an arrest or retention is not served within 10 days, or any extension granted, this causes automatic forfeiture of the decreed arrest, which is communicated directly to the Chilean Maritime Authority by the court.

Arrests of sister and associated ships

A lien on a ship granted by a privileged credit can be exercised not only against the actual ship to which the privileged credit relates, but also on a ship in the same ownership or a ship in the same administration or operated by the same person.

Security and counter-security

If the court considers that the supporting documents provided by the arrest petitioner are not sufficient, or the petitioner states that they are not yet available to him or her, the court may require that counter security be provided for the potential damages that may be result if, subsequently, it is found that the petition lacked basis. As to the form and amount of damages, there are no specific rules, so it is up to the court.

As regards security for lifting an arrest, the amount of security is usually established by the court based on the petition of the arresting party. The amount cannot exceed the value of the arrested vessel and can be reviewed subsequently through incidental proceedings. Regarding the form of security, there are no specific rules and it will depend on the court's resolution, but the security most usually requested and granted is a bank guarantee issued by order of the court. As soon as the security is provided, the court shall lift the vessel arrest without delay.

For a long time, protection and indemnity (P&I) insurance club letters of undertaking were accepted only if agreed by the arrest petitioner, mainly because of the fact that the Chilean courts were not accustomed to them. However, in the event of an arrest following a pollution incident, the court hearing the arrest accepted a letter of undertaking with no prior approval from the arrest petitioner. This is a positive development, as Chilean courts seem finally to be aligned with international practice, whereby a letter of undertaking is accepted by the courts as sufficient security.

Wrongful arrest

First, under Chilean regulations, an arrest based on privileged credits is subject to the following conditions:

a the arresting party must invoke one or more of the privileged credits enumerated above. In this respect, except for the regulations concerning pollution or for avoiding damage from spills of hazardous substances, maritime privileges preclude any other general or special privilege regulated by other laws in connection with the same goods. Maritime privileges also confer on the creditor the right to pursue the vessel in whosoever's possession it may be;

b the arresting party must attach antecedents that constitute presumption of the right being claimed; and

c if the court considers that the supporting documents are not sufficient or the petitioner states they are not yet available to him or her, the court may require that counter security be provided for the potential damage that may be caused if, subsequently, it is found that the petition lacked basis.

Second, when an arrest has been decreed a pre-judicial precautionary measure (i.e., a measure to secure the outcome of a subsequent substantive action), the petitioner is obliged to file its complaint requesting that the decreed arrest remain in force within a period that, in principle, is 10 days but that may be extended for up to a total of 30 days, provided there is a sound basis for doing so. The non-fulfilment of this obligation will result in cancellation of the arrest and liability for the damage that may have been caused, on the irrefutable presumption that the grounds for the arrest were fraudulent. In addition, if the arrest was wrongful, fraudulent or lacked basis, the defendant may claim damages in separate ordinary proceedings subject to the general rules set forth by the Code of Civil Procedure.

Bunker arrest claims

An arrest can be made over a vessel provided the claimant has a credit that qualifies as a maritime privilege as per the rules explained above. This credit will be considered a privileged credit in accordance with Article 846(2) of the Code of Commerce.

As regards specific regulations for arresting bunkers, there are no such regulations in Chile. In theory, this could be achieved by means of the general rules set forth by the Code of Procedure regarding pre-judicial and precautionary measures, but it is not an easy exercise because of formalities and timing restrictions.

Pre-judicial precautionary measures

Chilean procedural regulations are silent on the matter of whether the arresting party is required to pursue the claim on its merits in the jurisdiction of arrest or whether it is possible to effect an arrest only to obtain security. However, when an arrest is decreed as a pre-judicial precautionary measure (i.e., a measure to secure the outcome of a subsequent substantive action), it would be possible to arrest to obtain security and then pursue proceedings on the merits elsewhere. The procedural obligations established must be met, namely filing the petitioner's complaint requesting that the decreed arrest remains in force for a period that, in principle, is 10 days but may be extended for up to a total of 30 days provided there is a sound basis for doing so. However, this is an option that has yet to be further tested in Chile's courts.

ii Court orders for sale of a vessel

In accordance with the Code of Commerce, the judicial sale of a vessel, whether voluntary or forced, must observe the rules and formalities set forth by the Code of Civil Procedure for the judicial sale of real estate. The procedure may take between a couple of months and one or two years depending on the debtor's behaviour towards the proceedings. Court costs are usually minor but other costs might be generated, such as those relating to the administration of the attached property (incumbent on a depositary who has to render account for his or her administration before the pertinent court).

VI REGULATION

i Safety

Chile has ratified the following conventions:

a SOLAS and its Protocols of 1978 and 1988;
b the International Convention on Load Lines 1966 (the Load Lines Convention) and its Protocol of 1988;
c the International Regulations for Preventing Collisions at Sea 1972 (COLREGs);
d the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1995 (the STCW Convention);
e the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation 1988 (SUA) and its Protocol 1988; and
f the MLC and its Amendments of 2014 and 2016.[12]

These Conventions are in force notwithstanding the domestic regulations issued by the Chilean Maritime Authority.

ii Port state control

The responsibility for port state control falls on the Chilean Maritime Authority in accordance with the Navigation Law and complementary regulations, and applicable international conventions.

iii Registration and classification

Any type of vessel, whether constructed or under construction, or naval device can be registered at the following registries kept by the General Administration of the Maritime Territory and Merchant Marine:

a Large Vessels Registry;
b Minor Vessels Registry;
c Vessels in Construction Registry;
d Naval Devices Registry; and
e Mortgage, Liens and Prohibitions Registry.

The rules relevant to the organisation and operation of registries, and the procedures, formalities and requirements of registration, are contained in the applicable regulations. The practice of registering vessels chartered on a bareboat basis does not occur in Chile.

In accordance with Article 15 of the Navigation Law, all large vessels[13] must be registered in the Large Vessels Registry, which is kept by the General Administration of the Maritime Territory and Merchant Marine. Minor vessels (those of 50 GT or less) are registered in the minor vessels registries that are kept by harbour masters.

12 Maritime Labour Convention enacted by Decree No. 11 of the Chilean Ministry of Foreign Affairs, published in the *Official Gazette*, dated 22 February 2019.

13 Law No. 21,408, published in the *Official Chilean Gazette* on 15 January 2022, introduced modifications in the definitions of large and minor vessels. According to this Law, 'Large vessels are those whose gross tonnage is 100 or more and minor vessels all those whose gross tonnage is less than 100'. This modification will enter into force six months after its publication.

iv Environmental regulation

The key legislation, rules and conventions in force in Chile for regulating air and sea pollution are as follows:

a the CLC Convention 1992 on hydrocarbon spills from vessels carrying oil in bulk as cargo;

b the CLC Convention 1969 and supplementary norms set forth by the Chilean Navigation Law on hydrocarbon spills from vessels not carrying oil in bulk as cargo or spillage of other hazardous substances;

c the International Convention for the Prevention of Pollution of the Sea by Oil 1954 (the OILPOL Convention) (with its amendments of 1962 and 1969);

d the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (the London Convention);

e the International Convention for the Prevention of Pollution from Ships 1973 (as modified by the Protocol of 1978) (MARPOL (73/78)); and

f Article 136 of the Fishing Law (Law No. 18,892), which refers to criminal liability for spills that cause damage to hydrobiological resources (it covers both malicious acts and negligence and extends to companies' criminal liability).[14]

v Collisions, salvage and wrecks

Collisions

Article 1,116 et seq. of the Chilean Code of Commerce set out the main regulations applicable to collisions. The Chilean Navigation Law and the COLREGs also apply.

Chilean collision regulations apply to damage that arises, for example, from a collision between two or more vessels or from waves caused by the movement of a vessel resulting in damage to other vessels, cargo or people on board, even if an actual collision does not occur. A 'vessel' is a maritime device that can move either on its own or by external means.

These rules also apply to events occurring in fluvial waters, lakes and any other navigable waterway. In addition, Chilean collision regulations apply to collision damage that arises between vessels under the same ownership or administration.

For every collision, the applicable law is that of the state in whose territorial waters the event has occurred. If the collision occurs in waters not subject to the jurisdiction of any state, the law of the country where the lawsuit is instituted will apply.

Salvage

Salvage is regulated by Book 3, Title 6, Paragraph 5 of the Chilean Code of Commerce (Services rendered to a vessel or other property in damage).[15] These rules are based on the Comité Maritime International's draft International Convention (Montreal 1981) and the International Convention on Salvage 1989 (the 1989 Salvage Convention).

14 Liability for negligence introduced by Law No. 21,132, which modernises and strengthens the exercise of the public function of the National Fisheries Service, published in the *Official Gazette*, dated 31 January 2019.

15 Code of Commerce, Article 1,128 et seq.

Wreck removal

Wreck removal is regulated under the Chilean Navigation Law. In general, the Chilean Maritime Authority can order the pertinent proprietor, owner or operator to adopt all necessary measures, at his or her own cost, to proceed with removal of the wreck within a specified term. In February 2018, the Navigation Law was subject to an important amendment to strengthen marine environment preservation and navigation safety. Additionally, new faculties were granted to the Maritime Authority in respect of ships or craft whose condition poses a risk or danger, representing a positive change. The main amendments introduced to the Navigation Law are as follows:

a wreck removal now comprises the cargo on board a sunk or stranded vessel, aircraft or artefact;

b if a vessel or naval artefact is drifting in bad buoyancy conditions or taking on water, the Maritime Authority can require the owner, proprietor or operator to adopt corrective measures promptly. If the owner, proprietor or operator fails to take such measures, the vessel or naval artefact will be deemed abandoned and its ownership will pass to the state;

c once abandonment has been declared in favour of the state, the Maritime Authority may proceed with removal or disposal of the wreck through public or private tenders. In cases of extreme urgency (e.g., the imminent sinking of a vessel or naval artefact), the Maritime Authority can authorise the dumping of a vessel or naval artefact;

d vessels or naval artefacts that are still afloat but have no statutory crew on board will be deemed abandoned. Ownership will pass to the state where the Maritime Authority requires the owner, proprietor or operator to provide safe manning and the order is not complied with. The same applies for vessels or naval artefacts that lack crew and have been stranded by the Maritime Authority on account of their owners, proprietors or operators having been requested to remove them from the stranding location;

e if the Maritime Authority concludes that a sunken or stranded vessel, aircraft or naval artefact (including cargo) poses no threat or obstacle to navigation, fishing, the environment or other maritime or shore activities, the owner will have up to one year to commence wreck removal operations; and

f the cost of a removal or extraction operation will be borne by the owner or operator of the sunken vessel, aircraft or naval artefact on the date of the incident, provided that there are no bidders or the tender process is cancelled. The same applies in the event of the presence of hydrocarbons or other hazardous substances.[16]

Recycling

Chile has not signed the Hong Kong Convention for the Safe and Environmentally Sound Recycling of Ships 2009 (the Hong Kong Convention); however, the IMO Guidelines on Ship Recycling are applicable.

16 Amended by Law No. 21,066, which introduced new wreck removal provisions, published in the *Official Gazette*, dated 16 February 2018.

vi Passengers' rights

The Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974 (the Athens Convention) is not applicable in Chile. However, passengers' rights and the liability of the carrier are regulated by the Code of Commerce (Articles 1,044 to 1,078), which is based on the Athens Convention. In addition, if a travel agent is involved, the Chilean Consumer Protection Act may also apply.

vii Seafarers' rights

Chile has ratified the MLC. These matters are also regulated under a specific chapter in the Chilean Labour Code.

VII OUTLOOK

Within the framework of the productivity agenda of the executive – presented at the end of January 2023 – the ministers of transport and the economy recently entered various points into the maritime cabotage project, with a view to increasing competition in that sector. The initiative, which entered into force in August 2021 under the administration of former President Sebastián Piñera, seeks to promote competition in this market and the mobilisation of cargo.

Specifically, the points presented propose the modification of 5 articles of the Chilean Merchant Navy Law, among which the following stand out.

a Exit route: it is proposed to create a new exception that allows foreign trade vessels that come from abroad and unload cargo in a national port to carry out cabotage after this unloading, exclusively on their exit route. This would be done according to the navigation itinerary previously informed to the Chilean Maritime Authority (Directemar) and by notifying the Ministry of Transport and Telecommunications.

b Establishing an extended waiver of a duration of one year when there are no regular cabotage line services (regardless of the amount of the load) would give certainty in the service to those who supply cargo.

c Modifying the definition of cabotage so that it refers to national or nationalised cargo means that the repositioning of foreign trade cargo by foreign ships would be allowed in the event of port closures when the cargo cannot be unloaded in the destination port.

It is not yet known whether this bill will pass as other similar bills have been submitted to Congress without success.

Chapter 15

CHINA

Nicholas Poynder and Jean Cao[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

China plays an increasingly pivotal role in the global shipping industry. It is home to seven of the world's 10 busiest ports by cargo tonnage, with Shanghai consistently topping the list.[2] In 2020, China was the third-largest shipowner in terms of cargo-carrying capacity (228 million dead-weight tonnage (DWT)).[3] In 2019, China had the largest share of global shipbuilding gross tonnage (GT) (23.074 million gross tons) and of the construction of dry bulk carriers, general cargo ships, container ships and offshore vessels.[4] China's expertise in this sector continues to develop.

Although known for its exports of manufactured products to all corners of the globe, China is also a major importer of commodities. According to customs information,[5] from January 2020 to October 2020, China imported 81.261 million tonnes of natural gas, 83.217 million tonnes of soybeans, 975.204 million tonnes of iron ore and 458.56 million tonnes of crude oil. Despite the recent slowdown in the growth of China's economy, this level of demand ensures China's place as one of the most significant players in the shipping business.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The Chinese Maritime Code governs commercial contracts (carriage of goods and passengers by sea, charter parties, towage), admiralty (collisions, salvage, general average, limitation of liability) and marine insurance. It adopts many provisions of international rules and conventions, including many of the elements of the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules), the Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974 (the Athens Convention), the International Convention on Salvage 1989 (the 1989 Salvage Convention), the Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC Convention 1976) and the York Antwerp Rules. In addition, China is party to a number of international shipping conventions on safety. Those international conventions will prevail if there is a conflict between them and Chinese laws.

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1 Nicholas Poynder is a partner and Jean Cao is an associate at HFW. The information in this chapter was accurate as at May 2021.

2 UNCTAD, 'Review of Maritime Transport', 2020, at page 18, https://unctad.org/system/files/official-document/rmt2020_en.pdf.

3 ibid., at page 41.

4 ibid., at page 45.

5 http://www.customs.gov.cn/customs/302249/302274/302275/3357139/index.html.

III FORUM AND JURISDICTION

i Courts

Shipping disputes are heard by 11 maritime courts in China, located in Beihai, Dalian, Guangzhou, Haikou, Nanjing, Ningbo, Qingdao, Shanghai, Tianjin, Wuhan and Xiamen.

The maritime courts do not normally recognise foreign jurisdiction clauses in shipping contracts if the jurisdiction has no material connection with the contract or its performance; however, as China is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention – see Subsection iii), international arbitration clauses will generally be recognised by China's maritime courts when it comes to enforcement. If the parties to a shipping contract are Chinese persons (natural or legal) and there is no foreign element involved, the maritime courts will hold the international arbitration clause as invalid.

Limitation periods

The limitation periods for shipping disputes are as follows:

a contracts of carriage of goods by sea: one year from the time of cargo delivery or the time when the cargo should have been delivered;

b charter parties: two years from the date on which the breach was discovered;

c towage contracts: one year from the date on which the breach was discovered;

d collisions: two years from the date of the collision;

e salvage: two years from the conclusion of the salvage operation;

f marine insurance: two years from the date on which the insured event occurred;

g oil pollution: three years from the date on which the damage occurred, but no more than six years from the date of the event causing the damage;

h carriage of passengers: two years from disembarkation from the ship for personal injury, death before disembarkation and luggage loss or damage; two years from the date of death if death occurs after disembarkation, but not exceeding three years in total after disembarkation; and

i general average: one year from when the general average adjustment is issued.

ii Arbitration and ADR

There is no specific maritime arbitration procedure in China. It is governed by the rules of the particular arbitration committee chosen by the parties to the dispute. The China Maritime Arbitration Commission is an example of a domestic arbitration committee nominated by parties.[6]

Equally, China has no specific mediation, expert determination or alternative dispute resolution procedures. Mediation is normally conducted by the judge or the arbitration tribunal hearing the case. If the parties cannot reach a resolution following the mediation, the judge or the tribunal will proceed with the case in the usual way. Clearly, this is a very different situation from that found in England, for example, where it is unusual for any details of settlement discussions to be disclosed to the presiding judge or tribunal other than

6 Its rules are published on its website, http://www.cmac.org.cn/en/.

details regarding the question of costs. Since the announcement of the Administrative Rules over Maritime Mediation,[7] parties can submit their disputes relating to marine casualties to local maritime safety administration bureaus for mediation.

iii Enforcement of foreign judgments and arbitral awards

In practice, foreign judgments or rulings will be enforced in China only when there is an international treaty or agreement concluded between or acceded to by the foreign state and China or a finding of reciprocity. There are a few such foreign states but they do not include the key dispute resolution centres for shipping.

Fortunately, the position is different in terms of foreign arbitration awards. China is a signatory to the New York Convention; consequently, China is bound to recognise an award issued in another signatory state as binding and to enforce it. The United Kingdom, Singapore, the United States and other key maritime centres are signatory states.

The first step to enforcement is applying to have the award recognised by the local courts. This must be done within two years of the final date provided for in the award for compliance with the award or, if no such period is stated, the date on which the award takes effect.

The New York Convention provides five grounds for refusing recognition or enforcement, which will be applied by the local courts when considering an application for recognition. Apart from these five grounds, the Convention permits a refusal of recognition or enforcement if the recognition or enforcement would be contrary to local public policy. Accordingly, the Chinese courts may also, as a matter of Chinese law:

a consider whether there is any social or public interest reason not to recognise the award (there is no clear guidance on what exactly this means); and

b if petitioned by one of the parties, investigate whether the arbitration agreement contained in the relevant contract is valid. An arbitration clause should be valid under Chinese law if it is in writing and if it:
- contains an expressed intention to resolve disputes via arbitration;
- describes which issues will be decided through arbitration (e.g., all disputes); and
- identifies which arbitration tribunal or institution the parties agree to use.

If the local court of first instance (the Intermediate People's Court) refuses to recognise the award, it must refer the case to the Higher People's Court. If the Higher People's Court also refuses recognition, it must refer the decision to the Supreme People's Court, which is the only court that can ultimately refuse recognition of a foreign arbitration award.

In practice, enforcement of a foreign arbitral award in China, even though governed by the New York Convention, is not straightforward. It is well known that there can be problems. For example, some judges in the local courts may lack experience of applying the Convention. This can lead to inconsistent decisions and can slow down the recognition process.

Moreover, it can take a long time for the recognition application to be dealt with. First, it will take some time to put together the application and supporting documents (with translations). Second, it will take time for the local courts to respond to the application once

7 *HaiAnQuan* [2014] No. 513, announced on 18 August 2014 by the Maritime Safety Administration.

submitted. In one unreported case, the Chinese court had not responded 16 months after a party applied for recognition of a foreign award. In two other cases, it took seven months and 21 months, respectively, before the Chinese court's decision was issued.

IV SHIPPING CONTRACTS

i Shipbuilding

China has a very active shipbuilding industry and was ranked the largest shipbuilding country in the world in terms of GT in 2019.[8] China has the largest market shares in dry bulk carriers, general cargo ships, container ships and offshore vessels and ranks second for oil tankers.[9]

Similarly to the Japanese and Korean shipyards, Chinese shipyards tend to base their contracts on the SAJ Form (published by the Shipbuilders' Association of Japan), the AWES Form (issued by the Association of European Shipbuilders and Shiprepairers) or the Norwegian Form (Norwegian Standard Form Shipbuilding Contract 2000). The China Maritime Arbitration Commission published its own Standard Newbuilding Contract (the Shanghai Form) in March 2011, which is increasingly used by Chinese shipyards.

English law is the typical choice in contracts, coupled with dispute resolution provisions for arbitration in either London or Singapore. As such, a buyer wanting to contract with a Chinese shipyard must take into account very similar legal considerations to those that would apply if it were buying from other key shipbuilding centres.

As regards title, this will normally transfer at the time of delivery as per the standard clauses in the aforementioned contracts. If the yard refuses to deliver a vessel, depending on the reason for refusal, the buyer may be able to apply to a Chinese maritime court for an injunction ordering the yard to deliver the vessel in accordance with the contract. Otherwise, for this and any other issues that may arise in the process, the parties would need to follow the dispute resolution procedure agreed in the contract – as noted above, this tends to be London or Singapore arbitration.

However, the buyer should be wary of potential pitfalls. If the buyer is successful at arbitration and the shipyard is ordered to pay a sum of money to the buyer – perhaps by way of a refund of the instalments already paid – then the buyer may experience the enforcement issues described in Section III. The industry has attempted to avoid such risks by establishing a system whereby the shipyard's bank will guarantee to the buyer, at the outset, that in certain circumstances the bank will refund to the buyer the instalments already paid. This system is not exclusive to China; it is adopted worldwide. The problem in China, however, is that some shipyards have persuaded local courts to issue injunctions preventing the bank from paying out under the guarantee even if the relevant arbitral tribunal has found in favour of the buyer.

ii Contracts of carriage

Contracts of carriage are governed by the Chinese Maritime Code, which contains similar provisions to the Hague-Visby Rules, although China is not itself a signatory to the International Convention for the Unification of Certain Rules of Law relating to Bills

8 UNCTAD, 'Review of Maritime Transport', 2019, at page 45, https://unctad.org/system/files/official-document/rmt2020_en.pdf.

9 ibid., at page 45.

of Lading 1924 (the Hague Rules), the Hague-Visby Rules, the UN Convention on the Carriage of Goods by Sea 1978 (the Hamburg Rules) or the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (the Rotterdam Rules).

Trade between Chinese ports was governed by the Rules of Transportation of Goods by Waterway in China, which were abolished by the Ministry of Transport (MOT) on 30 May 2016.[10] Now trade between Chinese ports is generally governed by the Contract Law and General Principle of the Civil Law of the People's Republic of China.[11]

Duties of the shipper

Under the Maritime Code, the shipper is obliged to pack the goods properly and to provide accurate information about the goods. Failing this, the shipper will be liable for the carrier's losses so caused (Article 66).

Furthermore, the shipper is obliged to complete relevant formalities (port, customs, quarantine, etc.) in relation to the goods and submit documents to the carrier. Failing this, the shipper will be liable for the carrier's losses so caused (Article 67).

In respect of dangerous goods, the shipper is additionally obliged to mark the goods and to notify the carrier in writing of the description of the goods, their nature and any relevant safety measures to be taken. The shipper will be liable for any losses suffered by the carrier as a result of carrying the dangerous goods (Article 68).

Liens

A carrier is entitled to exercise a lien over cargo on board for unpaid freight, general average contributions, demurrage and other necessary charges paid by the carrier on behalf of the owner of the cargo.[12] The lien can be exercised only over cargo owned by the party that is liable for the claim.[13] Furthermore, unless the relevant bill of lading states clearly to the contrary, the bill of lading holder is not liable for demurrage, dead freight or any other expenses at the loading port; accordingly, a carrier cannot usually exercise a lien over the cargo for those matters unless the holder of the bill of lading is also the charterer.

Interestingly, in a case heard by the Shandong Province High People's Court in 2013, it was held that the carrier (in this case, the shipowner) could not exercise a lien over cargo if the shipper named on the bill of lading had already paid freight to the charterers but the charterers had failed to pay the shipowner. This was so even though the shipper had promised to pay the shipowner the freight and demurrage at the port of loading, and requested the shipowner to carry the cargo to the discharge port.

10 Order No. 2016 [57] of the Ministry of Transportation (30 May 2016).

11 Guiding Opinions No. 2012 [28] of The Supreme People's Court of the People's Republic of China on Legal Issues in Dispute over the Transportation of Goods by Waterway in China.

12 Maritime Code, Article 87.

13 Maritime Special Procedure Code, promulgated in 1999, Article 44.

Multimodal bills

Under the Maritime Code, the multimodal transport operator is responsible for all stages of multimodal transportation (Article 104). Importantly, if loss of or damage to the goods occurs during a certain leg of the voyage, liability will be limited according to the rules applicable to that leg only (Article 105). If it is impossible to ascertain on which leg the loss or damage occurred, the limitation of liability of the sea leg will be applied (Article 106).

iii Cargo claims

Under the Maritime Code, both the bill of lading holder and the subrogated cargo underwriter who has compensated the bill of lading holder for cargo loss have title in China to sue the carrier who entered into a contract with the shipper, as well as the actual carrier (the registered owner or the demise charterer of the carrying vessel at the material time). This choice is beneficial to a bill of lading holder as, in other jurisdictions, the option to sue may be restricted by demise clauses; those clauses have accordingly not been an issue in China.

It is important to note that in dealing with cargo claims, the maritime courts will normally ignore the incorporation into the contract of carriage of charter-party terms (including dispute resolution clauses).

Confusion was caused by Article 16 of the Supreme Court's Judicial Interpretation II on Insurance Law,[14] which provides that the limitation period for an insurer's right of action against a carrier or actual carrier starts to run at the time the insurance payment is made. The carrier or actual carrier could face a claim by the cargo underwriter when that same claim would otherwise be barred if brought by the bill of lading holder. This confusion has been resolved by the Supreme Court's Official Reply to Shanghai Senior People's Court on the Starting Date of the Statutory Time Limit for Subrogated Marine Insurer. Now it is clear that a marine cargo insurer will step into the shoes of the insured.

iv Limitation of liability

Although China is not a party to the LLMC Convention 1976, its regime for limitation of liability for maritime claims, contained in Chapter XI of the Maritime Code, is largely modelled on the LLMC Convention 1976. Save for claims in respect of wreck removal, destruction or rendering harmless a ship that is sunk, wrecked, stranded or abandoned or cargo on board, which cannot be limited, the scope of claims subject to limitation under the Maritime Code is the same as under the LLMC Convention 1976. In short:

a owners (including charterers and operators) and salvors are entitled to limit their liability unless it is proved that the loss resulted from their act or omission with intent to cause such loss, or that they acted recklessly with knowledge that such loss would probably result; and

b for cargo loss or damage, a carrier or actual carrier (the shipowner or demise charterer) may limit its liability on the basis of 'package limitation' (i.e., its liability is limited to the higher of 2 special drawing rights (SDRs) per kilogram or 666.67 SDRs per package.[15] For delays, the liability is limited to the amount of freight.[16] The carrier will lose the right to limit liability if it is proved that the loss, damage or delay in delivery of

14 Promulgated on 13 May 2013 and entered into force on 1 March 2015.

15 Maritime Code, Article 56.

16 ibid., Article 57.

the goods resulted from an act or omission of the carrier with the intent to cause such loss, damage or delay, or from the carrier recklessly acting with knowledge that such loss, damage or delay would probably result.[17]

Limitation of liability for vessels below 300 GT and vessels trading or operating along the coast of mainland China is subject to the Regulation of the MOT,[18] which is 50 per cent of the figure calculated under the Maritime Code. When there is a collision between international vessels and vessels trading or operating along the coast line or below 300 GT, the limitation of liability under the Maritime Code will apply, provided that the limitation fund is set by interests of the international vessel.

Procedures in relation to setting up a limitation fund, claim registration and distribution are governed by the Maritime Special Procedure Code and the Supreme Court's Provisions on Trial of Cases in relation to Limitation of Liability for Maritime Claims.[19]

V REMEDIES

i Ship arrest

Ship arrest is governed by the Maritime Special Procedure Code and the Supreme Court's Provisions on Issues in Relation to Ship Arrest and Auction (the Supreme Court's Provisions on Ship Arrest and Auction).[20] The Maritime Special Procedure Code adopts many of the provisions of the International Convention on the Arrest of Ships 1999.

To obtain an arrest order from a Chinese maritime court, the claimant must submit an arrest application to the court with the following items:

a power of attorney or a certificate of legal representation in favour of the appointed Chinese lawyer;

b documents supporting the underlying maritime claims;

c proof that the person alleged to be liable for the maritime claims is the owner of the vessel at the time of the application; and

d counter security.[21]

The court should make a decision within 48 hours of receiving the application.

The amount of the counter security required by the court is normally equivalent to 30 days' hire at the vessel's market rate at the time of the arrest or 30 per cent of the amount of the claim, whichever is higher. With the entry into force of the Supreme Court's Provisions on Ship Arrest and Auction, the counter security shall also cover costs and expenditure of ship maintenance during the arrest period and costs incurred by the respondent to provide security for lifting the arrest.[22] The counter security will take the form of either cash or a letter of undertaking issued by a Chinese bank or insurance company. Some Chinese insurance

17 ibid., Article 59.

18 Promulgated on 15 November 1993 and entered into force on 1 January 1994.

19 Promulgated on 27 August 2010 and entered into force on 15 September 2010.

20 Promulgated on 28 February 2015.

21 Under Article 4 of the Supreme Court's Provision On Ship Arrest and Auction, applicants for crew contract claims or personal injury claims may be relieved from the requirement to provide counter-security.

22 Supreme Court's Provision on Ship Arrest and Auction, Article 5.

companies would provide counter security to support an arrest in China, if the claimant purchases an insurance policy from them. The premium is roughly between 0.3 per cent and 0.5 per cent of the counter security amount.

It is possible to arrest sister ships; any ship that is owned by the party in question can be arrested. However, a ship that is not directly involved in the underlying dispute can be arrested only if that dispute does not relate to the ownership, mortgage or management of the ship.

Arrest of bunkers is also possible. This can be achieved if the claim is against the owner of the bunkers. The claimant must consider the practical difficulties and cost of removing and storing the bunkers while arrested. The Supreme Court's Provisions on Ship Arrest and Auction now clarifies that a ship arrested under a bareboat charter can be sold,[23] thereby putting an end to the controversy that a ship can be sold only when it belongs to the debtor.

Arrest orders can be issued for security purposes only. However, the claimant must commence litigation or arbitration proceedings on the underlying claim within 30 days of the arrest, no matter in which jurisdiction those proceedings will take place.

In terms of the mechanics of the arrest, it is not necessary for the vessel to be in the berth; a vessel can be arrested at anchor in territorial waters by traffic boat or, infrequently, by helicopter.

If, after obtaining an arrest order, a claimant loses the substantive proceedings, it will be arguable that the arrest was wrongful. However, there are no provisions under Chinese law setting out the basis on which an arrest can be wrongful, so the point is unclear.

ii Court orders for sale of a vessel

When a vessel has been arrested in China for more than 30 days, the respondent has failed to provide security for its release and it is not appropriate to maintain the arrest, the claimant that commenced litigation or arbitration proceedings may apply to a Chinese maritime court for sale of the vessel by auction. If a sale order is granted, an affected party may apply for review within five days of receipt of the order. The court will then make its decision within five days of receiving the review application.

The maritime court ordering the auction of a vessel will issue an announcement in newspapers or other news media. In the case of foreign vessels, an announcement will be published in newspapers or other news media for overseas distribution for at least 30 days. The court will also issue a notice 30 days before the auction to the registrar of the registry state of the vessel and to any known maritime lien holders, mortgagees and shipowners.

Auctions are conducted by ship auction committees via online platform Taobao. Bidders must register with a ship auction committee within the prescribed time limit and pay the required deposit, which is usually about 10 per cent of the estimated price. Following payment of the full price of the ship by the successful bidder, the original owner must deliver the vessel to that bidder – the buyer – within the designated period under the supervision and guidance of the auction committee. The auction committee will sign a protocol of delivery and acceptance with the buyer, and the maritime court will then issue a release order and public announcement. The buyer can then register its ownership.

The auction committee will return the deposits paid by unsuccessful bidders within three to five days.

23 Supreme Court's Provision On Ship Arrest and Auction, Article 7.

VI REGULATION

i Safety

China is a party to the following international conventions relating to safety at sea:

a the Convention on Facilitation of International Maritime Traffic 1965 (the FAL Convention);

b the International Convention on Load Lines 1966 (the Load Lines Convention) and the Load Lines Protocol 1988;

c the International Convention on the Tonnage Measurement of Ships 1969 (the Tonnage Convention);

d the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969 (the Intervention Convention);

e the Special Trade Passenger Ships Agreement 1971;

f the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (the Oil Pollution Fund Convention);

g the International Regulations for Preventing Collisions at Sea 1972 (COLREGs);

h the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (the London Convention) and its 1996 Protocol;

i the Protocol relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil 1973 (the Intervention Protocol);

j the Protocol on Space Requirements for Special Trade Passenger Ships 1973;

k the Athens Convention and its 1976 Protocol;

l the International Convention for the Safety of Life at Sea 1974 (SOLAS) and its 1978 and 1988 Protocols;

m the Convention on the International Maritime Satellite Organization 1976 (the INMARSAT Convention);

n the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 (the STCW Convention);

o the International Convention on Maritime Search and Rescue 1979 (the Search and Rescue Convention 1979);

p the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation 1988 (SUA);

q the 1989 Salvage Convention;

r the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (the OPRC Convention);

s the Protocol on the Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances 2000 (the OPRC-HNS Protocol);

t the International Convention on the Control of Harmful Anti-Fouling Systems on Ships 2001 (the Anti-Fouling Convention);

u the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (the Bunker Convention);

v the 1992 Protocol replacing International Convention on Civil Liability for Oil Pollution Damage 1969 (the CLC Convention);

w the 1972 International Convention for Safe Containers;

x the International Convention for the Prevention of Pollution from Ships 1973 (as modified by the Protocol of 1978) (MARPOL (73/78)) (Annexes I to V); MARPOL Protocol 97 (Annex VI);

y the Nairobi International Convention on the Removal of Wrecks 2007 (the Nairobi WRC 2007); and

z the Maritime Labour Convention 2006.

ii Port state control

The Maritime Safety Administration (MSA) is the port state control authority in China and bears responsibility for maritime safety, security, prevention of pollution from ships and protection of seafarers' rights. The MSA's main responsibilities include:

a drafting and implementing guidance, policies, regulations and technological codes and standards in national water safety supervision, marine pollution prevention, navigational aids and other relevant matters;

b comprehensively supervising water safety and preventing marine pollution;

c investigating and handling water traffic accidents, marine pollution from vessels and water transport violation cases;

d supervising statutory surveys and certification for vessels and offshore facilities;

e checking the qualifications of ship survey organisations and marine surveyors, and approving and supervising the resident representative offices of foreign ship survey organisations within China;

f controlling Chinese flag vessels' registration, certification, survey and certificate endorsement, and the entry into and exit from Chinese ports and waters; and

g administering seafarers' and pilots' training, examination and certification, and monitoring the qualification and quality systems of training institutions for seafarers and pilots.

Although the MSA has power to detain vessels, in 2014 (the most recent records available), vessels were detained in just 6.55 per cent of cases following an MSA inspection. When compared to numerous other flag states, such as the United Kingdom (7.45 per cent), Germany (10.78 per cent) and Russia (16.9 per cent), it can be seen that China's detention rate is relatively low. Information about vessels detained by the MSA after 2014 is not publicly available.

iii Registration and classification

Registration

Registration of shipping interests in China is governed by the Regulations Governing the Registration of Ships and is administered by the MSA. The interests of ownership, mortgage and demise charter can all be registered.

To register ownership, the owner must file an application with the registry, submitting documents that show its identity, technical information about the ship and proof of ownership. If the application is in order, the registry will normally issue the ownership certificate within seven days.

To register a mortgage, the mortgagor and the mortgagee must apply together to the registry with a certificate of ownership or shipbuilding contract and the mortgage agreement.

If the application is in order, the registry will record the mortgage in the ship's certificates and ownership certificate, and will issue a certificate of mortgage to the mortgagee within seven days.

The owner or demise charterer must register a demise charter in the event:

a a Chinese-flagged ship is demise chartered to a Chinese company;

b a Chinese company is demise chartered-in to a foreign-flagged ship; or
c a Chinese-flagged ship is demise chartered-out to a foreign company.

To register a demise charter, the owner and demise charterer must submit the original demise charter party, the certificate of nationality and certificate of ownership in the case of a charter-in of a foreign-flagged ship, class technical certificates and termination or cancellation of the nationality certificate issued by the previous port of registry.

Classification

The China Classification Society (CCS) is the only approved domestic classification society. Consequently, if a vessel is to fly the Chinese flag, the CCS must oversee its construction. However, if the vessel will fly another flag, the shipyard is entitled to engage any other classification society it wishes to oversee the build.

Interestingly, there is no reported case in China in which the CCS (or any other classification society) has been held liable for negligent work.

iv Environmental regulation

The key Chinese legislation, rules and conventions in force regulating air and sea pollution and a brief outline of their terms are as follows.

Marine Environment Protection Law

The law was enacted to protect and improve the marine environment, conserve marine resources and prevent pollution damage. It applies to internal waters, territorial seas and the contiguous zones, exclusive economic zones and continental shelves of China and all other sea areas under Chinese jurisdiction. All entities and individuals engaged in navigation, exploration, exploitation, production, tourism, scientific research and other operations in such sea areas, or engaged in operations in coastal areas that have an effect on the marine environment, must comply with this law.

Regulations on Administration of the Prevention and Control of Marine Environment Pollution Caused by Vessels

These regulations aim to prevent pollution caused by the discharge and carriage of pollutants by ships, and shipping-related operations such as hold clearing or cleaning, fuel supply, loading and unloading, shipbuilding, salvage, ship breaking and containerisation of hazardous cargo. The regulations also cover the response to, handling and investigation of ship pollution incidents, and liability for such incidents. Furthermore, they require cargo owners and their agents receiving oil cargoes in Chinese waters to pay into a compensation fund to cover oil pollution damage from ships.

Regulations on Emergency Preparedness and Response on Marine Environment Pollution from Ships

These Regulations require that owners or operators of (1) any ship carrying polluting and hazardous cargoes in bulk, or (2) any other ship above 10,000 GT enter into a pollution clean-up contract with an MSA-approved ship pollution response company before the ship enters a Chinese port.

Prevention and Control of Atmospheric Pollution Law

This law was formulated for the purpose of preventing and controlling atmospheric pollution. It sets out the duties of the government in the prevention and control of atmospheric pollution, including that caused by the burning of coal and fuel by motor-driven vehicles and vessels. Motor-driven vehicles and vessels are prohibited from discharging atmospheric pollutants in excess of the prescribed discharge standards.[24] The MOT has promulgated the Implementation Scheme of Domestic Emission Control Area for Atmospheric Pollution from Vessels,[25] which provides a sulphur limit of 0.5 per cent mass/mass (m/m) from 1 January 2019 and of 0.1 per cent m/m limit from 1 January 2020 for any fuel oil used on board seagoing vessels operating in domestic emission control areas.

International conventions

In addition to the above-mentioned domestic laws, China is a signatory to the following:

a the Basle Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (the Basle Convention);
b the Anti-Fouling Convention;
c the CLC Convention 1992; and
d the Bunker Convention.

v Collisions, salvage and wrecks

Collisions

Collisions are governed by the Maritime Code, the Supreme Court's Judicial Interpretation on Trial of Collision Cases 2008 and the Supreme Court's Judicial Interpretation on Compensation for Property Loss and Damage Due to Ship Collision and Allision 1995.

Vessels involved in collisions are liable for loss and damage according to the proportion of their liabilities. They are jointly and severally liable for personal injury.

Salvage and wreck removal

China is a party to the 1989 Salvage Convention, and the Chinese Maritime Code contains similar provisions to that Convention.

Recycling

China is a party to the Basle Convention. In 2003, the Convention issued 'Technical Guidelines for the Environmentally Sound Management of the Full and Partial Dismantling of Ships',[26] which offer information and recommendations on procedures, processes and practices that should be implemented. The Guidelines also provide advice on monitoring and verification of environmental performance. In 2005, China's Development and Reform Commission promulgated the Green Ship Recycling General Regulation, which has similar provisions to the Guidelines and is the industrial standard to be followed by ship recycling industries in China.

24 Prevention and Control of Atmospheric Pollution Law, Article 51.

25 http://www.msa.gov.cn/public/documents/document/mtex/mzm1/~edisp/20181219111335546.pdf.

26 Technical Guidelines for the Environmentally Sound Management of the Full and Partial Dismantling of Ships (2003), www.basel.int/Portals/4/Basel%20Convention/docs/meetings/sbc/workdoc/techgships-e.pdf.

vi Passengers' rights

China is a party to the Athens Convention. Contracts for the carriage of passengers by sea are governed by the Maritime Code.

vii Seafarers' rights

A significant proportion of the world's seafarers are Chinese. Their rights and obligations are governed by the Labour Law, Labour Contract Law, Crew Regulations, Crew Assignment Regulations, and Administrative Measures on Seafarers' Working and Living Conditions on Board. China ratified the Maritime Labour Convention 2006 on 12 November 2015 and the Convention came into force in China on 12 November 2016.

Seafarers may arrest a ship for unpaid salaries and personal injury on board without putting up counter-security.

VII OUTLOOK

China's change of leadership in 2012 brought with it the promise of a new industrial era for the country.

In September 2013, the first new free trade area was established in Shanghai to promote economic reform. The Chinese government has published incentives on registration, tax, banking, financing, customs supervision and foreign currency exchange. By September 2016, there were 42 insurance institutions in the Shanghai free trade area, including one insurance group, 18 life insurance companies, 13 property and casualty insurance companies, three reinsurance companies, seven insurance asset management companies and 51 provincial branches of insurance companies. The existence of a cluster of these companies has promoted the vitality of the market. In shipping insurance, reinsurance and other key areas, the effect of the establishment of the Shanghai Free Trade Zone is obvious.[27] As this new area develops, Shanghai port is expected to expand further.

In addition to the Shanghai Free Trade Zone, by 13 April 2018, the Chinese government had approved proposals to set up free trade areas in Fujian, Guangdong, Tianjin, Liaoning, Zhejiang, Henan, Hubei, Chongqing, Sichuan, Shaanxi and Hainan.[28] The government promulgated a 144-hour transit visa policy for citizens of 51 countries to promote cruise development.[29] In recent years, China's cruise market has grown at an average annual growth rate of 40 per cent. According to relevant agencies, the number of tourists will reach 10 million by 2030 and the cruise market will become the most important in the world.[30] The outlook for trade, and the scope for continued growth in the shipping industry, is therefore encouraging.

It may be argued, however, that China's maritime laws have not kept up with the pace of growth in trade and shipping. Since the entry into force of the Maritime Code in July 1993, there has been rapid development in shipping industry. Issues commonly faced, such as the legal position of non-vessel operating common carriers and cargo forwarders, and delivery of cargo without production of an original bill of lading, are not covered in the

27 http://insurance.hexun.com/2016-10-09/186325838.html.

28 http://www.gov.cn/zhengce/content/2018-10/16/content_5331180.htm.

29 www.mot.gov.cn/guowuyuanxinxi/201610/t20161012_2098204.html.

30 https://sh.cevsn.com/research/report/1/711125.html?b_scene_zt=1.

Maritime Code. As a result, there are some significant areas of uncertainty in maritime law. Against the background of China vigorously pushing forward to develop as a maritime power and the One Belt One Road programme, research work for the revision of China's maritime laws has now formally been put on the agenda.

In response to this, the Supreme People's Court issued 'Several Opinions on Providing Judicial Services and Guarantee for the Building of One Belt One Road by People's Courts' (No. 9 [2015]) to bring the trial function of the people's courts into full play and provide effective services and to guarantee the smooth building of One Belt, One Road, which includes maritime trial and arbitration services. The Supreme Court also asked local courts to broaden judicial reforms to help foreigners to attend trials. As a result, the Shanghai Maritime Court has, for example, simplified the legislative procedure for obtaining power of attorney (POA) for lawyers representing international clients. A foreign company may now legalise one POA with general authority for all its disputes before the Shanghai Maritime Court.

The MOT drafted and issued the Revised Draft of Maritime Code for Comment on 5 November 2018 (the Draft for Comment), according to which several revisions have been introduced, including:

a expanding the scope of legal regulation:
- the contract of carriage by sea is enlarged to carriage of goods and passengers by sea and navigable waterways connected with sea; and
- the meaning of 'vessels' is extended to include mobile units at sea or navigable waters connected with sea;

b adding two chapters: one deals with contracts of carriage of goods by domestic waterways, the other deals with compensation for pollution damage caused by vessels;

c improving title and property rights in vessels:
- clarifying the process for obtaining possessory liens and the circumstances required to terminate a possessory lien; and
- clarifying the ownership of vessels under construction and the process of obtaining a mortgage;

d standardising the rights, and obligations, of crew;

e improving the legal system in relation to the contract for international carriage of goods by sea;

f clarifying the connection between the 1989 Salvage Convention and the Maritime Law;

g improving the limitation of liability for maritime claims from the 1976 LLMC standard to the 1996 Protocol standard and abolishing the regime for limitation of liability for vessels below 300 GT and vessels trading or operating along the coast of mainland China;

h creating a supplement to the guarantee and notification obligation system;

i refining maritime litigation procedure; and

j improving the rules concerning the application of law to foreign-related matters.

Among other things, the Draft for Comment introduces systematic improvements to the existing compensation system for vessel-caused pollution damage, as well as comprehensively regulating oil-related pollution and fuel pollution caused by vessels, poisonous and harmful substances, and the fund of damage compensation for oil pollution.

We will be watching developments with interest during the next few years to see how China's proposed reforms play out. Undoubtedly, China can only become increasingly important in the global shipping industry.

Chapter 16

CYPRUS

Antonis J Karitzis and Ioannis Ttavas[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The history of the sea, trade and shipping in Cyprus can be traced back thousands of years. When Cyprus gained its independence in 1960, it heralded a new era of prosperity that witnessed an upsurge in the economy and modernisation of the business and commercial sectors. The development of the shipping industry in Cyprus began in 1963 with the introduction of legislation concerning the registration of ships, the terms of employment of sailors and the relevant taxation. In 1963, the Cyprus fleet consisted of two vessels of 96 gross tonnage (GT). Currently, the Cyprus fleet has more than 2,200 ocean-going vessels with a total GT of more than 20 million.

Cyprus takes pride in its re-election to the International Maritime Organization (IMO) Council for 2022–2023, ranking third in Category C with 133 votes, strengthening its role in the European and international decision-making process. Cyprus has been re-elected into Category C every year since 1987. Additionally, in October 2020, Cyprus was elected for the first time to the Presidency of the Executive Committee of the Mediterranean Memorandum of Understanding on Port State Control, of which it is a Member State. Moreover, in December 2019, Cyprus successfully prolonged its Tonnage Tax and Seafarer Scheme for the next 10 years (until 31 December 2029), following extensive negotiation and discussion between the Shipping Deputy Ministry to the President of Cyprus (SDM) and the European Commission. The Scheme provides competitive advantages, including, among other things, a wider list of eligible vessels and ancillary activities and discount rates for environmentally friendly vessels. Cyprus had the very first open registry within the European Union, with a comprehensive, transparent tonnage tax system approved by the European Union.

Cyprus has one of the largest registered merchant fleets in the world, and has a well-established shipping and ship management centre, located close to the Suez Canal, at the eastern edge of Europe, at the core of bustling air and shipping routes connecting Europe, Asia and Africa. Notably, in 1981, the Cypriot fleet was ranked 32nd globally in terms of its size, whereas currently, it is the 11th largest fleet in the world and the third largest in Europe. Cyprus has a large resident shipping industry, with more than 220 shipping-related companies based in the country that have approximately 4,500 employees. Of these, 87 per cent are controlled by EU interests. The Register of Cyprus Ships is also one of only two open registries within the European Union. It allows non-Cypriot citizens to register their ships under the

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Cyprus flag, provided that they fulfil the specific conditions of ownership as required by the Merchant Shipping (Registration of Ships, Sales and Mortgages) Laws of 1963, as amended. Cyprus has also concluded 27 merchant shipping bilateral agreements.[2]

The SDM, which is responsible for maritime and shipping matters, replaced the Department of Merchant Shipping, which had been a distinct entity within the Ministry of Transport, Communications and Works of the Republic of Cyprus, since 1977 and was responsible for the control and development of shipping in Cyprus. The date on which the SDM was established (1 March 2018) is marked as a historic day for Cyprus shipping because the SDM is an autonomous deputy ministry, dedicated entirely to Cyprus' maritime industry, with strategically located overseas maritime offices – in Piraeus, Brussels, Rotterdam, Hamburg, London and New York City – offering services to seafarers and Cypriot ships.[3] Since its establishment, the SDM has evolved with regard to its internal restructuring, aiming to make Cyprus' maritime administration even more modern, efficient and industry-focused, and thus, even more business-friendly to Cyprus-related shipping companies.

The SDM is headquartered in Limassol, the shipping and financial capital of Cyprus. Its mission is based on safeguarding and continuing to develop of Cypriot shipping as a safe, socially responsible and sustainable industry; enhancing the national economy; and creating jobs, specialisation and expertise in the sector. Furthermore, the SDM has been implementing a comprehensive 'Blue Growth' strategy that not only includes enhancement and updating the shipping regulatory framework and processes, but also focuses on digitalisation, the promotion of blue careers and shipping education, and a focus on maritime innovation and a contribution to the development of responsible environmental policies and solutions.[4]

The SDM strongly encourages and supports research and innovation initiatives. Examples such as the Cyprus Marine and Maritime Institute and the Cyprus Foundation of the Sea[5] promote technological innovation, bringing together the academic world with the public and private sector to develop innovative systems providing solutions to respond to the green and digital transformation of the sector. At the same time, the steady growth

2 Cyprus has concluded 27 bilateral agreements on merchant shipping, through which Cyprus ships receive either national or most favoured nation treatment in the ports of other states. These agreements with labour-supplying countries provide for specific terms of employment that are beneficial to both shipowners and seafarers.

3 The SDM attaches great importance to the quality and speed of its services, which are tailored to its clients and available around the clock. During the covid-19 pandemic, it remained fully operational and continued to provide its services without any disruption, providing facilities to shipping companies and owners of Cyprus-flagged vessels.

4 The SDM launched a consultation campaign on 5 April 2021 to gather feedback on key maritime issues, used to create a long-term strategic vision for Cyprus shipping. The open consultation took place throughout April and May 2021 in four phases: (1) environmental sustainability (7 to 22 April); (2) digital transformation (23 April to 6 May); (3) global persisting challenges: (a) social issues (seafarers' living and working conditions, crew changes and seafarers' vaccination) and (b) piracy and armed robbery against ships (7 to 20 May); and (4) issues pertaining to maritime transport activities of high local and regional interest such as coastal navigation, marine pollution, maritime education throughout May 2021. According to the SDM, the new strategic approach for Cyprus shipping is 'sustainable, extrovert and adaptable'.

5 On 25 October 2017, the Council of Ministers of the Republic of Cyprus approved the establishment of the Cyprus Foundation of the Sea, as proposed by the Cyprus Shipping Chamber and the Maritime Institute of Eastern Mediterranean (MarInEM). The Foundation is supported by the SDM and it will be the forum that, with appropriate research and development, will provide guidance on the type of research, education and training required in the marine and maritime fields to promote 'Blue Growth'.

of the three maritime academies operating across the country with around 300 students, the introduction of a maritime direction in secondary education[6] and the extension of the SDM's grants and scholarships aim to ensure the continuous supply of high-calibre human talent into the Cypriot shipping market. The establishment of the SDM clearly reflects the importance of the shipping sector in Cyprus and the significance that the government places on its development, since the yearly contribution by merchant shipping to the Cyprus economy is extremely high, with recent figures indicating that shipping accounts for approximately 7 per cent of gross domestic product (GDP). Pursuant to the Central Bank of Cyprus' (CBS) report published on 28 April 2021, Cyprus' ship management revenues dropped to €430 million during the second half of 2020 (4 per cent of the GDP).[7] According to the CBS' report published on 11 November 2021, Cyprus' ship management revenues increased to €447 million during the first half of 2021 (4.1 per cent of the GDP as turnover), marking a gradual recovery from the covid-19 pandemic and the associated decline in the economic activity observed during 2020. It can be seen that the gradual recovery in economic activity since the beginning of 2021, and the global recovery in international seaborne trade, benefited the ship management sector in the first half of 2021.

Shipping stands as one of the financially strongest and most significant pillars of the Cypriot economy. More specifically, it has been characterised as a 'blue economy', with the sector contributing around €1.034 billion to GDP per annum. More than 5 per cent of the world's fleet is controlled from Cyprus and more than 20 per cent of the world's third-party ship management activity (more than 200 shipping companies) is managed by companies based in Cyprus, making the island the largest third-party ship management centre within the European Union and one of the top three in the world, providing ship management services to around 3,300 ships under various flags, with a net tonnage of 47 million. In addition, more than 100,000 seafarers are employed on board Cypriot ships and 9,000 personnel are employed on shore (around 3 per cent of Cyprus' workforce).

The recent discovery of hydrocarbons in the island's exclusive economic zone widens the horizons of the shipping industry, creating synergies and new prospects. Offshore exploration and production of oil and gas, and their transportation ashore, require specialised ships and equipment, and specialist supporting services. A new industry is emerging to meet the needs of the offshore activities. Many Cypriot-based shipping companies are very keen to be involved in the industry and some have taken this step by broadening their activities. It is also anticipated that additional shipping companies operating in non-EU jurisdictions will relocate their offices and operations to Cyprus to explore the benefits of the emerging eastern Mediterranean offshore market. On this basis, Cyprus can develop into an important energy centre in the Mediterranean region, with new shipping and energy projects, and government policy includes future maritime transport needs for the exploitation of hydrocarbons.

6 It is of great importance that the SDM launched the Seayour Horizon campaign in March 2021, aiming to encourage students in upper high school to choose a career in the maritime sector. In addition, several shipping-related courses are now available in local universities that incorporate law, management and accounting, while a handful of dedicated maritime academies offer vocational marine training, some including on-board internships.

7 The ship management revenues of the second half of 2020, as compared with the second half of 2019, represent a 26 per cent decline, almost exclusively in the passenger ships sector. Again, the impact on the merchant ships sector (e.g., dry bulk carriers, tankers, containers and LNG carriers) was significantly smaller.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Cyprus is a common law jurisdiction, meaning that its legal framework is based on both legislation and case law. The legal system was based on the English legal system from 1878 until its independence in 1960.[8] The laws enacted for the colony applied the principles of common law and equity in Cyprus, and many of those laws are still in force.

Shipping legislation is essentially based on the UK model. The Register of Cyprus Ships is regulated by the Merchant Shipping (Registration of Ships, Sales and Mortgages) Laws of 1963, as amended, which are similar to the UK's Merchant Shipping Acts 1894–1954. In addition, Cypriot shipping companies are regulated by Chapter 113 of the statute laws of Cyprus, which is modelled on the UK Companies Act 1948.

As far as admiralty law is concerned, the Administration of Justice Act of 1956 (AJA) defines the admiralty jurisdiction of the Supreme Court of Cyprus, and the Cyprus Admiralty Jurisdiction Order 1893 regulates the procedure and rules before the Supreme Court.[9]

Moreover, following the accession of the Republic to the European Union in 2004, all EU maritime laws, including treaty provisions, regulations, directives and decisions (*acquis communautaire*) apply in Cyprus. Several international maritime conventions on safety, security, pollution prevention, maritime labour and health to which Cyprus is a signatory or that have been incorporated into Cyprus law also regulate the shipping industry.

III FORUM AND JURISDICTION

i Courts

All shipping disputes are litigated by the Supreme Court of Cyprus in its first instance jurisdiction as admiralty court and then as an appellate court, by a distinct judicial panel, at the second and final instance. However, the Supreme Court has the power to refer[10] an admiralty case for adjudication by a district court[11] (i.e., a first instance court) in the following cases:

a irrespective of its amount, any claim arising from a marine accident involving a ship and that includes any claim for loss of life or personal injury caused by a ship defect or as a result of an illegal or negligent act or omission of the owners, charterers or other persons possessing or controlling the ship; and

b any of the following admiralty claims, provided they do not exceed €100,000:
- in relation to goods or materials supplied to the ship;
- for loss of life or goods carried on board;
- pertaining to the building, repairing or supplying of a ship; and
- for wages or for disbursements made on behalf of a ship.

The jurisdiction of the Supreme Court to hear and determine admiralty claims and the extent of its jurisdiction are governed by the AJA.[12] The Court has, in many instances, stayed its

8 Cyprus was under the dominion of the British Empire from 1878 to 1914, as a British protectorate from 1914 to 1922 and as a Crown colony from 1922 to 1960.

9 Both Cypriot admiralty laws are based on the UK model.

10 By virtue of the Courts of Justice Law of 1960 (Law No. 14/1960), Article 22B.

11 Judgments issued by district courts can be appealed to the Supreme Court.

12 The Administration of Justice Act of 1956 (AJA) confers to the Supreme Court jurisdiction to hear and determine claims that relate, among other things, to damage done by or sustained by a ship, disputes as to

jurisdiction in favour of a more convenient foreign forum with a closer relation to the dispute and the litigants than Cyprus. The same approach has been adopted when the parties have agreed to refer their disputes to arbitration.

As far as the invocation of the admiralty court's jurisdiction is concerned, the AJA makes a distinction between *in personam* and *in rem* actions and, for the latter category, it makes a further distinction between occurrences in which the subject matter concerns a maritime lien or a statutory lien. In particular, Section 3(1) of the AJA stipulates that the jurisdiction of the Court may be invoked by an action *in personam* (i.e., against a person) in all cases, irrespective of the category of claim. However, the jurisdiction of the Court may be unconditionally invoked by *in rem* action against a ship only for claims that give rise to a maritime lien of the ship or for claims relating to the possession, ownership or (between co-owners) the business and earnings of the ship. Any other action *in rem* against the ship or against a sister ship may trigger the jurisdiction of the Court, only on the premise that the person who would otherwise be liable on an *in personam* claim was, both at the time the cause of action arose, the owner or charterer or person in possession or control of the ship, and at the time the action against the ship was brought, the beneficial owner of the ship in terms of all the ship's shares.

The admiralty court, pursuant to Section 1(1)(m) of the AJA (any claim in respect of goods or materials supplied to a ship for her operation or maintenance), has assumed jurisdiction for claims pertaining to bunkering[13] and supplies.

The time within which an admiralty action may be commenced is limited by the Limitation of Actionable Rights Law (Law No. 66(I)/2012 (the Limitation Law)), which constitutes the general law on limitation, and by the Torts Law, Chapter 148 when it comes to claims on negligence. After a few years of suspension, the Limitation Law eventually entered into force on 1 January 2016. It is the general law prescribing time bars for all legal actions to be instigated in the Cypriot courts, including admiralty actions. Hence, the time bar period depends on the nature of the claim and applies in the same fashion for all actionable rights, irrespective of jurisdiction. Indicatively, the following time limits apply:

a three years for actionable rights on negligence; and

b six years for actionable rights pertaining to a contract, including loan agreements.

The Supreme Court has recognised the right of the parties in a contract to set commonly acceptable time limits for certain aspects of their contractual relationship by adopting, for instance, those stipulated in shipping-related international conventions. As such, the Supreme Court, in one of its judgments, endorsed the agreement of the parties to adopt the one-year limitation provision of the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules) to raise a claim against the carrier and the ship in respect of carriage of goods.

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loss of life or personal injury, any claims that are concerned with the construction or repair or equipment of a ship, any disputes that arise in respect of goods or materials supplied to a ship for her operation or maintenance, any claim by a master, shipper or agent in respect of disbursement made on account of a ship and any collision or salvage claims.

13 In Admiralty Case No. 32/2014, *Interbunker Management Ltd and Novoil Ltd v. m/v 'BARIS'*, A Karitzis & Associates LLC successfully represented the plaintiffs in issuing an arrest warrant against the defendant's vessel, which was anchored in the port of Larnaca. The plaintiff's claim related to the supply of bunkers to the defendant's vessel, and the arrest warrant was issued upon filing an *ex parte* application at the Supreme Court of Cyprus.

Finally, regard must be paid to various international conventions containing limitation of action stipulations, provided these have been ratified by Cyprus. Cyprus has not ratified the Hague-Visby Rules, the UN Convention on the Carriage of Goods by Sea 1978 (the Hamburg Rules) or the Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974 (the Athens Convention), which contain certain limitation of action provisions (even though, as mentioned in more detail below, Cyprus has adopted most of the provisions of the Hague-Visby Rules and incorporated these into domestic law). However, Cyprus has ratified the International Convention on Civil Liability for Oil Pollution Damage 1969, replaced by the 1992 Protocol (the CLC Convention).

Reform of the judicial system

On 6 May 2019, the Council of Ministers announced the approval of a draft bill[14] that provides for the establishment of admiralty and commercial courts in Cyprus and that aims to constitute the fundamental basis of reforming the judicial system of Cyprus by providing fast and effective remedies for commercial and admiralty disputes. At the beginning of May 2022, the House of Parliament approved the bill and enacted the law creating the Commercial and Maritime Court, whereas the Constitution of the Republic of Cyprus has been recently amended to allow the use of the English language by the new Commerical and Maritime Court. These developments mark a significant process in the much needed reform of the Cyprus judicial system. The establishment and operation of both courts aims to help Cyprus to become a place for resolving international financial disputes.

ii Arbitration and ADR

No arbitration tribunal exists in Cyprus and, similarly, no specific maritime arbitration procedure is prescribed in the legal framework. The arbitration rules of Cyprus are widely applicable to all sectors of the legal arena, irrespective of the nature of the dispute or the jurisdiction to which they should be referred.

A dispute may be adjudicated by an arbitrator if the parties involved originally agreed in the underlying agreement (or thereafter agree in writing through a separate agreement) to refer the subject matter of their contention for resolution to one or more arbitrators of their choice.

The law of Cyprus categorises arbitral procedures and agreements as either domestic, which are governed by the Arbitration Law, Chapter 4, or international, which are regulated by the International Commercial Arbitration Law (Law No. 101/87), which adopts and reflects, in its greater extent, the provisions of the UNCITRAL Model Law on International Commercial Arbitration of 1985, including the definition of 'international arbitration'. Cyprus has been a contracting state to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention) since December 1980.

Irrespective of the arbitration time frames set by the parties in their agreement, the provisions of the Limitation Law apply to arbitration claims alike.

14 The bill provides that the Commercial Court will adjudicate specific commercial affairs disputes, namely those in which the value of the claim exceeds €2 million, and these cases shall be subject to adjudication via fast-track procedures. The Admiralty Court will adjudicate shipping and maritime matters (also subject to the fast-track procedure) regardless of the value of the claim. The ultimate aim of this set-up is to strengthen the island's shipping industry and simultaneously help to attract more investors.

Finally, pursuant to the Law Providing for Certain Aspects of Mediation in Civil Matters (Law No. 159(I)/2012), 'mediation' means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, voluntarily, to reach an agreement on the settlement of their dispute with the assistance of a registered mediator. For the purposes of the law, the term 'dispute' also includes a shipping dispute. Nonetheless, it is important to note that mediation law and practice in Cyprus is still in its infancy and not in common use for any kind of civil disputes, including maritime and shipping disputes.

iii Enforcement of foreign judgments and arbitral awards

Cyprus' legal framework does not specially classify or treat judgments or rulings of a maritime nature or context (foreign judgments) for recognition and enforcement purposes. As one would expect, the rules, principles and procedures governing the recognition and enforcement in Cyprus of foreign judgments awarded within the European Union are enunciated in Regulation (EU) No. 1215/2012 (the Brussels I Regulation (recast)), which also applies to maritime and admiralty judgments. The Regulation entered into force on 10 January 2015 and by virtue of its transitional provisions, the superseded Regulation (EC) No. 44/2001 continues to apply within the EU legal system (including Cyprus) to judgments given in legal proceedings instituted to authentic instruments formally drawn up or registered, and to court settlements approved or concluded, before 10 January 2015.

Foreign judgments given in legal proceedings outside the European Union are enforceable in Cyprus by terms of reciprocity where a bilateral or multilateral agreement is in place between Cyprus and the country in which the foreign judgment was handed down. In that regard, Cyprus, through the EU legislative initiatives, is a contracting party to the multilateral Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 1988, 2007 (the Lugano Convention). The Lugano Convention entered into force on 1 January 2010. Cyprus has also signed and ratified the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (in force since 1979) and has entered into bilateral agreements with a number of other countries to govern the mutual recognition and enforcement of court judgments, including the United Kingdom, China, Egypt, Russia, Belarus and Ukraine.

In the absence of any bilateral or multilateral convention governing the matter, the foreign judgment might be enforced in Cyprus by following and applying common law rules.

Finally, Cyprus is a contracting party to the New York Convention, based on which an arbitral award made in the territory of another contracting state to the Convention, including rulings in maritime disputes, might be recognised and enforced in Cyprus.

The Limitation Law and the provisions thereof also apply to maritime claims.

IV SHIPPING CONTRACTS

i Shipbuilding

Cyprus does not have a shipbuilding industry and, therefore, there is no specific regime or local laws regulating shipbuilding contracts. The general contract law principles apply.

ii Contracts of carriage

Cyprus has adopted, by way of succession, the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (the Hague Rules) (extended to Cyprus on 2 June 1931). Furthermore, the UK Bills of Lading Act of 1855 applies in Cyprus

by means of Articles 19 and 29 of the Courts of Justice Law of 1960 (Law No. 14/1960), as seen in The Ship LIPA.[15] In the absence of an express choice of law in a bill of lading or charter party, Article 5 of the Rome I Convention[16] applies.

Despite the fact that Cyprus has not ratified the Hague-Visby Rules, it has adopted most of the Rules' provisions and incorporated these into domestic law.[17]

Furthermore, Cyprus has ratified the Hague Rules through the Carriage of Goods by Sea Law, Chapter 263. However, the Hamburg Rules and the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (the Rotterdam Rules) have not yet been ratified in Cyprus.

Cabotage

Maritime cabotage is reserved to Cypriot and European nationals and it is governed by Council Regulation (EEC) No. 3577/92 in relation to the freedom to provide services to maritime transport within Member States. The Regulation is directly enforceable in Cyprus and provides that transport between the ports of mainland Cyprus is reserved for vessels operated by shipowners that are nationals of and registered in EU or European Economic Area (EEA) Member States and are flying a flag of one of those states.

Cyprus has concluded bilateral agreements on merchant shipping with Bulgaria,[18] Lithuania,[19] Italy[20] and Romania,[21] which provide for a cabotage restriction.

iii Cargo claims

The Supreme Court of Cyprus, in its admiralty jurisdiction, is vested with the jurisdiction to hear and determine questions or claims, inter alia, for loss of or damage to goods carried in a ship or arising out of any agreement relating to the carriage of goods in a ship.[22]

Cyprus has not ratified the Hamburg Rules. The operation of cargo claims in Cyprus is very much based on the old law and practice that applies in England and the common law or equity principles. In particular, the Carriage of Goods by Sea Law, Chapter 263, which essentially adopts the Hague-Visby Rules, applies only in relation to carriage of goods by sea from a port in Cyprus to any other domestic or foreign port. Furthermore, the Bills of Lading Act 1855 and relevant sections in the UK Merchant Shipping Act of 1894 (both of which

15 (2001) 1B CLR 1220.

16 Regulation (EC) No. 593/2008.

17 The Carriage of Goods by Sea Law, Chapter 263, basically adopts the Hague-Visby Rules.

18 Agreement between the Government of the Republic of Cyprus and the Government of the Republic of Bulgaria on Co-operation in the Field of Merchant Shipping, signed 19 December 1985 (Gazette No. 2108, Supplement VII, dated 24 January 1986), Article 6.

19 Agreement between the Government of the Republic of Cyprus and the Government of the Republic of Lithuania on Merchant Shipping, signed 15 February 2000 (Gazette No. 3392, Supplement VII, dated 10 March 2000), Article 5.

20 Agreement between the Government of the Republic of Cyprus and the Government of the Italian Republic on Maritime Navigation, signed 18 November 2004 (Gazette No. 3944, Supplement VII, dated 14 January 2005), Article 1. The Agreement was amended by exchange of Diplomatic Notes (Circular 1/2012 of the SDM).

21 Agreement between the Government of the Republic of Cyprus and the Government of Romania on Maritime Transport, signed 23 October 2006 (Gazette No. 4077, Supplement VII, dated 10 January 2007), Article 5.

22 AJA, Sections 1(1)(g) and 1(1)(h).

apply in the legal system of Cyprus pursuant to Section 29(e) of Law No. 14/1960) may intervene in cargo claims to clarify the legal position and possible liability of owners, carriers, shippers and agents. In addition, Cyprus ratified the Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC Convention 1976)[23] in 2006.

According to Rule 29 of the Rules of the Supreme Court in its admiralty jurisdiction (RSC), stated in the Schedule of the Cyprus Admiralty Jurisdiction Order 1893, any number of persons with interests of the same nature arising out of the same matter may be joined in the same action, whether as plaintiffs or defendants, while Rule 31 makes it clear that an underwriter or insurer shall be deemed to be a person interested in the action.

In terms of the procedurally recognised right of the underwriter or insurer to be joined in an admiralty action as an interested party, the principle enunciated in one of the important admiralty judgments given by the Supreme Court in plenary session[24] highlights matters relating to insurers and underwriters when issuing 'subrogation receipts'. The Court stressed that subrogation does not, by itself, give rise to a right of insurers or underwriters to bring an action to pursue the subrogated claim in their name but the action should be brought in the name of the assured, unless the claim has been clearly assigned to the insurer or underwriter. In any event, the Supreme Court has stressed in a number of judgments that it is desirable that the names of both the insurer and the assured are joined in the action.

Sometimes, contracts for the carriage of goods by sea may pose uncertainty on the *locus standi* of an innocent party, being a shipper, consignee, endorsee of the bill of lading or other, to initiate an action to the admiralty court. In one of its judgments,[25] the Supreme Court shed light on the importance and meaning of the bill of lading. Effectively, it adopted the principles articulated in common law cases and English case law, namely that the bill of lading is issued to the order of the person to whom the goods are destined and serves three purposes:

a it is evidence that the cargo has been laden on board the ship;
b it constitutes, or may constitute, evidence for the contract of carriage; and
c it constitutes *prima facie* title of the goods.

Nonetheless, the Supreme Court highlighted that whether the bill of lading contains the entirety of the terms and conditions of the carriage agreement is clearly a matter of the circumstances and the factual background embracing the dispute. The intentions of the parties as to the time and manner of passing the property of the goods, as reflected in the contract of carriage, is of decisive importance on the right of the consignee or end receiver of the goods to sue anyone who is responsible in terms of damage to or loss of the ordered goods.

When it comes to the possible liability of forwarding agents that undertake to transport goods from one destination to another on behalf of their clients, the Supreme Court reiterated that the contents of the bill of lading are not conclusive evidence but only an indication of the legal position of each party in the transaction for the carriage of goods. If a forwarding agent is engaged by the client to arrange the transportation of the goods to the destination that the client determines without expressly agreeing to do so only as agent of the client and, on the contrary, it essentially assumes the responsibility to ensure the safe transportation of

23 Cyprus has also ratified Protocol to amend the LLMC Convention 1996 (the 1996 LLMC Protocol).

24 *Gold Seal Shipping Company Ltd v. Standard Fruit Company (Bermuda) Limited and another* [2000] 1C JSC 1552.

25 *Andreas Orthodoxou Limited v. Demetriou Tylliri Limited* [2007] 1B JSC 1247.

the goods to the destination that the client will specify, the forwarding agent may be found liable against the client for the loss or damage that the goods may suffer during their delivery to the client.[26]

If an owner, charterer, carrier, forwarding agent or other is found liable for breach of the contract of carriage because of its failure to safely deliver goods to the prescribed destination and as a result the goods sustained loss or damage, the receiver or owner of the goods will be awarded compensation for the loss or damage suffered and that naturally arose in the usual course of things from the breach or that the parties knew, when the contract was made, to be the likely result of the breach. Compensation shall not be awarded for any remote and indirect loss or damage sustained by reason of the breach. This emanates from the Contract Law, Chapter 149, which reflects the principles of common law and, similarly, the Torts Law, Chapter 148, which includes similar provisions for the award of compensation for negligent or tortious acts. The admiralty court has, in some instances, awarded compensation for consequential pecuniary loss in the form of loss of profits when the circumstances of the case so justified.

In relation to demise clauses, even though the Supreme Court (at first instance as admiralty court or in its jurisdiction as appellate court) has not specifically interpreted or examined the effect of such a clause in a charter party, if such a question were to be brought before it for adjudication, the Supreme Court would, in all likelihood, follow the case law developed in England since *The Berkshire* case;[27] in other words, the validity of the demise clause will be recognised.

iv Limitation of liability

Cyprus has ratified the LLMC Convention 1976, whereby a shipowner may limit his or her liability for the claims set out in Article 2 of the Convention (except for those claims provided in Article 3) for the limits determined in Articles 6 and 7.[28] Furthermore, the Merchant Shipping (Shipowners' Insurance for Maritime Claims) Law of 2012 (Law No. 14(I)/2012) transposed Directive 2009/20/EC on insurance against maritime claims subject to the limitations of the LLMC Convention 1976. Moreover, the EU Passenger Liability Regulation,[29] which is based on the Athens Convention, sets out limits of liability for death or personal injury or for loss or damage to luggage and vehicles.

In addition, Section 502 of the UK Merchant Shipping Act 1894 fully relieves a shipowner of a Cypriot seagoing ship to compensate for any loss or damage to any goods by reason of fire on board, if it happened without his or her actual fault or privity. Also, under Section 503 of the Act, the liability of the owner of any ship for loss of life, personal injury or damage to any goods caused without actual fault or privity is limited to specified extents.

Furthermore, the parties to a contract may agree to expressly limit the liability of any of the parties by incorporating relevant and appropriate terms in the contract.

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26 *Magelire International SA and others v. Freetrade (SAL)* [2003] 1C JSP 1370; *Lord Jeans Ltd v. Orbit-Kazoulis Ltd* [2004] 1B JSC 1300.

27 [1974] 1 Lloyd's Rep 185.

28 The LLMC Convention 1976 liability limits were increased as from 8 June 2015 under the tacit acceptance procedure provided by Article 8 of the 1996 LLMC Protocol. See www.imo.org/en/MediaCentre/PressBriefings/Pages/24-LLMC-limits.aspx for the revised limits.

29 Regulation (EC) No. 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents.

V REMEDIES

i Ship arrest

Cyprus is not a party to the International Convention Relating to the Arrest of Sea-Going Ships 1952 (the 1952 Arrest Convention); however, the AJA does ratify the Convention.[30]

Under Cypriot law, maritime liens enjoy advantages over all other permitted actions *in rem* (statutory liens), at the time of creation of the lien, in priority and in the enforceability of the security. In addition, statutory liens have no priority over mortgages.[31]

Cyprus courts follow the English case *The Bold Buccleugh*,[32] which recognises as maritime liens salvage, bottomry, masters' and seafarers' wages, disbursements and liabilities, and damage done by a vessel. The arrest of a ship is only possible in the case of an action *in rem* (however, the possibility of securing a *Mareva* injunction for freezing of assets, including a vessel, is discussed in 'Procedures of ship arrest', below).

Thus, the filing of an action *in rem* is a prerequisite for such an arrest. The court has wide discretion to order the arrest of the vessel if it is satisfied that the plaintiff is eligible for arrest. Similarly, the arrest of a sister ship is applicable in Cyprus by means of Section 3(4) of the AJA. However, the concept of 'associated ship arrest' is not recognised under Cyprus law.

Procedures of ship arrest

Rule 50 of the RSC allows any party to apply to the court for the issue of a warrant for the arrest of property (i.e., for the arrest of ship or cargo), at the time of, or at any time after, the issuance of the writ of summons (but not without the submission of a writ of summons) in an action *in rem*. The application must be accompanied by an affidavit containing the particulars prescribed in the RSC, including the nature of the claim, that the aid of the court is required, the national character of the ship and that, to the best of the deponent's belief, no owner or part owner of the ship was domiciled in Cyprus at the time the necessaries were supplied or the work was carried out. However, the judge has the discretion to issue an arrest warrant even if the affidavit does not contain all the prescribed particulars.

The arrest warrant shall be served by the marshal of the court in the same manner as prescribed by the RSC for the service of a writ of summons in an action *in rem*. For instance, if the arrest warrant is to be served on a ship, or on cargo, freight or other property that is on board a ship, the warrant shall be considered as duly served if an office copy of it is attached to a conspicuous part of the ship, including a mast. If the cargo, freight or other property is not on board the ship, an office copy must be attached to some portion of the cargo or property.

The RSC vest the power and discretion on the judge to issue provisional arrest orders, notwithstanding that no notice of the application has been given to the ship or the shipowner, on such terms as to the furnishing of security as shall appear to the judge to have regard to the circumstances of the matter in question (Rule 205). In practice, almost invariably the judge will order the arresting party to provide security in the form of a bank guarantee from a Cyprus bank, the aim of which is to cover the costs of the marshal and to compensate the shipowner for loss he or she may have suffered from the detainment of the ship, acknowledging the concept of wrongful arrest. However, the security of the arresting

30 By virtue of the Constitution and by Law No. 14/1960, Articles 19 and 29.

31 As seen in *Nordic Bank PLC v. The Ship 'Seagull'* (1989) 1 CLR 420.

32 *The Bold Buccleuch* (1851) 7 Moo PC 267.

party shall not be seized in all cases where the provisional arrest order is finally set aside as unjustified. The arresting party's guarantee may be claimed only in the event of wrongful arrest, which was so unwarrantably brought that it rather implies malice or gross negligence.

At the time the arrest warrant is issued, the judge will determine the amount of the security that the shipowner or other opposing party may deposit to the court for the arrested ship to be released, taking into account the level of the claim. The ship may be released by an order of the judge upon a written application and provided that the security originally set by the judge is deposited to the court.

Any person desiring to prevent the arrest or the release of any property under arrest or the payment of any moneys out of court may, by a written application to the registrar of the admiralty court, cause a caveat against any such action or procedure and the court or judge will not proceed to issue the requested order without notice to the caveator, unless the judge deems that special circumstances have been presented that render it desirable or necessary to make an order without notice to the caveator, upon such terms as may seem fit to the judge. The caveat shall not remain in force for more than three months from the date of being entered, unless extended by further applications.[33]

Almost invariably at the time an arrest warrant is issued, the ship is located within the territorial waters of Cyprus,[34] either anchored in the port area or anchorage or berthed in one of the ports controlled by the Cyprus government (i.e., the ship must not be berthed in any of the ports that have been illegally occupied by the Turkish administration since Turkey's invasion of Cyprus in 1974). An arrest warrant against a ship may be issued even if, at the time the warrant is issued, the ship is located outside the territorial waters of Cyprus. However, in this case, it will not be possible to serve the arrest warrant unless the ship heads within the territorial waters. In these circumstances, the arresting party must see that the warrant will be adequately timetabled so that it does not expire before it is served on the ship.

The Supreme Court has recognised the option of a party to the admiralty proceedings to seek the 'arrest' of a ship by using the *Mareva* injunction mechanism under Section 32 of Law No. 14/1960. However, the Court stressed that the power of the Court to issue such an injunction must be exercised only on the premise that the ship is within the jurisdiction of the Court or, in other words, within the territorial waters controlled by the Cyprus government.

The issuance of an arrest warrant, based on Section 50 of the RSC or by way of a *Mareva* injunction, as security for court proceedings (not arbitration proceedings) pending in another jurisdiction, is plausible pursuant to the provisions of the Brussels I Regulation (recast) and, in particular, Section 35 of the Regulation, provided that the ship is within the jurisdiction of the court.[35]

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33 Rules of the Supreme Court (RSC), Rules 65 to 73.

34 The Republic of Cyprus, pursuant to the United Nations Convention on the Law of the Sea 1982 (UNCLOS), as well as the Territorial Sea Law of 1964 (Law No. 45/1964), has a territorial sea, the breadth of which extends to 12 nautical miles from the baselines. The geographical coordinates and the relevant map of the Cypriot baselines were submitted to the Secretary General of the United Nations on 3 May 1993. In the territorial sea, the Republic of Cyprus exercises full sovereignty and applies all related domestic laws, in line with UNCLOS provisions. Furthermore, according to the Regulation of Innocent Passage of Ships through the Territorial Waters Law of 2011 (Law No. 28(I)/2011), as well as UNCLOS, every foreign ship, whether merchant or warship, has the right of innocent passage through the territorial sea of the Republic of Cyprus, without encroaching upon its sovereignty and without a prior licence.

35 *The Commerzbank Aktiengesellschaft v. The Ship 'Tour 2'*, Admiralty Action No. 2/2018, 25 May 2018 is relevant.

In *Nationwide Shipping Inc v. The Ship 'Athena'*,[36] the Supreme Court, by adopting an extract from the judgment given in the English case *The 'Vasso'* (formerly *'Andria'*),[37] held that the admiralty court has no jurisdiction to issue an arrest warrant in an action *in rem* for the purpose of providing security for an award that may be made in arbitration proceedings. However, it seems that the extract from the English judgment extends to other proceedings as the court in *The 'Vasso'* case stressed that the purpose of the exercise of the admiralty court's jurisdiction to arrest a ship is to provide security in respect of the action *in rem* before it and not for any other purpose. In *The Ship 'Athena'*, the Court did not consider the application of the Brussels I Regulation (recast), which, of course, prevails over any domestic law, and therefore confers the jurisdiction to the admiralty court to issue provisional measures and orders for matters adjudicated on their merits in other European jurisdictions.

ii Court orders for sale of a vessel

An arrested ship, cargo or other property may be appraised and sold by order of the court or judge, either before (*pendente lite*) or after the final judgment. In this case, the judge will appoint the marshal of the court or any other person to appraise the property under arrest (in practice, the court appoints the marshal in almost all cases) and to proceed with its sale at auction (the sale procedure adopted in most cases). Nonetheless, the judge may allow the sale of the ship by private sale if he or she deems this fit and provided that all parties in the litigation acquiesce.[38]

The proceeds from the sale of a ship are paid into the court and, upon an application by any judgment creditor, will be distributed to all judgment creditors who claimed a share of the proceeds, in order of priority. In Cyprus, the priorities have been determined by case law and no guidance is found in the RSC or in any other law or procedural rules applying in Cyprus. Detailed analysis of the order of priorities is outside the scope of this chapter. In general terms, however, government fees, including the costs and expenses of the marshal, take priority over any other claims, and maritime liens take priority over statutory liens, although statutory liens have no priority over mortgages.

VI REGULATION

i Safety

The marine safety regulation regime in Cyprus is based on the International Convention for the Safety of Life at Sea 1974 (SOLAS)[39] and other international conventions, such as:

a the International Convention on Load Lines 1966 (the Load Lines Convention);
b the International Regulations for Preventing Collisions at Sea 1972 (COLREGs);
c the International Convention on the Tonnage Measurement of Ships 1969 (the Tonnage Convention), as amended;
d the Special Trade Passenger Ships Agreement 1971 and the Protocol on Space Requirements for Special Trade Passenger Ships 1973;
e the International Convention for Safe Containers 1972 (the CSC Convention);

36 [2012] 1C JSC 2343.

37 [1984] Lloyd's Law Reports 235.

38 RSC, Rules 74 to 77.

39 And the 1978 Protocol thereof, as well as Resolutions MSC 1 (XLV) and MSC 2 (XLV) 1981 (Ratification) and for Matters Connected Therewith Law of 1985 (Law No. 77/85), as amended.

f the International Safety Management Code 1998 (the ISM Code); and
g the International Ship and Port Facility Security Code 2004 (the ISPS Code), which adopts various international maritime safety standards.

Cyprus has a proven track record when it comes to maritime safety and has implemented a number of effective measures in line with its accession to the European Union. High-risk vessels are identified by extensive surveys undertaken by the authorities and inspections are undertaken on a global scale, with inspectors of Cyprus ships now operating from 23 important international ports. Moreover, a network of local inspectors of Cyprus ships covers important ports worldwide to ensure efficient and effective control of Cyprus ships and to avoid detentions by port state control.

In addition, Cyprus has a comprehensive and pioneering national legislation[40] for the protection of Cypriot ships from piracy and other unlawful acts, including a legal framework allowing and regulating the use of private armed security personnel in high-risk areas.

In December 2019, the SDM issued Circular 21/2019, through which it clarified the policy adopted by the SDM in response to IMO Resolution MSC.402(96) on the requirements for maintenance, thorough examination, operational testing, overhaul and repair of lifeboats and rescue boats, launching appliances and release gear in conjunction with IMO Resolution MSC.404(96), which, among other things, amends Regulations 3 and 20 of Chapter III of SOLAS. The amendments came into force on 1 January 2020. In addition, the SDM has clarified the adoption of the Guidelines on Safety during Abandon Ship Drills Using Lifeboats (MSC.1/Circ.1578).

Moreover, in January 2021, the SDM enacted the Merchant Shipping (System of Inspections for the Safe Operation of Ro-Ro Passenger Ships and High-Speed Passenger Craft in Regular Service) Law of 2020 (Law 189(I)/2020),[41] the Merchant Shipping (Safety Rules and Standards for Passenger Ships) Law of 2020 (Law 190(I)/2020),[42] the Merchant

40 According to the Protection of Cyprus Ships Against Acts of Piracy and Other Unlawful Acts Law of 2012 (the Law), all ship owners and managers of ships under the Cyprus flag are authorised to take any measure being necessary (within the scope of the Law) to protect their ships, personnel and cargo legally. More specifically, the Law allows the interested shipping company to hire a private security company to provide extra security (armed or not) for its ship while in high-risk zones. Additionaly, the Law states the relevant procedure needed to be followed, by a private security company, to obtain the authorisation of the Cyprus government that is required to guard (armed or unarmed) Cyprus-registered vessels. A copy of the Law must be placed on board every Cyprus-flagged vessel. The master and shipboard personnel of all Cyprus-flagged vessels are required to become aware of the provisions of the Law, as it has a global geographical application and establishes new rights and obligations for them. Two geographical areas are defined as high-risk areas. The coordinates and description of the high-risk areas are found in First Schedule of the Law.

41 The Merchant Shipping (System of Inspections for the Safe Operation of Ro-Ro Passenger Ships and High-Speed Passenger Craft in Regular Service) Law of 2020 (Law 189(I)/2020 aims to transpose into the law of the Republic of Cyprus Directive (EU) 2017/21103, which repeals and replaces Directive 1999/35/EC on the system of inspections for the safe operation of ro-ro passenger ships and high-speed passenger craft in regular service and ensures a high level of safety and compliance through relevant inspections. As a result of the repeal of Directive 1999/35/EC, the Merchant Shipping (Mandatory Surveys for the Safe Operation of Regular Ro-Ro Ferry and High Speed Passenger Craft Services) Laws of 2002–2012 (Law 59(I)/2002 as amended) are repealed. Currently 89 ro-ro passenger ships are registered under Cyprus flag.

42 The Merchant Shipping (Safety Rules and Standards for Passenger Ships) Law of 2020 (Law 190(I)/2020) transposes into the law of the Republic of Cyprus Directive (EU) 2017/21082, which amends

Shipping (Registration of Persons Sailing on Board Passenger Ships (Amendment) Law of 2020 (Law 188(I)/2020)[43] and the Reporting Formalities for Ships Arriving in and/or Departing from Ports of the Republic of Cyprus Order of 2020 (PI 605/2020).[44]

Between February 2020 and March 2022, the SDM issued a plethora of circulars,[45] taking urgent provisional measures for the operation of Cypriot ships and minimising risks to seafarers,[46] passengers and others on board Cypriot ships during the covid-19 outbreak.[47] Furthermore, the Minister of Transport, Communications and Works of the Republic of Cyprus, in exercising the powers vested in him by Article 14(1) of the Cyprus Ports Authority Legislation of 1973 to 2016, issued instructions for the implementation of restrictive measures at ports and port installations, as well as regarding crew-change protocol, to counter the covid-19 pandemic.

In addition, the SDM on 4 March 2022 proceeded with the issuance of Circular 10/2022, whereby it adopts urgent provisional measures with respect to the seafarers' employment agreements extensions due to the gravity of the situation in Ukraine. Specifically, pursuant to the Circular, immediately after a seafarer completes 11 months' continuous sea service, a repatriation plan shall be submitted by the owner, bareboat charter or manager of Cypriot ships for approval by the SDM.

Directive 2009/45/EC, repealing the existing Merchant Shipping (Passenger Ship Safety Rules and Standards) Laws of 2002 and 2004 by which Consolidated Directive 2009/45/EC had been transposed into the Cypriot legal order. Therefore, this Law also includes the provisions of Directive 2009/45/EC, which have not been repealed or amended by Directive (EU) 2017/2108.

43 The Merchant Shipping (Registration of Persons Sailing on Board Passenger Ships (Amendment) Law of 2020 (Law 188(I)/2020), which amends the basic Law 57(I)/2002, aims to transpose into the Law of the Republic of Cyprus the amendments made by Directive (EU) 2017/2109 to Directive 98/41/EC. The relevant amendments are a result of the implementation of Directive 98/41/EC, which has shown that information about passengers is not always immediately available to the competent authorities when needed, while the current requirements of Directive 98/41/EC should be aligned with the electronic data submission requirements to increase efficiency.

44 The amendments introduced by Directive (EU) 2017/2109 to Directive 2010/65/EU regarding Part A of the Annex thereof, are introduced to the Cyprus legal order by virtue of the Reporting Formalities for Ships Arriving in and/or Departing from Ports of the Republic of Cyprus Order of 2020 (PI 605/2020), issued under the Reporting Formalities of Ships Arriving in and/or Departing from Ports of the Republic of Cyprus Law of 2012 (Law 148 (I)/2012).

45 Circulars 3/2020, 5/2020, 6/2020, 7/2020, 8/2020, 9/2020, 12/2020, 13/2020, 17/2020, 18/2020, 23/2020, 24/2020, 1/2021, 2/2021, 4/2021, 9/2021, 10/2021, 11/2021, 12/2021, 14/2021, 16/2021, 19/2021, 33/2021, 10/2022 and 16/2022.

46 Cyprus was one of the first countries that recognised seafarers as essential workers and introduced practical measures for crew changes. Since May 2020, around 10,000 seafarers have been repatriated or have been able to return to work through Cyprus.

47 Among other things, the SDM adopted urgent provisional measures relating to the extension of the validity period of certain seafarers' certificates, extended the annual/intermediate period or renewal surveys for all ships' statutory certificates and enabled remote audits, acknowledging that Cyprus-flagged vessels are encountering increasing difficulties in arranging surveys, audits, inspections, etc. Moreover, the SDM introduced special measures as to the deferral of payment deadlines for tonnage tax and annual maintenance fees.

Safety achievements of the Cyprus flag

The International Chamber of Shipping published its annual Flag State Performance Table for the year 2020–2021 on 27 January 2021, which provides an invaluable indicator of the performance of individual flag states worldwide. It analyses how the countries delivered against a number of criteria, such as port state control records, ratification of international maritime conventions and attendance at IMO meetings.

The level of performance of many of the largest flag states, including Cyprus, continues to be very positive. More specifically, Cyprus maintains its reputation as a traditional large flag state with exceptionally high standards. As a party to all international maritime conventions on safety, security, pollution prevention, maritime labour and health and safety, Cyprus gives full and complete effect to their provisions.

In addition, during the last quarter of 2019, the SDM successfully passed European Maritime Safety Agency (EMSA) audits with no observations on safety and security. The Cyprus case will be used by EMSA as an example of successful use of best practices and procedures on safety.

ii Port state control

The SDM is the competent port state control (PSC) authority in Cyprus. It carries out all inspections of foreign ships in Cypriot ports,[48] verifying that crew, ships and equipment comply with the requirements of international conventions on safety, pollution prevention, operation, management and security, qualifications, living conditions and terms of employment.

Each SDM surveyor has wide-ranging powers on PSC. More specifically, the surveyor can, among other things, interrupt, enter, inspect and conduct inspections on any ship, whether lying at anchor or on a voyage, and provide any necessary assistance to the master, as he or she deems fit. It is of great importance that a network of local inspectors of Cypriot ships covers important ports worldwide to ensure efficient and effective control of Cypriot ships and to avoid PSC detentions.

48 The ships have to be located within the territorial waters of Cyprus, either anchored in the port area or anchorage, or berthed in one of the ports controlled by the government. As a result of the illegal Turkish invasion and military occupation of the northern part of Cyprus in 1974, all ports in the occupied part of the Republic have been declared by the government as prohibited ports of entry and exit, and no visitor should enter or leave the Republic through these ports. More precisely, the relevant restrictions regarding the ports of Famagusta, Karavostasi and Kyrenia have been imposed by an order (PI 265/1974) of the Council of Ministers of the Republic of Cyprus issued on 3 October 1974, declaring the ports in the occupied areas closed for all vessels. Thus, the ships must not be berthed in any of the ports that are illegally occupied and operated by the Turkish administration. In addition, Section 15(2) of the Cyprus Ports Authority Law of 1973 (Law No. 38/1973), as amended, provides for the relevant sanctions as follows: 'The master and/or the owner of a ship which arrives and departs from a port closed for such ship or enters or stays therein in contravention of an Order under subsection (1) shall be guilty of an offence and be liable to imprisonment not exceeding two years or to a fine not exceeding €17,086 or to both such imprisonment and fine, and in the case of a ship registered in the Register of Cyprus Ships, the Court dealing with the case has the power to order her deletion from the Register of Cyprus Ships.' These restrictions were taken to uphold and maintain the sovereignty of the Republic of Cyprus over its ports and harbours and due to the fact that safety of navigation could no longer be guaranteed in the areas illegally occupied by the Turkish Army since 1974.

The operator and the master of each ship have, individually, the obligation to provide the surveyor with any requested information and a signed declaration as to the accuracy and truth of the information provided. It is a criminal offence to refuse to provide this information, punishable by imprisonment for up to 12 months or a fine of up to €6,000.

Cyprus is a signatory to the Paris Memorandum of Understanding on Port State Control 1982 (the Paris MOU)[49] and the Mediterranean Memorandum of Understanding 1997 (the Mediterranean MOU).[50] Inspections in Cyprus are carried out according to the Merchant Shipping (Port State Control) Laws of 2011 to 2020 (Law No. 95(I)/2011) as amended, which harmonises Directives 2009/16/EC and (EU) 2017/2110[51] on port state control.

The operator, agent or master of a ship calling at a Cyprus port,[52] which, in accordance with Section 17 of Law No. 95(I)/2011, is eligible for an expanded inspection and bound for a port or anchorage of the Republic, has the obligation to ensure that one of them notifies the competent authority or the Cyprus Ports Authority[53] of the ship's arrival and to provide any necessary information regarding this. The notification shall be as per the Fourth Schedule of the relevant Notification[54] and shall be submitted at least three days before the estimated arrival time or before departure from the previous port or anchorage, if the voyage is expected to take fewer than three days.

49 The Maritime Authority of Cyprus adhered to the Paris MOU on 12 May 2006, and it took effect on 1 July 2006. The Paris MOU has been adopted by 27 flag states.

50 Signed in Valletta (Malta) on 11 July 1997. The Mediterranean MOU comprises 10 Member States: Algeria, Cyprus, Egypt, Israel, Jordan, Lebanon, Malta, Morocco, Tunisia and Turkey. According to the Mediterranean MOU's Annual Report of 2017, published in 2018, the Cyprus administration carried out 119 inspections of foreign vessels, 11 of which were detained. In 2017, 82 inspections of Cypriot ships took place, with only two detentions.

51 The Merchant Shipping (Port State Control) (Amendment) Law of 2020 (Law 187(I)/2020), amends the existing Merchant Shipping (Port State Control) Laws from 2011 to 2015 (Law 95(I)/2011 as amended by Law 155(I)/2015), and aims to transpose into the legal order of the Republic of Cyprus the amendments introduced by Directive (EU) 2017/2110 to Directive 2009/16/EC. These amendments seek to avoid unjustified ship detentions or delays in the framework of port state control.

52 The information relating to ship calls are provided through the Safe Sea Net (SSN), which is the European Community maritime information and exchange system. The SSN has been developed according to Directive (EC) No. 2002/59 (later amended by Directive (EC) No. 2009/17), which has been transposed into Cyprus legislation by virtue of the Merchant Shipping (Community Vessel Traffic Monitoring and Information System) Laws of 2004 to 2012, as amended. Also according to Directive 2009/16/EC, the Member States shall provide information to THETIS (the PSC inspection database) on ships' actual times of arrival and departure through the SSN.

53 The Cyprus Ports Authority (CPA) is a public sector entity established in 1973 based on the 1973 Ports Authority Law and is under the supervision of the Ministry of Transport, Communications and Works of the Republic of Cyprus. The CPA is the competent entity to administer, operate and develop the ports, as well as to facilitate international shipping aids and issue licences for pilotage. All ports, harbours and lighthouses of the Republic are under the jurisdiction of the CPA with exception to the new Limassol Port (which is now operated by three concessionaires). Its jurisdiction extends up to 12 nautical miles from the port's facilities. The Cypriot ports are among the first 33 ports worldwide that were certified in accordance with the International Ship and Port Facility Security Code 2004 (the ISPS Code), which relates to the security of port areas and services.

54 The Merchant Shipping (Port State Control) Notification of 2015 (PI 411/2015).

In addition to the above-mentioned laws, the Merchant Shipping (Port State Control – Duration of Night) Order of 2011 (PI 339/2011), the Merchant Shipping (Port State Control – Geographical Areas of Ports and Anchorages) Order of 2017 (PI 155/2017) and related SDM circulars[55] also apply.

Detainment of foreign ships in Cyprus

The Cyprus administration detained one foreign vessel in 2020 and nine foreign ships in 2019 for safety deficiencies. The deficiencies included, among other things, matters affecting seaworthiness, life-saving equipment, fire appliances, safe navigation and crew conditions, such as excessive working hours and outstanding wages. Generally, a detention lasts until the deficiency is rectified.[56]

Detainment of Cyprus-flagged vessels

In 2020, only 29 Cyprus-flagged vessels were detained worldwide,[57] compared with 47 in 2019.[58] In 2021, only 22 vessels were detained.[59]

Classification of Cyprus flag

The Cyprus flag is classified in the White List of the Paris MOU and the Tokyo Memorandum of Understanding on Port State Control in the Asia-Pacific Region 1994 (the Tokyo MOU). It is a top-quality sovereign flag that duly adheres to all safety and security standards deriving from both the Paris and Tokyo MOUs.

Pursuant to the 2020 Paris MOU Annual Report titled 'Dealing with the pandemic', between 2018 and 2020 2,018 Cypriot ships were inspected, 53 of which were detained. In particular, in 2020, 585 inspections of Cypriot ships took place, with 13 detentions. In addition, as of 1 July 2021, the Cyprus flag meets the criteria for low-risk ships, which will definitely lead to fewer inspections of Cypriot ships in the future.

As far as the Tokyo MOU is concerned, according to its 2020 Annual Report on Port State Control in the Asia-Pacific Region, 314 Cypriot ships were inspected, of which only eight were detained, a notable difference to the statistics of 2019, where 551 ships were inspected and 24 were detained. In addition, pursuant to the 2020 Annual Report of the Memorandum of Understanding on Port State Control for the West and Central African Region 1999 (the Abuja MOU), 54 Cypriot ships were inspected, none of which were detained. According to the 2020 Annual Report of the Riyadh Memorandum of Understanding on Port State Control in the Gulf Region (the Riyadh MOU), 26 Cypriot ships were inspected, with zero detentions.

55 Relevant Circulars: 7/2010, 8/2010, 41/2010, 24/2011, 31/2011, 26/2012 and 13/2016.

56 If a deficiency cannot be fixed immediately, the ship, under specific circumstances, may be eligible to sail to the nearest port facility for repair or to sail with the undertaking of fixing the deficiency within 15 to 30 days.

57 Of a total of 292 deficiencies, 45 concerned fire safety measures (fighting appliances), 33 concerned safe navigation and 31 concerned life-saving appliances.

58 Of a total of 438 deficiencies, 78 concerned fire safety measures (fighting appliances), 53 concerned propulsion and auxiliary machinery, and 49 concerned life-saving appliances.

59 Of a total of 197 deficiencies, 41 concerned fire safety measures (fighting appliances), 20 concerned life-saving appliances and 19 concerned safety of navigation.

According to the 2021 Annual Report of the Indian Ocean Memorandum of Understanding on Port State Control (the Indian Ocean MOU), 82 Cypriot ships were inspected, three of which were detained. Pursuant to the 2020 Annual Report of the Memorandum of Understanding on Port State Control in the Caribbean Region (the Caribbean MOU), 14 Cypriot ships were inspected, with no detentions. Finally, pursuant to the 2020 Annual Report of the Memorandum of Understanding on Port State Control in the Black Sea Region 2000 (the Black Sea MOU), between 2018 and 2020, 157 Cypriot ships were inspected, with only six detentions.

iii Registration and classification

Cyprus registry

Cyprus has an EU-approved open registry. The ship registry unit of the SDM is responsible for the registration of ships in the Register of Cyprus Ships and in the Special Book of Parallel Registration. In addition, it carries out all other transactions concerning Cyprus ships, such as the transfer of ownership and the deregistration of ships, the registration of mortgages on Cyprus ships and other transactions relating to mortgages. Furthermore, it is responsible for all transactions concerning the Small Vessels Registry.

Under the Advocates Laws, Chapter 2, only lawyers registered as practising advocates in Cyprus are entitled to carry out registry transactions, acting on behalf of the owner and, therefore, the first step to be taken by persons interested in registering a ship under the Cyprus flag is to engage the services of a locally registered advocate.

Types of registration

According to the Merchant Shipping (Registration of Ships, Sales and Mortgages) Laws of 1963, as amended (the Laws), which are the main statutes for all matters concerning the registration of ships and related transactions in the Register of Cyprus Ships, prima facie any ship used in navigation and not propelled by oars is eligible to be registered provisionally,[60] permanently or in parallel (parallel-in and parallel-out) in Cyprus, given that she meets the age-related and type-related requirements, and the ownership prerequisites.

The aforementioned Laws allow the provisional registration of a ship for six months, provided she is out of the territorial waters of the Republic at the time of her registration and that she is not already a Cypriot ship. The provisional registration may be extended for another three months under special circumstances.[61] Conversely, when a ship is in the

60 Provisional registration allows the owner of a ship to settle any administrative formalities with the vessel's previous flag, to collect and submit all the relevant and applicable documentation to the Registrar of Cyprus Ships for her permanent registration and complete all the necessary surveys of the ship. Furthermore, the physical presence of the ship in Cyprus is not obligatory. All the necessary inspections can take place at any port in the world. In addition, a provisional registration is as valid as a permanent registration and, therefore, the vessel immediately enjoys all the benefits the Cyprus flag has to offer.

61 The possibility of the three-month extension is not applicable if a vessel is within the territorial waters of the Republic. Thus, if a vessel is located in the territorial waters of Cyprus when her provisional registration expires, the only option is permanent registration of the vessel by filing of application with the Registrar of Cyprus Ships and the submission of all documents required. It is crucial that between the date of the expiry of her permanent registration and the date prior the completion of her permanent registration in the Register of Cyprus Ships, the vessel is not allowed to sail with the Cyprus flag, as it is not considered as a registered ship.

territorial waters of the Republic, there is no option other than to 'permanently' register her directly. It is of great importance to note that if a vessel is under construction, it can be registered (provisionally or permanently) even if it is not yet finished. It is common practice for the SDM to accept the registration of a vessel and to issue a certificate of registration in which the phrase 'not used for navigation' is used. Once the vessel is built, a new certificate of registration without this phrase and restriction can be obtained.

Small Vessels Registry

All ships (other than portable or collapsible crafts for use by bathers), such as recreational craft, personal watercraft, floatable craft, working boats, small high-speed vessels, sailing boats, fishing boats, jet skis and lighters, with a length of less than 13 metres, which only sail in the territorial waters of Cyprus or in the Sovereign Base Areas, should be registered in the Small Vessels Registry of the SDM, which is regulated by the Emergency Powers (Control of Small Vessels) Regulations of 1955 (PI 740/1955).

All vessels registered in the Small Vessels Registry obtain a unique number made up of the prefix -LL and five digits.

Port of registry

On 27 September 1974, the port of Limassol became the official port of registry of the Republic of Cyprus, by virtue of the Merchant Shipping (Temporary Provisions) Law of 1974 (Law No. 45/1974), as a result of the illegal Turkish invasion and occupation of the northern part of the island. Prior to this, the port of Famagusta, currently under Turkish occupation, was the official port of registry of the Republic.

New government policy on the registration of ships

In March 2022, further to the strategic vision for Cyprus shipping and aligned with the systematic policy review aiming at improving the quality of Cyprus flagged ships, the SDM issued a new government policy on the registration of vessels in the Cyprus Register of Ships, superseding and replacing the previous government policy Circular 10/2019. The Registrar of Cyprus Ships does not consider applications for registering ships in either the Register of Cyprus Ships or in the Special Book of Parallel Registration if the ship:

a at the time of the registration application, is banned (on PSC grounds) by any one of the Memoranda of Understanding on Port State Control or by the US Coast Guard;

b has been detained on PSC grounds by members of the Memoranda of Understanding on Port State Control or by the US Coast Guard, on three or more occasions during the three-year period prior to the date of application;

c has been constructed for exclusive use on inland navigation or to be used exclusively on inland navigation (e.g., on internal waters, rivers, inland waterways, canals, natural or artificial lakes, water reservoirs or dams); or

d has an age that exceeds the age limits as mentioned in the policy and that does not fall within the exceptions included therein.

Condition of ownership

According to the Merchant Shipping (Registration of Ships, Sales and Mortgages) Laws of 1963, as amended, a ship is eligible for registration under the Cyprus flag if:

a more than 50 per cent of the shares of the ship are owned by Cypriot citizens or by citizens of other EU or EEA Member States who, if not permanent residents of Cyprus, have appointed an authorised representative in Cyprus; or

b 100 per cent of the shares are owned by one or more corporations that have been established and operate:
- in accordance with the laws of Cyprus and have their registered office in the Republic;
- in accordance with the laws of any EU or EEA Member State and have their registered office, central administration or principal place of business within the EU or EEA and that have either appointed and maintained an authorised representative in Cyprus, or ensured that the management of the ship is entrusted in full to a Cypriot or a Community ship management company with its place of business in Cyprus; or
- outside Cyprus or outside any other EU or EEA Member State but controlled by Cypriot citizens or citizens of Member States who have either appointed an authorised representative in Cyprus or ensured that the management of the ship is entrusted in full to a Cypriot or a Community ship management company having its place of business in Cyprus.

A corporation is deemed to be controlled by Cypriots or citizens of any other Member State when more than 50 per cent of its shares are owned by Cypriots or citizens of any other Member State or when the majority of the directors of the corporation are Cypriot citizens or citizens of any other Member State.

The registration of any ship may be subject to any condition the SDM may impose and as it may consider appropriate as the government's general policy and, in particular, in terms of the adoption of more up-to-date and improved methods and standards relating to the safety of human life at sea, the welfare of seafarers, the protection of the sea environment, the preservation of marine life or for public interest in general.

Appointment of authorised representative

According to the relevant provisions of the Merchant Shipping (Registration of Ships, Sales and Mortgages) Laws of 1963, as amended, an authorised representative may be:

a a Cypriot citizen or a citizen of any other EU Member State (including Norway, Iceland and Liechtenstein as parties to the EEA) who is resident in the Republic within the meaning of the income tax laws of the Republic;

b a partnership that has been established and registered in accordance with the provisions of the General and Limited Partnership and Business Names Law, Chapter 116 having its place of business in the Republic and employing permanent staff in the Republic;

c a corporation that has been established and registered in accordance with the provisions of the Companies Law, Chapter 113 having its place of business in the Republic and employing permanent staff in the Republic; or

d a branch of any foreign company that has been established and registered in accordance with the provisions of the Companies Law, having its place of business in the Republic.

In practice, the authorised representative's main responsibility is to be the contact link between the Registrar and the shipowner.

Any document that is required to be served to the shipowner is deemed to be duly served if it is delivered to his or her representative. The authorised representative is then obliged to contact and inform the shipowner accordingly. However, authorised representatives shall not be responsible for any action or omission made by the shipowner. Therefore, a shipowner has to select his or her representative carefully.

Age-related requirements

The age of the ship is calculated by deducting the year in which the keel of the ship was laid from the year in which the application for its registration was filed with the Registrar of Cyprus Ships, provided that the registration takes place during the same year. Otherwise, the age of the ship will be calculated from the year in which the registration takes place.

Where a ship has undergone major conversion or reconstruction, the date of the major conversion or reconstruction commenced will not be taken into account regarding the calculation of the age of the ship. As per the new policy, ships having an age that exceeds the age corresponding to the type of ship specified below will not be accepted for registration in the Register of Cyprus Ships or in the Special Book of Parallel Registration.

Cargo ships

Cargo ships that have an age exceeding 20 years will not be accepted for registration in the Register of Cyprus Ships or in the Special Book of Parallel Registration.

Notwithstanding the above, a cargo ship of more than 500 gross tonnage, having an age exceeding 20 years, may exceptionally be accepted for registration in the Register of Cyprus Ships or in the Special Book of Parallel Registration, provided that it belongs to a fleet, which includes at least five other cargo ships, of more than 500 gross tonnage, already registered under the Cyprus flag, which are managed by the same company, having an average age of less than 17 years on the day of registration (taking into account also the ship to be registered under the Cyprus flag).

Passenger ships

Passenger ships that have an age exceeding 30 years will not be accepted for registration in the Register of Cyprus Ships or in the Special Book of Parallel Registration.

Notwithstanding the above, a passenger ship that exceeds 30 years may exceptionally be accepted for registration in the Register of Cyprus Ships or in the Special Book of Parallel Registration provided that it belongs to a fleet, which includes at least three other passenger ships already registered under the Cyprus flag, which are managed by the same company, having an average age less than 25 years at the day of registration (taking into account also the ship to be registered under the Cyprus flag).

Fishing vessels

Fishing vessels that have an age exceeding 25 years will not be accepted for registration in the Register of Cyprus Ships or in the Special Book of Parallel Registration.

The Registrar will not consider applications for the registration of fishing vessels unless they are accompanied by an official communication from the Director of the Department of Fisheries and Marine Research of the Ministry of Agriculture, Rural Development and the Environment, informing the Registrar of Cyprus ships that the registration of the fishing vessels in question is allowed.

Pleasure vessels

Pleasure vessels that have an age exceeding 35 years will not be accepted for registration in the Register of Cyprus Ships or in the Special Book of Parallel Registration.

Coastal and small passenger vessels

Coastal and small passenger vessels that have an age exceeding 30 years will not be accepted for registration in the Register of Cyprus Ships.

Notwithstanding the above, a coastal or small passenger vessel having an age exceeding 30 years may exceptionally be accepted for registration in the Register of Cyprus Ships provided that it belongs to a fleet, which includes at least 3 other Coastal or Small passenger vessels already registered under the Cyprus flag, which are directly or indirectly owned by the same owner/operator, having an average age of less than 25 years.

Initial flag state inspection

Pursuant to the new policy, all ships registered in the Register of Cyprus Ships or in the Special Book of Parallel Registration may be subject to an initial Flag State Inspection by marine surveyors of the Shipping Deputy Ministry, at the expense of the registered owner or the registered bareboat charterer, as the case may be, if this is deemed necessary by the Registrar of Cyprus Ships on type, age, safety, environmental, security and labour grounds. For the purpose of establishing whether the inspection is required to be carried out, a risk factor shall be calculated by the Shipping Deputy Ministry based on Paris MOU system.

Parallel registration

The Merchant Shipping (Registration of Ships, Sales and Mortgages) Laws of 1963, as amended, allow the parallel registration of vessels that are used in navigation and not propelled by oars in the Special Book of Parallel Registration. By parallel registration, a foreign vessel can be registered, for a certain period, under the Cyprus flag while at the same time continuing to be registered in the foreign registry, and vice versa.

Parallel-in registration

Parallel-in registration is used for cases of bareboat chartering where a bareboat charterer of a foreign ship wishes to register the ship in parallel under the Cyprus flag. The deletion of the ship from the registry of the state in which its ownership is registered is not required. However, its right to fly the flag of the state of registry and to have its nationality is suspended and the foreign registry remains operative only with respect to the ownership and encumbrances status of the ship. The period of parallel-in registration is usually two years and is renewable.

Currently, around 60 foreign vessels are registered (in parallel-in) in the Register of Cyprus Ships. Most are registered under the flag of Germany, the Marshal Islands, Belize or the Russian Federation.

Parallel-out registration

Parallel-out registration is used when a bareboat charterer wishes to register, in parallel, a vessel that is already registered provisionally or permanently under the Cyprus flag, to a foreign registry. The deletion of the ship from the Register of Cyprus Ships where its ownership and

mortgages are registered is neither required nor allowed. However, its right to fly the Cyprus flag and to have Cypriot nationality is suspended. The period of parallel-out registration may be up to three years and is renewable.

Currently, around 100 Cypriot vessels are registered (in parallel-out) in foreign registries, such as the Russian Federation, Estonia, Canada, the United Kingdom, Lithuania, Norway, Azerbaijan, Nigeria, Latvia, Italy, Liberia, France, Kazakhstan, the Netherlands and Belize.

Annual maintenance fee

For all ships registered in the Register of Cyprus Ships, there is an annual maintenance fee of €300, payable by 31 March of each calendar year. There is no maintenance fee for ships registered in the Small Vessels Registry.

Submission of documents

As a rule, the supporting documentation[62] relating to the registration of ships and to other transactions in the Register of Cyprus Ships or in the Special Book of Parallel Registration should be submitted to the Registrar. However, some of the required documents (except for the documentation for permanent and parallel registration) may be submitted abroad to any one of the Diplomatic and Consular Missions of Cyprus.[63] In such cases, the Registrar issues instructions to the relevant consular officers to accept the documentation and to proceed with the transaction required.

Provisional registration

For the purposes of the provisional registration of a ship, scanned or faxed copies of the corresponding document or certificate may be submitted, accompanied by an undertaking to submit the original within a specified period and, in any event, not later than by the time of the permanent registration of the ship in the Register of Cyprus Ships.

Permanent registration

For direct permanent registration, all required documents must be submitted in their original form, being duly executed.

Deletion of ship

According to Article 54A of the Merchant Shipping (Registration of Ships, Sales and Mortgages) Laws of 1963, as amended, a ship must be deleted from the Register of Cyprus Ships as soon as its ownership is transferred to a person (legal or natural) not qualified to own a Cyprus ship.

In addition, a Cypriot ship may be deleted from the Register upon submission of an application by the owner of the ship, for the same to be registered in a foreign registry. The owner can request deletion at any time. The SDM proceeded with the issuance of Circular 14/2022 in relation to the obligations of the shipowner for the deletion of ships from the

62 In practice, most of the documents are admissible in the English language.

63 Cyprus has overseas maritime offices in Piraeus, Brussels, Rotterdam, Hamburg, London and New York, offering services to seafarers and Cyprus-flagged ships.

Register of Cyprus Ships, whereby a deletion declaration is required to be submitted together with the application for deletion of a ship from the Register of Cyprus Ships. This declaration relates to the application of Regulation (EU) No. 1257/2013 on ship recycling.

A closed transcript of registry is issued by the Registrar and a deletion certificate is issued by a consular officer as soon as the registered mortgages and other encumbrances are discharged and all pending matters are settled. The owner has to return the certificate of registry or submit a declaration by which he or she will undertake the responsibility to return it within a reasonable period.

A ship can be also deleted in the following circumstances:

a the Cyprus character of the ship is revoked by order of the Deputy Minister;

b the ship is totally, actually or constructively lost;

c the ship is broken up;

d there has been no news regarding the ship for six months from the date of receipt of the last information, under such circumstances that make it highly probable that the ship has been either lost or broken up or that it has been sold to a non-qualified person; and

e the sale of the ship by court order.

Registration of mortgages

A mortgage against a ship can be registered at any time after the completion of the vessel's registration (provisional, permanent or parallel-out) under the Cyprus flag.

By a registered mortgage, the shipowner can secure a loan or other financial benefits, subject to the conditions agreed between the contracting parties, without the need for exchange control permission. The creation of a mortgage under Cypriot law is not allowed on vessels registered parallel-in in the Register of Cyprus Ships. Under the Merchant Shipping (Registration of Ships, Sales and Mortgages) Laws of 1963, as amended, there is full protection for financiers and mortgagees and there is no stamp duty on ship mortgage deeds or other security documents.

A mortgage can be created independently of whether the ship is provisionally or permanently registered. If the ship against which a mortgage was created belongs to a Cypriot company, the mortgage will also have to be registered with the Registrar of Companies within a maximum of 42 days after its creation.

In this way, mortgagees' security is protected in the event of liquidation of the ship-owning company. Transfer of a mortgage may be effected by completing the statutory form of transfer and submitting it to the Registrar of Cyprus Ships or to a consular officer, with the relevant deed of covenants. Both the statutory mortgage and the deed of covenants must be duly certified or notarised.

For discharging a mortgage, a memorandum of discharge must be duly executed by the mortgagee. The same has to be later attested and delivered to the Registrar of Cyprus Ships or a consular officer on the instructions of the Registrar.

Application of unmanned ships

Under the Merchant Shipping (Registration of Ships, Sales and Mortgages) Laws of 1963, as amended, the word 'ship' includes every description of vessel used in navigation not propelled by oars. This broad definition clearly allows any potential unmanned or autonomous ship to fall under it and, further, to be considered as a ship in the same way as a traditional

(conventional) vessel. Ships of this nature have already started appearing in the modern commercial world and there is a strong possibility of this being an alternative option for ship operations in the near future.

Registration issues in the Register of Cyprus Ships

In February 2020, the Registrar of Cyprus Ships refused to register a vessel that was previously registered in a non-European registry because it was not free of quantities of halon. According to the previous government policy for vessels whose keel was laid before 1 October 1994, a confirmation from the classification society, stating that the ship is free of halon, is required.

Moreover, in December 2018, the biggest-ever newly built coastal passenger vessel was registered in the Register of Cyprus Ships under the name *Ocean Vision*. This vessel has been characterised as a green ship, owing to its environmentally friendly equipment, engines and facilities; and in May 2015, the successful registration of the first commercial megayacht in the Register of Cyprus Ships, under the name *ANKA*, was completed.

Online services in the Register of Cyprus Ships

The covid-19 pandemic has resulted in the rapid advancement of technology in the shipping sector and especially in Cyprus. To that extent, the SDM made best use of digital technologies. More specifically, it has made significant progress in simplifying formalities and transforming its services to a paperless environment, providing electronic services, which increased the efficiency and attractiveness of the Register and its relevant services.

The SDM has upgraded its services by digitalisation and automatisation, allowing the electronic submission of seafarers' applications, the electronic verification of certificates issued by Register and the management of the electronic tonnage tax system (TTS, an online tax calculator) through which beneficiaries (owners, charterers or ship managers of qualifying ships) can submit their applications. In addition, the Cyprus flag provides web services (eSAS) for Cypriot endorsements and seafarers' books, the recognition of seafarers' certificates of competency, the administration of the seafarers' e-learning platform and the Seafarers Career Information System (a career database to facilitate the employment of seafarers, including an interactive platform that allows seafarers to share career information with companies using the system). Last but not least, the electronic ship registration process (online applications) in the Register, the digitalisation of the archives of the SDM and the port state control platform are under development and are expected to launch in the coming months.

Use of electronic certificates

Since 2018, the SDM has accepted, in electronic form, statutory certificates issued to Cyprus-flagged vessels by recognised organisations, provided that they satisfy the requirements set out in IMO Circular FAL.5/Circ.39/Rev.2 on Guidelines for the Use of Electronic Certificates. However, the existing practice of issuing certificates in hard copy remains acceptable.

Electronic log books (deck logbooks) on Cyprus-flagged vessels

In December 2020, the SDM decided to accept the use of electronic deck logbooks as equivalent to the official deck logbooks that are published exclusively by the Cyprus flag, provided they meet the requirements of IMO Resolution A.916(22) on Guidelines for the Recording of Events related to Navigation.

Use of electronic record books under MARPOL

The Maritime Environment Protection Committee, in its 74th session in May 2019, adopted Resolutions MEPC.314 (74), MEPC.316 (74) and MEPC.317 (74), by which amendments to MARPOL Annexes I, II, V and VI and the Technical Code on Control of Emission of Nitrogen Oxides from Marine Diesel Engines (NOx Technical Code 2008) are entering into force, allowing the use of electronic record books (ERBs) (for oil, cargo, garbage and ozone-depleting substances, fuel oil changeover and engine parameters) for the purposes of recording operations under the aforementioned Annexes. These amendments entered into force as of 1 October 2020.

On the basis of the foregoing, the Cyprus flag accepts the use of ERBs as an alternative means to a hard copy record book, at the discretion of the shipowner or manager. Ships using an ERB do not need to keep a hard copy of the same record. However, it is advisable to have on board the ship a hard copy of the relevant record book, for use in case of failure of the ERB, lack of power to the electronic equipment, or until crew are fully familiar with the use of the equipment.

New shipping legislation

During 2019, 15 pieces of legislation were prepared by the SDM. More specifically, five instruments were enacted and 10 draft bills have been submitted to the office of the Attorney General for legal review. Those that have been enacted include instruments relating to:

a designation of the safety zones in the exclusive economic zone of Cyprus, under these safety zone regulations; and

b simplification of the ship registration fees and dues to reflect the current shipping needs that may be considered obsolete, resulting in lower registration fees.

Of the 10 draft bills prepared and submitted in 2019, the SDM proceeded with the drafting of new legislation for the purposes of harmonisation with several EU directives. An integral part of this policy is the formulation of the national maritime spatial plan,[64] as required by the European Commission.

The directives deal with:

a the registration of persons on board passenger ships operating to or from ports of EU Member States;

b the systems of inspections for the safe operation of roll-on/roll-off (ro-ro) passenger ships;

c high-speed passenger craft in regular service; and

d updated safety rules and standards for passenger ships.

The harmonising legislation referring to these directives was adopted in 2021. The SDM recently announced the commencement of public consultation with all stakeholders, authorities and the public on the maritime content of the spatial plan, which will last 60 days, and any interested party wishing to submit any opinions or suggestions can submit them on the online communication platform of the SDM.

64 The Maritime Spatial Planning and Other Related Matters (Amendment) Law of 2021 (Law 34(I)/2021), the Maritime Spatial Planning (General Provisions) Regulations of 2021 (PI 132/2021)) and the Maritime Spatial Planning (Public Consultation) Regulations of 2021 (PI 133/2021)) entered into force in March 2021.

Recent updates

Technical standards for certain categories of vessels

On 13 April 2021, the SDM established technical standards for certain categories of vessels with respect to their registration in the Register of Cyprus Ships.[65] The purpose of the standards is to specify technical requirements for areas not currently covered by national, EU or international legislation, and to inform parties interested in the registration of vessels to whom the standards apply in the Register of Cyprus Ships, of the available options offered by the SDM.

In particular, and in accordance with the categorisation established within the standards, these are applicable to the following categories of vessels:

a Category A – cargo ships of more than 24 metres in load line length and below 500 GT;

b Category B – motor or sailing vessels used for pleasure, or engaged in trade, of more than 24 metres in load line length and below 500 GT carrying up to 12 passengers. Training vessels are also included in this category;

c Category C – motor or sailing vessels of more than 24 metres in load line length and below 500 GT carrying up to 12 passengers, which at the time are considered to be pleasure vessels not engaged in trade; and

d Category D – vessels used for pleasure or engaged in trade carrying between 13 and 36 passengers.

The standards also apply to yachts and megayachts.

Amendments to the basic law concerning the registration of ships, sales and mortgages

In December 2020, the Cyprus flag enacted the Merchant Shipping (Registration of Ships, Sales and Mortgages) (Amendment) Law of 2020, which expressly provides for the deletion of a Cypriot ship from the Register of Cyprus Ships following the sale of the ship by court order, as well as a new mortgage procedure.

Prolongation of the Cyprus tonnage tax system

Following the formal assessment of the Cyprus tonnage tax and seafarer scheme, the European Commission concluded, on 16 December 2019, that the assessed scheme of Cyprus is compatible with the internal market and in line with the EU Guidelines on state aid to maritime transport, prolonging the Cyprus tonnage tax and seafarer scheme for next 10 years (until 31 December 2029). The scheme provides competitive advantages, including a wider list of eligible vessels and ancillary activities, discount rates for environmentally friendly vessels and, more importantly, the companies operating under the current TTS can continue to do so with no major changes.

65 The technical standards have been determined by the SDM as part of government policy pursuant to the provisions of Section 14B of the Merchant Shipping (Registration of Ships, Sales and Mortgages) Laws of 1963-2020 (Law 45/1963 as amended). The technical standards were introduced through Circular 17/2021, which is supplementary to the relevant circular currently in force (No. 10/2019) and any future circular amending or replacing it. They applied from 15 April 2021. The standards apply to vessels for which an application for registration in the Register of Cyprus Ships is made on or after 15 April 2021.

The scheme was unanimously approved, on 15 April 2020, by the plenary of the House of Representatives of the Republic of Cyprus, securing the viability of the Register of Cyprus Ships and the shipping industry. Cyprus was the first open registry within the European Union to have a comprehensive and transparent TTS approved by the European Union.

Cyprus' TTS applies to ship ownership, management and chartering activities. It is a system whereby beneficiary companies can choose to be taxed based on their vessel's net tonnage (tonnage tax) rather than on their actual profits from maritime transport activities. The tonnage tax is considered as one of the key assets of the Cypriot shipping industry in its efforts to attract more ships and companies to the Cyprus maritime cluster.

The Cypriot scheme has been found to contribute to the global competitiveness of the EU maritime sector without unduly distorting competition, and encourages ship registration in Europe while preserving Europe's high social, environmental and safety standards, and ensuring a level playing field.

Moreover, the European Commission found that it complies with the rules limiting tonnage taxation to eligible activities and vessels. Furthermore, as regards taxation of dividends of shareholders, the Commission found that the Cypriot TTS ensures that shareholders in shipping companies are treated in the same way as shareholders in any other sector. As regards the seafarer scheme, the Commission found that Cyprus has agreed to apply the benefits of its scheme to all vessels flying the flag of any EU or EEA Member State.

The attractive and transparent Cyprus TTS, among other things, provides exemptions to beneficiaries (owners of Cypriot ships, owners of foreign ships, charterers and ship managers) from income tax. Under the Cypriot corporate income tax law, every shipping company that is a tax resident in Cyprus and does not benefit from the TTS is subject to income tax in respect of its worldwide profits from its activities at the normal corporate tax rate (12.5 per cent). As mentioned above, under the TTS, a special tax regime based on the amount of tonnage operated by eligible shipowners, charterers and ship managers, applicable to eligible maritime transport activities, exempts the companies concerned from the general obligation to pay corporate income tax irrespective of the companies' profits or loss.

The tonnage tax for companies owning foreign vessels is payable by 28 February, and the tonnage tax for Cypriot vessels is payable by 31 March.

Before the establishment of the SDM in March 2018, 168 shipping-related companies were registered under the TTS. Currently, 249 companies (45 ship managers, 41 charterers and 163 owners of foreign ships, with approximately 4,500 employees) are currently registered. Of these, 90 per cent are controlled by EU interests.

There were more than 1,100 Cypriot qualifying vessels registered under the TTS as at January 2021.

Importance of the tonnage tax scheme and seafarer scheme

With the implementation of the new scheme, Cyprus intends to:

a boost the competitiveness of shipowners and operators (charterers and ship managers);

b maintain and increase jobs and maritime expertise, to support the development of the maritime economy;

c encourage the employment of seafarers from EU and EEA Member States and the registration of vessels in their ship registers; and

d contribute to linking up the maritime economies of Member States while maintaining the overall competitiveness of the sector, and encouraging maritime-related research and innovation.

In particular, the Cyprus TTS and seafarer scheme encourage the flagging or reflagging of ships to registers in EU and EEA Member States and promotes the maritime cluster, especially in terms of ship management services, thus helping to create a safe, efficient, secure and environmentally friendly maritime transport sector.

The maintenance and sustainability of a Cypriot-registered fleet is a national priority, as is retaining and attracting companies engaging in shipping and shipping-related activities, with the aim of enhancing job creation and maritime expertise.

As regards the effect of the TTS, there has been a significant increase in the number of beneficiaries since 2010, mainly through the relocation or establishment of additional companies in Cyprus as a result of the TTS and the increase in the rate of corporate tax in 2013. Based on data relating to the impact of the existing scheme, the SDM estimates forgone state revenue for 2020–2029 at approximately €15 million per year.

As regards the financial impact of the seafarer scheme, the SDM estimates forgone state revenue for 2020–2029 at approximately €400,000 per year.

New government policy on yachts

On 23 December 2019, the Cyprus Tax Department released Interpretative Circular 240 (Value Added Tax), referring to the registration, in the VAT Registry, of Cypriot companies that operate in the business sector of leasing pleasure yachts in Cyprus. The Circular introduces new procedures that have been approved by the European Commission.

More specifically, pursuant to the Circular, a lease agreement must relate to supply of services and not to supply of goods. The classification of such a lease agreement as supply of services will be held based on the criteria the Court of Justice of the European Union set out in *Mercedes-Benz Financial Services UK Ltd*.[66]

Abolishment of commercial ships' initial registration and mortgage fees

The Merchant Shipping (Fees and Dues with respect to Ocean Going Commercial Cyprus Ships) Regulations of 2019 (PI 322/2019), which were issued by the Council of Ministers of the Republic of Cyprus, entered into force on 27 September 2019. Initial registration fees for ocean-going commercial ships were abolished in a bid to boost the competitiveness of the Register of Cyprus Ships and to attract more registrations. In addition, there is no cost for the issuance of the initial certificates of ocean-going commercial ships, nor mortgage fees. New regulations with respect to the applicable fees and dues for non-ocean-going commercial Cyprus-flagged ships are to be adopted within the coming months.

Re-establishment of the maritime passenger link between Cyprus and Greece

On 3 July 2020, the European Commission's Directorate General for Competition approved a state subsidy for the operation of the sea passenger line between Cyprus and Greece. More precisely, it was decided that the maritime passenger route between Cyprus and Greece is considered a general economic interest service under current EU rules and can thus be supported with state or government funds.

On the basis of the foregoing, in December 2020, the SDM launched European Open Tender Procedure No. SDM 13/2020 for the Establishment of a Passenger Maritime Link between Cyprus and Greece, securing the EU's approval for a maximum amount of state aid

66 Case No. C-164/16.

of €5 million annually for the 36-month contract, with the aim of reinstating the Cyprus–Greece ferry connection that was discontinued in 2000 after a sharp drop in the price of airline tickets, which made the line obsolete.

The ultimate aim of this project was to strengthen Cyprus's connectivity with mainland Europe, creating a new market for travellers to and from Cyprus and Europe, since the only means of travel currently available is by air.

Since the expiration of the new tender that was announced by the SDM, the tender has been awarded to a joint venture between a ship management company and tour operator. The launch of the maritime passenger link started successfully operating on 19 June 2022. The route connects Limassol or Larnaca port with the port of Piraeus, with the possibility of an intermediate stop at a Greek island port on the way to Piraeus and vice versa. During 2022, around 7,400 passengers travelled onboard the vessel, while 2,250 vehicles were transferred. The timetable for 2023 is already available, with a starting day at the end of May and the last route to be the 1 September.[67]

Effects of Brexit on Cypriot shipping

The risks to Cypriot shipping from Brexit seem to be minimal. British companies are in the process of registering ships in the Register of Cyprus Ships and other companies have moved their headquarters to the island. On a broader level, Brexit will affect shipping companies' income and trade, but Cypriot shipping has not been affected negatively as yet.

Cypriot registry

From 1 January 2021, British vessels are no longer considered part of the EU fleet. In addition, British shipping companies are no longer considered European and therefore cannot fit into the TTS unless they make the necessary changes to be considered European. The SDM, to prevent the deletion of vessels from its registry, contacted and informed the affected parties to make their own preparations for the United Kingdom's withdrawal from the European Union, providing them with options. British nationals and companies that owned Cypriot-registered vessels and wished to continue to have their vessels registered under the Cyprus flag had the following options:

a to transfer ownership of their vessels to a person who, by virtue of Section 5 of the Merchant Shipping Law, is qualified to own a Cypriot ship;

b to transfer the shares or change the directors of the registered owning company so that, by virtue of Section 5(4) of the Merchant Shipping Law, the registered owners will be deemed to be controlled by EU or EEA citizens; or

c to transfer the registered office of the current registered owning company (redomicilisation) to the Republic of Cyprus (by virtue of Sections 354A to 354H of the Companies Law, Chapter 113) or to any other EU or EEA Member State.

The vast majority of British shipowners transferred the ownership of their vessels to newly incorporated Cypriot legal entities. More specifically, the British owners proceeded with the

67 The official timetable and price list for the Maritime Route between Cyprus and Greece can be found at https://scandroholding.com/.

establishment of Cypriot entities in the island so that they could remain eligible to own Cypriot-registered vessels. No vessel has been deleted from the Register of Cyprus Ships as a result of Brexit.

Seafarers

Since the Merchant Shipping Law does not impose any restrictions on the nationality of seafarers working on board Cypriot ships, the British seafarers working on Cyprus-flagged vessels (around 2,000 people) will continue to do so with no effect and the Cyprus flag will continue to certify and recognise these seafarers.

Arrival of British shipping organisations

Brexit has resulted in an increased interest from UK-based maritime organisations that see Cyprus as an attractive jurisdiction for an outpost or base because of fears of loss of access to the bloc's financial market.

The Steamship Mutual Underwriting Association (Europe) Limited, one of the largest shipping insurance companies in the international market, has operated in Limassol since February 2020 as a fall-back decision for the UK marine insurer because of the uncertainty surrounding Brexit. The company's decision to choose Cyprus for its activities shows that companies of this calibre confer prestige and consolidates Cyprus as a high-quality complex of international maritime activities.

Another recent example is the British shipping firm P&O Ferries, which moved the registration of the six vessels in its English Channel operating fleet to Cyprus ahead of the UK's departure from the European, in part to keep its tax arrangements within the bloc. On the question of why the company chose the Cyprus flag, a P&O spokesman declared that 'the Cyprus flag is on the White List of both the Paris and Tokyo Memoranda of Understanding on port state control, resulting in fewer inspections and delays, and will result in significantly more favourable tonnage tax arrangements as the ships will be flagged in an EU Member State.'

Apart from the financial perspectives, Cyprus provides competitive advantages in terms of attracting UK-based shipping and shipping-related companies that seek to retain their access to the European market. Among other things, Cyprus has a high availability of highly educated, multilingual, motivated individuals specialised in a variety of areas, including shipping, finance, insurance and law. Cyprus is a common law jurisdiction, based on English law, with national legislation according to the *acquis communautaire*. The majority of the population have tertiary education and speak excellent English.

Classification societies

As at July 2019, Cyprus had approved all 12 members of the International Association of Classification Societies with no reservation on their approval. A model agreement has been drafted, governing the relations between the Cypriot government and the recognised organisations (classification societies) for statutory certification services. More specifically, the new agreement that was signed between the Republic of Cyprus and the recognised organisations provides survey and certification services to ocean-going Cyprus-flagged ships on behalf of the Republic.

The conclusion of the new agreement with the 12 specialised and internationally acclaimed organisations was required as a result of legislative developments in shipping

and to incorporate more flexible and technologically advanced procedures with the use of electronic services and certificates. In the new agreement, the Croatian and Indian Registers of Shipping are included for the first time in the history of Cypriot shipping.[68]

The performance of the classification societies is checked through biannual audits for the SDM or by auditing their performance. Any defect in their performance is discussed at the audits. Their performance is also monitored through ships' performance in PSC inspections. They are consultant organisations acting on behalf of flags, so are, in a way, liable for the performance of the flag they are acting for.

The Merchant Shipping (Recognition and Authorisation of Organisations) Law of 2011 (Law No. 128(I)/2011), which harmonises Directive 2009/15/EC, establishes measures to be followed by the Cyprus administration in its relationship with organisations entrusted with the inspection, survey and certification of ships for compliance with the international conventions on safety at sea and prevention of marine pollution, while furthering the objective of freedom to provide services. According to Article 8 of Law No. 128(I)/2011, the SDM, as the competent authority, shall monitor the work of recognised organisations acting on behalf of the Republic, to satisfy itself that they effectively carry out the functions required, while Article 7 states that when the SDM considers that a recognised organisation should no longer be authorised to act on behalf of the Republic, it may suspend or withdraw that authorisation.

The 12 specialised and internationally acclaimed organisations acting on behalf of Cyprus are as follows:

a American Bureau of Shipping;
b Bureau Veritas SA;
c China Classification Society;
d Croatian Register of Shipping;
e DNV;
f Korean Register;
g Indian Register of Shipping;
h Lloyd's Register Group;
i Nippon Kaiji Kyokai;
j Polish Register of Shipping;
k Registro Italiano Navale; and
l Russian Maritime Register of Shipping.

iv Environmental regulation

For air and marine pollution, the key legislation is the International Convention for the Prevention of Pollution from Ships 1973 (as modified by the Protocol of 1978) (MARPOL (73/78)). Through its six Annexes, it regulates the actions to avoid polluting the sea and the air, if that risk of pollution is associated with maritime activities.

The Annexes regulate the risks of pollution from:

68 Currently 401 Cyprus-flagged vessels are classed under the DNV; 220 under Bureau Veritas SA; 180 under Lloyd's Register Group; 126 under Registro Italiano Navale; 70 under the American Bureau of Shipping; 62 under Nippon Kaiji Kyokai; 38 under the Russian Maritime Register of Shipping; 21 under the Polish Register of Shipping; 13 under the China Classification Society; and nine under the Korean Register. No Cyprus-flagged vessels are classed under the Croatian Register of Shipping or the Indian Register of Shipping.

a oil, in respect of the transport of oil and its products as cargo, and the use of oil or its products as fuel for ship-installed machinery. This refers to the measures to be taken by ships when oil is transported as cargo, or when ships are using oil for their propulsion. There are regulations for loading, discharging, transport, storage, controlling leakages and how to handle residues produced;

b noxious liquid substances in bulk (i.e., chemical products transported by sea in bulk form);

c noxious liquid substances in packaged form (i.e., chemical products stored in any sort of container);

d sewage produced on a ship, including sewage produced by livestock being transported as cargo, in respect of the processing, storage and disposal of sewage and associated systems;

e garbage (meaning any sorts of items intended to be disposed of after use, including cargo remnants). MARPOL guides crews on the segregation, processing and disposal of the garbage of a ship, and refers specifically to cargo remnants as a separate category of garbage, and how to process and dispose of it; and

f air-polluting emissions produced by the operation of any machinery on board in respect of the ship's operation (including freezing means). MARPOL sets the limits of emissions released either by the engines (main or auxiliary) or any other machinery emitting gases, such as air conditioning and freezer units. A major breakthrough of this Annex was the introduction of the use of fuel with low sulphur on 1 January 2020. Additionally, it regulates the installation and operation of emission control systems (commonly known as 'scrubbers') that are installed on ships to minimise harmful emissions.

Cyprus has ratified all six Annexes by amending the respective national legislation (Law No. 57/1989) on the ratification of each Annex.

For clean ballast water, the Convention for the Control and Management of Ships' Ballast Water and Sediments 2004 (the Ballast Water Management Convention) is fully implemented by Cyprus. Although Cyprus has been a party to this Convention since 2018,[69] Cyprus-flagged ships did not implement it until 2017. The Convention regulates measures to prevent transport of species, new or alien, to a part of the marine environment where they did not exist before, thus altering the ecosystem and posing threats to the marine ecosystem of a territory, through the ballast water taken by ship from one location and discharging it in another. The Convention has a two-part implementation for its flag ships operating worldwide and the ships operating in the sea around Cyprus. The Convention provides for the discharging of ballast water in an area away from the coastline inhabited by local species and taking new water resembling the ecosystem of the coastal state. Furthermore, by 2024, all ships are required to install a treatment system that cleans ballast water before its discharge.

The Hong Kong Convention for the Safe and Environmentally Sound Recycling of Ships 2009 (the Hong Kong Convention), although not yet implemented internationally, has key provisions provided for in Regulation (EU) No. 1257/2013.[70] The Regulation provides

69 On 8 November 2018, Cyprus ratified the Ballast Convention to help prevent the spread of potentially harmful aquatic organisms and pathogens in ships' ballast water and, therefore, Cyprus-flagged ships must carry on board an International Ballast Water Management Certificate issued by an authorised recognised organisation.

70 Pursuant to the Regulation and the relevant Circular (No. 29/2015) issued by the SDM, all new and existing ships of 500 GT and above flying the EU flag must carry on board a verified Inventory Of

for the procedures to be adhered to by a ship bound for a scrapping yard. Every item on board the ship should be recorded and graded according to the pollutant load to ensure it will be handled accordingly during demolition. Before going to the yard, the ship will have to receive certification that all items have been graded and considered. The yard's procedures should be checked to ensure it properly disposes of the scrapped items, to eliminate or minimise the effects of pollution.

In addition to the main conventions mentioned above, several other supplementary conventions are important in facilitating marine pollution prevention, including:

a the CLC Convention, providing for the recovery of expenses after a pollution incident from oil when carried as cargo;

b the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (the Bunker Convention), providing for the recovery of expenses after a pollution incident from oil used as a ship's bunkers;

c the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (the Fund Convention), providing for compensation for damage occurring after a pollution incident; and

d the International Convention on the Control of Harmful Anti-Fouling Systems on Ships 2001 (the Anti-Fouling Convention).

Cyprus has also implemented EU legislation relating to or supplementing the IMO conventions, including:

a Regulation (EU) No. 530/2012 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers, to prevent pollution in marine accidents;

b Regulation (EC) No. 782/2003 on the prohibition of organotin compounds on ships, to prevent the poisoning of marine life that can occur when such compounds are used as anti-fouling systems on ships;

c Regulation (EU) 2015/757 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport;

d Regulation (EC) No. 1005/2009 on substances that deplete the ozone layer; and

e Directive (EU) 2016/802 relating to a reduction in the sulphur content of certain liquid fuels.

Recent enforcement record

In line with the enforcement of the above, Cyprus performs random checks on ships arriving in its ports, either under the PSC regime or specifically for pollution control purposes. For example, in the past couple of years, approximately 180 checks on docked ships were carried out to assess whether their fuel complied with new regulations ensuring sulphur content was not above 0.1 per cent, as provided by Directive (EU) 2016/802. The same practice is followed by other Member States for Cyprus-flagged ships.

During the past year, Cyprus checked five ships calling at Cyprus ports that had been reported as polluting the sea area under EU jurisdiction, which were detected by the Clean Sea Net, a system of satellite monitoring operated by the European Maritime Safety Agency.

Hazardous Materials (IHM) Report with International IHM Certificate by 31 December 2020. As of that date, ships flying the flag of a third (non-EU) country, when calling at a Cyprus port or anchorage, shall comply with the requirement to have on board a verified IHM report with a Statement of Compliance.

Environmental legislation

In terms of environmental regulation, the following laws are also applicable in Cyprus. International conventions:

a the United Nations Convention on the Law of the Sea 1982 (Ratification) Law of 1988 (Law No. 203/88);

b the International Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, its Protocols and amendments 1995 (the Barcelona Convention 1976);

c the International Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters of 1972 (Law No. 38/1990);

d the Basle Convention on the Control Transboundary Movement of Hazardous Wastes and Their Disposal of 1989 (Law No. 29(III)/1992), as amended;

e the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 1998 (the Aarhus Convention) (Law No. 33(III)/2003); and

f the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996 (the HNS Convention) and for Matters Connected Therewith Law of 2004 (Law No. 21(III)/2004) (not yet in force).

European regulations and directives:

a Commission Directive (EU) 2015/2087 of 18 November 2015, amending Annex II to Directive 2000/59/EC of the European Parliament and the Council on port reception facilities for ship generated waste and cargo residues;

b Regulation (EU) No. 757/2015 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport;

c the Water-Framework Directive (Directive 2000/60/EC);

d the Environmental Liability Directive (Directive 2004/35/EC); and

e the Waste Directive (Directive 75/442/EEC).

Bilateral agreements:

a the Agreement on Merchant Shipping with the government of the Arab Republic of Egypt signed on 26 November 2006;

b the Memorandum of Understanding between the Republic of Cyprus and the Arab Republic of Egypt on in the Field of Environmental Protection signed on 26 November 2006; and

c the Agreement Between Cyprus, Israel and Egypt for Cooperation in Combating Major Marine Pollution Incidents in the Mediterranean Law of 2001 (Law No. 21(III)/2001).

Domestic law:

a the Merchant Shipping (Ship Source Pollution) Law of 2008 (Law No. 45(I)/2008) and its subsequent amendments;

b the Protection of the Environment Through Criminal Law of 2012 (Law No. 22(I)/2012);

c the Control of Water Pollution and Soil Law of 2002 (Law No. 106 (I)/2002); and

d the Maritime Strategy Law of 2011 (Law No. 18(I)/2011).

Development of environmental policy

Another trend is an increasingly green and environmental focus within the shipping industry. New regulatory requirements, internationally and nationally, push the industry towards a greener environment that is also affecting shipping market dynamics in most sectors.

Environmental policy in Cyprus has undergone significant change, owing to increasing alignment of national law with European policy (*acquis communautaire*), which has generated momentum towards environmental protection by making it a political priority. Furthermore, in recent years, the SDM has been promoting environmental protection as one of the major goals on its agenda.

Decarbonisation of Cyprus-flagged vessels

As a leading EU flag, Cyprus is committed to taking an environmentally sustainable path and supporting the industry in making progress towards its emissions reduction ambitions. In response to the IMO MEPC meeting in November 2020, Cyprus welcomes the approval of the draft mandatory regulations to reduce carbon intensity of ships.

This is a positive step and a building block towards implementation of the IMO's initial strategy for the decarbonisation of shipping. The amendments of MARPOL Annex VI, which are expected to enter into force on 1 November 2022, relate to mandatory goal-based technical and operational measures to reduce carbon intensity, including a review clause for evaluation of the measures in the near future.

Cyprus encourages the examination of proposals put forward for the creation of mechanisms for research and development. This will help to expedite innovation, and enable discussion of initiatives that support the development of low-carbon and zero-carbon technologies from which the shipping industry can benefit.

Financial incentives for environmental preservation

As a leading maritime nation, Cyprus recognises the need to encourage and reward those realising emissions reductions. The SDM has announced a new range of green incentives to reward vessels that demonstrate effective emissions reductions. The SDM's green incentives programme supports shipowners in making sustainable choices and investing in new green technologies and cleaner operations.

Reduction of tonnage tax for environmentally friendly vessels

From fiscal year 2021, a reduction of up to 30 per cent of the annual tonnage tax is possible for a Cypriot, EU or EEA ship using mechanisms for preservation of the marine environment and to reduce the effects of climate change. The SDM gives particular importance to the environmental protection, internationally and locally, with the reapproval of the Cyprus tonnage tax, introducing discounted rates for environmentally friendly vessels.[71]

71 For the purposes of implementing the provisions of Sections 9(1) and 13(1) of the Merchant Shipping (Fees and Taxing Provisions) Laws of 2010-2020, which provide for a reduction of up to 30 per cent on the annual tonnage tax paid by owners of Cyprus ships and EU ships using mechanisms or equipment for the preservation of the marine environment and the reduction of the effects of climate change, the Council of Ministers, in exercise of the powers conferred on it under the provisions of Sections 9(1) and 13(1) of the aforementioned Laws issued the Tonnage Tax (Environmental Incentives) Order of 2021, published in the *Official Gazette of the Republic of Cyprus* No. 5454,, Suppl. III(I), dated 29 January 2021.

The Cyprus flag will give a 'discount' on its TTS by comparing the emissions reductions required of a vessel with what it achieves; for example:

a the Energy Efficiency Design Index (EEDI) – vessels that have achieved further reduction of their attained EEDI compared to the required EEDI (MARPOL Annex VI, Regulation 20) will receive a rebate on annual tonnage of between 5 per cent and 25 per cent;

b the IMO data collection system – the environmental incentive here applies to ships of 5,000 GT and above that comply with Regulation 22A of MARPOL Annex VI, and ships that demonstrate a reduction in total fuel oil consumption in relation to the distance travelled, compared to the immediately prior reporting period, will receive a rebate on annual tonnage of between 10 per cent and 20 per cent; and

c alternative fuels – vessels using an alternative fuel and achieving reductions in carbon dioxide emissions of at least 20 per cent in comparison with traditional fuels will receive a rebate on annual tonnage tax of between 15 per cent and 30 per cent, which will be reviewed case by case, following a review of the documents submitted from a classification society.

However, any vessel detained for any reason during a PSC inspection – and that violates any European Commission regulation on environmental protection, or is in a laid-up condition (warm or cold) during the calendar year – will not be eligible for any incentive.

v Collisions, salvage and wrecks

Collisions

Cyprus has adopted, by way of succession, the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910 (the Collision Convention 1910) (extended to Cyprus on 1 February 1913). In addition, as upheld in *Danish Kingdom v. Mystic Isle Navigation Company Ltd*,[72] the UK Maritime Conventions Act of 1911, which ratifies the Collision Convention 1910, applies in Cyprus.[73]

Furthermore, as seen in *The Ship BAYONNE*[74] and in *The Ship NATALEMAR*,[75] the COLREGs (Ratification) and for Matters Connected Therewith Law of 1980 (Law No. 18/80) also applies to all Cyprus and foreign ships within the territorial waters of Cyprus.

Moreover, Cyprus has, by statute, ratified the International Convention for the Unification of Certain Rules Concerning Civil Jurisdiction in Matters of Collision 1952 (Ratification) Law of 1993 (Law No. 31(III)/93) and the International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision or other Incidents of Navigation 1952 (Ratification) Law of 1993 (Law No. 32(III)/93).

The Cypriot courts have jurisdiction to hear any claim for damage done to or sustained by a ship in an action *in rem*. A necessary condition for invoking the *in rem* jurisdiction is the physical presence of the res within the territorial jurisdiction of the Cypriot courts to enable service of the writ of summons. However, service out of jurisdiction is not available for *in rem* proceedings.

72 (1990) 1 CLR 850.

73 By virtue of Law No. 14/1960, Articles 19(a) and 29(2)(a).

74 (1994) 1 CLR 54.

75 (1999) 1B CLR 1079.

Alternatively, proceedings may be filed against the owners of the vessel if their residence or place of business is in Cyprus. Conversely, if the owners are not Cyprus residents, *in personam* proceedings are subject to the rules of court relating to service out of jurisdiction. Leave of the court is granted if the cause of action arose within the jurisdiction, a related action is before the Cyprus courts or the owners have submitted to the jurisdiction.

Competent authority for investigating maritime casualties in the event of a collision

When a collision occurs anywhere in the world involving a Cyprus-flagged ship or a ship flying a foreign flag within Cyprus' territorial and internal waters, the master, owner, manager or agent of the ship must notify the Marine Accidents Investigation Committee (MAIC). The MAIC is not an enforcement or prosecuting body, but an independent committee responsible for the investigation of all types of marine accidents (casualties and incidents), established on 19 December 2013 by virtue of the Marine Accidents and Incidents Investigation Law of 2012 (Law No. 94 (I)/2012), which transposed Directive 2009/18/EC into Cyprus legislation.

The objective of the MAIC, in investigating an accident, is to prevent future accidents by establishing its cause and circumstances. Its purpose is not to apportion blame or liability; nevertheless, it will not refrain from fully reporting on the causal factors of an accident, from which blame or liability can be inferred. However, the SDM continues to be responsible for investigating marine accidents for certain types of ships (ships not propelled by mechanical means, simple wooden ships, pleasure yachts or craft not engaged in trade, unless they are or will be crewed and carry more than 12 passengers for commercial purposes; or fishing vessels of less than 15 metres in length).

According to the MAIC, there were 198 maritime accidents in Cyprus in 2020, of which 156 concerned ship safety and 42 concerned the safety of crew and passengers.

Salvage

Cyprus has adopted, by way of succession, the Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea 1910 (the 1910 Salvage Convention) (extended to Cyprus on 1 February 1913).[76]

As held in *L&M Seamasters Limited*,[77] Cyprus courts will enforce any existing salvage contract, and in assessment of the operation they will apply the common law principles on salvage, as seen in *Cyprus Ports Authority v. the Ship 'Zinovia' and her Cargo*.[78] In the absence of a salvage contract, or if the contract is silent in relation to the salvage operation,[79] Part III of the Wrecks Law, Chapter 298, and the 1910 Salvage Convention apply.

There is no compulsory local form of salvage agreement and, therefore, the Lloyd's Open Form is acceptable.

Any contractual provisions dealing with general average will be followed and the courts will respect the choice of the contracting parties. The York Antwerp Rules have no statutory force in Cyprus and the set of rules to apply is a matter of agreement between the parties.

76 Publication of succession by SDM Circular dated 17 April 1992 (FM 1569/69; 103 BSP 297).

77 *L&M Seamasters Limited v. 1. The Tug Boat Zohara, Israeli Flag, 2. The Fishing Trawler Black Tiger* (2007) 1A CLR 303.

78 (1990) 1 JSC 655.

79 The Wrecks Law, at Chapter 298, Article 34, and the 1910 Salvage Convention, at Article 8, provide for the method of defining the salvage remuneration.

Wrecks

Cyprus has implemented the Nairobi International Convention on the Removal of Wrecks 2007 (the Nairobi WRC 2007),[80] which requires ships, both Cyprus-flagged and those calling at Cyprus ports, to attest that their insurance will cover any expenses incurred in the removal of a ship that becomes a wreck, or the removal of a ship that poses a threat to the environment. The Nairobi WRC 2007 entered into force in Cyprus on 22 October 2015, as per Article 18(2) of the Convention. In addition, the Wrecks Law, Chapter 298, regulates wrecks in Cyprus. More specifically, it is a private maritime law that regulates enquiries into wrecks and provides for the custody and disposal of wrecked property. Pursuant to Section 8 of the Wrecks Law, Chapter 298, the official receiver of the wreck[81] is responsible for the removal of wrecks in the territory of Cyprus. However, in accordance with Section 16 of the Law, if the owner (or, if the wreck is insured, the underwriter or his or her agent) is present, the receiver shall not interfere with the wreck, unless he or she is requested to do so by the owner or underwriter.

vi Passengers' rights

The Merchant Shipping (Liability of Carriers of Passengers by Sea in the Event of Accidents) Law of 2014 (Law No. 5(I)/2014) applies to carriage of passengers[82] of sea-going ships, falling within the scope of the EU Passenger Liability Regulation,[83] which incorporates certain provisions of the Athens Convention. In addition, the Shipwrecked Passengers Law, Chapter 297, and Articles 2(b) and 17 of the LLMC Convention 1976, as amended by the 1996 LLMC Protocol, also apply to maritime passenger claims in Cyprus.

Cyprus is not a contracting state of the Athens Convention, but through Law No. 5(I)/2014, which transposed the EU Passenger Liability Regulation into national law, has incorporated certain provisions of the Convention as *acquis communautaire*.[84] The EU Passenger Liability Regulation sets out limits for death, personal injury, and loss or damage to luggage and vehicles. It lays down a harmonised regime of liability and insurance for the carriage of passengers by sea, based on the Athens Convention and the IMO guidelines

80 The Nairobi WRC 2007 (Ratification) and for Matters Connected Therewith Law of 2015 (Law No. 12(III)/2015) (*Gazette* No. 4207, Supplement I (III), dated 29 May 2015).

81 The receiver of the wreck under Cyprus law is the permanent secretary of the SDM.

82 The definition of 'passenger' in Article 1(4) of the Athens Convention (transposed into Cyprus law through the EU Passenger Liability Regulation), encompasses anyone who is carried on a ship under a contract of carriage, or who (with the consent of the carrier) is accompanying a vehicle or live animals covered by a contract of carriage of goods not governed by the Athens Convention. This definition also encompasses the drivers of vehicles carried on board roll-on/roll-off cargo vessels; consequently, the Cyprus authorities consider that cargo vessels that carry more than 12 such persons are also subject to the Athens Convention and the Regulation. Such vessels must therefore have the necessary compulsory insurance in place and submit evidence of insurance cover to obtain the requisite certificate from the Cyprus authorities. International carriage is defined under Article 1(9) of Athens Convention as any carriage in which, according to the contract of carriage, the place of departure and the place of destination are situated in two different states, or in a single state if, according to the contract of carriage or the scheduled itinerary, there is an intermediate port of call in another state.

83 Regulation (EC) No. 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents.

84 This means that the Cypriot courts are not legally bound to follow the Athens Convention in disputes about passenger claims.

for implementation of the Convention, adopted in 2006. More specifically, the contractual carrier is strictly liable under the two tiers of liability regime. For the loss suffered as a result of death or personal injury there is, for the carrier, a prima facie limitation right of 250,000 special drawing rights (SDRs) per passenger. This liability can reach up to 400,000 SDRs per passenger if a fault by the carrier is proved. In addition, ships must obtain a certificate from their flag state confirming that insurance or other financial security is in force.[85]

Moreover, Regulation (EU) No. 1177/2010,[86] concerning the rights of passengers when travelling by sea and inland waterway, is also applicable in Cyprus, as well as other EU regulations and decisions of 2015, which introduce a mechanism of imposition of administrative fines for infringement of certain provisions of Regulation (EU) No. 1177/2010.

vii Seafarers' rights

Legislative framework

Most of the relevant domestic legislation and circulars adopt the provisions of international conventions in which Cyprus participates, such as the Maritime Labour Convention 2006 (MLC),[87] which entered into force in Cyprus on 20 August 2013, and the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 (the STCW Convention). The following are also in force in Cyprus:

a the Merchant Shipping (Safety and Seamen) Law, Chapter 292;

b the Merchant Shipping (Masters and Seamen) Laws of 1963 (Law No. 46/1963), as amended;

c the Merchant Shipping (Safe Manning, Hours of Work and Watchkeeping) Law of 2000 (Law No. 105(I)/2000);

d the Merchant Shipping (Criminal and Disciplinary Liability of Seafarers, Suspension or Cancellation of Certificates) Law of 2000 (Law No. 106(I)/2000);

e the Merchant Shipping (Medical Examination of Seafarers and Issue of Certificates) Law of 2000 (Law No. 107(I)/2000);

f the Merchant Shipping (Registration of Seafarers and Seafarers' Register) Law of 2000 (Law No. 108(I)/2000);

g the Merchant Shipping (Minimum Safety and Health Requirements for Work on Board Fishing Vessels) Law of 2002 (Law No. 160(I) 2002);

h the Merchant Shipping (Minimum Requirements of Medical Treatment on Board Ships) Law of 2002 (Law No. 175(I)/2002);

i the Merchant Shipping (Organisation of Working Time of Seafarers) Law of 2003 (Law No. 79(I)/2003);

85 Operators of ships licensed to carry more than 12 passengers are required to maintain compulsory insurance or other financial security of no fewer than 250,000 special drawing rights (approximately €289,000) per passenger per incident to cover liability under the Athens Convention, in respect of death of and personal injury to passengers.

86 The Regulation provides for a minimum set of rights for passengers travelling by sea and inland waterway. More specifically, it establishes the right to assistance in cases of cancelled or delayed departures and lays down the right in certain circumstances to compensation in cases of delay in arrival. It also aims to provide disabled persons and persons with reduced mobility with the same opportunities for maritime and inland waterway travel as are enjoyed by passengers using other forms of transport across the European Union.

87 Cyprus has been a member of the International Labour Organization since 23 September 1960 and has had a prominent role in forming global shipping policies with a strong presence and powerful voice.

j the Merchant Shipping (Issue and Recognition of Certificates and Marine Training) Law of 2008 (Law No. 27(I)/2008);
k the Merchant Shipping (Dietary of the Crew) Regulations 1964 (PI 204/1964);
l the Merchant Shipping (Certificate of Maritime Competency of Radiotelegraph Operators) Regulations 1984 (PI 338/1984);
m the Merchant Shipping (Official Log Books, Ship's Articles and Six-Month Lists) Regulations 2001 (PI 297/2001), as amended; and
n the Merchant Shipping (Medical Examination of Seafarers and Issue of Certificates) (List of Approved Doctors) Notification of 2020 (PI 201/2020).

Nationality of crew

There is no restriction on the nationality of the seafarers on board Cypriot ships, provided they are holders of a valid Cyprus Seafarer's Identification and Sea Service Record Book issued by the Cyprus Maritime Administration. There are also no restrictions on officers' nationality. Moreover, no income tax is charged, levied or collected on the salary or other related benefits from the employment of eligible seafarers (officers, crew members or masters) who are tax residents of Cyprus and are employed on board a Cypriot ship that is a qualifying ship engaged in maritime transport. Around 100,000 seafarers are employed on board Cypriot ships and 9,000 shipping personnel are employed on shore. The sector employs around 3 per cent of Cyprus' workforce.

In fact, 280,000 seafarers of 98 nationalities are registered in the Seafarer's Register of the Republic of Cyprus, of which 100,000 actively work on board Cyprus-flagged vessels. Of these, 35 per cent are Filipino, 15 per cent Ukrainians and Russians, 10 per cent Polish, 3.5 per cent from the United Kingdom, and the rest from EU Member States.

Recent detainment of foreign vessels in relation to seafarers' rights

SDM surveyors[88] in the past couple of years detained two foreign vessels for non-compliance with the MLC: one in 2020 and one in 2019. The deficiency in both cases was the non-payment of seafarers' wages.

Seafarers' vaccination programme

Cyprus was one of the first countries that recognised seafarers as key workers and implemented a formal crew change process. These measures resulted in more than 10,000 seafarers being repatriated or able to return to work since May 2020. Cyprus continues to prioritise seafarer welfare and is keen to support a practical and coordinated solution to the global crew change crisis.

In response, the SDM has formally proposed a practical, global approach to delivering covid-19 vaccinations to seafarers. In letters to the EU Transport and Health Commissioners and IMO Secretary General, the SDM outlined the proposed programme and emphasised the need for a practical, feasible and collective approach to addressing the issue of seafarer inoculations.

Cyprus recognises that there are challenges with the logistics of a vaccination programme for seafarers, including the country of origin or residence of the seafarers, transport and

88 The jurisdiction of inspecting and further detaining vessels for MLC deficiencies is derived from the Merchant Shipping (Port State Control) Law of 2011 to 2015, Article 21A.

customer restrictions, availability of approved or authorised vaccines, the two-stage vaccination process, and the subsequent time required for a seafarer to be considered as inoculated. Therefore, Cyprus believes there should be a distinction on the basis of the duration of the sea voyage. The suggested programme comprises two main strands:

a for short sea shipping, national measures remain workable and regional cooperation is easier to achieve; and

b for deep sea shipping, Cyprus believes that vessels operating on long-distance intercontinental routes should be designated as an isolated covid-19 zone (a 'bubble').

The focus therefore should be on seafarers ashore. Cyprus suggests a coordinated global approach to ensure adequate numbers of approved or authorised vaccines, acceptable to all governments, are available to seafarers for inoculation in their country of residence before they travel to join their respective ships.

A resolution for a global seafarers vaccination programme proposed by the SDM has been officially adopted by the International Labour Organization (ILO). It was agreed at the Fourth Meeting of the Special Tripartite Committee of the Maritime Labour Convention 2006 – Part I, held in a virtual format in April 2021.

The resolution builds on the proposal for a global seafarers vaccination programme presented by Cyprus earlier in 2021 to the IMO Secretary General, the International Chamber of Shipping and the European Union.

This is a concrete step in identifying the magnitude of the vaccination challenge and then proceeding collectively with more decisive action, working with the World Health Organisation and pharmaceutical companies to secure sufficient vaccines for seafarers.

The approach requires social partners, in consultation with shipowners' and seafarers' organisations and in coordination with governments and IMO, to undertake a mapping exercise to establish the number of vaccines required for seafarers ashore. In addition, governments and shipowners' and seafarers' organisations are invited to formulate a resolution, communicating to all relevant UN bodies the need for a collective approach to secure the number of vaccines required.

VII OUTLOOK

Given the unique characteristics of the island, Cyprus will always have a prominent place in the global maritime sector. The maritime tax system, registration procedures and other policies attract numerous shipowners annually, making the fleet of ships registered under the Cyprus flag one of the largest in the world. Cyprus is a modern, efficient and integrated shipping cluster ranked among the world leaders. Limassol, the heart of the Cyprus maritime cluster, hosts more than 200 companies offering shipping and shipping-related services, from ownership and management to insurance, finance, brokerage, bunkering, ballast water system production, marine training and maritime technology in satellite and radio systems.

There has been an increasing need to implement measures to minimise air pollution by ships, such as reducing the sulphur content of fuel to one-seventh of the previous limit (now 0.5 per cent instead of 3.5 per cent), have created a number of legislative instruments or amended existing ones, such as MARPOL (73/78). Cyprus has adopted all related legislation. This is the main challenge the shipping sector is facing today and, to meet the targets, effort

will be required across the industry for a number of years in many respects, including the availability of compliant fuels, the effects on ships' machinery and the training of crews on proper documentation.

Another interesting innovation is the policy on taxation of shipping activities and the environmental incentives, which offer attractive taxation options to shipowners who have been affected by the recent financial crisis and global recession. In addition, the abolishment of initial registration fees aims to boost the competitiveness of the Register of Cyprus Ships and attract more ship registrations.

As far as the tax benefits the Cyprus flag provides are concerned, there is no tax on the income or profit made from the sale of a qualifying ship, nor is tax on capital gains payable on the transfer of a ship or shares in a shipping company. Furthermore, there is no tax on profits from the operation or management of a Cyprus-registered vessel nor on dividends received from a ship-owning company in Cyprus. Furthermore, there is no estate duty on the inheritance of shares in a ship-owning company, nor is registration duty payable on the shares of a shipping company. Moreover, a shipowner whose company is registered in Cyprus is fully exempted from income taxes on operations in international waters and on compensation and wages for officers on shore and crew on board Cypriot ships. Competitive investment funds legislation offering alternative funding solutions to shipping companies is also provided.

Cyprus has concluded double tax avoidance agreements with 65 countries. Moreover, according to the Cyprus VAT Law,[89] a zero rate of VAT is applicable to:

a the supply, modification, repair, maintenance, chartering and hiring of sea-going vessels that are used for navigation on the high seas and carrying paying passengers or that are used for the purpose of commercial, industrial, fishing or other activities; and

b the supply of services to meet the direct needs of seagoing vessels.

Committed to safeguarding and enhancing the competitiveness of the Cyprus maritime cluster, the SDM has obtained the approval of the European Union for the prolongation of its TTS for another 10 years. The SDM has taken steps to promote maritime education in Cyprus, while marine and maritime innovation has acquired new momentum with the creation of the Cyprus Marine and Maritime Institute (CMMI).[90] Cyprus takes pride in its role as a member of the IMO Council, the ILO and the European Union, striving to contribute to shaping international policies for greener, smarter and safer shipping.

On 20 May 2020, the SDM signed a memorandum of cooperation with the CMMI confirming the interest of both sides in the development and support of a joint strategy with the aim of encouraging and developing maritime technology and innovation in Cyprus, and promoting bilateral research cooperation in the field of the blue economy.

89 Value Added Tax Law of 2000 (Law No. 95(I)/2000), Article 25 and Schedule 6.

90 The Cyprus Marine and Maritime Institute (CMMI), based in Larnaca, is an independent international scientific and business centre of excellence for marine and maritime activities that carries out research, technological development and innovation activities to provide practical solutions to the challenges that the marine and maritime industry, and society, face or will face in the future. The proposal for the creation of the CMMI was submitted to the European Commission in November 2018 under the HORIZON 2020 'Spreading Excellence and Widening Participation' programme, and the project was eventually awarded the grant. The Municipality of Larnaca is the coordinator of the project; the other partners are the Limassol Chamber of Commerce and Industry, the Maritime Institute of Eastern Mediterranean, Cypriot companies SignalGeneriX and GeoImaging, Irish research organisations Marine Institute and SmartBay Ireland and UK research institute, the Southampton Marine and Maritime Institute.

On 18 September 2019, the Council of Ministers approved a state aid scheme for coastal passenger vessels[91] (*de minimis*), aiming to:

a enhance the protection of the marine environment;
b upgrade coastal vessels;
c further improve health and safety conditions for crew and passengers; and
d advance accessibility for people with disabilities.

Beneficiaries of the scheme are physical or legal entities that own coastal passenger vessels (registered under the Cyprus flag) that have been engaged in the coastal passenger industry for no fewer than three of the previous seven years, with at least 60 trips per high season (April to November).

The scheme will be implemented by the SDM for 2019–2022 and has been allocated a budget of €3 million (€1 million per year). Budgetary support will be up to 60 per cent of eligible expenses and will not exceed €200,000 per beneficiary. Pursuant to the scheme, the minimum investment should be €20,000. Currently, 118 coastal passenger vessels of 7,671 GT are registered in the Register of Cyprus Ships.

Following the redevelopment of the old port of Limassol that is now available for pleasure boats and the success of Limassol Marina,[92] which opened in 2014, work has been under way to develop a number of new marina projects to bolster Cyprus' role as a yachting location in the eastern Mediterranean.

The Paralimni Marina[93] is still under construction with an estimated opening in 2023, while the Ayia Napa Marina[94] is already open as an official port of entry into Cyprus. They

91 According to the Coastal and other Passenger Vessel Regulations of 2012 (PI 278/2012), 'coastal passenger vessel' or 'vessel' means a marine craft or a high-speed small vessel (in accordance with Article 2 of The High-Speed Small Vessels Laws of 1992-2001) that transports passengers to and from different parts of the coast of the Republic on sea tours, education and training, amateur fishing, diving, embarkation or disembarkation to another vessel or ship or other related activity along the coast, including small passenger vessels. A coastal passenger vessel can be operated only within three nautical miles of the shores of Cyprus and the maximum number of persons permitted on board is 150, provided that the vessel is licensed to carry that number, whereas a small passenger vessel can be operated within the territorial sea of Cyprus and perform international voyages within sea areas A1 and A2 of the Global Maritime Distress and Safety System. The maximum number of persons permitted on board small passenger vessels is 12.

92 The Limassol Marina has already established itself as one of the most attractive and unique projects in Europe. Boasting a capacity of 650 berths, able to accommodate yachts of between eight and 115 metres, Limassol Marina is the first superyacht marina in Cyprus.

93 The project for the construction of the Paralimni Marina commenced in March 2021. It is situated in the Pernera area, where the Agia Triada fishing shelter is currently located and its value will amount around to €100 million, including 300 berths and building sites. The Paralimni Marina is the second major maritime tourism project in the region of the free city of Famagusta after Ayia Napa and the third maritime project in Cyprus for the construction and development of marinas (after Ayia Napa and Larnaca). The construction of Paralimni Marina is expected to take four years, while the marine works are expected to be completed within 34 months from the commencement date.

94 The new Ayia Napa Marina is an ambitious project and is expected to attract investors, bringing further economic growth to the island. The marina will host approximately 600 yachts in wet and dry storage. According to the Decree on Customs Ports of 2021 (PI 31/2021), the Ayia Napa Marina is designated as a 'port of limited use', in which the limited use concerns the boarding and disembarking of cruise ship and pleasure craft passengers with their accompanied luggage. The definition also includes the repair of yachts and the loading of goods for export for special reasons, with the prior approval of the Director of the Customs Department of the Republic of Cyprus. The Ayia Napa maritime port area is also designated

will contribute to the development of nautical tourism and will enrich the tourist attractions in the city of Famagusta. Both marinas will be official ports of entry into Cyprus, providing customs and immigration clearance 24 hours a day. Moreover, on 12 February 2020, the government signed an agreement[95] with an Israeli consortium for the development of Larnaca port and Larnaca Marina[96] with an overall value of €1 billion, which will be the largest investment in Cyprus to date.[97] On 1 April 2022, a new era beckoned for Larnaca as the Cyprus Ports Authority handed over the operation of the Larnaca port and Marina to a private consortium, a Cypriot-Israeli private investor.

In addition, following the completion of the privatisation process in February 2017, operations at Limassol port are now provided by three private concessionaires.[98]

Cyprus is one of the few countries that has already succeeded in being included in important cruise programmes[99] for 2023, and Royal Caribbean International called Limassol its home port for the first time in 2021. Another important announcement was made by the Royal Caribbean Group on 23 January 2023, regarding its plans to open an office in

as a port of limited use for the boarding and disembarking of crews and passengers of cruise ships and megayachts (with their accompanied luggage), which, owing to their size, cannot dock in Ayia Napa Marina, and for the purposes of oil and supply of cruise ships. This development will upgrade Ayia Napa Marina and strengthen efforts to increase the flow of tourists in the area, creating a completely new category of tourists that did not exist in the past in the free province of Famagusta, placing Ayia Napa on the map for cruise tourism.

95 The signing of the concession agreement was completed in December 2020 and the 12-month transition period is effective as of January 2021. Construction work on the project is expected to start at the beginning of 2022 and is to be completed in four phases by 2037. The first phase will last five years and, among other things, aims to complete the new infrastructure works, so that citizens can use and enjoy the new spaces created. The works include the expansion and reconstruction of the existing marina, so that it can accommodate 650 boats from five to 150 metres long and offer facilities such as boat repair and services. The upgraded marina will also accommodate megayachts of up to 150 metres and approach a broader clientele than currently. The works also include the construction of a Marina Yacht Club. In addition, the upgraded Larnaca Port will be able to accommodate ships of up to 450 metres in length, such as luxury cruise ships, energy exploration vessels, military and other merchant ships. The port of Larnaca is the second largest of the Republic and until 1973 it was operating as a roadstead with inadequate port facilities. The port is under the jurisdiction of the Cyprus Ports Authority.

96 Larnaca Marina is under the exclusive jurisdiction of the Deputy Ministry of Tourism, which was established in January 2019, replacing the Cyprus Tourism Organisation. The Deputy Ministry of Tourism is responsible, among other things, for the implementation of the Regulation of Marinas Laws of 1977-2002 and the Administration of Leisure Boats Docking Space Laws of 2007-2013.

97 According to the *International Boat Industry* magazine.

98 The concessionaires are: P&O Maritime (GAP Vassilopoulos Group in partnership with P&O Maritime), which will handle marine services for the next 15 years; DP World Limassol Ltd, which is to provide services to vessels of general cargo, break-bulk, ro-ro, oil and gas sector, cruise and passenger vessels within the new passenger terminal for the next 25 years; and Eurogate Container Terminal Limassol, which deals with containerised cargo. Before the privatisation, Limassol port was under the jurisdiction of the Cyprus Ports Authority, which still has jurisdiction within the pier of the port. Limassol port is the largest port facility and the main cruise port of the island. It is considered one of the largest and busiest ports in the Mediterranean, with modern facilities. It can accommodate vessels of any length. Ferries connect Limassol with Greece, Israel, Egypt, Lebanon, among other places.

99 During the past two years, Royal Caribbean International begun a round trip in Haifa, Israel. Royal Caribbean has once again included Cyprus in its cruise schedule for June, July and August 2023 for its most modern and advanced ship, which is expected to arrive in Cyprus about 15 times, between June and August 2023, with the prospect of additional stations in the coming months.

Cyprus. The office will be based in Limassol and will support ship operations as the company looks to develop its eastern Mediterranean business. The opening of an office in Cyprus follows the company's first commercial sailing from the Port of Limassol in July 2021. This was made possible by a unique and special relationship that was fostered between the Royal Caribbean Group, the Cypriot government and authorities over the past several years, to build a credible long-term cruise business for Cyprus. As part of the Royal Caribbean Group's presence in the country, the company will flag *Spectrum of the Seas* under the Cyprus flag. According to the official announcement by the Royal Caribbean Group, the office is scheduled to open in the first half of 2023.[100]

Meanwhile, seven cruise ships of the Carnival Group remain moored off the anchorage at Moni in Limassol as part of the 'hot lay-up' in less costly Cyprus waters, boosting the island's economy.[101]

Developments have been also seen in the small port at Vassilikos, on the south coast near the island's main oil terminal. There are plans to develop Vassilikos into an industrial port that will operate as an oil and gas service centre, and it is expected to be ready by 2023. Its strategic location makes Vassilikos the first terminal of its kind in the eastern Mediterranean, connecting Europe and the Black Sea with the Middle East and Asia.

As well as the CMMI and the development of Larnaca port and marina, a plethora of other projects in Larnaca will make the city a new and promising maritime centre, including the newly established Cyprus Centre for Land, Open Seas and Port Security.[102]

The fishing industry[103] has developed dramatically in the past few years. On 5 August 2020, a contract was signed for the ambitious revamp of the Liopetri fishing shelter.[104] This €8.5 million project, one of the biggest involving a fishing shelter in Cyprus, includes the construction of a bridge over the Liopetri river, 100 berths for pleasure boats

100 Official Press Release from Royal Caribbean Group on Jan 23,2023 https://presscenter.rclcorporate.com/press-release/177/royal-caribbean-group-to-open-a-new-office-in-cyprus/.

101 A leading cruise ship operator (Carnival cruise line and its sister companies) have chosen to anchor seven of the world's most impressive cruise ships (the Island Princess, Enchanted Princess, Regal Princess and Sky Princess, the Seabourn Sojourn, Seabourn Ovation and Seabourn Encore) off Limassol (in the Limassol Moni anchorage) in a significant financial boost to the Cypriot economy, at a time when it is under pressure because of the covid-19 pandemic. More specifically, the cruise ships have been anchored (with no passengers on board) off Limassol since May 2020, after journeys were cancelled because of coronavirus restrictions and lockdowns, as they could not conduct their trans-Atlantic routes. Only crew are on board the ships. Each vessel contributes around €20,000 per month. More precisely, the vessels pay fees for anchorage, they order goods and services from local suppliers to support the crews on board (there are no passengers) and they use local companies to provide technical support and assistance.

102 In September 2020, the Republic of Cyprus and the United States, in the framework of their bilateral cooperation in the security and defence realm, signed a memorandum of understanding to establish a training facility in Larnaca – the Cyprus Centre for Land, Open Seas and Port Security (CYCLOPS) – which will be Cypriot-owned and has already secured an initial funding sum from the US government for the purpose of establishing and operating. CYCLOPS will allow the United States to provide enhanced technical assistance related to safety and security, including border security, customs and export controls, port and maritime security, along with cybersecurity. Official construction began in February 2021.

103 Cyprus has a long-standing fisheries tradition. Despite its limited contribution to GDP (around 0.8 per cent), the Cypriot fisheries sector holds significant socio-economic importance, particularly in coastal areas. The fishing fleet comprised 858 vessels in 2019, with a combined gross tonnage of 3,811 and total engine power of 40,801kW.

104 The project will be a boost not only to professional fishermen and tourism but will also protect the marine environment. The project is co-financed by the European Maritime and Fisheries Fund (75 per cent) and

and another 35 for professional fishermen. In addition, there will be a training centre for canoes, coastal paths and facilities for fishermen, contributing significantly to sustainable fishing in Famagusta. The Ormidhia fishing shelter in Larnaca is also under development. This €1.4 million project was signed on 6 April 2021 and construction will take 24 months.

The Network of Scientists and Fishermen of Cyprus, which is co-financed by the European Maritime and Fisheries Fund, was created on 23 September 2020. The Network is led by the Oceanographic Centre at the University of Cyprus and is attended by the Pancyprian Association of Professional Coastal Fishermen, the Professional Fishermen of Multipurpose Boats, the Pancyprian Association of Professional Fishermen of the Small Fishing Boat and the Enalia Physis Environmental Research Centre Ltd. The main objectives of the Network are as follows:

a the protection of fisheries;
b the safeguarding of the interests and rights of fishermen;
c the identification, promotion and resolution of problems related to fisheries; and
d the better and sustainable exploitation of fishery stocks.

On 6 October 2022, the Deputy Ministry of Shipping announced that the House of Representatives passed the Limited Liability Shipping Company (NEPE) Law of 2022.[105] The passing of this legislation constitutes the implementation of Action No. 14 of the Long-term National Strategy for Cypriot Shipping (SEA Change 2030), which was adopted in October 2021 by the Council of Ministers. The aim of this strategy is to improve the competitiveness of the Cypriot flag in international shipping, as well as to simplify the procedures and the operating regime of Cypriot shipping companies that own Cypriot ships.

To this end, a new form of limited liability company was created, the shipping company limited (NEPE), with the sole purpose of owning and operating Cypriot ships. The law regulates the procedure for setting up and registering shipping limited liability companies.

This law created the NEPE Registry, which will be overseen by the Deputy Ministry of Shipping. The General Director of the SDM (who is also by law the Registrar of Cypriot Ships) will also act as Superintendent of NEPE. The NEPE Law in its structure is inspired by the basic provisions of the Companies Law, Chapter 113, and to make the NEPE more flexible and attractive, it includes provisions aimed at simplifying various procedures and aspects. By law, shipping companies that own Cypriot ships that are already registered with the Registrar of Companies can request their transfer to the NEPE Registry based on specific conditions. This Law enters into force on a date determined by a decision of the Council of Ministers, which is published in the Official Gazette of the Republic. Therefore, the Council of Ministers may determine a different effective date of the provisions of Subsection (1) of Article 101 of this Law.

The Deputy Ministry of Shipping, according to the Circular 22/2022[106] dated 24 May 2022, sets some conditions for the bareboat chartering of pleasure crafts to regulate

National Resources of the Republic of Cyprus (25 per cent) and it is expected to be ready before the end of 2022. Construction will take 30 months. The project has been on the cards for some years and was first intended to be launched in 2013 but was postponed because of the economic crisis that year.

105 Limited Liability Shipping Company (NEPE) Law of 2022, is issued by publication in the Official Gazette of the Republic of Cyprus in accordance with Article 52 of the Constitution.

106 Circular 22/2022 SDM.

the chartering activity of pleasure boats in the territory of Cyprus under 'bare' conditions chartering (i.e., renting them without providing crew and captain). Some of the main conditions and requirements for the bareboat chartering of pleasure crafts are the following:

a pleasure crafts, regardless of flag, that are commercially active in the territory of Cyprus and that have Cyprus as their starting point of travel or departure must have suitable living quarters and be available for a fee based on the charter agreement;

b the completion of the customs clearance process for pleasure crafts located in Cyprus is a necessary condition for the crafts to be active in bare charter;[107]

c pleasure crafts must be owned by charter companies that must obtain a tax registration number and must be registered in the VAT register;

d the captain and crew to be hired by the charterer must not belong to the chartering company or to a company that is a subsidiary, or that is considered a member, of a group of companies of the chartering business, or a company that owned or managed by the charter company;

e there should be a person in charge of the operation of pleasure crafts and a substitute for them, who must hold a pleasure boat operator's licence with an engine as the main means of propulsion (motorboat);

f the yacht charter company, to be able to carry out the activity of bare chartering, should submit a request with a relevant letter to the Deputy Ministry of Shipping;[108]

g the vessel and the insured (charter company) must have, among other things, insurance;[109] and

h the captain of a chartered pleasure craft must hold certificates that prove his or her maritime training, a condition for taking over the management of the craft.

In addition to the above-mentioned developments, the one thing that could dramatically drive the growth of Cyprus' shipping industry, and bring about the further expansion of Cyprus' registry, is a viable and functional solution to the lifting of the Turkish embargo on Cypriot ships, which, since 1987,[110] has been the Achilles heel of the Cyprus flag, hindering the development of the Register of Cyprus Ships and of the island's ports.[111]

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107 A relevant certificate from the Customs Department should be submitted by the chartering company concerned, together with its letter of request (to carry out the activity of bare charter of pleasure crafts) to the Deputy Ministry of Shipping.

108 In the event that all the conditions are met, the Deputy Ministry of Shipping will issue a Certificate of Operation of the charter business with a validity of one year or up to one year from the last review of the certificate of conformity of the quality system.

109 Liability for death or bodily injury of passengers or third parties, which may be caused by collision, submersion or any other cause. Liability for damage that passengers or third parties may suffer due to collision, submersion or any other cause. Liability for marine pollution.

110 In April 1987, Turkey imposed restrictive measures exclusively against Cyprus-flagged vessels, prohibiting them to call at Turkish ports. In May 1997, Turkey issued new instructions to its ports and harbours to clarify uncertainties arising from the imposition of the restrictions, thus, extending them against vessels under a foreign flag (of any nationality) sailing to Turkish ports directly from any Cypriot port under the effective control of the Republic of Cyprus (Limassol, Larnaca) and to vessels of any nationality related to the Republic of Cyprus in terms of ownership or ship management. The immediate effect of the May 1997 instructions was to restrict the use of Cypriot ports for transshipment operations of shipping lines in the Mediterranean.

111 It is important to note that the Republic of Cyprus fully complies with its international and EU obligations regarding Turkey-flagged vessels, as these vessels can freely call at any port under the effective control of the government of the Republic of Cyprus.

Chapter 17

DENMARK

Peter Appel and Thomas E Christensen[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

As at January 2023, the Danish merchant fleet comprised 760 vessels.[2] The Danish-flagged merchant fleet has experienced a significant growth in the number of ships and gross tonnage (GT) since 2010. The number of vessels has increased by 180 (equivalent to 10.97 million GT), which corresponds to an increase of 31 per cent since 2010. Danish vessels currently account for 22.6 million GT (or 61.9 million GT if Danish-owned vessels under foreign flags and chartered vessels are included). This places Denmark as the nineth-largest shipping nation in the world. In 2022, the Danish-flagged merchant fleet decreased in size by 0.57 million GT, corresponding to a decrease of 2.44 per cent. In 2021, exports by Danish shipping companies were worth more than 324.8 billion Danish kroner, more than any other industry sector.[3] Approximately 60,880 people are employed in the Danish maritime cluster.[4]

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The Danish legal system is divided into three separate jurisdictions: Denmark, the Faroe Islands and Greenland.

This chapter deals solely with the law applicable in Denmark, but the maritime and procedural systems in the Faroe Islands and Greenland are almost identical (based on Danish legislation) and with appeal to either the Danish high courts or the Danish Supreme Court.

The Merchant Shipping Act (MSA)[5] constitutes the main legislative framework for Danish maritime law and is to a large extent based on international maritime conventions such as the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules), the UN Convention on the Carriage of Goods by Sea 1978 (the Hamburg Rules), the Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC Convention 1976), the International Convention on Civil Liability for Oil Pollution Damage 1969, replaced by the 1992 Protocol

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2 Numbers published by Danish Shipping: www.danishshipping.dk/analyse/ ('Handelsflåden', last accessed 7 March 2023).

3 Numbers published by Danish Shipping: www.danishshipping.dk/analyse/ ('Verdenshandlen', last accessed 7 March 2023).

4 Numbers published by Danish Shipping: www.danishshipping.dk/analyse/ ('Beskæftigelse', accessed 7 March 2023).

5 Consolidated Act No. 1505 of 17 December 2018 as amended by Act No. 569 of 10 May 2022. For an English translation of the Merchant Shipping Act, see www.dma.dk.

(the CLC Convention), the International Convention on Salvage 1989 (the 1989 Salvage Convention) and the Nairobi International Convention on the Removal of Wrecks 2007 (Nairobi WRC 2007). The MSA is supplemented by the Administration of Justice Act (AJA)[6] on general procedural issues and other acts on particular areas of law. In addition, EU law is increasingly of relevance, in particular in relation to the carriage of passengers and in respect of safety, offshore and environmental matters.

The Danish Maritime Authority (the Authority), an agency under the Ministry of Industry, Business and Financial Affairs, regularly issues circulars and guidelines that regulate most aspects of the shipping industry – ship safety, navigation, seafarers and manning, as well as ship registration, being its core areas of responsibility.[7]

III FORUM AND JURISDICTION

i Courts

Maritime disputes must, in most instances, be initiated at either one of the 24 district courts or at the Maritime and Commercial High Court in Copenhagen, which considers disputes in commercial and maritime matters.[8] The latter Court, therefore, is very experienced in deciding maritime disputes and agreed to be the preferred court in maritime contracts. The decisions of the district courts can be appealed to either the Western or Eastern High Court. The Maritime and Commercial High Court's decisions can be appealed to either the high courts or the Supreme Court, depending on the specific circumstances of the case in question.[9]

The international competence of the Danish courts, in relation to maritime disputes, will in most cases be determined by Regulation (EU) No. 1215/2012 (the Brussels I *bis* Regulation). This Regulation applies in Denmark, irrespective of the Danish opt-out to the EU's judicial cooperation, pursuant to an agreement between Denmark and the European Union entered into on 19 October 2005.[10] The Brussels I *bis* Regulation is supplemented by the AJA, in particular Chapters 21 and 22, and certain provisions in the MSA covering specific instances, such as carriage of goods and marine pollution.

The limitation periods for maritime claims are set out in Chapter 19 of the MSA, and vary from one to three years depending on the type of claim. By way of example, the limitation period for claims for salvage and special compensation is two years from the day on which the salvage operations were terminated and one year in relation to maritime liens and actions under a bill of lading. As for claims that are not listed in the MSA, the generally applicable limitation period under Danish law is three years from the due date of the claim.[11] The claimant's unawareness of the claim or the debtor may suspend the limitation period by a maximum of 10 years or, for claims relating to personal injury and environmental damage, 30 years.

6 Consolidated Act No. 1655 of 25 December 2022.

7 For further information, see www.dma.dk.

8 See Administration of Justice Act [AJA], Sections 224 and 225.

9 See id., Section 368.

10 See Consolidated Act on the recognition and enforcement of certain foreign judgments etc. in civil and commercial matters No. 1282 of 14 November 2018.

11 Consolidated Act on Limitation No. 1238 of 9 November 2015 as amended by Act No. 140 of 28 February 2018; see Limitation Act, Section 3.

ii Arbitration and ADR

The Danish Institute of Arbitration resolves commercial and maritime disputes through confidential arbitration and mediation procedures. The Institute was established in 1981 and is based in Copenhagen.[12] Ad hoc arbitration is also commonly used in maritime disputes.

Arbitration proceedings are governed by the Arbitration Act[13] (AA), which is based on the 1985 UNCITRAL Model Law. A draft bill to update the AA based on the 2006 Model Law amendment has been prepared by an expert committee but is yet to be presented before Parliament.

The Nordic Offshore and Maritime Arbitration Association (NOMA) was established in late 2017 by leading forces in the maritime sector, including specialist lawyers and trade associations from the Nordic countries. NOMA specialises in maritime disputes and is expected over time to become the preferred resolution body when dealing with maritime disputes. The NOMA rules are based on UNCITRAL Arbitration Rules, as amended to fit international maritime disputes. An increasing number of owners, charterers, operators, builders and suppliers opt for arbitration in accordance with the NOMA rules in their contracts. For instance, the Baltic and International Maritime Council (BIMCO) refers to the NOMA rules on its website as an alternative dispute resolution centre for Nordic countries, and the Nordic Marine Insurance Plan 2023 sets out NOMA as the default solution in cases where the claim leader is non-Nordic and as an option when the claims leader is Nordic.

iii Enforcement of foreign judgments and arbitral awards

Under the Brussels I *bis* Regulation, judgments issued in other EU Member States can be recognised and enforced without any declaration of enforceability being required. Recognition and enforcement may be refused on certain grounds, however, including public policy, insufficient service of the writ to the defendant (default judgments) and if the judgment is irreconcilable with an earlier judgment.[14] Judgments from the European Economic Area (EEA) States (Norway, Liechtenstein, Iceland and Switzerland) can be recognised and enforced based on the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 1988, 2007 (the Lugano Convention), which is similar in many respects to the former Brussels I Regulation.[15]

Effective as of 1 September 2018, the Convention of 30 June 2005 on Choice of Court Agreements (the Hague Choice of Court Convention) entered into force in Denmark. Consequently, judgments from other contracting states, such as Mexico, Singapore and Montenegro, can also be recognised and enforced in Denmark, provided that the parties to the dispute have agreed on the jurisdiction of the foreign court in question (subsequent to the entry into force of the Convention in that state) and the matter falls within the scope of the Convention. Importantly, the Hague Choice of Court Convention does not apply to the

12 See www.voldgiftsinstituttet.dk.

13 Act No. 553 of 24 June 2005 as amended by Act No. 106 of 26 February 2008.

14 See Brussels I *bis* Regulation, Articles 39 and 45.

15 Council Regulation (EC) No. 44/2001 of 22 December 2000. See Lugano Convention, Article 34, and Act on the recognition and enforcement of certain foreign judgments etc. in civil and commercial matters No. 1282 of 14 November 2018.

carriage of passengers and goods and other maritime matters.[16] Within the European Union and the EEA, the Brussels I *bis* Regulation and the Lugano Convention will take precedence over the Hague Choice of Court Convention.

Under Sections 223a and 479 of the AJA, the Minister of Justice has the authority to lay out provisions on the recognition and enforcement, respectively, of foreign judgments. However, this authority has never been exercised. Apart from a few provisions on specific types of cases, there is no applicable statutory basis for the recognition and enforcement of foreign judgments. However, on the basis of recent case law, it has been asserted in Danish legal literature that foreign judgments might be recognised in some instances if the parties had agreed on the jurisdiction of the foreign court issuing the judgment, subject to certain additional conditions.

In respect of judgments from the United Kingdom, now that the Brexit transition period has ended, the Brussels I *bis* Regulation no longer applies to judgments rendered in court proceedings initiated after 31 December 2020.[17] In some of these cases, the Hague Choice of Court Convention may apply as the United Kingdom is deemed to have acceded to the Convention on 1 October 2015 by way of it being a member of the European Union at that time. Owing to the limited scope of the Hague Choice of Court Convention, in particular in maritime matters, and owing to the uncertainty and limitations as to the recognition of judgments on a non-statutory basis, commercial parties will probably have difficulty in obtaining enforcement of English judgments in Denmark, unless the United Kingdom and the European Union reach a bilateral agreement to supplement the Brussels I *bis* Regulation.

Arbitral awards can be recognised and enforced under certain conditions as set out in the AA, which in this regard is based primarily on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). Recognition and enforcement may be denied only on a few specific statutory grounds, including public policy and non-arbitrability.[18]

IV SHIPPING CONTRACTS

i Shipbuilding

Under Danish law, shipbuilding contracts are subject to the general principle of contractual freedom. Thus, the parties to a shipbuilding contract will have considerable latitude to enter into a contract on individually negotiated terms. Often, this will be based on a standard form of shipbuilding contract, such as BIMCO's NEWBUILDCON 2007, or the parties' own templates.

Shipbuilding contracts are generally regarded as sale of goods contracts and are regulated by the Sale of Goods Act (SGA).[19] However, the SGA applies only to the extent that the parties have not departed from its provisions in their contract. Given the detailed nature of most shipbuilding contracts, the SGA will most often not be applied.

16 Hague Choice of Court Convention, Article 2(2).

17 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Article 67(2)(a).

18 Arbitration Act [AA], Sections 38 and 39.

19 Consolidated Act No. 1853 of 24 September 2021.

ii Contracts of carriage

Chapter 13 of the MSA governs contracts of carriage, based on the Hague-Visby Rules, including the SDR Protocol, 1979, which Denmark has ratified. Although Denmark has not ratified the Hamburg Rules, these have in part been incorporated in the MSA. Denmark has signed but not yet ratified the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (the Rotterdam Rules).

Under Section 262 of Chapter 13 of the MSA, the carrier must perform the carriage with appropriate care and dispatch, and otherwise safeguard the interests of the cargo owner.

The obligations and liability of the shipper are regulated in Section 290 of the MSA, which follows Article 12 of the Hamburg Rules. Pursuant to Section 290, a shipper is only liable for loss sustained by the carrier or the sub-carrier that is caused by the fault or neglect of the shipper or any person for whom he or she is responsible. The same applies to any person for whom the shipper is responsible.

Some of the MSA provisions also govern multimodal transport, including Section 285, whereby the contracting carrier may limit his or her liability for losses arising out of the carriage of the cargo by a sub-carrier under certain circumstances.

iii Cargo claims

Danish law on liability for cargo claims and bills of lading are based on the Hague-Visby Rules. These apply mandatorily for transports between the Nordic countries and as set out in the Hague-Visby Rules.

Claims for damage or loss to cargo and for delay can be brought by the lawful owner of the bill of lading against the carrier. The carrier is liable for any loss, damage or delay to the cargo caused while the cargo was in the carrier's custody.[20] The carrier can counter this presumption of negligence and avoid liability by proving that the carrier and its crew acted with due care in the carriage of the cargo. Furthermore, a number of exemptions from liability apply.[21] The carrier is not liable for losses caused by measures to save persons or reasonable measures to salvage a ship or other property at sea.[22] If the carrier's negligence is not the only cause of damage, it is only liable for the part of the loss attributable to its negligence.[23] The carrier is not liable for loss because of error in navigation or fire that was not caused by the carrier,[24] unless the loss was caused by unseaworthiness.[25] An exclusion of liability for deck cargo and transport of live animals is set out in Sections 263 and 277 of the MSA.

The carrier is entitled to limit liability for cargo claims.[26] Liability can be limited to the higher amount of 667 special drawing rights (SDRs) per package or 2 SDRs per kilo of cargo lost or damaged.

The limitation period for claims for compensation under Sections 275 and 276 of the MSA is one year from the day on which the goods were delivered or should have been delivered.

20 See Merchant Shipping Act [MSA], Section 274(1).

21 The exemptions are incorporated from the Hague-Visby Rules and the Hamburg Rules.

22 See MSA, Section 275(2).

23 See id., Section 275(3).

24 See id., Section 276(1).

25 See id., Section 276(2).

26 See id., Sections 280 to 283.

iv Limitation of liability

Chapter 9 of the MSA, which is based on the LLMC Convention 1976 as amended by the LLMC Protocol 1996, governs the rights for owners, charterers, managers and operators of a vessel to limit liability for claims arising in connection with the use of the vessel.[27] The claims for which limitation applies (including damage to property and personal injury, and loss resulting from delay) are listed in Section 172 of the MSA, whereas the claims that are excluded from limitation (including claims for salvage and damage from oil pollution) are listed in Section 173.

The right of limitation may not be relied on if the loss or damage was caused by a wilful act or gross negligence.[28] Danish law follows the 'single liability' principle.[29]

The limits for liability in the MSA have been amended in accordance with amendments to the LLMC Convention 1976 that entered into force on 8 June 2015.[30] The increased limits apply to all incidents occurring on or after that date.

Under Section 175(1) of the MSA, claims for death of a vessel's own passengers are limited to 400,000 SDRs multiplied by the number of passengers.

Pursuant to Section 175(2) of the MSA, claims for death and personal injury other than the vessel's own passengers can be limited to 3.02 million SDRs for vessels of up to 2,000 tonnes. For vessels with a greater tonnage, the limits are increased as follows:

a for every tonne from 2,001 to 30,000 tonnes, by 1,208 SDRs;
b for every tonne from 30,001 to 70,000 tonnes, by 906 SDRs; and
c for every tonne above 70,000 tonnes, by 604 SDRs.

Pursuant to Section 175(3) of the MSA, liability in respect of wreck removal claims is limited to 2 million SDRs for non-passenger vessels. For non-passenger vessels, the limits are increased as follows:

a for every tonne from 1,001 to 2,000 tonnes, by 2,000 SDRs;
b for every tonne from 2,001 to 10,000 tonnes, by 5,000 SDRs; and
c for every tonne above 10,001 tonnes, by 1,000 SDRs.

These special limits for wreck removal claims do not apply to passenger vessels, which, according to the legislative preparatory works, is because passenger vessels are seldom involved in major casualties.

All other claims are regulated in Section 175(4) of the MSA, and these can be limited to 1.51 million SDRs for vessels with a tonnage of up to 2,000 tonnes.[31] For vessels with a greater tonnage, the limits are increased as follows:

a for every tonne from 2,001 to 30,000 tonnes, by 604 SDRs;
b for every tonne from 30,001 to 70,000 tonnes, by 453 SDRs; and
c for every tonne above 70,000 tonnes, by 302 SDRs.

27 See id., Section 171.
28 See id., Section 174.
29 See id., Section 172(2).
30 See id., as amended by Act No. 1526 of 19 December 2017, Section 175.
31 The limits for liability for vessels of 300 tonnes or less are set out in Executive Order No. 463 of 11 May 2018.

These limitation amounts do not apply to claims relating to oil pollution from tankers, as these may be limited pursuant to Section 194 of the MSA (based on the CLC Convention) to between 3 million and 59.7 million SDRs, depending on the vessel's tonnage.

As regards passenger injury or death, owners may limit their liability to 400,000 SDRs per passenger on each occasion (injury or death) under Annex I, Article 7 of the Passenger Liability Regulation.[32] As regards other personal injury claims, the general applicable limits under the LLMC Convention 1976 apply.

Sections 177 to 180 and Chapter 12 of the MSA set out the procedural rules for establishing a limitation fund.

V REMEDIES

i Ship arrest

Under Danish law, a vessel may be arrested either under Chapter 4 of the MSA, which is based on the International Convention Relating to the Arrest of Sea-Going Ships 1952 (the Brussels Convention), as security for 'maritime claims', or under Chapter 56 of the AJA for other claims. If the MSA applies, the rules in Chapter 56 of the AJA apply only to the extent that the rules do not conflict with the MSA (Section 96). Arrest falls under the jurisdiction of the Danish bailiff courts, which are located at each of the 24 district courts.

Under the MSA, a vessel can only be arrested as security for a 'maritime claim' (listed in Section 91) against the owner and only if the vessel is present in Danish waters. For certain claims, sister ship arrest may be made.[33] However, for other claims (notably disputes concerning ownership of and mortgages over a vessel), only the vessel to which the claim relates is subject to arrest.

The court may order the creditor applying for arrest to put up security for the potential loss of the debtor.[34] Proceedings on the merits must be commenced against the debtor within a week of the date of the arrest, or if the claim on which the arrest is based is under foreign jurisdiction, two weeks after the date of the arrest.[35]

Some of the maritime claims listed in Section 91 also constitute maritime liens under Chapter 3 of the MSA, which is in part based on the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages (Brussels, 1967). Under Section 51 of the MSA, these include crew wages, port fees and duties, claims for damage arising out of the operation of the vessel and claims for salvage (but notably not claims for payment of bunkers supplied to the vessel). Maritime liens over cargo are listed in Section 61 of the MSA.

As opposed to arrest under the MSA, under the AJA, an asset of the debtor (including a vessel) can be arrested as security for any claim (i.e., those that are not maritime claims). However, the creditor must show that the possibility of recovering the underlying claim from the debtor will cease to exist at a later stage or be fundamentally reduced if the arrest is not granted.[36]

32 Regulation (EC) No. 392/2009 on the liability of carriers of passengers by sea in the event of accidents.

33 See MSA, Section 93(1).

34 See AJA, Section 629 and MSA, Section 94.

35 See AJA, Section 634.

36 See id., Section 627.

ii Court orders for sale of a vessel

Judicial sales of vessels are regulated by the general rules on judicial sales of personal property laid down in Chapters 49 and 50 (Sections 538 to 559) of the AJA. Rights over vessels, including maritime liens, are generally regulated by the MSA. The Danish government has supported the United Nations Convention on the International Effects of Judicial Sales of Ships on 7 December 2022. No legislative steps have, however, yet been taken to ratify the convention and to implement it into Danish statutory law.

Under Section 538(1) of the AJA, the levying of an execution on goods entitles a creditor to request a judicial sale of the goods to cover his or her claim. Under Section 478 of the AJA, execution can be levied on the basis of, inter alia:

a decisions of courts or other authorities, provided their decisions are enforceable according to Danish law, including in relation to costs;

b a written demand for payment undisputed by the debtor and endorsed by the bailiff's court under Section 477e(2) of the AJA;

c negotiated settlements of disputes entered into by the parties before the above-mentioned authorities (intra-judicial);

d other negotiated settlements of disputes concerning payable debt, provided it is explicitly decided in the settlement that it can serve as a basis of enforcement (extrajudicial);

e instruments of debt, not included in point (d) above, provided it is explicitly decided in the document that it is enforceable;

f mortgage deeds; or

g bills of exchange.

In addition, arbitration awards can form the basis of execution under the same rules as judgments under point (a), above, with some exceptions (set out in Sections 38 and 39 of the AA). The execution is levied by the bailiff's court against the vessel itself.

Under Danish law, all creditors, not only the creditor who has arrested the vessel, may levy execution in the asset (vessel) as they are treated equally. As such, an arrest does not in itself give the arrest applicant any priority in the distribution of the proceeds of the sale.

When an execution has been levied on a vessel, the creditor may request the bailiff's court in which the execution was levied to schedule a judicial sale.[37] To protect his or her execution against claims from other creditors or other third parties acquiring rights over the vessel, the creditor must therefore register the execution with the Danish Ship Register or the Danish International Ship Register.[38]

VI REGULATION

i Safety

The Safety at Sea Act (SSA) sets out the main obligations relating to navigation and safety at sea in Denmark and in relation to Danish-flagged vessels.[39] The SSA is based on international conventions such as the International Convention for the Safety of Life at Sea 1974 (SOLAS), the International Convention on Load Lines 1966 (the Load Lines Convention),

37 See id., Section 539.

38 See MSA, Section 28(1).

39 Consolidated Act No. 211 of 11 February 2022.

the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1995 (the STCW Convention) and the International Convention for the Prevention of Pollution from Ships 1973 (as modified by the Protocol of 1978) (MARPOL (73/78)) and various EU regulations. The purpose of the SSA is to ensure safety at sea; in particular, to ensure the seaworthiness of vessels on departure from port. The Danish Act on the Manning of Ships regulates the manning requirements.[40]

ii Port state control

Denmark has ratified SOLAS and the Paris Memorandum of Understanding on Port State Control 1982 (the Paris MOU), the latter requiring the contracting states to execute efficient port state control on ships from any state. The Authority is responsible for port state control.

In the event that a vessel does not comply with the applicable regulations, the Authority may order the owners to rectify any deficiencies. Under Sections 14 and 16 of the SSA, the Authority and the local port master may confiscate a vessel's certificates and detain the vessel.

iii Registration and classification

Denmark maintains two ship registers – the Danish Ship Register (DAS) and the Danish International Ship Register (DIS), which are governed by Chapters 1 and 2 of the MSA and the DIS Act,[41] respectively. The income generated by vessels registered under the Danish flag (whether with the DAS or the DIS) may be subject to the Danish tonnage tax regime, which is considered one of the most competitive and attractive shipping taxation systems in the world. The rules on taxation are primarily set out in the Tonnage Taxation Act.[42] The registration system for DAS and DIS was recently made fully digital, with the intention of easing the international vessel transactions and financings. The system includes an online verification system for the issue of certificates on the registration platform.

When a vessel is registered with the DAS or the DIS, it becomes subject to Danish jurisdiction and is entitled to fly the Danish flag. It will also have to comply with Danish mandatory legislation.

Registration with the DAS

Danish vessels must be registered under the Danish flag.[43] For a vessel to be considered Danish, the owner of the vessel must be Danish, which will be the case if the owner is as follows:

a a Danish citizen;

b a legal person established pursuant to Danish legislation; or

c a legal person registered as a Danish company, foundation or association in the country.[44]

No licences are required to establish a business in Denmark with the purpose of owning or commercially operating vessels.

40 Consolidated Act No. 74 of 17 January 2014 as amended by Act No. 400 of 2 May 2016.

41 Consolidated Act No. 390 of 1 April 2020.

42 Consolidated Act No. 500 of 22 March 2021.

43 See MSA, Section 10.

44 See id., Section 1.

Registration with the DIS

The criteria for registration with the DIS are less strict than for registration with the DAS. Furthermore, registration with the DIS allows the vessel's crew to exempt their wages from being subject to taxation. However, a vessel registered with the DIS may not transport passengers from one Danish port to another.

Vessels in international trading may be registered with the DIS subject to certain requirements. Vessels not considered Danish under the MSA (see above) may be registered with the DIS if the (foreign) owner fulfils two conditions.[45] First, the owner must appoint a representative in Denmark who is authorised to accept service of legal documents and who may be contacted by authorities for inspection purposes. Second, the vessel must have 'economic activity' in Denmark. Since 1 January 2018, this condition can be fulfilled not only through the technical or commercial management being carried out from Denmark, but also in the two following cases:

a the vessel fulfils the requirements to be covered by the tonnage tax regime (see above); or

b the person who has applied for the vessel's Document of Compliance (under the International Safety Management Code), such as the appointed representative, is established in Denmark.

Through the latter option, a vessel may thus be registered with the DIS even though the actual economic activity is not substantial in Denmark, which may open the way for a considerable increase of vessel registrations with the DIS.

Bareboat registration with the DIS

A legal entity in the European Union or the EEA that complies with the criteria for registration with the DIS may also make a bareboat registration with the DIS. A bareboat-registered vessel must be under the flag of an EU or EEA Member State. A bareboat registration may be granted for a maximum of five years; it may be prolonged by one year at a time. Bareboat registration with the DIS does not allow for other rights, such as mortgages, to be registered with the DIS.

Registration fee

On 26 April 2018, the government adopted a bill abolishing the regime of registration fees.[46] Ship registration is now subject only to an annual fee, which is due for payment on 1 March each year. The annual fee is calculated based on the ship's GT.[47]

Registration of rights

Under Section 28 of the MSA, all rights over vessels (except for maritime liens and possessory liens, for which, see Section 30) must be registered with the DAS to obtain protection against claims from, and acquisitions by, third parties. This also applies for vessels under construction.

Under Section 10(3) of the MSA, vessels under construction in Denmark can be registered with the Danish Shipbuilding Register provided that the vessel can be identified easily and individually. Registration with the Shipbuilding Register is optional and the owner does not need to be Danish. When construction of the vessel is completed, the vessel must be deleted from the Shipbuilding Register and registered with the DAS or the DIS.

45 See Consolidated Act No. 390 of 1 April 2020, Section 1(2).

46 Act No. 359 of 29 April 2018.

47 See www.dma.dk for an overview of the annual fees.

Classification

The following classification societies are recognised by the Authority to undertake statutory certification and services on Danish-flagged vessels:

a the American Bureau of Shipping;
b Bureau Veritas;
c the China Classification Society;
d Class NK (Nippon Kaiji Kyokai);
e DNV;
f the Indian Register of Shipping;
g the Korean Register;
h Lloyd's Register;
i the Polish Register of Shipping; and
j Registro Italiano Navale.[48]

There is some uncertainty as to whether classification societies will be subject to liability for negligence in carrying out their work; however, the exclusion of liability clauses in the terms and conditions of classification societies has not been set aside by the Danish courts.

iv Environmental regulation

Ship-source pollution and environmental damage is primarily governed by the MSA and the Protection of the Marine Environment Act,[49] while supplementary rules follow from, inter alia, the Environment Protection Act,[50] the Environmental Damage Act,[51] the Nature Protection Act[52] and the Coastal Protection Act (CPA).[53] These regimes incorporate the international conventions and EU directives mentioned below into Danish law. Under Danish law, shipowners are generally strictly liable for ship-source pollution.

The CLC Convention is implemented in Chapter 10 of the MSA. Danish law on liability for oil pollution differs to some extent from the CLC Convention. The channelling provisions of the Convention are implemented in Danish law, albeit with some important changes on shipowners' recourse claims against charterers and cargo owners. Danish law on recourse claims by shipowners is considered more onerous for charterers and cargo owners than Article III.4 of the CLC Convention.[54]

Denmark has ratified other conventions relating to marine pollution liability, including the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (the Oil Pollution Fund Convention), the 2003 Protocol establishing an International Oil Pollution Compensation Supplementary Fund, and the International Convention on Civil Liability for Bunker Oil Pollution Damage

48 Agreement Governing the Authorisation of [Recognised Organisation (RO)] to undertake Statutory Certification Services on behalf of the Danish Maritime Authority (the Danish RO Agreement 2015).
49 Consolidated Act No. 1165 of 25 November 2019 as last amended by Act No. 2608 of 28 December 2021.
50 Consolidated Act No. 5 of 3 January 2023.
51 Consolidated Act No. 482 of 25 April 2022.
52 Consolidated Act No. 1392 of 4 October 2022.
53 Consolidated Act No. 705 of 29 May 2020.
54 MSA, Section 193, Subsection 2, Paragraphs (2) and (3).

2001 (the Bunker Convention). These are supplemented by the International Convention for the Prevention of Pollution from Ships (MARPOL) (73/78), which sets out detailed regulations for the operations of vessels.

Denmark has also acceded to international conventions and regulations on particular environmental matters, in part through EU law. These include the Convention for the Control and Management of Ships' Ballast Water and Sediments 2004 (the Ballast Water Management Convention), Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements, Directive 2008/99/EC on the protection of the environment through criminal law, Directive 2008/98/EC on waste, Regulation (EC) No. 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals, Regulation (EC) No. 1013/2006 on shipments of waste (relevant to ship recycling) and Regulation (EU) No. 1257/2013 on ship recycling.

v Collisions, salvage and wrecks

Collisions

The rules on collisions can be found in Chapter 8 of the MSA. In the event of a collision caused by the fault of one side, that ship shall compensate the other ship for any damage suffered to the ship itself, its cargo and any passengers on board.[55]

When the cause of a collision can be attributed to both vessels involved, liability for the damage is to be divided between the parties based on each party's fault.[56] In practice, this will often be based on discretionary assessments and is often divided into fractions such as one-half, one-third to two-thirds and one-quarter to three-quarters. If a collision is accidental without any fault by any of the parties involved, each party is responsible for the damage caused to its own ship.

Salvage

The rules on salvage are found in Chapter 16 of the MSA and are based on the 1989 Salvage Convention. It is a condition for a claim for payment for salvage that the salvaged item was in actual danger.[57] When determining the payment for salvage, the circumstances listed in Section 446, Paragraphs (a) to (j) of the MSA are to be considered. In general, salvage of between 5 per cent and 10 per cent of the value of the salvaged items is not unusual.

Danish law operates a 'no cure, no pay' principle whereby the salvage has to be successful to entitle the salvor to a claim for salvage. However, where salvage is undertaken in circumstances where there is a threat to the environment, salvage may be payable even if the salvage operation was not successful.[58]

55 See id., Section 161(1).

56 See id., Section 161(2).

57 See id., Section 441(a).

58 See id., Section 449.

Wrecks

Depending on the dangers and other circumstances relating to a wreck, the Danish authorities may order the removal of the wreck or demand reimbursement for any government expenses incurred in connection with wreck removal, pursuant to either the CPA, the Protection of the Marine Environment Act, the Act on Additions to the Act on Wreckage[59] or Chapter 8a of the MSA, which incorporates the Nairobi WRC 2007.

According to Sections 164(2) and 172(1)(4) of the MSA, a shipowner may limit its liability for wreck removal in accordance with the general limitation rules set out in Chapter 9 of the MSA. It is not yet settled whether shipowners may refuse to observe orders under the CPA and other legislation stated above, if such action would entail wreck removal costs that exceed the limitation amounts otherwise enjoyed by owners.

vi Passengers' rights

The rights of passengers travelling by sea or inland waterways are regulated by Regulation (EU) No. 1177/2010, including with regard to cancellation and delay of more than 90 minutes to and from ports situated in the European Union and cruises departing from an EU port. The Regulation provides additional rights for disabled persons and persons with limited mobility.

The Passenger Liability Regulation (PLR) governs the liability of carriers of passengers in the event of accidents based on the Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974 (the Athens Convention). It applies to all carriers involved in international carriage, including carriage between EU Member States and some types of domestic carriage.

Sections 401 to 432 of the MSA contain provisions regarding passengers' rights, including claims relating to delay. However, the majority of regulations regarding passengers' rights are to be found in the PLR, not in the MSA.

vii Seafarers' rights

The rights of Danish seafarers are regulated by the Seafarers Act.[60] The purpose of the Act is to protect seafarers by ensuring proper conditions of employment and to contain provisions on standards for employment contracts, rest hours, the right to return home and sickness. This Act is supplemented by general regulations on workers' rights in Denmark.

Denmark is a party to the Maritime Labour Convention. At least one vessel has been detained by the Authority on violations of the Convention.

VII OUTLOOK

The covid-19 pandemic and, more recently, the Russian invasion of Ukraine in February 2022 – together with the imposition of sanctions against Russian interests – have significantly disrupted the international shipping markets, causing increased volatility in the freight rates. Some industries, particularly container shipping (in which Denmark holds a leading position), have seen record-breaking earnings, with Maersk A/S earning about US$30 billion in 2023. Other large sectors, such as the product tanker and dry bulk sectors have also seen good results. Generally, Danish shipping companies have been relatively resilient and

59 Consolidated Act No. 838 of 10 August 2009, as last amended by Act No. 1711 of 27 December 2018.

60 Consolidated Act No. 1662 of 17 December 2018.

effective as they combat these crises. Many shipowners are investing heavily in the green revolution of shipping, led by Maersk's zero-emission target of 2040. The expectation is that the adaption to new fuels, such as e-methanol and battery power, will become increasingly more important.

Chapter 18

ECUADOR

Leonidas Villagran[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The shipping industry in Ecuador is relatively small. A United Nations Conference on Trade and Development report from 20 October 2022 mentions that the fleet flying the national flag consists of 145 ships (100 gross tonnage (GT) and above). This fleet has a capacity of 307,000 deadweight tonnage (DWT). Fleet ownership is 557,000 DWT (1,000 GT and above).[2]

Fishing is carried out using 546 considered industrial fishing vessels.[3] The main product is tuna fish. Fisheries exports in 2022 were US$1,914.026 of which tuna fish was US$1,270.943, which is more than 6 per cent of total exports.[4] Artisanal fishing is carried out using around 60,000 ships with 180,000 fishers.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Ecuador is a civil law country that is traditionally based on statute. The exception is regarding the capacity of the Constitutional Court to issue jurisprudence that is generally binding, according to the Constitution and the duty of the National Court to generate binding rules of jurisprudence for repeated and similar judgments or for incomplete or unclear legislation in determined matters.

As a tradition, maritime commerce in Ecuador has been regulated according to provisions included in the Code of Commerce. Conversely, maritime law related to state control is based on the new Navigation Act 2021 that has replaced the Code of Maritime Police. Both of these are complemented by several international conventions to which Ecuador is a party.

The Code of Commerce of Ecuador was traditionally inspired by the Napoleonic Code of Commerce but is also derived from the first Spanish Code. The first Code of Ecuador was enacted in the 19th century followed by two more codes, but its text regarding maritime commerce was maintained almost intact until 2019 with the enactment of a new Code of Commerce.

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1 Leonidas Villagran is a senior partner at Villagran Lara. Special appreciation to Evelyn Garcia, who is an associate at Villagran Lara, for her assistance.

2 https://unctadstat.unctad.org/CountryProfile/MaritimeProfile/en-GB/218/index.html.

3 https://srp.produccion.gob.ec/registro-nacional-de-embarcaciones/registro-de-embarcaciones-pesqueras-industriales/?tex_tipo_embarcacion=industrial&pageNumber=46.

4 https://camaradepesqueria.ec/wp-content/uploads/2023/02/EXPORTACIONES-PESQUERAS-DIC-2022.pdf.

The Commercial Code 2019 makes fundamental changes to maritime law and updates the regulations according to current universal doctrines; for example, incorporating the international doctrine on collision contained in the Brussels Collision Convention 1910. Ecuador is not a party to this Convention but has introduced its rules into its domestic legislation

As regards state control, the Navigation Act was approved in 2021 and replaces the Code of Maritime Police (originating from 1945). The main changes are the recognition of the Ecuador Navy as the maritime authority and an increase in the amount of fines for maritime infractions. The Navigation Act submits several of its provisions to a regulation that has to be enacted by the President. This is still pending and under internal discussion.

International sources of law

From 2012, Ecuador has been a party to the United Nations Convention on the Laws of the Sea (UNCLOS 1982). As regards the four pillars of maritime law regulatory regime, Ecuador is party to the International Convention for the Safety of Life at Sea (SOLAS 1974, as amended), and also to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW 1978).

Furthermore, it is involved in the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) to the following:

a Annex 1 (oil and oily waters);
b Annex II (noxious liquid substances carried in bulk by tankers);
c Annex III (harmful substances carried by sea in packaged form);
d Annex IV (sewage from ships); and
e Annex V (garbage from ships).

Ecuador is not party to Annex VI (air pollution by ships).

Maritime Labour Convention (MLC 96) was approved in 2022 by the legislature. The Convention is pending the approval of the President.

As regards maritime commerce, Ecuador is party to the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading and the Brussels amendments (the Hague-Visby Rules). Multimodal transportation (including transportation by sea) related to transportation to or from the Andean Countries is regulated under Decisions 331 and 393 of the Andean Community.

In respect of the law of collision, Ecuador adhered to the International Regulations for Preventing Collisions at Sea 1972, but not to the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels (the Brussels Collision Convention 1910). Nevertheless, the Code of Commerce 2019 is in line with the principles of the Brussels Collision Convention 1910.

Regarding the arrest of ships and maritime liens, Ecuador is party to the International Convention on Arrest of Ships 1999, the International Convention on Maritime Liens and Mortgages 1993 and the Maritime Liens and Arrest of Ships Regulations 487 and 532 by the Andean Community.

Additionally, Ecuador is party to the International Convention on Salvage 1989. The Code of Commerce 2019 is in line with the principles of this Convention.

III FORUM AND JURISDICTION

i Courts

Currently, Ecuador does not have maritime courts. Transportation of goods via sea is considered a commercial activity. Therefore, any lawsuits that involve claims regarding maritime transportation are to be heard by a civil and commercial judge. This is the same for claims in delict.

Moreover, claims regarding labour relations are to be heard by labour judges. In a marine incident involving death, injury to crew or third parties, or pollution, a prosecutor may intervene to determine potential felonies.

In relation to civil and labour claims, the procedure in court is to be followed according to the General Organic Procedure Code 2016. This Code stipulates that, as a general rule, the plaintiff needs to present his or her evidence to the court. This rule provides exceptions to allow the plaintiff to present either evidence that has been contested by the defendant or new evidence, the existence of which he or she was not aware.

According to the Code of Commerce 2019, if a lawsuit is filed against a shipowner whose domicile is outside Ecuador, it is possible to execute the service through his or her agent.

Prescription terms may apply in the following circumstances:

a environmental damages: there is no prescription term. There is a rule in the Ecuador Constitution that states that there is no time bar – no prescription – for actions regarding pollution;

b payment of freight or demurrage: the prescription term is one year;

c declaration of general average: the term is six months;

d recovery of general average contribution: the term is one year;

e cargo claims under a bill of lading (BL): the prescription term is one year, which is in line with the Hague Visby Rules;

f collision: the prescription time is two years. However, if the ship could not be detained or sued while in national waters, the term is three years. This is in line with the Brussels Collision Convention 1910;

g claims for damages in delict by non-passengers (injury, death and damage to property), the term is four years, according to the general rules of prescription in the Civil Code; and

h cargo claims in international multimodal transportation to or from a port member of the Andean Community: the prescription term is nine months.

According to procedural law, the general rule is that the interruption of prescription is when the complaint has been served. There is an exception to this rule meaning that if the lawsuit is effectively served at least six months from the date of its filing, the prescription term is interrupted from the moment the complaint was filed.

The Code of Commerce states that prescription terms for merchants must be counted from the date on which those actions or rights are able to be enforced. This appears to be related to the *dies a quo* principle.

A prescription term can be suspended if the person who is to benefit from that term provides his or her consent. Courts are not allowed to extend prescription limits.

Terms of extinctive prescription are suspended in favour of minors (under 18), as stated in Articles 2420 and 2409 of the Civil Code, according to the doctrine of *contra non valentem*. This may not be usual in cargo claims but is very common for death-related claims.

Finally, according to a regulation related to the Mediation and Arbitration Act, the filing of a mediation request interrupts prescription. Terms are to be counted again when the mediation process ends.

ii Arbitration and ADR

There are several arbitration and mediation centres primarily under the auspices of the Commercial Chambers. Nevertheless, maritime cases in local arbitration are rare.

Parties are allowed to agree arbitration instead of ordinary courts. A clause containing the agreement can be inserted into the original contract or arbitration can be agreed upon when the dispute is raised. Normally, the parties agree which arbitration centre will hear the case.

Government entities are allowed to submit their differences to international arbitration but with the previous authorisation of the Attorney General's Office.

iii Enforcement of foreign judgments and arbitral awards

The procedure of recognition of foreign judgments is stated in the General Code of Procedure. The process of recognition or homologation is carried out by a panel of judges. This panel has to verify compliance with external formalities, so as to confirm that the decision is final and that the serving of process has been fulfilled.

The process includes the notification to the defendant who is able to file an opposition in five days. After all considerations have been made, the judges issue their final decision.

Regarding foreign arbitral awards, the Mediation and Arbitration Act states that the execution of international awards is to be the same as local arbitral awards, meaning that authority rests on a civil judge of the domicile of the defendants or where the goods are located.

A decree by the President regarding a regulation of the Mediation and Arbitration Act confirms that the enforcement of an international arbitration award does not require homologation. A certified copy of the award is the only requirement. Nevertheless, according to Ecuadorian law, the decision may be required to be duly legalised or apostilled.

The defendants are able to oppose the petition if it provides evidence of compliance of claimed obligation, the suspension of the award or any declaration that the award is void.

Additionally, Ecuador is party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

IV SHIPPING CONTRACTS

i Shipbuilding

Shipbuilding contracts can be considered to be service agreements or sale agreements depending on which party has to provide the main documents. If those documents are provided by the party that orders the work, then the title of the vessel in construction belongs to the shipowner.

In contrast, if the documents are provided by the shipbuilder, then the legal relation is to be considered as a contract of sale. Moreover, in a contract of sale, title passes to the buyer when the public deed is executed, normally before a notary public and registered before the harbour master. Notably, registration is mandatory and is evidence of the transfer of property of vessels.

It is possible for parties in a shipbuilding contract to decide when the title will be transferred but the transfer always needs to be executed by public deed. The exception to this rule is related to vessels with no more than 10 gross registered tonnes (GRT); in this case, it is only necessary to have the signatures legalised.

The entity that pays in advance for shipbuilding purposes may request a guarantee issued by a financial institution to assure a refund of payments. Therefore, the financial institution will issue a guarantee in the form of a letter of credit or guarantee of contractual compliance. Notably, the wording of the guarantee takes supreme importance.

In that sense, it is recommended that the guarantee to be provided is unconditional, contemplates automatic renovation at the sole request of the beneficiary and with the commitment of immediate payment upon declaration by the beneficiary of non-compliance by the shipbuilder.

If the shipbuilder has not delivered the vessel according to the terms of the contract, the buyer is able to file a claim requesting termination of the contract or compliance with the agreement, with compensation of damages.

Additionally, the builder holds a lien against the subject vessel for non-compliance of payments by the buyer in relation to the contract.

ii Contracts of carriage

The Code of Commerce 2019 is the key legislation regarding contracts of carriage. Furthermore, Ecuador is party to the Hague-Visby Rules but not party to the SDR Protocol. Owing to Ecuador membership in the Andean Community, multimodal transportation is under the Community rules. This rule is valid for all transportation from or to member countries.

The Code of Commerce 2019 states that all contracts of carriage related to cargo are to be subject to its provisions, regardless of the nationality of the ship, the carriers and the shipper or consignee, if:

a the port for loading or unloading is situated in Ecuador;

b the BL or any other document that provides evidence of the contract of carriage states that it is subject to Ecuadorian law; and

c one of the unloading ports stated in the contract of carriage is the effective unloading port and is situated inside Ecuador.

Notably, charter parties are not under this regulation. However, when a BL is issued in compliance of a charter party then the regulations will be applied to that BL if it regulates the relationship between the carrier and the holder of the BL who is not the charterer.

Cabotage is reserved only for vessels that fly the Ecuadorian flag. Nevertheless, foreign vessels are allowed to be considered as Ecuadorians if they are brought under a bareboat charter. Ecuadorian law allows for bareboat charter registration. This provides special benefits for the charterer that includes the possibility of operating with the Ecuadorian flag, cabotage and tax exemptions. The general rule is that the vessel must comply by having at least 70 per cent of the crew as locals, and other obligations of a national vessel. According to a regulation on safe manning, the master is allowed to be a foreign national.

Regarding the transportation of hydrocarbons, there is a provision in the law that states that this is only reserved to Ecuadorian-owned corporations or to those conjoined by the state with a participation of at least 51 per cent. Currently, the transportation of hydrocarbons is conducted through the state-owned corporation FLOPEC.

iii Cargo claims

The general rule is that the lawful holder of the BL has title to sue. However, other cargo interests are able to file lawsuits in delict for any alleged damages. Notably, insurers are able to exercise subrogation actions.

Regarding demise clauses, the Code of Commerce 2019 includes a provision in Article 1019 stating that the carrier executing the BL is liable. It is possible to agree that a performing carrier will take care of the transport and that the liability is imposed on the performing carrier. Nevertheless, such a provision is ambiguous.

Generally, liability can be determined by way of statute or the contract. For example, if cargo damage is a result of defective stowage in the vessel then the Code of Commerce 2019 would be invoked owing to the provision that assigns the master as responsible for supervising proper stowage.

Additionally, regarding contracts of carriage by sea, the Code of Commerce 2019 recognises that parties are able to opt for arbitration by means of a previous agreement. If this is not the case, the Code provides specific rules of jurisdiction, which state that the tribunals that have the authority to decide are as follows:

a those that have the main business or residency as the defendant;
b those that are in the place of execution of the contract if this is the place where the defendant has an office, branch or agency;
c those that are in the same the place of loading or unloading of the subject cargo; and
d those that are designated in any other place as stated in the contract of carriage by sea.

Moreover, the action is able to be initiated before the judges of the Ecuadorian port in which the ship or a sister ship was arrested.

iv Limitation of liability

Ecuador is not party to the Convention on Limitation of Liability for Maritime Claims 1976. The Code of Commerce 2019 includes provisions regarding the limitation of liability for carriers; however, these provisions only rely on Andean Community law and international conventions to which Ecuador is party. Currently, there is no community regulation, with the exception of specific limitations determined for multimodal transportation.

Regarding international conventions that include specific regimes for limitation of liabilities, Ecuador is party to the Hague-Visby Rules and the International Convention on Civil Liability for Oil Pollution Damage 1992.

Regarding death or permanent incapacity to passengers, the Code of Commerce 2019 states a compensation of US$45,000. Furthermore, for injuries, the value of compensation is to be determined but with the same maximum amount; however, affected passengers are still able to initiate legal actions to be compensated according to what they consider appropriate.

Moreover, there is a general rule that limitation of liability is not to be invoked when the loss is as a result of malice or with knowledge that such damage would probably result.

V REMEDIES

i Ship arrest

Ecuador is party to the Arrest Convention 1999. Furthermore, Decision No. 487 of the Andean Community regulates arrest in line with this Convention.

A request to arrest a ship must be based on a maritime claim. For a definition of what a maritime claim is the Code of Commerce submits to community law and international conventions to which Ecuador is party. Therefore, the International Convention on Arrest of Ships 1999 and the Andean Community Decision No. 487 are to be applied. Both are similar in terms of provisions regarding the arrest of ships.

Sister ships can be arrested in Ecuador. In contrast, Ecuadorian law does not provide this possibility for associated ships.

Filing of an arrest petition requires evidence of representation of the party asking for the arrest. This means original or certified copy of a power of attorney duly translated when applicable and legalised or apostilled if it is issued in a foreign country.

ii Court orders for sale of a vessel

The judicial sale of a vessel can be requested upon a final judgment and also as an execution of a mortgage due to non-payment. Once the petition is filed, the vessel has to be officially seized and the seizure needs to be registered in the harbour master's office.

Therefore, the judge will require the vessel to be appraised by a judicial expert. Parties are able to challenge the appraisal report in a hearing. After this, the judge decides the date for the auction, which is to be conducted via the official website of the judiciary.

Once offers have been submitted, the judge will call for a hearing to determine the best offer to be awarded. The judge will provide his decision which will be considered as a title to be registered in the harbour master's office.

A judicial sale of a vessel in a foreign jurisdiction would be recognised by maritime authorities but a previous homologation will be needed before the Ecuador judiciary.

VI REGULATION

i Safety

Regarding the safety regime, Ecuador is party to the SOLAS Convention. Currently, the control of compliance with the Convention is under DIRNEA, an agency of the Ecuador army, as maritime authority.

The Navigation Act 2021 has the objective of guaranteeing safety in navigation. The Act includes the creation of the National Maritime Organisation, composed of several ministries presided over by the Minister of Defence. One of its main duties concerns safety. Therefore, it is expected that further regulations will set up a clear safety regime for the maritime sector.

ii Port state control

The Ecuador Navigation Act 2021 provides full authority regarding coastal, flag and port state control to the Navy and its agency – DIRNEA.

Ecuador is party to the Latin American Agreement on Port State Control of Vessels, also known as the Viña del Mar Agreement.

A vessel can be detained as a result of a port state control inspection. Inspections are usually based on documents and certifications to verify the normal condition of the ship, her equipment and crew. The maritime authority is able to execute specific inspections on site.

iii Registration and classification

Any person or entity is able to own and register a vessel as long as they have full capacity to act or to be represented. Furthermore, shipbuilding contracts can be registered. Registration is to be done before the harbour master's office.

For the registration of vessels built outside Ecuador, the interested party needs to file a petition, providing evidence of ownership, classification documents and proof that the previous vessel registration was cancelled. In addition, documents that accredit that the ship was cleared in customs are required.

If the vessel is built in Ecuador and this is the first registration, then the interested party needs to provide evidence that the construction plans were approved by the DIRNEA along with classification documents and ownership evidence.

According to several regulations, certifications by classification societies that are members of the International Association of Classification Societies (IACS) are accepted in Ecuador. Moreover, any other IACS non-member classification society needs to be registered before the National Maritime Authority.

Under general principles of Ecuador's civil law, a classification society can be held liable; for example, if a certification has been issued by negligent actions or omissions.

iv Environmental regulation

The Constitution of Ecuador states the following basic pillars regarding pollution liability:

a strict liability; and

b no time bar for claims and enforcement related to pollution damages.

Moreover, Ecuador is party to the CLC Convention, and therefore there is direct action against liability insurers regarding sea pollution-related claims but also to the limitation of liability as stated in the CLC Convention.

The Environmental Code 2017 and several related regulations state the procedure in cases of marine pollution. Therefore, if pollution comes from a ship or a maritime terminal, the environmental authority has to be immediately notified and an urgent response plan needs to be implemented or produced with verification of the damages. Lack of notification or compliance entitles the environmental authority to impose huge fines. Remediation and compensation for damages are mandatory.

Pollution incidents in the sea are monitored by the maritime authority through DIRNEA. In a pollution incident, the Ministry of Environment may file a denouncement before the prosecutor to determine potential felonies. Moreover, the prosecutor is able to open an investigation even without a denouncement.

Therefore, the prosecutor may investigate potential felonies. Related felonies appear in the Penal Integral Code and include:

a pollution in the seas, with a penalty of imprisonment from three to five years (Article 251);

b air pollution, with a penalty of one to three years (Article 253); and

c criminal liability of entities, with these penalties according to the infringement: fines from US$45,000 to US$225,000, temporal closure and remediation of environmental damages (Article 258).

v Collisions, salvage and wrecks

Collisions

Ecuador is not party to the Brussels Collision Convention 1910 but most of its principles have been introduced in the new Code of Commerce 2019 regarding apportion of liabilities according to the degree of fault, time bar (prescription) and the non-existence of legal presumptions of fault, valid also for internal waters.

Salvage

There is no mandatory local form of salvage agreement, but the Lloyd's standard form is normally used for international vessels. For some incidents involving towage services, confusion may arise if the service is merely a towage service or a salvage operation, thus involving discussions on the amount of fees. Certain towage services have specific rates determined by port authorities.

Salvage operations are regulated under the Navigation Act 2021 and the Code of Commerce 2019.

The Navigation Act states that no salvage operation has to be exercised without the consent of the master or shipowner according to the principles of international maritime law. Furthermore, operation that is related to salvage needs to be authorised by the harbour master and failure to comply is a breach of the law that would result in a fine.

The Code of Commerce 2019 regulations are basically under the principles and rules of the International Convention on Salvage 1989.

Wreck removal

Wreck removal orders are primarily based on environmental law. The Ecuador Constitution has included the strict liability principle for pollution incidents. Therefore, the shipowner is obliged to minimise or prevent pollution that may come from wrecks. Ecuador is not party to the Nairobi International Convention on the Removal of Wrecks 2007.

Recycling

Ship recycling is regulated under a resolution of 9 January 2014, issued by the Undersecretariat of Maritime Transportation of the Ministry of Transportation.

vi Passengers' rights

The Code of Commerce provides the main rules regarding passengers' rights. Some of these rules are outlined below:

a in events of *force majeure* regarding injuries to passengers or damage to luggage, the carrier is free from liability. However, the carrier is obliged to have insurance for these potential incidents;

b claims for loss or damage to the luggage will include the loss resulting from non-delivery of the luggage in a reasonable time unless the delay was caused by *force majeure*;

c if a trip is cancelled, the passenger has the right to be reimbursed and to claim damages unless the cancelation is a result of *force majeure*;

d in the event of delay in sailing or arriving to the port of destination, the passenger is able to terminate the contract and request reimbursement and damages unless the carrier proves that it is not responsible for the delay;

e when the trip is interrupted temporarily, the passenger will have the right to accommodation and food with no supplementary payment, without prejudice to request termination of the contract and reimbursement. If the trip is interrupted permanently, the carrier will indemnify the passenger; and

f in the event of death or injuries to the passenger or loss of or damage to the luggage, the carrier will be liable if death, injury, loss or damage are a result of guilt or negligence by the carrier or its servants or agents.

Passengers's rights stated in the Code of Commerce 2019 cannot be waived. Any stipulation in breach of this principle is considered not valid.

vii Seafarers' rights

The MLC2006 ratification is in process. The legislature on January 2022 approved its terms and has passed it to the President. Once accepted, the MLC will be part of Ecuadorian law.

Certain fundamental rights related to the MLC are already recognised by the Constitution of Ecuador, such as freedom of association and unions, the equal pay principle, the right to an adequate work place, non-discrimination, non-forced labour and the eradication of child labour.

VII OUTLOOK

There have been important developments in the shipping industry, both commercial and regulatory, in past years. The Navigation Act 2021 resolves an old discussion on which institution must lead. Former decrees divided the authority between the Ministry of Transportation and the Army, thus generating confusion in the public. Presently, the Navigation Act states that the Army, through DIRNEA, is the entity that will lead the maritime regulatory regime, also known as the maritime authority. Therefore, this new Act also provides more certainty. Nevertheless, there are certain provisions that still need to be amended or regulated.

According to the Navigation Act, the President has to issue a regulation, which is still being discussed by the government but is expected to be enacted shortly. This regulation is very important because the Navigation Act relegates to the regulation the application of several provisions, such as the nomination and procedure of the Jury of Captains, a body that decides cases on marine incidents.

Additionally, once the President has issued the regulation, it is expected that the DIRNEA will set up several rules according to Ecuadorian law and regulations.

Chapter 19

ENGLAND AND WALES

Andrew Chamberlain and Holly Colaço[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The shipping industry has been an important contributor to the United Kingdom's island-nation economy for centuries. In 2022, the United Kingdom was ranked 10th in ownership of world fleet.[2] In economic terms, shipping accounts for 95 per cent of UK exports and imports. The wider maritime sector contributes approximately £10 billion and 240,000 jobs to the UK economy every year.[3] According to the most recent statistics available, total port freight traffic through the United Kingdom's major ports in 2022 was 448.6 million tonnes, which represents an increase of 3 per cent compared with the previous year.[4] In 2022, the UK Ship Register was ranked within the top 20 flag states in the Paris MOU's White List league table.[5]

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

England and Wales is a common law jurisdiction with a legal framework founded on a mixture of case law and legislation. Shipping law has historically been developed primarily by decided cases, although there are statutes in key areas. The Merchant Shipping Act 1995 (the MSA 1995), consolidating previous statutes dating from 1894, is a particularly important piece of overarching legislation in this field and various statutory instruments have been made under it.

International conventions that are ratified by the United Kingdom are usually implemented through domestic legislation. The United Kingdom has ratified all the major international maritime conventions.

The United Kingdom is no longer a member of the European Union, following the end of the Brexit transition period on 31 December 2020. EU legislation, as it applied to the United Kingdom on 31 December 2020, is now a part of UK domestic legislation, known

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2 United Nations Conference on Trade and Development, 'Review of Maritime Transport: 2022', Table 2.5: Ownership of world fleet, ranked by carrying capacity in dead-weight tons, 2022, https://unctad.org/system/files/official-document/rmt2022_en.pdf.

3 https://www.maritimeuk.org/about/our-sector/shipping/.

4 https://www.gov.uk/government/statistics/port-freight-quarterly-statistics-october-to-december-2022/port-freight-quarterly-statistics-october-to-december-2022.

5 https://www.parismou.org/2021-paris-mou-annual-report-%E2%80%9Cgetting-back-track.

as 'retained EU legislation',[6] under the control of the UK's Parliaments and Assemblies. The European Union (Future Relationship) Act 2020 implements the arrangements for the relationship between the United Kingdom and the European Union, as agreed on 24 December 2020. These arrangements include the Trade and Cooperation Agreement,[7] applicable since 1 January 2021, which concerns the establishment of a free trade area, non-reciprocal maritime cabotage, climate change cooperation and reciprocal access to maritime services.

III FORUM AND JURISDICTION

i Courts

Forum and jurisdiction

Shipping disputes in England and Wales are heard in the Commercial Court or the Admiralty Court, depending on the precise nature of the claim. These are specialist courts experienced in dealing with shipping disputes, in which a number of highly experienced commercial and maritime judges sit. There are currently 13 judges attached to the two courts.[8]

Proceedings commenced in the Admiralty and Commercial courts are governed by the general procedural rules contained in the English Civil Procedure Rules (CPR). There is also, however, a specialist Admiralty and Commercial Court Guide,[9] which sets out detailed information regarding the conduct of litigation in these courts. The CPR also contains specific rules and practice directions relating to admiralty claims (CPR 61 and Practice Direction 61) and claims commenced in the Commercial Court (CPR 58 and Practice Direction 58).

Under English law, the following claims must be commenced in the Admiralty Court: salvage, collision, limitation actions and *in rem* proceedings for the arrest of a vessel. Claims that fall within the jurisdiction of the Commercial Court include carriage of goods, import or export of goods, insurance and reinsurance disputes, and shipbuilding. Appeals are heard by the Court of Appeal and, ultimately, the Supreme Court.

During the past year, several particularly significant shipping disputes have come before the English Court of Appeal, including:

a *The C Challenger*,[10] in which the Court of Appeal upheld the Commercial Court's ruling, finding that charterers were not entitled to rescind the charter party regarding a speed and performance warranty, despite having reserved their rights to do so, because charterers had opted to affirm the charter party by their conduct;

b *The Panamax Alexander*,[11] in which the Court of Appeal considered the meaning of Clause C of the standard collision jurisdiction agreement (ASG 2) of the London

6 This is set out in Sections 2 and 3 of the European Union (Withdrawal) Act 2018 (c. 16). Section 4 of the 2018 Act ensures that any remaining EU rights and obligations, including directly effective rights within EU treaties, continue to be recognised and available in domestic law after exit.

7 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948119/EU-UK_Trade_and_Cooperation_Agreement_24.12.2020.pdf.

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

9 The current edition is the 11th edition, updated in 2022, https://www.judiciary.uk/wp-content/uploads/2022/02/Commercial-Court-Guide-11th-edition.pdf.

10 *SK Shipping Europe Ltd v Capital VLCC 3 Corp* (*C Challenger*) [2022] EWCA Civ 231.

11 *M/V Pacific Pearl Co Ltd v Osios David Shipping Inc* (*Panamax Alexander*) [2022] EWCA Civ 798.

Admiralty Solicitors Group, and found for the shipowner, holding that provided reasonable security was given pursuant to Clause C then the recipient is obliged to accept it and any refusal to do so is a breach of the Criminal Justice Act;

c *OCM Maritime Nile LLC & Anor v Courage Shipping Co Ltd & Ors*,[12] concerning a dispute in which the Court of Appeal confirmed a sanctioned owner of bareboat charterers can cause default in the underlying bareboat charter parties and entitle the other party to terminate, resulting in the loss of a purchase option. A party may have a right to claim relief from forfeiture, and the Court granting this discretionary remedy may depending on a party's conduct and also if it exposes the other party to sanctions;

d *MUR Shipping BV v RTI Ltd*,[13] in which the Court of Appeal allowed the charterers' appeal, holding that owners were not entitled to rely on a *force majeure* clause in a contract of affreightment to suspend performance obligations when the charterers' parent company became subject to US sanctions;

e *The Newcastle Express*,[14] in which the Court of Appeal confirmed that there could be no arbitration agreement where subjects were not lifted, confirming the approach in *Leonidas*[15] and the presumption that subjects are a condition precedent in the charter party context.

In addition, since publication of the previous edition of this text, parties to the following disputes have been granted permission to appeal to the Supreme Court:

a *The Eternal Bliss*,[16] where the Court of Appeal overturned the High Court's decision, ruling that demurrage is an owner's exclusive remedy for failure to complete cargo operations within laytime;

b *The Polar*,[17] in which the Court of Appeal reviewed the principles to apply when considering whether charter party terms are incorporated into bills of lading, and confirmed that GA recovery from cargo interests for piracy losses is not blocked by bill of lading terms; and

c *Argentum Exploration Ltd v. The Silver*,[18] where the Court of Appeal upheld the Admiralty Court decision that South Africa was not entitled to assert a claim of state immunity in respect of *in rem* proceedings brought by salvors concerning a cargo of silver bars recovered from the seabed 75 years after the sinking of the carrying vessel.

Limitation periods

The following limitation periods may apply to maritime claims in England and Wales:

12 *OCM Maritime Nile LLC & Anor v. Courage Shipping Co Ltd & Ors* [2022] EWCA Civ 1091.

13 *MUR Shipping BV v. RTI Ltd* [2022] EWCA Civ 1406.

14 *DHL Project & Chartering Ltd v. Gemini Ocean Shipping Co Ltd* (*Newcastle Express*) [2022] EWCA Civ 1555.

15 *Nautica Marine Ltd v. Trafigura Trading LLC* [2020] EWHC 1986 (Comm).

16 *K Line Pte Ltd v. Priminds Shipping (HK) Co Ltd (the Eternal Bliss)* [2021] EWCA Civ 1712 (CoA).

17 *Herculito Maritime Ltd v. Gunvor International BV (the polar)* [2021] EWCA CIV 1828.

18 *Argentum Exploration Ltd v. The Silver and all persons claiming to be interested in, and/or have rights in respect of, the silver* (*SS Tilawa*) [2022] EWCA Civ 1318.

a one year for cargo actions under the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (the Hague Rules) or the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules);

b two years for passenger claims under the Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974 (the Athens Convention);

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

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

e three years from the date of the act or omission that caused the death or injury for death or personal injury claims (or, in certain circumstances, from the date of knowledge of a latent injury);[19]

f three years from the date the loss or damage was discovered or could have been discovered for latent damage (except personal injury);

g six years from the date on which the cause of action occurred for ordinary contractual or tortious actions (except personal injury);[20] and

h 12 years for 'upon speciality' claims, for instance, for claims based on deeds.[21]

It is possible to extend time limits by agreement. However, in most cases, agreement to extend must be reached before the relevant time limit expires. The limitation period for personal injury claims under Section 11 of the Limitation Act 1980 (the LA 1980) may be extended at the court's discretion under Section 33 of the LA 1980. Other specific tribunals may have further applicable limitation periods, and contractual limitation periods should always be checked.

ii Arbitration and ADR

Maritime disputes are often resolved via London arbitration and the vast majority of international shipping arbitrations are currently dealt with in London.[22] For a dispute to be subject to arbitration, there must be an arbitration agreement, which may be either written in the contract under which the dispute arises or agreed between the parties after the dispute has arisen.

The London Maritime Arbitrators Association (LMAA) is an association of specialist maritime arbitrators operating in London. In 2022, the LMAA received approximately 3,193 new arbitration appointments and published 420 arbitration awards.[23]

LMAA arbitration is frequently used to determine commercial shipping disputes, such as charter party and bill of lading disputes, ship sale and purchase disputes, shipbuilding and repair disputes, marine insurance disputes, and offshore and oil and gas disputes. LMAA arbitration is not usually used for collision and salvage matters, salvage being more commonly resolved by Lloyd's Salvage Arbitration (see Section VI).

19 Limitation Act 1980 [LA 1980], Sections 11 and 12.

20 ibid., Sections 2 and 5.

21 ibid., Section 8.

22 See https://www.hfw.com/The-Maritime-Arbitration-Universe-in-Numbers-London-remains-ever-dominant-July-2020.

23 https://lmaa.london/wp-content/uploads/2023/03/Statistics-up-to-2022-for-website.pdf.

The LMAA operates within the framework laid out in the Arbitration Act 1996 and publishes its own set of rules, which are structured to deal with small, intermediate and larger cases. The most recent rules were published in 2021 and apply to all LMAA arbitrations commenced on or after 1 May 2021.

Several forms of alternative dispute resolution are used within England and Wales, including expert determination, early neutral evaluation, early intervention and mediation. Mediation in particular is an increasingly popular option for settling maritime disputes. Both the Admiralty and Commercial courts and the LMAA encourage parties to a dispute to engage in mediation before proceeding to trial or arbitration. If a party refuses to mediate without reasonable grounds for doing so, the court may make an adverse costs order against the refusing party. Additionally, if an English law contract contains a mediation clause, this clause will be enforceable by the parties to the contract provided that the clause is sufficiently certain.

iii Enforcement of foreign judgments and arbitral awards

Foreign judgments

Following the end of the Brexit transition period on 31 December 2020, England and Wales are no longer able to rely on the various EU conventions on jurisdiction, service and enforcement.

The Brussels 1 Regulation (recast),[24] which covers the recognition and enforceability of judgments between EU Member States, no longer applies to claims, unless issued on or before 31 December 2020. The Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007 (the Lugano Convention), which regulates the enforcement of judgments between EU Member States and the European Free Trade Association countries, also no longer applies to claims, unless issued on or before 31 December 2020. The United Kingdom sought to join the Lugano Convention in its own right, but required the consent of the EU Member States. On 8 March 2021, Switzerland approved the United Kingdom's application to accede to the Lugano Convention. However, in June 2021, in a *Note Verbale* to the Swiss Federal Council, the EU Commission said it was 'not in a position to give its consent to invite the United Kingdom to accede to the Lugano Convention'. The Swiss Federal Council acts as the official depository of the 2007 agreement.[25]

The Hague Convention of 30 June 2005 on Choice of Court Agreements, which continues to apply in England and Wales to certain contracts, requires the courts of contracting states to uphold exclusive jurisdiction clauses (entered into after the Convention came into force), and to recognise and enforce judgments given by courts in other contracting states that are designated by such clauses.

The Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933 govern the recognition and enforcement of judgments made in the Commonwealth and other reciprocating countries. These Acts require judgments to be registered before they can be enforced in England. The requirements for registration are that

24 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

25 https://www.lawgazette.co.uk/news/eu-deals-second-blow-to-uks-lugano-chances-/5109099.article?msclkid=c32af77ab65a11eca164f1a2dd8e6751.

the court that issued the judgment must have had jurisdiction and the judgment must not have been obtained by fraud or be contrary to public policy. Once registration has occurred, the judgment will take effect as if it were an English judgment.

Enforcement of judgments from countries that are not party to the above statutory regimes is governed by English common law and requires the commencement of a new action based on the judgment itself. The English courts will not examine the merits of the judgment. However, it will be necessary to show that the court that made the judgment had jurisdiction to do so under the English conflict-of-laws rules, that the judgment is for a debt or a limited sum and that it is final, conclusive and not contrary to public policy.

Foreign arbitral awards

Many foreign arbitration awards are enforceable within England and Wales, and this position remains largely unaffected by Brexit. The United Kingdom is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). Accordingly, most awards from other contracting states are enforceable. Enforcement is governed by Section 66 of the Arbitration Act 1996.

It is also possible to enforce an award issued by a non-contracting state. Again, enforcement is covered by Section 66 of the Arbitration Act 1996 and by common law. The key criteria for enforcement are that the award is valid under its own governing law and that it is final.

IV SHIPPING CONTRACTS

i Shipbuilding

English law continues to be the governing law of choice for parties entering into shipbuilding contracts and so England and Wales remains a key jurisdiction in this respect. See the 'Shipbuilding' chapter for further discussion of the law in this area.

The United Kingdom itself has a proud history of shipbuilding spanning many centuries; however, since the closure of many yards in the 1970s and 1980s, commercial shipbuilding has been in significant decline.

ii Contracts of carriage

The Hague-Visby Rules, incorporated into English law by the Carriage of Goods by Sea Act 1971, are the salient convention rules applicable in this jurisdiction. The Rules will apply compulsorily to bills of lading when the port of shipment is in England and Wales or when the bills are issued there. Further legislation on the function of bills of lading and contracts of carriage has been enacted by the Carriage of Goods by Sea Act 1992. There is no specific legislation governing multimodal contracts of carriage, although it is generally accepted that the Hague-Visby Rules will apply to the seagoing leg of such contracts for carriage. As yet, the United Kingdom is not a signatory to the UN Convention on the Carriage of Goods by Sea 1978 (the Hamburg Rules) or the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (the Rotterdam Rules).

The Carriage of Goods by Sea Act 1971 qualifies that for contracts falling under that Act (including bills of lading governed by English law), there is no absolute implied term as to seaworthiness. The effect of this is to make the carrier's general duty regarding seaworthiness one of exercising 'due diligence'. Following Article III.1 of the Hague-Visby Rules, a carrier must exercise due diligence in the following cases:

a when making the ship seaworthy;
b when properly manning, equipping and supplying the ship; and
c when making holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe.

The duty is on the carrier personally and is not delegable to servants, agents or contractors. Deck and live animal cargoes are excluded from the provisions of the Hague-Visby Rules.

Pursuant to Article III.2 of the Hague-Visby Rules, the carrier must properly and carefully load, handle, stow, carry, keep, care for and discharge the goods under the contract for carriage. Owners may rely on the defences at Article IV.2 if goods in their care are lost or damaged.[26] These defences include the act or neglect of the master in the navigation or management of the vessel, act of war and arrest or restraint of princes, as well as latent defects not discoverable by due diligence (otherwise known as 'inherent vice').

Article IV.6 states that inflammable, explosive or dangerous goods may be discharged or destroyed at any time before discharge without compensation if the carrier has not consented (with full knowledge of their characteristics) to carry them.

Unless notice of loss or damage is given in writing to the carrier or his or her agent before or at the time of the receiver removing the goods into his or her custody (or within three days of doing so, if the loss or damage is not immediately apparent), the carrier will be deemed to have complied with its obligations, as per Article III.6. In any event, the time limit under which a claim can be brought under the Hague-Visby Rules is one year from the cargo's date of delivery or the date on which it should have been delivered.

Liens

The right to exercise a lien under English law may arise out of a variety of contexts, either pursuant to a contract or another legal relationship. Liens may be classed as maritime, statutory, equitable or possessory and each of these classes has a defined means of enforcement. A common characteristic of all liens is their function of conferring a proprietary interest in an asset as security for a claim and in enforcement against third parties. Liens generally do not have to be registered under English law.

Maritime liens under English law are confined to five specific categories:

a bottomry and respondentia;
b damage done by a ship;
c salvage;
d seafarer's wages; and
e masters' wages and disbursements.

These categories also overlap with the definitions under Section 20(2) of the Senior Courts Act 1981, and so maritime liens may be pleaded as statutory liens in the alternative. Purely

26 In *Volcafe Ltd v. Cia Sud Americana de Vapores SA* [2018] UKSC 61, the Supreme Court addressed the burden of proof under the Hague-Visby Rules, and the interaction between the carrier's duty to care for cargo under Article III.2 and the defences available under Article IV.2. If a shipowner fails to deliver cargo in the same condition it was shipped, they are legally responsible for proving that the damage was not caused by a breach of their duty of care as outlined in Article III.2, or that the damage was caused by an excepted peril. Where a shipowner intends to rely on an excepted peril, it must also prove that the damage was not caused by its negligence.

statutory liens are defined under Section 20(2) of the Senior Courts Act 1981 and include claims for loss or damage to goods carried in a ship, personal injury sustained in consequence of a defect in or wrongful act done by a ship, claims relating to any agreement in relation to the carriage of goods in a ship, and claims arising out of general average acts. Maritime and statutory liens fall under the umbrella term 'admiralty liens', coming under the exclusive jurisdiction of the Admiralty Court, and may be brought as *in rem* claims (see Section V).

English common law recognises possessory liens, which confer the right to enforce a claim by means of retaining property already held by the claimant. Typical possessory liens include a shipowner's lien on cargo for outstanding freight or general average contributions.

If an owner or disponent owner under a time charter party has not been paid hire by the charterer, the owner may be entitled to exercise a lien requiring the charterers down the charter chain to pay direct to the owner the sub-hire or sub-freight that would ordinarily have been payable to their owners. The EWCA confirmed in the *Bulk Chile*[27] case that owners are able to exercise a lien over freight from the shipper under the bill of lading as well as a lien over the sub-freights due under a charter party in a charter party chain. Salvors may exercise possessory liens over salved property. Possessory liens can also be created by contract or statute.

An equitable lien is a right to proceed against an asset pursuant to a claim arising from a contract (the classic example being a floating charge) or pursuant to a course of conduct. Equitable liens will bind third parties only if they have acquired a legal interest in the liened asset with notice of the lien.

iii Cargo claims

The bill of lading evidences a contract for carriage, obliging the carrier to deliver cargo against that document. Aside from charter parties, bills of lading are a fundamental element of cargo claims under English law. A common basis for English law cargo claims is the breach by the carrier of their duty under Articles III.1 or III.3 of the Hague-Visby Rules, namely a failure to exercise due diligence to make the vessel seaworthy or a failure to care for the cargo properly.

Pursuant to the Carriage of Goods by Sea Act 1992, which is applicable to bills of lading, sea waybills and ships' delivery orders, title to sue is vested in the lawful holder of the bill of lading. The 'lawful holder' is the person who becomes the holder of the bill in good faith, that is, a consignee or endorsee (following a valid endorsement or chain of endorsements) in possession of the bill. The EWCA confirmed that a bank that is the pledgee of goods under a letter of credit can also be classed as a lawful holder of the bill of lading because it is entirely entitled to those goods.[28]

The party that is potentially liable for the cargo claim under the bill of lading is the carrier stated under the bill. Typically, this is the shipowner or head time charterer. English law will generally give effect to 'identity of carrier' and demise clauses in bills of lading, which seek to make clear that it is the shipowner that is to be regarded as the carrier under the bill, although the issue of on whose behalf the bill has been signed will also be an important factor in deciding who is actually the carrier.

Liability in tort – that is, a breach of the duty to take reasonable care not to cause damage or loss (i.e., negligence) – will usually be asserted by any cargo claimant against the

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

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

shipowner, and may also arise between parties where no contractual relationship exists, for example, between stevedores and cargo owners. The claimant must be able to prove physical loss or damage, and so cannot claim for pure financial losses in the absence of any cargo loss or damage (for example, in the event of cargo delay). Furthermore, only the person who owned the cargo, or was entitled to possession, at the time of the negligent act may claim. Apart from tortious liability, English law also recognises the effectiveness of *Himalaya* clauses in bills of lading in the context of losses caused by the acts of stevedores (for a deeper analysis of *Himalaya* clauses, see the 'Ports and Terminals' chapter).

When bills of lading are issued in respect of carriage on a chartered vessel, carriers may attempt to limit liability to cargo owners with reference to a charter party, by expressly incorporating terms of the charter party into the issued bills of lading. Provisions incorporating charter-party terms into bills of lading will be recognised only if they are relevant to the bill of lading contract, and terms as to choice of law or jurisdiction (including arbitration) must be expressly referred to if they are to apply. There is a general presumption that terms in a charter party will not be upheld if they are inconsistent with the terms of the bill of lading.

Parties will often attempt to incorporate the terms of the charter party into the bill of lading. However, this will be successful only in the following cases:

a where the wording purporting to incorporate the charter-party terms is sufficiently accommodating;

b where the term of the charter party being incorporated makes sense in the context of the bill of lading; and

c where the incorporated term is consistent with the terms of the bill of lading itself.[29]

It is important when trying to incorporate charter-party terms into a bill of lading to refer to the exact charter party in question, as the charter may not otherwise be incorporated effectively. There is a presumption that in circumstances in which the parties failed to specify which charter party in a chain is being incorporated in the bill of lading, the head charter party is incorporated, but that presumption is subject to several exceptions.

Cargo claims can also be brought under charter parties. They will usually be made within the framework of the Hague Rules or Hague-Visby Rules, which have usually been incorporated into the charter by contract. The apportionment of liability for cargo claims as between owners and charterers who are party to a dry bulk time charter is often governed by the International Group of P&I Clubs' Inter-Club New York Produce Exchange Agreement (revised in 2011).

iv Limitation of liability

The earliest legislation entitling shipowners to limit their liability was the Shipowners Act 1733. This permitted shipowners to limit their liability to the value of the ship and freight in respect of theft by a master or crew. Subsequent legislation seeks to strike a balance between a claimant's right to be compensated adequately in allowed situations and a shipowner's requirement for the insurance costs of an adequately high limitation fund to be affordable.

The Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC Convention 1976) was given effect in the United Kingdom by virtue of the MSA 1995

29 Bennett, Berry, Foxton, Smith and Walsh, *Scrutton on Charterparties and Bills of Lading* (24th edition, 2020), Chapter 6, Article 54.

and is incorporated in Schedule 7 thereof. The Protocol to amend the LLMC Convention 1996 (the 1996 LLMC Protocol) was given effect in the United Kingdom by Statutory Instrument 1998 No. 1258, which varied the LLMC Convention 1976 (and Schedule 7 of the MSA 1995) to the extent set out in the 1996 LLMC Protocol. The main effect of the Protocol is to raise the limits.

As from 8 June 2015, the limits under the 1996 LLMC Protocol have automatically been increased by 51 per cent through the tacit acceptance procedure.[30]

Who can limit liability and what claims are subject to limitation?

Under the 1996 LLMC Protocol, shipowners and salvors may limit their liability in accordance with the rules of the Protocol. The definition of 'shipowner' under Article 1(2) includes 'the owner, charterer, manager or operator of a seagoing ship'. Each of these terms requires clarification, and the Court of Appeal has now provided much needed guidance on the meaning of an 'operator' within the Limitation Convention with its decision that the term 'operator' involved something more than mere operation of the machinery of the vessel or providing personnel.[31]

Charterers are entitled to limit their liability,[32] as are slot charterers,[33] but only in respect of certain claims. For example, they cannot limit in respect of damage to the vessel by reference to which the limitation fund is calculated.

Salvors are also entitled to benefit from limitation under the LLMC Convention 1976 provided the salvors are directly connected with the salvage. The 1996 LLMC Protocol does not change this.

An insurer may limit its liability to the same extent as its assured (under Article 1(6) of the LLMC Convention 1976).

Before the LLMC Convention 1976, shipowners were only able to limit liability in respect of claims for which they were liable in damages, as opposed to debts. Consequently, towage costs and wreck removal expenses claims brought by harbour authorities, for example, could not be limited. The LLMC Convention removed this requirement and now, per Article 2 thereof (which is unchanged by the 1996 LLMC Protocol), 'claims whatever the basis of liability may be' may be limited. There are exceptions, however, so that, for example, claims for salvage, contributions in general average, certain oil pollution claims and others (Article 3) may not be subject to limitation, nor can a party limit in respect of claims to the extent they relate to remuneration under a contract with the person liable (Article 2(2)). It is also not possible to limit claims for wreck removal. However, indemnity claims in respect of salvage contributions as between owners and cargo interests are limitable.[34]

Generally, limitation may be invoked against all qualifying claims 'arising on any distinct occasion' (Article 6). Claims in respect of loss of life or damage to property that occur 'on board or in direct connection with the operation of the ship . . . and consequential loss resulting therefrom' may be subject to limitation (Article 2). Thus, the action leading to limitation does not have to occur on board a vessel.

30 https://www.imo.org/en/MediaCentre/PressBriefings/Pages/24-LLMC-limits.aspx.

31 *Splitt Chartering APS v. Saga Shipholding Norway AS (the 'STEMA BARGE II')* [2021] EWCA Civ 1880.

32 *CMA CGM SA v. Classica Shipping Co Ltd (The CMA Djakarta)* [2004] EWCA Civ 114.

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

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

Breaking limits

The LLMC Convention 1976 (unchanged by the 1996 LLMC Protocol) makes it very difficult to break the limitation limit. To do so, it must be proved that the act or omission of the person seeking to limit was 'committed with the intent to cause such loss or recklessly and with the knowledge that such loss would probably result' (Article 4).[35] The LLMC Convention (unchanged by the Protocol) is a compromise whereby claimants accept that they are unlikely to break the right to limit liability, in return for a higher compensation fund.[36]

Overview of English procedure

As a matter of English law, it is not necessary to admit liability to take advantage of a limitation defence. Nor does invoking limitation constitute an admission of liability. The procedure for pleading limitation and constituting a fund is set out in CPR 61.11 and the accompanying practice direction.

Two particularly important points are, first, that, as a matter of English law, it is not necessary for a liability action to already be pending before an owner is permitted to initiate limitation proceedings,[37] and second, bringing England in line with many other jurisdictions, a limitation fund can now be constituted by way of a letter of undertaking,[38] which offers owners and insurers a significant cost saving.

Summary

States across the world have enacted the provisions of the LLMC Convention 1976 and the 1996 LLMC Protocol in different ways, in particular in relation to wreck removal expenses and whether an owner is entitled to limit for these (many states have excluded Article 2(1)(d) from domestic law). Given that one state party should automatically recognise a fund constituted in another (Article 13), careful consideration is needed as to where to limit, as this may significantly mitigate against an owner's exposure following a casualty.

V REMEDIES

i Ship arrest

Vessel arrests may be brought only pursuant to an admiralty claim *in rem* (that is, in this case, against a vessel itself). As mentioned previously, the Admiralty Court has jurisdiction over such claims.

Grounds for admiralty claims are prescribed in an exhaustive list at Section 20(2) of the Senior Courts Act 1981. These include damage received or done by a ship, loss or damage to goods carried in a ship, claims in respect of a mortgage on a ship, towage and pilotage. It is not possible to base an arrest on a claim for bunkers, legal costs or insurance premiums.

35 Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v. Securities Commission* [1995] 3 All ER 918 sets out a comprehensive discussion of the test and its application.

36 Griggs, Williams and Farr, *Limitation of Liability for Maritime Claims* (4th edition, 2004), pp. 3–6.

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

38 *The Atlantik Confidence* [2016] EWHC 2412 (Admlty), in which cargo interests successfully broke limitation in the UK, following the sinking of the vessel.

The procedure for applying for an arrest pursuant to a claim *in rem* is set out in Part 61.5 of the CPR and the Practice Direction to that part (PD61). Additional procedural rules are contained within the Admiralty and Commercial Courts Guide and elsewhere in the CPR.

Procedure

Pursuant to CPR 61.5, a claimant may make an application for a vessel arrest in respect of a claim *in rem* issued by the Admiralty Court. In practice, an admiralty claim form and application for arrest may be issued and served on the target vessel at the same time or separately.

An application must be made on the prescribed court form (ADM4) and must include an undertaking by the claimant to cover the Admiralty Marshal's expenses of arrest. The claimant must also request a search of the admiralty register for any cautions against arrest in respect of the vessel.

Subject to the claimant's compliance with the prescribed procedure, and the target vessel being within the territorial jurisdiction of the court, the Admiralty Marshal will proceed with issuing a warrant for the vessel's arrest. The arrest itself is effected by service of the warrant by the Admiralty Marshal or his or her substitute (for example, a bailiff) on the target vessel. At the request of the claimant, the Admiralty Marshal may also serve the admiralty claim form at this time; otherwise it is the responsibility of the claimant to serve the admiralty claim form in accordance with the CPR.

Sister and associated ship arrests

It is possible to arrest a sister ship of a vessel subject to an admiralty claim, although to do so a claimant must satisfy certain strict criteria. The owner of the target sister vessel must have been the owner or demise or bareboat charterer, or in possession or control of that vessel when the cause of action arose in relation to the defendant vessel. That person or entity must also be the beneficial owner of all the shares in the target sister vessel when the admiralty claim is commenced.

Security and counter security

A claimant is not required to provide security for an arrest, although he or she must provide an undertaking as to the arrest expenses of the Admiralty Marshal.

Security may be provided by the defendant to procure release of the vessel in the form of a payment into court or by issuing a guarantee acceptable to the claimant. On the application of any party, the Admiralty Court may order that any security provided to procure the release of an arrested vessel, or to prevent an arrest, be reduced, or that a claimant may arrest or rearrest the property to obtain further security (unless that security would exceed the value of the vessel itself).

Wrongful arrest claims

It is open for a defendant owner to claim damages for wrongful arrest. The defendant must prove that the basis for the application for arrest was made in bad faith or through gross negligence. In practice, satisfying these criteria is very difficult.

Requirement to pursue claim on merits or possibility of arrest to obtain security only

Pursuant to Section 26 of the Civil Jurisdiction and Judgments Act 1982, a claimant may apply for the arrest of the vessel by reason of security for purposes of arbitration or other proceedings in the United Kingdom or in another country.

Arrest by helicopter of a vessel at anchor in territorial waters but not yet in berth

In theory, this can be done as long as the target vessel is within the territorial jurisdiction of England and Wales. Ultimately, however, arrest is effected by the Admiralty Marshal and so the means by which the service of the arrest warrant is effected is at the Admiralty Marshal's discretion.

ii Court orders for sale of a vessel

The Admiralty Court has the jurisdiction to order the sale of a vessel that is under arrest. The judicial sale of a vessel is made free from encumbrances and liens, and with good title.

An applicant must follow the procedure as prescribed in CPR 61.10. The application may be made by any party, and must be served on all parties, including those who have obtained judgment against the vessel and those who have been granted cautions against arrest.

Any order for sale must be preceded by an appraisement of the vessel's value by the Admiralty Marshal with assistance from an appointed ship broker. The vessel is advertised and offers for purchase are invited, with the sale going to the highest bidder. In any event, a vessel cannot be sold at a price less than its appraised value unless permitted by the Admiralty Court. The Admiralty Court receives commission on the sale, and the Admiralty Marshal's expenses of arrest, appraisement and sale rank as first priority from sale proceeds.

The Admiralty Marshal acts as an impartial officer of the court, rather than the arresting party, and so this procedure is likely to be followed even if a claimant is able to procure buyers at ostensibly the best possible price unless there is an exceptional reason to deviate.

VI REGULATION

i Safety

The Maritime and Coastguard Agency (MCA) is the key executive agency of the UK Department of Transport responsible for maritime safety in the United Kingdom. The MCA fulfils a number of maritime safety functions, including coordinating a 24-hour maritime emergency response service, monitoring the quality of vessels operating in UK waters, promoting and managing the UK Ship Register and working to minimise the environmental effects of shipping.

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

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

ii Port state control

England is a party to the Paris Memorandum of Understanding on Port State Control 1982 (the Paris MOU). The provisions of the Paris MOU were incorporated into EU law through the EU Council Directive on port state control.[39] This was implemented into English law through the Merchant Shipping (Port State Control) Regulations 1995, Statutory Instrument 1995 No. 3128, as amended. This EU Directive was subsequently replaced by Directive 2009/16/EC on Port State Control, which was implemented into English law by the Merchant Shipping (Port State Control) Regulations 2011, which have been in force in England and Wales since 24 November 2011.

The port state control authority in England is the MCA. In this capacity, the MCA is responsible for checking that all vessels visiting UK ports and anchorages meet UK and international safety regulations and standards. Accordingly, the MCA has wide-ranging powers to carry out periodic checks on any vessels calling at UK ports and in-depth 'expanded inspections' on the following:

a vessels with a high-risk ship profile, as recorded on the Paris MOU database;
b oil, gas or chemical tankers over 12 years old;
c bulk carriers over 12 years old; and
d passenger ships over 12 years old.

An expanded inspection involves a detailed check of the construction elements and safety systems in place on vessels by inspectors from the MCA. Inspectors are required to ensure that their visits and inspections do not disrupt the safety of any on-board operations, such as cargo handling.

In the event that a vessel is found not to comply with any applicable safety or environmental convention, a deficiency may be raised against the vessel. If the deficiency is regarded as serious enough to require rectification before the vessel's departure, then the vessel may be detained. A detained vessel must then satisfy MCA surveyors that remedial work has been carried out before the vessel is permitted to leave the United Kingdom.

iii Registration and classification

Registration

The UK Ship Register consists of four parts: Part I relates to merchant vessels and pleasure vessels; Part II relates to fishing vessels only; Part III is known as the UK Small Ships Registry; and Part IV relates to the registration of bareboat charters of foreign registered ships. The Register does not allow registration of vessels under construction under the UK flag.

The following, among others, may be registered as shipowners on the UK Ship Register:

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

39 Directive 95/21/EC.

g European economic interest groupings.[40]

Where none of the qualified owners is resident in the United Kingdom, a representative person must be appointed who may be either an individual resident in the United Kingdom or a company incorporated in an EEA country with a place of business in the United Kingdom.[41]

The UK Registry offers a potentially advantageous tonnage tax regime under the UK Tonnage Tax Incentive, which offers an alternative method of calculating corporation tax profits in accordance with the net tonnage of the ship operated. The tonnage tax profit replaces both the tax-adjusted commercial profit or loss on a shipping trade and the chargeable gains or losses made on tonnage tax assets. The Incentive is available to companies operating qualifying ships that are 'strategically and commercially managed in the UK'.[42] Reforms to the UK Tonnage Tax regime came into force in April 2022. These reforms remove requirements for ships to fly the flag of any European country, and instead encourage the use of the UK flag.

Classification

The following classification societies are recognised and approved by the UK government for the purpose of performing surveys and inspections on UK-registered vessels:

a ABS Europe Ltd;
b Bureau Veritas;
c Class NK;
d DNV;
e Lloyd's Register Marine; and
f RINA UK Ltd.[43]

Generally, classification societies exclude their liability in contract. Furthermore, according to the leading House of Lords decision in *Marc Rich & Co v. Bishop Rock Marine (The Nicholas H)*, classification societies do not owe a duty of care to third parties in respect of their classification and certification duties.[44]

iv Environmental regulation

Environmental regulations are reshaping global shipping. See the Shipping and the Environment chapter for further discussion of the development of law in this area.

v Collisions, salvage and wrecks

Collisions

Several international conventions relating to collision claims operate in England and Wales. The Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910 (the Collision Convention 1910) was implemented into English law by

40 https://www.ukshipregister.co.uk/registration/eligibility/.
41 ibid.
42 HMRC, Tonnage Tax Manual, www.gov.uk/hmrc-internal-manuals/tonnage-tax-manual/ttm01010.
43 Maritime and Coastguard Agency, UK Authorised Recognised Organisations (ROs), www.gov.uk/uk-authorised-recognised-organisations-ros.
44 [1995] 2 Lloyd's Rep 299.

the Maritime Conventions Act 1911 (repealed and replaced by the MSA 1995). The Collision Convention 1910 sets out the basic rules regarding civil liability for collisions between vessels. Furthermore, the COLREGs also apply to all foreign ships sailing in UK territorial waters and to all UK ships sailing anywhere in the world. These were also brought into force by the Merchant Shipping (distress signals and prevention of collisions) Regulations 1996 and are updated from time to time by reference to International Maritime Organization Regulations.

Salvage

The 1989 Salvage Convention applies in England and Wales. There is no mandatory form of salvage agreement, but the Lloyd's Open Form (LOF) is by far the most commonly used. The LOF is governed by English law and provides for arbitration by the Lloyd's Salvage Arbitration Branch in London. The latest version is LOF 2020 and, with the accompanying Lloyd's Standard Salvage and Arbitration Clauses, the contract is kept under review and updated from time to time in consultation with industry stakeholders and salvage practitioners, as well as Lloyd's.[45] When the LOF is not used, parties to a salvage operation are free to agree their own terms and conditions for salvage and, in the absence of any contractual arrangements, the salvors may also bring a claim for common law salvage.

Wreck removal

The MSA 1995 grants coastal authorities broad powers to intervene in relation to the handling of wrecks. These powers include the power to take possession of, remove or destroy the wreck, as required. The relevant authority is also permitted to contract with a third party for the removal or salvage of the wreck. The owner of the vessel remains liable for the costs of removing the wreck and this liability is unlimited (however, this is usually a protection and indemnity risk).

The Wreck Removal Convention Act 2011 allowed the United Kingdom to ratify the Nairobi International Convention on the Removal of Wrecks (the Nairobi WRC 2007), adopted in 2007, and, on 15 April 2015, the Convention came into force following ratification by Denmark on 14 April 2014. The Nairobi WRC 2007 imposes a number of obligations on shipowners; for instance, a requirement to obtain a certificate from a WRC state party confirming that insurance or other financial security is in force in line with the Nairobi WRC 2007.

vi Passengers' rights

Passenger rights are dealt with by a mixture of common law, legislation, EU law and international conventions. In the first instance, the contract of carriage may apply to any disputes, subject to the protections of the Athens Convention and EU regulations, such as the Package Travel, Package Holidays and Package Tours Regulations 1992 (as amended).

The Athens Convention was incorporated into English law in 1996 via Section 183 of the MSA 1995. The Convention renders a carrier liable for damage or loss suffered by a passenger in the event that the incident giving rise to the damage occurred during the carriage and was caused by the fault or neglect of the carrier. Under the Athens Convention,

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

as amended by the 1976 Protocol, carrier liability for death of, or personal injury to, a passenger is capped at 46,666 special drawing rights (SDRs) per carriage; however, under Article 7, England increased the limit in respect of its own national carriers to 300,000 SDRs.

The 2002 Protocol to the Athens Convention entered into force in England on 23 April 2014. This Protocol increases the limit for carrier liability contained in the Athens Convention to 250,000 SDRs for each passenger's injury or death. It also introduces changes to the liability regime for the loss of, or damage to, cabin luggage (2,500 SDRs per passenger per carriage) and compulsory insurance of 250,000 SDRs per passenger.

Although the Athens Convention usually applies to international carriage, under the Carriage of Passengers and their Luggage by Sea (Domestic Carriage) Order SI 1987/60, English law extends the Convention's protections to domestic voyages for which the points of arrival and departure are within the United Kingdom.

The Package Travel Regulations apply to packages in which two elements of travel, accommodation and other services are sold together. Therefore, this covers cruises and, potentially, overnight ferries. These Regulations set out a consumer protection regime, which includes details of the information to be provided to passengers and that the tour operator is responsible to the passenger for performance of the package.

vii Seafarers' rights

The Maritime Labour Convention 2006 (MLC) entered into force in England and Wales on 14 August 2014, the United Kingdom having been the 41st International Labour Organization (ILO) Member State to ratify the MLC on 14 August 2013. The MLC replaces various existing conventions and provides a new framework aimed at protecting seafarers' rights.

The MLC was established by the ILO in 2006 and its aim is to provide a comprehensive set of rights and protections for all seafarers. The MLC applies to all commercial vessels, with the exception of ships navigating inland or sheltered waters subject to port regulations, fishing vessels, warships and naval auxiliaries and traditional ships, such as dhows. The MLC sets out minimum standards for seafarers working on ships, including the minimum age, medical certification, training and qualifications, hours of work and rest, welfare and social security protection.

Seafarers wholly or substantially employed in the United Kingdom may also benefit from the protection of English employment law, although many protective regulations contain exemptions for offshore work. Vessel owners and employers must also extend protection to seafarers regarding safety at work and, for example, providing suitable equipment.

VII OUTLOOK

UK shipping remains focused on decarbonisation, with the UK shipping sector agreeing that international shipping must pursue a net-zero carbon emissions target by 2050. International regulations require the global shipping industry to cut their emissions by 50 per cent compared to 2008 levels; however, the UK Chamber of Shipping is pushing the International Maritime Organization to double this target and commit to net-zero emissions by 2050. In 2023, the government will review its Clean Maritime Plan and is expected to move towards an incentive approach similar to the EU's, with an emissions trading scheme starting with a monitoring, verification and reporting requirement.

The year 2023 also looks set to be a busy year for shipping disputes, with two significant Supreme Court hearings (*The Polar*, on the issue of whether owners can recover a contribution to a ransom payment within general average, and *The Eternal Bliss*, which will determine whether demurrage is an exclusive remedy) anticipated later in 2023.

Despite the challenges of the covid-19 pandemic, in addition to the implications arising from the end of the Brexit transition period, English law and jurisdiction continue to remain attractive to parties wishing to resolve disputes. The majority of shipping contracts are governed by English law, and the latest statistics show that arbitration continues to thrive in London.[46] In addition, specialist courts that hear the majority of shipping litigation (the Commercial and Admiralty Courts) continue to enjoy an excellent reputation internationally. This is highlighted by the fact that the proportion of the Commercial Court's business that is international is 79 per cent.[47]

Given the sophistication of English shipping law and the high level of trust placed in the dedicated Commercial and Admiralty Courts, it is generally expected that English law will remain the first choice of the industry for shipping contracts in 2023.

46 Around 25 per cent of claims issued in the Commercial Court concern matters arising from arbitration, reflecting London's continued status as an important centre for international arbitration. The Commercial Court Report 2020–2021, https://www.judiciary.uk/wp-content/uploads/2022/02/14.50_Commercial_Court_Annual_Report_2020_21_WEB.pdf.

47 The Commercial Court Report 2020-2021, https://www.judiciary.uk/wp-content/uploads/2022/02/14.50_Commercial_Court_Annual_Report_2020_21_WEB.pdf.

Chapter 20

FRANCE

Mona Dejean[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The French flag was designated by the International Chamber of Shipping as one of the best flags in 2021 in terms of the quality of its fleet and of its environmental, security and social regulations.[2]

In July 2021, the merchant fleet under the French flag comprised 424 vessels of more than 100 gross tonnage (GT), of which 191 vessels were dedicated to transport and 233 were service vessels. This is the 27th largest world fleet by flag.

The average age of the French transport fleet was 8.3 years as at 1 July 2021 (the global average is 15.5 years).[3]

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

France has ratified most of the major international maritime conventions. As a Member State of the European Union, France is also subject to European legislation addressing maritime issues. International conventions and European legislation can be directly applied by the French courts, but most of their provisions are also set out in domestic regulations.

Modern French shipping law was mainly developed in the 1960s. In the 2010s, it was codified in a Transport Code, which is now the main reference regarding legislation concerning shipping and transport, although some related provisions can still be found in other acts and codes.

Case law is considered to be a secondary source of law. There are no binding precedents, although higher court decisions can have a persuasive effect on lower courts.

III FORUM AND JURISDICTION

i Courts

Apart from the traditional jurisdiction clauses, the French courts have jurisdiction to rule on international matters under specific jurisdiction provisions of international conventions, under the general provisions of Regulation (EU) No. 1215/2012 or under French law

1 Mona Dejean is a senior associate at HFW. The information in this chapter was accurate as at May 2022.

2 International Chamber of Shipping, 'Shipping Industry Flag State Performance Table 2021/2022'.

3 Ministry of Ecology, Sustainable Development and Energy, 'Statistiques – Flotte de commerce sous pavillon français', July 2021'.

provisions such as Articles 14 and 15 of the Civil Code, which respectively enable any French claimant to bring proceedings before the French courts against a foreign defendant, and enable a foreign claimant to do likewise when the defendant is domiciled in France.

Most shipping disputes are heard before the commercial courts, or occasionally the civil courts (competent to order judicial sales or enforcement of judgments) or administrative courts (matters relating to damage to public assets such as port facilities).

The principal feature of the commercial courts is that the judges are lay magistrates, chosen from the local business community. These 'consular' judges' knowledge and understanding of complex legal issues will inevitably vary; moreover, not all commercial court judges will be familiar with maritime law or practice. Consequently, the decisions made by the French commercial courts are somewhat inconsistent at times with the generally accepted understanding of the law.

Since 2018, the Paris Commercial Court and Court of Appeal include an international chamber to deal with commercial litigation. Parties are able to choose English as the language for oral proceedings, judges are specialists in international commercial litigation and the procedure is faster than average by dint of shorter deadlines and fostering parties' cooperation.

The grounds for appeal are very broad, the underlying principle being that a party should always have access, as a matter of right, to two 'levels' of jurisdiction. An appeal can therefore always be made on questions of law or fact – the Court of Appeal is always free to reverse the court of first instance's findings of fact. A final appeal can be lodged with the Court of Cassation but only on points of law.

An interesting feature of French court procedures is that, unlike proceedings before English or US courts, witnesses are not called to give evidence and there is no equivalent system of disclosure or discovery of documents before the French courts. Each party is required only to provide documents that may be necessary to prove its case (i.e., to support its arguments). For questions of fact that require specialist knowledge, French judges often appoint court surveyors, whose terms of reference usually encompass assessing the causes of the relevant incident, the implications thereof, the extent of the damage caused thereby and, in certain cases, providing solutions and discussing issues of loss mitigation. This process permits the courts to be guided by the experts and assists judges with rendering their final verdicts.

The general time bar under French law is five years. However, there are exceptions: all actions arising under a charter party or similar contract and all actions under a bill of lading are time-barred after one year. Claims arising out of a collision are time-barred after two years and in personal injury cases after 10 years.

ii Arbitration and ADR

The parties can also refer their disputes to arbitration, and French law implements the *kompetenz-kompetenz* principle, pursuant to which, when an arbitration clause is invoked, a state court can accept jurisdiction only if the arbitral tribunal has not yet been seized and, cumulatively, the clause is manifestly invalid or inapplicable.[4]

4 In *The 'Uncle Jan'* case of 12 June 2019, the Paris Court of Appeal held that an arbitration clause can only be regarded as manifestly non-applicable if, in the absence of any necessary interpretation of its terms to assess its scope as well as any legal analysis of the nature of the contractual relations between the parties, it clearly does not govern the dispute between the parties.

Paris is an established seat of arbitration and several arbitral courts have their seats in the city, such as the International Chamber of Commerce. In addition, the Paris Chamber of Maritime Arbitration (CAMP) deals exclusively with maritime disputes. Arbitration costs before the CAMP are generally considered attractive.

One of the major features of French arbitration rules is that no appeal against the award is possible before the courts of appeal. However, a peculiarity of the CAMP Rules, which is generally regarded as a downside, is the right to second-degree arbitration, allowing any party to request that a dispute for which an award has already been made be submitted to a second examination.

An application for the annulment of the award can be lodged by a party before the local court of appeal within one month of the award being issued, unless the parties have waived the right to apply for annulment. Nullity can only be invoked for a limited list of reasons.[5]

iii Enforcement of foreign judgments and arbitral awards

Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is applicable in France. The Regulation, which is binding and directly applicable, facilitates the enforcement of judgments issued in other European countries. The applicant only needs a certificate issued by the court of origin using the form set out in Annex I of Regulation (EU) No. 1215/2012, certifying that the judgment is enforceable and containing an extract of the judgment as well as, where appropriate, relevant information about the recoverable costs of the proceedings and the calculation of interest.

As regards judgments rendered outside the European Union, unless a bilateral convention on the reciprocal enforcement of judgments has been agreed by France, the enforcement of foreign judgments in France is subject to *exequatur*,[6] pursuant to Article 509 et seq. of the Civil Procedure Code. The French courts will not review the merits of the dispute, and the following conditions are to be met:

a the party requiring the *exequatur* will have to produce evidence testifying that the foreign court had jurisdiction;

b the decision is enforceable in the country in which it was delivered; and

c the decision was indeed notified to the defendant.

The *exequatur* will not be granted if a conflicting judgment already exists in France on the same facts, if the decision contradicts French public policy, or if the French courts consider that the claimant introduced its claim before the foreign court for the sole purpose of avoiding the application of French law, which would have otherwise governed the dispute.

With respect to arbitral awards, France has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). An arbitral award (regardless of whether it was issued in France) is enforceable in France once the *exequatur* has been granted by a civil court.[7]

5 Article 1520 of the French Civil Procedure Code.

6 A procedure resulting in the original decision being enforceable as a judgment of a French court.

7 Article 1487 et seq. and Article 1514 et seq. of the Civil Procedure Code.

IV SHIPPING CONTRACTS

i Shipbuilding

The French shipbuilding industry has proved increasingly promising in recent years. Shipbuilding contracts are governed by Articles L5113-1 to L5113-6 of the Transport Code, which provide for a holistic approach to contractual freedom. Pursuant to Article L5113-2, the main requirement is for the contract to be in writing. Moreover, the shipyard is required to make a declaration to the competent maritime administration, to enable the administration to determine whether the necessary safety conditions for the construction are met.

Two types of sales coexist: the parties must choose between a sale that will be completed on delivery, or a sale in which the ownership is transferred during construction. The aim of the latter type of sale is to protect the owner if the shipyard goes bankrupt.

Regarding the actions that can be engaged against a shipyard for defects, Article L5113-4 of the Transport Code provides that the builder 'guarantees any hidden defect of the vessel, even if the buyer has accepted the delivery without reservation'. This action is time-barred one year after the defect is discovered. This provision sets out a strict liability regime, reinforced by the applicability of Article 1643 of the Civil Code, which imposes on the seller an obligation to reimburse the purchase price, or to compensate for damage that may have occurred because of the defects. Clauses limiting or excluding the builder's liability in the event of the existence of hidden defects are only valid in certain circumstances under French law.

ii Contracts of carriage

The 1968 Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (the Hague-Visby Rules) is enforceable in France. The UN Convention on the Carriage of Goods by Sea 1978 (the Hamburg Rules) is not applied by the French courts unless the parties have inserted a paramount clause in the contract of carriage.

The French Transport Code also contains provisions concerning contracts of carriage. Depending on the international nature of the contracts and other criteria, such as the port of departure or destination, an international convention or a French law will apply. When applicable under the conflict-of-law rules, French law also governs issues not addressed by the Hague-Visby Rules.

French legislation does not contain specific provisions in respect of multimodal transport. Freedom of contract prevails, except in two cases where provisions on multimodal transport are set by an international convention: a rail–sea carriage is governed by the mandatory provisions of the Uniform Rules Concerning the Contract for International Carriage of Goods by Rail; and in the case of a road–sea carriage, provisions of the Convention on the Contract for the International Carriage of Goods by Road 1956 (the CMR Convention) are applicable if the goods are not unloaded from the road vehicle. It must be highlighted that under French law, a party that organises a carriage (multimodal or otherwise), acting for the account of another party but in its own name, is considered to be a forwarding agent, governed by Article L132-3 et seq. of the French Commercial Code. A forwarding agent is liable for its own acts and omissions. Unlike a freight forwarder, it is also vicariously liable for the acts and omissions of its subcontractors, including the carrier. As such, it has a strict liability for loss or damage to the goods.

Cabotage in France is reserved for French and European nationals shipowners[8] who operate vessels registered in, and fly the flag of, a Member State of the European Union or the European Economic Area (EEA) pursuant to Article 257 of the Customs Code.[9] Maritime cabotage is also governed by the Maritime Cabotage Regulation.[10] As a result of Brexit, vessels registered under the UK flag, owned or operated (or all three) by UK entities will no longer meet the conditions of access to French cabotage.

iii Cargo claims

As a contract of carriage will impose a strict liability on the carrier in most instances, cargo claimants will seek to file their claims on a contractual basis. Both the shipper and the consignee or endorsee will have a right of action against the carrier under the bill of lading, provided they have personally suffered losses. In addition, parties whose names are not mentioned on the bill can also sue the carrier on a contractual basis if they can establish that they are the actual shipper or consignee of a cargo (for example, because a freight forwarder or a non-vessel operating common carrier (NVOCC) is named in lieu of them). Cargo underwriters can act personally before the French courts on a contractual basis if they establish that they have been subrogated to the rights of the insured.

A frequent issue concerns the identity of the carrier. Contractual claims can be pursued against the carrier named on the bill, even if it is not the actual carrier (NVOCC bills). If the name of the carrier is not provided on the bill, a rule established in 1987[11] states that the registered owner of the vessel is deemed the carrier. Demise clauses cannot be invoked against shipowners in France.

Under French law, a party can claim full recovery of losses sustained – that is to say, not only resulting from the actual damage to the cargo but also as a consequence of, for example, the damage or loss and the extra costs incurred.

Both the Hague-Visby Rules and the French Transport Code provide that action against the carrier for loss or damage is time-barred after one year, unless the parties agree on a time extension[12] after the event that has given rise to the claim.

Where an arbitration clause is mentioned on a bill of lading, the *kompetenz-kompetenz* principle prevents French courts from deciding by themselves whether this clause applies.[13] The French Supreme Court has moderated its position regarding jurisdiction clauses and considered that where the consignee, on acquiring the bill of lading, succeeded to the shipper's rights and obligations by virtue of the relevant national law, then a jurisdiction clause can be invoked against the consignee with no need to establish the specific agreement.[14] Nevertheless, the enforceability of jurisdiction clauses remains much disputed before the French courts.

8 European Union and the European Economic Area.

9 The wording of the Article 257 of the Customs Code is of poor quality since in practice one can no longer distinguish between the registration and the flag.

10 Council Regulation (EEC) No. 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States.

11 Court of Cassation, Commercial Chamber, 21 July 1987 (*The 'Vomar'*).

12 Article L5422-18 of the Transport Code.

13 Court of Cassation, First Civil Chamber, 22 November 2005 (*The 'Lindos'*); Court of Cassation, Commercial Chamber, 21 February 2006 (*The 'Pella'*).

14 On 16 December 2008, the Commercial Chamber and the First Civil of the Court of Cassation rendered similar decisions inspired by the European Court of Justice ruling in *The 'Tilly Russ'* (C71/83 of 19 June 1984). These decisions were confirmed by the Commercial Chamber on 17 February 2015.

iv Limitation of liability

France has ratified the Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC Convention 1976) and the Protocol to amend the LLMC Convention 1996 (the 1996 LLMC Protocol, as amended[15]) has been in force in France since 2007. This applies to vessels flying foreign flags (regardless of whether they are a party to the LLMC Convention 1976). French domestic law, which applies to vessels flying the French flag and subject to proceedings before the French courts, contains similar provisions to those of the LLMC Convention 1976 under Article L5121-1 et seq. of the Transport Code.

Constituting a limitation fund in France is relatively quick and simple. An *ex parte* application requesting the court's permission to constitute a limitation fund can be presented to the president of a commercial court, who will appoint a liquidator and stipulate the way in which the fund can be constituted. Funds are usually made up by way of a P&I club guarantee. Once the letter of undertaking or the cheque has been handed to the liquidator, a second application must be presented for the court to acknowledge the constitution of the fund.

France is known for being strict with regard to shipowners seeking to limit their liability. The French courts have initially adopted an objective approach of the conduct-barring limitation, considering that an inexcusable fault has been committed when the shipowner 'should have known' that the loss 'may' result from the conditions in which the voyage was undertaken.[16] Later decisions, however, suggest that the French courts are gradually overcoming their claimant-friendly approach and have adopted a subjective approach in line with a strict application of the terms of the LLMC Convention 1976.[17]

V REMEDIES

i Ship arrest

The International Convention Relating to the Arrest of Sea-Going Ships 1952 (the Brussels Convention) has been ratified by France. Ships flying the flag of a country that is a signatory to the Brussels Convention can be arrested only on the grounds of securing maritime claims. Ships flying flags of states that are not signatories to the Brussels Convention can be arrested either based on a mere allegation of a maritime claim as defined in the Convention, or under French domestic law in respect of any type of claim the arresting party might have against the owner of the ship; this is subject to demonstrating that the arresting party has a valid prima facie claim, as provided in Article L5114-22 of the Transport Code.

Bunker arrest is possible in theory, although rarely put into practice because of the need to discharge bunkers in shore tanks when the vessel herself is not under arrest. Moreover, although the issue is debated, some French courts adopt a permissive interpretation of the

15 Last amendment of the 1996 LLMC Protocol in 2012, in force in France since June 2018.

16 In *The 'Heidberg'*, a shipowner was deprived of limitation as he failed to ensure that there existed between the master and the crew 'the confidence and cohesion indispensable to permit them to overcome difficulties which whilst unforeseen were not unforeseeable'. Court of Appeal of Bordeaux, 31 May 2005, subsequently overruled by the Court of Cassation.

17 Court of Cassation, 19 October 2010, concerning the Hague-Visby Rules limitation; Court of Cassation, Commercial Chamber, 22 September 2015.

Brussels Convention by considering that a ship can be arrested and the shipowner ordered to provide a security for a claim for unpaid bunkers ordered by a former charterer to supply the arrested vessel without a maritime lien.

Arrest of an associated ship used to be possible in France as a result of the French courts' interpretation of the wording of the Brussels Convention that allows the arrest of associated vessels; however, the courts have narrowed their approach in recent years. Essentially, an applicant seeking authorisation to arrest an associated ship must now prove:

a there is a confusion of assets between the company whose assets have been arrested and the company that is alleged to owe the debt in question;[18] or

b the shipowner or the debtor company is, in reality, fictitious.

The procedure of ship arrests is set out in Articles R5114-15 to R5114-19 of the Transport Code. An *ex parte* petition to arrest a ship must be made to the enforcement judge[19] or, if no proceedings on the merits have been commenced, to the president of the commercial court of the vessel's port of call. The petition must be supported by documents evidencing the claim, such as bills, contracts and letters concerning payment.

In practice, an arrest order can be obtained within a few hours of a local lawyer having been fully instructed, if one is dealing with a straightforward arrest with 'simple' supporting documents. In serious emergencies, this period can be reduced, although much will depend on the availability of a magistrate. However, French law does allow for petitions to be presented to the president of the commercial court at his or her home in extreme emergencies. Conversely, to carry out an associated vessel arrest in France, more time is usually needed. Obtaining the authorisation to arrest a vessel will thus generally be possible before the vessel is at berth or even before it arrives in a French port.

Once the order authorising the arrest has been issued, it will need to be served by a bailiff on the ship's master and the port authority.

The claimant is generally required to initiate legal proceedings on the merits (either in France or abroad, in a court or via arbitration proceedings) within one month of the arrest, otherwise the arrest or the security provided to lift the arrest will be held null and void.

ii Court orders for sale of a vessel

Under French law, the judicial sale of a vessel requires a creditor holding an enforcement title against the owner of the vessel, to proceed with the executory arrest of the vessel. These proceedings generally follow a conservatory arrest (attachment) ordered by the court to prevent the vessel from leaving the port until the creditor obtains an enforcement title, which can be an enforceable judgment or an authentic instrument (i.e., a deed).

An executory arrest gives creditors the right to sell the vessel at a public auction and to obtain satisfactory proceeds therefrom. Article R5114-20 et seq. of the Transport Code set out the steps of such a procedure. The judicial sale of the vessel takes place, at the request of the claimant, by the civil court in the jurisdiction where the vessel is located, and is carried out by auction. The court sets the reserve bid, the sale conditions and the date of the sale. After the auction sale, creditors of the shipowner or those who have a lien on the ship must file an

18 *Confusion de patrimoine*.

19 The French *juge de l'exécution* is a judge in a civil court who is in charge of the implementation of judgments for issues relating mainly to seizure proceedings.

application requesting to partake in the distribution of the sale proceeds. The enforcement judge determines the sharing of the price after having considered the observations that the creditors may send him or her.

Judicial sales are very rare in France, especially for merchant vessels.

VI REGULATION

i Safety

France is a party to the International Convention for the Safety of Life at Sea 1974 (SOLAS) and its successive Protocols,[20] most provisions of which have been incorporated into EU legislation and codified in the Transport Code and in some of the French Regulations on the Safety of Life at Sea.

The safety regime also includes provisions for the treatment of casualties: Directive 2009/18/EC was transposed into the domestic provisions relating to the French Marine Accident Investigation Office, which established a procedure for investigating and for facilitating the exchange of information in the event of marine incidents.[21]

A step was made towards cybersecurity in May 2018, when France transposed the European Network and Information System Security Directive,[22] which prompts shipping companies to protect their navigation devices, databases and network technology against third-party intrusions.

ii Port state control

France is a member of the Paris Memorandum of Understanding on Port State Control 1982 Under French domestic law, port state control is regulated, in particular by Division 150 of the Regulations on the Safety of Life at Sea.

Inspections are conducted by inspectors of the ships' safety centres, which are part of the Maritime Affairs Administration. In 2019, more than 1,000 foreign vessels and 10,565 French vessels were inspected in France, and 24 vessels were detained.

Within the framework of port state control, the ship safety centres in France are fixing targets for controlling the sulphur content of marine fuels in increasing numbers, and the public prosecutor is demonstrating a clear intention to seek out and prosecute the instigators of air pollution. Hence, there is reason to expect that France will carry out increasingly more controls on board ships that call at France, whether they are under French or foreign flags. In 2019, four out of 628 sulphur emission controls that were carried out were reported to the Public Prosecutor.

iii Registration and classification

There are six registers under French law:

a the French International Register (RIF);

20 The International Regulations for Preventing Collisions at Sea 1972 (COLREGs), the International Safety Management Code 1998 (the ISM Code), the International Ship and Port Facility Security Code 2004 (the ISPS Code), the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1995 (the STCW Convention), etc.

21 Transport Code, Article L1621-1 et seq.

22 Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union.

b the applicable register in metropolitan France and overseas departments;
c the French Southern and Antarctic Lands (TAAF) Register;[23]
d the New Caledonia Register;
e the Wallis and Futuna Register; and
f the French Polynesia Register.

As at 1 July 2021, the French transportation fleet of vessels over 100 GT comprised 90 vessels registered in the RIF, 60 in the metropolitan register and 41 in the overseas registers (including 22 in French Polynesia).[24]

Since January 2022,[25] *francisation* proceedings and the registration proceedings have been combined into a single procedure called *enregistrement*. The deed of *francisation* is replaced by a registration certificate. Although Article L5112-1-1 of the Transport Code continues to define '*francisation*' as the right for the vessel to fly the French flag and benefit from all advantages attached to it, the distinction between the terms '*francisation*' and '*immatriculation*' is no longer relevant in practice.

The Maritime Affairs Administration is now in charge of registration applications (this task was previously undertaken by customs); for ships registered under the RIF, the *guichet unique* of the RIF is now in charge. In this respect, the Maritime Affairs Administration or *guichet unique* is also responsible for the publicity of ownership.

The procedure is governed by the Transport Code, which lists several conditions: the vessel must have passed a safety inspection and it must have been built in an EU Member State, or the import costs and fees must have been paid in an EU Member State. A ship built outside the European Union can qualify for the *francisation* term if at least 50 per cent is owned (or intended for ownership or bareboat chartered) by nationals or companies from an EU or EEA Member State that have an actual presence in France.

The criteria for registration (i.e., for obtaining the necessary sail and security certificates) will depend on the register concerned.

France has adapted the rules concerning the RIF to increase the competitiveness of the French flag and thus attract shipping companies and shipowners.[26] For example, the knowledge and language requirements for access to the RIF are now less stringent (Transport Code, Article L5521-3).

Classification societies in France are subject to an amended ministerial order on ship safety dated 23 November 1987.[27] Classification societies can be held liable to shipowners, third parties (the victims) or the state when a party claims against the state in relation to control duties that have been delegated to classification societies. Their liability can be contractual, tortious or criminal. Both the managers and the classification society itself can be

23 The French International Register will eventually replace the French Southern and Antarctic Lands Register, which is used nowadays only for fishing vessels.

24 Ministry of Ecology, Sustainable Development and Energy, 'Flotte de commerce sous pavillon français', July 2021.

25 Order No. 2021-1843 of 22 December 2021; as regards maritime mortgages, jurisdiction is transferred to the clerks of the Commercial Courts (depending on the registered port of the vessels), or for vessels under the RIF, to the *guichet unique*.

26 Mobility Orientation Law of 24 December 2019.

27 There are currently five approved or recognised classification societies in France: Bureau Veritas, DNV and RINA Services, LLOYD'S REGISTER Group Ltd and KR.

held criminally responsible. For instance, in the case of *The 'Erika'*,[28] the classification society was found guilty of polluting because of the behaviour of its inspector, who had renewed a class certificate despite the ship's poor condition.

iv Environmental regulation

Under French law, criminal sanctions against oil pollution are set out in Article L218-10 et seq. of the Environment Code, pursuant to which oil spillage in breach of the International Convention for the Prevention of Pollution from Ships 1973 (as modified by the Protocol of 1978) (MARPOL (73/78)) can lead to up to 10 years' imprisonment and a €15 million fine. These sanctions can be ordered against the master, the registered owner and the operator of the vessel. They can also be ordered against the legal representatives or managers of the owner or operator, or against any other person exercising a control over, management in or running of the vessel, when the owner, operator or person is responsible for illegal spillage or has not taken the necessary steps to avoid it.

The French courts are generally severe on polluting vessels. Masters are generally found guilty based on aerial pictures taken by the customs authority, the evidentiary weight of which is almost impossible to rebut.[29]

The French courts very often impose criminal sanctions against the interests of polluting vessels. In recent decisions, the courts have imposed fines of €800,000 and €1.5 million, plus civil damages granted to environmental associations.[30] The most recent decision provides, for the first time in France, an assessment of the conditions set by Article 228 of the United Nations Convention on the Law of the Sea on the suspension of proceedings initiated by the coastal state, when proceedings are initiated by the flag state, in addition to imposing a fine of €800,000. In an unprecedented decision, French judges considered that the decision to continue the proceedings by the coastal state is an act of sovereignty, binding on the judges.[31]

As regards civil liability, France has ratified the International Convention on Civil Liability for Oil Pollution Damage 1969, replaced by its 1992 Protocol (the CLC Convention), the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (the Oil Pollution Fund Convention) and the Protocol of 2003, establishing an International Oil Pollution Compensation Supplementary Fund. France has also ratified the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (the Bunker Convention).

Air pollution from ships is mainly addressed by Directive 2005/33/EC of 6 July 2005 as regards the sulphur content of marine fuels, which has been transposed into French domestic law, and Regulation (EU) 2015/757 of 29 April 2015 on carbon dioxide emissions from maritime transport.

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28 Cassation Court, Criminal Chamber, 25 September 2012.

29 The *Trefin Adam Maritime* case, Court of Cassation, 10 November 2015, conviction for marine pollution in the absence of evidence other than the official report issued by the French Navy; *The 'Carthage'* case, Court of Cassation, 19 April 2017, conviction for marine pollution solely based on video and data records collected by plane.

30 See *The 'Tian Du Feng'*, Rennes Court of Appeal, 27 February 2014; cases illustrating damages granted to associations for environmental harm : *The 'FastRex'*, Court of Cassation, 18 March 2014; *The 'Thisseas'*, Aix-en-Provence Court of Appeal, 13 December 2021; and the Total oil refinery of Donges case, Rennes Court of Appeal, 9 December 2016.

31 *The 'Thisseas'*, Aix-en-Provence Court of Appeal , 13 December 2021, see also Court of Appeal of Rennes, 13 September 2018, Cassation Court, 24 September 2020 (previous decisions on the same case).

For the time being, there is limited case law in France concerning air pollution. Nevertheless, for the first time, a French court of appeal (Aix-en-Provence) ruled on the criminal liability of a master for air pollution in a decision dated 12 November 2019. The master of the passenger vessel *Azura* was prosecuted for using fuel with a sulphur level exceeding the authorised limits in French territorial sea (the Mediterranean). The master, convicted in the first instance, was released on appeal because there was no intent to commit the offence. However, this decision was reversed by the French Supreme Court.[32] Most French coastal areas are emission control areas, in which emissions are the most strictly limited. These constraints are challenging for shipping companies, many of which are trying to make their ships more environmentally friendly, notably through the use of low-sulphur fuels, liquefied natural gas (LNG) propulsion or the installation of scrubbers.

France is concerned about the effects of maritime transport on the environment. As such, the country has undertaken to develop a strategy to reduce global carbon emissions and accelerate the transition to carbon-neutral propulsion by 2050. France will also take measures to comply with European Regulation (EU) 2015/757 on the monitoring, reporting and verification of carbon dioxide emissions from the shipping industry and International Marine Organization Resolution MEPC.265, of 15 May 2015, which makes the environment-related provisions of the International Code for Ships Operating in Polar Water (the Polar Code) mandatory (MARPOL (73/78), Annexes I, II, IV and V). It also allows large ports to set their fees under the terminal agreement (an agreement giving temporary authorisation to use public land), which may include a decreasing portion depending on traffic or the environmental performance generated by the operator concerned (Transport Code, Article L5312-14-1). Last, some ports are now equipped with electrical connections.

v Collisions, salvage and wrecks

France has ratified the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910 (the Collision Convention 1910), the International Convention for the Unification of Certain Rules relating to Civil Jurisdiction in Matters of Collision 1952 (the Collision Convention 1952) and the International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision and Other Incidents of Navigation 1952 (the Criminal Collision Convention 1952). Furthermore, the Collision Convention 1910 regime has been incorporated into French domestic law in Article L5131-1 et seq. of the Transport Code. Liability for damage will rest with the vessel at fault for causing the collision. In the event that fault is shared between each vessel, the principle of proportional liability, according to the respective faults, is applicable. France has also ratified the Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea 1910 (the 1910 Salvage Convention), the provisions of which have been incorporated into French domestic law in Article L5132-1 et seq. of the Transport Code. France has ratified the International Convention on Salvage 1989 (the 1989 Salvage Convention).

Most salvage disputes raise the question of whether the assistance provided to a vessel constitutes salvage and thus gives rise to a salvage reward. There is no mandatory form of salvage agreement under French law. An agreement can be made in writing, using general standard contracts, such as the Lloyd's Open Form or the French Villeneau form. However,

32 Cassation Court, Criminal Chamber, 24 November 2020, No. 19-87651 *The 'Azura'*.

there can be salvage without any salvage contract having been agreed between the parties; for instance, when a vessel is in great danger. Reciprocally, French courts can decide that no salvage reward is due, even if the parties have agreed a 'salvage contract', if the conditions of salvage are not met (e.g., if the danger was no longer an issue at the time assistance was provided). Moreover, the level of salvage awards granted by the French courts is usually lower than that in the United Kingdom, for instance.

French provisions concerning maritime wreckage are set out under Article L5142-1 et seq. of the Transport Code. If a maritime wreck could be dangerous for navigation, fishing, the environment or the access to a port, the owner of the wreck has an obligation to proceed with recovery, removal, destruction or any other operation to remove all danger in relation to the wreck. Pursuant to Article L5242-18 of the Transport Code, the administration is entitled to carry out the removal of the wreck itself if the owner does not carry out the removal operations within the time allotted to it, or if the owner is unknown. In these cases, the owner of the wreck or its insurer will have to bear the final cost of the operation. The LLMC limitation of liability is not applicable to claims for removal costs by the French state.[33] The Nairobi International Convention on the Removal of Wrecks 2007 (Nairobi WRC 2007) applies to wrecks in the exclusive economic zone.

Ships that constitute waste and that are subject to a transboundary movement for recycling are regulated by the Basle Convention of 22 March 1987 and Regulation (EC) No. 1013/2006. One aim of Regulation (EU) No. 1257/2013 of 30 November 2013 on ship recycling is 'facilitating a rapid ratification' in both EU Member States and non-EU countries of the Hong Kong Convention for the Safe and Environmentally Sound Recycling of Ships 2009 (the Hong Kong Convention). The Regulation applies to vessels of 500 GT or greater sailing under the flag of an EU Member State, but includes some provisions for third-country ships calling at or mooring in an EU Member State.

vi Passengers' rights

Regulation (EU) No. 392/2009 (the Passenger Liability Regulation (PLR)) on the liability of carriers of passengers by sea in the event of accidents is applicable in France. This Regulation brought into force the 2002 Protocol to the Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974 (the Athens Convention) for all EU Member States.

The PLR applies to international carriage of passengers on seagoing vessels, but also, under certain conditions, to Class A and Class B vessels[34] engaged in domestic seagoing voyages in France.

The PLR covers the liability of the carrier for losses arising from incidents that occur during the course of carriage, which encompasses the period during which the passenger is on board the ship, in the process of embarkation or disembarkation, or being transported by water from land to the ship, or vice versa.

Although the carrier is under a strict liability, the PLR provides a list of exemption cases and sets carrier limitation of liability in the event of death or personal injury caused by

33 Article 18 of the LLMC Convention 1976 confers the right on signatory states to exclude these claims from the scope of limitation. France made a declaration in that respect and reiterated this notification when ratifying the 1996 LLMC Protocol and when ratifying the Nairobi WRC 2007.

34 Recreational craft designed for winds up to and including Class B or that may exceed Class A wind force 8 (Beaufort scale) and significant wave height of four metres, as defined by amended Directive 94/25/EC on recreational craft.

a shipping incident, and for shipping and non-shipping incidents. Moreover, contributory fault on the part of the passenger may wholly or partially exonerate the carrier. The carrier will lose its right to limit liability if it is proven that the damage resulted from an act or omission intended to cause damage or a reckless act carried out with the knowledge that such damage would probably ensue. The French courts have a wide interpretation of the carrier's fault.[35] The carrier's limit of liability for loss or damage to luggage varies, depending on whether the loss or damage occurred in respect of cabin luggage, of a vehicle or luggage carried in or on it.

In some cases, maritime cruises will be considered package travel, governed by the French Tourism Code, implementing the EU Package Travel Directive,[36] which provides for a strict liability regime that differs from that of the PLR.[37]

Finally, Regulation (EU) No. 1177/2010 on maritime passenger rights established a mechanism applicable in cases of interruption of travel, requiring operators to comply with a series of obligations regarding information, assistance and cruise lines and not discriminating against disabled passengers.

vii Seafarers' rights

French legislation on seafarers is mainly provided by Article L5511-1 et seq. of the Transport Code, which contains some provisions specific to seafarers, such as those on the execution of the employment contract, probationary period, performance and termination of contract, and collective labour relations. As provided in Article L5541-1 of the Transport Code, some general provisions of the Labour Code apply to seafarers employed under a French contract, when no specific provisions depart from the general regime. These provisions relate particularly to a company's work council, staff representatives, minimum wages, collective bargaining agreements, procedures for dismissal, hours of work, and the committee on health, safety and working conditions.

France ratified the Maritime Labour Convention 2006 (MLC) on 28 February 2013. As France's social legislation is relatively comprehensive, the implementation of the MLC into domestic legislation did not require major reform.

VII OUTLOOK

A programme called *Fontenoy du maritime* was launched by the Minister of the Sea in December 2020, to boost the French flag in a post-covid and post-Brexit vision, and to strengthen the attractiveness and competitiveness of the French maritime industry. France should thus implement a number of measures to make the French flag more competitive, to promote productive investment, to support stakeholders in the eco-energy transition and to create employment. The Presidential elections that took place in April 2022 might, however, affect the French maritime policy.

In addition, the long-term effects of the current war in Ukraine and economic sanctions against Russia remain to be determined.

35 Court of Cassation, First Civil Chamber, 18 June 2014.

36 Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No. 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC.

37 See, for instance, Court of Cassation, 9 December 2015.

Chapter 21

GREECE

Paris Karamitsios, Dimitri Vassos and Steffi Gougoulaki[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

For at least the past four decades, Greece has been at the top of the global list of shipowning countries. Greek interests control approximately 21 per cent of the world's total merchant fleet. Greece (by way of Greek controlled tonnage and units) reportedly owns 31.78 per cent of oil tankers, 25.01 per cent of bulk carriers, 22.35 per cent of liquefied natural gas carriers, 13.85 per cent of liquefied petroleum gas carriers, 15.60 per cent of chemical and product tankers and 9.33 per cent of the world fleet of container ships. At the beginning of 2023, Greek shipowners controlled 21 per cent of global deadweight tonnage (DWT), as the Greek-owned merchant fleet measured a total deadweight tonnage of more than 349 million and a gross tonnage (GT) of more than 204 million, representing 59.08per cent of the EU-controlled fleet One-third of the Greek-owned fleet, or more than 1,300 vessels, fly an EU Member State flag. New building orders by Greek interests in 2023 reportedly amount to 173 ships (from 104 ships the previous year). The average age of the Greek-owned fleet is reportedly 9.99 years, being lower than the world fleet average age, which is reportedly 10.28 years.

As a result, there are well over 1,000 offices established in Greece that are active in ship management, ship brokerage (sale and purchase and chartering), legal, accounting and other shipping activities, making the shipping sector one of the country's major industries, perhaps second only to tourism.

The import and export of cargoes at Greek ports are not substantial, but the port of Piraeus is rapidly climbing the ranks of busy container terminal ports, mainly because it is used by COSCO as a hub; COSCO owns the majority share of the Port of Piraeus. The other two significant ports are Thessaloniki (which is becoming increasingly more active) and Patras (mainly as a ferry port and the main eastern gateway for the trans-Adriatic liner trade), while Alexandroupolis is emerging as an energy hub.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

In February 2023, the new Code of Private Maritime Law (CPML) was introduced (Law 5020/2023), replacing the old CPML, which was introduced in 1958. The new CPML came into force on 1 May 2023, with the exception of certain provisions regarding the introduction of new shipping registries (for boats of less than 10 gross register tonnage (GRT), floating

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constructions and ships under construction or to be constructed), which will come into force on 1 November 2023. The CPML regulates private shipping law matters in Greece (such as crew claims, collisions, salvage and time bars). In parallel, the Code of Public Maritime Law regulates public shipping law matters (such as ship registries, the obligations of vessel masters and the duties of pilots). Numerous presidential decrees and ministerial decisions regulate specific maritime issues, such as Greek ports.

Greece has also ratified a number of international maritime conventions, which supersede the CPML to the extent that they contravene its provisions. The new CPML incorporates the provisions of the most important international maritime conventions in domestic law. The most important maritime conventions that apply in Greece are as follows:

a the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910 (the Collision Convention 1910);

b the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules);

c the International Convention on Salvage 1989 (the 1989 Salvage Convention);

d the International Convention Relating to the Arrest of Sea-Going Ships 1952 (the 1952 Arrest Convention);

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

f the Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC Convention 1976), including the 1996 Protocol to amend the LLMC Convention (the 1996 LLMC Protocol)). Greece has also adopted the amendments to the 1996 LLMC Protocol, setting higher limits of liability; and

g the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001.

III FORUM AND JURISDICTION

i Courts

Shipping cases relating to the region encompassing Athens and Piraeus (i.e., the Prefecture of Attiki) are litigated before the Shipping Division of the Piraeus Court of First Instance or the Court of Appeal of Piraeus. The vast majority of shipping-related cases in Greece are litigated in Piraeus. Even if a shipping case does not have any link to Athens or Piraeus, the plaintiff has the option to litigate it before the special Maritime Division of the Piraeus Court, instead of the local competent civil court.

The new CPML has introduced changes to the limitation periods of maritime claims. The following claims have a limitation period of one year:

a claims relating to crew wages;

b owners' claims against the master and the crew arising from tortious actions committed by them;

c claims arising from the provision of supplies on ships;

d claims arising from the management of ships;

e claims arising from the exploitation of a ship by a third party and the liability of the registered owner of a ship for such exploitation;

f claims arising from the agency agreements with respect to ships and cargoes;

g claims arising from charter parties or contracts for the transportation of goods; and

h general average.

The one-year limitation period of the above claims starts at the end of the year during which the claim arises, with the exception of:

a claims arising from time charter parties, for which the limitation period starts the day following the re-delivery of the vessel to the owner or the termination of the charter party;

b voyage charter parties, for which the limitation period starts the day following the completion of the discharge of the cargo or the termination of the charter party;

c contracts for the transportation of goods, for which the limitation period starts at the date of delivery of the goods or the date when the goods should have been delivered; and

d general average claims, for which the limitation period starts on the date when the adjustment report is filed.

The limitation period for the following claims is two years:

a claims between co-owners of a ship;

b insurance claims;

c salvage claims;

d collision claims;

e claims arising from the carriage of passengers; and

f claims arising from works carried out on ships relating to repair or to shipbuilding contracts.

The two-year limitation period of the above claims starts at the end of the year during which the claim arises, with the exception of:

a salvage claims, for which the limitation period starts on the day when the salvage services are completed;

b collision claims, for which the limitation period starts on the date of the collision; and

c claims arising from the carriage of passengers, for which the commencement of the limitation period is regulated in the Athens Convention.

The new CPML for the first time provides that the parties may contractually agree the extension of limitation periods of maritime claims that are regulated in the CMPL, something that is not possible for other claims under the Greek Civil Code.

ii Arbitration and ADR

Arbitration is not widely used in Greece. The two main tribunals that resolve maritime disputes are the Piraeus Association for Maritime Arbitration and the arbitration body of the Hellenic Chamber of Shipping. Both associations operate from Piraeus and each has its own rules. The vast majority of maritime cases are litigated in the Piraeus courts and not in arbitration. No special limitation periods apply to arbitration proceedings.

Mediation centres operate in the major lawyers' bar associations, such as the Piraeus Bar Association. As of 1 July 2020, mediation is obligatory for all claims over €30,000 before the claim is litigated. In such cases, the hearing of the lawsuit is inadmissible if the parties do not submit to the court the minutes of the initial obligatory mediation session.

iii Enforcement of foreign judgments and arbitral awards

To enforce a foreign judgment in Greece, the following conditions need to be fulfilled:

a the judgment must be enforceable in the country in which it was rendered;

b it must not be contrary to Greek public policy or to good morals;
c the defendant must have had the opportunity to participate in the proceedings;
d the court that rendered the judgment must have seised jurisdiction over the dispute; and
e there must be no contradictory Greek judgment in the matter.

Greece has adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). The Piraeus Court of First Instance declares a number of foreign judgments and awards as enforceable in Greece each year.

With respect to judgments issued in the EU, Regulation No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters applies.

IV SHIPPING CONTRACTS

i Shipbuilding

Greece does not have a significant shipbuilding industry and only a very few small vessels are built in Greece each year (usually special-purpose vessels for local use, such as ferries and patrol boats). There are no notable local laws regulating shipbuilding contracts. That being said, a ship may be registered while under construction.

ii Contracts of carriage

The Hague-Visby Rules apply compulsorily to bills of lading or other documents of title and carriage by sea between Greek ports, regardless of whether a bill of lading is issued. Greece has not ratified the UN Convention on the Carriage of Goods by Sea 1978 (the Hamburg Rules) or the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (the Rotterdam Rules).

Vessels that do not sail under an EU flag are still not allowed to transport passengers, vehicles or cargo between Greek ports in liner services; only Greece-flagged tugs are allowed to offer port towage services, and salvage and wreck removal services, in Greek territorial waters.

Under Greek law, maritime claims do not 'attach' to the vessel in the same way as maritime liens in other jurisdictions and the vessel cannot be sued *in rem* by a creditor. The new CPML abolishes the possibility of a creditor of a ship (even with a non-priority claim) suing the new owner of the ship, irrespective of whether it sails under a Greek or foreign flag, *in personam* provided that the circumstances of the sale of the ship have a sufficient link to Greece (e.g., the ship was sold from one Greek interest to another or the ship is managed by Greek offices before and after the sale). As per the new CPML, a creditor of a Greek flag vessel with a priority claim is entitled to file the claim against the new owner of the ship within three months of the ship's transfer (or within one year from its transfer for crew claims).

There is no automatic right to lien under a bill of lading contract. The carrier cannot exercise a lien on cargo for non-payment of freight (nor demurrage or deadfreight, among other things). However, the carrier can apply to the court for the following:

a cargo to be held by a trustee until freight is paid; and
b the sale of cargo through public auction (in the case of perishable cargoes or if there are financial or other reasons making this sale necessary).

Under the new CPML, in the above cases the carrier has a priority claim for unpaid freight and demurrage over the proceeds of the sale of the cargo.

The shipper is obliged to pay freight and all other charges of the voyage (such as demurrage) provided that it has a contractual obligation towards the carrier. It is also deemed to have guaranteed to the carrier the accuracy, marks, number, quantity and weight of the cargo at the time of shipment. The shipper must indemnify the carrier against all loss, damage and expenses resulting from inaccuracies in these particulars.

The new CPML regulates multimodal bills of lading and electronic bills of lading in addition to bills of lading and transport documents. Under the old CPML, the Greek courts have accepted the validity of multimodal bills of lading and have considered that they have the same functions as 'port-to-port' bills of lading. A multimodal bill of lading has therefore been accepted as evidence of loading or receipt of the cargo, the contract of affreightment and a document of title.

iii Cargo claims

As a matter of principle under Greek law, if cargo is lost or damaged during sea carriage, the party entitled to claim in its own name is the shipper who entered into the contract with the carrier.

However, if the original bill of lading was issued to the order of a consignee (or has been endorsed by the shipper to the consignee) and the latter has the original bill of lading, the consignee will be entitled to claim in its own name. The same applies to other legal holders of the bill of lading (e.g., other parties who bought the goods from the consignee) provided that they can establish their rights as legal holders of the bill of lading with an unbroken chain of lawful endorsements (or assignments – see below).

If the insurer compensates the legal holder of the bill of lading for losses sustained as a result of lost or damaged cargo, the insurer is subrogated to the rights of the assured and is entitled to claim in its own name against the carrier.

The cargo's pledgee or the assignee of the consignee's rights is entitled to sue the carrier provided they are legal holders of the bill of lading. The shipper or charterer is also entitled to sue the carrier for damage or losses to the cargo in the following instances:

a it is the legal holder of the bill of lading;

b when it endorsed the bill of lading to the consignee or another third party, it bore the risk of the transportation (e.g., in a cost, insurance and freight sale); and

c it has compensated the consignee or legal holder of the bill of lading for the relevant loss or damage and subrogated to the rights of the legal holder of the bill of lading.

References in the bill of lading to the terms of a charter party are binding on the receiver provided:

a the terms are appropriate as between the carrier and the receiver; and

b the bill of lading incorporates specified terms of the charter party and does not purport to incorporate all the charter party terms in general.

However, in accordance with Greek case law, Congenbill[2] bills of lading are deemed to automatically incorporate all terms of the charter party. The new CPML, for the first time, regulates the requirements for a holder of a charter party bill of lading to be bound by the charter party clauses.

2 Congenbill 2022 is the latest version of standard charter party bill of lading issued and approved by the Documentary Committee of the Baltic and International Maritime Council (BIMCO).

The party that issues the bill of lading in its name -and therefore in the contract for the carriage of goods- is deemed the contractual carrier, whilst the party that exploits the vessel (i.e. the party that actually performs the carriage) is deemed to be the performing/actual carrier. The new CPML for the first time regulates the contractual liability of the actual carrier, which shall be jointly and severally liable with the contracting carrier for cargo claims. Pursuant to the new CPML, the actual carrier is also entitled to limit its liability in accordance with the Hague-Visby rules. In the event that it is not clear from the bill of lading whether it has been issued by the vessel's master on behalf of the shipowner or the charterer, the shipowner is deemed the contractual carrier provided:

a it has full control over the vessel and has not assigned the vessel to the charterer (e.g., by authorising the charterer to employ the master and the crew, which is always the case in demise charter parties); or

b there is an agreement between the shipowner and the demise charterer that the latter has full control over the vessel but the shipper or the legal holder of the bill of lading, acting in good faith, is not aware of such an agreement.

In view of the above, in the case of demise charter parties the demise charterer is considered both the contractual carrier (as the bill of lading is issued in its name) and the actual carrier (as it has the exploitation of the ship), while in voyage or time charter parties the contractual carrier is the charterer, if the bill of lading is issued in its name, and the actual carrier is always the ship owner.

A demise clause is invalid because it is contrary to Article 3(8) of the Hague-Visby Rules.

The new CPML provides that the carrier is liable for claims arising from the late delivery of cargo, while to date the Greek courts, when applying the Hague-Visby Rules, have not accepted any such liability of the carrier.

iv Limitation of liability

In accordance with the Hague-Visby Rules, the carrier is entitled to limit its liability either by unit (666.67 special drawing rights (SDRs) per unit) or by weight (2 SDRs per kilogram), whichever is higher. The limitation limits set out by the LLMC Protocol 1996 following the LLMC Convention 1976 and the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (the OPRC Convention) also apply.

V REMEDIES

i Ship arrest

Under Greek law, the arrest of a vessel is carried out in two stages: first by the issuance of a provisional order and second by the issuance of a judgment following a security measures hearing.

To obtain an arrest order, the applicant must file a security measures application demonstrating to the court that it has a *prima facie* claim against the defendant debtor and that, unless security measures (i.e., an arrest) are ordered, it runs the risk of not being able to satisfy its claim in the event that it obtains a favourable court decision or award.

Filing a security measures application does not interrupt any time bars under Greek law. Separate substantive proceedings must be pursued before the competent court or tribunal in Greece or abroad.

Upon filing the application, the court gives the defendant at least 24 hours' notice of an informal hearing to consider the application. At the informal hearing, the parties' arguments are presented orally and the court will decide on the spot, or within a short time thereafter, whether to issue a provisional order. The provisional order will remain in force until the application is heard by the court and, in most cases, until judgment is rendered on the application.

In exceptional cases (e.g., if there is an imminent danger that by summoning the defendant to attend the hearing, the vessel will sail from the court's jurisdiction), the applicant may request a provisional arrest order without summoning the defendant (*ex parte*). In such a case, the court may grant a provisional order (without first hearing the defendant's arguments), which will remain in force for a few hours or a working day for the purpose of preventing the vessel from leaving the jurisdiction. Thereafter, the defendant is summoned to present its defence and the court decides whether to uphold the provisional order or revoke it.

Following the issuance of the provisional order, the court schedules the hearing date for the security measures application. In Piraeus (which issues the largest number of arrest orders in Greece), the hearing date is usually three to four weeks later and the applicant must formally summon the defendant to attend the hearing.

During the hearing, the parties examine their witnesses (usually one witness is allowed for each party). Within one to three working days, the parties usually submit their written pleadings and all evidence in support of their position (documents, affidavits, etc.). Within approximately one to two months, the court issues its judgment on the arrest application. The judgment is final and unappealable and can be revoked only if new facts arise thereafter that are material to the case.

Any arrest order can be lifted by the defendant depositing with the court a bank guarantee letter issued by a bank operating in Greece, securing the applicant's claim up to the amount ordered by the court. Usually the Greek courts do not order the arrestor to provide counter security, although this is a matter for the courts' discretion.

The court ordering the conservatory attachment of the vessel may, at its discretion, order the arrestor to commence substantive proceedings against the owner of the vessel before a competent court or tribunal in Greece or abroad (as the case may be) within a period of at least 30 days, otherwise the arrest will be revoked.

Under the new CPML, if the applicant acted in bad faith when arresting a ship, the owner of the ship is entitled to claim his or her legal costs for setting the arrest aside and any hire lost during the arrest.

Under Greek law, it is extremely difficult to obtain an associated arrest as this involves piercing the corporate veils of the shipowning companies involved – this is a very difficult exercise under Greek law.

The arrest of a vessel's bunkers is possible provided that the arrestor has a claim against the owner of the bunkers. Arrest orders are enforced by the port authority while the vessel is in a berth or anchored at roads provided that the port authority has a boat available to enforce the arrest at the anchorage. Arrest by helicopter is not practicable.

ii Court orders for sale of a vessel

Judicial sales of vessels are primarily carried out by way of public auctions. The enforcement procedure commences as soon as the creditor of the vessel's owner obtains an enforceable title against the owner (usually a final and unappealable judgment or a provisionally enforceable judgment in exceptional cases, such as in crew claims).

The claimant must first serve the enforceable title on the owner of the vessel. If the owner does not pay the awarded amount within 24 hours, the court bailiff attaches the vessel and schedules its auction at a date at least 40 days from the date of attachment.

The court bailiff sets the first bidding price, which is equal to at least two-thirds of the vessel's market value at the time of its attachment. Auctions take place online (electronically) under the supervision of a notary public.

The attachment process (and the auction) may be delayed by the vessel's owner or by any creditor who is entitled to file an objection against the sale. They are also entitled to request an increase in the vessel's appraised value.

If there is no bidder, the auction is repeated within 40 days at the same starting bidding price. If there is no bidder at the second auction, a third auction takes place at 80 per cent of the starting bidding price and if there is no bidder at the third auction, a fourth auction takes place at 65 per cent of the starting bidding price.

To bid at the auction, a party must file with the notary public an offer (equal to the lowest bid) and security (in the form of cash, bank guarantee letter or banker's draft) equal to 30 per cent of the amount of the starting bid at the auction.

The vessel is awarded to the highest bidder, who should pay the purchase price (in excess of the amount of the security retained by the notary) within three business days of the auction. Each party having a claim against the vessel's owner is entitled to file a claim with the notary public, at the latest 15 days after the auction. Thereafter, the notary public drafts the adjudication list (at the latest within two months of the auction), to which the other creditors have a right to object.

The new CPML has, to an extent, revised priority claims. Under the new regime, on distributing the sale proceeds, the following claims will be deemed to be privileged and will have priority above all others:

a dues and charges incurred by the vessel, taxes relating to navigation, provided that they have arisen within six months of the compulsory attachment of the ship, and the costs for maintaining the ship at the last port when it was attached (first rank);

b claims by the master and crew arising out of their employment contracts and the claims of the social security funds of the master and crew (second rank);

c salvage claims (third rank); and

d damages owing to vessels, passengers and cargoes as a result of collisions (fourth rank).

Under the new CPML, salvage claims that arose after the compulsory attachment of the ship have priority over all other preceding claims, while claims that were made by the party expediting the auction for the common benefit of the ship's creditors (inclusive of the cost for hiring guards) are paid in advance from the auction proceeds, before the issuance of the adjudication list by the notary.

Privileged claims have priority over registered mortgages, with the exception of ships that have been registered under the Greek flag pursuant to the provisions of Article 13 of Greek Law 2689/1953, and in which case, preferred mortgages have a priority over privileged claims, unless these claims are privileged both under the CPML and Article 2 of the Brussels Convention of 1926 (which otherwise has not been ratified in Greece). For a claim to have privileged or priority status, it must have that status both under the law of the vessel's flag and under Greek law. The ranking of the various privileged claims will be determined in accordance with Greek law.

In accordance with the new CPML, a party that expedites the auction of a ship is entitled to apply to court and request that the court order the transfer of the ownership of the ship to a specific third party at a price not less than the starting bidding price of the auction. This application is admissible only when there is urgency for the sale of the ship (e.g., because the ship is rapidly losing value or there is a risk of causing pollution). In these sales, the same provisions for the distribution of the auction proceeds are applied.

VI REGULATION

i Safety

Greece applies all European Union and International Maritime Organization regulations and international conventions relating to safety at sea. The most important of these are as follows:

a the Convention on the International Regulations for Preventing Collisions at Sea 1972 (COLREGs);
b the International Convention for the Safety of Life at Sea 1974 (SOLAS) and all its protocols and amendments;
c the International Safety Management Code 1998 (the ISM Code); and
d EU Regulation No. 1406/2002 establishing a European Maritime Safety Agency as amended by EU Regulation No. 1625/2016.

ii Port state control

Greece is a member of the Paris Memorandum of Understanding (the Paris MOU) and has implemented the port state control (PSC) regime. The guidelines of the Paris MOU apply to all ships calling at Greek ports and anchorages, irrespective of their flags. Greece, along with Spain, Italy, Canada, the United Kingdom and France, are the Members with the largest number of inspections, jointly accounting for 41 per cent of the total number of inspections during 2021.

During 2021, 824 such inspections were carried out in Greece.

iii Registration and classification

All major Greek ports have their own ship registries, kept by the local port authorities. The vast majority of ships under the Greek flag are registered in the port of Piraeus.

Under the new CPML, the following interests may be registered:

a title or transfer of ownership (or both);
b ownership of a ship under construction or to be constructed;
c ownership of a boat of less than 10 GRT;
d ownership of a floating construction;
e the right of exploitation of the ship by a non-owner (usually the bareboat charterer);
f mortgages;
g arrest orders;
h prohibitions against any change in the ship's factual and legal condition (e.g., the right to carry out repairs, sell or encumber the vessel); and
i enforcement or auction proceedings against a ship.

To be registered in a Greek ship registry (i.e., under the Greek flag), a ship must be more than 50 per cent beneficially owned by Greek or other EU nationals. Various documents are required for the registration of a ship in a Greek registry, such as:

a documents evidencing title of ownership (such as a bill of sale);
b documents evidencing that the ship is beneficially owned by Greek or EU interests;
c a tonnage certificate; and
d a certificate of deletion from the vessel's previous registry (from certain registries) or a letter of undertaking by the new owner that a certificate will be submitted within one month of its registration.

The following classification societies are approved to issue certificates in respect of Greece-flagged vessels:

a American Bureau of Shipping;
b Bureau Veritas;
c China Classification Society;
d DNV;
e International Naval Survey Bureau;
f Lloyd's Register;
g Korean Register of Shipping;
h Class NK (Nippon Kaiji Kyokai);
i Phoenix Register of Shipping;
j Polish Register of Shipping; and
k Registro Italiano Navale.

Classification societies can be held liable to the owners of the ships that they monitor if they have breached their contractual obligations to them. They can also be held liable in tort to third parties if they have acted negligently in the performance of their duties and that negligence caused loss or damage to the third party (e.g., seafarers who suffer injuries because of the ship's defects).

The classification society that monitored a vessel before its sale can be held liable to the buyers of the vessel under Greek consumer protection laws if it has erroneously described the vessel's condition in her class records.

iv Environmental regulation

Greece has ratified the International Convention for the Prevention of Pollution from Ships 1973 (as modified by the Protocol of 1978) (MARPOL (73/78)) and the Annexes thereto: Annex I (Prevention of Pollution by Oil), Annex II (Control of Pollution by Noxious Liquid Substances), Annex III (Prevention of Pollution by Harmful Substances in Packaged Form), Annex IV (Prevention of Pollution by Sewage from Ships), Annex V (Prevention of Pollution by Garbage from Ships) and Annex VI (Prevention of Air Pollution from Ships).

The following conventions have also been ratified by Greece:

a the International Convention on Civil Liability for Oil Pollution Damage 1969, replaced by the 1992 Protocol (the CLC Convention);
b the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (the London Convention);
c the Convention for the Protection of the Mediterranean Sea Against Pollution 1976 (the Barcelona Convention);
d the OPRC Convention; and
e the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (the Bunker Convention).

According to data published by the Hellenic Coast Guard, in 2021, there were 16 pollution incidents arising from ships, 40 pollution incidents arising from inland installations and six pollution incidents arising from other sources.

v Collisions, salvage and wrecks

Greece has ratified the Collision Convention 1910 and the 1989 Salvage Convention. Issues relating to wreck removal are governed by Greek law, as Greece has not yet ratified the Nairobi International Convention on the Removal of Wrecks 2007 (Nairobi WRC 2007). The owner of a wreck that endangers other vessels (in ports, canals or channels) is obliged to remove the wreck at its own expense, otherwise the authorities are entitled to remove it at the owner's expense. There is no specific regulation on the recycling of shipwrecks.

To the extent that no Lloyd's Open Forum or other agreement with a foreign jurisdiction clause is signed between the salvor and the owner of a salvaged vessel, salvage cases relating to incidents that take place in Greece are litigated before the Greek courts. The amounts awarded to salvors by the Greek courts are generally considered to be less generous than those awarded in London arbitration.

The conditions for a salvage claim under Greek law are as follows:

a assistance is offered to a vessel;

b the vessel receiving assistance faces the danger of loss or of sustaining damage. This danger must be real, even if not imminent, but predictable, possible and existing at the time of the offering of salvage services. The existence and extent of the danger are examined by reference to all the facts and circumstances surrounding the particular incident; and

c the salvors' actions must have a beneficial result.

vi Passengers' rights

Greece has ratified the Athens Convention and the subsequent 2002 Protocol. The Athens Convention applies to international carriage when the place of departure and the place of destination are located in two different states, or in a single state if, according to the contract of carriage or the scheduled itinerary, there is an intermediate port of call in another state. Following the introduction of Regulation (EC) No. 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents, the Athens Convention also applies to domestic carriage in Greece for class A vessels as of 31 December 2016 and for class B vessels as of 31 December 2018.

According to the new CPML, the Athens Convention and Regulation (EC) No. 392/2009 applies on all domestic voyages. However, in respect of the carriage of vehicles, in international or domestic journeys, for which bills of lading (and not only tickets) have been issued, the Hague-Visby Rules apply instead of the CPML.

vii Seafarers' rights

Greece has ratified the Maritime Labour Convention 2006 and the Prevention of Accidents Convention 1970 (No. 134) of the International Labour Organization.

A sick or injured seafarer is entitled to receive sickness wages for up to four months and may be compensated if he or she suffers a 'labour accident', which is defined as:

a an injury that occurs during his or her employment on a ship and by reason of his or her employment; or

b an illness that occurs during his or her employment on a ship and by reason of his or her employment while working under extraordinarily harsh conditions that are not appropriate for a seafarer, or if the seafarer continued working under normal conditions after showing symptoms and (as a result of continuing to work) his or her medical condition worsened.

If a seafarer is not fit to work as a result of a labour accident for more than four months, he or she is entitled to compensation in addition to sick pay if he or she has been (at least partly and temporarily) disabled because of the labour accident. This compensation is paid regardless of whether the employer is at fault in respect of the labour accident. The compensation is calculated according to a specific formula based on the seafarer's monthly wage (strict liability compensation). If, however, the employer is at fault in respect of the labour accident, it is also obliged to pay compensation for the 'moral suffering' caused by the accident.

If the labour accident was the result of a breach of safety regulations by the owner, the seafarer is entitled to claim for loss of income for the period during which he or she was not fit for work as a result of the accident (in addition to compensation for moral suffering). However, he or she would not be entitled to claim strict liability compensation in these circumstances.

In the event that the employer's principal place of business is in Greece, the law of the seafarer's employment contract does not apply to the extent that it conflicts with the minimum privileges afforded by Greek law. Greek courts tend to calculate damages on the basis of the minimum salaries prescribed by Greek law as opposed to the actual salary that the seafarer is entitled to receive according to his or her contract of employment.

VII OUTLOOK

The new CPML has drastically reformed and modernised maritime law in Greece, by incorporating into domestic law, among others, the Collision Convention 1910, the Hague-Visby Rules, the 1989 Salvage Convention, the Athens Convention and the LLMC Convention 1976, including the 1996 Protocol to amend the LLMC Convention and the amendments to such protocol and the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001. The new CPML also contains other novelties, such as the introduction of new shipping registries for boats of less than 10 GRT, floating constructions and ships under construction or to be constructed, the establishment of electronic ship registries, the regulation of the function of multimodal bills of lading, electronic bills of lading, bills of lading and transport documents.

Moreover, the new CPML, for the first time:

a contains regulations on floating objects;

b clarifies the relationships between the registered owner and the party exploiting the ship and regulates the extent of their liability;

c contains provisions on ship agents, ship managers and freight forwarders and on the chartering of ships that align with modern shipping practices;

d harmonises maritime insurance provisions with international practice; and

e provides the tools for the swift auctioning of ships in urgent cases.

Greece has introduced and maintains favourable taxation laws in relation to income deriving from shipping activities. As a result, the income from dividends of shipowning companies

deriving from the exploitation or the sale of their own ships (whether the ships are flagged in Greece or abroad) that are managed from Greece by branch offices of companies established under Law 27/75 (known as the 'Law 89' regime) is free from any income tax, except that Greek tax residents are, in respect of shipowning companies that have acceded to a special memorandum with the Greek State, taxed at (now at the lower rate of) 5 per cent on any such dividends that they import in Greece (those kept abroad are not taxed). Foreign ships managed from Greece pay (in addition to their usual flag annual tonnage tax) a special additional annual tonnage tax to the Greek state, calculated according to each vessel's age and GRT.

Dividends received by Greek tax residents from shipping offices (except ship managers, namely shipbroking, chartering, etc.) established in Greece under the special regime of Law 89 are taxed at a flat rate of 10 per cent (expected to shortly drop at 5 per cent), whereas these offices are taxed with a low (decreasing) minor percentage on the funds that they import to meet their expenses locally.

Other than the foregoing, there is no corporate income tax imposed on shipowning, ship management or other such special regime shipping companies.

Chapter 22

HONG KONG

Nicola Hui and Derek Tam[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Hong Kong is currently the ninth-busiest container port in the world,[2] handling over 16.6 million twenty-foot equivalent units (TEUs) of containers in 2022.[3] As at January 2023, there were more than 2,300 vessels on the Hong Kong Shipping Register, with a gross tonnage of over 126 million,[4] making Hong Kong the fourth-largest register after Panama, Liberia and the Marshall Islands.[5] In addition, Hong Kong remains a major centre for ship management, finance, insurance, logistics, terminal operations, maritime arbitration and legal services.

Several factors make Hong Kong attractive.[6] Pursuant to an agreement with Mainland China, Hong Kong-flagged ships receive a 30 per cent reduction in Chinese port dues.[7] Furthermore, in addition to Hong Kong's modest tax rate (16.5 per cent),[8] Hong Kong has a competitive tax regime to support shipping activities. Income derived from international carriage of goods and towage for Hong Kong-registered ships and charter hire for international operations are exempt from profits tax.[9] Following the introduction of a concessionary profit tax regime in 2020, qualifying ship lessors and managers would either be exempted from paying profits tax on qualifying profits or be entitled to pay profits tax on qualifying profits at a significantly reduced rate.[10] Another consideration is that Hong Kong substantially increased the number of its double taxation relief agreements from just four to 56 as at November 2022.[11] Most key international shipping conventions are applicable in Hong Kong.[12]

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1 Nicola Hui is a senior associate and Derek Tam is an associate at HFW.

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

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

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

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

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

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

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

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

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

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

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

The Sale of Goods (United Nations Convention) Ordinance, which adopts the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Hong Kong, came into effect on 1 December 2022.[13] This would enhance Hong Kong's status as an international trade centre.

With its many advantages, Hong Kong is well positioned to serve as the maritime service hub, particularly with the development of the Greater Bay Area.[14]

II FORUM AND JURISDICTION

i Courts

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

The Limitation Ordinance (Cap 347) applies to most maritime claims except collisions, for which two years applies. For claims in contract[15] and tort, the time limit is six years from the date on which the cause of action accrued or from the date the damage was suffered, respectively. For personal injury or death claims, the limitation period is three years from the date on which the cause of action occurred.

ii Arbitration and ADR

The Arbitration Ordinance (Cap 609) came into force in Hong Kong on 1 June 2011. It incorporated the majority of the UNCITRAL Model Law on International Commercial Arbitration and replaced the previous Arbitration Ordinance (Cap 341), thereby providing a clearer framework. The Hong Kong courts are empowered to enforce emergency orders or relief granted by an emergency arbitrator, whether the relief was initially granted by an arbitral tribunal within Hong Kong or elsewhere.[16] On 23 June 2017, the Arbitration Ordinance was further amended to allow third-party funding of arbitration.[17] On 16 December 2022, the Arbitration (Outcome Related Fee Structures for Arbitration) Rules also became fully operational, further boosting Hong Kong's competitiveness as a leading hub for arbitration and cross-border alternative dispute resolution.[18]

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

13 https://www.info.gov.hk/gia/general/202206/30/P2022063000275.htm.

14 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.

15 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.

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

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

18 Arbitration (Outcome Related Fee Structures for Arbitration) Rules (Cap. 609D).

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

According to the 2021 International Arbitration Survey by Queen Mary University of London, Hong Kong was ranked as one of the top five most preferred seats for arbitration in all regions.[22] Hong Kong's main arbitration body is the HKIAC, which has been designated as the appointing body under the Arbitration Ordinance to appoint arbitrators and to determine the number of arbitrators when the parties to a dispute are unable to agree. In 2022, 344 new arbitration cases, with an aggregate amount in dispute exceeding HK$43.1 billion, were submitted to the HKIAC.[23]

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

iii Enforcement of foreign judgments and arbitral awards

Judgments

There are three methods of enforcing a foreign judgment in the Hong Kong courts: under a special arrangement with China, under a statutory regime or at common law.

Enforcement of civil and commercial judgments between Hong Kong and the mainland is governed by the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned, signed on 14 July 2006, and the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597), which came into force on 1 August 2008.[24] The Mainland Judgments (Reciprocal Enforcement) Ordinance applies to judgments requiring payment in commercial and civil cases. The judgment creditor must register the judgment that it wishes to enforce in Hong Kong within two years of the date of the judgment taking effect.

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

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

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

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

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

23 www.hkiac.org/news/hkiac-releases-statistics-2022.

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

Kong government. The Arrangement widens the existing scope for reciprocal recognition and enforcement of civil judgments in Hong Kong and the mainland. On 26 October 2022, the Legislative Council passed the Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance.[25] Upon its commencement, the Arrangement will supersede the Choice of Court Arrangement (currently in force through the Mainland Judgments (Reciprocal Enforcement) Ordinance).[26]

Foreign judgments in civil and commercial matters may be enforced in Hong Kong under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319). The countries that have reciprocal arrangements with Hong Kong are listed in the Foreign Judgments (Reciprocal Enforcement) Order (Cap 319A) and include Australia, Austria, France, Belgium and Italy.[27] A judgment creditor with a foreign judgment for the payment of a sum of money from a country listed under the Order can make an *ex parte* application to the Court of First Instance to register that foreign judgment after fulfilling certain requirements under the Foreign Judgments (Reciprocal Enforcement) Ordinance. The application must be made within six years of the date of the judgment, or, if there has been an appeal against the judgment, of the date of the last judgment given in those proceedings.[28] Once the foreign judgment is registered, it can be enforced in Hong Kong as a Hong Kong judgment.

If a foreign judgment cannot be enforced under one of the aforementioned Ordinances, it may be enforced at common law. To do so, fresh proceedings must be brought by the judgment creditor in a Hong Kong court. The judgment creditor must issue a fresh writ in Hong Kong and serve it on the defendant. The court will not go into the underlying merits of the claim founding the foreign judgment if certain conditions are met. The judgment creditor must prove that the foreign judgment:

a is a final and conclusive judgment;
b is for a fixed sum of money;
c was not obtained by fraud;
d was obtained in a foreign court that had jurisdiction over the defendant according to the Hong Kong rules; and
e is not contrary to Hong Kong rules of public policy or natural justice.

After commencing proceedings, the plaintiff can apply for summary judgment on the basis that the defendant has no defence. If summary judgment is not given, the action will proceed to trial.

Arbitration awards

Hong Kong is an arbitration-friendly jurisdiction, as well as enforcing arbitration awards. If parties fail to appeal against, set aside or refuse enforcement of arbitration awards, the court will usually order cost on an indemnity basis, subject to exceptional circumstances.[29]

25 www.elegislation.gov.hk/hk/2022/11!en.
26 www.doj.gov.hk/eng/public/enforcement.html.
27 Foreign Judgments (Reciprocal Enforcement) Order, Schedules 1 and 2.
28 Foreign Judgments (Reciprocal Enforcement) Ordinance, Section 4(1).
29 *A v. R (Arbitration: Enforcement)* [2009] 3 HKLRD 389 and approved by the Court of Appeal in *Grand Pacific Holdings Ltd v. Pacific China Holdings Ltd (in liq) (No.2)* [2012] 4 HKLRD 569 and in *Gao Haiyan v. Keeneye Holdings Ltd* [2012] 1 HKLRD 627.

Enforcement between Hong Kong and the mainland is governed by the Arrangement Concerning Mutual Enforcement of Arbitration Awards between the Mainland and the Hong Kong Special Administrative Region, signed in June 1999, and amended by the Supplemental Arrangement, signed on 27 November 2020.[30]

Hong Kong, as part of the People's Republic of China, is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), which provides for the mutual enforcement of arbitration awards in over 160 contracting states.[31] The Hong Kong courts also have discretionary power to enforce arbitration awards from countries that are not parties to the New York Convention.

Furthermore, the Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards between the Hong Kong Special Administrative Region and the Macao Special Administrative Region was signed in January 2013. Under this Arrangement, Macao arbitration awards are enforceable in Hong Kong in the same way as other non-New York Convention awards; the grounds for refusal to enforce a Macao award are in line with the grounds set out in the New York Convention. This Arrangement deals with the problem brought about by both Hong Kong and Macao having their own judicial systems but not being separate countries for the purpose of the New York Convention, and is similar to the Arrangement already in place between Hong Kong and mainland China.

III SHIPPING CONTRACTS

i Contracts of carriage

Contracts of carriage in Hong Kong are governed by the Carriage of Goods by Sea Ordinance (Cap 462), giving the full force of law to the Protocols 1968 and 1979 to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (the Hague-Visby Rules), which has been ratified by Hong Kong.[32] The Hague-Visby Rules govern the rights and liabilities of both the carrier and the shipper. Provided that one of the criteria that are set out in the Hague-Visby Rules applies (e.g., shipment from Hong Kong, bill of lading issued in Hong Kong or if the bill of lading provides for the Rules to apply), then the only instance when the Rules will not apply is when the contract of carriage does not require a bill of lading or similar document of title to be issued.[33] 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.[34]

ii Cargo claims

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

30 www.doj.gov.hk/en/mainland_and_macao/pdf/supplemental_arrangementr_e.pdf.

31 https://www.hkmpb.gov.hk/publications/hkMaritime_EN_280H198W_APR27_op.pdf.

32 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.

33 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.

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

Under Section 2(2) of the Bills of Lading and Analogous Shipping Documents Ordinance (Cap 440), anybody who is the 'lawful holder' of a bill of lading has title to sue.[35] The lawful holder can be a person in possession of the bill:

a who is identified on the bill as the consignee of the goods;

b as a result of completion, by delivery of the bill, by endorsement of the bill or by transfer of the bill; or

c as a result of any transaction whereby he or she would have become a holder under point (a) or (b) when the transaction took place at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates.

The holder must be a holder in good faith.

It is important for cargo interests to determine who is the contractual carrier to be sued. If a demise clause is incorporated into the bill, even if the bill is not provided by the shipowner or demise charterer of a vessel (e.g., a charterer's bill), a contract may exist between the shipowner or demise charterer and the shipper. The demise clause will have to show a clear intention to act in such a manner. This has been the subject of previous (English) case law,[36] as has the way in which the bill of lading is signed, which can also have legal consequences.[37]

There are time limits for any cargo claim made under the Hague-Visby Rules, which will generally apply (e.g., by virtue of a clause paramount, sub-bailment on terms or a *Himalaya* clause). Notice of loss or damage must be given by the party claiming the damage within three days of the cargo being delivered (failure to do so has evidential consequences), while any proceedings, unless an extension of time is agreed between the parties, will be substantively time-barred if they are not brought within one year of the date of delivery or the date when the cargo should have been delivered.[38] If the Hague-Visby Rules do not apply, then the normal six-year time bar for contract and tort applies.

iii Limitation of liability

On 4 December 2017, with the Merchant Shipping (Limitation of Shipowners Liability) (Amendment) Ordinance 2005 coming into effect, Hong Kong applied the International Maritime Organization's (IMO) latest amendments to the limits of liability under the 1996 Protocol to amend the Convention on Limitation of Liability for Maritime Claims 1996 (the 1996 LLMC Protocol).[39] In respect of loss of life and personal injury claims for ships not exceeding 2,000 tonnes, the new limit is 3.02 million special drawing rights (SDRs) plus additional amounts for larger vessels; in respect of any other claims for ships not exceeding 2,000 tonnes, the new limit is 1.51 million SDRs plus additional amounts for larger vessels.[40]

35 The Hong Kong equivalent to the UK's Carriage of Goods by Sea Act 1992.

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

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

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

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

40 ibid., Article 6 of Schedule 2.

Under Hong Kong law, a person may limit his or her liability for claims in respect of loss of life or personal injury, or loss of or damage to property (such as other ships, harbour works, basins or waterways and aids to navigation), so long as the claims in respect of which he or she is alleged to be liable fall within Article 2 of the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC Convention 1976) as set out in Schedule 2 of the LSL Ordinance. Once this is established, he or she will be entitled to a decree limiting his or her liability, unless any person opposing the making of the decree proves that his or her conduct bars entitlement to limitation. Article 4 provides that a person liable shall not be entitled to limit his or her liability if it is proved that the loss resulted from his or her 'personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result'. This is a high obstacle to overcome. In a 2016 case, *Floata Consolidation Limited v. Man Lee Hing (Hong Kong) Vehicles Limited and others*, the Hong Kong Court of First Instance cited *Saint Jacques II* [41] 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.[42] In *Star Centurion*,[43] the Court of Appeal held that the element of wreck removal that formed part of the owners' claim for the wreck against the colliding vessel is not subject to limitation.

IV REMEDIES

i Ship arrest

Arrest in Hong Kong

The International Convention Relating to the Arrest of Sea-Going Ships 1952 (the Brussels Convention) applies in Hong Kong. The maritime claims for which a ship may be arrested are set out in Section 12A(2) of the High Court Ordinance (Cap 4). One can arrest a vessel in Hong Kong for the purpose of obtaining security in aid of foreign proceedings. A ship under any flag may be arrested in Hong Kong and security arrests are permitted.

Ownership

When exercising its admiralty jurisdiction, the court must be satisfied that the person who would be liable for the claim *in personam* was either the sole beneficial owner of the vessel or the demise charterer at the time the *in rem* action is commenced.

Sister ship arrests

By virtue of Section 12B(4) of the High Court Ordinance, a sister ship may be arrested if, when the cause of action arose, the defendant was the 'owner or charterer of, or in possession or in control' of the offending ship, and at the time when the action is brought, the defendant is 'the beneficial owner as respects all the shares' of the ship to be arrested. In the *Decurion* case,[44] 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

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

42 [2016] 2 HKLRD 1091.

43 [2022] HKCA 1089.

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

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.

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

Procedure

A ship may be arrested if the arresting party has a cause of action that carries with it a right of arrest. A party wishing to arrest in Hong Kong must first issue an *in rem* writ against the ship in the Hong Kong admiralty jurisdiction of the Court of First Instance. No counter security is required, although the arresting party has to provide an undertaking (usually in the form of a solicitor's undertaking) to pay the bailiff's expenses of the arrest and the costs of maintaining the ship under arrest.

The person who intends to arrest the vessel should file in court a writ of summons and the arrest papers, which include an affidavit to lead to arrest.[45] The affidavit will set out the details of the claim and, as it is *ex parte*, the arresting party has an obligation to make full and frank disclosure in relation to the material facts stated in it.[46] The affidavit is the only evidential requirement for arrest and the arresting party need only establish a *prima facie* right to arrest, in good faith, as reaffirmed in *Bo Shi Ji 393*.

The party applying to arrest the vessel bears the cost of maintaining the vessel while it is under arrest. Further security will be charged daily. The party applying to arrest the vessel will also be liable for the bailiff's expenses and any overtime. Furthermore, it may be necessary to pay to bunker and provision the vessel and its crew.

Wrongful arrest

Depending on the facts and conduct of the parties, the warrant of arrest may be set aside and the owner of the arrested ship can make a claim for damages for wrongful arrest. However, the Hong Kong courts are reluctant to award damages for wrongful arrest and a claim will only succeed if the owner of the arrested ship could prove that the arresting party acted in bad faith or in a grossly negligent manner,[47] which is a very high level of proof.

ii Court orders for sale of a vessel

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

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

However, if the vessel's owners are in financial difficulty, a sale *pendente lite* is possible. An order can be made within six to eight weeks in limited circumstances when a vessel has

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

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

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

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).

Broadly, the order of priorities is as in England.[48] For buyers, the attraction of purchasing a vessel sold by the court is that it will be free of encumbrances.[49]

V REGULATION

Collisions, salvage and wrecks

Collisions

The Merchant Shipping (Safety) (Signals of Distress and Prevention of Collisions) Regulations (Cap 369N) gives the International Regulations for Preventing Collisions at Sea 1972 (COLREGs) force of law in Hong Kong. It is an offence under the Shipping and Port Control Ordinance (Cap 313) to contravene any of the COLREGs, unless the person charged proves that he or she has taken all reasonable precautions.[50] The decision of the Court of Final Appeal in *Kulemesin Yuriy and Tang Dock-Wah v. HKSAR*[51] 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*,[52] a coxswain was sentenced to eight years' imprisonment after being found guilty of manslaughter by a Hong Kong jury. The case arose out of a collision on 1 October 2012 between two ferries in Hong Kong waters, resulting in the loss of 39 lives.

The doctrine of proportionate fault applies with respect to claims for property damage;[53] 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.[54] 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.[55] If it is not possible to establish degrees of fault, the liability is apportioned equally.

There is a two-year limitation period for civil claims arising out of a collision.[56]

Salvage

The provisions of the International Convention on Salvage 1989 (the 1989 Salvage Convention) applies in Hong Kong by way of Section 9 of the CDLS Ordinance. Any salvage contracts governed by Hong Kong law would be treated in the same manner as any other contract made under Hong Kong law. Pursuant to Section 12A(2)(i) of the High Court

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

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

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

51 [2013] 16 HKCFAR 195.

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

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

54 ibid., Section 4.

55 ibid., Section 5.

56 ibid., Section 7.

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.

There is a two-year limitation period for salvage claims, commencing from the day on which the salvage operations are terminated.[57]

Wreck removal

Section 21 of the Shipping and Port Control Ordinance empowers the Director of Marine to order the removal of stranded, abandoned or sunken vessel in the waters of Hong Kong and impose punishment for non-compliance. The Director has wide powers to contract with tugs and salvors for this purpose. Pursuant to Section 12 of the Merchant Shipping (Limitation of Shipowners Liability) Ordinance (Cap 434), most of the provisions of the LLMC Convention 1976 (as amended by the 1996 Protocol) have force of law in Hong Kong; however, claims in relation to the cost of wreck removal are not subject to limitation of liability under Hong Kong law,[58] as confirmed in *Star Centurion*. This was confirmed in *Perusahaan Perseroan (Persero) PT Pertamina v. Trevaskis Ltd*,[59] where the party was not allowed to limit its wreck removal claim. Although the Nairobi International Convention on the Removal of Wrecks 2007 (the Nairobi WRC 2007) came into force in China on 11 February 2017, it does not apply to Hong Kong.

VI OUTLOOK

Hong Kong's geographical location and proximity to the mainland has cemented its position as a major maritime hub in the region. The covid-19 epidemic in the past three years has greatly impacted Hong Kong as a highly open economy.[60] With the anti-epidemic measures being relaxed, the shipping industry is slowly recovering from the pandemic. It is more important now than ever that the government and the key commercial principals in the maritime trade continue to work collaboratively towards strategic planning for the sustainable growth of the industry and to capitalise on its unique advantage in the region. The Chief Executive of Hong Kong put forward in his latest policy address that the government will work with the Hong Kong Logistics Development Council and the shipping industry to promote high value-added modern logistics development by reinforcing intermodal transport to strengthen the key role played by Hong Kong in the logistics chain of the Greater Bay Area, promoting the development of high-end and high value-added logistics services such as the processing of cold chain goods and pharmaceuticals and encouraging a wider application of smart logistics solutions.[61] Port digitalisation, automation, global sustainability and environmental social governance are growing trends for the maritime industry.

Furthermore, China's National 14th Five-Year Plan, released in March 2021, continues to reinforce and advance Hong Kong as a centre for international legal and dispute resolution services in the Asia-Pacific region,[62] which is an important support to the national development

57 International Convention on Salvage 1989, Article 23.

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

59 [2021] 2 HKLRD 4.

60 https://www.policyaddress.gov.hk/2022/public/pdf/policy/policy-full_en.pdf (paragraph 137).

61 https://www.policyaddress.gov.hk/2022/en/p47.html.

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

of economic activities in the mainland. This is given Hong Kong's strategic location at the heart of the Asia-Pacific region and its being the only common law jurisdiction in China with an up-to-date arbitration law regime with effective and enforceable interim relief.

Hong Kong is a free and international metropolis connected to the mainland and the world. Hong Kong, as an international financial, shipping and trade centre, remains highly competitive.[63]

63 https://www.policyaddress.gov.hk/2022/public/pdf/policy/policy-full_en.pdf (paragraph 144).

Chapter 23

INDIA

Amitava Majumdar, Pabitra Dutta, Rishabh Saxena and Ruchir Goenka[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

India has untapped potential to leverage its 7,517 kilometres of coastline spanning nine states and four union territories and has sought to utilise this with a thrust towards an export-led development model. India's merchandise trade has grown at more than twice the growth rate of global merchandise exports over the past decade. With 12 major ports and 205 notified non-major ports facilitating seaborne trade, more than 95 per cent of India's merchandise trade by volume and around 70 per cent by value is moved through maritime transport. In recent years, the Indian government has made a concerted effort to switch to clean fuel with subsidies being provided to encourage the consumption of liquefied natural gas, leading to an increasing number of gas carriers calling at Indian ports. India exports bulk raw commodities such as bauxite and iron ore to countries such as China, while it is dependent on importing coal from countries such as Indonesia, Australia and South Africa for its thermal power plants, which account for most of the energy produced in India. While there had been an effort to shore up domestic production of coal, the increasing demand for steel is likely to increase the demand of coking coal from countries such as Australia. A majority of Indian petrochemical companies that import crude oil from Africa and the Middle East are government owned.

In keeping with its goal of encouraging private participation and foreign investment in the shipping sector, in its 2023 Budget speech,[2] the government focused on its aim to capitalise on India's advantageous geographical location and has emphasised the importance of developing coastal shipping. This is in line with the government's previous announcements that seven projects worth about 20 billion rupees will be offered by the Major Ports on Public Private Partnership mode thereby allowing major ports across the country to outsource management of their operational services to private players. Furthermore, a scheme for promoting flagging of merchant ships in India by providing subsidy support to Indian shipping companies in global tenders floated by ministries and CPSEs was announced. The speech also highlighted that pursuant to India having enacted the Recycling of Ships Act, 2019 and acceded to the Hong Kong International Convention, around 90 ship recycling yards at Alang in Gujarat have been granted the HKC compliant certificate with the government working to bring more ships to India from Europe and Japan and aiming to double the recycling capacity of around 4.5 million Light Displacement Tonne (LDT) by 2024. Furthermore, with an aim to provide a better framework for the development, maintenance, and management of aids

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2 Budget 2023-2024: Speech of Nirmala Sitharaman Minister of Finance, available at: https://www.indiabudget.gov.in/doc/Budget_Speech.pdf (last accessed on 19 April 2023).

to navigation in India, the Marine Aids to Navigation Act, 2021 was brought into force on 31 March 2022. This Act inter alia repeals the 90-year-old Lighthouse Act, 1927. The Marine Aids to Navigation Act, 2021 seeks to promote ease of doing business by incorporating the global best practices, technological developments and India's International obligations in the field of marine aids to navigation. Pursuant to the Navigation Act 2021, marine aids to navigation dues will be levied and collected for every ship arriving at or departing from any port in India, at the rate specified by the central government from time to time. The central government of India may wholly or partially exempt certain vessels from these dues. These vessels include:

a any government ship that is not carrying cargo or passengers for freight or fares; or
b any other ship, classes of ships or ships performing specified voyages.

There is, however, a commonly held view that to achieve the ambitious target of having a 5 per cent share in world exports and climb up the ranks in ease of doing business, India needs to recalibrate the current legal and regulatory regime governing its shipping ecosystem. While the paradigm shift in policy in the recent years reflects this need to strengthen shipping regulations to tie into India's overarching aim to become a viable investment destination, much progress is still required to achieve this objective.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Shipping in India is centrally regulated and exclusively controlled by the Indian government through the Ministry of Shipping (MoS). The MoS has set up a semi-autonomous statutory body – the Directorate General of Shipping (DG Shipping) – whose powers are circumscribed by the Indian Merchant Shipping Act, 1958 (MSA) to deal with all matters relating to shipping policy and legislation, implementation of various international conventions and other mandatory regulations of the International Maritime Organization. The MSA is a general umbrella legislation that deals with merchant shipping and empowers the DG Shipping to promulgate delegated legislation, such as circulars and notifications, to regulate all issues relating to shipping. The Mercantile Maritime Department is a body under the control of the DG Shipping dealing with the registration of Indian-flagged vessels, survey of ships and enforcement of international regulations, such as the SOLAS and the Load Line Conventions.

The MoS has a chartering wing (Transchart) to broker transportation of government-owned and government-controlled cargoes, and regularly finalises long-term time charter parties and contracts of affreightment for various Indian government-owned entities, such as the Steel Authority of India, Rashtriya Ispat Nigam Ltd and the Department of Fertilizers. Transchart makes shipping arrangements at internationally competitive freight rates while giving preference and support to Indian-flagged vessels without any difference in freight rate, at a service charge of 1 per cent.

While India allows 100 per cent foreign direct investment under the automatic route in the shipping sector, there have been very few global players who have sought to invest and flag their vessels in India. As a general rule, foreign investors set up special purpose vehicles that in turn own India-flagged vessels merely to take advantage of the cabotage policy in India.

Generally, an Indian shipping company will have to pay corporate tax at the rate of 33.3 per cent, unless it opted for the tonnage tax system, which is between 1 and 2 per cent of its income. An Indian shipping company could opt for the tonnage tax system by fulfilling

certain guidelines laid down by the government, such as the training of Indian seafarers and making financial provisions for new vessel ownership. The Indian indirect tax regime has undergone a radical overhaul with the implementation of the goods and services tax regime (the new taxation structure is a destination-based tax on consumption as compared to the principle of origin-based taxation under the erstwhile regime). The Indian government has issued an amendment through its notifications[3] stating that the export of services by way of transportation of goods by vessel will be exempted from goods and services tax, effective from 25 January 2018 with a 'sunset clause' up to 30 September 2021 (i.e., the exemption will automatically be terminated after this fixed period, unless further extended).

i Maritime India Vision 2030

The MoS has undertaken an aggressive development of the maritime landscape in India including introducing the Maritime India Vision-2030, a 10-year blueprint with the aim of overhauling the Indian maritime sector.[4] The following key themes outlined in the policy have been identified:

a developing best-in-class port infrastructure;
b driving end-to-end logistics efficiency and cost competitiveness;
c enhancing logistics efficiency through technology and innovation;
d strengthening policy and institutional framework to support all stakeholders;
e enhancing global share in shipbuilding, repair and recycling;
f enhancing cargo and passenger movement through inland waterways;
g promoting ocean, coastal and river cruise sector;
h enhancing India's global stature and maritime co-operation;
i leading the world in safe, sustainable and green maritime sector; and
j becoming a top seafaring nation with world-class education, research and training.

The Indian government has also launched a dedicated portal for inviting and facilitating investments in the maritime sector in India which sets out in detail all the investment opportunities as part of the initiative.[5]

III FORUM AND JURISDICTION

i Courts

Commercial disputes in India are litigated primarily in civil courts having territorial jurisdiction (over the cause of action or the defendant in the action) or pecuniary jurisdiction. For general suits, the high courts of Bombay, Calcutta, Delhi, Madras and Himachal Pradesh exercise original jurisdiction for claims that have arisen within their territorial and pecuniary jurisdiction, while all other civil suits have to be instituted in the courts of first instance, which are generally the relevant district courts. However, admiralty suits are to be brought

3 Notification No. 04/2020 – Integrated Tax (Rate) dated 30 September 2020; Section 12(8) of the IGST Act 2017 has been amended to provide that the point of service for transportation of goods to a place outside India will be the place of destination of such goods.

4 The Maritime India Vision 2030 document is accessible at https://static.investindia.gov.in/s3fs-public/2021-03/MIV%202030%20Report.pdf (last accessed on 8 April 2021).

5 The dedicated portal launched by the Ministry of Shipping of the Indian government can be accessed at https://maritimeinvest.in/investment-oppurtunities (last accessed on 8 April 2021).

before the high court of a coastal state, which are the only courts vested with admiralty jurisdiction. Under the present admiralty regime, each high court of a given state can only exercise admiralty jurisdiction over vessels calling at its own coastal waters.

The Commercial Courts Act 2015 radically upgraded the existing judicial procedural framework. The government has established special commercial courts to deal exclusively with 'commercial disputes' involving specialised subject matters (i.e., those relating to export or admiralty and maritime law, carriage of goods, import of merchandise, sale of goods and insurance) and for claims of a specified value.[6] The Act makes pre-institution mediation compulsory, unless urgent interim relief is sought, in which case the Commercial Court can be approached directly without having to go through the mediation process.[7] However, the Bombay High Court in *Ganga Taro Vazirani v. Deepak Raheja*,[8] held that the requirement of pre-institutional mediation under Section 12A of the Act was procedural in nature and could be deemed to be waived by a party through its conduct. The Court observed that in a situation where the parties attempted to resolve the disputes but failed, driving them to mandatory mediation would run contrary to the aims and objectives of the Commercial Courts Act, that is, quick and speedy redressal of disputes. This was overturned by the Court of Appeal, which held that pre-institution mediation is mandatory[9]. This issue, however, has now been laid to rest by the Supreme Court of India, wherein the Apex Court has held that pre-institution mediation is mandatory for all commercial suits that are not accompanied by urgent relief in accordance with the provisions of the Commercial Courts Act.[10]

The Commercial Courts Act imposes fixed and strict deadlines to complete procedural formalities. Notably, the Act provides for a strict timeline of presenting the statement of defence within 120 days of the date of service of the writ of summons, failing which the right to file the statement of defence is forfeited.[11] This position has been confirmed by the Apex Court,[12] which has also held that an interim application for rejection of the plaint or statement of claim will by itself not stop the clock of 120 days from running[13]. The Bombay High Court has clarified that the strict timelines are applicable to commercial suits instituted after the enactment of the Act, and would not apply to older suits transferred to the Commercial Courts after the Act came into force.[14] The Apex Court has also clarified that the strict timelines would only be applicable to commercial disputes of a specified value and insofar as non-commercial disputes are concerned, the Court still retains the discretion

6 The specified value is currently fixed at 300,000 rupees.

7 Section 12A of the Commercial Courts Act, 2015.

8 2021 SCC Online Bom 195.

9 *Deepak Raheja v. Ganga Taro Vazirani*, Commercial Appeal (L) No. 11950 of 2021.

10 *Patil Automotive Private Limited and Others v. Rakheja Engineers Private Limited*, 2022 SCC Online SC 1028.

11 Section 16 read with Clause 4(A) of the Schedule to the Commercial Courts Act, 2015.

12 *M/s SCG Contracts India Pvt Ltd v. KS Chamankar Infrastructure Pvt Ltd & Ors*, C.A. No. 1638 of 2019.

13 A warrant of arrest served on a vessel would not be sufficient for the time bar for the filing of the written statement (defence) to start counting and the service of writ of summons is mandatory unless the order of arrest specifies that the written statement is required to be filed within the time specified as required in law. *CMOG Fuel DMCC v. OSS Altus Uber* (IMO No. 9385300) (Interim Application No. 169 of 2019, judgment dated 16 June 22022).

14 *Reliance General Insurance Co. Ltd v. Colonial Life Insurance Company (Trinidad) Ltd. & Anr* (Commercial Appeal No. 543 of 2019).

to condone delays upon sufficient cause being shown.[15] The Commercial Courts Act also seeks to impose a duty of full and frank disclosure of facts and documents at the time of filing the claim statement and defence and gives the court greater power to compel parties to disclose documents.

The Commercial Courts Act also introduces a regime that now makes legal costs recoverable. Under the new regime, it is incumbent on the court to award legal costs after disposal of the suit and the judge must set out reasons why legal costs have not been awarded. The Bombay High Court has recently awarded costs to the successful party in an application filed by a judgment debtor challenging a domestic award after considering circumstances such as conduct of the parties and frivolity of the action carried out.[16] Subsequently, it has also passed an order in favour of a claimant, directing the errant shipowner to pay costs for its dilatory tactics.[17]

Some important points to bear in mind in the context of issues arising in India on the choice of law and civil jurisdiction are as follows.

a Words such as 'alone', 'only' or 'exclusive' are not required for a clause to be interpreted as an exclusive jurisdiction clause under Indian law.[18] If a contract provides for parties to submit to the jurisdiction of a particular court, there is a general presumption that the intention of the parties would be to exclude the jurisdiction of all other courts.

b As a general rule, in the absence of a cause of action arising in India, it may be difficult for two foreign parties to litigate before an Indian court, save for admiralty disputes in which the court acquires jurisdiction by virtue of the vessel having been arrested in India, by an order of an Indian littoral high court.[19]

c If, in any case, more than one Indian civil court has jurisdiction over the subject matter, it is open for the parties to contractually agree to choose one court and oust the jurisdiction of the other courts that would, under normal circumstances, also have had jurisdiction.[20]

d An Indian entity and a foreign entity can agree to litigate in a foreign court, which is enforceable as a matter of Indian law.[21]

e Two Indian parties cannot exclude, by contract, the applicability of Indian substantive law if the place of performance of the contract is in India.[22]

15 *Desh Raj v. Balkishan (D) Through Proposed LR Ms Rohini*, Civil Appeal No.433 of 2020.

16 *Reliable Spaces Pvt Ltd v. Evonik India Pvt Ltd* (Commercial Arbitration Petition No. 1019 of 2019, judgment dated 19 October 2020); *Sanjay Soya Private Limited v. Narayani Trading Company* (Interim Application (L) No. 5011 of 2020, judgment dated 9 March 2021).

17 *Rajnish Steels and Ors v. MV Golden Pride and Anr* (Interim Application (L) No. 7724 of 2021, judgment dated 24 March 2021).

18 *Swastik Gases P Ltd v. Indian Oil Corporation Ltd* (2013) 9 SCC 32, *Jagdish Chander v. Ramesh Chander and Ors* (2007) 5 SCC 719.

19 Section 20 of the Code of Civil Procedure, 1908 (CPC).

20 *ABC Laminart Pvt Ltd v. AP Agencies Salem*, (1989) 2 SCC 163.

21 *Modi Entertainment Network and Anr v. WSG Cricket Pte Ltd*, AIR 2003 SC 1177.

22 Section 23 of the Indian Contract Act, 1862.

f Indian courts can apply foreign law in deciding disputes. The question of what constitutes foreign law is a question of fact.[23] If no evidence is adduced regarding foreign law, normally the presumption is that it is the same as the Indian law on the point under consideration.[24]

g Limitation being an issue of the lex fori, the Indian Limitation Act, 1963 will mandatorily apply to disputes litigated in India. For most types of cause of action, the limitation period under Indian law is three years.

h Parties cannot extend or reduce the limitation period by contract.[25]

Owing to the onset of covid-19, the Supreme Court of India took *suo motu* note of the various hardships being faced by litigants in approaching judicial forums and, accordingly, passed several orders clarifying the computation of limitation periods as follows:

a in computation limitation for suits, appeals or applications, the time period from 15 March 2020 to 28 February 2022 shall stay excluded and the balance period as on 15 March 2020 shall become available from 1 March 2022;

b where limitation had expired in the time between 15 March 2020 and 28 February 2022, irrespective of the actual balance period of limitation, a period of 90 days would be available from 15 March 2021 unless the actual balance period is more than 90 days, in which case, the period available would be the longer balance period; and

c the period between 15 March 2020 and 28 February 2022 would be excluded in computing various time limits prescribed under Sections 23(4) and 29 A of the Arbitration Act, 1996 (in relation to domestic arbitrations), Section 12A of the Commercial Courts Act and periods mentioned under any other laws where periods of limitation for instituting proceedings or outer limits (within which the court or tribunal can condone delay) and termination of proceedings are prescribed.[26]

ii Arbitration and ADR

Maritime arbitrations in India may be ad hoc or institutional arbitration with bodies such as the Indian Council of Arbitration (ICA). It is common for shipping contracts involving Indian government-owned companies to provide for arbitration in India to be administered by the ICA under its Maritime Arbitration Rules.

India has given effect to the UNCITRAL Model Law on International Commercial Arbitration through the Arbitration and Conciliation Act, 1996 (the Arbitration Act). The Arbitration Act was significantly amended in 2015, ushering in what is essentially a new arbitration regime following the amendment. The default court to move any application with respect to an international commercial arbitration (where one of the parties is a foreign party irrespective of whether the arbitration is seated in India or not) would be the relevant high court, which is better equipped to deal with complex commercial disputes relating to international transactions. The Arbitration Act was also amended in 2019 as well as in 2020. The 2019 amendment sought to undo the progressive regime promulgated by the 2015 amendment especially with respect to the default court being the concerned high court for

23 *Hari Shanker Jain v. Sonia Gandhi*, AIR 2001 SC 3689.

24 *Malaysian International Trading Corp v. Mega Safe Deposit Vaults (P) Ltd*, 2006 (3) Bom C R 109.

25 Section 28 of the Indian Contract Act, 1872.

26 Orders dated 23 March 2020, 8 March 2021, 27 April 2021, 23 September 2021 and 10 January 2022 in *In Re: Cognizance of Limitation, Suo-Motu Writ Petition* (Civil) No. 3 of 2020.

the conduct of matters related to international commercial arbitrations. However, the Apex Court declared certain portions of the 2019 amendment to be unconstitutional, thereby restoring the position as set out in the 2015 amendment.[27] For the sake of completion, the Arbitration Act also came to be amended in 2021 by the Arbitration and Conciliation (Amendment) Act, 2021 wherein grounds for the unconditional stay on the enforcement of a domestic arbitral award were inserted.

The Arbitration Act empowers Indian courts to pass interim orders for security and other ancillary relief in support of arbitration taking place both within and outside India.[28] The Supreme Court in *Essar House Pvt Ltd v. Arcellor Nippon*[29] held that while passing these interim orders, they are not bound by the strict prerequisites applicable when obtaining an attachment before judgment as prescribed under Order 38, Rule 5 of the Code of Civil Procedure, 1908 (CPC); that is, these requirements under the CPC act merely as guidelines, and technicalities cannot prevent the court from securing justice. However, immediately after this pronouncement, the Supreme Court, in the case of *Sanghi Industries Limited v. Ravin Cables & Anr*,[30] held that the rigours of Order 38, Rule 5 of the CPC must be satisfied to grant interim orders. Another pronouncement from the Supreme Court on this issue[31] seems to suggest that wide powers are available to courts passing orders for interim relief in aid of arbitral proceedings and only factors such as a good prima facie case, balance of convenience and approaching the court with reasonable expedition are to be considered. In appropriate cases where the defence is prima facie untenable, an order of deposit of security can be made at the interim stage.[32] However, courts have clarified that they would not have subject-matter jurisdiction to grant relief in a dispute involving foreign parties with no nexus to India.[33] Courts have also observed that applications seeking interim relief for a foreign seated arbitration may be filed where assets of a party are located.[34]

The Supreme Court in the landmark judgment of *Amazon.com NV Investment Holdings LLC v. Future Retail Limited*[35] held that foreign emergency arbitration are orders under Section 17(1) of the Arbitration Act and are enforceable in India. It has been clarified that an 'emergency arbitrator' would be included within the ambit of an 'arbitral tribunal' as defined under the Arbitration Act.[36] Therefore, an emergency order will be exactly the same as an order of any other arbitral tribunal. The Apex Court further held that the no appeal lies from enforcement of such emergency award made under Section 17(2) of the Arbitration Act.

27 *Hindustan Construction Company Limited v. Union of India & Ors* (2020) 17 SCC 324.

28 Section 9 of the Arbitration Act, 1996.

29 2022 SCC Online SC 1219.

30 2022 SCC Online SC 1329.

31 *Sepco Electric Power Construction v. Power Mech Projects Limited*, 2022 SCC Online SC 1243.

32 *Essar House Private Limited v. Arcellor Mittal Nippon Steel India Ltd*, 2021 SCC OnLine Bom 149; *Valentine Maritime Ltd v. Kreuz Subsea Pte Ltd & Anr*, 2021 SCC OnLine Bom 75.

33 *Cyrstal Sea Shipping Company Ltd v. Bostomar Shipping Pte Ltd & Ors* (I.COM.A.O.A. No. 1 of 2021; order dated 5 March 2021 passed by Andhra Pradesh High Court) and *Cyrstal Sea Shipping Company Ltd v. Bostomar Shipping Pte Ltd & Ors* (AP No. 136 of 2021, order dated 11 March 2021 passed by Calcutta High Court).

34 *Shanghai Electric Group v. Reliance Infrastructure Ltd*, OMP (I) (Comm) 433 of 2020, judgment dated 19 July 2022.

35 (2022) 1 SCC 209.

36 Section 2(1)(d) of the Arbitration Act, 1996.

The 2019 amendment to the Arbitration Act amended Section 45 of the Act[37] by permitting reference to foreign-seated arbitrations if a prima facie case is made out 'that the said agreement is null and void, inoperative or incapable of being performed'. The Supreme Court, in *Chloro Controls India Private Ltd. v. Severn Trent Water Purification Inc*,[38] (*Chloro Controls* judgment) had held that the court could have a full-fledged trial (which includes leading oral or documentary evidence) to determine whether an arbitration agreement exists before referring the parties to arbitration. However, this position appears to have been diluted in light of the 2019 amendment to the Arbitration Act.

Pertinently, the Supreme Court in the *Chloro Controls* judgment also held that 'group of companies doctrine' shall bind a non-signatory party to arbitration where there is a clear intention of the parties to bind both the signatory and the non-signatory parties who are part of a group of companies. The intention of the parties is a very significant feature that must be established before the scope of arbitration and can be said to include the signatory as well as the non-signatory parties. In an interesting judgment in 2017,[39] the Delhi High Court, in its interpretation of the *Chloro Controls* judgment, followed the proposition of law laid down by the Singapore High Court in *Aloe Vera of America, Inc v. Asianic Food (S) Pte Ltd*.[40] The Delhi High Court held that the arbitral tribunal would, in principle, have jurisdiction to decide on issues regarding whether it should disregard the corporate and juridical personality of a company to hold a non-signatory to an arbitration agreement bound by the arbitration agreement. However, the Supreme Court in *Cox and Kings v. SAP India (P) Ltd*,[41] after analysing the group of companies doctrine and after taking note of the *Chloro Controls* judgment, doubted its applicability and referred it to a larger bench. This reference was reserved for judgment at the time of writing this article.

Another notable feature of the Act is allowing 'any person claiming through or under' a party who was a signatory of the original arbitration agreement to be party to the arbitration agreement.[42] This has the effect of binding even an assignee or subrogated party within the ambit of the arbitration agreement contained in the underlying contract. The High Court of Gujarat has held that an endorsee of a bill of lading, which incorporates the terms of the charter party, including the law and arbitration clause, would be bound by such arbitration agreement.[43] The Supreme Court of India has held that a generic incorporation of a standard form contract in a particular industry (e.g., the GENCON, NYPE, Norwegian Sale Form and SUPPLYTIME in the shipping industry) is sufficient to incorporate the arbitration agreement contained in those forms into the underlying contract.[44] The Supreme Court took this proposition a step further by holding that a generic incorporation of a contract into another contract is sufficient to incorporate the arbitration clause (even if the contract that has been sought to be incorporated into the underlying contract is a bespoke contract, which is not common in the industry).[45]

37 Section 45 of the Arbitration Act, 1996 applies to foreign seated arbitrations and deals with the power of a judicial authority to refer parties to arbitration.

38 (2013) 1 SCC 641.

39 *GMR Energy Limited v. Doosan Power Systems India Pvt Ltd*, 2017 SCC OnLine Del 11625.

40 2006 SGHC 78.

41 2022 SCC Online SC 570.

42 Section 8 of the Arbitration Act, 1996.

43 *MV Nicoloas A v. Indian Farmers Fertilizers Cooperative*, 2017 SCCOnLine Guj 2149.

44 *MR Engineers & Contractors (P) Ltd v. Som Datt Builders Ltd* (2009) 7 SCC 696.

45 *Inox Wind Ltd v. Thermocables Ltd* (2018) 2 SCC 519.

Following the doctrine in the *Chloro Controls* judgment, the Apex Court further held an arbitral award to be enforceable against a non-signatory after examination of factors such as the circumstances and intention in entering into the agreement, relationship and commonality of the parties, the composite nature of the transaction and endeavour to find out the true essence of the business arrangement.[46] Furthermore, invoking the same principles, the Supreme Court decided to implead a non-signatory to the arbitration proceedings.[47] The principle has further been applied in a recent case[48] by the Delhi High Court, wherein it has been held that the 'group of companies' doctrine can be invoked to bind the non-signatory affiliate of a parent company if there was the following:

a a direct relationship with the signatory to the arbitration agreement;

b commonality of the subject matter; and

c a composite transaction between the parties at dispute.

In other judgments, the Supreme Court has taken the view that the question of fraud leading to the conclusion of the underlying contract and arbitration agreement is an arbitral issue that ought to be decided by the tribunal.[49]

In the context of the classic 'seat versus venue' debate, the Supreme Court of India held that the designation of 'venue' of the arbitration, would not confer exclusive jurisdiction on the High Court having jurisdiction over that 'venue' to supervise the arbitration.[50] This view now stands approved and underlined by a three-judge bench of the Apex Court, who held that in the absence of a designated seat and only a designated venue, the cause of action may vest with different courts.[51] The Supreme Court has further clarified that the parties in dispute are empowered to mutually decide upon the change in seat of the arbitration, the courts of which seat shall then have exclusive jurisdiction to deal with matters related to the arbitration.[52]

The Supreme Court in *PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited*[53] has authoritatively ruled that there is no bar on two Indian parties agreeing to a foreign-seated arbitration and this would not bar the parties from seeking interim reliefs under Section 9 of the Arbitration Act. The Court in this ruling also seems to have opened the gates for Indian parties to even agree to the substantive law of the contract being foreign law. However, the Court has also clarified that merely by agreeing to foreign substantive law, parties cannot dodge Indian law and issues arising in this regard may be adjudicated by the arbitrator in accordance with applicable conflict of law principles. The Court further clarified that should the provisions of Indian law be violated, the foreign award can also be challenged under the ground of public policy as provided under Section 48(2) (a) of the Arbitration Act.

The Arbitration Act requires an arbitrator to disclose in writing any circumstances relating to his or her impartiality and independence, and contains an exhaustive list[54] of

46 *Cheran Properties Limited v. Kasturi and Sons Limited* (2018) 16 SCC 413.

47 *Mahanagar Telephone Nigam Limited v. Canara Bank* (2020) 12 SCC 767.

48 *Shapoorji Pallonji and Co Pvt Ltd. v. Rattan India Power Ltd & Anr*, 2021 SCC OnLine Del 2875.

49 *MSM Satellite v. World Sport Group* (2014) 1 SCC 58.

50 *Brahmani River Pellets Ltd v. Kamachi Industries Ltd* AIR, 2019 SC 3658.

51 *BGS SGS SOMA JV v. NHPC Ltd*, 2019 (17) SCALE 369.

52 *Inox Renewables Ltd v. Jayesh Electricals Ltd*, 2021 SCC OnLine SC 448.

53 2021 SCC Online SC 331.

54 The Fifth and Seventh Schedules of the Arbitration Act, 1996.

grounds, including direct, indirect, past and present relationship with the subject matter or parties or counsel to the dispute, be it financial, business, professional or personal, among other types of relationships. Significantly, the Apex Court has held that a party having a financial interest in an arbitration is barred from unilaterally appointing an arbitrator.[55] The Supreme Court has also recently held that Section 12(5) read with the Seventh Schedule of the Arbitration Act is a mandatory and non-derogable provision of the Act.[56] However, the Bombay High Court has recognised:

> *Under Explanation 3 to the Fifth Schedule, maritime or commodities arbitration may draw arbitrators from a small, specialised pool, in which case it is the custom and practice for parties to appoint the same Arbitrator in different cases.*[57]

As per the 2019 amendment to the Act, pleadings are required to be completed within six months from the date on which written notice of appointment is served on the arbitrators.[58] An arbitrator is mandatorily required to dispose of the reference within one year from the period of completion of pleadings in domestic arbitrations, while this period is merely a direction for international commercial arbitrations.[59]

Following the 2015 amendment, the Arbitration Act, has introduced fast-track arbitration, or document-only arbitration (with the consent of both parties), which, inter alia, entails that the tribunal would consist only of a sole arbitrator, the award being passed by the tribunal merely by reviewing documents without an oral hearing and the arbitrator being under obligation to pass and publish its award within six months of its reference.

In the event that the arbitration proceeding is an 'international commercial arbitration' seated in India (i.e., when one of the parties to the arbitration is a foreign party), the scope of interference by Indian courts would be limited and similar to the threshold of deciding the award debtor's application to resist the enforcement of a foreign arbitral award in India whereby the Indian court is precluded from setting aside the Indian-seated arbitral award on the ground of 'patent illegality'. However, the 2019 amendment to the Arbitration Act in the context of domestic arbitrations has provided that should an arbitration agreement or the making of the award be induced by fraud or corruption and the concerned court is prima facie satisfied of the same, then the court shall unconditionally stay the execution of the award.[60]

Insofar as domestic arbitrations are concerned, under the Arbitration Act, the fact that the award debtor has filed an application to challenge or set aside the award does not in itself amount to a stay on the execution of the award by the award holder.[61] To obtain a stay on execution, the award debtor would need to file a separate application for such a stay under Section 36(3) of the Arbitration Act. The Supreme Court of India has further clarified this position by holding that the amended Section 36 of the Arbitration Act has retrospective effect, and thereby the automatic stay as envisaged under the old Section 36 no longer applies

55 *Perkins Eastman Architect DPC v. HSSC (India) Ltd*, 2019 SCC OnLine SC 1517.

56 *Haryana Space Application Centre (HARSAC) and Another v. M/s Pan India Consultants Pvt Ltd* (2021) 3 SCC 103.

57 *Sawarmal Gadodia v. Tata Capital Financial Services Limited and Ors*, Arbitration Petition No. 560 of 2019.

58 Section 23 of the Arbitration Act, 1996.

59 Section 29A of the Arbitration Act, 1996.

60 Section 36(3) of the Arbitration Act, 1996.

61 Section 36(2) of the Arbitration Act, 1996.

to any pending application challenging the award under Section 34 of the Arbitration Act.[62] As a general rule, a court would pass an order staying the execution of the award, conditional on the party seeking the stay furnishing security for 50 per cent of the value of the award. That said, should a party make out a strong, exceptional and overwhelmingly compelling case for not furnishing a security, the court may not order security to be furnished.[63]

The Division Bench of the Delhi High Court, in its judgment of *Shakti Nath v. Alpha Tiger Cyprus Investment No. 3 Ltd*,[64] upheld the findings of the court of first instance, which upheld the legal costs awarded by the arbitral tribunal in excess of US$1 million. On the issue of fees of the arbitral tribunal, the Supreme Court in the case of *ONGC v. Afcons Gunanusa JV*[65] has observed that arbitrators cannot unilaterally issue binding orders determining its fees.

Under the Indian Stamp Act 1899 and legislation in every state of India regulating the payment of stamp duty such as the Maharashtra Stamp Act 1958, legal instruments and contracts require the payment of stamp duty levied by the local state government for these documents to be enforceable in a court of law. Stamp duty is required to be paid, inter alia, on shipping contracts such as charter parties, bills of lading, indemnity bonds, delivery orders, protest of the master of ship and agreements that create a hypothecation or pledge over the goods. In this regard, in a recent 3:2 opinion the Constitution Bench of the Supreme Court, in the case of *NN Global Mercantile Private Limited v. Indo Unique Flame Ltd & Ors* (Civil Appeal Nos 3802-3803 of 2020, judgment dated 25 April 2023) (*NN Global*), conclusively held that an arbitration agreement contained in an instrument that is liable to stamp duty is non-existent in law unless the agreement is validated under the Stamp Act and this would make it unenforceable. The Court has, however, clarified that this observation was not pronounced in relation to Section 9 of the Arbitration Act, which provides for interim relief in aid of arbitral proceedings. This decision was passed in the context of an application seeking appointment of an arbitrator. The decision may arm erring litigants in creating more roadblocks in arbitral proceedings. In the context of a foreign seated arbitration, the Andhra Pradesh High Court has granted interim relief on an unstamped agreement.[66]

iii Enforcement of foreign arbitral awards and foreign judgments

Enforcement of arbitral awards under New York Convention or Geneva Convention

Although the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the New York Convention) has also been incorporated into the Arbitration Act, a foreign arbitral award can be enforced in India only if the government declares the country in which the award was passed to be a 'reciprocating territory' under Section 44 or 53 of the Arbitration Act. However, should a notified country be subsequently divided or disintegrated, the award from the new territory (even though the same is not notified) can be enforced as per the Arbitration Act.[67] A foreign award holder seeking to enforce an award in India would have to apply to the court, within whose jurisdiction the award debtor has

62 *Board of Control for Cricket in India v. Kochi Cricket Private Limited & Ors* (2018) 6 SCC 287.

63 *Kishore Shah and Ors v. Urban Infrastructure Trustees Ltd)*, Commercial Arbitration Petition No. 1435 of 2019, judgment dated 14 December 2020.

64 2017 (5) ArbLR 112 (Delhi).

65 2022 SCC Online SC 1122.

66 *VR Commodities Private Limited v. Norvic Shipping Asia Pte Ltd* (ICOMAA No. 1 of 2022, judgment dated 5 May 2022).

67 *Transocean Shipping Agency Pvt Ltd v. Black Sea Shipping & Ors* (1998) 2 SCC 281.

its assets, to enforce the foreign award.[68] Presently, there is no requirement to convert the foreign award into a judgment of the Indian court by way of separate proceedings and the party seeking to enforce a foreign award can directly initiate consolidated proceedings for enforcement and execution to liquidate the assets of the award debtor.[69] Proceedings for enforcement of foreign awards may be filed in more than one court.[70] Enforcement and execution proceedings can be initiated in India by placing on record the following documents before the Indian court:

a the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

b the original agreement for arbitration or a duly certified thereof; and

c this evidence as may be necessary to prove that the award is a foreign award. In this regard, generally an affidavit from a lawyer from the country in which the foreign award was passed stating that the foreign award is final and binding as a matter of the laws in that jurisdiction and confirming that there is no appeal against the award pending in that jurisdiction is sufficient.

The Supreme Court in *PEC Limited v. Austbulk Shipping SDN BHD*[71] held that the word 'shall' appearing in Section 47 of the Arbitration Act has to be read as 'may', and thus the need for producing the original award or the original arbitration agreement or its certified copy is not mandatory at the time of filing proceedings for enforcement of an arbitral award. Furthermore, the Apex Court in its latest judgment of *Gemini Bay Transcription P Ltd v. Integrated Sales Service Ltd*[72] has settled that all the requirements of Section 47 of the Arbitration Act are procedural in nature and aimed at satisfying the enforcing court that the award is a Foreign Award, as defined and enforceable against the persons bound by it.

The award debtor can resist the enforcement of the foreign award on the grounds of objections enumerated in the New York Convention, which are reproduced under Section 48 of the Arbitration Act. The Supreme Court in Government of *India v. Vedanta Limited and Ors*[73] (the *Vedanta* judgment) restated the scenarios under which the enforcement of an award may be refused being, inter alia:

a the award being passed in 'violation of procedural due process in the conduct of the arbitral proceedings' in observing procedural fairness that 'constitutes a fundamental basis for the integrity of the arbitral process' since 'fair and equal treatment of the parties is a non-derogable and mandatory provision'; and

b the award is 'in conflict with the basis notion of justice, or in violation of the substantive public policy of India', that is, the award is tainted by 'corruption or fraud, or undue means'.

The burden is on the person resisting enforcement to show that the case comes within Section 48(1) or (2) of the Arbitration Act, failing which the award must be enforced.[74] The Supreme

68 *Bharat Aluminium Co v. Kaiser Aluminium Technical Services* (2012) 9 SCC 552.

69 *Fuerst Day Lawson Ltd v. Jindal Exports Ltd* (2001) 6 SCC 356.

70 *NCC Infrastructure Holdings Ltd and Anr v. TAQA India Power Ventures Pvt Ltd* (Arb OP Nos. 410 and 412 of 2021, judgment dated 11 January 2023).

71 2018 SCC Online SC 2549.

72 (2022) 1 SCC 753.

73 2020 SCC Online SC 749.

74 Supra 66.

Court in the *Vedanta* judgment clarified that in light of the usage of the phrase 'may be refused' in Section 48 of the Arbitration Act, a court would, where a party against whom the award is being enforced is able to establish one or more grounds or objections under Section 48 to refuse enforcement, retain a residual jurisdiction to overrule such objections where such 'grounds for refusal concerns a minor violation of the procedural rules applicable to the arbitration, or if the ground for refusal was not raised in the arbitration' or where the violation is not grave in nature to prevent enforcement in international relations.

One commonly used ground under Section 48 of the Arbitration Act was on the issue of public policy, where the award debtor would seek to argue again the underlying issues of the arbitration proceedings on merits, and there was a plethora of cases in which the courts reconsidered their merits. However, there were two landmark judgments of the Supreme Court in 2015,[75] in which the scope of public policy was clarified. Subsequently, the 2015 amendment to Section 48 of the Arbitration Act included an explanation that clarified that 'for the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian Law shall not entail a review on the merits of the dispute'.

The 2015 amendment to Section 48 further clarified that a foreign award would fall foul of the India's public policy only if:

a there was fraud or corruption involved in the making of the award;
b it was in contravention of the fundamental policy of Indian law; or
c it was in conflict with the most basic notions of morality and justice.

Therefore, the courts have been more restrictive in allowing the reopening of any issues on merits. The Supreme Court in *Vijay Karia and Ors v. Prysmian Cavi E Sistei SRL*[76] endeavoured to settle this position of law by observing that the grounds mentioned under Section 48 can be segregated into three groups being those affecting the jurisdiction of the arbitration proceedings, grounds affecting the party interest alone and grounds that go to the public policy of India. Furthermore, the Supreme Court in *Centrotrade Minerals v. Hindustan Copper*[77] has held that a party is 'otherwise unable to present his case' under Section 48(1)(b) only if it has not been given an opportunity to present its case through circumstances outside the party's control. However, the Supreme Court may have slightly undone the good with its subsequent pronouncement in the case of *NAFED v. Alimenta SA*[78] wherein it held a foreign award to be unenforceable, based on the finding that the transactions contemplated under the underlying agreement were in violation of Indian law and therefore fell foul of the public policy of India.

The Supreme Court in the *Vedanta* judgment[79] has now clarified that the period of limitation for filing enforcement or execution of a foreign award Section 47 of the Arbitration Act would be covered under the residuary provision being Article 137 of the Limitation Act, 1963, which prescribes a period of three years from when the right to apply accrues.

Indian courts are prone to adopting a commercial approach in refusing to allow an Indian party to take advantage of its own wrong and avoid a contract; for example, in

75 *Oil and Natural Gas Corporation v. Western Geco International Ltd* (2014) 9 SCC 263 and *Associate Builders v. Delhi Development Authority* (2015) 3 SCC 49.

76 2020 SCC OnLine SC 177.

77 2020 SCC OnLine SC 479.

78 *NAFED v. Alimenta SA*, 2020 SCC Online SC 381.

79 Supra 67.

circumstances such as issuing guarantees for overseas companies that do not comply with Indian foreign exchange regulations.[80] In their judgments involving shipping disputes, the Bombay and Calcutta High Courts held that a party is estopped from raising challenges to the foreign arbitral award at the time of its enforcement in India on the grounds of the existence of a valid and enforceable arbitration agreement, when it has chosen not to appeal against the award before the appropriate court in the country where the arbitration had been seated.[81]

Enforcement of foreign judgments in India

A foreign judgment can only be enforced in India as if it were a decree of an Indian court if it has been passed in a reciprocating territory declared by the Indian government[82] subject to the decree holder establishing that the foreign decree satisfies the requirements of Section 13 of the CPC. Foreign jurisdictions such as the United Arab Emirates and Australia are not 'reciprocating territories' and a party seeking enforcement of a judgment passed in a court in these territories would have to file a substantial lawsuit in India on the cause of action stemming out of the judgment passed by the foreign court in the non-reciprocating territory. Furthermore, only a foreign 'decree' (i.e., a final judgment on the underlying merits of the case) can be enforced in India and not an interim order. Courts in India have the right to examine whether a foreign judgment has been given on the merits.[83] In these circumstances, it would appear that interim or interlocutory orders of freezing or *Mareva* injunctions passed by foreign courts are not enforceable in India. However, an *ex parte* judgment may be executed provided the defendant was served and the foreign court duly tried the claim.[84]

The Supreme Court of India in *Bank of Baroda v. Kotak Mahindra Bank Limited*[85] has clarified that the period of limitation for executing a foreign decree, under Section 44A of the CPC, passed by a superior court of a reciprocating territory (cause country) will be the limitation prescribed under the laws of the cause country. Once the period of limitation prescribed in the cause country is over, no execution proceedings can be filed in India. Where the execution proceedings are initiated in India pursuant to the decree passed in the cause country, the limitation period for such proceedings shall be governed by Article 137 of the Limitation Act, 1963 (three years from the date of finalisation of execution proceedings in the cause country).

While the Gujarat High Court in *MV Cape Climber v. Glory Wealth Shipping Pvt Ltd*[86] has allowed the enforcement of a London arbitral award that has subsequently been converted into a judgment of the English High Court (as a decree of that court), the Delhi High Court, in *Marina World Shipping Corporation Ltd v. Jindal Exports & Imports Private Ltd*[87] rejected this approach and held that a London arbitral award can only be enforced in India under the Arbitration Act and not as an English judgment under the CPC. The Bombay High Court

80 *Intesa Sanpaolo SPA v. Videocon Industries Ltd*, 2014 SCC Online Bom. 1276.

81 *Mitsui OSK Lines Ltd (Japan) v. Orient Ship Agency Pvt Ltd* (India), Arbitration Petition No. 842 of 2009 and *Aurelia Reederei Eugen Friederich GmbH v. POL India Projects Limited*, Arbitration Petition 12 of 2012; *Sifandros Carrier Ltd v. LMJ International Ltd*, 2018 SCC OnLine Cal 7146.

82 Section 44A of the Code of Civil Procedure, 1908.

83 *International Woollen Mills v. Standard Wool (UK) Ltd*, AIR 2001 SC 2134.

84 *TransAsia Private Capital Limited v. Gaurav Dhawan* (ExP Mo. 37 of 2021, judgment dated 6 April 2023).

85 Civil Appeal No. 2175 of 2020 (judgment rendered on 17 March 2020).

86 Civil Application (OJ) No. 250 of 2015.

87 2007 (3) ARBLR 46 Delhi.

in *Marine Geotechnic LLC v. Coastal Marine Construction & Engineering Ltd*[88] held that a foreign judgment could in principle be directly enforced in India by way of bankruptcy or winding-up proceedings strictly subject to the decree holder establishing that the foreign decree satisfies the requirements of Section 13 of the CPC. It has been recently clarified by the National Company Law Tribunal, Cuttak Bench in the matter of *Jaldhi Overseas Pte Limited v. Steer Overseas Private Limited*[89] that a foreign award in itself is not sufficient to initiate insolvency proceedings against the coprorate debtor under the Insolvency and Bankruptcy Code, 2016.

IV SHIPPING CONTRACTS

Under Indian law, as a general rule of contractual construction, an attempt must be made to reconcile the relevant terms of a contract if possible and not treat any term as idle surplusage.[90] Indian courts have held that if a party seeks to invoke a termination clause in the contract, it is incumbent upon the party to strictly follow the procedural requirements stipulated in the contract to effect a valid termination.[91]

i Shipbuilding

As of 2021, there are about 28 shipyards in India[92] and about 33 dry docks for ship repairs. Presently, the Indian shipbuilding industry can be broadly divided into the following three categories:

a large ocean-going vessels catering to overseas as well as coastal trade;
b medium-sized specialised vessels, such as port crafts, fishing trawlers, offshore vessels, inland and other smaller crafts; and
c defence or naval crafts and coast guard vessels.

India extensively overhauled its Foreign Direct Investment policy in 2018, thereby allowing 100 per cent foreign direct investment into ports and shipping in India through the automatic route. In order to provide a boost to the Indian government's 'Make in India' campaign, various state maritime boards offer building parks and plots adjacent to coasts on concessional terms for the purposes of shipbuilding in India. The Indian government has also launched a 'Shipbuilding Financial Assistance Policy' with an aim to provide financial assistance to Indian shipyards for shipbuilding contracts signed between 1 April 2016 and 31 March 2026. The financial assistance will be 20 per cent of the 'contract price' or 'fair price', whichever is lower, as determined by international valuers,[93] for any vessel constructed and delivered in India within a period of three years from the date of contract. However, an

88 Company Petition No. 67 of 2013.
89 2021 SCC OnLine NCLT 490.
90 *Tiruvenibai v. Lilabai*, AIR, 1959 S.C. 620.
91 *Base International Holdings NV Hockenrode 6 v. Pallava Hotels Corporation Ltd*, 1999 PTC (19) 252.
92 Annual Report 2020–21, Government of India Ministry of Ports, Shipping & Waterways, at the link https://shipmin.gov.in/sites/default/files/AnnualReport2021_0.pdf (last accessed on 8 April 2022).
93 Schedule III to the Guidelines for implementation of Shipbuilding Financial Assistance Policy (SBFAP), 2016.

exception has been provided for specialised vessels[94] wherein the time period of construction and delivery can be increased to a maximum of six years by the DG Shipping. A dedicated online platform has also been launched for this purpose.[95]

A shipbuilding contract providing for Indian law would be governed by the Indian Contract Act, 1872[96] and the Indian Sale of Goods Act, 1930.[97] The Indian Sale of Goods Act, 1930 is based on and largely a reproduction of the English Sale of Goods Act, 1893 and the principles of the law of sale of goods in both the countries are similar.[98]

The shipbuilding industry is subject to goods and service tax (GST), which subsumes the earlier levy of value added tax (VAT), central sales tax (CST), excise duty, octroi and service tax, among other taxes. Customs duty, customs bonds, cost clearing and forwarding excise, foreign income tax and taxes by ancillary units and subcontractors are charged separately. GST at 5 per cent is applicable on all design and engineering services procured by the shipyards during the course of ship construction. It is important to ensure that any shipbuilding contract with an Indian counterparty is governed by Indian law and jurisdiction has clear demarcations of the liability on each party, for the payment of taxes imposed by the Indian authorities.

ii Specific Relief Act, 1963

India recast the law relating to specific performance of contracts from an equitable and discretionary remedy to be exercised in limited circumstances to a statutory remedy. The new regime provides for only four exceptions wherein the specific performance of a particular contract would not be directed by the courts, namely:

a a case of 'substituted performance';
performance of a continuous duty that the courts cannot supervise;

b a contract heavily dependent on the personal qualifications of the contracting parties; and

c contract of a determinable nature.[99]

Unlike under the old regime, it is now no longer impossible to obtain an order directing specific performance of a contract, for the non-performance of which compensation is an adequate relief. In fact, under the new regime, a court, even after granting specific performance, can additionally grant a certain amount of compensation.

Indian courts would not be able to pass an order of injunction if it would likely impede the completion of specific infrastructure projects, which, inter alia, include capital dredging of ports and other operations in ports, shipyards (including a floating or land-based facility with the essential features of waterfront, turning basin, berthing and docking facility, slipways

94 Schedule II to the Guidelines for implementation of Shipbuilding Financial Assistance Policy (SBFAP), 2016.

95 The online platform in respect of shipbuilding is accessible at https://www.shipbuilding.nic.in/ (last accessed on 8 April 2022).

96 The text of the Act can be accessed by clicking on the link https://www.indiacode.nic.in/bitstream/123456789/2187/1/A1872-9.pdf (last accessed on 8 April 2022).

97 The text of the Act can be accessed by clicking on the link https://www.indiacode.nic.in/bitstream/123456789/2390/1/193003.pdf (last accessed on 8 April 2022).

98 *Consolidated Coffee Ltd v. Coffee Board*, Bangalore (1980) 3 SCC 358.

99 Section 14 of the Specific Relief Act, 1963 (as amended).

or ship lifts, and which is self-sufficient for carrying on shipbuilding, repair or breaking activities), inland waterways, oil pipelines, oil, gas or liquefied natural gas storage facilities (including strategic storage of crude oil).

iii Contracts of carriage

The following are legislation and principles of law applicable to contracts of carriage.

The Indian Carriage of Goods by Sea Act, 1925

The Indian Carriage of Goods by Sea Act, 1925 (the Indian COGSA), in its Schedule, incorporates the Hague Rules. In 1993, India amended the COGSA and included certain provisions of the Hague-Visby Rules. Significantly, the legislation increased the limits as prescribed in the Hague-Visby Rules. However, the Hague-Visby Rules do not, in themselves, have the force of law in India.

The Indian COGSA is applicable to outward cargo (i.e., ships carrying goods from Indian ports to foreign ports or between ports in India) and does not apply to inward cargo (i.e., ships carrying goods from foreign ports to Indian ports). In *Shipping Corporation of India Ltd v. Bharat Earth Movers Ltd*,[100] the Supreme Court of India had to determine whether the Indian COGSA or the Japanese Carriage of Goods by Sea Act, 1992 (the Japanese COGSA) applied in a case involving goods carried from Japan to India. The Court held that the Indian COGSA did not apply to inward shipments and chose to apply the Japanese COGSA. In another case concerning the Indian COGSA, the Supreme Court clarified that for the Indian COGSA to become applicable, the port of loading has to be in India.[101] The courts have also allowed carriers to take defences enumerated under Article IV of the Hague Rules (e.g., fire).[102]

The limitation period under the Indian COGSA is one year, unlike the general limitation period of three years provided under the Limitation Act 1963. The Multimodal Transport Act, 1993 applies to multimodal transportation of cargo from any place in India to a place outside India using two or more modes of transport.

The Indian Contract Act, 1872

Charter party contracts are governed by the Indian Contract Act, 1872 and common law principles derived from various jurisdictions. This is the position in the absence of any provision in the contract whereby a different substantive law applies to the contract.

Sections 73 to 75 of the Indian Contract Act, 1872 deal with the measure of damages to which the claimant may be entitled, arising out of the counterparty's breach of contract. In the case of liquidated damages, there appears to be a slight divergence between Indian and English law. Indian courts have held that in the absence of loss, a claimant is unlikely to be awarded liquidated damages. In their interpretation of Section 74 of the Indian Contract Act,

100 (2008) 2 SCC 79.

101 *British India Steam Navigation Co Ltd v. Shanmughavilas Cashew Industries and Ors* (1990) 3 SCC 481.

102 *Collis Line Private Ltd v. New India Assurance Co Ltd*, AIR, 1982 Ker 127.

1872, Indian courts have taken the view that clauses in a contract providing for liquidated damages are enforceable only if it is impossible to compute the loss resulting from the breach of a contract, subject to the same not being a penalty clause.[103]

Liens

If cargo is to be discharged at a port designated as a major port, a shipowner may be able to exercise a statutory lien over the cargo shipped on board the vessel for claims of outstanding freight and other charges payable to the shipowner.[104] Certain ports in the ownership of the state government, such as Gujarat, have similar provisions enabling a shipowner to exercise a statutory lien over the cargo.[105] Notice of such a lien must be served upon the consignee and the concerned port authority before the discharge of the cargo from the vessel.

Other than the right of lien under the Major Port Trust Act, 1963 – now the Major Port Authorities Act, 2021 (addressed in detail below) – as above, the question of whether an owner has the right of lien against the charterers and the cargo interests will depend upon the lien clauses in the charter party, in the bill of lading and the incorporation clause in the bill of lading.

A shipowner can also, in principle, exercise a possessory lien over the cargo by refusing to discharge the same in the event that the party liable to pay the shipowner's dues is the owner of the cargo. The exercise of a possessory lien over cargo owned by third-party cargo interests may potentially expose the vessel to claims under the bills of lading contract.

iv Cargo claims

India does not have an equivalent of the English Carriage of Goods by Sea Act, 1992, but rather follows a colonial legislation – the Indian Bills of Lading Act, 1856. The Madras High Court in *MT Titan Vision v. 3F Industries Ltd*[106] and the Gujarat High Court in *MG Forest Pte Ltd v. MV Project Workship*,[107] in their interpretation of Section 1 of the Indian Bills of Lading Act 1856, held that only a named 'consignee' or 'endorsee' would have the right in India to initiate a cargo claim against the carrier under the bill of lading contract. In these circumstances, it can be argued that the consignee 'assumes only those rights and liabilities created by the contract of carriage that concern the carriage and delivery of the goods, and the payment therefor' so that, for example, the consignee would not be liable for the consequences of the shipment of dangerous cargo. To incorporate an arbitration or dispute resolution clause, the bill of lading will be required to specify that the arbitration or dispute resolution clause is incorporated.[108]

In *British India Steam Navigation Co Ltd v. Shanmughavilas Cashew Industries*,[109] the Supreme Court of India expressed the opinion that a consignee or an endorsee may be bound by the terms of the charter party terms incorporated into the bill of lading contract even when the consignee or endorsee is unaware of those terms. The Bombay High Court, in

103 *Fateh Chand v. Balkishan Dass*, AIR, 1963 S.C. 1405; *Oil & Natural Gas Corporation Ltd v. Saw Pipes Ltd*, 2003(5) SCC 705.

104 Section 29 of the Major Port Authorities Act, 2021.

105 Section 48 of the Gujarat Maritime Board Act, 1981.

106 (2014) 2 MLJ 154.

107 Misc Civil Application No. 187 of 2003 in Admiralty Suit No. 14 of 2003.

108 *MV 'Baltic Confidence' v. The State Trading Corporation of India Ltd* (2001) 7 SCC 473.

109 (1990) 3 SCC 48.

its judgment in *M/s Assobhai Bhanji and Sons v. Great Circle Shipping Pvt Ltd*,[110] allowed a shipper's claim against a carrier for delivering cargo without production of the bill of lading even though the bill of lading had been made out 'to the order of a named consignee'.

v Interest

Indian courts have the power to pass judgments in foreign currency.[111] As a general rule, for commercial transactions, courts award interest at the rate at which monies are lent or advanced by nationalised banks.[112] The Appeal Court of the Bombay High Court has held that an Indian arbitral tribunal can award interest at the rate of 9 per cent per annum on a claim in US dollars.[113] However, the Supreme Court in *Vedanta Ltd v. Shenzen Shandong Nuclear Power Construction Co Ltd*[114] held that a high rate of interest on foreign currencies would be punitive in nature, and reduced the rate of interest awarded by the arbitrator to LIBOR plus 3 per cent. Additionally, the Supreme Court in *Delhi Airport Metro Express v. Delhi Metro Rail Corporation*[115] clarified that the discretion to grant interest is available to the arbitral tribunal only in the absence of any agreement to the contrary. However, the Calcutta High Court has ruled that the award of future or post-award interest is mandatory.[116]

In *Forysthe Trading Services Ltd v. MV Niizuru*,[117] the contract between the bunker supplier and the shipowner provided for interest of 20 per cent per annum for late payment. The Bombay High Court disregarded the interest rate stipulated in the bunker supply contract and awarded interest of only 8 per cent per annum.

The Supreme Court has held that a tribunal's award may be inclusive of interest and the sum of the principal amount plus interest may be directed to be paid by the tribunal for the pre-award period.[118]

vi Limitation of liability

Carriers can limit their liability for cargo claims by way of 'package limitation' and 'kilo limitation' pursuant to the Indian COGSA and the Multimodal Transportation Act, 1993. A party seeking to limit liability under the LLMC Convention, 1976 can initiate limitation proceedings by filing an admiralty suit in the High Court.

Section 352(b) contained in Part XA of the MSA provides that 'the Convention on Limitation of Liability for Maritime Claims, 1976 as amended from time to time' has the force of law in India. The Merchant Shipping (Limitation of Liability for Maritime Claims) Amendment Rules, 2015 (the 2015 Rules), which came into force on 16 February 2015, gives effect to the 1996 Protocol of the 1976 LLMC. Under the 2015 Rules, a different unit of account applies to 'Indian ships intended for navigation in or around the coast of

110 (2018) 2 AIR Bom R 252. However, this judgment is pending appeal.

111 *Forasol v. Oil & Natural Gas Commission*, 1984 SCR (1) 526; and *Forysthe Trading Services Ltd v. MV 'Niizuru'*, 2004 (5) Bom CR 806.

112 Section 34 of the Code of Civil Procedure, 1908.

113 *Steel Authority of India Ltd v. Pacific Gulf Shipping Co Ltd*, Appeal No. 391 of 2013.

114 (2018) SCCOnLine 1922.

115 2022 SCC Online SC 549.

116 *Future Market Networks Limited v. Laxmi Pat Surana & Anr* (IA GA 1 of 2022, judgment dated 28 April 2022).

117 2004 (5) Bom CR 806. See footnote 59.

118 *Hyder Consulting Ltd v. State of Orissa* (2015) 2 SCC 189.

India' than to foreign-going vessels. The Merchant Shipping (Limitation of Liability for Maritime Claims) Amendment Rules, 2017 (the 2017 Rules), which came into force on 21 February 2017, gave effect to the 2012 amendments to the 1976 LLMC. However, the 2017 Rules do not apply to coastal trade. This would imply Indian-flagged vessels having a licence only to trade along the coast of India would follow the 1996 Protocol to the 1976 LLMC, whereas seagoing vessels would follow the 2012 amendments to the 1976 LLMC. The amended rates are applicable to incidents that take place subsequent to the amendment coming into force.

The High Court of Bombay held that a shipowner's right to limit liability under Part XA of the MSA is absolute and without reference to any proof of loss resulting from a personal act or omission of the shipowner.[119] The Bombay High Court in another recent case has supported its previous decision and held that the inquiry would be restricted to the question as to whether the application satisfies the conditions set out in the Merchant Shipping Act, 1958 (Section 352 A).[120] These decisions are, therefore, likely to make India a favourable jurisdiction for constituting a single worldwide limitation fund, without any prior claim being initiated. However, Section 352 E of the MSA sets out the scope of application of Part XA of the Act, and states that if the vessel in relation to which the limitation of liability is sought to be invoked is flagged in a country that is not party to the LLMC Convention, the provisions of Part XA of the MSA will not apply and the LLMC Convention provisions will stand excluded. Interim limitation funds are not permissible under Indian law.

The CLC Convention, as amended from time to time, has been incorporated under Part XB of the MSA. A party seeking to limit liability can file an action in the admiralty court.[121] Security in the form of cash or bank guarantee is permissible.

V REMEDIES

i Admiralty actions in India

Admiralty law in India has been codified as of 1 April 2018 with the coming into force of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 (the Admiralty Act). The brief ramifications of the Admiralty Act are as follows:

a the Bombay and Calcutta High Courts no longer exercise pan-India jurisdiction and each high court of a coastal state in India only has jurisdiction over vessels within its own territorial waters;

b Indian ships are amenable to orders of arrest, except vessels owned or operated by the government of India and vessels registered under the Inland Vessels Act, 1917. However, the Court of Appeal of the High Court at Calcutta has upheld the observation of the

119 *Murmansk Shipping Company v. Adani Power Rajasthan Ltd & Ors*, Admiralty Suit No. 43 of 2012 (decided on 8 January 2016).

120 *Ms MV Nordlake GmbH v. Union of India and Ors*, Notice of Motion No. 41 of 2017 in Comm Admiralty Suit No.14 of 2014.

121 For an Indian-registered ship, in the high court of the state in whose port the vessel is registered, or where the incident occurs. For foreign ships, at the port or place within the territorial waters of which the vessel is present.

Court of First Instance that if the vessel has dual registration- under the Inland Vessels Act, 1917 as well as the Merchant Shipping Act, 1958, the vessel would be amenable to arrest;[122]

c the Bombay High Court, while dealing with the application to vacate an order of arrest on the ground that the vessel was an inland vessel, clarified that even if the vessel is registered under the Inland Vessels Act, 1917, the applicability of the Admiralty Act cannot be discounted unless it can be shown that the vessel ordinarily plied only inland waters. The court also further held that matters of proving or disproving the nature of voyages conducted by the vessel would be a matter of trial and cannot be decided at the interim stage;[123]

d a claimant can arrest a vessel to enforce a judgment or order;

e an express stipulation of the limited cluster of claims that are classified as 'maritime liens' bring much-needed clarity to the rather nebulous notion of whether claims for supply of necessities to a vessel give rise to a maritime lien;

f express stipulations on the priority of claims or the hierarchy of various clusters of creditors over a vessel seeking to assert an *in rem* action against a vessel that includes an express stipulation of priorities of various creditors seeking to assert a maritime lien;

g an expansive definition of a 'vessel' that can be subject to an order of arrest;

h a plaintiff may arrest a vessel for any defined 'maritime claim' as listed in the 1999 Arrest Convention;

i the right of a plaintiff to arrest a vessel other than a vessel against which a maritime claim has arisen is subject to the fulfilment of certain conditions;

j there is an express right of a plaintiff to initiate a pure action in personam for a 'maritime claim' beyond the scope of an action *in rem*;

k the appointment of nautical assessors to assist the admiralty court to deal with technical or nautical matters;

l an express provision authorising the admiralty court to sell the vessel by way of a judicial auction free of all encumbrances, liens, attachments, registered mortgages and charges. However, this does not mean that the rates applicable to the dues after the sale to the new buyer may not attract rates prior to the sale;[124]

m a defined time period of one year after which maritime liens would expire, except for seafarers' wages, which expire after two years;

n the courts have been empowered to impose on a claimant, either as a condition to obtain an arrest or to maintain the order of arrest, an obligation to provide an undertaking to pay damages or furnish security for damages, for any loss or damage to the shipowner as a result of a wrongful arrest or excessive security having been demanded;

o express power to the Indian central government to publish rules under the Admiralty Act;

p all pending applications in any admiralty court will be decided in accordance with the Admiralty Act;

122 *Jindal ITF Limited & Anr v. I-Marine Infratech (India) Pvt Ltd* (APO 160 of 2020, GA 1 of 2020, AS 5 of 2020 before the Calcutta High Court.

123 *MV Lima V and Ors v. Coastal Marine Construction and Engineering Ltd*, Interim Application No. 105 of 2022 in Comm Admiralty Suit No. 82 of 2021.

124 *NKD Maritime Limited v. Board of Trustees of the Port of Mumbai and Ors*, 2022 SCC Online 1272.

q the Admiralty Act is silent on whether property other than ships, such as bunkers, cargo and freight, is amenable to an order of arrest without an underlying cause of action being made out against a vessel;

r the Bombay High Court in a recent judgment held that the vessel sought to be arrested needs to be a party to the suit as the jurisdiction arises by virtue of the vessel being in the jurisdiction of the court, and the court will not entertain the arrest of a vessel in an *in personam* proceeding, nor can the vessel be detained by way of an injunction to circumvent the provisions of the Admiralty Act;[125] and

s the Bombay High Court, while dealing with an argument on whether the interest and costs associated with crew wages would have the same priority as the crew wages themselves, held that if a decree is for crew wages, it cannot be dismembered into distinct parts and, therefore, holds the same priority as that of the crew wages.[126]

The high courts of Kerala, Madras (Tamil Nadu), Calcutta and Bombay have notified new Admiralty Rules through the respective state governments, governing admiralty actions in those courts. The Bombay High Court Admiralty Rules[127] permit the arrest of cargo in place of a ship, in a suit for salvage, if there is a claim against the cargo onboard the ship or onshore.

The Bombay High Court in the case of Flag Mersinidi[128] rejected the notion that a bunker supply contract could be given the recognition of a maritime lien, if the governing law of the bunker supply contract recognises a maritime lien for bunkers supplied to a vessel. The Court had refused to apply American law, which was the governing law of the bunker supply contract and applied Indian law as the lex fori.

The Supreme Court of India held that a claim for necessaries supplied to a vessel would constitute a maritime claim against a vessel and not a maritime lien.[129] The judgment further stated that 'arrest of a foreign ship for a maritime claim is permissible only if there is no change of ownership between the date of claim and date of arrest'.

Arrests can be moved *ex parte*, unless there is a caveat against arrest filed up to a reasonable contemplation of the claim with an undertaking to furnish security for the claim amount. India follows the English case of The Moschanthy[130], based on which a claimant can sustain an order of arrest over a vessel merely by making out a reasonably 'best arguable' case.[131] The Division Bench of the Kerala High Court has clarified that even though an admiralty suit for damages can be filed for any amount the plaintiff desires, the owner of the ship cannot be asked to furnish excessive security for an unrealistic amount, having no proximity with the actual loss.[132]

125 *Angsley Investments Limited v. Jupiter Denizcilik Tasimacilik Mumessillik*, San Appeal No. 902 of 2006 in Admiralty Suit No. 15 of 2001.

126 *Slovesnov Vadym & Ors v. OSV Beas Dolphin Interim Application*, (L) No. 9499 of 2020 in Comm Admiralty Suit 30 of 2022.

127 Chapter LX of the Bombay High Court Original Side Rules, 1980, Rules for Regulating the Procedure and Practice in Cases Brought Before the High Court Under the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017.

128 *MV Flag Mersinidi v. Southport Spirit SA*, Notice of Motion No. 763 of 2013 in Admiralty Suit No. 8 of 2013.

129 *Chrisomar Corporation v. MJR Steels Private Ltd*, 2017 SCC OnLine SC 1104.

130 [1971] 1 Lloyd's Rep 37.

131 *Videsh Sanchar Nigam Limited v. MV 'Kapitan Kud'* (1996) 7 SCC 127.

132 *Sangita Das & Ors v. MV Amber L and Ors* (2018) 1 KLT 836.

A party seeking release of the vessel is required to furnish security by way of either a cash deposit or a bank guarantee.[133] Indian courts do not accept club letters of undertaking (LOUs) as security as a right, unless consented to by the plaintiff.[134]

In India, every company is a separate and independent legal entity; ownership of the assets vests with the company and not in its shareholders.[135] Prima facie, the registered owner of the vessel is deemed the beneficial owner, save in very exceptional cases.[136] Only in exceptional circumstances in which questions of public policy, fraud or malice are involved will the courts consider piercing the corporate veil. It must be noted that the party seeking to lift the corporate veil will be required to plead and particularise fraud, malice or public policy.[137]

The Supreme Court of India has recognised that although a demise charterer may have absolute dominion and control over the vessel, this fact in itself would not allow a claimant to obtain an order of arrest against the vessel for an in personam claim against the demise charter relating to another vessel.[138] However, a single judge of the Bombay High Court, on a bare reading of Section 5 of the Admiralty Act (which departs slightly in wording from Article 3 of the Arrest Convention 1999), came to a conclusion that even a vessel on bareboat charter could be arrested for an unrelated third-party claim against the bareboat charterer.[139]

Various notable judgments in India involving ship arrest and sale have clarified the following matters.

a In the event that bunkers are ordered by the owner (irrespective of whether the vessel is on time charter or not), the bunker supplier will be entitled to arrest a vessel on a prima facie basis.[140] The Appeal Court of the Bombay High Court has held[141] that an arrest granted at the prima facie stage cannot be vacated in the absence of a trial, on a rebuttable presumption of privity of contract between the actual physical supplier of bunkers and the shipowner, especially when supplies of necessities to a vessel such as bunkers have been made on faith and credit of the vessel.

b Although the earlier position was that a vessel could not be arrested for security pending arbitration in the admiralty jurisdiction of the court,[142] and the Admiralty Act does not expressly contain any provisions allowing a party to arrest a vessel for simpliciter security in aid of judicial and arbitral proceedings taking place outside India, a single judge of the Bombay High Court has held that it was permissible for a party to obtain

133 Security can be deposited in US dollars in the Bombay High Court, Gujarat High Court and the High Court of Andhra Pradesh at Amravati.

134 *Stephen Commerce Pvt Ltd v. Owners and Parties in Vessel MT 'Zaima Navard'*, AIR 1999 Cal 64. However, the parties can agree to an LOU as security, which could be accepted by the courts.

135 *Lufeng Shipping Company Ltd v. MV 'Rainbow Ace'*, 2013 (4) ABR1412.

136 *Universal Marine & Anr v. MT 'Hartati'*, Notice of Motion No. 1080 of 2013 in Admiralty Suit No. 77 of 2012 dated 11 February 2014.

137 Order VI Rule 4 of the Code of Civil Procedure, 1908.

138 *Sunil B Naik v. Geowave Commander*, 2018 SCC OnLine SC 203 (Geowave Commander).

139 *Siem Offshore Redri AS v. Altus Uber*, 2018 (6) ABR 361. This judgment was upheld by the Court of Appeal in *Altus Uber v. Siem Offshore Redri AS* (2019) 5 Bom CR 256. This is now under appeal before the Supreme Court of India on, inter alia, the ground that it is contrary to the findings of the Supreme Court in Geowave Commander.

140 *Gulf Petrochem Energy Pvt Ltd v. MT 'Valor'* in Notice of Motion (L) No. 581 of 2015 in Admiralty Suit (L) No. 94 of 2015 and *Drop Energy Services Ltd v. MT 'Tradewind'* in Notice of Motion No. 805 of 2015 in Admiralty Suit No. 240 of 2015.

141 *Socar Turkey Petrol Enerji v. MV Amoy Fortune*, 2018 SCC Online Bom 1999.

142 *Rushab Ship International LLC v. The Bunkers on board MV African Eagle*, 2014 (4) Bom CR 269.

security pending arbitration by way of an arrest in India, since the Admiralty Act is silent on this issue and does not expressly prohibit it, provided that the suit is filed for a decree and determination on the merits of the underlying maritime claim. According to the Bombay High Court, a party has a statutory right to initiate *in rem* proceedings under the Admiralty Act, which cannot be denied if a party otherwise had a valid maritime claim.[143]

c A claim for damages for wrongful arrest of a vessel is not a special law. Principles of mitigation will apply and the claim is subject to mitigation of losses arising from wrongful arrest of the vessel.[144]

d The arrest of bunkers onboard a vessel is not subject to the admiralty jurisdiction of the courts in India.[145]

e Freight alone cannot be arrested.[146]

f The arrest of cargo without an underlying cause of action being made out against a vessel is not permitted by the Bombay High Court,[147] albeit certain other high courts have allowed the same on occasions prior to the enactment of the Admiralty Act. The Bombay High Court in its admiralty rules, however, provides for the arrest of cargo for suits for salvage or claims for salvage of cargo.[148]

g Institution of a prior legal proceeding against the concerned vessel or its owner cannot be said to be a precondition for maintainability of a suit for constitution of fund to limit the shipowner's liability under the LLMC Convention 1976 and the LLMC Protocol 1996.[149]

h Proceedings for the sale of a vessel under arrest can be taken out on expiry of three days from the date of arrest if no security or bail has been furnished.[150]

i 'Owner' means registered owner. The corporate veil can be lifted only in exceptional cases, such as fraud or public policy. The party seeking arrest based on fraud must plead and prima facie establish that fraud has been committed.[151]

j In the Bombay High Court, once the order of arrest is vacated, the party that has suffered 'prejudice' can invoke the undertaking issued by the plaintiff to pay damages arising out of a wrongful arrest, and the test of malice or crassa neglentia does not apply.[152]

143 Supra 116.

144 *Lufeng Shipping Co Ltd v. MV 'Rainbow Ace' and Ors*, Notice of Motion No. 1646 of 2013 in Admiralty Suit No. 29 of 2013.

145 *Peninsula Petroleum Ltd v. Bunkers on board the vessel MV 'Geowave Commander'*, Notice of Motion No. 385 of 2014 in Admiralty Suit No. 85 of 2014.

146 *Bulk Shipping Management SEA & Anr v. The Bunkers on board MV 'African Eagle'*, 2013 (3) BomCR 380.

147 *Global Integrated Bulkers Pte Ltd v. Cargo of 14,072.337 MTS of Limestone* (Judge's Order No. 253 of 2017 in Comm Admiralty Suit (L) No. 665 of 2017.

148 Bombay High Court: Rules for Regulating the Procedure and Practice in Cases brought before the High Court under the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017, Rule 1103, it shall be open to the claimant to institute a suit *in rem* against the cargo and the provisions of the rules shall apply *mutatis mutandis* to such a suit as if the property to be arrested is the cargo in place of the ship.

149 Supra 101.

150 *Coromandel International Limited v. MV 'Glory I' and Andromeda Ship Holdings Ltd*, 2014 (3) ABR 365.

151 Supra 112.

152 *Navbharat International Ltd v. Cargo on board MV 'Amitees'*, 2014 (5) BomCR 312.

k There is no right vested in a shipowner against a receiver or consignee, or the shipper or charterer (unless a vessel is a party) in personam in the admiralty jurisdiction of the court.[153]

l The Bombay High Court in its interpretation of Section 5 of the Admiralty Act has held that multiple arrests of a number of vessels in the fleet of a shipowner are not permissible for a single claim even when the sale proceeds are sufficient to meet the claim of the plaintiff though these sale proceeds may be insufficient to meet the claims of all creditors asserting a claim against the vessel (i.e., even if the *pari passu* distribution of the sale proceeds would be insufficient to fully satisfy the claim of the plaintiff, arrest of multiple vessels to satisfy the plaintiff's claim is impermissible).[154]

m The Bombay High Court in its interpretation of Section 4(1)(n) and Section 9(1)(d) of the Admiralty Act held that port dues are in the nature of a maritime lien as well as a maritime claim against the vessel.[155]

n A claim for interest on a principal amount towards supply of bunkers by a bunker supplier to a charterer would not be a 'maritime claim'.[156]

o Arrest of a vessel is akin to the seizure of property and thus attracts Article 80 of the Indian Limitation Act 1963, which provides for a limitation period of one year from the date of seizure (the arrest of the vessel) to lodge a claim for damages or to lodge a counterclaim.[157]

p The Court of Appeal of the Bombay High Court held that a claim involving a vessel operated by the central government will be outside the purview of the Admiralty Act in light of the proviso to Section 1(2) therein.[158]

The Bombay High Court in a recent judgment has given precedence to the construction and nature of the charterparty as opposed to its nomenclature whilst deciding whether the vessel can be arrested for a claim against a demise charterer.[159]

The Court of Appeal of the Bombay High Court[160] has held that the crew wages arising after the arrest of a vessel are to be treated as sheriff expenses and hence to be paid out of the sale proceeds in priority. The judgment came to be passed in appeals preferred by crew members engaged on board the vessel, MT GP Asphalt I and by The Swedish Club (i.e., the P&I Club for that vessel). The P&I Club had approached the Single Judge of the Bombay High Court seeking permission to pay the pending wages of the crew of that vessel and that

153 *M/s Greenwich Meridian Logistics (India) Pvt Ltd v. M/s Sapphire Kitchenware Pvt Ltd*, Admiralty Suit 31 of 2008 of Bombay High Court and *MUR Shipping BV Amsterdam v. Al Gyas Exports Private Ltd*.

154 *Praxis Energy Agents SA v. MT Prathibha Neera*, 2018 (4) ABR 148.

155 *State of Goa v. Sale Proceeds of vessel MT Pratibha Bheema and Ors*, AS No. 72 of 2014 (decided on 7 June 2018).

156 *MV Kiveli v. Monjasa DMCC and Ors*, 2018 (5) ALT 73.

157 *MV Tongli Yantai and Ors v. Great Pacific Navigation (Holdings) Corporation Ltd*, NoM No. 2202 of 2015 in CC 19 of 2012 in AS No. 3 of 2011 & No. 1770 of 2015 in AS No. 66 of 2015 (decided on 17 September 2018). This judgment was under appeal to a higher bench of the Bombay High Court, but the Appeal has now been withdrawn pursuant to a settlement between parties.

158 *Joao Martin Fernandes v. The Union of India and Ors*, Appeal No. 65 of 2017 (decided on 24 October 2018).

159 *Continental Radiance Offshore Pvt Ltd v. MV Lewek Altair*, Review Petition (L) No. 9091 of 2022.

160 *The Swedish Club v. V8 Pool Inc and Other*, Commercial Appeal No. 108 of 2021 (decided on 23 March 2022).

these were to be treated as sheriff expenses. The Single Judge declined the request of the P&I Club and held that it was a duty of the P&I Club to reimburse the pending wages of the crew and hence no permission of court was required to be sought.

This order of the Single Judge was on appeal and the Court of Appeal overturned the order and, inter alia, held:

a crew wages accrued post arrest shall be treated as sheriff expenses or marshall expenses, without the trouble of filing a suit, proving their claims, getting a decree, determining priorities and seeking payment out. Any doubt or objection on the quantum or validity of the claims can be verified by the sheriff or commissioner for taking accounts;

b payments made by the P&I Club towards crew wages accrued post arrest shall also be treated as sheriff expenses; and

c payments made by the P&I Club towards crew wages accrued before arrest can be claimed as maritime lien upon assignment by the crew, subject to prior leave of the court. The Bombay High Court in a more recent judgment has clarified that in the absence of leave of the court and expenses being mentioned in the sheriff's report, it would be at the discretion of the court to consider the sheriff's expenses.[161]

The Supreme Court of India, while dealing with an appeal arising out of an order passed in a commercial admiralty suit, harmoniously interpreted the provisions of the Admiralty Act and the Commercial Courts Act and held that only orders passed by a court under the Admiralty Act while exercising an *in rem* jurisdiction would be appealable under the provisions of the Admiralty Act. The appeal provision in the Admiralty Act cannot be taken as a blanket appeal provision from every order passed by a court while exercising admiralty jurisdiction, and the provisions of the Commercial Courts Act would continue to apply to the general conduct of the proceedings, including orders that can be appealed.[162]

ii The insolvency regime

The law relating to corporate insolvencies in India has undergone a paradigm shift with the enactment of the Insolvency and Bankruptcy Code, 2016 (the Insolvency Code). The Insolvency Code is dynamic in nature and has undergone a number of amendments in order to cater to the needs arising out of different situations. The Insolvency Code recognises the 'creditor in possession' model and differs from jurisdictions that follow the 'debtor in possession' model, such as Singapore and the United States. The Insolvency Code stipulates definitive time periods within which various stages of the insolvency, corporate rescue and liquidation proceedings have to be completed. The moment the National Company Law Tribunal admits an insolvency petition, a resolution professional is appointed to take over the management of the company. A committee of creditors is formed, comprising the financial creditors of the company, who then have a period of 330 days to finalise a corporate rescue strategy, known as an 'insolvency resolution plan', failing which the company would automatically be put into liquidation. During this period when the committee of creditors is attempting to rehabilitate the company, there is a moratorium on institution of new or continuation of pending legal proceedings against the company.

161 *Irwin Edmund Sequeira & Ors v. MV Karnika Interim Application* (L) No. 2893 of 2021 in Comm Admiralty Suit (L) No. 5166 of 2020.

162 *Owners and Parties Interested in the Vessel MV Polaris Galaxy v. Banque Cantonale De Geneve*, 2022 SCC OnLine SC 1293.

To commence the corporate insolvency resolution process, the creditor would have to show that there is no pending dispute between the creditor and the debtor. Such disputes should not be merely illusory in nature. However, the Supreme Court has clarified that requirement is that of a 'pre-existing' dispute (i.e., a dispute that existed before the date of receipt of the demand notice or invoice as the case may be).[163] One issue that parties to the insolvency proceedings were facing was with regard to reaching an amicable settlement pursuant to the commencement of the corporate insolvency resolution process. The Insolvency Code was amended to allow the admitted applications for the institution of insolvency resolution process with the approval of a 90 per cent vote of the committee consisting of financial creditors of the debtor.[164]

The Insolvency Code only envisages two situations after the commencement of the corporate insolvency resolution process:

a to formulate a plan in order to continue the existence of the corporate debtor as a going concern; or

b to commence the liquidation proceedings.

Owing to the situation arising out of the covid-19 pandemic, the Insolvency Code was amended to forever exclude actions for initiation of insolvency process for defaults arising after 25 March 2020 for a period of six months or any such time that the central government prescribed,[165] the last of these extensions expired on 31 March 2021. This amendment was also upheld by the Supreme Court,[166] although the Court clarified that the embargo would not in any manner extinguish the debt owed or the right of the creditor to recover the same.

Furthermore, the threshold for default was increased from 1 million rupees to 10 million rupees for initiating an insolvency action. The Supreme Court in *Indus Biotech Private Limited v. Kotak India Venture (Offshore) Fund (earlier known as Kotak India Venture Limited) & Ors*[167] has held that a dispute would not remain arbitrable after an application for insolvency resolution has been admitted as *in rem* proceedings are not arbitrable under Indian law. In addition, the National Company Law Tribunal, Mumbai has admitted an application for initiation of insolvency process based on a foreign award from a reciprocating country,[168] although the position in the erstwhile regime was that such an action was not permissible.[169] The Delhi High Court has also observed that mere pendency of a petition for invocation of insolvency proceedings would not per se make a dispute non-arbitrable.[170]

163 *Transmission Corporation of Andhra Pradesh Limited v. Equipment Conductors and Cables Limited*, (2019) 12 SCC 697.

164 Section 12A of the Insolvency and Bankruptcy Code, 2016.

165 Ins by Act No. 17 of 2020, Section 2 (w.e.f. 5 June 2020).

166 *Ramesh Kymal v. Siemens Gamesa Renewable Power (P) Ltd* (2021) 3 SCC 224.

167 2021 SCC Online SC 268.

168 *Agrocorp International Pvt Ltd v. National Steel and Agro Industries Ltd*, CP (IB) No. 798/MB/C-IV/2019 dated 9 June 2020.

169 *Marina World Shipping Corporation Ltd v. Jindal Exports & Imports Private Ltd*, 2007 (3) ARBLR 46 Delhi).

170 *Brilltech Engineers Pvt Ltd v. Shapoorji Pallonji and Co Pvt Ltd* (Arbitration Petition No. 790 of 2022, judgment dated 15 December 2022).

iii Insolvency versus Admiralty regime

In a recent case,[171] the Bombay High Court considered the interplay and overlap of the provisions of the Admiralty Act with those of the Insolvency Code and the Companies Act. The Court, inter alia, held:

a as regards the Insolvency Code, an action *in rem* may be filed and the ship arrested (1) before the moratorium under Section 14 of the Insolvency Code comes into force; (2) during the moratorium period; or (3) even after the corporate debtor is ordered into liquidation. However, the Court clarified that while an action *in rem* may proceed even after declaration of the moratorium, the suit would thereafter not be allowed to proceed after such an arrest so as to not impede the insolvency resolution process. In the event that an order for liquidation is passed against a corporate debtor under the Insolvency Code, the same would not be a bar to continue with an action *in rem*. The liquidator may then defend the proceedings. Thus, the Court held that the provisions of the Insolvency Code have to be read harmoniously with the provisions of the Admiralty Act;

b the Admiralty Act (being a special act) would prevail over the provisions of the Companies Act, 1956 (Companies Act) (being a general legislation), and no leave would be required under Section 446 (1) of the Companies Act for (1) commencing a suit under the Admiralty Act; or (2) proceeding with a pending suit against the company under the Admiralty Act, when a winding-up order has been passed or the official liquidator has been appointed as provisional liquidator. However, a notice would have to be given to the official liquidator prior to the sale of the vessel in an action *in rem* under the Admiralty Act, unless the official liquidator has already entered appearance. The Court of Appeal of the Madras High Court has held a similar view[172] and further expanded on this proposition by holding that admiralty claims deserve to be adjudicated without any intervention by the Official Liquidator;

c an action *in rem* against a vessel will proceed in accordance with the Admiralty Act (being the applicable law), and the priorities for payment out of the sale proceeds of the vessel will also be determined in accordance with the Admiralty Act and not as per the priorities set out in the Insolvency Code. Similarly, in the matter of priorities for payment out, the Admiralty Act would prevail over the priority provisions of the Companies Act; and

d the moment a ship is arrested, the plaintiff becomes a secured creditor qua the vessel and not against its owner or the assets of the owners. However, on the deposit of the security for the release of the vessel by the owners (i.e., when the action turns into an in personam action against the owners), the provisions of the Insolvency Code would apply in relation as to how the matter proceeds against the owners.

171 *Raj Shipping Agencies v. Barge Madhwa and Anr*, 2020 SCC OnLine Bom 651. This judgment of the Bombay High Court is presently under appeal to the Supreme Court of India where the Court issued Notice on 14 September 2020 (See: *Sudip Bhattacharya and Anr v. Barge Madhwa*, SLP (C) No. 9384/2020 and SLP (C) No. 9388/2020).

172 *Pratibha Shipping Company Ltd v. Praxis Energy Agents SA* (Unreported) Dt. 9.8.2019 in OSA Nos. 20, 317 to 349, 363 & 264 of 2018 & W.A. Nos. 738 to 751 of 2013.

The above has been recently relied upon by the Bombay High Court in the case of *Angre Port Private Ltd v. TAG 15 (IMO 9705550) & Anr*.[173]

VI REGULATION

India is a party to the Indian Ocean Memorandum of Understanding (MOU) on Port State Control, which lays down basic standards for vessels calling at ports. In order to prevent wreckage of older foreign ships in Indian waters, as well as to prevent oil spills, the MoS has notified the Merchant Shipping (Regulation of Entry of Ships into Ports, Anchorages and Offshore Facilities) Rules 2012, which, inter alia, provide that foreign-flagged vessels can only enter Indian territorial waters on being in possession of a Blue Card (i.e., valid insurance cover) from the International Group of P&I Clubs or from insurance companies that are specially authorised by the DG Shipping upon fulfilling certain criteria. Foreign-flagged vessels entering India must be registered with a classification society that is a member of the International Association of Classification Societies.

i Registration and classification

India-flagged vessels will be registered under the MSA, the Inland Vessels Act, 1917 or the Coasting Vessels Act, 1838, depending on the nature and type of vessel. The Supreme Court of India, in interpreting the provisions of the MSA, has held that a provisional certificate of registry for India-flagged vessels can be granted only to a constructed vessel and not to an 'under construction' vessel and the provisional certificate of registry will be valid for a period of six months, within which the shipowner must obtain a permanent certificate by ensuring that all the obligations of the Indian flag state are met.[174] A central register is maintained by the DG Shipping, which contains all the entries recorded in the registers kept by the registrar at the port of registry in India. Any vessel that is registered requires a licence to trade. Vessels that are more than 25 years old require a special licence to trade.

The Customs Act, 1962 imposes various obligations upon owners of vessels calling at ports in India, such as the Import General Manifest. The Central Board of Indirect Taxes and Customs has notified the Sea Cargo Manifest and Transhipment Regulations, 2018 (the SCMT Regulations).[175] The SCMT Regulations[176] make it compulsory for shipping lines, exporters and importers to follow set timelines for submitting cargo manifests and vessel documentation and declarations for imports arriving in India and for exports out of India, and for transshipment via Indian ports. The SCMT Regulations are aimed at implementing entirely new procedures to which vessels either arriving into or departing from India must adhere, and is a push towards a consolidated, efficient and more transparent platform to ease the procedural formalities of the entire end-to-end logistic chain. Under these regulations,

173 Commercial Admiralty Suit(L) No. of 2020 (decided on 3 January 2022).

174 *Halliburton Offshore Services Inc v. Principal Officer of Mercantile Marine Department*, Civil Appeal No. 5428 of 2017.

175 Notification No. 38 /2018-Customs (NT) dated 11 May 2018.

176 The SCMT Regulations have been enacted in supersession of the Import Manifest (Vessels) Regulations, 1971, Export Manifest (Vessels) Regulations, 1976 and Transportation of Goods (Through Foreign Territory) Regulations, 1965.

advance intimation must be given of vessel and cargo arrivals and departures, all commodities and cargo will be identified by unique identifiers, and standard format of declarations are provided.[177]

ii Age norms for Indian tonnage and foreign flag vessels requiring a Section 406/407 licence

The DG Shipping issued Order No. 6 of 2023 setting out the age norms and other qualitative parameters for the registration and operation of vessels under the Indian flag and that foreign flag vessels are required to apply for a licence under Sections 406 and 407 of the Merchant Shipping Act, 1958. The DG Shipping has, as part of its plan to improve tonnage safety and to reduce the age of Indian tonnage, has issued this Order and made it applicable to all Indian and foreign flag vessels required to be licensed under Sections 406 and 407 of the Merchant Shipping Act, 1958 (and it is also applicable to vessels exempt from applying for these licences under the law). While the order sets out the specifics of the requirements in the annexure thereto, broadly, the Order effectively bans the acquisition of vessels (as specified) older than 20 years and withdraws the general trading licence for plying vessels (as specified) older than 25 years. This Order, however, has not been made applicable to passenger vessels, floating storage regasification units, floating production storage and offloading units, and drilling and production units certified under the Mobile Offshore Drilling Unit or Special Purpose Ships Code.

iii Environmental regulation

India has ratified the CLC Convention and its 1976 and 1992 Protocols. Part XB of the MSA deals with civil liability for oil pollution damage, and Part XC was introduced to incorporate the requirements of the International Oil Pollution Compensation Fund, 1992 (the IOPC Fund). When an oil spill occurs from two or more ships as a result of an accident, the owners of all ships are jointly and severally liable for all damage that is not reasonably separable.[178]

India is the highest contributor to the IOPC Fund in the world, with 13.12 per cent of the total composition of the fund. The IOPC Fund is under an obligation to pay compensation to states and persons who suffer pollution damage, if those persons are unable to obtain compensation from the owner of the ship from which the oil escaped or if the compensation due from the shipowner and P&I club is not sufficient to cover the damage suffered.

Although India is a party to the aforementioned conventions, in a first of its kind case, the National Green Tribunal, under the powers given to it by the Environment (Protection) Act 1986, directed the cargo interests to deposit 1 billion rupees following the oil spill caused by the MV Rak Carrier.[179]

177 Notification No. 44/2021-Customs (NT), dated 15 April 2021, has deferred the date of implementation of the SCMT Regulations to 31 May 2021.

178 Section 352I(4) of the MSA.

179 *Samir Mehta v. Union of India & Ors*, 2017 SCC OnLine NGT 1314) This is presently under appeal before the Supreme Court of India.

iv Collisions, salvage and wrecks

The COLREGs have been incorporated into Indian law under the Merchant Shipping (Prevention of Collisions at Sea) Regulations 1975. Although, in principle, Indian courts have the power to apportion liability between two vessels in accordance with the degree of fault, there have been very few instances when they have proceeded to do so. There is no precise formula to measure the degree of negligence of a party under Indian law and the courts have a considerable amount of discretion based on justice and equity.[180] Section 345(1)(a) of the MSA provides that in an event where it is not possible to establish different degrees of fault, the liability shall be apportioned equally. In these circumstances, liability between two vessels in a collision would be apportioned equally unless it is ex facie evident that the degree of fault of one vessel was palpably higher than the other.

The law in India with respect to shipwrecks is laid down in Part XIII of the MSA and in the Indian Ports Act 1908. The term 'wreck' includes 'a vessel abandoned without hope or intention of recovery'. India is in the process of giving effect to the Nairobi International Convention on the Removal of Wrecks 2007 into domestic law, but at present there is no legal regime to deal with the removal of wrecks in the exclusive economic zone of India. In *Oil & Natural Gas Corporation Ltd v. Osprey Underwriting Agencies Ltd*,[181] the Bombay High Court, in interpreting Section 14 of the Indian Ports Act, directed a foreign P&I club and its Indian agents to deposit the cost of removing and raising the wreck in the Indian court. However, it should be noted that the Bombay High Court, inter alia, dealt with a dispute between the assured and the P&I club.

Sections 402 to 404 of the MSA provide the salvor with the right to claim salvage services. The Kerala High Court, in *Commander KP Shashidharan v. Union of India*,[182] allowed an officer of the Indian Coast Guard to claim salvage services even though he had a preexisting duty to protect life and property at sea.

v Seafarers' rights

India has ratified the Maritime Labour Convention 2006 (MLC) and made amendments to the MSA to give effect to the provisions of the MLC. In the exercise of the powers conferred by Section 218A read with Section 457 of the MSA, the Indian government promulgated the Merchant Shipping (Maritime Labour) Rules, 2016 (MLC Rules), which, inter alia, cast an obligation on a vessel's financial security provider for unpaid wages for up to a maximum period of 120 days and repatriation expenses in the case of abandonment by the shipowner. The DG Shipping has further issued a notice to ensure that Indian seafarers on India-flagged vessels have clear and unambiguous terms in their employment contract in terms of the provisions of the MLC as amended.[183]

The Merchant Shipping (Recruitment and Placement of Seafarers) Rules 2016[184] have overhauled the earlier regime set up under the 2005 Rules, and have placed greater responsibility, liability and obligations on the recruitment and placement service providers (RPSL agents). Under these Rules, an RPSL agent has to provide a bank guarantee to the

180 *Municipal Corporation of Greater Bombay v. Laxman Iyer*, 2003 (8) SCC 731.

181 1998 (2) BOMLR 179.

182 AIR 2002 Ker 388.

183 Merchant Shipping Notice, 7 of 2020 dated 24 April 2020.

184 GSR 169(E) dated 15 February 2016.

DG Shipping, to ensure that the rights of seafarers are protected and that seafarers would be compensated for any monetary loss arising out of the breach of the obligations of the RPSL agent or the shipowners under the seafarer's employment agreement.

The Supreme Court of India held that a foreign seafarer's right to wages falls within the ambit of a fundamental right to life and liberty under Article 21 of the Constitution of India.[185] Indian courts are likely to be guided by the general standard agreement between the National Union of Seafarers of India and the Indian National Shipowners' Association, as an overwhelming majority of contracts of employment on board a vessel incorporate these terms.

Indian law recognises the rights of an injured seafarer or the family members of a deceased seafarer to claim compensation for injury or death of the seafarer. The Employees' Compensation Act, 1923 (ECA) is a general legislation that allows workers or employees to claim compensation for death and personal injury of seafarers. However, the ECA does not apply to Indian seafarers working aboard foreign-flagged vessels. Under Indian law, foreign seafarers cannot be employed on India-flagged vessels unless they obtain prior permission from the DG Shipping.

vi The Major Port Authorities Act

With the exception of 12 designated 'major ports', all ports in India are owned and controlled by state and union governments. The governments of Gujarat, Maharashtra and Tamil Nadu have enacted legislation to set up autonomous maritime boards that own and operate ports and formulate parameters for the collection of tariffs in their respective states. In a number of recent cases, port authorities have entered into concession agreements with private terminal operators under the Build, Own, Operate and Transfer (BOOT) Policy designed for private sector participation in the development of Indian ports. In these circumstances, a private terminal operator levies a port tariff on ships calling at the port.

The Major Port Authorities Act, 2021 (the Ports Act) repeals The Major Port Trusts Act, 1963. The Ports Act brings about a sea change in the functioning of the 12 major ports in India by setting up the Board of Major Port Authority and giving it autonomy to conduct its business and promote the development of the major ports, enter into public–private partnership (PPP) and lease out port property and terminals for third parties to develop and run. Pursuant to the Ports Act, the government shall constitute an adjudicatory board to exercise jurisdiction, power and authority as conferred under the Ports Act, which, inter alia, include the functions envisaged to be carried out by the Tariff Authority for the Major Ports (TAMP), adjudicate disputes relating to rights and obligations of major ports and PPP, look into complaints received from port users against services rendered by the major ports and review such PPP projects referred by the government. However, the adjudicatory board is yet to be constituted and, until then, the TAMP shall continue to discharge the functions of the adjudicatory board under the Ports Act. The Ports Act also retains the right of the master or the shipowner to exercise statutory lien on the cargo for freight and other charges payable to the shipowner. With the notification of the Major Port Adjudicatory Board Rules, 2023 one would have expected some clarity on the jurisdiction of the Board to adjudicate disputes against major ports. However, a reading of the Major Port Authorities Act and the rules thereto seems to suggest the ouster of the jurisdiction of a civil court for any proceeding to be moved against major ports.

185 *O Konavalov v. Commander*, Coast Guard Region (2006) 4 SCC 620.

The Supreme Court of India in a recent judgment held[186] that major ports cannot fasten the liability for payment of port storage or demurrage charges for uncleared cargo or containers lying in port premises upon the shipowners, vessel agents or steamer agents after the port has taken charge of the goods and given a receipt for the same. Unfortunately, there is no regulatory authority for ports other than the 12 major ports and this has resulted in a number of litigations relating to the arbitrary conduct of private terminal operators levying tariffs on ships calling at these ports.

vii The Recycling of Ships Act

India as a party to the International Maritime Organization has adopted the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009 (the Hong Kong Convention) and, in an effort to bring the Indian regulations in line with the Hong Kong Convention, has enacted the Recycling of Ships Act, 2019 (the Ship Recycling Act).[187] The Ship Recycling Act seeks to establish an authority that will maintain and record the business of ship recycling conducted in India, including the registration of new ships built in India (for their hazardous material), surveys conducted prior to the breaking of the ship or vessel and the registration of ship recycling facilities. The Ship Recycling Act also prescribes the penalty for offences as imprisonment or fine, or both.

viii The Cabotage Regime

Unlike the Jones Act regime of the United States or the domestic cabotage legislation of China, India does not have a regime that bars foreign players from operating in the Indian market and instead has a right of first refusal regime wherein an Indian shipowner is given an opportunity to match the price quoted by a foreign shipowner to the Indian charterer. In these circumstances, it would be open for an Indian charterer to charter a foreign-flagged vessel in the event that no Indian shipowner is able to match the bid quoted by the foreign shipowner. Under the present regime, the DG Shipping would first circulate an enquiry with the Indian National Shipowners Association (INSA) – a private body of Indian shipowners – on whether an Indian shipowner could provide a vessel with similar characteristics at the same or a lower freight rate quoted by the foreign shipowner. It is only when INSA issues a 'no objection certificate' that a licence is issued to the Indian party to charter a foreign-flagged vessel. Insofar as coastal trade goes, a no objection certificate would have to be provided by the Indian Coastal Conference (ICC).

On 21 May 2018, the MoS issued General Order No. 1 of 2018, whereby restrictions on foreign-flagged vessels undertaking a coastal voyage from one Indian port to another Indian port have been relaxed for the carriage of empty containers. Additionally, if export-import containers intended for transshipment are loaded onboard a vessel, no licence will be required under Section 407 of the MSA for that vessel to undertake the coastal voyage from one Indian port to another. This regime remains in force at the time of writing and seeks to reduce India's dependence on foreign transshipment terminals in ports such as Colombo, Singapore, Port Klang and Jebel Ali, which currently account for about one-third of India's transshipment cargo.

186 *The Chairman, Board of Trustees, Cochin v. M/s Arebee Star Maritime Agencies Private Ltd & Ors*, 2020 SCC OnLine SC 622.

187 Recycling of Ships Act, 2019 gazetted on 16 December 2019.

In an attempt to bolster the 'Make in India' policy of the Indian government and add stimulus to the shipbuilding industry in India, the government issued a circular published on 14 January 2021 (effective from 16 January 2021) and a further clarificatory circular dated 11 February 2021, which has completely revamped the cabotage regime in India (the New Right of First Refusal (RoFR) Regime).[188]

Under the New RoFR Regime, the exercise of the RoFR will be available in the following hierarchy:

a first priority: India-built, India-flagged and India-owned;

b second priority: foreign-built, India-flagged and India-owned; and

c third priority: India-built, foreign-flagged but foreign-owned.

All India-flagged vessels registered in India up until midnight of 15 January 2021 (irrespective of whether they are India- or foreign-built) shall be deemed to be India-built vessels and will fall within first priority. Further foreign-flagged vessels permitted to be chartered by an Indian entity by the DG Shipping under Section 406 of the MSA, as a temporary substitute for a vessel being built in an Indian shipyard for registration under the India flag, shall be deemed to be an India-built vessel and will fall within first priority, provided:

a 25 per cent of the contract money has been paid to an Indian shipyard; and

b 50 per cent of the hull fabrication has been completed, as may be certified by a recognised organisation.

However, the duration of the licence provided by the DG Shipping to such chartered vessels will be limited to the period of building the ship as per the shipbuilding contract.

ix Satellite devices, ammunition and drones banned in Indian waters

There have been incidents in which foreign crew members were arrested for using satellite devices, such as Thuraya or Iridium phones, within Indian territorial waters. The use of such satellite devices is banned in India by the DG Shipping.[189] Even if a foreign-flagged vessel possesses all the valid documents permitting her to carry satellite phones, the Indian authorities have the right to deny permission to use them. These satellite phones can be used only after a 'no objection certificate' is obtained from the Department of Telecommunications. There have been instances in which crew members accused of using such banned devices in Indian territorial waters have been arrested and detained in India pending a full-fledged trial of the offence and instances in which vessels have been detained for their failure to provide proper declarations.

188 The New RoFR Regime supersedes a notification dated 13 February 2019 and a consequent circular dated 22 March 2019 (together the Proposed RoFR Regime) where an India-built foreign-flagged vessel was given preference over a foreign-built India-flagged vessel. The Delhi High Court stayed the operation of the Proposed RoFR Regime by an interim order dated 28 March 2019 in *The Great Eastern Shipping Company Limited v. Union of India and the Proposed RoFR Regime* was thereafter withdrawn *suo moto* by the government vide the notification dated 20 July 2020 issued by the Ministry of Shipping and Vide DGS Circular 31 of 2020 dated 7 August 2020.

189 Vide Order No. 2 of 2012 (48-NT(1)/2012).

The carriage of arms and ammunition has posed additional complications for vessels calling into an Indian port following the incident with the MV Seaman Guard Ohio, a foreign-flagged floating armoury, which had been arrested in India for entering Indian waters. The Madurai Bench of the Madras High Court[190] exonerated 35 foreign seafarers on board.

A foreign crew member was arrested for the use of a drone in a restricted area within port limits of India and was charged under Section 10 (2) of the Aircraft Act, 1934 which provides for a maximum punishment of two years imprisonment and fine up to 1 million rupees. Subsequently, the Indian Ministry of Civil Aviation has introduced the new Unmanned Aircraft System Rules, 2021[191] and has designated areas prohibiting the use of drones, including notified port limits identified by the central government beyond the territorial waters of India. The punishment under the new Rules for contravention has been reduced to a fine of 50,000 rupees.

VII OUTLOOK

Indian maritime and commercial laws have undergone substantial changes with the enactment of a plethora of legislation and amendments in areas such as arbitration, admiralty, insolvency and tax. Moreover, India has recently taken proactive steps to improve its maritime presence in the world with a focus on updating legislation such as the Major Port Authorities Act, the Recycling of Ships Act, the Merchant Shipping Bill, 2016, the Code on Social Security, 2020 and the Marine Aids to Navigation Act, 2021. The thrust towards bringing the Indian legal and regulatory environment up to speed with legislative developments in other countries is a welcome development. It is also heartening to note that India has jumped 14 places, from its ranking last year in the 'Ease of Doing Business' rankings published by the World Bank in Doing Business 2020, to 63 and has improved its rank by 79 positions in the past five years. Notwithstanding the foregoing, it remains to be seen how stakeholders react to the entire gamut of legislation affecting the shipping industry.

190 *Dudnik Valentyn and Ors v. The Inspector of Police, 'Q' Branch CID*, Crl A (MD) Nos. 41, 43 and 44 of 2016.

191 Unmanned Aircraft System Rules, 2021, Ministry of Civil Aviation Notification dated 12 March 2021, GSR 174(E).

Chapter 24

INDONESIA

Stefanny Simorangkir and I Ketut Dharma Putra Yoga[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

For the past nine years, the Indonesian government has invested a huge amount to transform Indonesia into a global maritime power by 2045. To realise this objective, the government has begun improving inter-island connectivity and upgrading port infrastructure within the archipelagic country, which spans over 6 million square kilometres and consists of over 17,000 islands.

Since 2014, the Indonesian government has launched the Indonesian Sea Tollway Ports, which involve 24 strategic ports and 18 routes, connecting west to east Indonesia. The maritime economy is expected to contribute more than 10 per cent of the country's GDP by 2045, up from 6.4 per cent in 2015. Further, the 2025 aim is 8.4 per cent, followed by 10.5 per cent in 2035 and 12.5 per cent in 2045.[2]

Relevant information on the Indonesian shipping industry in 2021 is as follows:

a the capacity of the national-flagged fleet is approximately 29.015 million deadweight tonnage (DWT) with approximately 10,672 ships, of which most are passenger ships and roll-on or roll-off ships, among other smaller types, followed by general cargo ships, oil tankers, container ships and bulk carriers;

b merchandise trade reaches approximately US$33,808 million;

c container port throughput reaches approximately 14,025,449 twenty-foot equivalent units (TEUs);

d the majority of goods that are exported are manufactured goods, followed by food items, fuels, ores and metals, and agricultural raw materials. The top five export partners in 2021 were China, the United States, Japan, India and Malaysia; and

e in 2021, ship building in Indonesia consisted of 0.11per cent of global shipbuilding, which is approximately 64,473 gross tonnage (GT).[3]

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2 The Ministry of National Development Planning of the Republic of Indonesia, Indonesian Vision 2045 (2019) Paragraph 75.

3 https://unctadstat.unctad.org/countryprofile/maritimeprofile/en-gb/360/index.html.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

i General principles of law

Indonesia is a civil law jurisdiction, which inherited the civil law system from its former colonial master, the Netherlands. Statutory law is the primary source of law.

ii Legislative framework for shipping

The Indonesian Commercial Code (Wetboek van Koophandel voor Indonesie, Staatsblad 1847:23 or the Commercial Code) regulates mostly the basic carriage of goods through sea transportation, including issues related to, inter alia, marine casualty, cargo claims and passenger claims.

The main regulation on shipping was first enacted on 17 September 1994 through Law No. 21 of 1994 on Shipping. Subsequently, it was revoked by Law No. 17 of 2008 on Shipping and was last amended by Law No. 6 of 2023 on Stipulation of Government Regulation in lieu of Law No. 2 of 2022 on Job Creation into Law (the Shipping Law).[4] Various implementing regulations of the Shipping Law have been issued in the form of, inter alia, a government regulation, presidential regulation and minister of transportation regulation or circular letter.

III FORUM AND JURISDICTION

i Courts

Overview of shipping disputes litigation

There is no specialised court in Indonesia in which shipping disputes are litigated. All shipping disputes are submitted to and examined by the relevant district court.

Indonesia has a maritime court with limited authority. For example, to carry out further examination of the investigation results issued by the Directorate General of Sea and Transportation (DGST) and to determine whether the master or crew of the related ship has breached the regulation regarding the code of ethics and seaman competency.

Jurisdictional and choice of law issues

Most shipping disputes that arise from contractual performance often contain the choice of foreign jurisdiction. If the parties agree that foreign jurisdiction should apply, the Indonesian District Court has been very consistent in its decision that it has no jurisdiction or competence to examine, adjudicate and decide the case.

If the parties do not choose a jurisdiction, the Indonesian Civil Procedural Law (the Civil Procedural Law) provides the jurisdiction applicable for the claim to be examined by a certain district court:

a the district court where the defendant is domiciled; or

4 Previously, the Shipping Law was amended through the Law No. 11 of 2021 on Job Creation. Further, on 30 December 2022, the Job Creation Law was revoked by the Government Regulation in lieu of Law No. 2 of 2022 on Job Creation. This Government Regulation was then stipulated as a law by the House of Representatives of Indonesia on 31 March 2023 by way of Law No. 6 of 2023 on the Stipulation of Government Regulation in lieu of Law No. 2 of 2022 on Job Creation into Law (the Job Creation Law).

b if the defendant's domicile is unknown, the claim will be submitted to the district court where the plaintiff is domicile.

Specifically, in cases of vessel collision, if the parties have not chosen a specific jurisdiction, Article 543 of the Commercial Code provides the following jurisdiction of Indonesian courts:

a before the judge where the defendant is domiciled or at one of the defendants' domicile if there are several defendants;
b before the judge who has legal jurisdiction over the location of the collision;
c before the judge who has legal jurisdiction over the registration of the defendant's ship, as registered in the ship registry; or
d before the judge whose legal jurisdiction over the ship seizure is conducted.

In principle, Indonesian courts may recognise a choice of foreign law in shipping contracts. However, despite the stipulated (foreign) governing law of contract, in practice, Indonesian judges tend to apply Indonesian law as the law for all substantive and procedural matters when examining case in Indonesian courts.

Limitation period

The following time limits apply:

a a time limit of one year for cargo claim, pursuant to Article 487 in conjunction with Article 741 of Indonesian Commercial Code; and
b a time limit of two years for all legal claims regarding compensation for the damage caused by the collision.

ii Arbitration and ADR

Maritime arbitration in Indonesia

To date, Indonesia has neither a dedicated maritime arbitration institute nor arbitration law specifically tailored for maritime arbitration.

Alternative dispute resolution

In addition to arbitration, disputing parties can opt for other forms of alternative dispute resolution forum, depending on the circumstance.

Notably, pursuant to Supreme Court Regulation No. 1 of 2016 on Court-annexed Mediation Procedure (SCR 1/2016) and Supreme Court Regulation No. 3 of 2022 on Court-annexed Electronic Mediation, the disputing parties who have proceeded with the litigation process within the Indonesian courts are obliged to attempt to resolve the dispute in question through a court-annexed mediation (through face-to-face or online mediation procedure). The court-annexed mediation shall be conducted for 30 days from the date of the court order for the commencement of mediation and may be extended for an additional 30 days if the parties agree.

iii Enforcement of foreign judgments and arbitral awards

Indonesia has not ratified any bilateral agreement that allows for recognition and enforcement of foreign judgments. Consequently, any judgment rendered by a foreign court would require the enforcing party to initiate a new proceeding in a competent court in Indonesia.

However, maritime disputes that are resolved through foreign arbitration benefit from the Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which has been ratified by Indonesia through the promulgation of Presidential Decree No. 34 of 1981. The recognition and enforcement of foreign arbitral awards, including those related to maritime disputes, therefore adhere to the procedure set forth in Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution (the Arbitration Law).

Pursuant to the Arbitration Law, to enforce the international arbitral award in Indonesia, registration of the award through an Indonesian court (i.e., the Central Jakarta District Court – the CJDC) is required. Upon successful registration, the award creditor may submit an *ex parte* application for the issuance of an execution order (exequatur) from that court. The arbitral award shall be deemed as duly recognised and enforceable in Indonesia upon issuance of the exequatur.

Although there is no particularly notable recent enforcement record in terms of maritime arbitral awards, there has been one on the obstruction of enforcement (in Indonesia) of an arbitral award issued in arbitration and administered by the Tokyo Maritime Arbitration Commission (TOMAC). In that case, the CJDC's Chairman refused to issue the court reprimand against the debtor (even though the award had obtained exequatur from the CJDC). The Chairman was of the view that in light of the debtor's ongoing insolvency proceeding, the creditor should have participated in the insolvency proceeding instead of enforcing the arbitration award separately.

IV SHIPPING CONTRACTS

i Shipbuilding

The price of ships in Indonesia reached US$1,900 per tonne in 2020.[5] This relatively high cost (e.g., as compared to the price of a ship in China – US$1,200 per tonne) owing to a complex distribution network (for ship components) resulted in a price increase of ship components.

The issuance of Law No. 11 of 2020 regarding Job Creation, which was revoked by Law No. 6 of 2023 on the Stipulation of Government Regulation in lieu of Law No. 2 of 2022 on Job Creation into Law (the Job Creation Law), was expected to improve performance of the Indonesian shipbuilding industry. However, the Job Creation Law does not provide a solution to the complex distribution network for ship components.

The Job Creation Law amended several articles under the Shipping Law, namely:

a all ship procurement, building and manufacturing should be in accordance with international safety standards (previously only in accordance with vessel safety requirements); and

b the ship design validation system is to be conducted by the centralised licensing system (previously validated by the ministry of transportation).[6]

Pursuant to Minister of Transportation Regulation No. 39 of 2017 on Registration and Nationality of the Vessel (MOTR 39/2017), ownership of a ship being built within Indonesian territory or abroad can be registered temporarily in Indonesia through a temporary ship registration certificate.

5 https://www.globalsecurity.org/military/world/indonesia/industry-shipbuilding.htm.

6 Articles 124 and 125 (2) of the Shipping Law as amended by the Job Creation Law.

The shipping industry in Indonesia is gradually recovering from impact of the covid-19 pandemic. For instance, in 2021 and 2022, some Indonesian shipbuilders successfully built war vessels, namely, *KRI Teluk Palu – 523*, *KRI Golok* and *KRI Pollux – 935*, for the Indonesian Navy.[7]

ii Contracts of carriage

Key legislation that is applicable to contracts of carriage is mainly regulated under the Commercial Code and the Shipping Law. Indonesia is not a party to the Hague, Hague-Visby, Hamburg or Rotterdam Rules.

iii Cargo claims

Article 468, Paragraph (2) of the Commercial Code provides that a carrier shall be liable to compensate any damages arising out of its failure to deliver the cargo, either partially or entirely, or any damage to the related cargo, unless the carrier can establish that the damage or non-delivery of cargo was caused by an unforeseeable event beyond the control of the carrier, due to its nature, circumstances or due to a defect of goods, or the fault of the shipper. The provisions related to the carrier's responsibilities for the loss or damage of cargo are stipulated under Articles 40 to 42 of the Shipping Law.

In practice, the shipper, the consignee, the lawful holder of the bill of lading, the cargo owner or the cargo insurer (by subrogation) is entitled to bring cargo claims against the carrier for loss or damages arising out of the carrier's alleged default.

Article 466 of the Commercial Code provides the definition of 'carrier' as the person who is bound to provide full or partial services under the time charter, the voyage charter or other agreements for transporting goods by sea. Indonesian courts may identify the carrier as the shipowner, the party who issued the bill of lading, by reference to the letterhead of the bill of lading, or to whom the charter is paid. The demise clause or identity of carrier clause is not widely known in Indonesia.

Any relevant provisions in the charter party can be incorporated into the bill of lading. However, the charter party and the bill of lading must be duly executed by the contracting parties.

iv Limitation of liability

Indonesia has not ratified the International Convention relating to the Limitation of Liability of Owners of Sea-Going Ships 1957 (including 1979 Protocol Amending the Convention) and the International Convention on Limitation of Liability for Maritime Claims 1976 (including 1996 Protocol to Amend the Convention).

Carrier's limitation of liability

The Commercial Code recognises the following carrier limitation of liabilities:

7 https://regional.kompas.com/read/2021/08/21/160421878/mengenal-kri-golok-kapal-siluman-buatan-indonesia-yang-baru-diluncurkan-di?page=all; https://nasional.tempo.co/read/1491734/mengenal-kri-pollux-935-alutsista-tni-al-buatan-indonesia-ini-kehebatannya, last accessed on 17 March 2022; https://nasional.sindonews.com/read/707837/14/sangar-ini-kri-teluk-palu-523-kapal-perang-pengangkut-tank-yang-diresmikan-ksal-1646827384.

a the carrier is allowed to affix a certain number of limitations or package limitation of liability if the cost of the package is less than 600 Dutch East Indies Guilder, as stipulated under Article 470, Paragraph (2) of the Commercial Code;

b for collisions, Article 541 of the Commercial Code provides limitation of liability up to the amount of 50 Dutch East Indies Guilder per cubic metre of the net tonnage of the vessel, plus, for mechanically propelled vessels, the amount that was deducted to determine that tonnage from the GT for the space occupied by the means of the propulsion; and

c Article 474 of the Commercial Code stipulates the tonnage limitation of liability to be 50 Dutch East Indies Guilder per cubic metre, plus, for mechanically propelled vessels, the amount that was deducted to determine that tonnage from the GT for the space occupied by the means of the propulsion.

The Commercial Code has never been developed or modernised after Indonesia's independence in 1945. There is no clear guidance on how Indonesian courts should interpret how the liability amount of 50 or 600 Dutch East Indies Guilder should be applied at the present time. However, several court decisions have made reference to the gold price in determining the amount of compensation.

Limitation of liability for collisions

In addition to the above, the Commercial Code regulates the following limitation of liability for collisions:

a if the collision is accidental, if it is caused by force majeure or if the cause of the collision is uncertain, the damages are borne by those who have suffered them (Article 535);

b if the collision is caused by the fault of one of the vessels, liability to make good the damages attaches to the one who has committed the fault (Article 536); and

c if two or more vessels are at fault in the collision, the liability of each vessel is in proportion to the degree of fault that is committed (Article 537).

V REMEDIES

i Ship arrest

Indonesia has not ratified any of the international conventions on the arrest of ships, including the International Convention on the Arrest of Ships (Geneva 1999).

Under Article 222 of the Shipping Law, a ship may be arrested if the ship is involved in a criminal investigation or civil claim. The Shipping Law provides discretionary authority to a competent court to issue a vessel's warrant of arrest, being the object of maritime claims, without needing to undergo a normal civil proceeding. Currently, there are no detailed procedures for the issuance of a warrant of arrest.

Owing to the lack of implementing regulation on the arrest of a vessel, a claimant pursuing the arrest generally needs to make a formal application to the competent court (where the vessel is lying, moored or at anchor) for a Conservatory Attachment Order/CA Order, and such an application may be incorporated in, or filed together with, a statement of claim.

In addition to the above, a claimant often lodges a criminal report to the police to put pressure on the debtor to settle its debt. The police may seize the vessel if the police believe that the vessel can be used for evidentiary purposes in investigation, prosecution and adjudication.

Furthermore, the General Regulation for the Ports and Waters of the Shipping in Indonesia of 1925 (Port Regulation 1925) stipulates that the harbour master may oblige the master of the vessel (if he or she caused such damage) to provide compensation or security for compensation in relation to the damage, and the harbour master may only grant or provide port clearance after the master of the vessel has fulfilled his or her obligation pursuant to Port Regulation 1925.

In light of the above, in practice, the harbour master may delay the issuance of port clearance of the vessel that caused damage to the vessel or asset if the harbour master is of the view that there is no compensation or security for the compensation of the damage being provided.

Sister ship and associated arrests

Arrest of a ship in Indonesian jurisdiction can only be executed upon the ship that is an object of civil or criminal proceedings, or deemed to have outstanding obligation by the harbour master. Therefore, a sister ship cannot be enforced or be arrested.

Wrongful arrest claims

The Shipping Law is silent on any provisions in relation to wrongful arrest.

Nonetheless, if the grounds for or conduct of a CA Order upon the vessel under the statement of claim or civil claim is not in accordance with the prevailing laws and legal procedures, then one may argue that the vessel's arrest is unlawful or wrongful. Indonesian law does not specifically regulate the defendant's compensation for a wrongful arrest. Legally, an available option that may be taken by the court is applying a rule obliging a claimant arresting a ship to pay a guarantee fee as a precondition of a CA Order, pursuant to Article 722 of the Civil Procedure Regulations. However, this rule is rarely implemented by Indonesian judges.

From a criminal law perspective, a pretrial application or a writ of habeas corpus may be submitted against the confiscation or seizure by the police (based on the grounds stipulated under Article 77 of the Indonesian Criminal Procedural Code).

Arrest by helicopter

The Shipping Law is silent on vessel arrest by helicopter.

Bunker arrest claims

The elucidation of Article 223 of the Shipping Law lists cost-related bunkering activities as one of the legitimate bases for a maritime claim. However, due to lack of implementing regulation, the bunker supplier claimant needs to undergo a normal civil proceeding (wherein the contractual relationship between the shipowners and the bunker supplier must be proved), but it does not give rise to any maritime lien.

ii Court orders for the sale of a vessel

The judicial sale of a vessel is recognised as a form of execution or enforcement of a final and binding court decision. If the losing party refuses to voluntarily comply with the court decision, then the winning party should submit a petition for execution of decision.

Notification of Judicial Sale

Pursuant to Article 55, Paragraph (1) of Minister of Finance Regulation No. 213/PMK.06/2020 on Auction Implementation Guidelines (MOFR 213/2020), the public auction for immoveable objects or immoveable objects that will be sold together with moveable objects will be announced by the Auction Office twice:

a the first announcement is to be made in a flyer, electronic media, or newspaper; and

b the second announcement must be made in a newspaper 15 days after the first announcement and, at the latest, 14 days before the date of the auction.

Judicial Sale Proceedings

Indonesian law is silent on how many public auction rounds may take place. During the process, the prospective bidder does not have to make an appearance in the judicial sale proceeding with an attorney. In order to participate, participants of an auction must provide guarantee in the form of a guarantee fee or bank guarantee, and a taxpayer identification number.

VI REGULATION

i Safety

Indonesia has incorporated the numbers of International Maritime Organization (IMO) conventions into its own legislative framework, inter alia:

a the Convention on the International Regulations for Preventing Collisions at Sea 1972 (COLREGs);

b the International Convention for the Safety of Life at Sea 1974 (SOLAS);

c the International Convention for the Prevention of Pollution from Ships 1973 (MARPOL) and the Protocol of 1978 relating to the International Convention for the

d Prevention of Pollution from Ships 1973;

e the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 (the STCW Convention); and

f Maritime Labour Convention 2006 (MLC).[8]

ii Port state control

Relevant regulations

The Indonesian government has executed and ratified the Asia-Pacific Region dated 1 December 1993 (Tokyo MOU) on 1 December 1993, which then came into force on 1 April 1994.

8 Pursuant to Law No. 15 of 2016, Presidential Decision No. 50 of 1979, Presidential Decision No. 65 of 1980, Presidential Decision No. 46 of 1986, Presidential Decision No. 60 of 1986, Presidential Decision No. 21 of 1988, Presidential Decree No. 57 of 2017 and Presidential Decree No. 57 of 2017.

In consideration of the MOU and to comply with several conventions that have been ratified by the Indonesian government,[9] the DGST has issued Regulation No. HK.103/1/9/DJPL-18 on the Implementation of Safety and Seaworthiness of Foreign Vessel Inspection (DGST Regulation 103/2018), which was implemented from Minister of Transportation Regulation No. PM 119 of 2017 on Port State Control Officer (PSCO) of Safety and Seaworthiness of Foreign Vessel (MOTR 119/2017).

Port state control officer – authorities and appointment

DGST Regulation 103/2018 defines PSCO as an official or officer at DGST who has the obligation to supervise the safety and seaworthiness of foreign vessels in accordance with the conventions' regulation. The authority of PSCO is delegated from the harbour master.

MOTR 119/2017 and DGST Regulation 103/2018 regulate that a PSCO has the authority to supervise and conduct inspection over any type of foreign vessel at any port in Indonesia.

The most recent publication of detaining ships by the PSCO was on 19 May 2020, where vessel MV CTP HONOUR, 5906 GT, an Indonesian-flagged vessel departing to Port Klang, Malaysia, was delayed prior to departure for an inspection due to several deficiencies or findings that required the vessel to resolve to avoid the risk of being detained at Port Klang.

iii Registration and classification

Vessel's registration in Indonesia

Indonesia adopts a closed-registry system. Therefore, only Indonesian nationals or legal entities that are duly established under Indonesian laws and domiciled in Indonesia can be registered as the rightful owners of Indonesia-flagged vessels.

MOTR 39/2017 stipulates the following statutory requirements for a vessel to be eligible for registration under the Indonesian flag:

a at least 7 GT;

b owned by an Indonesian citizen or legal entity duly established under Indonesian law and

c domiciled in Indonesia; and

d owned by an Indonesian legal entity, which constitutes as a joint venture company with the majority of shares owned by an Indonesian national or legal entity.

In general, Article 158, Paragraph (1) of the Shipping Law provides that the registration process of a vessel shall be conducted after the vessel has been measured and has obtained a measurement certificate.

Article 7 of MOTR 39/2017 stipulates that in the event that the vessel was previously registered outside of Indonesia, several documents are required for the registration of the vessel in Indonesia, inter alia, evidence of ownership and a report of vessel safety inspection by the marine inspector or surveyor.

9 Including, inter alia, the International Convention on Load Lines 1966, the Convention on Load Lines 1966, the Convention on the International Regulations for Preventing Collisions at Sea and the Convention for the Safety of Life International Convention on the Control of Harmful Anti-fouling System on Ship 2001.

Vessel classification

Indonesia-flagged vessels must undergo classification in accordance with Minister of Transportation Regulation No. PM 7 of 2013 on Classification Obligation for Indonesia-Flagged Vessels (MOTR 7/2013), which was last amended by Minister of Transportation Regulation No. PM 61 of 2014 (MOTR 61/2014). Vessel classification is carried out by either PT Biro Klasifikasi Indonesia (Persero) (BKI), a state-owned enterprise, or another foreign classification agency (members of the International Association of Classification Societies (IACS)) recognised by the Indonesian government under MOTR 7/2013 and MOTR 61/2014. In Indonesia, BKI is the only national classification bureau in Indonesia and was established on 1 July 1964.

The MOTR 61/2014 is silent on whether BKI can be held liable if they have acted negligently in performing their duties. We are aware of a case in which a shipowner filed a statement of claim against BKI on the grounds of an unlawful act due to BKI's refusal to issue a class maintenance certificate (i.e., North Jakarta District Court Decision No. 418/Pdt.G/2017/PN.Jkt.Utr).

From this case, we conclude that filing a claim against BKI is possible on the grounds of an unlawful act. Nevertheless, the plaintiff would be required to establish that BKI had failed to carry out its duties in accordance with the prevailing laws.

iv Environmental regulation

The Shipping Law stipulates that all crew members in a vessel are obliged to prevent and mitigate environmental pollution from their vessel. Generally, liability for pollution that originates from a vessel will be imposed on the owner, master or operator of the vessel.

The issue of pollution from a vessel is also governed under several environmental regulations, including:

Law No. 32 of 2009 on Environmental Protection and Management, last amended by Law No. 6 of 2023 on Stipulation of Government Regulation in lieu of Law No. 2 of 2022 on Job Creation into Law (the Environmental Law);

Government Regulation No. 21 of 2010 on Maritime Environment Protection (GR 21/2010); and

Minister of Transportation Regulation No. PM 29 of 2014 on Prevention of Maritime Environment Pollution, last amended by Minister of Transportation No. 24 of 2022 (MOTR 29/2014).

Air pollution

As stated above, all crew members in a vessel are obliged to prevent and mitigate environmental pollution from their vessel. Article 3 of GR 21/2010 specifies that air pollution is a form of environmental pollution that may be caused by vessels.

MOTR 29/2014 states that air pollution from vessels includes engine emission and energy efficiency. GR 21/2010 imposes obligations for vessels of 400 GT and over to have as the bare minimum air pollution prevention equipment, such as a gas-filter exhaust, a refrigeration system and fire extinguisher equipment that does not destroy the ozone layer.

Furthermore, MOTR 29/2014 stipulates, inter alia:

a all vessels with 400 GT and over and all vessels with a diesel engine of 130 kilowatts or over that sail in international waters are obliged to fulfil the requirements of preventing

air pollution in accordance with Annex VI of the International Convention for the Prevention of Pollution from Ships 1973 modified by 1978 Protocol (MARPOL 73/78); and

b all vessels with 400 GT and over and all vessels with a diesel engine of 130 kilowatts or over, including off-shore drilling facilities or other off-shore facilities, and that sail in Indonesian waters must fulfil the requirements of MOTR 29/2014.

Sea pollution

Indonesia has ratified most of the major international environmental treaties; for example, the United Nations Convention on the Law of the Sea has been ratified by Law No. 17 of 1985 (UNCLOS). Indonesia has also ratified MARPOL and the Protocol 1978 and its annexes through the Presidential Decree No. 46 of 1986 and the Presidential Regulation No. 29 of 2012.

Moreover, the International Convention on Civil Liability for Oil Pollution Damage 1969 and its amendment in 1992 have been ratified by the Presidential Decree No. 18 of 1978 and Presidential Decree No. 52 of 1999 (CLC 1992), respectively.

The Shipping Law stipulates that all crew members in a vessel are obliged to prevent and mitigate environmental pollution from their vessel. Liability for pollution originating from a vessel and the obligation to insure the pollution liability are generally imposed on the owner or operator of the vessel.

It is also compulsory for the owner or operator of a vessel of 1,000 GT and over to insure its liabilities to indemnify third-party losses caused by oil pollution, resulting from bunker fuel operations.

v Collisions, salvage and wrecks

Collisions

Indonesia has ratified the Convention on the International Regulation for Preventing Collisions at Sea 1972 by virtue of Presidential Decree No. 50 of 1979.

Article 249 of the Shipping Law regulates that any accident as referred to in Article 245 of the Shipping Law (sinking of vessel, fire on board and vessel grounded) shall be under the liability of the master of the vessel unless it may be proven otherwise.

Articles 534 to 544 of the Commercial Code are also the key provisions relating to ship collision. See Section IV.

The investigation of ship collisions is regulated by Government Regulation No. 9 of 2019 on Vessel Incident Investigation and Minister of Transportation Regulation No. 6 of 2020 on Vessel Incident Investigation Procedure, as last amended by Minister of Transportation Regulation No. 30 of 2022. Further, the DGST also issued a new technical regulation regarding the procedure of vessel collision investigations though DGST Decree No. KP-DJPL 692 of 2022 on the Standard Operational Procedure for Preliminary Investigation of Vessel Collision as the guidelines for the harbour master in conducting the foregoing preliminary investigation.

Salvage and wreck removal

Indonesia has ratified the Nairobi International Convention on the Removal of Wrecks of 2007 (the Nairobi Convention) pursuant to Presidential Regulation No. 80 of 2020 on the Ratification of the Nairobi International Convention on the Removal of Wrecks of 2007 (PR 80/2020). As such, provisions of the Nairobi Convention are wholly applicable to vessels operating in Indonesian waters.

Prior to the ratification of the Nairobi Convention, the applicable national regulation regarding salvage and wreck removal is governed under Minister of Transportation Regulation No. 71 of 2013 as last amended by Minister of Transportation Regulation No. 27 of 2022 (MOT 71/2013) and any salvage conventions.

Pursuant to Article 202 of the Shipping Law, the owner or its master (or both) is obliged to report its shipwreck, which occurred within Indonesian waters, to the authorised agency. Article 203 of the Shipping Law states that the shipowner shall be obliged to remove its shipwreck or cargo (or both), which is disturbing navigational safety and security, no later than 180 days upon the sinking of the ship or cargo (or both). MOT 71/2013, however, regulates that the shipowner may be released by the authority from any responsibility to conduct wreck removal if, based on the risk assessment issued by the relevant institution or agency, the shipwreck or cargo does not disturb navigational safety and security.

Under Article 560 of the Commercial Code, a salvage reward shall be paid for any salvage operations. Unless otherwise agreed by the parties, the salvage reward must be paid even if the salvage operation is not successful. The salvor is entitled to receive compensation for costs, losses and loss of profits. There is no mandatory form of salvage agreement. In practice, Lloyd's standard form of salvage agreement is generally acceptable.

Wreck removal insurance

Article 203 of the Shipping Law, Article 150 paragraph (2) of Government Regulation No. 31 of 2021 on the Implementation of Shipping Sector (GR 31/2021), and specifically Article 18, Paragraph (1) and Article 26, Paragraph (1) of MOTR 71/2013 provide that vessels operating in Indonesia must be insured with wreck removal insurance or through protection and indemnity insurance (P&I insurance), or both.

MOTR 71/2013 and 150 paragraph (3) of GR 31/2021 exclude several vessels from the obligation of having wreck removal insurance, such as war vessels and vessels with less than 35 GT. Further, the vessels with 300 GT or more should have wreck removal insurance in compliance with the provisions under the Nairobi Convention.

Vessel owners who do not have wreck removal insurance or P&I Insurance may be subjected to several sanctions, including:

a refusal of operational services by the harbour masters (Directorate General of Marine Transportation Regulation No. HK.103/2/20/DJPL-14 of 2014 on Procedures for Imposing Sanction of Not Providing Vessel Operational Service (HK.103)); and

b warnings, licence suspension and licence revocation (Minister of Transportation Letter No. AL 801/1/2/PHB-2014 on the Obligation for Vessels to be insured with Wreck Removal Insurance and/or Protection and Indemnity Insurance).

vi Passengers' rights

Indonesia has not ratified the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea of 1974. The Commercial Code and the Shipping Law (as well as its implementing regulation) provide the main legal basis for the responsibilities of the carrier in relation to the safety of its passengers and goods.

Pursuant to Article 522 of the Commercial Code, the carrier assumes the responsibility of taking care of the safety of its passengers from their embarkation until their disembarkation. Furthermore, in the event that the passenger suffers from injury during the voyage, the carrier will be required to compensate any damages resulting from the injury, unless the carrier can establish that the injury that occurred was attributable to a force majeure cause or was a result of the passenger's own fault.

vii Seafarers' rights

Indonesia has ratified the Maritime Labour Convention 2006 by virtue of Law No. 15 of 2016 on the Ratification of Maritime Labour Convention 2006, which came into force on 6 October 2016.

The Minister of Transportation has enacted Regulation No. PM 58 of 2021 on Maritime Labour Convention Certification.

Article 28, Paragraph (1) of Government Regulation No. 7 of 2000 on Seafarers provides that the shipping company shall bear the costs of medical treatment and medicines for the sick or injured crew while they are on board the vessel.

Furthermore, under Minister of Transportation Regulation No. 26 of 2022 on Manning of Commercial Vessel (MOTR 26/2022), shipping companies and manning recruitment companies must provide education or training, or both, for at least two members of the deck or engine department of the vessel.

VII OUTLOOK

In addition to the issuance of the Job Creation Law that has amended several regulations related to shipping law, recently, the Indonesian government has enacted Government Regulation No. 13 of 2022 on the Implementation of Security, Safety and Law Enforcement in Indonesian waters and Indonesian jurisdictions. Essentially, this Regulation provides authority to the Indonesian Maritime Security Agency to inspect a vessel if there is a strong alleged violation of shipping-related regulations.

In the third quarter of 2022, the Minister of Transportation issued several regulations to amend and revoke the previous regulations inter alia, as follows.

a Minister of Transportation Regulation No. 27 of 2022, which serves as the third amendment to the MOTR 71/2013: this new regulation emphasises the implementation of the Nairobi Convention (which entered into force in Indonesia on 20 July 2020) concerning the obligation for vessels sailing within Indonesian waters to possess wreck removal insurance.

b Minister of Transportation Regulation No. 28 of 2022, which revoked Minister of Transportation Regulation No. 82 of 2014 on Procedures for the Issuance of Port Clearance and Approval for Vessel Activities at Port: in essence, the new regulation provides more comprehensive provisions compared to the previous regulation, such as the requirement of the ship owner, operator or master to notify the relevant harbour master of arrival online or manually before the arrival of the vessel.

c MOTR 26/2022 superseded Minister of Transportation Decree No. 70 of 1998 on Manning of Commercial Vessels: the major amendment is related to the number of crew manning the ship, the procedures for determining the number of crew manning the ship, and the obligations and responsibilities of shipping companies towards the crew on-board and employed.

d Minister of Transportation Regulation No. 30 of 2022, which serves as the first amendment to Minister of Transportation Regulation No. 6 of 2022 on Ship Accident Investigation Procedure: according to this new regulation, hearings can be held online with the approval of the chair of the Maritime Tribunal.

e Minister of Transportation Regulation No. 25 of 2022, which revoked Minister of Transportation Regulation No. 53 of 2018 on Verified Container Airworthiness and Gross Weight: the scope of this new regulation is for the container used as part of the conveyance on ships used for the transportation of containers abroad and within the country.

f Minister of Transportation Regulation No. 24 of 2022, which serves as the first amendment to Minister of Transportation Regulation No. 29 of 2014 on the Prevention of Marine Environmental Pollution: the new regulation, inter alia, allows ship owners to insure their liabilities in relation to environmental pollution with other financial guarantee institutions, in addition to insurance companies.

Chapter 25

ISRAEL

Yoav Harris and John Harris[†1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Located at a strategic meeting point between Europe, Asia and Africa, the Israeli ports of Haifa and Ashdod (on the east shore of the Mediterranean Sea) and Eilat (on the west shore of the Red Sea) fulfil a key role in domestic and other related and connected trade, including trade that became available after the Abraham Accords[2] were concluded. We confirm that after the building of new ports and the privatisation of the Israeli ports, port users will have freedom of choice to decide which port that they will use.

On September 2021, the new Bay Port located at Haifa Bay began to operate. This new port is under the ownership of the State of Israel through the Israel Ports Development and Assets Company (Ltd) and is operated by the Messrs Shanghai International Port Group. In quarter one of 2022, the new Sought Port located next to Ashdod Port (operated by Messrs Terminal investment Limited SA of Switzerland) is expected to operate at full capacity. In January 2023, the selling of the Haifa Port to Adani-Gadot group (a group comprised of Adani Ports and Special Economic Zone Ltd and Gadot Chemical Terminals (1985) Ltd) has been completed, meaning that the main Israeli ports are now operated under private commercial operators. These private companies may compete with each other and provide the merchants with the possibility to choose at which port they will have their import or export activities.

According to statistics provided by the Israeli Administration of Shipping and Ports, the volume of cargoes both loaded and discharged at all Israeli ports during 2021 reached a total of 59.765 million tonnes. In February 2022, the number of vessels under Israeli ownership or control was reported to be 38, having a total deadweight tonnage of 1.895 million tonnes and average age of 7.1 years.[3]

With government support, such as allowing an increase of 20 per cent depreciation on vessels for reducing income tax payments and subsidising the employment of Israeli crew and officers, the government of Israel supports local shipowners to preserve and develop Israeli ownership of shipping and vessels.

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1 Yoav Harris is managing partner and John Harris[†] (1940–2023) was co-founder at Harris & Co Maritime Law Office. John Harris recently passed away.

2 The Abraham Accords are a joint statement between Israel, the United Arab Emirates and the United States, reached on 13 August 2020. See Section VII.ii.

3 The Annual Statistics Shipping and Ports, 2021, *The Administration of Shipping & Ports*, available at www.gov.il.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Israel has been a member of the International Maritime Organization since 1952 and follows, including by domestic legislation, the international conventions relating to the different aspects of maritime law, shipping and marine environment, including the Convention for the Protection of the Mediterranean Sea against Pollution 1978 (in its updated version as the Convention for the Protection of the Marine Environment and Coastal Region of the Mediterranean 1995), the International Convention Relating to the Limitation of Liability of Owners of Sea-Going Ships 1957 and its amending Protocol of 1979, the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules), the International Convention for the Prevention of Pollution from Ships 1973 (MARPOL, Annexes I, II, III and V) and The Admiralty Acts of 1840 and 1861.

III FORUM AND JURISDICTION

i Courts

All ports of Israel are governed by the Haifa Maritime Court located in the Haifa District Court, which has the authority to judge *in rem* claims and ship arrests, ownership and registration disputes, and to order on confiscation of vessels according to the Naval Prize Act of 1864.

Other aspects of shipping and maritime law, such as cargo claims or charter-party disputes, are considered commercial civil claims and are brought before either a magistrate court or a district court, depending on the amount claimed and the relevant local jurisdiction. Claims up to 2,500,500 shekels are filed before a magistrate court, whereas claims that exceed this amount are filed before a district court.

Under Clause 48 of the Shipping Act (Vessels) 1960, a maritime lien (which is enforced by the Haifa Maritime Court) expires within one year. The date of enforcement depends on the nature of the lien; for example, in a lien for salvage, the one-year expiry period will count from the end of providing the salvage service; and in a lien for a damage to cargo, the expiry period will start from the date of delivery of the cargo, or from the date on which the cargo should have been delivered.

However, if at the end of the expiry period (as explained above) the vessel is not in Israeli territory, the beginning of the expiry period will be extended until the vessel's arrival at an Israeli port, provided that the lien will expire no later than three years from the date of the beginning of the expiry period had the vessel been in Israel.

Unless subject to specific rules, such as the one-year time bar on filing cargo claims against shipowners according to Article III(6) of the Hague-Visby Rules or the one-year expiry of the maritime lien according to Clause 48 of the Shipping Act (Vessels) 1960 (which is similar to Article 9 of the International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages 1926), all other matters are governed by the standard seven-year limitation period, as stipulated in the Israeli Limitation Act 1958.

ii Arbitration and ADR

Israel has ratified the Convention on the Recognition and Enforcement of Arbitral Awards 1958 (the New York Convention). Under the Regulations for the Performing of the New York Convention (Foreign Arbitration) 1978, the district courts are authorised to enforce a foreign arbitral award, provided that the applicant will present the court with a verified copy of the award and of the arbitration agreement.

In addition, under Articles 5 and 6 of the Arbitration Act 1968, the district court can order a stay of proceedings when the matter in dispute is subject to an arbitration agreement or to an arbitration clause in the contract.

Pursuant to Clauses 16(a) and 39A of the Arbitration Act 1968, a district court is authorised to order on supportive remedies, such as liens and restraining orders, so as to secure arbitration proceedings, including proceedings taking place in foreign jurisdictions. The Haifa Maritime Court, situated in the Haifa District Court, exercises this authority and will order on the arrest of the vessels even if the claim itself should be determined in arbitration or foreign jurisdiction.

In M/V *Aquis Perla* and M/V *Mare Zen*,[4] the Haifa Maritime Court held that it is authorised to order on attachments on assets of the local defendant to secure a London arbitration in relation to unpaid hire, following the above-mentioned orders of the Israeli Arbitration Act and with no need to enquire whether English arbitration law does or does not allow attachment of a defendant's assets.

iii Enforcement of foreign judgments and arbitral awards

Under the Enforcement of Foreign Judgments Act (the Enforcement Act), an Israeli court is authorised to enforce a foreign judgment, provided that the judgment is issued by an authorised court. It is not appealable and its contents are not in contravention of public policy (Enforcement Act, Article 3, Paragraphs (1) to (4)). If the foreign courts handling the subject judgment do not, according to their domestic law, enforce Israeli judgments, then the foreign judgment will be enforced by an Israeli court only if so requested by the Attorney General (Enforcement Act, Article 4, Paragraphs (a) and (b)). Treaties for mutual recognition and enforcement of judgments have been reached between Israel and Germany and between Israel and the United Kingdom. In the matter of MV *Captain Hurry* (2016), the Maritime Court recognised a German court's declaratory judgment, declaring that the owners were not liable for any payment for the bunkers claimed by the claimant. As a result, the claim was dismissed.

IV SHIPPING CONTRACTS

i Shipbuilding

Israel does not undertake a significant amount of shipbuilding.

ii Contracts of carriage

The Hague-Visby Rules have been adopted into Israeli law as part of the Ordinance for the Carriage of Goods by Sea, as amended on 21 January 1992.

4 Folio No. 59972-07-19.

The Hague-Visby Rules will apply to any bill of lading that governs the sea carriage of cargo from any Israeli port or a port or country that is a party to either the Hague Rules or Hague-Visby Rules, or when the bill of lading incorporates the Hague-Visby Rules or is governed by the laws of a country that applies the Rules.

Israel has adopted neither the UN Convention on the Carriage of Goods by Sea 1978 (the Hamburg Rules) nor the UN Convention for the International Carriage of Goods Wholly or Partly by Sea 2009 (the Rotterdam Rules).

iii Cargo claims

In line with the above, a claimant in a cargo claim should file within one year of the date of delivery of the cargo or the date on which it should have been delivered (Hague-Visby Rules, Article III(6)). In *Polska Morska v. Bank National de Paris*,[5] the Supreme Court held that a cargo claim filed in a foreign jurisdiction 'cuts' the one-year limitation period under Article III(6) of the Rules. In MV *Eleftheria*,[6] Haifa Maritime Court held that the underwriter can add the insured as an additional claimant even after the one-year limitation period has elapsed. The Court's reasoning was that the underwriter's claim was filed within the one-year time bar and that the ownership of the vessel is immaterial to the legal identity of the entity suing it. The Court also stated that an owner's interests are in the merits of the claim itself, the preservation of evidence and the owner being aware of the fact that there is a claim for damage to the cargo. The Court ruled that all the information in the underwriter's claim that was filed within the one-year time bar was known to the owners and that the addition of the cargo interests as an additional plaintiff would not prejudice the owners of the vessel.

In *Fehya Maritime v. Millubar*,[7] the Supreme Court held that a claim filed by a claimant who did not have title to sue does not 'cut' the one-year time bar and therefore after the 12 months have elapsed, the claim cannot be amended by adding the claimant who had the title to sue to the claim.

The cargo claim is subject to the owner's limitation of liability to either 666.67 special drawing rights (SDRs) per package or unit or to 2 SDRs per kilogram of the cargo lost or damaged, according to the highest of the two (Hague-Visby Rules, Article IV(5)(a)). The claimed damage to the cargo should be a result of the owner's failure to exercise due diligence at the beginning of the voyage to make the vessel seaworthy and properly manned and equipped (Hague-Visby Rules, Article III(1), Paragraphs (a) to (c); Article IV(1)). Neither the carrier nor the vessel will be liable for damage resulting from perils of the sea or any other cause not arising from the actual fault or privity of the carrier or without the fault or neglect of the agents or servants of the owners (Hague-Visby Rules, Article IV(2), Paragraphs (a) to (q)).

In *Trans KA v. Vitol Energy*,[8] the Supreme Court held that the owners of a vessel that called at Haifa port, and was later prohibited by Libyan authorities from entering a Libyan port because of the Arab boycott on Israel, was exempt, according to Article IV(2)(5) of the Rules (Restraint of Princes), from paying damages to the charterer of the vessel that chartered it for a carriage between Libya and Turkey.

5 Civil Appeal 6260/97.

6 *In rem* Claim No. 30100-10-10.

7 Civil Appeal 7195/18.

8 Civil Appeal 7802/11.

In Appeal No. 8518/19, the Supreme Court affirmed the decision of the Haifa Maritime Court in Civil Claim 35583-11-18 relating to MV *Chrysopigi*, that a foreign marine insurer has a title to sue under the insured rights that have been subrogated to him or her, even if the foreign insurer is not listed in the Israeli insurance supervisor's list as an insurer active in Israel and subject to the supervisor's supervision. Under this decision, the Court has given effect to the Israeli legislator's wording and meaning when excluding marine insurance from the supervision and other liabilities according to the Insurance Agreement Act 1982. In a similar matter of Civil Claim 31521-01-20, *Nobel v. Zim*, the Haifa District Court ordered that the act of subrogation does not relate to the manner in which an insurer handles its insurance agreements, and accordingly, the act of subrogation is not subject to local regulations and supervisions on insurers.

In *HDI v. Orl*,[9] the Supreme Court held that the quantities stated in a bill of lading are *prima facie* evidence towards not only the owners (who issued the bill of lading) but also the underwriter insuring the cargo in marine insurance.

iv Limitation of liability

Israel has adopted the International Convention Relating to the Limitation of Liability of Owners of Sea-going Ships 1957 (and its amending Protocol of 1979) as part of the Shipping Act (Limitation of Liability of Sea-going Ships) 1965.

Following the orders of this Act, the owners of a vessel can apply to the Maritime Court for the establishment of a limitation fund. If the Court is satisfied with the owner's application, it will order the establishing of the limitation fund and will give orders as to the owner's deposit and the publishing of notices to the creditors. Creditors' claims, or participation claims that are filed by a local creditor, have to be filed within 30 days. A foreign creditor must file a claim within 60 days.

In the matter of MV *Moraz* (2022), the Haifa Maritime Court has denied owners' application to set a limitation found in order to limit its liability damages caused as a result of oil leakage from the vessel while being bunkered near Haifa Port. The Court held that the nature of the damage caused – the contamination of the port's facilities – should be construed as damage to 'harbour works, basins and navigable water ways', which appear in Article 1(1)(c) of the Brussels Limitation Convention 1957 and which have been excluded by the above-mentioned Israeli Act of 1965 adopting the Convention. In addition, the Court held that the incident was caused by the actual fault or privity of the owners through the local operators of the vessel who did not give the vessel's crew the required instructions for the bunkering operations, and did not supervise the crew members' qualifications; therefore, also for this reason, the owner's application was denied.

V REMEDIES

i Ship arrest

By a King's Order in Council dated 2 February 1937, the Supreme Court of Jerusalem was constituted as a Maritime Court, under the Colonial Courts of Admiralty Act 1890 (the Colonial Act). On the date on which the Colonial Act was enacted, the relevant acts of

9 Civil Appeal No. 7779/09.

Admiralty in force were the Admiralty Court Acts of 1840 and 1861, and the Naval Prize Act of 1864. These continue to apply to the jurisdiction of the Israeli Maritime Court situated in Haifa.

In 1952, the state of Israel enacted the Admiralty Courts Act. This is merely an administrative act transferring the authorities of the Supreme Court of Jerusalem to act as a maritime court to the Haifa District Court, which has acted as a maritime court ever since.

When enacting the Shipping Act of 1960, the Israeli legislator included specific chapters on mortgages and liens, adopting the continental maritime lien regime of the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages 1926, preferring the Convention's regime to that of English law.

The result is that the Haifa Maritime Court has two non-identical sets of rules relating to maritime liens and there are relatively few Supreme Court judgments on appeals filed on decisions of the Haifa Maritime Court, so there are no Supreme Court precedents covering all aspects of maritime liens.

The main Supreme Court judgment is the one that was handed down on 5 July 1990 in MV *Nadia S*, in which it was held that a maritime lien is a substantive right rather than a procedural right (and in this regard diverged from the majority opinion in the English judgment in *Halycon Isle*), attaching to the ship and following the *res* into the hands of third parties, and is determined according to the *lex* cause.

The ranking of the recognised liens is as follows:

a the costs of the court's auction sale of an arrested vessel;

b port dues of all kinds and other payments for such port services as much as they are due to the state, to another state or authority, or have been paid to them by a third party;

c the costs of preservation of an arrested vessel (from the date of its entry into the port and until its sale by the court;

d wages;

e salvage;

f compensation for death or injury of passengers;

g compensation for damage caused as a result of a collision at sea or any other navigation accident, or for damage done by the vessel to port facilities, and indemnities for loss or damage to cargo or passengers' baggage; and

h payments due for the supply of necessaries.

A mortgage is ranked after the lien in point (g), above, and has priority over the lien in point (h), above, which is the lien for necessaries.

In MV *Ellen Hudig* (2004), the Haifa Maritime Court denied a maritime lien for 'indemnities for loss or damage to cargo or baggage'. The alleged damage that was claimed was alleged to be additional expenses relating to the discharge of the cargo from an arrested vessel and additional freight paid to another vessel for the voyage to Singapore. The Court held that the vessel was arrested because of a claim filed by the crew for unpaid wages and, within 10 days, the owners fell into bankruptcy proceedings before a Belgian court, and that these circumstances did not fall under the owner's liability. Therefore, the claim was denied.

Since then, the *Ellen Hudig* case has been cited by the Haifa Maritime Court as an authority that establishes the need to show the owner's liability for the court to recognise and enforce a maritime lien.

The case of MV *Emmanuel Tomasus* (2014) dealt with a physical supplier who had supplied bunkers to the vessel and was not paid. Its claim to enforce the lien for 'necessaries'

was denied, under the reasoning that this is a contractual lien, and that when the claimant was not a party to the supply agreement, and the contractual supplier was paid by the owners, there is no personal liability on the owners to pay the physical supplier.

In MV *Nissos Rodos* (2016), the Haifa Maritime Court held, citing the *Ellen Hudig* case, that the local agent who paid the port dues for 17 calls at Haifa was not entitled to the maritime lien for port dues. The Court's reasoning was that the agent had no agreement with the owners and that there was no personal liability on the owner to pay the agent the port dues because the commercial relations were between the owner of the vessel and the operator of the vessel, and not between the owner and the agent.

In MV *Captain Hurry* (2016), the Haifa Maritime Court dismissed a claim by a bunker supplier who argued that an enforcement of a maritime lien does not require an owner's personal liability. In this matter, the owners asked the Court to enforce a German court's judgment declaring that the owners were not liable to pay the supplier. After examining the German court's judgment and its finding that all the contractual relations took place between the bunker supplier and the charterer only, and not with the owners, the Haifa Maritime Court dismissed the claim due to *res judicata* and lack of owner's liability.

However, in the matter of MV *Captain Hurry*, the Haifa Maritime Court noted the fact that maritime liens differ from each other, whereby some are intended to secure liabilities voluntarily and others are to secure liabilities under law. For example, according to the Court's view, a lien for salvage exists even if the owners were not liable in the circumstances that led the vessel to distress.

These views of the Haifa Maritime Court, which recognise the diversity of maritime liens, may open a path to an enforcement of maritime liens that does not require an owner's personal liability.

Israel is not a signatory party to any of the conventions allowing the arrest of a sister ship (such as the International Convention for the Unification of Certain Rules relating to the Arrest of Sea-going Ships 1952 or the International Convention on the Arrest of Ships 1999) and no authority of sister ship arrest is mentioned in either the Admiralty Acts of 1840 and 1861 or the Israeli Shipping Act (Vessels) of 1960. Therefore, in MV *Huriye Ana* (2017), the Haifa Maritime Court held that there was no legal basis to order a 'sister ship' arrest. In M/V *OSOGOVO* (2021), while denying a supplier's arrest application for necessaries supplied to a sister ship vessel of the subject vessel, the Haifa Maritime Court mentioned that it does not deny the possibility of extending, under judicial legislation, the causes for sister ship arrest, leaving the path for applying for such an arrest by using the legal principles of lifting the corporate veil.

Security and counter security

A protection and indemnity (P&I) letter of undertaking can be accepted as security on behalf of an arrested vessel, provided that the P&I club is a respected or reputed club that will be able to pay the secured amount. An Israeli bank's guarantee will be accepted. It is likely that a guarantee from a foreign bank will be rejected.

The Haifa Maritime Court has continuously held that, typically, there is no justification for putting procedural thresholds before creditors seeking enforcement of their maritime liens and only in exceptional occasions. For instance, when the validity of the documents constituting the lien is doubted or when the owners' liability in a claim to enforce a maritime lien for necessaries is questioned, the claimant will be required to deposit a counter security for the arrest. The nature and ranking of the lien would also be considered.

In MV *Captain Hurry*, a deposit of US$12,500 was required as counter security for an arrest securing a claim of US$315,763 for the delivery of bunkers, which was ultimately denied.

Position and location of arrested vessel

In MV *Donar*,[10] the Supreme Court held that according to Articles 5, 10 and 17 of the Rules Touching the Practice in the Vice Admiralty Court, established in 1883 (the Vice Admiralty Rules 1883), an action *in rem* is opened with a writ of summons that should be served by the plaintiff within six months. Accordingly, the Supreme Court held that proceedings (before the Haifa Maritime Court) can be commenced (by the plaintiff) even within six months prior to the vessel entering Israeli territorial waters, provided that the writ of summons will be served to the vessel within six months and in the territorial waters.

Therefore, legally, a vessel can be arrested even before entering Israeli waters and can be served with a writ of summons (and the arrest order and pleadings filed by the claimant) on entering the territorial waters as long as the intended vessel for arrest is within the designated port area it can be arrested, namely, the vessel can be arrested even if not in berth as long as it is in the port area. There is no legal requirement for the arrested vessel to be at a berth when it is arrested. Obviously, in practice, the chances of an arrested vessel either at a berth or in port unlawfully escaping arrest are relatively slim, whereas at open sea on the edge of or within the territorial waters, these chances are much higher.

ii Court orders for sale of a vessel

If no Notice of Appearance is filed on behalf of the arrested vessel within seven days of the service of the maritime claim documents (including the writ of summons), the court may order the judicial sale of the vessel so as to save maintenance, port due and crew costs. According to the Vice Admiralty Rules 1883, the court is authorised to order that the vessel will be sold either by public auction or by private contract.

VI REGULATION

i Safety

As a member of the International Maritime Organization (IMO) since 1952, under Articles 99 and 100 of the Israeli Regulations on Port Safety (Vessels) and the IMO Code for the Investigation of Marine Casualties and Incidents, the Administration of Shipping and Ports conducts investigations of marine casualties and issues reports.

In *HDI Global Antwerp and Others v. The State of Israel and Owners of MV Diana*,[11] Haifa District Court ordered that the Israeli Authority for Shipping and Ports should have disclosed foreign cargo interests in the communications that took place between the distressed MV *Diana* and the Rescue Coordination Centre at Haifa port, prior to the vessel's grounding on 19 January 2018, 250 metres from Haifa Bay Watch, which were collected by the Authority while investigating the incident.

The decision was reached in view of the separate London arbitration proceedings between the cargo interests and the owners and following the cargo interests' application filed on grounds of the Israeli Freedom Act 1998 and the Arbitration Act 1968. Haifa District

10 Civil Appeal 362/83.

11 Folio No. 67484-03-19.

Court's reasoning was that the cargo interests were entitled to receive information collected by the Authority for Shipping and Ports regarding the cargo that was damaged as a result of the grounding.

ii Port state control

The Administration of Shipping and Ports is a statutory authority with the Ministry of Transport. The Administration supervises the ports of Haifa, Ashdod and Eilat. It is responsible for marine traffic, licensing and registration of vessels, certification of seafarers, supervising the safety of vessels, conducting port state control, issuing notices to mariners and acting as the Israeli representative within the international marine community.

iii Registration and classification

The Israeli registration of vessels takes place before the Registrar at the Administration of Shipping and Ports. Registration should include ownership rights, mortgages and liens, among other things, as required in each case.

In MV *Badar* (2020), the Haifa Maritime Court held, in a decision accepting an application for attachments on the Israeli registration of the vessel, that a vessel is registered with a foreign registry unless properly deleted from its former registration, even if a writ of ownership arises from a writ of ownership issued by an authority.

In MV *Hurriye Ana* (2020), the Haifa Maritime Court denied a bank's claim for the enforcement of a mortgage incorporated in a foreign vessel's registration. The Court held that the validity of the loan agreement was not proven and that no information was provided in relation to the payment schedule agreed with the debtor (who was not the owner) nor the exact amount of debt that remained. The fact that a mortgage is incorporated in the vessel's registration is not enough to have it enforced.[12]

iv Environmental regulation

Israel is a party to the Convention for the Protection of the Mediterranean Sea Against Pollution 1978 and reaffirmed its updated version and the Convention for the Protection of the Marine Environment and Coastal Region of the Mediterranean 1995. In addition, Israel joined MARPOL in 1983 and has reaffirmed Annexes I, II, III and V.

v Collisions, salvage and wrecks

The law relating to a distressed vessel, wrecks and lost merchandise is governed by the Salvage Fee and Lost Merchandise Order of 1926. Under this Order, whoever finds lost merchandise or discovers any wreck must inform the Receiver of the Wrecks at the Authority of Shipping and Ports, who will publish a notice about the finding of the same and serve a copy of the notice to the Lloyd's agent in Israel or to Lloyd's in London. If the merchandise or the wreck is not claimed within six months, it will be sold by the Receiver of the Wrecks and the balance of the sale after deducting the salvage fee and expenses will applied by the Minister of Treasury as part of the national income.

The International Regulations for Preventing Collisions at Sea 1972 (COLREGs) have been adopted into Israeli law under the Port Regulations (Preventing Collisions at Sea) 1972.

12 Folio No. 67484-03-19.

Under the Salvage Fee and Lost Merchandise Order of 1926, whenever a ship is grounded, sinking or in distress within Israeli territorial waters, the receiver nominated by the Minister of Transportation shall go to the relevant place to give orders to attending persons to preserve the ship and the lives of people on board. Anyone who provides aid to a distressed or grounded vessel or helps to save lives of people on board is entitled to a fair payment for those services, which should be paid by either the owners of the ship or the salvaged cargo. If no understanding is reached, the parties will refer to arbitration.

The amount due by the shipowners for salvage is a recognised lien either according to Clause 42(5) of the Shipping Act (Vessels) 1960 or Clause 9 of the Admiralty Court's Act 1961. As mentioned above, in MV *Captain Hurry*, the Haifa Maritime Court advised that the lien for salvage will exist even if the owners were not liable for the circumstance that led the vessel to distress.

vi Passengers' rights

Israel is not a party to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea 1974. Therefore, passengers' claims will be governed by general contract and tort law, and other general laws, including those relating to jurisdiction clauses.

vii Seafarers' rights

The qualification requirements, supervision, duties and requirements of and from Israeli seafarers are the subject of the Shipping Act (Seaman) 1973. Israel has not adopted the Maritime Labour Convention. However, the amount due to a seafarer for wages is a recognised maritime lien and Israeli law considers the labour relationship as a contractual relationship. Therefore, any entitlement of seafarers either from an international convention or a collective agreement, which can be viewed as governing the labour contract (including as an implied term), can be enforced by the competent maritime court when deciding on the amount due to a seafarer in wages.

In M/V *MORAZ* (2021) the Haifa Maritime Court accepted that the costs of medical treatment provided by a local hospital to a crew member who became ill with the coronavirus (covid-19) constituted a maritime lien on the vessel under the recognised lien for 'payments claimed by the captain, crew and others who served on board arising out of their employment in the vessel'. In the matter of M/V *Stellar Pacific* (2023), the Haifa Maritime Court ordered compensation payments to the heirs of a late third officer who suffered from head injuries while serving on the vessel located near Ashdod port and later died in the hospital, in amounts exceeding those that are usually stated in the collective agreements. This judgment was rendered by the Court by way of settlement and with no reasoning. However, it seems that the amount awarded validates the proposition that under Israeli law owners cannot limit their tortious liabilities and other liabilities in relation to tortious incidents that occur to a crew member, as this limitation is not within public policy.

Arresting a vessel in respect of a claim *in rem* and an arrest application filed by the crew, either for wages for tortious compensation for injury or casualty, when the vessel arrives at an Israeli port is a common practice for arresting vessels in Israel.

VII OUTLOOK

i Prize

In MV *Estelle* (2014), quoting as its authorities the Colonial Court's Act of 1890 and the Naval Prize Act 1864, the Haifa Maritime Court held that it is authorised to act as a Prize Court and order the confiscation of a vessel attempting to breach the naval blockade imposed on Gaza. In the specific case of MV *Estelle*, the vessel was released by the Court because the Israeli Navy did not promptly bring the matter to adjudication. Later, in MV *Marianne* (2016), MV *Zaytouna-Oliva* (2019), M/V *Freedom* and M/V *Kaarstein* (2021) the Haifa Maritime Court ordered the confiscation and judicial sale by auction of the vessels and ordered that the amount received from the sales would be transferred to the state of Israel.

ii The Abraham Accords

The Treaty of Peace, Diplomatic Relations and full normalisation between the United Arab Emirates and the State of Israel, followed by normalisation agreements with Bahrain, strengthens the strategic location of Israel and Israeli ports. An increase in the volume of trade and transport between Israel and the Gulf States is expected.

The Haifa Maritime Court has exercised its rights in favour of either a bunker supplier located in Dubai (arresting the MV *Huseyn Javid* for unpaid bunkers) or a Libyan owner (in cancelling the Israeli registration of MV *BADR* which was done *ex parte* while the vessel was registered in its original Libyan registration). Following the conclusion of the Abraham Accords, the Persian Gulf and other Middle East claimants and interests will find the Haifa Maritime Court and other Israeli courts to be a favourable jurisdiction.

Chapter 26

ITALY

Pietro Palandri and Marco Lopez de Gonzalo[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

According to statistics published by the Italian Shipowners Association, Confitarma, as at 31 December 2021, Italy's merchant fleet comprises 1,314 units totalling 14.5 million gross tonnage (GT) with a negative trend of 1.5 per cent in terms of fleet and 1.2 per cent in terms of tonnage compared to 2020. About 91 per cent of the fleet (about 13.3 million GT) is listed in the International Registry (see Section VI.iii) and about 8 per cent (about 1.2 million GT) is listed in the Ordinary Registry. A small number of vessels fly the flag of a foreign country under bareboat charter registration. Italy has the world-leading roll-on, roll-off fleet in terms of tonnage, with 265 vessels with a total GT of 5.5 million.

As a result of the market crisis that has affected some shipping segments (especially dry bulk), many Italian shipowners have faced financial difficulties, forcing them to agree debt restructuring plans with creditors – under which the shipping companies were often forced by lending banks to sell their assets – or to commence liquidation and insolvency proceedings. Private equity funds (such as Pillarstone) have recently taken over the distressed credits from various lending banks. In some cases, these operations have led to the acquisition by private equity funds of the control of Italian shipping companies so that rather than selling the companies or the single assets, the funds have taken control of the business.

The Italian shipbuilding industry has a long tradition and an established reputation; however, fierce competition, especially from Asian shipyards, has significantly restricted activity in Italian shipyards. The main focus is currently on high-quality niche markets, such as cruise vessels and megayachts.

With 40 orders for new ships (totalling approximately 2.9 million GT) in 2021, Italy is ranked fifth in the world for shipbuilding and first in Europe. The main market is that of cruise vessels, with 32 orders for 2.9 million GT in 2021. Fincantieri, the largest shipbuilding company, which is controlled by the Italian state, currently accounts for 80 per cent of Italian shipbuilding production and is a leading shipyard for cruise vessels (for instance, it has built several vessels for the Carnival group).

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The legislative framework for shipping in Italy is set out in domestic and international legislation. As far as domestic legislation is concerned, the Italian Code of Navigation is the main set of rules and regulates both maritime and air navigation. The maritime and inland

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navigation section regulates the administrative organisation of the navigation, ownership and operation of vessels, charter parties, bills of lading, salvage, collision, maritime insurance and procedural rules for maritime claims.

In addition to the Code of Navigation, a number of complementary laws provide specific rules for particular areas of shipping, such as Law No. 135/1977 on the Role of Shipping Agents, Law No. 84/1994, as amended in 2016, on Port Organisation and Services and Legislative Decree No. 171/2015, as amended in 2018, on Recreational Craft.

International conventions and EU legislation make an important contribution to the shipping framework in Italy, completing and derogating (if necessary) domestic legislation. These conventions and EU legislation usually prevail over domestic legislation.

Laws applicable to contractual and non-contractual obligations are regulated, respectively, by Regulation (EC) No. 593/2008 (Rome I) and Regulation (EC) No. 864/2007 (Rome II), while matters relating to jurisdiction and the recognition and enforcement of judgments in civil and commercial matters are governed by Regulation (EU) No. 1215/2012 (Brussels I *bis*), which replaced Council Regulation (EC) No. 44/2001 (Brussels I) in 2015.

A number of conventions have been ratified and enforced by Italy, including the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (the Hague Rules), the International Convention Relating to the Arrest of Sea-going Ships 1952 (the Brussels Convention), the International Convention on Salvage 1989 (the 1989 Salvage Convention) and the Maritime Labour Convention 2006 (MLC).

The most prominent convention not yet ratified by Italy is the Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC Convention 1976). Nevertheless, its provisions have been partially included in domestic legislation (see Section IV.iv).

III FORUM AND JURISDICTION

i Courts

There are no specific courts in which shipping disputes are litigated, but courts of the main maritime districts have divisions that deal mainly with this type of claim and have a wide experience in maritime matters.

Choice-of-forum clauses will be considered valid by the Italian courts if they comply with provisions set out in Article 25 of Brussels I *bis*. In particular, Article 25 provides that the prorogation of jurisdiction is valid if it is agreed:

> *in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.*

In accordance with Article 25, choice-of-forum clauses included in a bill of lading are usually considered valid and binding by Italian courts.[2] The Court of Cassation has also affirmed the validity of a jurisdiction clause included in a multimodal transport document.

2 More recently, see Tribunal of Genoa on 15 March 2022.

Furthermore, the parties can agree the jurisdiction of an EU Member State even if none of them is domiciled in a Member State. A jurisdiction clause is to be considered an agreement independent of the other terms of the contract and its validity cannot be contested solely on the ground that the contract is not valid.

In the event that proceedings are commenced before an Italian court without jurisdiction, the defendants must challenge this in their first pleadings under penalty of inadmissibility.

Choice-of-law issues are regulated by the Rome I Regulation, according to which the choice of law made by the parties requires no formalities and can be inferred by the judge taking into consideration the parties' intentions and behaviour.

Limitation periods depend on the nature of the claim. According to Article 2951 of the Italian Civil Code, a one-year time limit applies to claims arising under a contract of domestic rail or road carriage. The same one-year limit applies to cargo claims in international contracts under the Hague Rules. If, however, a claim arises under a contract of domestic sea carriage, the time bar will be six months in the event that the carriage is within Europe or a Mediterranean country; otherwise, the time limit is one year.[3] Other limitation periods in shipping are one year for charter parties (six months or one year for voyage charter or contracts of carriage), two years for collision damages and salvage remuneration, and three years for oil pollution damages. The general rule for liability in tort provides a five-year time limit.

Time limits cannot be extended or shortened by agreement between the parties, but domestic law time limits may be interrupted, so that a new limitation period commences by a claimant serving a writ of notice of claim with a request of payment.

ii Arbitration and ADR

Arbitration is not the main method of dispute resolution in Italy, and therefore there are no specific associations dealing with maritime arbitration such as there are in other maritime countries. Most arbitration clauses included in contracts, even with Italian parties, refer to arbitration in London.

Nonetheless, arbitration can be instituted according to Article 840 et seq. of the Italian Code of Civil Procedure and it can be formal or informal. The main difference between the two procedures is that in formal arbitration, the arbitrators serve as substitutes for the ordinary courts and their award is enforceable as a judgment, whereas in informal arbitration, the arbitrators are deemed to be acting as agents to whom the parties have delegated the function of settling the dispute by means of a document (the award) that is in the nature of a settlement agreement rather than a judicial decision. An award in informal arbitration therefore cannot be directly enforced but must be 'sued on' like a contract and is carried into effect through enforcement of the judgment rendered on it.

As far as arbitration clauses are concerned, courts in Italy are very strict on ascertaining their validity, and they must be signed by the parties. An arbitration clause included in a contract that has not been specifically signed is likely to be considered void.

As of September 2013, compulsory mediation was introduced in Italy for certain types of claims. The list of matters subject to compulsory mediation has been integrated with the

3 Code of Navigation, Article 438, Paragraphs 1 and 2.

recent legislative reform implemented in 2023. As far as shipping is concerned, mediation is compulsory for insurance claims, and therefore must be carried out before any proceedings against insurers are brought to court.

As of 28 February 2023, passengers' claims in relation to disputes arising out from travel by train, ship, bus and air are subject to prior online mandatory conciliation.

iii Enforcement of foreign judgments and arbitral awards

The rules on the recognition and enforcement of judgments rendered in other EU Member States are set out by Brussels I *bis*. Under the EU Regulation, a judgment rendered in a Member State that is enforceable in that Member State is also enforceable in the other Member States without any declaration of enforceability being required. Proceedings may be instituted only in cases where the grounds for enforcement are disputed. The person against whom the enforcement is sought can in fact make an application for refusal of enforcement to the competent authority (i.e., the tribunal of the place where the enforcement is sought).

For all other countries, international and bilateral conventions may exist.

As far as international conventions are concerned, judgments rendered in, for example, Switzerland, Norway, Denmark and Iceland will be recognised and enforced in accordance with the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Lugano Convention 2007) (succeeding the Lugano Convention 1988), which is, in fact, very similar to EU legislation.

If Brussels I *bis* or international conventions do not apply, specific bilateral conventions exist between Italy and certain countries (such as Tunisia since 1967) or, as a residual criterion, the Italian courts will apply Articles 64 to 71 of Italian Law No. 218/1995, which provides a test regarding only the regulatory proceedings followed in rendering the judgment without any reconsideration of the merits.

Regarding the enforcement of foreign arbitral awards, Italy is a signatory party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), pursuant to which the courts will consider arbitral awards rendered in another contracting state as directly binding in Italy. Enforcement will be provided by means of an *exequatur* procedure that involves a petition to be filed with the competent court of appeal. The decision of whether to grant or reject the enforcement of the award, which after the 2023 legislative reform is immediately enforceable, can be challenged by any interested party within 30 days.

As regards awards rendered in non-contracting states of the New York Convention, the Italian courts will apply Articles 839 to 840 of the Code of Civil Procedure; the tests for recognition and procedure for enforcement are very similar to those described above.

IV SHIPPING CONTRACTS

i Shipbuilding

A shipbuilding contract is considered to be a contract for the supply of workmanship and materials. Article 241 of the Code of Navigation in fact refers to the provisions of the Civil Code regarding supply of workmanship and materials (*appalto*). In any case, parties are free to select the law to govern their contract[4] and usually each contract includes an express clause to that effect.

With reference to transfer of title to the vessel, this is another aspect that is usually dealt with from contract to contract. If no choice is made, ownership will be transferred on delivery; in this situation, pre-delivery instalments are usually secured by refund guarantees or by a mortgage on the ship under construction. However, it is also possible to agree that ownership will be transferred in stages, concurrently with payment of pre-delivery instalments.

Another aspect that must be underlined is that, under Italian law there is a separate Registry of Ships under Construction.[5] The shipbuilding contract and a declaration that construction has started must be registered. The registration is made in the name of the builder or the buyer, depending on who holds title in construction.

As to the remedies for defects, the parties can incorporate into the contract clauses providing for liquidated damages in the event of breaches of guaranteed standards of performance; for example, regarding speed or consumption[6] and for the right of termination in the event of particularly serious breaches.[7]

The signature of the protocol of delivery and acceptance will be final and binding except for continuing performance warranties, defects that were fraudulently concealed and latent defects (i.e., defects that could not be detected by reasonable diligence).[8]

ii Contracts of carriage

After entering into force in 7 April 1939, the Hague Rules were renounced in 1984 and, in August 1985, Italy ratified the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules), which entered into force in November 1985, as amended by the Protocols of 1968 and 1979. The Hague-Visby Rules are to be considered a special Italian law, overruling the general Code of Navigation. Whenever the Hague-Visby Rules do not apply, the Italian courts make reference to the law stated in the bill of lading to be applicable or, in the absence of a choice of law, to the law of the country in which the carrier has its principal place of business. In the absence of sufficient evidence of a foreign law, the Italian courts would apply the Code of Navigation.

The Code of Navigation – which also applies to any carriage performed by Italian vessels between Italian ports (cabotage) – is inspired by the Hague Rules, and its provisions on carriers' liability do not differ substantially from the Convention, except in respect of the amount of the package limitation.

4 Regulation (EC) No. 593/2008, Article 3.

5 Code of Navigation, Article 234.

6 Civil Code, Article 1383.

7 ibid., Article 1456.

8 ibid., Article 1667.

Article 423 of the Code of Navigation provides that 'the compensation due by the carrier cannot exceed, for each unit of cargo, the amount of €103.29 or any higher amount equal to the value declared by the shipper before loading'; the package limitation under the Hague-Visby Rules is certainly higher than the limitation figure under the Code of Navigation. However, after Judgment No. 199/2005 of the Constitutional Court, the limit of Article 423 of the Code of Navigation cannot be applied in a case of wilful misconduct or gross negligence of the carrier and, in practice, the limit is frequently overruled by Italian courts.

iii Cargo claims

Only the person who has title can sue for loss or damage to the cargo. The title holder is the legitimate holder of the original bill of lading according to the rules of transfer of the bill of lading itself. Once the bill of lading has been surrendered to the carrier against delivery of the goods, the cargo owner can also sue. Therefore, the shipper cannot sue unless it has retained possession of the original bill of lading or has become the assignee of the rights of the cargo owner. Insurers may bring a suit in their own name, but must be properly subrogated in the rights of their assured.

In Judgment No. 12565/2018, the United Sections of the Italian Court of Cassation addressed the issue of insurance compensation and compensation for damages, and held that:

a compensation for damages and insurance compensation have the same compensatory function, and therefore cannot be accumulated for the benefit of the damaged party;

b payment of the insurance indemnity automatically determines a corresponding reduction of the claim for compensation against the damaging party; and

c the subrogation of the insurer against the third party responsible for the damage takes place automatically with the payment of the indemnity and does not require any prior communication from the insurer regarding its intention to enforce the rights of the insured against any third party.

A suit may be brought against the carrier. Unlike in common law jurisdictions, Italian law does not allow a suit to be brought against the ship, as defendant, by an action *in rem*.

Under Italian law, the ship's agent can be sued as the representative of the carrier,[9] provided the carrier was its principal. The identity of the agent's principal can be gathered from the notice that the agent must file with the harbour master in connection with the arrival of a foreign ship in port. If the ship's agent was not appointed by the carrier, the claimant will have no alternative but to sue the carrier direct by serving a writ of summons at the carrier's registered office.

A jurisdiction clause contained in a bill of lading will be recognised by the Italian courts provided it complies with the provisions of Brussels I *bis* (Article 25) or of the Italian International Private Law[10] (Article 4).

An arbitration clause contained in a charter party will be recognised by the courts on condition that the charter party is signed and its terms and conditions, including express mention of the arbitration clause, are incorporated into the bill of lading. The incorporation

9 Code of Navigation, Article 288.

10 Law No. 218/1995.

of an unsigned arbitration agreement into a contract will not be recognised. If a bill of lading refers to the terms of a charter party without identifying it, incorporation will not be recognised.

iv Limitation of liability

According to Article 7 of the Code of Navigation, shipowners' liability is ruled by the law of the ship's flag state. Therefore, the tonnage limitation regime in respect of claims against the vessel to be applied by the Italian courts depends on the national law or international conventions ratified by the country of the ship's flag.

Italy has not ratified the LLMC Convention 1976 but, by means of Legislative Decree No. 111/2012, the government has enacted the provisions of EU Directive 2009/20/EC on the insurance of shipowners for maritime claims. This Decree also introduces into Italian law a new regime of limitation of liability for shipowners. Articles 7 and 8 of the Decree have, in fact, introduced the same limits of liability as those provided under Chapter II of the LLMC Convention as amended by the LLMC Protocol 1996 for vessels of 300 GT or more. The Decree gives rise to a number of problems, though, including:

a the absence of a list of credits that are subject to limitation and those exempted from limitation; and

b the absence of any provisions regarding the cases in which a shipowner may lose title to limit.

In addition to the foregoing, the Decree does not contain any provisions regarding the procedural rules applicable to limitation proceedings. The procedural rules contained in the Code of Navigation (adopted but having in mind the old regime provided under the Code of Navigation, which remains valid for vessels of 300 GT or less) should, in our view, remain in force. A similar solution was adopted in a decision of the Court of Nola in 2017.

For vessels of 300 GT or less, the regime of the Code of Navigation, which is based on the value of the vessel rather than the tonnage, remains applicable.[11] A decision of the Court of Appeal of Palermo in 2019 has confirmed the principle that the value of the vessel for the purpose of limitation corresponds to the insured value. The same decision has also confirmed that it is lawful that two different regimes of limitation presently exist in Italy and that it is reasonable and consistent with the Constitution that (according to the regime of the Code of Navigation) the right to limitation is lost in cases of gross negligence or wilful misconduct of the owner only (and not also of his or her servants or agents).

V REMEDIES

i Ship arrest

Italy has ratified the Brussels Convention under which a vessel registered in a contracting state can be arrested only for maritime claims as defined and listed in Article 1 of the Convention. Ships flying the flag of non-contracting states can be arrested in Italy for any claim.

Procedural rules for arrest are set out in domestic legislation by Articles 682 to 686 of the Code of Navigation and Article 669 *bis* et seq. of the Code of Civil Procedure.

11 Article 275.

To obtain the arrest of a ship, the claimant must file a petition for arrest in the competent court, providing *prima facie* evidence of its claim (*fumus boni iuris*). Following the petition, the court sets up a hearing for a discussion of the arrest with both the claimant and the defendant to decide whether to grant the arrest. If the arrest is urgently needed and waiting to summon the defendant would jeopardise the claimant's rights, the court can order the immediate arrest of the ship and then set the hearing to decide whether to confirm, amend or revoke the arrest.

The court may also, at its discretion, order the applicant to provide counter security in favour of the owner to cover damages in the event that the arrest is found to be wrongful. A claim in Italy will be declared wrongful if it is found to be groundless and brought by the claimant without due care.

Pursuant to Article 669 ter of the Code of Civil Procedure, it is possible to appeal an arrest order issued by a court.

Once a ship has been arrested, the court fixes a deadline (not exceeding 30 days) for the claimant to start proceedings on the merits before the competent court, which is not necessarily an Italian court. If the claimant fails to do so, the arrest ceases to be effective.

Apart from in exceptional cases, sister and associated ships can be arrested in Italy only if they are owned by the same debtor.

The issue of arrests in connection with claims for bunker supplies became particularly relevant after the collapse of the Danish group OW Bunker in November 2014, which gave rise to a series of court disputes.

The claim for unpaid bunkers supply falls within the definition of the maritime claim under Article 1(k) of the Brussels Convention ('goods or materials wherever supplied to a ship for her operation or maintenance'); thus, when the debtor is the shipowner itself, the claimant may secure the claim with an arrest of the supplied vessel.

More controversial is the possibility of obtaining an arrest of the vessel if the debtor is a person other than the shipowner, such as the charterer. It is disputed whether Article 3, Paragraph 4 of the Convention may be interpreted as allowing the arrest of the vessel even when the claim is not assisted by a lien on the vessel. While the trend of the Italian courts in past years was traditionally more favourable towards claimants allowing arrests even in the absence of a lien on the vessel, a significant number of recent decisions have ruled that the maritime claim should be assisted by a lien on the vessels according to the law of the flag.[12]

According to some decisions of the Italian courts, Article 3.4 of the Convention allows the arrest of the supplied vessel only when the debtor (other than the shipowner), such as the charterer, has control over the vessel, but in no other cases. In one case of a claim against the bareboat charter of the arrested vessel, on the assumption that the claim was assisted by a lien, the arrest was granted even though the debtor was a bankrupt company and despite the provisions of the bankruptcy law, which prohibits claimants from bringing enforcement and precautionary proceedings after bankruptcy is declared.[13]

A recent decision of the Tribunal of Oristano established that damages for reckless litigation resulting from a wrongful arrest of a ship shall be liquidated in an amount

12 Tribunal of Oristano in 2019; Tribunal of Venice in 2019; Tribunal of Siracusa in 2019; Tribunal of Venice in 2022; and Tribunal of Oristano in 2021.

13 Tribunal of Ravenna in 2020.

corresponding to the costs incurred by the ship in the port where the arrest was made during the arrest period and to the daily freight, for the period from the end of commercial operations to the release of the ship.[14]

ii Court orders for sale of a vessel

Rules concerning the judicial sale of a vessel can be found in Articles 643 to 686 of the Code of Navigation and Articles 483 to 542 of the Code of Civil Procedure.

The procedure for carrying out a judicial sale of a vessel starts with the court bailiff serving an order to pay the shipowner and a deadline to do so, with the notice that, in the event of non-compliance, the creditor will proceed with the attachment of the debtor's goods. To do so, the creditor must be in possession of an enforceable title, usually a judgment.

If the debtor fails to pay within the deadline, the creditor will be entitled to serve on the debtor and the master of the vessel, through the bailiff, a writ of attachment, along with the order to pay and the enforceable title. The same writ of attachment must be sent to the harbour master of the port at which the ship is registered so it can be recorded in the register. The procedure can be joined by other creditors, according to Articles 499 and 500 of the Code of Civil Procedure.

Once the vessel is attached, it cannot leave the port without specific permission from the court. If the debtor persists in not paying, a creditor is entitled to apply for the judicial sale of the vessel between 30 and 90 days after the attachment. The application must be served, through the bailiff, on the debtor and all other creditors who joined the procedure, who are allowed to make observations on the method of the sale.

The application must be filed within 30 days of its service at the competent court so that an expert can carry out a survey to render an estimate of the value of the vessel. After hearing all interested parties, the judge will order the sale of the vessel, which is carried out by means of a public auction. The sale operations can be delegated by the judge to a notary public, a lawyer or an accountant.

The judicial sale of the vessel may be ordered when the vessel is under arrest even before a judgment on the merits is issued if, in the opinion of the judge, there is a danger that the vessel will become lost or deteriorate pending the proceedings on the merits. After the sale, the judicial seizure is transferred from the vessel to the proceeds of the sale.

VI REGULATION

i Safety

The International Convention for the Safety of Life at Sea 1974 (SOLAS) was enacted in Italy by Law No. 313/1980. Following its enactment, and taking into consideration its subsequent amendments, the national Regulation on the Safety of Life at Sea was reformed in 1991 by Presidential Decree No. 435/1991.

The relevant rules in respect of safety of work on board ships are set out in Legislative Decree No. 271/1999.

Finally, the European Commission, in connection with the MV *Erika* and MV *Prestige* disasters in 1999 and 2002, respectively, introduced various measures on maritime safety. These measures pertain, inter alia, to the setting up of a European Maritime Safety Agency, the

14 Tribunal of Oristano in 2021.

setting up of a Compensation Fund for Oil Pollution in European Waters, the introduction of a Community monitoring, control and information system for maritime traffic, the speeding up of the replacement of single-hull oil tankers with double-hull oil tankers, and the ban from all European ports of all ships older than 15 years that have been detained more than twice in the previous two years.

ii Port state control

Italy is party to the Paris Memorandum of Understanding on Port State Control 1982 (the Paris MOU), pursuant to which each contracting state must maintain an effective system of port state control with a view to ensuring that foreign merchant ships calling at or anchored off a port of its state comply with certain international standards, as provided in the international conventions listed under Section II. For European countries such as Italy, the provisions of the Paris MOU are reinforced by EU Directive 2009/16/EC on port state control, which substantially endorses the MOU's content.

The port state control officers in Italy (i.e., the parties responsible for port state control) are harbour masters.

In accordance with the Paris MOU, when deficiencies are found that render a ship unsafe to proceed to sea or that pose an unreasonable risk to safety, health or the environment, the ship may be detained. The harbour master will issue a notice of detention to the ship's master, also informing the ship's owner or operator that it has the right of appeal. An appeal must be made to the competent regional administrative tribunal within 60 days of notification of the detention. A complaint may also be addressed by the owner, the flag, the class or the International Safety Management manager to the harbour master's headquarters.

iii Registration and classification

Under Article 143 of the Code of Navigation, registration of a ship in the Italian Registry is subject to the following requirements:

a at least half of the shares in the ship are owned by an Italian or a European person or entity; or

b in the case of a newbuild or a ship that was previously registered in a non-European country, the vessel is owned by a non-European person or entity that directly assumes the exercise of the ship through a stable organisation in the Italian territory.

Law No. 30/1998 instituted the International Registry in which ships exclusively destined for commercial international trade are listed. Further to that, a special registry (bareboat registry) is dedicated to vessels already listed in a foreign registry and temporarily suspended from that registry when on bareboat charter to an Italian or European subject.

Regarding the registration of a ship under construction, see Section IV.i.

The Italian classification society is RINA, which, as with all other recognised classification societies, is entrusted by the state with technical control over the building of ships in Italian shipyards.[15]

As regards the liability of classification societies, the sole precedent is the decision rendered by the Genoa Tribunal in 2010 in a case regarding the claim of a charterer against a classification society for damages suffered resulting from the detention of a vessel after

15 Code of Navigation, Article 235.

a control order under the Paris MOU. The Genoa Tribunal held that the liability of the classification society could be based on the reliance placed by the charterer on the class certificate in deciding to charter the *Redwood* and upheld the claim.

However, that decision has been overruled by the Court of Appeal of Genoa (though for reasons concerning the merits of the cause and not the legal principle mentioned above), which was confirmed by the Italian Supreme Court of Cassation in March 2018.

In a judgment dated 10 December 2020, the Italian Supreme Court ruled for the first time on the right of the classification societies to profit from immunity from jurisdiction when performing state functions as delegated by states.

In a recent judgment in 2022, the Supreme Court of Cassation further held that the activities directly commissioned or delegated to classification societies must have as their main objective a public interest (i.e., the protection of maritime safety, but they incorporate activities of a private nature that are regulated in a contract).[16]

iv Environmental regulation

Italy has ratified the following:

a the International Convention on Civil Liability for Oil Pollution Damage 1969, replaced by 1992 Protocol (the CLC Convention);

b the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (the Oil Pollution Fund Convention); and

c the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (the Bunker Convention).

Domestic legislation on environmental regulation is contained in the Environmental Code.[17] Part 6 of the Environmental Code contains the procedure for the establishment of liability and compensation for damage to the environment. Article 303 provides that Part 6 of the Code does not apply to environmental damage relating to accidents falling within the application of an international convention, including the CLC Convention, the Oil Pollution Fund Convention and the Bunker Convention.

Despite this exclusion, the decision of the European Court of Justice in *The 'Erika'*[18] deemed Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 amending Directive 2008/98/EC on waste (which was enacted in Italy with the Environmental Code) to be applicable to a spill of hydrocarbons after the sinking of a ship and, therefore, invited the national judge to apply the principles of the Directive.

Through Legislative Decree No. 112/2014, Italy has adapted its legislation to comply with Directive 2012/33/EU of the European Parliament and of the Council of 21 November 2012 amending Council Directive 1999/32/EC as regards the sulphur content of marine fuels, which introduced standards aimed at drastically reducing sulphur emissions from vessels.

On 17 June 2021, the IMO adopted amendments to MARPOL Annex VI at MEPC 76, introducing the Efficiency Existing Ship Index (EEXI) (Regulations 23 and 25) and the requirement to reduce Operational Carbon Intensity through the Carbon Intensity Indicator (CII) (Regulation 28), which entered into force on 1 November 2022. Vessels impacted by

16 Judgement No. 30484 of 18 October 2022.

17 Legislative Decree No. 152/2006.

18 C-188/07.

EEXI must have demonstrated compliance by their next survey – annual, intermediate or renewal – for the International Air Pollution Prevention Certificate (IAPPC), or the initial survey before the ship enters service for the International Energy Efficiency Certificate (IEEC) to be issued, whichever is the first on or after 1 January 2023.

Last, in July 2021, the European Union adopted the European Union's 'Fit for 55' climate package, which contains two measures that have an impact on the shipping industry: the extension of EU Emissions Trading Scheme (EU ETS) to shipping industry and the introduction of FuelEU Maritime, which proposes a common EU regulatory framework to increase the share of renewable and low-carbon fuels in the fuel mix of international maritime transport.

v Collisions, salvage and wrecks

The Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910 (the Collision Convention 1910) is in force in Italy. Jurisdiction is founded on the International Convention for the Unification of Certain Rules relating to Civil Jurisdiction in Matters of Collision 1952 (the Collision Convention 1952). Therefore, an Italian court will have jurisdiction if Italy is where:

a the defendant has either his or her habitual residence or a place of business;

b arrest of the defendant ship, or of any other ship belonging to the defendant that can be lawfully arrested, was effected or where arrest could have been effected and bail or other security has been furnished; or

c the collision occurred.

The Court of Cassation[19] held that the special criteria of jurisdiction of the Collision Convention 1952 prevail over the general discipline of Brussels I. Neither Brussels I nor Brussels I *bis* affects any conventions to which the Member States are party and that govern jurisdiction in relation to particular matters.

A party can claim all damages that are immediate and direct consequences of the collision, including material damages and loss of earnings. Italy has ratified the 1989 Salvage Convention, which therefore applies as a general rule.

In Judgment No. 7149, dated 13 March 2020, the Italian Supreme Court clarified a number of issues concerning the 1989 Salvage Convention. First, the Court confirmed that the Convention applies also to purely domestic salvage cases. Second, the Court stated that the Convention can be supplemented by national legislation on certain issues indicated in the Convention itself, one being the joint liability of the owners of the salvaged goods.

Third, the Court considered the long-debated issue of the existence of joint liability of the owners of the salvaged goods. In this respect, the Court restated the law by holding:

a the owner of the ship is the 'main debtor', and therefore can also be liable for the portion of the salvage award relating to cargo; and

b cargo owners are liable only for the portion of the salvage award relating to their own goods.

The limitation period for enforcing salvage claims in Italy is two years from the day on which the salvage operations are completed.[20]

19 Judgment No. 4686 of 9 March 2015.

20 Code of Navigation, Article 500.

The salvor can arrest the salvaged ship (or a sister ship) under the Brussels Convention. It can also arrest the cargo within 15 days of discharge and before it has been lawfully delivered to a third party.

According to Article 73 of the Code of Navigation, the owner of the vessel has the duty to remove a wreck. Furthermore, a general obligation of remediation or depollution is imposed by the Environmental Code on the party responsible for the pollution of an area. In a case of omission, the remediation or depollution is carried out by the public administration, which can claim the costs from the responsible party.[21]

Italy has not ratified the Nairobi International Convention on the Removal of Wrecks 2007 (Nairobi WRC 2007), which entered into force in 2015.

Finally, Regulation (EU) No. 1257/2013 provides for a new regime on ship recycling. It introduces the same standards of ship recycling as are imposed by the Hong Kong Convention for the Safe and Environmentally Sound Recycling of Ships 2009 (the Hong Kong Convention) (not yet in force) and establishes a list of recycling facilities authorised to conduct ship recycling operations. The only Italian facility that is included in the European list is San Giorgio del Porto SpA of Genoa.

vi Passengers' rights

The European Union implemented two important pieces of legislation on passengers' rights: Regulation (EU) No. 1177/2010 concerning the rights of passengers when travelling by sea and inland waterways, and Regulation (EC) No. 392/2009 on the liability of carriers of passengers by sea in the event of accidents, implementing the Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974 (the Athens Convention) as amended by the 2002 Protocol (according to the 2006 International Maritime Organization guidelines for implementation of the Athens Convention). The Italian Code of Navigation also regulates the carriage of people by sea (Articles 396 to 418).

For example, Article 400 of the Code of Navigation provides that if a passenger is unable to start a journey for serious, justified and unpredictable reasons, he or she may terminate the contract of carriage by paying the carrier a penalty of 25 per cent of the ticket price. If, however, for reasons that cannot be attributed to the passenger's fault (such as an illness that forces him or her to disembark) the journey is interrupted, he or she is entitled to a refund of the price from the carrier for the part of the journey that has not been undertaken.

In the event that the carriage forms part of an 'all-inclusive' tourist package, in application of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, Articles 32 to 51 of the Tourism Code[22] set out special provisions to protect passengers' rights on sea carriage, such as liability of the seller and of the provider of the services included in the tourist package in relation to their respective activities.

On 25 November 2015, Directive (EU) 2015/2302 of the European Parliament and of the Council on package travel and linked travel arrangements was issued. The new rules, implemented by the Member States in their national legislation by 1 January 2018, increase the existing protection for travellers and, for the first time, set out a regulation on linked travel arrangements.

21 Environmental Code, Article 250.

22 Legislative Decree No. 79/2011.

vii Seafarers' rights

Italy ratified the MLC on 19 November 2013 and it entered into force on 19 November 2014. As of that date, 13 maritime conventions previously ratified by Italy are considered *ipso jure* denounced.

In accordance with Standard A4.5, Paragraphs (2) and (10) of the MLC, the Italian government has specified that it will progressively extend the following branches of social security to seafarers:

a sickness benefit;
b unemployment benefit;
c old-age benefit;
d employment injury benefit;
e family benefit;
f maternity benefit;
g invalidity benefit; and
h survivors' benefit.

In domestic legislation, seafarers' rights are granted by the National Labour Collective and a wide number of specific laws, such as Presidential Decree No. 231/2006 on seafarers' placement regulation or Legislative Decree No. 271/1999 on security and health of seafarers on board merchant ships.

Article 18 of Law No. 18/1970 protects employees as far as stability of employment is concerned, providing strict rules on the termination of employment agreements by the employer. This Law became directly applicable to seafarers following Judgment No. 364/1991 of the Italian Constitutional Court. Nonetheless, labour law legislation, including the application of Article 18 of Law No. 18/1970, has been modified to give more rights to employers in respect of the termination of employment contracts. The provisions of labour law resulting from this reform have been declared applicable to seafarers.[23]

VII OUTLOOK

In July 2020, the European Council approved the NextGenerationEU, providing up to €672.5 billion to support investments and reforms across the European Union.

Italy's recovery and resilience plan under the NextGenerationEU is the Recovery and Resilience Plan (PNNR).

The PNNR dedicates to shipping, transport and infrastructure a certain number of missions and milestones for an overall calculated cost of approximately €30 billion.

Among others, the main missions in the infrastructure and sustainable mobility sector include:

a interventions for the environmental sustainability of ports (green ports), which have the objective of making port activities sustainable and compatible with urban port contexts through the financing of interventions aimed at improving the efficiency and reducing the energy consumption of port structures and activities. A key principle of the project is the promotion of the environmental sustainability of port areas. It also aims to promote the conservation of natural heritage and biodiversity. In this case, the

23 Tribunal of Venice in 2019.

environmental objective will be pursued through measures to improve energy efficiency and promote the use of renewable energy in ports. The project is expected to contribute to a 55 per cent reduction in greenhouse gas emissions by 2030.

b simplification of authorisation procedures for cold ironing plants;

c measures on the port system and integrated logistics intermodality, such as the renewal of the Mediterranean naval fleet with fuel-powered units capable of reducing environmental impact and the increase the availability of alternative marine fuels;

d development of maritime accessibility and resilience of port infrastructure, with the objective of improving maritime accessibility mainly through reinforcement and consolidation works on dykes, piers and quays, and to enable adaptation to the increasing tonnage of ships;

e selective increase of port capacity, both through dredging works and the development of new jetties and logistics platforms; and

f dock electrification (cold ironing), with the objective of reducing dependence on oil and decreasing the environmental impact in the transport sector, in line with Directive 2014/94/EU, which requires the implementation of a coastal electricity supply network with the aim of completing it by 31 December 2025. The proposed investment, in line with the national decarbonisation targets set out in the National Integrated Plan for Energy and Climate in terms of energy efficiency in transport, would mainly focus on ports belonging to the TEN-T network. It consists of the realisation of a network of systems for the supply of electricity from the shore to ships during the mooring phase, so as to minimise the use of auxiliary engines on board for the self-production of the necessary electricity, thus significantly reducing emissions of CO_2, nitrogen oxides and fine particles, as well as reducing the noise impact.

Chapter 27

JAPAN

Jumpei Osada, Masaaki Sasaki and Takuto Kobayashi[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Japan is the world's third-largest shipowning country (it owns and controls more than 4,000 ocean-going vessels) and one of the top three shipbuilding countries in terms of tonnage. Japan has a unique maritime cluster that comprises three large shipping companies (NYK, MOL and Kline), several prominent and high-quality shipbuilding companies and individual shipowners, which are mainly located in Tokyo and Imabari, with the remainder in the Shikoku, Chugoku and Kyushu regions. The cluster is supported by banking, leasing corporations and trading houses, which are active in investing not only in domestic companies but also in overseas companies through schemes such as operating and finance leases. Of approximately 54,000 ocean-going commercial vessels in the world, roughly 4,000 vessels with more than 242 million deadweight tonnage are owned or operated by Japanese companies or special-purpose companies established in Japan or elsewhere, such as Panama, Liberia, Singapore and the Marshall Islands.[2]

Notably, the cluster has recently been tackling environmental issues on decarbonisation and taking a new approach to the operation of vessels, in line with global trends. Additionally, similar to other major shipping countries, digital transformation in the Japanese shipping industry is gradually progressing and, as an example of this, the Legislative Council has been discussing how to legislate for electronic bills of lading.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Japan has ratified most of the basic maritime conventions, including:

a the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules);

b the International Convention on Civil Liability for Oil Pollution Damage 1969, replaced by 1992 Protocol (the CLC Convention);

c the International Convention for the Prevention of Pollution from Ships 1973 (as modified by the Protocol of 1978) (MARPOL (73/78)) with its Annexes;

d the International Convention for the Safety of Life at Sea 1974 (SOLAS);

e the Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC Convention 1976) with its 1996 Protocol;

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2 The relevant data is taken from Shipping Now 2022–2023, issued by Japan Maritime Center.

f the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (the Fund Convention);

g the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (the Bunker Convention);

h the Nairobi International Convention on the Removal of Wrecks 2007 (Nairobi WRC 2007); and

i other relevant rules and regulations that are incorporated or codified by local laws and regulations.

III FORUM AND JURISDICTION

i Courts

There are no special courts dedicated to handling shipping disputes. The district courts are competent to handle shipping matters in the first instance. Disputes may be appealed to the High Court and then to the Supreme Court. In general, civil litigation that is initiated in a district court would take one to two years from commencement of the lawsuit to judgment. A successful party is not entitled to recover legal costs from the losing party, unless the court exceptionally finds that a part of legal costs should be recoverable in the case of a tort claim (in general, up to 10 per cent of the admitted amount).

Whether Japanese courts have jurisdiction in international disputes is determined pursuant to the Code of Civil Procedure[3] and the Act on General Rules for Application of Laws.[4] In the event that two vessels collide within Japanese territorial water or that a vessel damaged in a collision reaches a Japanese port as the first port after the collision, the resulting tort claims can be brought to Japanese courts, regardless of the vessels' flags.[5] Exclusive jurisdiction clauses in contracts, which are normally considered to be valid, would make it clear that the designated courts have the competent jurisdiction.[6]

Prescription periods as set out in substantive laws (i.e., the Civil Code or the Commercial Code) vary depending on the nature of the claim. In general, claims arising from contracts are subject to a five-year prescription period from when the creditor becomes aware of the possibility to exercise its right[7] and tort claims are subject to a three-year period,[8] from when the victim first becomes aware of the damage and the identity of the wrongdoers. Tort claims for damages caused by death or personal injuries are subject to a five-year prescription period.[9] Importantly, shorter time limits apply to specific claims, such as for carriers' liability for breach of carriage of goods contract,[10] shipowners' claims against charterers, shippers or consignees,[11] and those arising from collision,[12] salvage[13] and general average.[14]

3 Law No. 109 of 1996.

4 Law No. 78 of 2006.

5 Code of Civil Procedure, Article 3.3, Paragraphs (viii) and (ix).

6 id., Article 3.7.

7 Civil Code, Article 166(1).

8 id., Article 724.

9 id., Article 724 *bis*.

10 Act on International Carriage of Goods by Sea [JCOGSA], Article 15; Commercial Code, Article 585(1).

11 JCOGSA, Article 15; Commercial Code, Article 586.

12 Commercial Code, Article 789.

13 id., Article 806.

14 id., Article 812.

ii Arbitration and ADR

The Tokyo Maritime Arbitration Commission (TOMAC), which is located in the Japan Shipping Exchange, is the only arbitral tribunal in Japan for resolving shipping disputes. It has a long history and a prestigious reputation, in particular with regard to disputes relating to the NIPPONSALE contract. The TOMAC is recognised as being the more popular choice for dealing with shipping issues than the International Chamber of Commerce Japan, which tends to deal with more general commercial disputes.

The TOMAC has drawn up three types of arbitration rules:

a Ordinary Rules;

b Simplified Rules (claims up to ¥20 million); and

c Small Claims Arbitration Procedure (SCAP) Rules (claims up to ¥5 million).[15]

These rules all have a basic concept that the smaller the claim amount is, the lower the costs that will be borne by the arbitration and the quicker the arbitration proceedings are resolved. The average length of arbitration proceedings is about 13 months under the Ordinary Rules, three to five months under the Simplified Rules and five to 10 weeks under the SCAP Rules.

Under the Ordinary Rules, which are similar to those of other arbitral organisations, after one or three arbitrators have been nominated and appointed, the parties can exchange defence statements and supplemental statements in English, and then move to the hearing, which is conducted in English. An arbitral award is issued within 30 days of the conclusion of the hearing being announced.

An arbitral award has the same effect as a final and binding judgment and an appeal to the court to set aside the arbitral award is allowed only on narrow grounds (such as violation of the arbitration procedure or public policy).[16] One of the advantages of arbitration by the TOMAC in comparison with court proceedings is that the successful party is entitled to recover legal costs from the losing party to a reasonable extent upon application for recovery of those costs.

iii Enforcement of foreign judgments and arbitral awards

The following requirements must be met for foreign judgments to be enforced in Japan:

a the jurisdiction of the foreign court is recognised under laws, regulations, conventions or treaties;

b the defeated defendant has been issued with a summons or order as required for the commencement of the lawsuit, or has appeared without receiving any summons or order;

c the content of the judgment and the court proceedings are not contrary to public policy in Japan; and

d a mutual guarantee exists.[17]

To date, judgments on point (d) have concluded that a mutual guarantee exists between Japan and the United Kingdom, Japan and Singapore, and so on, whereas a mutual guarantee between Japan and China is denied.

15 www.jseinc.org/en/tomac/arbitration/rules_index.html.

16 Arbitration Act (Law No. 138 of 2003), Articles 44 and 45.

17 Code of Civil Procedure, Article 118.

As Japan is a contracting state of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), arbitral awards rendered in signatory states of the Convention would be enforceable in Japan, as long as the requirements of the Convention have been fulfilled. However, enforceability of arbitral awards in non-party states would be subject to the conditions set out in the Arbitration Act.[18]

IV SHIPPING CONTRACTS

i Shipbuilding

Japanese shipyards have been constructing high-quality and high-tech commercial vessels for a long time. Owing to the intense global competition in the shipbuilding market, however, some Japanese shipyards have decided to consolidate their business or form alliances to survive this competition.

Most shipbuilding contracts with Japanese shipyards are based on the SAJ Form issued by the Shipbuilder's Association of Japan, with some amendments. The key elements of a contract using the SAJ Form are payment and title transfer, and a performance guarantee. A refund guarantee for security of advance payments may be furnished by the shipyard or its bank. Payment of the purchase price is made in three or four instalments. Title of the vessel is transferred to the buyer at the time of delivery, which is usually a trigger for payment of the final instalment.

ii Contracts of carriage

Contracts of international carriage are governed by the Act on International Carriage of Goods by Sea (JCOGSA), which incorporates the essence of the Hague-Visby Rules, though with some variations. JCOGSA has force of law for carriage of goods by sea when either the port of loading or the port of discharge, or both, is located outside Japan, whether or not the bill of lading is issued.[19] In contrast, contracts of domestic carriage of goods by sea are subject to the Commercial Code.

Under JCOGSA, the carrier is obliged to exercise due diligence to ensure the vessel is seaworthy in three respects, namely the physical condition of the vessel, the efficiency of the crew and equipment, and the vessel's cargo-worthiness.[20] In the event of damage to cargo during a voyage resulting from unseaworthiness, the carrier is liable for damages unless it can successfully prove that it has fulfilled all aforementioned aspects of due diligence. If a vessel runs aground as a result of errors by the crew in managing or controlling her ballast water, causing significant damage to the cargo, the Tokyo District Court has concluded that the carrier is liable to pay for damage occasioned by unseaworthiness in the sense that the seafarer who had managed and controlled the ballast water was not competent to bring about a safe voyage and the carrier was not able to exercise due diligence.[21]

Turning to the shipper's duty, if any of the goods have a flammable, explosive or other dangerous nature, the shipper is obliged to notify the carrier of this and provide additional information as necessary to carry the goods safely.[22]

18 Arbitration Act, Article 46.

19 JCOGSA, Article 1.

20 id., Article 5.

21 Judgment of the Tokyo District Court dated 30 November 2012, *The 'Cougar Ace'*.

22 JCOGSA, Article 15; Commercial Code, Article 572.

The Supreme Court[23] has affirmed a judgment by the Tokyo High Court,[24] in which it ruled that the shipper and the cargo manufacturers are liable for damage to the vessel and the cargo caused by the fire on the container of the cargo in question, on the basis of tort and product liability, respectively.

Under Japanese law, unless the consignee pays for the freight and costs relating to carriage and anchorage, the shipowner is entitled to exercise a possessory lien on the cargo and the master has a right to detain the cargo.[25] Unlike under English law, however, a contractual lien on cargo owned by a third party is not recognised.

The Commercial Code sets out provisions for multimodal transport and bills of lading, under which the liability of the multimodal carrier is determined by the laws that are applied to transportation by air, land or sea, depending on the period in which the cause of the loss or damage occurs.[26]

iii Cargo claims

Under Japanese law, the lawful holder of a bill of lading is entitled to sue the carrier for loss or damage to the cargo based on the contract of carriage written on the bill of lading. Even if a bill of lading is not issued, the consignee has title to make claims against the carrier after the cargo reaches the port of discharge, since the consignee is supposed to take over the shipper's title at that time.[27] If there is an issue regarding the identity of the carrier, the Supreme Court[28] has established basic rules that the carrier shall be identified based on the description on the bill of lading, concluding that the shipowner shall be considered to be the carrier on the ground that the bill of lading included a signature 'for the Master', a demise clause on the reverse side and a statement of receipt of freight by the agent of the shipowner or master, despite the time charterer's logo being on the face of the bill of lading. It is also considered by this Supreme Court judgment that demise clauses would essentially be enforceable.

When a bill of lading has clear clauses or wording for incorporation of the terms set out in a specific charter party, the incorporation of those terms (including dispute resolution clauses) into the bill of lading would be adopted by the courts,[29] although the requirements for incorporation are unclear as yet. In this context, the courts are inclined to broadly accept an arbitration clause or an exclusive jurisdiction clause on a bill of lading, which means that the courts will dismiss a claim brought under a contract of carriage covered by such a bill of lading.[30]

JCOGSA sets out the rules for calculation of damages, which state that the amount shall be either the current market price or, if there is no available market, the normal value at the place and time at which the goods should have been discharged.[31] The prevailing view

23 Judgment of the Supreme Court dated 12 December 2015, *The 'NYK Argus'*.

24 Judgments of Tokyo High Court dated 28 February 2013 (claim against the shipper) and 29 October 2014 (claim against the cargo manufacturer).

25 Commercial Code, Article 741(2).

26 JCOGSA, Article 15; Commercial Code, Article 578(1).

27 JCOGSA, Article 15; Commercial Code, Article 581.

28 Judgment of the Supreme Court dated 27 March 1998, *The 'Jasmine'*.

29 Judgment of the Osaka District Court dated 11 May 1959, *The 'Tribeam'*.

30 Judgment of the Supreme Court dated 28 November 1975, *The 'Tjisadane'*.

31 JCOGSA, Article 8.

is that determination of the value should be consistent with the cost, insurance and freight value.[32] JCOGSA also includes a package limitation that is identical to that set out in the Hague-Visby Rules.[33]

A claim for damaged or lost cargo is subject to a time limit of one year from the date of delivery of the cargo, or the date when the cargo should have been delivered in the case of total loss of the cargo. An agreement on extension of time to sue the carrier can be made between the shipper and the carrier and used to avoid unnecessary court proceedings.

iv Limitation of liability

Japan is a party to the LLMC Convention 1976 and the LLMC Protocol 1996, both of which have been implemented into the Limitation of Liability Act.[34]

Under the Act, an applicant for limitation of liability must be a 'Shipowner, etc.',[35] which is widely construed to include voyage charterer, time charterer and slot charterer as well as shipowner. The applicant must file an application to the district court to initiate limitation proceedings, and must establish a limitation fund either in cash, equivalent to the liability limit, or in the form of a guarantee made by a bank, insurance company or protection and indemnity club.[36] Under the Limitation of Liability Act, a complex calculation is required to find the limitation funds, but the basic concept for the calculation is as follows:

a the limitation figure is calculated based on gross tonnage of the vessel; and

b two types of limitation figures are set out: one being for claims arising out of only property damage and the other for all other claims (including those arising out of death and personal injury).

Once decisions have been reached about the filed claims and the limitation fund has been distributed accordingly, the proceedings are deemed to be completed. The limitation proceedings would normally continue more than several years from the date on which an application is filed.

V REMEDIES

i Ship arrest

Japan has not ratified either the 1952 International Convention Relating to the Arrest of Sea-going Ships (the 1952 Arrest Convention) or the 1999 International Convention on the Arrest of Ships (the 1999 Arrest Convention); thus, a vessel arrest is carried out under the domestic laws of Japan. Under Japanese law, creditors may arrest vessels on a lien, a ship mortgage, a provisional attachment order or general civil enforcement of a settled claim that has been proven by, for instance, a judicial settlement agreement or a final and binding judgment.

With regard to a lien, 'maritime lien' is not formally recognised under common law, such as the laws of England and Wales or the laws of Singapore. Further, there is also no distinction between maritime claims and non-maritime claims. However, claims for death or

32 Judgment of the Tokyo District Court dated 27 October 2008, *The 'Keiyo'*.

33 JCOGSA, Article 9.

34 Act on Limitation of Shipowner Liability (Law No. 94 of 1975).

35 Limitation of Liability Act, Article 2(1)(ii).

36 id., Articles 19 and 20.

personal injury, for salvage and general average, for pilotage, towage or voyage-related taxes, for necessity for continuation of a voyage and mariners' claims arising from their employment contracts are covered by statutory liens that enable the claimants to arrest the vessel more easily than other measures. Thus, these claims have a similar nature to maritime claims that are covered by maritime liens. To arrest a vessel on a maritime lien, Japanese courts may also require the following:

a the governing law of the contract from which the claim arises; or

b the law of the country where the vessel was located when the claim arose or the flag state of the vessel (or both) recognise and grant an arrest on the lien.

In addition, a claim subject to a limitation held in accordance with the Limitation of Liability Act[37] and a claim pertaining to the damage caused by oil pollution resulting from the spill or discharge of oil from a tanker[38] are also covered by a statutory lien.

In relation to an argument of wrongful arrest, the threshold for this argument against an arrest on a lien may be lower than that against an arrest on a provisional attachment order. The main requirement for such an argument is negligence or wilful misconduct of the arresting party in the course of filing and arresting the vessel. The reason for this is that, since the arrest of the vessel on a lien is easier than other normal attachment order procedure, the arresting party is required to be more cautious and should carry out sufficient analysis, both factual and legal, to avoid damage being incurred by innocent or irrelevant parties such as the owner who is not liable *in personam*.

ii Court orders for sale of a vessel

The arrest of a vessel based on a lien, ship mortgage or general civil enforcement is commenced by a court order as part of the compulsory judicial auction procedure.[39] This means that private sale is not allowed in these procedures.

VI REGULATION

i Safety

Japan has ratified, accepted or acceded to major conventions for ship safety, such as SOLAS, and relevant codes, including the International Maritime Dangerous Goods Code 2004 (the IMDG Code), the International Maritime Solid Bulk Cargoes Code 2011 (the IMSBC Code), the International Code for the Construction and Equipment of Ships carrying Dangerous Chemicals in Bulk (the IBC Code), the International Safety Management Code 1998 (the ISM Code) and the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1995 (the STCW Convention). Japan has also introduced the International Regulations for Preventing Collisions at Sea 1972 (COLREGs) and the International Convention for Safe Containers 1972 into domestic legislation.[40]

37 id., Article 95(1).

38 Act on Liability for Oil Pollution Damage, Article 40.

39 Civil Execution Act (Law No. 4 of 1979), Articles 114(1) and 189.

40 Act on Preventing Collision at Sea (Law No. 62 of 1977).

ii Port state control

Japan has entered into a Memorandum of Understanding on Port State Control (PSC) in the Asia-Pacific Region (the Tokyo MOU), which comprises 22 countries.[41] The Tokyo MOU has announced that there is a practical need to apply flexibility on the inspections in view of the covid-19 pandemic. For this purpose, the Tokyo MOU has announced interim guidance relating to covid-19 circumstances and still maintains this, consisting of the following:

a preventive measures to halt the spread of covid-19;
b ship certification issues; and
c crew-related issues.[42]

The Tokyo MOU carries out the concentrated inspection campaign (CIC) from time to time. According to the Tokyo MOU, during the latest campaign, which was from 1 September 2022 to 30 November 2022, 5,908 CIC inspections were carried out, 1,041 deficiencies were found and 20 ships were detained.[43]

The Ministry of Land, Infrastructure, Transport and Tourism publishes a monthly list of the vessels detained in Japan on its website.[44]

iii Registration and classification

For a vessel to be eligible to fly the Japan flag, its owner must fulfil the following criteria:

a be a Japanese authority;
b be a Japanese citizen;
c be a company incorporated under the law of Japan with all its representatives and at least two-thirds of its executive officers being Japanese nationals; or
d an entity other than a company as described in point (c) all of whose representatives are Japanese nationals.[45]

Only Japan-flagged vessels are able to call at closed ports or conduct coastal transportation of cargoes and passengers.[46]

iv Environmental regulation

Japan has ratified the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (the London Dumping Convention), MARPOL (73/78) and the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (the OPRC Convention), including the Protocol on the Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances 2000 (the OPRC-HNS Protocol). These were implemented by the Act on Prevention of Marine Pollution and Maritime Disaster. This Act applies to all vessels and marine structures in Japanese territorial waters and all Japan-flagged vessels. The Act prohibits anyone from

41 http://www.tokyo-mou.org/doc/Memorandum%20rev20.pdf.
42 http://www.tokyo-mou.org/doc/Interim%20guidance%20relating%20to%20COVID-19%20circumstances-p.pdf.
43 https://www.tokyo-mou.org/doc/Preliminary%20Results%20of%20the%20CIC%20on%20STCW%202022%20(Press%20release)-f.pdf.
44 www.mlit.go.jp/english/psc/psc.html.
45 Ships Act (Law No. 46 of 1899), Article 1.
46 id., Article 3.

discharging oil and other harmful substances from the vessels. A person who breaches the Act, even without negligence, may be held liable for criminal punishment. If there is discharge of oil or harmful substances from a vessel, and the shipowner does not or could not carry out effective measures against it, the Commandant of the Japan Coast Guard may conduct necessary actions to prevent pollution by oil or harmful substances, as well as requesting the related authorities or local government to take the necessary action for the same purposes.

Japan has been promoting and engaging in the reduction of greenhouse gas emissions globally, which has been reflected in the adoption of the International Maritime Organization's Marine Environment Protection Committee's amendments the MARPOL Convention, including the requirement for existing ships to achieve specific carbon intensity by meeting the criteria under the Energy Efficiency Existing Ship Index (EEXI). There seem to be several options available to achieve this EEXI, including limiting the engine output, changing the fuel, or changing parts of the ship or engine. This new MARPOL regulation has also been effective in Japanese territorial waters from 1 January 2023.

v Collisions, salvage and wrecks

Japan has ratified the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910 (the Collision Convention 1910), which was promulgated and enforced as a domestic law. The major differences between the Collision Convention and domestic law have been in the rules of time bar and joint and several liability. As regards the former, the Collision Convention stipulates a two-year time bar starting from the date of the collision. Under domestic law, a claim based on death or personal injury is time-barred for five years from the time the victim is first aware of the damage and the perpetrator,[47] and a claim based on property damage is time-barred for two years from the time the victim is first aware of the damage and the perpetrator.[48] As regards joint and several liability, the Collision Convention stipulates that damage caused to the cargo or the property of the crew, passengers or other persons on board are borne by the vessels separately, based on the proportion of fault. However, liability for all damage imposed by domestic law could be held jointly and severally.[49]

Japan has ratified the Brussels Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea 1910 (the 1910 Salvage Convention), but not the International Convention on Salvage 1989 (the 1989 Salvage Convention). The Lloyd's Standard Form of Salvage Agreement (LOF) and the Japan Shipping Exchange Form of Salvage Agreement are the two forms most widely used for salvage operations in Japan. When there is no specific agreement between the parties, the Commercial Code applies. In that event, the principle of 'no cure, no pay' is generally sustained, the labour and costs incurred as a result of any necessary measures to prevent or reduce environmental pollution are taken into account in determining the amount of salvage reward, and the time bar for the claim for the salvage reward is two years from the time of completion of salvage.[50]

47 Civil Code, Article 724 *bis*; Judgment of the Supreme Court dated 20 April 1915.

48 Commercial Code, Article 789; Judgment of the Supreme Court dated 21 November 2005.

49 Civil Code, Article 719(1).

50 JCOGSA, Article 15; Commercial Code, Articles 793, 805 and 806.

vi Passengers' rights

Japan has not ratified the Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974 (the Athens Convention). The rights of the passenger against the ocean carrier are governed by the passenger transportation agreement and the Commercial Code. With regard to liability for death or personal injury of passengers, there is no legislative limitation of liability in favour of the carrier. Furthermore, any agreement that releases a carrier from its liability for death or personal injury of passengers is deemed to be null and void, except for damages resulting mainly from delay.[51] The burden of proof on exercising due care by the carrier or its employees lies with the carrier.[52]

vii Seafarers' rights

Japan has ratified the Maritime Labour Convention 2006 with its amendment of 2014 and has introduced it into the Mariners Act.[53] For instance, the Mariners Act stipulates the shipowner's obligations, such as delivery of documents and explanation with regard to the working conditions on each specific voyage, repatriation of employees at its own cost, limitation on working hours, minimum age requirements and establishment of procedures for handling complaints arising on board vessels. The Mariners Act also stipulates the procedures for inspection of employment conditions to be conducted by the authorities. The Act applies to mariners on board Japan-flagged vessels and other vessels stipulated by the Act that are in a similar condition to Japan-flagged vessels.[54]

VII OUTLOOK

Japanese maritime laws and regulations and their amendments are generally in line with international conventions; however, there are also customary practices and rules developed on the basis of Japanese national laws and legal procedures, and roles and ways of conducting business for each maritime stakeholder.

The number of Japanese-owned and controlled vessels is growing, and the shipping and shipbuilding industries in Japan will continue to have a significant presence worldwide and in its competition with other Asian countries, such as China, Hong Kong, Taiwan and South Korea.

51 Commercial Code, Article 591(1).

52 id., Article 590.

53 Law No. 100 of 1947.

54 Mariners Act, Article 1(1).

Chapter 28

MALTA

Jean-Pie Gauci-Maistre, Despoina Xynou and Deborah Mifsud[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The Republic of Malta is a small, strategically located island country whose maritime industry has long provided great value to its economy. Malta is regarded as a strong and safe maritime jurisdiction; in fact, it has consolidated its position as the largest European maritime flag. Since then, registered numbers have steadily increased over the years.

As well as offering a stable legal and fiscal regime, Malta's ship registry has remained competitive and has constantly proven itself ready to accommodate shipowners and shipping companies, always within the parameters of international rules and conventions. According to UNCTAD's Review of Maritime Transport for 2022, Malta has positioned itself as the seventh-largest flag worldwide and increased the registered deadweight tonnage (DWT) (currently standing at 114,910), constituting a share of the total global DWT of 5.2 per cent.

The successful enactment of the Commercial Yacht Code also makes Malta a leading commercial yacht registry and has led to the country becoming the flag choice for the global luxury superyacht industry. In addition, lying midway between Europe, the Middle East and North Africa, Malta is established as the third-largest transshipment port and logistics centre in the Mediterranean region, mainly for container cargo.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Malta's legal system is a hybrid, mainly based on Roman law influenced to a great extent by UK law, as a result of its former status as a British colony. Following Malta's accession to the European Union in 2004, the European Union Treaty was transposed into Maltese law and is now the law of the country.

The principal legislation for shipping is the Merchant Shipping Act of 1973, a law based on UK shipping laws, as amended, and supplemented by a comprehensive set of rules and regulations. Several international conventions to which Malta is either a signatory or that have been incorporated into Maltese law, as well as EU regulations and directives, also regulate the shipping industry.

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III FORUM AND JURISDICTION

i Courts

Maritime cases are heard in the Civil Court. Disputes with a value of more than €15,000 are heard by the First Hall of the Civil Court while smaller claims are heard by the Court of Magistrates. Although the Civil Court is the competent court to hear a vast range of cases, individual judges are normally assigned cases of a similar nature to increase court efficiency.

Ship arrest procedures are swift and relatively inexpensive. When coupled with the judicial sale by auction procedure or a court-approved private sale, Malta offers a reliable solution for an executing creditor seeking recourse to the courts.

ii Arbitration and ADR

Arbitration proceedings are regulated by the Arbitration Act,[2] which incorporates a number of international conventions, such as the UNCITRAL Model Law on International Commercial Arbitration. Arbitration in Malta falls under the auspices of the Malta Arbitration Centre.

Maltese law only contemplates mediation as a method of alternative dispute resolution, which is regulated by the Mediation Act.[3] The law allows for disputes involving civil, family, social, commercial or industrial matters to be referred for mediation.

iii Enforcement of foreign judgments and arbitral awards

In accordance with Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgment in civil and commercial matters (recast), a judgment given in an EU Member State shall be recognised in Malta without any special procedure being required. With respect to judgments constituting a *res judicata* given by any other competent court outside Malta and the European Union, these may be enforced in the same manner as judgments that are delivered in Malta, upon an application containing a demand that the enforcement of the judgment be ordered.

With respect to the recognition and enforcement of arbitral awards in Malta, the Second Schedule of the Arbitration Act[4] incorporates into Maltese law the Protocol on Arbitration Clauses (Geneva 1923), the Convention on the Execution of Foreign Arbitral Awards (Geneva 1927) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). Therefore, a foreign arbitral award, by means of registration through the Malta Arbitration Centre, may be recognised and subsequently enforced as an executive title by the courts of Malta in the same manner as if the awards were delivered in domestic arbitration. An executive title would then be of relevance with respect to executive warrants of arrest (see Section V.ii).

2 Laws of Malta, Chapter 387.

3 ibid., Chapter 474.

4 ibid., Chapter 387.

IV SHIPPING CONTRACTS

i Shipbuilding

The Grand Harbour in Valetta – Malta's capital city – is considered to be the deepest natural harbour in the Mediterranean, which has further increased Malta's maritime importance throughout history. Historically, the dry docks were mainly used for repair and construction of civilian ships but naturally this changed during both world wars, given Malta's role and strategic location.

After Malta became an EU Member State, a process of privatisation of Malta Shipyard Ltd took place as government subsidies to the shipyard had to stop. Nowadays, there are no state-owned shipyards and only a handful of privately owned yards, the largest being Palumbo Malta Shipyards Ltd. All are regulated by international and domestic law.

ii Contracts of carriage

Malta's economy is dependent on foreign trade, serving as a freight transshipment hub. Being an importing country, it is essential that Malta is compliant with international regulations and standards. In this respect, Malta is not a signatory to the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules), the UN Convention on the Carriage of Goods by Sea 1978 (the Hamburg Rules) or the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (the Rotterdam Rules). However, the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (the Hague Rules) is applied by the Maltese courts with regard to marine cargo claims by virtue of the Carriage of Goods by Sea Act 1954.[5] The Maltese courts also apply the Hague-Visby Rules when they are incorporated into a bill of lading that is the subject of a dispute.

Carriage is considered an act of trade as per the Commercial Code,[6] and therefore any dispute that may arise in this respect shall be subject to the jurisdiction of the Civil Court of Malta in accordance with the provisions contained in the Code of Organisation and Civil Procedure,[7] which also caters for contracts of affreightment. The Merchant Shipping Act[8] regulates the carriage of goods as a shipping activity.

The United Nations Convention on International Multimodal Transport of Goods (Geneva 1980) is not in force and, as such, multimodal transport is not regulated in Malta.

iii Cargo claims

Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy and to ensure that the ship is properly manned, equipped and supplied.[9] In addition, Article IV(2)(q) of the Carriage of Goods by Sea Act states that neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the

5 ibid., Chapter 140.

6 ibid., Chapter 13.

7 ibid., Chapter 12.

8 ibid., Chapter 234.

9 Carriage of Goods by Sea Act 1954, Article IV, Schedule 1.

agents or servants of the carrier. The burden of proof is on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

Under the Merchant Shipping Act, an agent is to be considered mandatory for the carrier and cannot be found liable for any liability of the carrier.[10]

iv Limitation of liability

The regime for limitation of liability for maritime claims applicable in Malta is the Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC Convention 1976) as amended by the 1996 Protocol, which was ratified by Malta on 13 February 2004 by virtue of an instrument of accession. On 8 June 2015, the International Maritime Organization (IMO) announced new limits to enter into force, in accordance with the tacit acceptance procedure, raising the amount claimable for loss of life or personal injury on ships (not exceeding 2,000 gross tonnage) to 3.02 million special drawing rights (SDRs), up from 2 million SDRs (additional amounts are claimable on larger ships).[11] For the purposes of Article 11 of the LLMC Convention 1976, the fund referred to therein is governed by the Limitation of Liability for Maritime Claims Regulations[12] and shall be constituted with the First Hall of the Civil Court. The rate of interest to be applied shall be 8 per cent.

V REMEDIES

i Ship arrest

According to the Merchant Shipping Act, ships and other vessels constitute a particular class of movables whereby they form separate and distinct assets within the estate of their owners for the security of actions and claims to which the vessel is subject. The Code of Organisation and Civil Procedure provides for the arrest of vessels in Malta both as security of maritime *in rem*[13] claims, when the ship concerned is within the territorial jurisdiction of the Maltese courts, and as security of *in personam*[14] claims, when the owner is subject to the jurisdiction of the Maltese courts. The legislation provides for an exhaustive list of maritime claims for which the courts shall have jurisdiction *in rem*. Ships can be arrested in Malta only by virtue of a warrant of arrest. A precautionary warrant of arrest may be issued against any seagoing vessel (subject to certain requirements) to secure a claim that has not yet been decided, and an executive warrant of arrest is to be issued when enforcing a judgment. Vessels may also be arrested pursuant to the provisions of Article 31 of Council Regulation (EC) No. 44/2001, dealing with protective measures, in cases where the courts of another Member State have jurisdiction as to the substance of the matter. The arrest of sister ships is possible but only in cases concerning specific maritime claims as listed in the relevant legislation.

A ship within Maltese territorial waters can be arrested irrespective of her flag so long as the requirements prescribed by law are met, which are that the ship has a length exceeding 10 metres and that the claim is not less than €7,000. The warrant of arrest is filed *ex parte* by the arresting party by submitting the appropriate forms requesting the arrest of the vessel and

10 Laws of Malta, Chapter 234.

11 www.imo.org/en/MediaCentre/PressBriefings/Pages/24-LLMC-limits.aspx.

12 Laws of Malta, Subsidiary Legislation 234.16.

13 Code of Organisation and Civil Procedure [COCP], Article 742B.

14 COCP, Article 742.

indicating the place where the vessel is to be found: it is not permissible to apply for a warrant of arrest unless the vessel is within Maltese territorial waters. Transport Malta is deemed by law to be the authority with the power and control to have a ship arrested as soon as it enters Maltese territorial waters.

By virtue of Act XXXI of 2019, entitled Various Laws (Better Administration of Justice) (Amendment) Act, the procedure for the arrest of vessels in Malta has been amended; the amendments came into force on 18 December 2019. The execution of the warrant is effected for all effects of law the moment a notice of the warrant has been duly served on the executive officer of the Authority for Transport in Malta. In accordance with these amendments, the party issuing the warrant should appoint a natural or legal person who should be responsible for serving an official copy of the warrant to the master of the vessel or other person in charge of the vessel and seize the appropriate documentation and certification from on board the vessel, which must be handed to the registrar, civil courts and tribunals by the person indicated by the applicant within one working day. The applicant is required to indicate the particulars of the nominated person, so appointed, in the prescribed form. It is essential that the nominated person must have agreed to effect this service. The same procedure as described above is applicable *mutatis mutandis* in the event of a counterclaim to lift the warrant of arrest. The application forms for precautionary and executive warrants of arrest have also been amended.

Once a vessel has been arrested, the arrestor must commence an action on the merits, or arbitration proceedings in respect of the claim stated in the warrant, within 20 days of the date of issue of the warrant of arrest. In default, the effects of the warrant cease and the arresting party may be liable for damages. A warrant of arrest may be lifted by means of a counter-warrant of arrest issued by the court on the grounds of repayment of the claim or the setting up of a security by means of a guarantee, among other things. Cash deposits, Maltese bank guarantees or, by agreement between the parties, a guarantee put up by a P&I club can be placed for the release of the arrest. A penalty of not less than €11,600 is applicable if it is found that the warrant was obtained upon a demand maliciously made.

Moreover, the owner whose vessel was arrested may apply to the court requesting that the arresting party give, with good cause and within a time fixed by the court, a counter-security sufficient for the payment of the penalty that may be imposed, and of damages and interest, and, if in default, to rescind the warrant.

ii Court orders for sale of a vessel

A court judgment and a mortgage are executive titles, and therefore the holder of such a title may proceed directly to enforce its claims.

Judicial sale by auction

The holder of an executive title could file an application in court requesting the court to order the judicial sale of the vessel and appoint a public auctioneer. The court registry is bound to publish the list of judicial sales by auction that are to be held. The auction is conducted in the presence of the Registrar of Courts and the purchaser shall be the highest bidder. The public auctioneer may request that a person submitting an offer should be in possession of the necessary guarantees. The auctioneer shall cause that no bid shall be accepted if it is either made *pro persona nominanda* or by any person who is notoriously incapable of fulfilling the obligations arising out of the adjudication. The purchaser shall pay the price into court within seven days of the final adjudication. Any creditor having a judgment or

other executive title in its favour may bid *animo compensandi*; that is, in set-off of the debt it is owed. In such cases, the creditor by means of an application should request the approval of the court for proposed set-off, and it shall pay into court the surplus of the price if the price exceeds the amount of the debt and costs. When a ship is sold in a judicial sale by auction, the vessel is sold free and unencumbered.

Court-approved private sale

A court-approved private sale offers creditors of an indebted vessel a simple remedial mechanism, by which a request is made to the Superior Courts of Malta to approve the private sale of a vessel. This amendment was introduced to address the disadvantages of private sales and judicial sales by auction.

By means of such an application and subject to certain procedures being followed, in the event of default, a holder of an executive title may sell the vessel to a private buyer, thereby being able to agree on a reasonable price (as would be the case in a private sale) but also allowing the buyer to benefit from purchasing the vessel free and unencumbered (as in a judicial sale by auction). The agreed price should be equal to, or higher than, two previously obtained valuations of the vessel, carried out by independent and reputable valuers. An application is filed in court, exhibiting copies of the memorandum of agreement and the valuations obtained, and requesting the court to approve the private sale and to appoint a person who can transfer the vessel by means of a bill of sale to the new buyer for the agreed price. The court shall appoint the application for hearing within 10 days of its filing. If approved, the vessel would be sold free and unencumbered.

Despite this legislation being enacted in 2006, the courts were not asked to rule on it until December 2011. The sale of the MV *Thor Spirit*[15] in December 2011 paved the way for many similar cases in which other subtleties of this judicial mechanism have also been explored.[16] Several court-approved private sales have since been successful, such as the *Blankenese* case in 2013, the *MV Ladybug* case in 2014 and the HHL *Rio de Janeiro* case, decided in 2019. The procedure is now being used extensively and the more contentious private sales are being more uniformly handled by the courts of Malta.

15 *Danske Bank A/S v. MV Thor Spirit* (1 December 2011).

16 In *Joint Stock Company Rietumu Banka v. MV Blankenese* (22 August 2013), the issue arose that the mortgagee was requesting the court to sell the ship to a company in which the same mortgagee was in control. The court held that there is nothing in the Maltese Companies Act that prohibits a shareholder from acquiring property of a company in which he or she is a shareholder, and made a distinction between the physical individual shareholder and a duly incorporated company which is separate and distinct from its members. It specifically stated that parties alleging bad faith on the part of the buyer must prove bad faith before the court and it emphasised that the price being paid by the buyer was as good as or superior to the valuations produced by the mortgagee, so the court was convinced that the valuations were reasonable and true. Given the fact that the price offered exceeded the valuations presented, the court discarded the objections raised by the two claimants; *Amsterdam Trade Bank NV v. MT Pacific* (28 November 2013); *Hyundai Heavy Industries Co Ltd and Hyundai Samho Heavy Industries Co Ltd v. MV B Ladybug* (8 April 2014), in which the court made it clear that any creditor who decides to make use of this mechanism is not abusing the law, since the private sale of vessels is a legitimate remedy according to Maltese law as long as creditors who decide to apply for the approval of a private sale of a vessel do not abuse this mechanism or use it frivolously to the detriment of other creditors or the debtor himself; *Malta Towage Limited v. MV Irmak* (25 August 2014); *Pacific Seaways Shipbuilding Inc. v. MV Kay* (18 February 2016), in which not only was the mortgagee of the vessel allowed to purchase it but was allowed to do so *animo compensandi*; *Fenech noe v. MY Indian Empress* (25 September 2018).

VI REGULATION

i Safety

The Merchant Shipping Directorate (MSD) and Armed Forces of Malta (AFM) are the institutions with responsibility for maritime safety in Malta. The MSD is responsible for ensuring that Malta implements and accedes to the key international conventions regarding maritime safety and the AFM implements the International Convention on Maritime Search and Rescue 1979 (the Search and Rescue Convention 1979) in addition to the Global Maritime Distress and Safety System used to increase safety at sea and facilitate the rescue of distressed ships, boats and aircraft.

Malta is a party to the following maritime safety and security conventions:

a the International Convention for the Safety of Life at Sea 1974 (SOLAS) (as amended);
b the International Regulations for Preventing Collisions at Sea 1972 (COLREGs) (as amended);
c the Convention on Facilitation of International Maritime Traffic 1965 (the FAL Convention);
d the International Convention on Load Lines 1966 (the Load Lines Convention);
e the Search and Rescue Convention 1979;
f the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation 1988 (SUA);
g the Torremolinos International Convention for the Safety of Fishing Vessels (as amended);
h the Maritime Labour Convention 2006 (MLC) (as amended); and
i the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1995 (the STCW Convention) (as amended).

These maritime safety regulations are transposed into domestic law through:

a the Merchant Shipping (Safety Convention) Rules (SL 234.30);
b the Merchant Shipping (Safety Convention Rules) (SL 234.33);
c the Merchant Shipping (Ship Inspection and Survey Organisations) Regulations (SL 234.37);
d the Merchant Shipping (Accident and Incident Safety Investigation) Regulations (SL 234.49);
e the Merchant Shipping (Fishing Vessels) (Minimum Health and Safety Requirements) Regulations (SL 234.34);
f the Merchant Shipping (Fishing Vessel Safety) Rules (SL 234.36);
g the Merchant Shipping (Maritime Labour Convention) Rules (SL 234.51); and
h the Merchant Shipping (Certification of Commercial Yachts and Commercial Cruising Vessels) Regulations (SL 234.45).

The Merchant Shipping (Accident and Incident Safety Investigation) Regulations (SL 234.49) established the Marine Safety Investigation Unit as an independent government investigation unit to carry out safety investigations into accidents and incidents and participate in safety studies and academic research.[17] As per Regulation 19.3 of Chapter III of SOLAS, fire

17 https://mtip.gov.mt/en/Pages/MSIU/Marine-Safety-Investigation-Unit.aspx.

and abandon ship drills on board all Malta-flagged cargo ships shall be carried out once a fortnight, and fire and abandon ship drills on board all Malta-flagged passenger ships are to be carried out once a week.

IMO Resolution MSC.428(98) concerning Maritime Cyber Risk Management in Safety Management Systems encourages ship management companies to ensure that cyber risks are appropriately addressed in the vessel's safety management systems with regard to their operations ashore and aboard, by no later than the first annual verification of the respective document of compliance after 1 January 2021.

ii Port state control

Through the MSD, Malta ensures that any ship entitled to fly its flag complies with the applicable international rules and standards. As part of the effective enforcement of those rules, standards, laws and regulations, Malta adopted the Memorandum of Understanding on Port State Control in the Mediterranean Region (the Mediterranean MOU) on 11 July 1997 (which entered into force on 24 February 1998), with other maritime authorities and the assistance of, among others, the IMO, the International Labour Organization and the European Commission. Moreover, Malta has an active participation in the Paris Memorandum of Understanding on Port State Control 1982 (the Paris MOU), of which Transport Malta has been a member since 2006.

As the provisions of the Paris MOU were incorporated into EU law through Directive 2009/16/EC of the European Parliament and of the Council on port state control, Malta transposed them into domestic law through the Merchant Shipping (Port State Control) Regulations (SL 234.38)[18], which apply to any ship and her crew calling at a port in Malta or anchored off a Maltese port to engage in a ship-port operation, unless the exemptions set in the legislation apply. Furthermore, the Merchant Shipping (Flag State Requirements) Regulations (SL 234.48) adopt the measures contained in Directive 2009/21/EC of the European Parliament and of the Council on compliance with flag state requirements. Both regulate inspections and detention procedures.

iii Registration and classification

Registration

Maltese legislation offers great advantages and benefits to those who choose to register their vessels under the Malta maritime flag. Malta retains its place on the Paris MOU white list, in line with its policy not to register ships with a poor detention, safety or marine pollution record, and ranks among the flags meeting the Paris MOU criteria for low-risk ships.[19] Ship registration and the provision of all ancillary services are the responsibility of the MSD, which is also responsible for the regulation, control and administration of all matters concerning

18 Subsidiary Legislation 234.38 was amended by Legal Notice 37 of 2021 and adopts the measures contained in Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009, in Directive 2013/38/EC of the European Parliament and of the Council of 12 August 2013 in its latest version, and in Regulation (EC) No. 725/2004 of the European Parliament and of the Council of 31 March 2004 on Enhancing Ship and Port Facility Security, in its latest version as far as its Article 8 and Regulation 9 in its Annex I are concerned.

19 Published on the flag performance list of the Paris Memorandum of Understanding on Port State Control 1982.

merchant shipping, the certification of seafarers and the administration and implementation of international maritime conventions and agreements.[20] The registry's services are offered around the clock, to accommodate any urgent matter.

Maltese legislation provides for the registration of vessels used for navigation in international waters under the provisions of the Merchant Shipping Act, and the registration of ships under 24 metres in length and employed solely in navigation within the territorial waters of Malta, whether privately or commercially, under the provisions of the Small Ships Regulations. Registration of fishing vessels used in the territorial waters of Malta is provided for under the provisions of the Fisheries Conservation and Management Act. Commercial yachts (that is, those in commercial use that are more than 15 metres in overall length and do not carry more than 12 passengers) can be registered in Malta subject to the conditions of the Commercial Yacht Code.[21] All types of vessels, from pleasure yachts to oil rigs, may be registered, provided that all requirements set out in the applicable legislation are met. Maltese law also provides for the registration of vessels under construction.

As for ownership and eligibility for registration, the Merchant Shipping Act provides that vessels owned by either citizens of Malta or bodies corporate established under the laws of Malta, or a citizen of the European Union or of the European Economic Area or of Switzerland or of the United Kingdom not residing in Malta, or foreign corporate bodies or entities (international owner) having a Maltese resident agent, are eligible for registration under the Malta flag. An international owner shall be deemed to have submitted to the jurisdiction of the Maltese courts through the resident agent. There are no nationality restrictions for masters, officers and crew of Malta-registered vessels and no trading restrictions. A vessel is first registered provisionally under the Malta flag for six months, during which time all documentation needs to be finalised.

Maltese law allows for both bareboat charter registration of foreign ships under the Malta flag (bareboat charter in registration) and for bareboat charter registration of Maltese ships under a foreign flag (bareboat charter-out registration), as long as all the requirements prescribed in the legislation are satisfied and the consent of the registrar is provided. Moreover, Malta caters for a certificate of registry to be issued in the name of the charterer or the lessee when a ship registered under the Malta flag is being operated under charter or is leased, and that ship is not bareboat-charter registered in a foreign registry.

At the request of the owner, the registry of a Maltese ship may close, followed by the issuance of a deletion certificate, provided, inter alia, that the consent of the registered mortgagees is evidenced and all liabilities and obligations of the ship towards the Republic of Malta have been fulfilled.

Malta has also become renowned for the protection it offers to financiers. The mortgagee has the right to take possession and sell the vessel secured by the mortgage when the debtor is in default and is also empowered to maintain the status and validity of the registration of the ship, thereby safeguarding its ability to operate the ship commercially pending a sale procedure. Under Maltese law, a mortgage is an executive title and can be enforced upon default without the need for a special judgment. Mortgages enjoy a relatively high ranking

20 https://www.transport.gov.mt/maritime/transport-malta-sea-99.

21 The requirements of the Commercial Yacht Code [CYC] 2015 have been duly revised and improved and a new CYC 2020 was issued to replace CYC 2015. CYC 2020 is applicable to all commercial yachts and has been effective as of 1 January 2021. Merchant Shipping Notice 164 can be accessed at https://www.transport.gov.mt/include/filestreaming.asp?fileid=5739.

among maritime claims, which is of great importance if the mortgage is actually enforced through a judicial sale or a court-approved private sale and the proceeds from the sale of the vessel are not sufficient for all creditors.

Classification

A merchant vessel at the time it is being registered as a Maltese ship and during the period of its registration under the Malta flag must be classed with a classification society authorised to issue statutory certificates on behalf of the government. The criteria in accordance with which organisations or bodies of surveyors may be authorised under the Merchant Shipping Act are prescribed in the Ship Inspection and Survey Organisations Regulations.[22]

The following classification societies are recognised and approved by the government:

a American Bureau of Shipping;
b Bureau Veritas;
c China Classification Society;
d Croatian Register of Shipping;
e ClassNK (NK);[23]
f DNV;[24]
g Indian Register of Shipping;
h Korean Register of Shipping;
i Lloyd's Register;
j Polish Register of Shipping; and
k Registro Italiano Navale.

iv Environmental regulation

Malta is a Member State of the European Maritime Safety Agency, the European Seaports Organisation and the Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea. In assistance with these regional authorities and, among others, the IMO, Malta enforces international, regional and EU instruments, which have been either ratified or directly form part of domestic legislation. Malta is a party to the major conventions regulating sea and air pollution.

As a signatory of the International Convention for the Prevention of Pollution from Ships 1973 (MARPOL) (as amended), Malta has transposed MARPOL's Annexes into domestic legislation through:

a Merchant Shipping (Prevention of Pollution of Ships) Regulations (SL 234.32);
b Merchant Shipping (Prevention of Pollution by Garbage) Regulations (SL 234.33);
c Merchant Shipping (Prevention of Pollution Sewage) Regulations (SL 234.47); and
d Merchant Shipping (Wreck Removal Convention) Regulations (SL 234.53).

As of 1 January 2020, all ships subject to MARPOL Annex VI are, in principle, required to use on board either fuel oils with a sulphur content of no more than 0.5 per cent mass/mass in accordance with the revised MARPOL Annex VI, Regulation 14.1, or alternative emission reduction and control technologies to comply with the emission standard. In the

22 Subsidiary Legislation 234.37.

23 https://www.transport.gov.mt/maritime/ship-and-yacht-registry/ship-registration/authorised-recognised-organisations-132.

24 https://www.transport.gov.mt/include/filestreaming.asp?fileid=6092.

event that any deficiencies are recorded against the listed items, action may be taken by the Port State Control Officer, which may include the detention of the ship, other enforcements, administrative or corrective measures.[25] As of 1 October 2020, electronic record books can be used in lieu of hard copy record books on board Malta-flagged vessels for record-keeping requirements under MARPOL.[26]

The International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (the Bunker Convention) has been transposed into domestic law through the Merchant Shipping (Liability for Bunker Oil Pollution Damage) Regulations (SL 234.46).

In response to grave concern about the spread of invasive species through the carriage of ballast waters from ships, Malta acceded to the Convention for the Control and Management of Ships' Ballast Water and Sediments 2004 (the Ballast Water Management Convention, which entered into force on 8 September 2017) on 7 September 2017. The Convention came into force in Malta on 7 December 2017 when it was transposed into domestic legislation through the Merchant Shipping (Ballast Water Management Convention) Regulations (SL 234.55).

To further establish a system of penalties for failure to comply with monitoring and reporting obligations, Regulation (EU) 2015/757 of the European Parliament and of the Council of 29 April 2015, and amending Directive 2009/16/EC, was transposed into domestic legislation through the Merchant Shipping (Monitoring, Reporting and Verification of Carbon Dioxide Emissions from Maritime Transport) Regulations (SL 234.54).

Furthermore, Malta is a signatory to the following:

a the UN Environment Programme Convention on Biological Diversity;

b the Convention for Protection of the Mediterranean Sea against Pollution 1976 (the Barcelona Convention) and its 2002 and 2004 Protocols;

c the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (the London Convention);

d the International Convention on the Control of Harmful Anti-Fouling Systems on Ships 2001 (the Anti-Fouling Convention);

e the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (the OPRC Convention); and

f the Protocol on the Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances 2000 (OPRC-HNS).

In response to the obligations brought upon a state as a result of the OPRC Convention and the OPRC-HNS, the Oil and Hazardous and Noxious Substances Pollution Preparedness, Response and Co-Operation Regulations[27] were introduced whereby Transport Malta, as the National Competent Authority, is empowered to, inter alia, approve pollution emergency plans of marine terminals and marine facilities, organise periodical national training and drills in pollution emergency and response, approve and coordinate training in pollution emergency and response for the personnel of marine terminals and marine facilities.

25 https://www.transport.gov.mt/include/filestreaming.asp?fileid=4477.

26 https://www.transport.gov.mt/include/filestreaming.asp?fileid=5451.

27 Subsidiary Legislation 234.59.

v Collisions, salvage and wrecks

Collisions

Malta has adopted the COLREGs, which are regulated in the Commercial Code (Chapter 13), the Merchant Shipping Act (Chapter 234) and the Prevention of Collisions Regulations (SL 234.20).

The Commercial Code has sections dealing with the rights and obligations of the insurer and of the assured, specifying the risks borne by the insurer, and with the prescription and inadmissibility of action for damage occasioned by the collision of vessels when a collision happens in a place in which the master could institute proceedings, unless the master has made a protest.[28]

The Prevention of Collisions Regulations are regulated under the Merchant Shipping Act.[29] Any proceeds from any indemnity arising from a collision are secured by a special privilege upon the vessel. In the case of a mortgaged vessel, the same will attach to any proceeds from any indemnity arising from such collisions.

Salvage

Malta is not a signatory to the International Convention on Salvage 1989 (the 1989 Salvage Convention); however, the law of salvage is found in the Commercial Code and the Merchant Shipping Act.

The Commercial Code establishes that any damage caused to a vessel or to cargo, or to both, and the salvage payable for extraordinary services to avoid loss or capture in cases of imminent peril, are to be considered to be general average, as per the provisions of Title IV of the Code.[30]

Under the Merchant Shipping Act, salvage includes all expenses properly incurred by the salvor in the performance of salvage services.[31] Salvage in respect of preservation of life, when payable by the owners of the vessel, shall be payable as a priority over all other claims for salvage.[32] If the vessel, cargo and apparel are destroyed, or the value thereof is insufficient, after payment of the actual expenses incurred, to pay the amount of salvage payable in respect of the preservation of life, the Minister may, at his or her discretion, award to the salvor, out of the Consolidated Fund, such sum as he or she thinks fit in whole or in part satisfaction of any amount of salvage so left unpaid.[33]

Moreover, under the principle of 'no cure no pay', the liability of the owner to pay salvage shall extend to persons having an interest that has been saved by the property being brought into a position of security.[34]

If any dispute arises as to apportionment of any amount of salvage among the owners, master, pilot, crew and other persons in the service of any foreign vessel, the amount shall be apportioned in accordance with the law of the country to which the vessel belongs.[35]

28 Commercial Code (Chapter 13 of the Laws of Malta), Article 545.

29 Merchant Shipping Act (Chapter 234 of the Laws of Malta), Part V, Section 5.

30 Commercial Code (Chapter 13 of the Laws of Malta), Article 444(h).

31 Merchant Shipping Act (Chapter 234 of the Laws of Malta), Article 330.

32 ibid., Article 342.

33 ibid.

34 ibid., Article 344.

35 ibid., Article 345(3).

Wrecks

Malta ratified the Nairobi International Convention on the Removal of Wrecks 2007 (Nairobi WRC 2007) on 18 January 2015. The Nairobi WRC 2007 is transposed into Maltese legislation through the Merchant Shipping (Wreck Removal Convention) Regulations (SL 234.53), which is applied to all Maltese ships wherever they may be and to all other ships while in Maltese waters regardless of flag. A section on wrecks is also found in both the Commercial Code and the Merchant Shipping Act.

The applicability of the Nairobi WRC 2007 in Malta, as per the Regulations, means an area extending to 25 nautical miles from the baselines from which the territorial waters are measured in accordance with the Territorial Waters and Contiguous Zone Act.[36] With respect to certification, Transport Malta is the authority that issues the wreck removal certificates in terms of the Nairobi WRC 2007, which must be placed on board the vessel.

If a vessel has sunk, is stranded or is abandoned on or near the coasts within the territorial jurisdiction of Malta, the Minister responsible for shipping[37] is granted the power not only to remove the vessel but also to destroy it, whether in whole or in part.[38]

Ship recycling

Malta ratified the Hong Kong Convention for the Safe and Environmentally Sound Recycling of Ships 2009 (the Hong Kong Convention) on 14 May 2019, becoming the 12th nation to do so. Additionally, the obligations set out in Regulation (EU) No. 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling (amending Regulation (EC) No. 1013/2006 and Directive 2009/16/EC) (the EU Ship Recycling Regulation) are enforceable in Malta through the Merchant Shipping (Ship Recycling) Regulations (SL 234.56) adopted on 31 December 2018.[39] Moreover, to establish a framework to protect human health and the environment against the adverse effects of hazardous wastes and their disposal, Malta ratified the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal in June 2000. The obligations as found in this Convention are in force by means of the Environment Protection (Control of Transboundary Movement of Toxic and other Substances) Regulations 2000. The Environment and Resources Authority is the competent authority under these regulations. The EU Ship Recycling Regulation relating to the Inventory of Hazardous Materials (IHM) is in force, which gives rise to the obligation to carry on board an IHM with a certificate or statement of compliance as appropriate, as of 31 December 2020.

vi Passengers' rights

Malta has ratified the Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974 (the Athens Convention). The Convention establishes a regime of liability for damage suffered by passengers carried on a seagoing vessel. Passengers' claims are regulated by the Merchant Shipping (Carriage of Passengers by Sea) Regulations[40] and give effect to the Athens Convention. In accordance with the Regulations, the Registrar General of Shipping

36 Chapter 226 of the Laws of Malta.

37 Merchant Shipping Act (Chapter 234 of the Laws of Malta), Article 339.

38 id.

39 Subsidiary Legislation 234.56.

40 Subsidiary Legislation 234.52.

and Seamen should issue a certificate attesting that insurance cover or another financial security is in force in respect of ships registered under the Malta flag and of any other ship entering or leaving Maltese ports. Malta is also bound by Regulation (EC) No. 392/2009 on the liability of carriers of passengers in the event of loss of damage resulting from an accident, which entered into force on 31 December 2012. The Regulation incorporates certain provisions of the Athens Convention (as amended by the 2002 Protocol) and applies to all carriers involved in international carriage, including carriage between EU Member States, and certain types of domestic carriage. Regulation (EU) No. 1177/2010 concerning the rights of passengers when travelling by sea and inland waterways,[41] which came into force on 18 December 2012, is also enforceable in Malta.

vii Seafarers' rights

Malta ratified the MLC on 22 January 2013. The MLC, which entered into force on 20 August 2013, was transposed into domestic legislation through the Merchant Shipping (Maritime Labour Convention) Rules (SL 234.51). Part IV of the Merchant Shipping Act regulates certification, the conditions for admission to employment, the form, period and conditions of agreements with crew, the conditions of service regulations, the discharge of seafarers, the repatriation of seafarers, rights of wages and payment of seafarers, and the power of the court to rescind a contract between owner or master and seafarer.

Malta has acceded to the STCW Convention (as amended), which was transposed into domestic legislation through the Merchant Shipping (Training and Certification) Regulations (SL 234.17).[42] In terms of these Regulations, officers and seafarers are subject to certification issued by the Registrar General of Shipping and Seamen, who is responsible for certification of seafarers. Certificates of competence are issued after the successful completion of approved training courses and examinations held in Malta. In addition, Malta has entered into bilateral agreements with foreign maritime administrations for the recognition of certificates of competence issued to seafarers.[43] These Regulations were amended through Legal Notice 26 of 2021. Furthermore, the Regulations include new training provisions directed towards the yachting sector.

With regard to detention measures in respect of ships, if a ship is not in compliance with the provisions of the Merchant Shipping Act, the Merchant Shipping (Maritime Labour Convention) Rules and applicable requirements of the STCW Convention, the Registrar General of Shipping and Seamen shall take necessary measures to ensure that the ship shall not sail until it can proceed to sea 'without presenting an unreasonable threat of harm to the working and living conditions of seafarers and any expenses incurred therefor shall be a charge on the ship, so however that the ship shall not be unduly detained or delayed'.[44]

41 https://ec.europa.eu/transport/themes/passengers/maritime_en.

42 The Merchant Shipping (Training and Certification) Regulations (Subsidiary Legislation 234.17) have been amended through Legal Notice 26 of 2021.

43 https://www.transport.gov.mt/maritime/ship-and-yacht-registry/superyacht-registration/mlc-2006-stcw-157.

44 Merchant Shipping (Maritime Labour Convention) Rules, Article 129(1).

VII OUTLOOK

The Passenger Yacht Code was introduced in Malta and took effect from 25 May 2021. This Code is specifically designed and intended for passenger yachts, which carry between 12 passengers and 36 passengers, but not more than 200 persons, do not carry cargo and are engaged on international voyages.[45] The Non-Convention Vessel Code (NCV Code)[46] has been amended to meet particular needs, demands and technologies of this market, in conformity with applicable national, EU and international rules, regulations and standards.[47] With effect from 1 July 2024, SOLAS Chapter XV will enter into force in Malta, which will result in the International Code of Safety for Ships Carrying Industrial Personnel becoming mandatory for all cargo ships and high-speed cargo craft of 500 gross tonnage and over carrying more than 12 industrial personnel and engaged on international voyages.[48]

Under the Maltese system, a shipping company is subject to tonnage tax calculated based on the net tonnage of the ship as an alternative to charging corporation tax. Tonnage tax is applied to a shipping company's core revenues derived solely from shipping activities, such as international carriage of goods and passengers, certain ancillary revenues that are closely connected to shipping activities (which are, however, capped at a maximum of 50 per cent of a ship's operating revenues), and revenues from towage and dredging subject to certain conditions. Maltese legislation also caters for ship management companies that may benefit from the tonnage tax system, subject to the conditions set in the legislation being met. Moreover, Malta, under its domestic legislation, has an exemption for domestic source income earned by non-resident shipping owners on a reciprocal basis.

Subject to amendments introduced by Legal Notice 31 of 2020,[49] shipping companies should file audited financial statements, as from financial year 2020, within the periods required for a company incorporated in terms of the Companies Act.[50] The amendments cater for small companies and the exemptions applicable for small companies under the Companies Act should also apply to shipping companies, as long as the other criteria set out in the legislation are met. A shipping company may elect to be governed by the Companies Act should the relevant notice be filed.

Through the introduction of the amendments, foreign shipping companies have been provided with their own specific rules catering for this circumstance, which provides for a smoother transition of foreign-registered companies wishing to continue in Malta, or conversely, a Malta shipping company wishing to continue in another jurisdiction.

A provision introduced to the Companies Act as of 3 March 2020, with the introduction of Act V of 2020, has extended the possibility for cell companies to be created and for companies to be converted into cell companies, provided that they carry on or are engaged in shipping or aviation business. The directors of the cell company should keep separate records, accounts statements and other documents to evidence the assets and liabilities of each cell as distinct and separate from the assets and liabilities of other cells in the same company. The marine industry being one of Malta's economic pillars, efforts are continuously being made to ensure the industry remains competitive and robust.

45 Merchant Shipping Notice 171.

46 The revised NCV Code came into force on 1 September 2021.

47 Merchant Shipping Notice 170.

48 Technical Notice SLS. 36.

49 Published in the *Government Gazette* on 21 February 2020.

50 The Laws of Malta, Chapter 386.

Malta has enacted a legal framework to regulate activities based in the blockchain and fintech industries and has established itself as a centre for distributed ledger technology businesses; as a result, we have seen a lot of blockchain-driven shipping platforms choose Malta for business. Maltese legislation also caters for smart contracts offering the opportunity for paperless and more efficient shipping transactions.

Securitisation is one of the financing tools being used as a primary source of raising finance within the shipping industry. Securitisation transactions are undertaken through special purpose vehicles, which are entities that are set up for the sole purpose of issuing securities to fund the acquisition of particular assets. The Maltese legislation is also very popular among financiers and shipowners who opt for sale and leaseback transactions because of the benefits offered. Malta offers a network of double tax treaties with approximately 80 jurisdictions.

Furthermore, Malta has established its position as a ship finance leasing jurisdiction offering various incentives to the parties involved. The legislation was amended and a certificate of registry in the name of the charterer or lessee might be issued. Maltese law provides that the letting of ships shall be regulated by the provisions of any agreement between the lessor and the lessee. The termination of the lease shall be regulated by the agreement between the lessor and lessee. Any notice of termination that may be required to be given under the agreement may be given by notice in writing in any manner, including by electronic means. The lease of a ship or rights thereunder shall be dissolved immediately or terminated by the lessor (or mortgagee who shall be deemed to have such power unless expressly waived) at any time in the event of a default and upon notice in writing to the lessee (in the manner referred to above), notwithstanding any opposition by the lessee, and without the need of any authorisation or confirmation by any court that an event of default has taken place. In these circumstances, the lessor may, after notice to the lessee, take possession of the ship in accordance with the agreement between the parties and may ask the court in Malta for an order authorising or directing these acts, and the court shall render full support to the lessor or the mortgagee as expeditiously as possible.[51]

A financial institution, whether established or operating in Malta, carrying out the activity of financial leasing and all related transactions, should not require a licence from the competent authority for the purposes of exercising its activities in Malta under the Financial Institutions Act.

As a member of the European Union, Malta adopted the restrictive measures imposed against Russia, in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, which included the removal of the Russian Maritime Register of Shipping from the list of classification societies that are recognised and approved by the government.

Currently, Transport Malta enables small boat owners to renew the registration of their small ships through an online portal.

51 See Civil Code (Chapter 16 of the Laws of Malta), Article 1526.

Chapter 29

MEXICO

Ramiro Besil Eguia[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Mexico has a relatively long coastline with a strategic position facing the Pacific on the west and the Gulf of Mexico and Caribbean Sea to the east and south. It is a manufacturing country with a large economy, and imports and exports goods on a large scale; however, the amount of maritime cargo handled by its ports does not reflect this. In 2022, Mexican ports handled 287,457,715 tonnes of cargo, a 0.2 per cent increase from the 286,114,290 in 2021. Of this total, 124,692,287 tonnes of cargo were imported, 108,560,261 tonnes were exported and 54,205,167 tonnes correspond to coastal trading.

According to the Mexican Infrastructure Plan for 2020–2024, one of the objectives of the current administration is to double the amount of cargo handled in coastal trading by 2024.

The cruise industry is important in Mexico, with 2,665 arrivals and 6,673,191 passengers in 2022, which is a substantial increase from the 833 arrivals and 1,486,790 passengers in 2021.

Although the Maritime Authority does not have updated records, it is estimated that the number of merchant vessels over 500 gross tonnage flying the Mexican flag in December 2022 was approximately 800.

A vessel can only be flagged and registered in Mexico when it is owned or possessed under a financial lease agreement by a Mexican company or individual. Shipping companies that wish to carry out coastal trading in Mexico are limited to 49 per cent foreign investment.

Coastal trading is restricted to Mexico-flagged vessels; however, foreign-flagged vessels may obtain a permit to carry out coastal trading in Mexico provided that certain conditions are met. By the end of December 2022, close to 54 foreign-flagged vessels were operating in coastal trading in Mexico with a navigation permit.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Maritime law is regulated by federal laws. In general, maritime law is regulated in the Navigation and Maritime Commerce Law, including maritime contracts, navigation regimes, ship registration, maritime liens, marine insurance, administrative structure of the maritime authority, maritime accidents, general average, salvage, limitation of liability, and certain rights of crew members.

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Mexico is also a party to several international conventions on maritime law, such as the United Nations Convention on the Law of the Sea, which with the Federal Law of the Sea provides the main legal framework from the territorial perspective.

From the safety perspective, the main applicable convention is International Convention for the Safety of Life at Sea 1974 (SOLAS); however, there are other applicable rules, such as the Latin American Agreement on Port State Control of Vessels 1992 (Viña del Mar MOU), which is an agreement between Latin American countries on marine safety in port states, as well as other domestic regulations.

From an environmental perspective, the International Convention for the Prevention of Pollution from Ships 1973 (as modified by the Protocol of 1978) (MARPOL 73/78) and the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (the London Convention) apply and both of them are either incorporated or replicated in the domestic laws.

In respect of liability, the conventions ratified by Mexico include the Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC Convention 1976), the International Regulation for Preventing Collisions at Sea 1972 (COLREGs), the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules), and the International Convention on Civil Liability for Oil Pollution Damage 1969 (the CLC Convention).

Other laws and regulations that may apply to maritime cases, for example, when there is an absence of specific regulation in the Navigation and Maritime Commerce Law, one of the following general rules will apply, depending on the nature of the absence: Commerce Code, Federal Law of the Sea, Law of Ports, General Law of National Assets, Administrative Procedure Law, Antitrust Law, Civil Code, Civil Procedures Code, Labour Law, Insurance Contract Law.

III FORUM AND JURISDICTION

i Courts

All laws regarding maritime issues are federal laws and, as a general rule, disputes arising in connection with federal laws may be heard in local or federal courts at the choice of the plaintiffs; however, under Article 105, Section IV of the Mexican Constitution, all matters relating to maritime law are to be heard by federal courts. When resolving jurisdiction controversies, courts tend to have different opinions as to what disputes relate to maritime law; however, it is common for courts to consider that only the cases expressly contained in the Navigation and Maritime Commerce Law as being exclusively of federal jurisdiction cannot be heard by a local court. These types of cases include the arrest of vessels, enforcement of ship mortgages, procedures of limitation of liability, disputes in respect of marine insurance, collision, general average and salvage. There is no express provision, for example, in the case of disputes arising from ship repair contracts.

The proceedings are governed in general by the procedural chapters of the Commerce Code; however, specific submissions regulated in the Navigation and Maritime Commerce Law, such as those concerning the arrest of vessels, enforcement of ship mortgages, claims for collision, general average, salvage and limitation of liability.

The following limitation periods apply to maritime claims in Mexico:

a six months from the agreed date of delivery for claims related to towing contracts;

b one year for charter disputes, cargo claims under a bill of lading and passenger claims;

c two years from the date of the occurrence for collision claims; and
d two years from the date of the occurrence for marine insurance claims.

In the case of shipbuilding, the limitation is two years from the date a latent defect is discovered, but no later than four years from the date of delivery of the vessel from the shipbuilder to the owners.

General average claims have a one-year limitation from the date of the first arrival in port following the event that caused the general average or four years from the date a general average guarantee is granted.

When not specified in the law, the applicable time limit will be 10 years.

Time limits cannot be extended by agreement unless the applicable law expressly authorises the extension. Courts and arbitral tribunals are not entitled to extend time limits.

ii Arbitration and ADR

Mexican law does not have a specific maritime arbitration procedure and there are no codified arbitration rules for commercial matters; however, parties are free to agree to resolve disputes by arbitration or other means of alternative dispute resolution and, in general, Mexican courts will honour arbitral clauses provided one of the involved parties requests the court to submit the controversy to arbitration as per the agreed arbitration clause or agreement.

There is no specific wording required for arbitration clauses to be valid; however, the parties must clearly submit to the jurisdiction of the courts.

Commercial arbitration is regulated in the Commerce Code, which incorporates the UNCITRAL Model Law of 1976 and vaguely regulates the commencement of arbitration, the composition of the tribunal as well as awards and their enforcement. The Commerce Code also provides for the attachment of assets as an interim form of relief that can be obtained from a court in support of arbitration.

iii Enforcement of foreign judgments and arbitral awards

Mexican courts will enforce public judgments in respect of commercial disputes, including those of a maritime nature. The rules for enforcement are included in the Commerce Code, at Articles 1346 to 1348. Pursuant to Article 1347-A, the requirements for the enforcement of a foreign judgment in Mexico are as follows:

a the court that heard the dispute had jurisdiction as per international law;
b it is not the consequence of an action *in rem*;
c the defendant was given proper notice of the complaint to guarantee the opportunity to present his or her case;
d the judgment is final and cannot be appealed in its country of origin;
e the controversy is not subject to a different procedure before the Mexican courts;
f the subject matter of the controversy is not against public policy in Mexico; and
g the formalities to be considered authentic are met, such as certification of signatures, legalisation and apostille.

Furthermore, Mexico has ratified a bilateral treaty with Spain for the recognition and enforcement of civil and commercial judgments; however, the existence of a treaty between Mexico and the country of origin of the judgment is not a requirement for enforcement.

Mexican courts do not require registration to enforce a foreign judgment, provided that the requirements in Article 1347-A of the Commerce Code are met.

Foreign arbitral awards may be enforced in Mexico under the rules of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), which Mexico has ratified and is incorporated in domestic legislation, specifically the Commerce Code.

Both foreign judgments and awards must be translated into Spanish by a translator who has been duly authorised by the Mexican courts.

IV SHIPPING CONTRACTS

i Shipbuilding

There is not a significant amount of shipbuilding in Mexico. Shipyards are engaged mainly in ship repairs and building small fishing ships.

Under the Navigation and Maritime Commerce Law, all shipbuilding contracts to be executed in Mexico must be recorded in the Mexican Maritime Public Registry. Article 82 of the Navigation and Maritime Commerce Law allows the following options for shipbuilding contracts:

a future purchase agreement, in which the shipyard must supply the materials needed for the performance of the contract. In this case, title will be transferred once the construction is completed; and

b work agreement, in which the shipowner must supply the materials and the title over the ship is transferred to the shipowner at the time the building process starts.

Notwithstanding the foregoing, the parties may agree to a different scheme for the transfer of title.

As per Article 95 of the Navigation and Maritime Commerce Law, shipbuilders will have a lien over the built vessel; however, the lien expires when the vessel is delivered to the shipowner but will remain in force even if title over the vessel is transferred to a third party.

In general, shipbuilders and shipowners are free to agree on the terms of the shipbuilding contract and courts will honour those agreements provided that they are not against the public policy of Mexico.

ii Contracts of carriage

Mexico is a signatory to the Hague-Visby rules and Mexican courts will honour them when invoked by the parties to a dispute. However, Mexico is not a signatory to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (the Rotterdam Rules). As per the Hague-Visby Rules, unless notice of loss or damage is given to the carrier at the time of delivery, or within three days of the date of delivery, removal of the cargo is *prima facie* evidence that it was delivered in the same condition as described in the bill of lading.

The Navigation and Maritime Commerce Law also provides a set of general rules for contracts of carriage in Chapter IV (Articles 128 to 137), which are in line with the Hague-Visby Rules. For Chapter IV to apply to a contract of carriage, the following, as a minimum, must be met:

a the port of loading or unloading in the bill of lading is located in Mexico; or

b the bill of lading expressly stipulates that Mexican law applies.

The aforementioned Articles of the Navigation and Maritime Commerce law provide that freight rates may be freely agreed between carriers and shippers making reference to the United Nations Convention on a Code of Conduct for Liner Conferences; however, the Maritime Authority may intervene when there are anticompetitive conditions in the market.

It also provides the minimum information that a bill of lading must contain, namely:

a name and domicile of the carrier and shipper;
b name and domicile of the consignee;
c name and country of registry of the vessel, voyage and bill of lading number;
d goods to be carried, including the necessary elements for their identification;
e freight rate and any other charges consequent to the carriage;
f an indication of whether the freight rate has been paid;
g port of loading and unloading;
h mode and type of transport;
i place of delivery of the goods to the consignee; and
j clauses outlining the terms and conditions agreed by the parties.

Shippers will be liable for whatever damage or losses are caused as a consequence of misdeclaration of cargo.

iii Cargo claims

Mexico is a signatory to the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (the Hague Rules), and therefore the bill of lading and the removal of the cargo are considered *prima facie* evidence.

Under Mexican law, the shipper and any other lawful holder of a bill of lading will be entitled to bring claims under the contract of carriage documented by the bill of lading. Claims can be brought against the carrier; however, shipowners can also be liable when they are not the contractual carrier if the loss or damage was a direct consequence of their management of the vessel. Notwithstanding this, demise clauses are enforceable in Mexico.

The carrier can also bring claims against the shipper if there has been a misdeclaration of cargo, even when that cargo is not inflammable, explosive or dangerous in nature.

The terms of a charter party can be incorporated into a bill of lading provided that the parties clearly express that it is their will, including dispute resolution clauses. Whether the dispute resolution clauses will be binding for a lawful holder of the bill of lading who is not the shipper will depend on the wording of the clause.

Unpaid credits from the carriage of goods, handling of the cargo, storage, loading and unloading will grant a lien to the creditor, which will remain in effect for a month from the date the cargo was unloaded.

Once the cargo is being unloaded from the vessel, the carrier cannot retain the goods on board because of a lack of payment of the freight rate; however, the carrier may request a court of law to order attachment and arrest of the cargo.

iv Limitation of liability

Despite Mexico being a party to the LLMC Convention 1976, neither the 1996 Protocol to amend the LLMC Convention nor the 2012 Amendment has been signed by Mexico. Mexico is also a party to the CLC Convention and the Protocols of 1976 and 1992. Although these Conventions are not properly incorporated into domestic legislation, they are referenced

throughout the Navigation and Maritime Commerce Law and are established as the legal instruments to determine liability as a consequence of marine casualties and to determine the limitation of liability.

Articles 304 to 322 of the Navigation and Maritime Commerce Law stipulate the procedure for parties to limit their liability under the LLMC Convention and the CLC Convention.

The final purpose of the procedure is to establish the sum that the liable party will be bound to pay, to create a fund with the relevant sum and to determine how that fund will be distributed between the different creditors; therefore, it is a procedure at which many parties with an interest may appear.

The procedure must be heard by the federal court with jurisdiction over the port where the occurrence that gave rise to the liability took place or the first port of arrival after the occurrence. If the vessel never reached a port, the procedure may be heard at the port of departure or the destination for that last voyage.

The procedure must be initiated within a year of the date on which the shipowner or the person entitled to limit his or her liability became aware of the existence of a claim that entitled him or her to limit his or her liability. When applying to limit liability, the shipowner or party entitled to the limitation must submit security for the full amount equivalent to the limitation of liability and must also inform the court of the possible claimants and their domiciles, outlining the nature of their possible claim.

The limitation fund will remain available to settle the claims arising from the relevant occurrence even if the shipowner is placed in bankruptcy procedures.

When accepting the right to limit the liability of the applying party and the security submitted, the court will stop any attachment ordered against the applicant for claims that may be credited against the limitation fund and all legal actions connected with the event against the applicant that are already in place will be allocated in the file of the limitation.

The security required to create the fund may be a cash deposit or a bond. It is possible that the judge may also allow a letter of undertaking from the protection and indemnity club. However, attempts to limit liability under the LLMC Convention have not always been successful in Mexican courts, especially in cases in which a vessel has caused damage to floating platforms.

Furthermore, Article 142 of the Navigation and Maritime Commerce Law provides the following limitations of liability of the carrier:

a for the death or injury of passengers: up to 16,000 special drawing rights (SDRs) per passenger;
b for loss of or damage to cabin luggage: up to 400 SDRs;
c for loss of or damage to vehicles being carried, including the luggage in those vehicles: up to 1,400 SDRs; and
d for the loss of or damage to any other luggage: up to 600 SDRs.

Notwithstanding the contents of Article 142, the limitation applicable to death and injuries would be considered unconstitutional by a court of law and therefore it is null.

V REMEDIES

i Ship arrest

Mexican law allows for more than one option for ship arrests, mainly, the general commercial remedy under the Commerce Code and the remedy under the Navigation and Maritime Commerce Law. Mexico is not a signatory to the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships 1952 or the International Convention on Arrest of Ships 1999.

Arrest procedure under Navigation and Maritime Commerce Law

The procedure under the Navigation and Maritime Commerce Law is more consistent with international maritime practice and apparently more expeditious than the general rules under the Commerce Code; however, it only applies in the following specific cases:

a damage and losses caused through the use of the vessel;
b death or injuries connected with the use of the vessel;
c salvage operations;
d environmental claims;
e wreck removal or refloating expenses;
f charter claims;
g bill of lading and passenger claims;
h luggage and other cargo claims;
i general average;
j towage;
k pilot claims;
l goods, bunkers and supplies and services for the use of the vessel;
m shipbuilding and ship repairs;
n port duties;
o wages and salaries of crew;
p disbursements made on behalf of the vessel;
q insurance premiums, including protection and indemnity club calls;
r ship broker's commission or fees;
s disputes regarding ownership or use of the vessel;
t disputes between co-owners of the vessel;
u enforcement of mortgages; and
v disputes from sales contracts.

Any claim that is not included in this list should follow the general procedure under the Commerce Code to apply for an arrest.

The claimant may submit an application for the arrest of a vessel with the federal court where the vessel to be arrested is located and the court will review the case and resolve it ex parte. When accepting the application and ordering the arrest, the judge must also set the amount of the security that the claimant must place for the arrest to be enforced. The amount of the security will depend entirely on the criteria of the judge; the usual forms of security are bonds or bank deposits made with a specific government-owned bank.

When accepting the application and ordering the arrest, the court will notify the Mexican Maritime Authority and relevant harbour master office, ordering that the arrested vessel may not be cleared from the port and must remain in its current position. The court

may request the assistance of the Navy or other government agencies to enforce the arrest. Arresting a vessel by helicopter while at anchor in territorial waters but not in the berth is possible and not uncommon owing to the operation of large offshore vessels in shallow draft ports in the Gulf of Mexico.

Enforcement of the arrest is made by a court clerk who visits the vessel, notifies that the arrest is in place, performs an inventory of the vessel and everything in it, and appoints a custodian who will be responsible for the maintenance of the vessel while under arrest. The custodian should be appointed by the claimant.

Once the arrest is in place, the claimant will have five days to produce evidence that court or arbitral proceedings have been initiated; otherwise, the arrest will be lifted. Therefore, it is not possible to effect an arrest only to obtain security; the claim must be pursued. The claim may be pursued before whichever court has jurisdiction over the dispute. The arrest will be lifted if the shipowner posts counter security.

Arrest rules under Commerce Code

The general arrest rules in the Commerce Code allow for the retention of any assets, including vessels, when there is fear that the debtor may transfer the property or hide the asset.

The requirements that the claimant must meet for the arrest to be ordered under the rules of the Commerce Code include provision of proof of any existing credit. When applying for the arrest, the claimant must demonstrate the existence of the credit and must post security to guarantee payment of damages arising from wrongful arrest. When initiated as a pretrial action, the process or the arrest will take place *ex parte*.

The arrest will be lifted if the shipowner posts counter security.

Once the arrest is in place, the claimant will have three days to produce evidence that court or arbitral proceedings have been initiated; otherwise, the arrest will be lifted. The three-day period may be extended at the discretion of the court when the claim is being pursued elsewhere.

The arrest of bunkers may be pursued under these general rules of the Commerce Code.

In both cases, wrongful arrest will be determined if the claim fails or if security is not posted.

ii Court orders for sale of a vessel

The parties to a court procedure may agree to a specific procedure for the sale of the vessel, and the courts will honour such an agreement. If there is no agreement in place, the procedure under the Commerce Code and the Federal Civil Procedures Code must be followed.

A claimant can apply for a court order to sell an arrested vessel once an unappealable judgment has been issued.

If the vessel has not yet been appraised, the procedure will commence with each of the parties appointing an expert to value the vessel and the court will take the average of the two appraisals as the value. If there is a difference of 20 per cent or more between the two appraisals, the court will appoint a third independent expert.

The court will request a report from the National Maritime Public Registry in respect of any liens or encumbrances over the vessel and will serve notice of the sale to all the creditors that appear in the report. These creditors and any other creditor that can demonstrate the existence of their credits through registry certificates may participate in the sale procedure and may contest the decisions made by the court.

Notice of the sale must also be published twice in a local newspaper and in the *Official Gazette* and the latest publication must be at least five days before the day of the auction.

On the day of the auction, the vessel will be sold to the highest bidder, provided the offer is at least two-thirds of the appraised value of the vessel. If there is no offer of at least two-thirds of the appraised value, the court will call a second auction, in which the same rules will apply but the value of the vessel will be reduced by 10 per cent. If no offer of at least two-thirds of this amount is made, a third auction with an additional 10 per cent reduction will be conducted.

If there is no offer for two-thirds of the value of the vessel at the third auction, the claimant may opt to acquire the vessel for two-thirds of the appraisal and will reimburse the debtor with the difference, if any.

VI REGULATION

i Safety

As of June 2017, the Mexican Navy is the government agency in charge of regulating and supervising maritime safety. To perform this task and to act as the maritime authority in Mexico, a Harbour Masters and Maritime Affairs Unit (UNICAPAM) was created within the Navy. Before that, the Ministry of Transportation was responsible for maritime safety.

The maritime safety system incorporates SOLAS (as amended), which is the main safety regulation. Mexico is also a signatory to the International Convention for Safe Containers 1972, the International Convention on Maritime Search and Rescue 1979 (the Search and Rescue Convention 79), the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA), the COLREGs, International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 (the STCW Convention).

In addition to the international conventions into which Mexico has entered, the domestic Regulation of the Navigation and Maritime Commerce Law provides specific rules and regulations regarding maritime safety that are mandatory in Mexico. These rules categorise vessels, determine which rules and requirements apply to which vessels, certifications, surveys, inspections, minimum manning, and other aspects of maritime safety.

ii Port state control

Mexico is a signatory to the Convention and Statute on the International Regime of Maritime Ports and, most importantly, is a party to the Viña del Mar MOU, which is the Latin American agreement on port state control of vessels.

Port state control responsibilities fall within the scope of the work of UNICAPAM. The instruments to be applied under the Viña del Mar MOU are the following:

a the International Convention on Load Lines 1966 (the Load Lines Convention);
b the Protocol of 1988 relating to the Load Lines Convention;
c SOLAS;
d the Protocol of 1988 relating to the International Convention for the Safety of Life at Sea 1974;
e MARPOL (73/78);
f the STCW Convention;
g the COLREGs; and
h the International Convention on the Tonnage Measurement of Ships 1969 (the Tonnage Convention).

Under the Viña del Mar MOU, port state authorities are required to inspect at least 20 per cent of foreign-flagged vessels in their territories; however, in recent years, UNICAPAM has been inspecting close to 50 per cent of the foreign-flagged vessels operating in Mexico and the authorities are working to implement a rigorous system of port state control.

UNICAPAM has the power to inspect any foreign-flagged vessel in Mexican waters. As a result of the inspection, the surveyor may determine that a second inspection is required and deny clearance or dispatch to a vessel for safety concerns until the deficiencies are duly corrected. UNICAPAM may also impose fines, the amounts of which will depend on the level of the safety breaches.

iii Registration and classification

The Mexican ship registry is the National Public Maritime Registry. Under Article 17 of the Navigation and Maritime Commerce Law, the following must be registered:

a shipowners, shipping companies, operators and ship agents. In respect of companies, the deed of incorporation should be recorded; in respect of individuals, the birth certificate is required;
b title over vessels, such as bills of sale, mortgages and other liens and encumbrances;
c bareboat charters and financial lease agreements with purchase options over Mexico-flagged vessels;
d shipbuilding contracts when the vessel is to be Mexico-flagged; and
e court resolutions in connection with registered vessels;

Documents must be notarised to be registered. If drafted in any language other than Spanish, a certified translation must be attached. Foreign documents must be apostilled or certified by the Mexican consulate to the country of origin of the document.

Failure to register will not make the interest null, but it will not be opposable to third parties.

Only vessels owned or possessed by Mexican individuals or corporations may be flagged and registered in Mexico; dual registration and flagging are not possible in Mexico.

The National Maritime Public Registry's central office is located in Mexico City and has branch offices in every port in Mexico.

iv Environmental regulation

Mexico has extensive regulation in respect of marine pollution and, as with many jurisdictions, it may be considered complex.

On the international level, Mexico is a signatory to many international conventions on marine pollution such as MARPOL (73/78), the CLC Convention and its 1976 and 1992 Protocols, the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (the London Convention), International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (the OPRC Convention) and the International Convention for the Control and Management of Ships' Ballast Water and Sediments 2004 (Ballast Water Management Convention).

On a domestic level, the main laws dealing with marine pollution are the Navigation and Maritime Commerce Law, the General Law of Ecological Balance and Environmental Protection, the Federal Law of Environmental Liability, and the Marine Dumping Law.

The Marine Dumping Law was amended to be consistent with MARPOL (73/78) and the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (the London Protocol 1996).

There is a multiplicity of authorities in respect of marine pollution in Mexico: the Navy, the Ministry of the Environment, the Environmental Prosecutor and a special occupational, health, safety and environment agency created for the oil industry. Each has different scopes, powers and capacities.

v Collisions, salvage and wrecks

Collisions

Mexico is a signatory to the COLREGs, and Article 153 of the Navigation and Maritime Commerce Law expressly stipulates that all vessels must comply with the COLREGs when sailing. The Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels (the Collision Convention) has also been ratified by Mexico, and the Navigation and Maritime Commerce Law states that collisions will be resolved as per the Collision Convention.

Salvage

Mexico is a signatory to the Convention for the Unification of Certain Rules of Law with respect to Assistance and Salvage at Sea 1910 (the 1910 Salvage Convention), the International Convention on Maritime Search and Rescue 1979 (the Search and Rescue Convention 1979) and the International Convention on Salvage 1989 (the 1989 Salvage Convention).

Mexican law does not provide a mandatory form of salvage agreement; therefore, the parties are free to negotiate salvage conditions to their best interest. The Navigation and Maritime Commerce Law does provide regulation regarding rescue, the role of the authorities in rescue and salvage operations, apportion of liability, and compensation limits in cases where assistance is rendered by port tugs.

The Navigation and Maritime Commerce Law also provides that, unless agreed otherwise by the parties, contributions to general average will be regulated under the York Antwerp Rules 2016.

Wrecks

The Navigation and Maritime Commerce Law contains an administrative procedure for wreck removal.

When a vessel, aircraft, rig, barge or cargo is drifting, in peril of sinking, sunk or stranded and, in the opinion of the maritime authority, it represents a danger or obstruction to navigation, port operations, fishing or other marine activities, the maritime authority will notify the shipowner or operator and order it to take the relevant action to correct the situation, such as removal, signalling, repair, sinking or cleaning. The shipowner will have three months to comply with the order, otherwise the Navy will conduct the ordered activity at the shipowner's cost.

All wreck removal operations require authorisation from the Navy and from the environmental authorities.

vi Passengers' rights

The Navigation and Maritime Commerce Law guarantees compensation to passengers within the limits of the LLMC Convention 1976; however, it is possible that the limitation of liability in respect of personal claims, such as injury and death, is considered unconstitutional.

Additionally, there is a complete regime of consumers' rights available for passengers with claims. Mexico is not a party to the Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974 (the Athens Convention).

vii Seafarers' rights

Mexico is not a signatory to the Maritime Labour Convention 2006. Therefore, seafarers' rights are mainly protected by the Mexican Labour Law, which contains a full chapter on the subject. These stipulations include working hours, weekly rest days, annual vacation period, redundancies, quality of the lodging and food on board, and repatriation. There are other labour regulations of lesser hierarchy that mainly deal with occupational health and safety issues.

Additionally, under Mexican law, all workers must be registered in the workers compensation system (the Mexican Institute of Social Security), which will provide all workers and their families with medical services, a retirement fund and, in some cases, a retirement pension.

Crew members of a Mexico-flagged vessel must be Mexican nationals.

VII OUTLOOK

i Antitrust investigation on maritime transportation

In November 2023, the Mexican antitrust authority began an investigation into the market participation and conditions of effective competition with respect to maritime transportation services of passengers and roll-on/roll-off cargo in coastal trading bound to and from the state of Baja California Sur.

ii Annexes of adherence to MARPOL

On 15 October 2022, Annex III and Annex IV of MARPOL came into force in Mexico.

Chapter 30

NEW ZEALAND

Simon Cartwright and Colin Hunter[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

As the previous authors of this chapter have noted, New Zealand is essentially an importer and exporter. It is not a commercial ship-owning nation.

Commercially, New Zealand is serviced by international shipping lines for container, bulk and car carriers. Domestic shipping largely comprises local fishing fleets, several coastal tankers and bulk carriers (primarily for cement cargoes) and ferries (including the inter-island ferries operating between the North and South Islands). However, recent emphasis on coastal shipping has meant the redevelopment of domestic container services.

New Zealand's only oil refinery, at Marsden Point in Northland, closed in April 2022. New Zealand now imports only refined oil.

Otherwise, supply chain issues and the regulation of health and safety have continued to dominate the headlines over the past year.

Maritime New Zealand, the national maritime regulator, has taken an active approach to health and safety regulations for several years. A number of prosecutions have been brought against vessel owners, operators, ports and stevedores for breaches of health and safety regulations.

There continues to be strong debate on the consolidation of port operations, investment in marine infrastructure (including dry dock facilities) and coastal shipping. The current government has committed to supplement coastal shipping.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

New Zealand is a common law jurisdiction, meaning that its legal framework is based on both legislation and case law. In the maritime context, legislation provides the broader framework and is supplemented by international conventions, domestic regulations, rules and standards.

The principal legislation is the Maritime Transport Act 1994 (MTA). The MTA regulates maritime activity (safety), the marine environment (e.g., prevention of pollution), the protection of seafarers, the international carriage of goods by sea, and liability for civil maritime claims and maritime offences (including the incorporation of international conventions).

International conventions ratified by New Zealand are usually implemented through the MTA; these include the International Convention on Salvage 1989 (the 1989 Salvage Convention), the Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC Convention 1976) (as amended by the 1996 Protocol) and the Protocol to amend

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the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 and 1979 (the Hague-Visby Rules). Other conventions are given effect by subordinate regulations; for example, the Maritime Rules (discussed below) give force to the International Regulations for Preventing Collisions at Sea 1972 (COLREGs) and the International Convention for the Safety of Life at Sea 1974 (SOLAS).

Other legislation focuses on specific matters, such as admiralty jurisdiction,[2] domestic carriage of goods,[3] biosecurity,[4] non-sector-specific employee safety,[5] security measures around ships and ports,[6] criminal provisions relating to maritime matters,[7] rights and liability under shipping documents and the delivery of goods, liens for freight and warehousing of cargo,[8] formation of port companies and management and operation of the commercial aspects of ports,[9] discharge from ships and offshore installation within 12 nautical miles,[10] ship registration, transfer of ownership and mortgages,[11] and outward shipping policy.[12]

Several different pieces of legislation apply to the maritime environment both in internal waters and New Zealand's territorial seas and exclusive economic zone: the MTA, the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 and the Resource Management Act 1991.[13]

In addition to primary legislation, New Zealand has subordinate regulations and orders, which contain administrative and mechanical provisions, and rules giving effect to technical standards and establishing a framework for compliance, such as the Maritime Rules[14] and the Marine Protection Rules.[15]

2 Admiralty Act 1973; High Court Rules 2016, Part 25.

3 Contract and Commercial Law Act 2017 [CCLA], Part 5, Subpart 1.

4 Biosecurity Act 1993.

5 Health and Safety at Work Act 2015.

6 Maritime Security Act 2004 and Maritime Security Regulations 2004, giving effect to aspects of the International Ship and Port Facility Security Code 2004.

7 Maritime Crimes Act 1999.

8 CCLA, Part 5, Subpart 2.

9 Port Companies Act 1988.

10 Resource Management Act 1991; Resource Management (Marine Pollution) Regulations 1998.

11 Ship Registration Act 1992.

12 Shipping Act 1987.

13 There is a further division in the safety context between local regulations of recreational boating and shipping under navigation safety by-laws, and national regulations under the Maritime Transport Act (MTA) and the Maritime Rules.

14 The Maritime Rules give effect to a number of conventions, including the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1995, the COLREGs and SOLAS.

15 The Marine Protection Rules give effect to a number of conventions, including the International Convention for the Prevention of Pollution from Ships 1973 (as modified by the Protocol of 1978) (MARPOL (73/78)), the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (the London Convention), the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (the OPRC Convention) and the International Convention on Civil Liability for Oil Pollution Damage 1969 (the CLC Convention).

III FORUM AND JURISDICTION

i Courts

Maritime claims will generally be heard in the High Court, which has an admiralty jurisdiction (pursuant to the Admiralty Act 1973) as well as a general jurisdiction.

If the amount in dispute is more than NZ$350,000 or is an *in rem* claim, it must be brought in the High Court. *In personam* claims of NZ$350,000 or less may be determined in the District Court.

The High Court has no specialist admiralty judges.

ii Arbitration and ADR

Arbitrations are conducted pursuant to the Arbitration Act 1996, under which there is wide scope for parties to agree their own procedure. The typical procedure (as set out in Schedule 1 of the Act) will involve the exchange of statements of claim and defence, disclosure of documents (on a more informal basis than is required in the High Court), briefs of evidence and submissions, and an arbitration hearing. The time frame for arbitration will vary but is typically between six months and a year for a substantial arbitration.

The most prominent arbitration institution in New Zealand is the Arbitrators' and Mediators' Institute of New Zealand. There are also two smaller arbitration institutes: the New Zealand Dispute Resolution Centre and the New Zealand International Arbitration Centre. None of these arbitration institutes have specialist maritime expertise. The Maritime Law Association of Australia and New Zealand has issued arbitration rules, which parties may decide to adopt, and has a panel of recommended arbitrators.

Mediation can also be used to resolve disputes and is largely unregulated in the commercial context. It is not common for maritime arbitrations to be seated in New Zealand. Typically, parties to maritime contracts will choose arbitration in London or Singapore.

iii Enforcement of foreign judgments and arbitral awards

Foreign judgments can be enforced under common law or by statute. The Reciprocal Enforcement of Judgments Act 1934 (REJA) provides for the enforceability of judgments for a prescribed 27 countries on a reciprocal basis, including the United Kingdom, Hong Kong and France. A judgment registered under Part I of the REJA has the same effect as if the judgment had been originally given in the High Court on the date of registration. Australian judgments may be enforceable in New Zealand under the Trans-Tasman Proceedings Act 2010.

Court judgments in British Commonwealth countries for the payment of money may be enforceable by filing the judgment with the High Court, requesting execution and sealed in accordance with Section 172 of the Senior Courts Act 2016.

In certain cases, a foreign judgment can be enforced under common law where: it is a money judgment and is not for a sum in respect of taxes or penalty; the judgment is final and conclusive; and the foreign court had jurisdiction to give the judgment against the judgment debtor.

Limitation periods for liability

Under the Limitation Act 2010 (LA), New Zealand has a generally applicable limitation period of six years after the date of the act or omission on which the claim is based. However, there are several exceptions, including:

a if the claim has a late knowledge date on which the claimant has gained all the relevant facts as specified by Section 14(1) of the LA;

b a one-year limit under the Hague-Visby Rules for claims in respect of loss or damage to goods under a contract of carriage governed by the Rules;[16]

c under the Contract and Commercial Law Act 2017 (CCLA), there is a one-year time limit, which can be reduced by contract, for claims relating to domestic carriage of goods and loss must be notified within 30 days;

d under Section 361 of the MTA, no action may be brought in respect of discharge or escape of oil from a vessel in relation to the International Convention on Civil Liability for Oil Pollution Damage 1969, replaced by the 1992 Protocol (the CLC Convention), or in respect of discharge or escape of bunker oil from a vessel in relation to the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (the Bunker Convention), unless the proceedings have been commenced no later than three years after the date on which the claim arose, nor later than six years after the event by reason of which liability was incurred;

e a general one-year time limit for MTA defences, which does not run while a person who is charged with an offence is beyond the territorial sea, and a six-month time limit for offences under the Resource Management Act 1991;

f under Section 97 of the MTA, there is a two-year time limit on claims arising from collisions: salvage claims under the 1989 Salvage Convention are subject to a two-year limit, but this does not affect proceedings in admiralty based on a salvage lien;[17] and

g in addition to these statutory limits, the admiralty jurisdiction draws on the equitable concept of laches in other instances of delay. When considering laches, the court may apply the LA by analogy with reference to the LA provisions.

The LA applies to arbitral and court proceedings. The LA also has a 15-year longstop period for claims arising out of late knowledge.

IV SHIPPING CONTRACTS

i Shipbuilding

There is no specific statutory regime for shipbuilding contracts. General contract law principles apply (as do any applicable statutory provisions relevant to the supply of parts).

The passing of legal title

Legal title in the ship will pass from the shipbuilder to the shipowner in accordance with the terms of the contract, or pursuant to the CCLA.[18]

Typically, title will pass on delivery.

16 The recent case of *Silver Fern Farms Ltd v AP Møller Maersk* [2022] NZHC 3120 has suggested that New Zealand might allow correction of pleadings and possibly misnomers after the one-year time bar.

17 Articles 21(1) and 23 of the Salvage Convention 1989.

18 CCLA 2017, Part 2, Subpart 2. The CCLA repealed (and consolidated under one statute) various New Zealand statutes that formerly governed contract and commercial law. The CCLA is a revision Act and is not intended to change the effect of the law except for minor amendments.

ii Contracts of carriage

New Zealand is not a signatory to the UN Convention on the Carriage of Goods by Sea 1978 (the Hamburg Rules) or the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (the Rotterdam Rules). Instead, the carriage of goods under New Zealand law is subject to the following:

a the MTA (which incorporates the Hague-Visby Rules for international carriage of goods by sea);[19] and

b the CCLA, Part 5, Subpart 1 (which governs domestic carriage of goods by land, water or air or by more than one of those modes).

Cabotage

New Zealand has (partially) deregulated cabotage under the MTA,[20] under which no foreign ship may carry coastal cargo[21] unless:

a it is passing through New Zealand waters while on a continuous journey from a foreign port to another foreign port and is stopping in New Zealand to load or unload international cargo; and

b its carriage of coastal cargo is incidental to its carriage of international cargo.

In practice, this means that liner companies will call at several New Zealand ports as part of their rotation to and from foreign ports.

International carriage of goods by sea

The Hague-Visby Rules apply to every bill of lading (BOL) relating to the international carriage of goods[22] if:

a the BOL is issued in a contracting state;[23]

b the carriage is from a port in a contracting state; or

c the contract contained in or evidenced by the BOL provides that the MTA or the Hague-Visby Rules are to govern the contract.

Under the MTA, parties may not limit the New Zealand courts' jurisdiction[24] in respect of:

a a BOL (or similar) relating to the international carriage of goods; or

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19 MTA, Section 209(1). The Hague-Visby Rules are a combination of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 24 August 1924 (the Hague Rules) as amended by the First (Visby Rules) Protocol of 23 February 1968 and the Second (SDR) Protocol of 21 December 1979.

20 MTA, Section 198(1)(c).

21 A foreign ship on demise charter to a New Zealand-based operator may carry cargo if the operator employs or engages crew to work on board the ship under an employment agreement or contract for services governed by New Zealand law. See MTA, Section 198(1)(b).

22 MTA, Schedule 5, Article 10. Section 209 of the MTA also extends the application of the Hague-Visby Rules to carriage of goods by sea evidenced by a non-negotiable document (other than a bill of lading or similar document of title) that contains express provision to the effect that the Hague-Visby Rules are to govern the carriage as if the document were a bill of lading.

23 For 'contracting states', see Section 211 of the MTA. Under that Section, if the Secretary of Foreign Affairs and Trade certifies that, for the purposes of the Hague-Visby Rules, a state specified in the certificate is a contracting state, it will be presumed to be until the contrary is proven.

24 MTA, Section 210(1).

b a non-negotiable document (other than a BOL or similar document of title) that contains express provision to the effect that the Hague-Visby Rules are to govern the carriage as if the document were a BOL (as provided for in Section 209 of the MTA).

However, the provisions of the MTA do not affect the enforceability of arbitration agreements and foreign choice-of-law clauses.[25]

Domestic carriage of goods by sea

Domestic carriage of goods by sea is governed by Part 5, Subpart 1 of the CCLA.[26] The Act applies to all domestic carriage pursuant to a contract of carriage (even if the ship is simultaneously engaged in international carriage).[27]

The CCLA outlines the liability for all those involved in domestic carriage, including those who arrange carriage or provide incidental services to carriage.[28] The Act provides (subject to exceptions) for strict liability for carriers for loss or damage to goods. Pure economic loss caused by delay, is not generally covered by the Act (common law principles apply).

The CCLA recognises four types[29] of contracts of carriage:

a 'at owner's risk': the carrier will be liable only if the loss or damage is intentionally caused by the carrier;

b 'at declared value risk': the carrier is liable for the loss or damage to the amount specified in the contract. If the contract is silent, Sections 256 to 260 will apply;

c 'on declared terms': the contracting parties may regulate the carrier's liability under the contract; and

d 'at limited carrier's risk': the carrier is liable for the loss or damage to any goods in accordance with Sections 256 to 260. Section 259 caps the liability for carriers at NZ$2,000 for each unit of goods lost or damaged.[30]

25 MTA, Section 210(2); *Mobil Oil New Zealand Ltd v. The Ship 'Stolt Sincerity'*, HC Auckland AD628/93, 14 March 1995.

26 It applies to the carriage of goods performed or to be performed by a carrier under a contract (whether the carriage is by land, water, air or multimodal) unless an exception in Section 243 applies (namely international carriage). See CCLA, Section 242.

27 CCLA, Section 243(2).

28 CCLA, Section 246. 'Carriage' includes any 'incidental service' undertaken to facilitate carriage; for example, stevedores.

29 CCLA, Section 248.

30 Liability is limited to NZ$2,000 for each unit of goods or to the declared value. Pursuant to the CCLA, Section 260, liability is not limited if the loss of or damage to goods is caused intentionally by the carrier; liability for damages other than loss of or damage to goods; liability for damages that are consequential on the loss of or damage to the goods: CCLA, Section 259.

Subject to limited defences,[31] the default rule is that the contracting carrier is liable to the contracting party for loss or damage to any goods, while the contracting carrier is responsible for them, whether caused by the contracting carrier or by an actual carrier.[32]

The right to sue for freight arises when a carrier ceases to be responsible for the goods.[33] The right to sue is supported by a lien.[34] If the owner does not pay within two months' notice of the lien, the carrier may sell the goods by public auction.[35]

iii Cargo claims

The High Court has jurisdiction to hear cargo claims in the civil jurisdiction and admiralty (actions *in rem* and *in personam*).[36] However, most cargo claims are settled on commercial terms.

The contracting carrier is liable to the contracting party for loss or damage to goods while under the carrier's responsibility.[37]

The CCLA confers a right to bring proceedings under a contract of carriage to the holder of the BOL, a person entitled to delivery of the goods,[38] or a consignee not a party to the contract once the goods are in the possession of the consignee.[39] Claims may also be brought in tort (including bailment).

Jurisdiction

A defendant issued with proceedings from New Zealand may protest jurisdiction (*forum non conveniens*) and apply to the New Zealand court to stay (or to dismiss) the proceeding in favour of the foreign jurisdiction. As New Zealand does not generally require leave to serve out of jurisdiction, practically, a plaintiff will still need to convince the court that New Zealand is the appropriate jurisdiction if a defendant protests jurisdiction.

31 A carrier will avoid liability if he or she can prove that the loss or damage resulted directly, without fault on his or her part, from an inherent vice; breach of the contracting party's statutorily implied warranties relating to the condition, packing and lawfulness of the consignment; seizure under legal process; or saving or attempting to save life or property in peril: CCLA, Section 260, Paragraphs (2) and (3).

32 CCLA, Section 256.

33 CCLA, Section 283. An action for recovery of freight may be brought against the consignee if property in the goods has passed to the consignee: CCLA, Section 284.

34 CCLA, Section 285. The carrier's lien is active, which means there is a right to sell the goods in certain circumstances. The carrier's lien is also particular, which means that it is confined to the sum owing in relation to the goods held, and does not extend to a general balance of account.

35 CCLA, Section 288.

36 Under Section 4(1)(g) of the Admiralty Act 1973, admiralty jurisdiction extends to any claim for loss of or damage to goods carried in a ship.

37 CCLA, Section 256.

38 CCLA, Section 314. The transfer of rights of suit and liabilities under bills of lading and similar documents is not dependent on property passing at a specific stage of the transaction.

39 CCLA, Section 281. Where the risk of loss or damage has already passed to the consignee, but property has not, the consignee will usually have to seek the help of the contracting consignor to bring a claim.

Commencing proceedings against overseas parties

Generally, the rules governing service of proceedings are set out in Part 6 of the High Court Rules 2016. There are various exceptions to the standard rules for service outside New Zealand that parties must consider when serving proceedings on an overseas party.[40] For almost all claims leave is not required.[41] Primarily, service must comply with New Zealand procedure and that of the foreign state where service takes place.

Damages

The measure of damages under the CCLA and Hague-Visby Rules is similar. The primary difference is that, unlike the Hague-Visby Rules, the CCLA provisions do not prevent the parties contracting with respect to some consequential loss outside of 'damage to . . . any goods'.[42]

In addition to the damages available under the Hague-Visby Rules or the CCLA, the courts will award interest[43] and have a discretionary power to award legal costs (including increased or indemnity costs) and disbursements to successful claimants.[44] Costs awards will usually be given unless the conduct of the successful party is impugned.

iv Limitation of liability

Both the CCLA and the Hague-Visby Rules allow a carrier to limit its liability.[45] The benefit of the limitation of liability does not apply to loss or damage either intentionally or recklessly caused by the carrier. However, principal carriers may still be able to limit their liability for intentional acts of their agents under the CCLA.[46]

Under the Hague-Visby Rules, liability is limited in accordance with Article 4. The default position under the CCLA is to cap liability at NZ$2,000 for each unit of goods lost or damaged.[47]

Only in truly exceptional cases will a shipowner lose the right to limit liability.[48] Limitation of liability under the MTA was reformed following the grounding of the MV Rena.[49] Part 7 of the MTA gives direct force of law to the Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC Convention 1976) (incorporated in Schedule 8) as amended by the Protocol of 1996 to Amend the LLMC Convention 1976 (the LLMC Protocol 1996) (incorporated in Schedule 9).[50] By Order in Council, in

40 Overseas service is generally governed by Rule 6.32 of the High Court Rules 2016 [HCR]. There are various exceptions to Rule 6.32, including service in Australia (Rule 6.36) and service in convention countries (Rule 6.34).

41 HCR, 6.27.

42 CCLA, Section 256(1).

43 Interest on Money Claims Act 2016, sections 9-10.

44 HCR, Part 14.

45 Hague-Visby Rules IV; CCLA, Section 259.

46 Hague-Visby Rules IV 5(e); CCLA, Section 259.

47 CCLA, Section 259.

48 *Daina Shipping Company v. Te Runanga O Ngati Awa* [2013] 2 NZLR 799 at [29].

49 MTA, Section 83.

50 ibid., Section 84A.

May 2015, New Zealand also adopted the increased LLMC Protocol 1996 limits (i.e., the LLMC Protocol 1996 as amended by the International Maritime Organization (IMO) in April 2012), effective since 8 June 2015 and replacing the previous limits.

V REMEDIES

i Ship arrest

New Zealand is not a signatory to any international convention concerning the arrest of ships. Ship arrest is provided for in domestic legislation: the Admiralty Act 1973 and the High Court Rules 2016.

Ship arrest is available either in the case of admiralty claims that are maritime liens for the purpose of common law in New Zealand, or those cases otherwise falling within one of the 18 claims iterated in Section 4(1) of the Admiralty Act 1973.

Claims giving rise to maritime liens in New Zealand are those for the following:

a damage done by a ship;
b salvage; seafarers' wages;
c masters' wages and disbursements; and
d bottomry and *respondentia*.

As regards the claims listed in Section 4(1) of the Admiralty Act 1973, these include claims: for the possession or ownership of a ship; for any damage done or received by a ship; arising out of any agreement relating to the carriage of goods in a ship, or its use or hire; for loss of or damage to goods carried by a ship; in respect of the construction, repair or equipment of a ship; and for dock or port or harbour charges.

If a maritime lien exists in relation to a ship a party may initiate an *in rem* action against the ship concerned[51] and contemporaneously apply for that particular ship's arrest. If the claim is one found in the list in Section 4(1), then sistership arrest is also possible.

For claims listed in Sections 4(1), Paragraphs (a), (b), (c) and (s), an action *in rem* and warrant for arrest may be brought only against the particular ship or property that is the subject of the claim.[52] These claims include those in respect of ownership or possession of the subject ship, a mortgage on the subject ship and the forfeiture or condemnation of the subject ship.

For claims listed in Sections 4(1), Paragraphs (d) to (r) arising in connection with a ship, if the person who would attract liability on an *in personam* action was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, an action *in rem* may be invoked against:[53] The particular subject ship if, at the time the action is brought, that ship is beneficially owned as regards all the shares therein, or is on charter by demise to, the person who would have liability *in personam*; or any other ship that, at the time the action is brought, is beneficially owned or on charter by demise as aforesaid.

By way of example, the claims listed in Sections 4(1), Paragraphs (d) to (r) include those (1) for damage done or received by a ship, (2) for loss of or damage to goods carried by a ship, (3) in the nature of towage or pilotage, and (4) in respect of goods, materials or services supplied to a ship in its operation or maintenance.

51 Admiralty Act 1973, Section 5(1).
52 ibid., Section 5(2)(a).
53 ibid., Section 5(2)(b).

It is unlikely that bunkers may be arrested separately, as distinct from the ship herself; the High Court has suggested (in *obiter dicta*) that a ship includes permanent structures, components and accessories but not her bunkers.[54] As an alternative, a party may be able to apply for a freezing order in relation to the bunkers, which would restrain the respondent from removing the bunkers (or disposing of, dealing with or diminishing the value of them). Freezing orders are outside the scope of this chapter.

Arrest procedure

Prior to applying (or at the time of application) for an arrest warrant, the applicant must search the Admiralty Register to check that there is no current caveat against arrest.[55] This may be done with the assistance of the Admiralty Registrar. The existence of such a caveat does not per se prevent the applicant from obtaining a warrant, but the applicant runs the risk that it will be found liable for costs and damages if it is unable to show good and sufficient reason for the arrest.[56]

An applicant must have legitimate grounds for arrest. Wrongful arrest requires bad faith or subjective recklessness on the part of the arresting party.[57]

An application for arrest may be made only after the issue of a notice of proceeding or counterclaim *in rem*.[58] That said, a notice of proceeding *in rem* is typically filed contemporaneously with the application for arrest papers, given the usual pressures of the subject vessel being in New Zealand waters for only a short time.

To apply for a warrant of arrest, an applicant files the following court papers:

a an application;

b an affidavit, stating:[59]

- the name and description of the applicant;
- the nature of the claim;
- the name or nature of the property to be arrested;
- the extent to which the claim has been satisfied, the amount claimed paid into court, or security for payment of the claim given to the Registrar;
- whether any caveat against the issue of a warrant of arrest has been filed and, if so, whether a copy of the notice of proceeding or a notice requiring payment or security has been served on the caveator; and
- any other relevant information known to the applicant;

c a warrant of arrest[60] and a notice by the Registrar of the arrest[61] (both of which the Registrar will sign if the application is accepted); and

d an indemnity to the Admiralty Registrar, with security to the Registrar's satisfaction for his or her fees, expenses and harbour dues (if any).[62] This security is likely to be

54 *Mobil Oil NZ Ltd v. The Ship ' Rangiora'*, HC Auckland AD 877, 10 August 1999.

55 HCR 25.34(3).

56 HCR 25.43(2).

57 *Centro Latino Americano de Commercio Exterior SA v. Owners of the Ship 'Kommunar' (The 'Kommunar') (No. 3)* [1997] 1 Lloyds Law Reports 22; *Nalder & Biddle (Nelson) Ltd v. C & F Fishing Ltd* [2005] 3 NZLR 698 (HC).

58 HCR 25.34(1).

59 HCR 25.34(4)(a).

60 HCR 25.35.

61 HCR 25.38.

62 HCR 25.34(4)(b).

significant (in our experience usually in the region of NZ$10,000 to NZ$20,000 as a minimum), as the Registrar will want sufficient funds in hand to cover anticipated costs of maintaining custody of the ship, such as for berthage. Note that the Registrar may later ask for more funds if the ship is arrested and the initial funds are depleted.

The filing fees at the time of writing are NZ$1,350 for initiating the *in rem* proceeding and NZ$1,500 for filing an application for the issue of a warrant of arrest.[63]

The court will require originals of the application, affidavit and signed indemnity, and a would-be applicant should allow at least 48 hours to prepare and file the papers, and for the Admiralty Registrar to put the arrest in motion. That said, in urgent cases of a ship being due to leave, a request for urgency may be raised with the Admiralty Registrar at the time.

If the papers are all in order, the Registrar will complete and issue the warrant of arrest and a notice by the Registrar of the arrest. To assist the Registrar, spare copies of the warrant of arrest and notice of the arrest are usually provided at the time of filing. The warrant must be served on the ship[64] by attaching a sealed copy to either a place adjacent to the bridge or some conspicuous part of the ship, or adjacent to an entrance to the superstructure or accommodation area of the ship, and leaving a copy with the person apparently in charge of the ship, if that person is available at the time.[65]

This is the same prescribed method of serving a notice of proceeding *in rem* on the ship and, in practice, the Admiralty Registrar serves that document at the same time.

Ships may be arrested by serving the warrant of arrest and by giving notice of the arrest of property. In practice, vessels are generally arrested at berth or anchorage.[66]

Upon arrest, the Admiralty Registrar effectively takes control (custody) of the ship.[67] That will remain the position until the subject action is determined, the ship is released[68] or the ship is sold by court order.[69]

The Registrar may issue and action an instrument of release on payment into court of either the actual costs, charges and expenses due in connection with the care and custody of the ship while under arrest, or, at the Registrar's election, upon a written undertaking from the party who asked for the release to pay those costs, charges and expenses.[70]

If a ship has been arrested and then released after security has been provided, generally it cannot then be rearrested based on the same claim. That said, there may be exceptional circumstances for which the party may be able to rearrest (for example, the Registrar has released the ship for significantly inadequate security).[71]

63 High Court Fees Regulations 2013.

64 HCR 25.36.

65 HCR 25.10(1), Paragraphs (a) and (b).

66 HCR 25.38.

67 *Babcock Fitzroy Ltd v. The MV Southern Pasifika* [2012] 2 NZLR 652.

68 HCR 25.44.

69 HCR 25.51.

70 HCR 25.44.

71 *Det Norske Veritas AS v. The Ship 'Clarabelle'* [2002] 3 NZLR 52 (CA).

Security

Arresting a ship, or threatening to do so, may prompt an agreement between the parties as regards security to prevent the ship's arrest, or to quickly release the arrested ship; for example, if a ship is arrested and the claim is covered by insurance, the insurer typically offers security. If the parties disagree on security, or it cannot be addressed by the Registrar in the first instance, an application may be made to the High Court.

The typical formula is that an arresting party is entitled to an amount as security, which may be paid into court, for a reasonably arguable best case, plus interest and costs.[72] There is no prescribed upper limit on what this amount may be, although it will not exceed the value of the ship. A common alternative security to payment of money is a protection and indemnity club guarantee.[73]

The arresting party does not have to provide counter security (although it will have been required to give the Registrar an indemnity and security for the Registrar's costs for care of the arrested vessel as part of the arrest application).

However, when a ship has been arrested and other parties also have claims against it, one of those other parties may prevent the ship's release by filing a request for a caveat against release (or against the payment out of court of any money held representing the proceeds of sale of the ship).[74] The caveat is valid for six months.

Arrest of ship for security

The usual position is that a would-be arresting party will file substantive proceedings in New Zealand, arrest a ship and then pursue those substantive proceedings in New Zealand. A defendant may seek to stay the proceedings by raising a protest to jurisdiction (*forum non conveniens*); although even if the defendant is successful on that point, the New Zealand court may maintain security pending resolution of the dispute elsewhere.[75] Arrest may also be used in support of foreign proceedings.

Caveat against arrest

As an alternative position, a party may request a caveat to prevent a ship's arrest.[76] That request must encompass an undertaking to enter an appearance in any action that may be started against the ship, and within three working days of receiving notice that such an action has started, to give security to the satisfaction of the Registrar.

As noted earlier, the existence of such a caveat does not prevent an applicant from obtaining a warrant of arrest but that applicant runs the risk that it will be found liable for costs and damages on an application to set aside the arrest if it is unable to show good and sufficient reason for the arrest.[77]

72 id.

73 This has been approved by the High Court – see *General Motors New Zealand Ltd v. The Ship 'Pacific Charger'*, HC Wellington AD 135, 24 July 1981.

74 HCR 25.46.

75 See *Raukura Moana Fisheries Ltd v. The Ship Irina Zharkikh* [2001] 2 NZLR 801 (HC); a stay was sought based on an arbitration clause.

76 HCR 25.42.

77 HCR 25.43(2).

ii Court orders for sale of a vessel

Any party to the proceeding (not limited to the arresting party) may request a commission for the appraisal and sale of the ship, on provision of an undertaking to pay the Admiralty Registrar's fees and expenses.[78] There are prescribed forms for the request and the commission itself.[79]

Typically the mode of sale is by tender through brokers appointed by the Registrar, and the sale may be with or without appraisement (though in the case of commercial or large ships, appraisement is usually required to ensure the ship is not sold too cheaply, to the detriment of the claimants in the proceeding). The gross proceeds of the sale are paid into the court with an account relating to the sale.[80]

Sale of a ship by court order in an *in rem* action will be a sale free of all encumbrances (including maritime liens);[81] this would not be the case for a private sale.

The ship may be sold before judgment is given, which may be appropriate if the ship is of deteriorating value and the costs of maintaining it under arrest are high. However, if the plaintiff is yet to be awarded judgment demonstrating that its claim is meritorious, there must be strong reasons to order the sale, as it will deprive the shipowners of their property rights.[82] *Glencore Grain BV v. The Ship 'Lancelot V'*[83] is a recent example of a case in which appraisal and sale were ordered prior to judgment, despite opposition.

The order of priority to the sale proceeds is not immutable, and depends on the particular circumstances,[84] but generally falls as follows:

a costs and expenses of the Admiralty Registrar (highest priority);
b costs and expenses of the fund's producer (generally the arresting party);
c maritime liens;
d possessory liens;
e mortgages; and
f statutory claims under Section 4(1) of the Admiralty Act 1973.

A party who obtains judgment against the ship or its sale proceeds has the right to apply for orders determining the order of priority of claims to the sale proceeds.[85]

VI REGULATION

i Safety

The MTA is the principal maritime safety enactment. It is supplemented by the Maritime Rules. In addition, the Health and Safety at Work Act 2015 (HSWA) applies to New Zealand-flagged vessels and foreign-flagged vessels in particular circumstances.

78 HCR 25.51.
79 Forms AD15 and AD16, respectively.
80 HCR 25.51(7).
81 *The 'Acrux'* [1962] 1 Lloyd's Rep 405.
82 *URL Charters Ltd v. The Ship 'Malakhov Kurgan'*, HC Christchurch CIV-2006-409-1370, 17 October 2006.
83 [2015] NZHC 2052.
84 See Perkins, 'The Ranking and Priority of *In Rem* Claims in New Zealand', (1986) 16 VUWLR 105; *ABC Shipbrokers v. The Ship 'Offi Gloria'* [1993] 3 NZLR 576 (HC); *Fournier v. The Ship 'Margaret Z'* [1999] 3 NZLR 111 (HC).
85 HCR 25.52.

The MTA sets out general requirements for participants in the maritime system, which are focused on: compliance with the conditions attached to relevant maritime documents (licences, permits, certificates); proper qualification of participants in the maritime industry; and compliance with prescribed safety standards and practices.

Although participants in the maritime industry have to ensure that their operations are managed and carried out safely, the Director of Maritime New Zealand also has the role of maintaining an appropriate level of oversight over them by auditing their performance against prescribed safety standards and procedure.

In addition to general safety requirements, the MTA provides for other safety-related matters, such as safety offences,[86] regulation of alcohol consumption by seafarers[87] and hazards to navigators.[88]

The Maritime Rules cover everything from ship design to navigation but, importantly, they also implement some of the international conventions to which New Zealand is a party (SOLAS, the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1995 (the STCW Convention) and the COLREGs, among others).

New Zealand's general health and safety legislation, the HSWA, applies to ships as a place of work. It applies to New Zealand-flagged vessels wherever they are located in the world and foreign-flagged vessels when on demise charter to a New Zealand-based operator and operating in New Zealand. The HSWA imposes a duty to eliminate risks to health and safety insofar as is reasonably practicable, with the primary duty being on 'persons conducting a business or undertaking' towards their workers or other persons who might be at risk from the work carried out. In the first case of its kind, a New Zealand company was recently convicted of an offence under the HSWA in relation to injuries experienced by a fumigation technician while on a foreign-flagged vessel in international waters.[89]

ii Port state control

Port state control is governed by the MTA and carried out in accordance with the Tokyo Memorandum of Understanding on Port State Control in the Asia-Pacific Region 1994 (the Tokyo MOU) (incorporating several international treaties).[90]

From 1 January 2014, the regulatory body, Maritime New Zealand, adopted the New Inspection Regime, targeting higher-risk ships for inspection. Utilising the Tokyo MOU database (and other resources), inspections are generally conducted depending on the risk profile of the vessel; for example, high-risk vessels are inspected every two to four months.[91]

86 MTA, Part 6.

87 ibid., Part 4A.

88 ibid., 33J and 33K.

89 *Maritime New Zealand v. Genera Limited* [2021] NZDC 11060.

90 ibid., Sections 54, 396 and 397.

91 There are three categories of ships: high-risk, standard-risk and low-risk.

Maritime New Zealand conducts inspections in accordance with the MTA and the approach agreed by Tokyo MOU members. This includes monitoring compliance with numerous international conventions and resolutions of the IMO and the International Labour Organization.[92]

If a vessel fails to meet the requisite standards, Maritime New Zealand may impose conditions on the vessel or detain it until such time as it complies with the standard. A decision by Maritime New Zealand to detain a ship or impose conditions may be appealed to the District Court.

In addition to the Tokyo MOU, New Zealand and Australia signed a separate MOU in 1999, recognising each other's inspections and sharing data.

iii Registration and classification

Registration

The registration of commercial and pleasure ships is regulated by the Ship Registration Act 1992. Registrations are recorded on the New Zealand Register of Ships, by the office of the Registrar of Ships at Maritime New Zealand in Wellington.

The Register is in two parts.

Part A confers nationality, provides evidence of ownership and enables registration of mortgage. It is aimed principally at larger commercial vessels and those ships that have mortgages. Registration under this Part is compulsory for New Zealand-owned ships of 24 metres and over, except for pleasure vessels, ships engaged solely on inland waters and barges that do not proceed on voyages beyond coastal waters.[93] To be registered under this Part, the ship must be surveyed and the owner must provide very detailed information and documents, a declaration of ownership and nationality, the builder's certificate, a tonnage certificate and evidence of changes in ownership.[94]

Part B confers only nationality. Registration is less expensive and easier to achieve. This Part is aimed primarily at pleasure vessels that require nationality for offshore cruising and racing purposes.

Commercial vessels on demise charter to a New Zealand-based operator and pleasure vessels owned by a foreign national entitled to reside in New Zealand indefinitely do not have to register but are entitled to do so.[95]

Last, the Fisheries Act 1996 has separately established a Fishing Vessel Register for fishing vessels operating in New Zealand fisheries waters.

92 Conventions that New Zealand applies for port state control are, in particular: the International Convention on Load Lines 1966, SOLAS, as amended, MARPOL (73/78), the STCW Convention, as amended, the International Convention on the Tonnage Measurement of Ships 1969, the Maritime Labour Convention 2006, the International Convention on the Control of Harmful Anti-Fouling Systems on Ships 2001 and the Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage 1969.

93 Ship Registration Act 1992, Section 6(1).

94 ibid., Sections 14 and 15.

95 See ship registration flow chart on Maritime New Zealand website for more details about whether a ship needs to be registered.

Classification societies

Maritime New Zealand recognises the following classification societies: the American Bureau of Shipping, Bureau Veritas, DNV, Class NK and Lloyd's Register International.

iv Environmental regulation

The regulation of pollution of New Zealand's marine environment by vessel activity is multi-layered. Comprehensive regulation is provided by a combination of primary legislation, regulations, rules, standards, guidelines and conventions.

The major international conventions implemented in New Zealand include:

the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969 (the Intervention Convention) and the Protocol relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil 1973 (the Intervention Protocol); the CLC Convention; the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (the Oil Pollution Fund Convention); MARPOL (73/78); the United Nations Convention on the Law of the Sea 1982 (UNCLOS); the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (the OPRC Convention); and the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (the London Convention) and the 1996 Protocol.

Environmental framework

The primary environmental enactments in the marine context are the Resource Management Act 1991 (RMA) and the MTA. Many of the international conventions listed above are given the force of law (or paraphrased) by the enactments, or the regulations, rules and standards that are subordinate to the enactments.

The RMA and the MTA impose a mixture of civil and statutory liability, as follows:

a the dumping of waste and the discharge of contaminants and harmful substances from ships into water or air in New Zealand's coastal marine area (coastal marine area) is an offence under the RMA;[96]

b the dumping of waste and the discharge of harmful substances within New Zealand's exclusive economic zone (EEZ) or onto the continental shelf are offences under the MTA;[97] and

c the cost of cleaning up harmful substances or pollution damage attracts civil liability under the MTA.[98]

In addition to the two primary maritime pollution statutes, the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 regulates exploratory and development activities in the EEZ and continental shelf. It is enforced by the Environmental Protection Agency. The Act prohibits harmful discharge and dumping of waste from structures, submarine pipelines and ships (where it is a mining discharge from a ship).

Beyond pollution, two other relevant environmental enactments are the Biosecurity Act 1993 and the Hazardous Substances and New Organisms Act 1996.

96 Resource Management Act 1991 [RMA], Sections 15A to 15C.

97 MTA, Sections 226 and 261.

98 ibid., Part 25.

In addition to providing a general regulatory framework for biosecurity, the Biosecurity Act 1993 enables the Ministry of Primary Industries (MPI) to create standards that are generally applicable to vessels entering New Zealand waters. The standards include requirements for the discharge of ships' ballast water[99] and biofouling requirements.[100] With regard to the latter, since May 2018, vessels arriving in New Zealand must arrive with a 'clean hull', as defined by the Craft Risk Management Standard on Biofouling, or risk expulsion. A firm stance by the MPI has resulted in a number of vessels being ordered to move to international waters to undertake hull cleaning, or to take some other action at great expense to the vessel owner.

The importation and management of hazardous waste and products are governed by the Hazardous Substances and New Organisms Act 1996.

Penalties

Under both the RMA and the MTA, when an offence is committed, both the master and the owner (including the beneficial owner or charterer) commit a strict liability offence.

Under the RMA, non-natural persons may be fined up to NZ$600,000 plus up to NZ$10,000 per day for continuing offences. Natural persons may be imprisoned for up to two years or be fined up to NZ$300,000.[101] However, offenders on foreign ships (although a few exceptions exist) cannot be imprisoned in New Zealand for offences under the RMA.[102]

In addition to the aforementioned fines, a penalty of up to three times the commercial gain (of the contravening action) can be imposed if the offence was committed during the course of producing that gain.[103] Furthermore, general reparations for clean-up costs may be awarded.[104]

Under the MTA, the maximum penalty is imprisonment of no more than two years or a fine of up to NZ$200,000 plus up to NZ$10,000 per day for continuing offences. In addition to the fines or imprisonment, a court may order that clean-up costs be paid.[105]

As with offences committed under the RMA, an additional penalty of three times the value of any commercial gain may be imposed if the offence was committed during the course of producing that gain.[106]

Civil remedies

The MTA imposes civil liability for pollution damage in the coastal marine area and the EEZ. Civil liability, though subject to overall limitation, extends to the following:

a the costs (including goods and services tax) reasonably incurred by the government in dealing with a harmful (or waste) substance, that has been discharged or is an imminent threat of being discharged;[107] and

99 It does so via the Import Health Standard for Ballast Water implemented under Section 22 of the Biosecurity Act 1993.

100 It does so via the Craft Risk Management Standard on Biofouling implemented under Section 24G of the Biosecurity Act 1993.

101 The penalties are contained in Section 339(1) and (1A) of the RMA.

102 RMA, Section 339A.

103 ibid., Section 339B.

104 Sentencing Act 2002, Section 12.

105 MTA, Section 244(1).

106 ibid., Sections 244(1)(c) and 409.

107 ibid., Section 344.

b all pollution damage caused by a harmful substance or waste (or reasonable cost in preventing pollution damage).[108]

CLC Convention ships are not liable for civil liability under point (a), above. However, damages may be sought for pollution under point (b).

In addition to the MTA provisions, an enforcement order may be sought against a shipowner for breach of certain RMA provisions.[109]

Limitation of liability for civil claims

Despite the MTA establishing civil liability for the discharge of harmful substances or waste (or the cost of preventing the same), shipowners are entitled to limit their liability under the LLMC Convention 1976 or, in the case of CLC Convention vessels, in accordance with that Convention.[110]

v Collisions, salvage and wrecks

Collisions

Both the COLREGs and the IMO Traffic Separation Schemes have force in New Zealand by virtue of the Maritime Rules.[111] In line with international practice, liability for collisions is determined in accordance with normal tort law principles. Negligence will generally be established when the COLREGs have been contravened.

Under Section 6 of the Admiralty Act, no *in personam* claims may be brought in respect of damage, loss of life or personal injury arising from collisions between ships, manoeuvres to avoid a collision or non-compliance with the COLREGs unless:

a the defendant ordinarily resides in or has a place of business within New Zealand;
b the collision took place within New Zealand's territorial waters;
c an action arising from the same incident or series of incidents is proceeding in, or has been decided by, a New Zealand court; or
d the defendant has submitted to a New Zealand court's jurisdiction.

Salvage

There is no mandatory local form of salvage agreement. However, it is common to use the Lloyd's standard form agreement.

The 1989 Salvage Convention is given force of law in New Zealand by Section 216 of the MTA (incorporated as Schedule 6).

Wrecks

The provisions of the MTA dealing with wrecks are primarily concerned with hazards to navigation.

A regional council has the authority to order the owner of a vessel to make arrangements for the removal of the wreck or may itself take steps to remove and sell wrecks within its

108 ibid., Section 345.
109 RMA, Section 314.
110 MTA, Sections 344 and 345. These two Sections are subject to Part 7 of the MTA, which provides for limitation.
111 Maritime Rules, Part 22.

region that are posing a hazard to navigation.[112] Furthermore, the Director of Maritime New Zealand has the power to order regional councils or the owner to remove wrecked ships that are navigational hazards.[113] In the event that the owner has not made arrangements to secure and remove the hazard and the regional council has not taken steps to remove the wreck, the Director of Maritime New Zealand may remove and sell the wreck.[114]

vi Passengers' rights

New Zealand has no specific statutory regime regarding the carriage of passengers by sea. Instead, the carriage of passengers by sea is regulated by the terms of the individual contract of carriage and overlaid with general statutes (e.g., the Accident Compensation Act 2001 (which covers personal injury within (though not outside) New Zealand) and the CCLA (which covers damage to luggage)).

vii Seafarers' rights

Seafarers' rights and responsibilities are subject to a comprehensive and multi-layered regulatory framework, including:

a the terms of the individual employment contract;
b the Employment Relations Act 2000;
c the Maritime Transport Act 1999;
d the Health and Safety at Work Act 2015;
e the Minimum Wage Act 1983;
f the Wages Protection Act 1983;
g the Holidays Act 1987;
h the Maritime Rules (incorporating the STCW and SOLAS conventions); and
i the Maritime Labour Convention 2006.

Under the various statutes and international conventions, seafarers are guaranteed a range of fundamental rights; for example, minimum wage, obligations to seafarers if a vessel is lost (including food and water) and holidays. If wages are unpaid, seafarers are able to seek a maritime lien in the Admiralty Jurisdiction.[115]

VII OUTLOOK

As noted in Section I, the maritime community in New Zealand continues to monitor developments in ports and infrastructure, coastal shipping, maritime environment regulation, health and safety regulation and enforcement of competition laws.

Serious maritime incidents are, fortunately, few and far between. The grounding of the MV Rena in 2011 was the most recent such event. When they do occur, however, they usually have a significant effect on New Zealand's maritime regulation and case law.

112 MTA, Section 33J.
113 ibid., Section 33K.
114 ibid., Section 33K.
115 Admiralty Act 1973, Section 4.

Chapter 31

NIGERIA

Adedoyin Afun[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Nigeria continues to be the pivot of West Africa's shipping activities, owing to its strategic location on the coast. With an extensive natural maritime endowment base incorporating a coastline of more than 800 kilometres and an exclusive economic zone of more than 200 nautical miles,[2] the Nigerian 'blue economy'[3] is being harnessed, despite the decline in oil and gas revenues, as one of the key drivers of the nation's economic development.[4]

Nigeria is also blessed with a vast resource base of waterways spanning 10,000 kilometres, 38,000 kilometres being navigable seasonally,[5] comprising more than 50 rivers, both large and small, that can support a vibrant intra-regional trade.[6] The country's population inspires large-scale importation of raw materials, luxury goods and other commodities, and large quantities of petroleum products owing to the lack of sufficient refining capacity in Nigeria.[7] The country is also a major oil producing and exporting country; hence, crude oil and natural gas continue to be exported in large quantities, particularly with the increase in demand of natural gas following the Russian–Ukraine conflict. Demand in shipping services has consequently been increasing, and the maritime industry, which accounts for about 95 per

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2 By a combined reading of Sections 1 and 2 of the Exclusive Economic Zone Act 1978, Cap. E17 Laws of the Federation of Nigeria (LFN) 2004, the sovereign and exclusive rights in the Exclusive Economic Zone, which includes the sovereign and exclusive rights to the exploration and exploitation of the natural resources of the seabed, subsoil and superjacent waters of the area extending from the external limits of the territorial waters of Nigeria up to a distance of 200 nautical miles from the baseline from which the breadth of the territorial waters of Nigeria is measured, is vested in the Federal Republic of Nigeria.

3 Andrew Hudson, 'Blue Economy: a sustainable ocean economic paradigm', United Nations Development Programme, (26 November 2018), www.undp.org/content/undp/en/home/blog/2018/blue-economy-sustainable-ocean-economic-paradigm.html (last accessed 10 April 2021); The Commonwealth, 'Blue Economy', http://thecommonwealth.org/blue-economy (last accessed 13 March 2023).

4 Wumi Iledare, 'Oil and the Future of Nigeria: Perspectives on Challenges and Strategic Actions for Sustainable Economic Growth and Development' (2007), *International Association for Energy Economics*, pp. 21 to 25; PwC, 'Nigeria: Looking beyond oil' (March 2016), Lagos Chamber of Commerce and Industry, pp. 1 to 32.

5 Nigerian Inland Waterways Authority, 'Waterways are very important to the economy of Nigeria.' (2023), https://niwa.gov.ng/nigerian-waterways/#:~:text=Nigeria%20is%20blessed%20with%20a,can%20be%20accessed%20through%20water/ (accessed 29 March 2023).

6 Eromosele Abiodun, 'Rescuing the Maritime Sector', *THISDAYLIVE* (2018), www.thisdaylive.com/index.php/2018/03/09/rescuing-the-maritime-sector/ (last accessed 13 March 2023).

7 A H Isa, S Hamisu, H S Lamin, M Z Ya'u and J S Olayande, 'The perspective of Nigeria's projected demand for petroleum products' (2013) 4(7) *Journal of Petroleum and Gas Engineering*, pp. 184 to 187.

cent of the vehicular means of international trade, plays a key role in the exploitation and distribution of Nigeria's oil and gas, and takes second place as a contributor to the nation's economy after petroleum.[8]

Commercial shipping activities largely revolve around seven active ports,[9] six petroleum export terminals,[10] and five newly licensed export processing terminals.[11] The 2006 port reforms brought about a remarkable increase in the volume of cargo.[12] Consequently, the infrastructure and all other paraphernalia suitable for a standard port have been put in place, and continue to be upgraded to meet the demands brought about by the increase in cargo volume.

A decline in the total number of vessels berthed at Nigerian ports has been evident for several years: 5,014 vessels in 2015, 4,373 vessels in 2016, 4,292 vessels in 2017, 4,009 vessels in 2018 and 1,045 vessels in the first three months of 2019.[13] In 2020, there was a further decline, largely as a result of the covid-19 pandemic.[14] There was, however, a substantial increase in the number of vessels that berthed in Nigerian ports, as well as port activities, in 2021 and 2022 as a result of more relaxed covid-19 rules.[15]

According to the National Bureau of Statistics, after quarter four of 2022, Nigeria's total merchandise trade in 2022 was valued at 52.4 trillion naira (24.2 per cent more than the value recorded in 2021 (which was 39.7 trillion naira and a 57.5 per cent increase on the

8 Alari Emomoemi Faith, 'The Maritime Industry of Nigeria, Challenges and Sustainable Projects', https://dj.univ-danubius.ro/index.php/DWP/article/view/126/285#:~:text=4-,The%20maritime%20industry%20of%20Nigeria%20is%20a%20Major%20sector%20of,goods%20owing%20to%20its%20population.

9 In Lagos State – Apapa Port, Tin Can Island Port and Lekki Deep Sea Port; in Rivers State – Port Harcourt Port and Onne Port; in Delta State and Cross River State – Warri Port and Calabar Port, respectively. Five other ports are under construction: Badagry, Bakassi, Bonny, Ibom and Warri Deep Sea Port. The Lekki Deep Sea Port, which is Nigeria's first deep sea port, was launched in January 2023.

10 Nigeria Business Info, 'The Nigerian Crude Oil & Gas Industry', https://web.archive.org/web/20060213013744; www.nigeriabusinessinfo.com/nigerian-oil.htm (last accessed 22 March 2023).

11 The federal government through the Nigerian Port Authority (NPA) licensed five new export processing terminals for non-oil related exports in November 2022. Oluwatobi Ojo, 'How Nigeria's export processing terminals will boost intra-African trade and non-oil exports', https://businessday.ng/opinion/article/how-nigerias-export-processing-terminals-will-boost-intra-african-trade-and-non-oil-exports/ (last accessed March 29, 2023).

12 James Leigland and Gylfi Palsson, 'Port reform in Nigeria', Grid Lines, World Bank (March 2007), www.infradev.org/Infradev/assets/10/documents/Gridline%20-%20Port%20Reform%20in%20Nigeria.pdf (last accessed 13 March 2023).

13 Source: Nigerian Port Authority – Number and Gross Registered Tonnage (GRT) of Vessels that entered all Nigerian Ports: 2007-2019, https://nigerianports.gov.ng/ports-statistics/ (last accessed 13 March 2023).

14 Other factors include the continued increase in the exchange rate of international currencies against the Nigerian naira and continued reduction in service boat operation because of the decline in international crude oil prices.

15 Nigerian Port Authority, Daily Shipping Schedule, see https://shippos.nigerianports.gov.ng/ (last accessed 13 March 2023).

value recorded in 2020).[16] The value of total imports in 2022 rose by 23 per cent compared to 2021 to 25.59 trillion naira (23 per cent higher than 20.84 trillion naira in 2021, a value that rose by 64 per cent from 12.68 trillion naira in 2020).[17]

Compared to other oil-producing nations, vessel tonnage is low, but in the three years preceding the covid-19 pandemic and pursuant to the implementation of several pieces of domestic legislation on shipping development, Nigeria-flagged vessels (largely oil tankers, oil rigs and liftboats, offshore support vessels, floating storage and offloading vessels, and floating production storage and offloading (FPSO) vessels) enjoyed significant growth, from 370 vessels with a total of almost 420,000 metric tonnes in 2016 (with a dip in 2017 to 307 registered vessels with a total of 415,638.03 metric tonnes)[18] to approximately 595 vessels and a total of approximately 711,987.95 metric tonnes in 2018, thanks to the registration of high-capacity index vessels such as the *Egina* FPSO and a crude oil tanker.[19] Nigerian vessel tonnage did not attain the expected levels in 2020 and 2021 because of the pandemic; however, the country's seaports recorded a total of 1,992 ships with an aggregate gross registered tonnage of 60.2 million tonnes and handled 849,175 twenty-foot equivalent units (TEUs) of containers in the first six months of 2022.[20]

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Although there has been a flurry of maritime legislation in Nigeria, the principal body of substantive shipping laws is contained in the Merchant Shipping Act 2007 (the MSA 2007), the Nigerian Maritime Administration and Safety Agency Act 2007 (the NIMASA Act), the Coastal and Inland Shipping (Cabotage) Act No. 5, 2003 (the Cabotage Act) and a raft of regulations (a number of which put into force, or are used to apply, international instruments on the construction and safety of ships, navigation, pollution and crew matters) and guidelines published pursuant to the foregoing legislation.

In addition, discrete legislation governs areas such as ports, carriage of goods by sea, wreck and salvage, pollution, the environment and marine resources. This legislation includes the Nigeria Ports Authority Act 2004,[21] the Carriage of Goods by Sea Act[22] and the United Nations Convention on Carriage of Goods by Sea (Ratification and Enforcement) Act 2005.

16 'Nigeria's Annual Trade Volume Rises to Near Pre-COVID Level', see https://www.thisdaylive.com/index.php/2023/03/12/nigerias-annual-trade-volume-rises-to-near-pre-covid-level/#:~:text=The%20report%20also%20showed%20that,8%20trillion%20from%20N18 (last accessed 23 March 2023).

17 See https://www.vanguardngr.com/2022/03/merchandise-trade-deficit-rises-171-to-n1-9trn/ (last accessed 23 March 2023).

18 Nigeria's Maritime Industry Forecast: 2018–2019 as presented by the Nigerian Maritime Administration and Safety Agency (NIMASA).

19 Nigeria's Maritime Industry Forecast: 2019–2020 as presented by the NIMASA.

20 Ships & Ports, 'Nigerian ports handle 849,175 TEUs as NPA remits N78bn to FG in H1 2022', https://shipsandports.com.ng/nigerian-ports-handled-849175-teus-in-first-half-of-2022-bello-koko/.

21 Cap. N126, LFN 2004.

22 Cap. C2, LFN 2004.

Generally, the Constitution of the Federal Republic of Nigeria 1999 (as amended) (the Nigerian Constitution),[23] the Admiralty Jurisdiction Act (AJA)[24] and the Admiralty Jurisdiction Procedure Rules 2011 (AJPR) provide the framework for admiralty jurisdiction and court practice.

Notably, however, steps are currently being taken to revolutionise and bring about some real changes in the Nigerian maritime industry. Therefore, the following bills have been passed by the House of Representatives (the lower legislative chamber of the National Assembly) and presented to the Senate (the upper legislative chamber of the National Assembly):

a the Merchant Shipping Act (Repeal and Re-enactment) Bill 2021;

b the Coastal and Inland Shipping (Cabotage) Act Amendment Bill 2022; and

c the Nigerian Maritime Administration and Safety Agency Bill 2022.

These bills are set to bring about laudable changes to the maritime industry in Nigeria, and the legislative chambers have seriously considered these bills in a bid to ensure that they are passed into law.

III FORUM AND JURISDICTION

i Courts

Pursuant to Section 251(1)(g) of the Constitution and Sections 1 and 2 of the AJA, the Federal High Court has exclusive jurisdiction over shipping and admiralty matters.

Notwithstanding the foregoing, Section 254(c)(1) of the Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010 conferred exclusive jurisdiction over all labour-related matters on the National Industrial Court, to the exclusion of all other courts of coordinate jurisdiction (i.e., the high court of each of the 36 states and the Federal Capital Territory and the Federal High Court). As such, the National Industrial Court has exclusive jurisdiction to deal with all shipping-related labour claims, such as unpaid wages, which the AJA defines as a maritime lien. However, the interpretation of this law has led to different decisions by the courts. For example, in *Amarjeet Singh Bains & 6 Ors v. The Vessel MT SAM PURPOSE (Ex MT TAPTI)*,[25] a dispute concerning unpaid crew wages, the Federal High Court held that it had exclusive jurisdiction over this matter as it was a labour-related matter rooted in admiralty and as such the admiralty jurisdiction of the Federal High Court was properly activated. However, the Court of Appeal held that the National Industrial Court is the court with statutory jurisdiction over matters concerning unpaid crew wages despite not having the jurisdiction to enforce a maritime lien.[26] This decision of the Court of Appeal is currently being challenged in the Supreme Court of Nigeria.

Notably, Section 20 of the AJA in Paragraphs (a) to (h) stipulates that the Federal High Court can exercise jurisdiction over admiralty matters, notwithstanding any exclusive jurisdictional clauses contained in any agreement on such a matter, where the following circumstances exist:

a the place of performance, execution, delivery, act or default is or takes place in Nigeria;

23 Cap. C23, LFN 2004.

24 Cap. A5 LFN 2004.

25 *Suit No. FHC/L/CS/1365/2017 (Coram Faji, J.)* Unreported.

26 In *Suit No. CA-LAG-VC-419-2020 - The Vessel MT SAM PURPOSE (EX. TAPTI) & Anor v. Amarjeet Singh Bains & 6 Ors* (Unreported).

b any of the parties resides or has resided in Nigeria;
c the payment under the agreement (implied or express) is made or is to be made in Nigeria;
d the plaintiff submits to the jurisdiction of the Nigerian court or the *rem* is within Nigerian jurisdiction;
e the government of a state of the federation is involved and the government or state submits to the jurisdiction of the court;
f some financial consideration is to be derived from the contract in Nigeria; or
g in the opinion of the court, the cause, matter or action is one that should be adjudicated in Nigeria.

Despite the foregoing, recent interpretations of Section 20 of the AJA suggest that any jurisdictional clause that seeks to oust a Nigerian court's jurisdiction in favour of a foreign court (and not an arbitration clause (Nigerian or foreign)) shall be considered void. However, only the jurisdictional aspects of the clause are affected, not the entire agreement. Section 10 of the AJA[27] clearly empowers the Federal High Court to recognise and enforce arbitration clauses in admiralty agreements.[28]

Furthermore, Section 18 of the AJA mandates that proceedings in a maritime claim or a claim on a maritime lien or other charge are to be commenced within any stipulated limitation period provided in the contract in respect of the claim. However, where there is no stipulated limitation period in an agreement or law, the proceedings must be commenced within three years of the cause of action arising.

Meanwhile, the MSA 2007 prohibits the commencement of any action for payment by a salvor more than two years after completion of salvage.[29] Collision claims can also not be commenced more than two years after accrual of the cause of action.

ii Arbitration and ADR

In general, commercial arbitration in Nigeria is governed by the Arbitration and Conciliation Act (ACA).[30] It primarily grants parties the freedom through arbitration agreements to determine the arbitral procedure to govern their dispute resolution. When parties do not agree on the procedure to govern the dispute, the arbitrator will apply the procedural rules set out in the first schedule to the Arbitration Act, which are based on the UNCITRAL

27 Section 10 of the Admiralty Jurisdiction Act (AJA) codifies Nigeria's obligations under Article II(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), which provides that Nigeria and the other contracting states shall recognise an agreement in writing under which parties undertake to submit their disputes to arbitration. Article II(3) of the New York Convention provides that: 'The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.'

28 *Onward Enterprises Limited v. MV 'Matrix' & 2 Ors* (2010) 2 NWLR (Pt. 1179) 530 and *The Owners of The MV Lupex v. Nigerian Overseas Chartering and Shipping Limited* (2003) FWLR (Pt 270) 1428.

29 This time may, however, be extended by a court if the salvor has been unable to arrest the salvaged vessel.

30 Cap. A18, LFN 2004. It is noteworthy that the Arbitration and Mediation Bill 2022, which seeks to repeal and replace the Arbitration and Conciliation Act, has been passed by the National Assembly and is currently before the President of the Federal Republic of Nigeria for assent.

Arbitration Rules.[31] There are some other very active arbitral institutional bodies in Nigeria (with their own procedures) that entertain commercial disputes, including maritime and shipping disputes. Notable in this regard are the Chartered Institute of Arbitrators UK, Nigeria branch, the Lagos Court of Arbitration (which was established under the Lagos Court of Arbitration Law, No. 17, 2009) and the Regional Centre for International Commercial Arbitration – Lagos (the formation of which is backed by federal legislation).[32]

Nigeria does not have any specific maritime arbitration procedure legislation, nor is it anticipated that the prospective Arbitration and Mediation Bill yet to be passed into law will make specific provisions on maritime arbitration considering that the maritime sector is *sui generis*. However, recourse is often made either to the Maritime Arbitrators Association of Nigeria (MAAN), a non-governmental body comprising maritime and commercial law practitioners, master mariners, surveyors, insurance brokers and other maritime practitioners, or to experienced arbitrators, who are committed to providing specialist arbitration services for the settlement of shipping disputes. The MAAN has developed arbitration rules for large-scale (US$15,000 and above) and small-scale (below US$15,000) maritime claims.

There has been a progressive effort to institutionalise the use of alternative dispute resolution (ADR), especially mediation, into the procedure of the judicial process in Nigeria. The first and most advanced of these is the Lagos Multi Door Court (LMDC). If parties fail to resolve their dispute through ADR, then the court would proceed to trial of the action. Matters resolved by mediation at the LMDC are entered as consent judgments of the Lagos State High Court and are enforceable.

iii Notable judicial decisions

In 2022, there were a few very notable and highly influential judicial decisions in Nigeria's maritime industry. One of these decisions was the judgment of the Supreme Court in *OAN Overseas Agency Nigeria Limited v. Bronwen Energy Trading Limited & Ors*.[33] In this matter, the issue of whether a person who is neither the owner nor the demise charterer of an arrested vessel can maintain an action from wrongful arrest of the vessel. The Court held that only a demise charterer or the owner of an arrested vessel possesses the requisite legal capacity to maintain an action for wrongful arrest. As such, the Court of Appeal erred in its judgment in that matter by awarding US$400,000 in favour of the first respondent who was neither the owner nor the demise charterer of the arrested vessel and, as such, lacks the legal capacity to maintain an action for the alleged wrongful arrest. The Court also held that assuming the first respondent is the owner or demise charterer of the arrested vessel, and it has suffered damage in the circumstance, the law still requires proof by evidence of the claim for US$400,000 being the alleged daily charter cost, and that a court ought to enquire into how a claimant arrived at the damages claimed before making an award for losses incurred for wrongful arrest.

31 Arbitration and Conciliation Act, Section 15.

32 The Regional Centre for International Commercial Arbitration Act, Cap. R5, LFN 2004.

33 (2022) 11 NWLR (Pt. 1842) 489 S.C.

IV SHIPPING CONTRACTS

i Shipbuilding

Nigeria does not undertake a significant amount of shipbuilding. Most new vessels are ordered from abroad, but a few Nigerian shipyards build or assemble craft (barges, tugboats and riverboats) below 5,000 tonnes for use on inland waterways, in cabotage operations and for the lucrative support services to the oil and gas industry. The size and sophistication of the products of these shipyards are growing steadily and the Nigerian Maritime Administration and Safety Agency (NIMASA), in line with its statutory responsibility to facilitate the growth of local capacity in the construction of ships and other maritime infrastructure, is taking strategic steps towards shipbuilding, with much expectation hinged on the Ajaokuta steel mill in Kogi State and Aluminium Smelter Company in Ikot-Abasi, Akwa Ibom State, coming on stream.[34]

In January 2020, NIMASA announced the government's proposed plan to ban the importation of certain categories of foreign-built vessels from December 2022 (the Ban on Importation). In support of this proposal, it was also announced that the Central Bank of Nigeria would prohibit the provision of foreign exchange for the purchase and importation of vessels affected by the Ban on Importation, and the Nigerian Customs Services would stop the issuance of import waivers (i.e., temporary import permits) in respect of the banned vessels. In a bid to promote this policy, one of the concrete steps that is currently being taken is to introduce new provisions, for shipbuilders and to incentivise the industry, in the Merchant Shipping Bill before the National Assembly.

The Ban on Importation is one of a number of measures being proposed by NIMASA as part of a five-year strategic plan to end the cabotage waiver regime. The ultimate aim is to promote the building of vessels in Nigeria, which is one of the key objectives of the Coastal and Inland Shipping (Cabotage) Act 2003. NIMASA also expressed its intentions to partner with the Nigerian Content Development and Monitoring Board (NCDMB) in relation to joint ship building initiatives.[35]

There is no statutory regime governing shipbuilding, and the rights and obligations of the parties are circumscribed by the terms of the contract and the principles of English common law of contract. The structure of most shipbuilding contracts mirrors the standard provisions as adopted elsewhere – that is, the shipyard undertakes to construct the vessel to specification and to deliver and pass title following completion of sea trials coupled with post-delivery warranties. The purchaser undertakes to pay for the construction of the vessel in instalments against the completion of specified milestones and to accept delivery and title.

ii Contract of carriage

Ship and cargo owners with an interest in Nigeria may be confronted by a unique question in their quest for due diligence: in the event of damage or loss to cargo, which liability regime applies? The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (the Hague Rules) and the UN Convention on the Carriage of Goods by Sea 1978 (the Hamburg Rules) are concurrently in force in Nigeria. The Hague Rules are

34 Anna Okon, 'NIMASA to end 16-year cabotage waivers regime', *The Punch* (11 April 2019), https://punchng.com/nimasa-to-end-16-year-cabotage-waivers-regime/ (last accessed 13 March 2023).

35 Bloomfield LP published a briefing on the Ban on Importation – see http://bloomfield-law.com/Publications/Nigeria's_Proposed_Ban_on_Importation_of_Foreign_Built_Vessels_07022020.pdf.

one of the statutes inherited from the time of British rule and they apply pursuant to the provisions of the Carriage of Goods by Sea Act 2004 (COGSA). Conversely, the Hamburg Rules were domesticated in Nigeria as a National Assembly Act (as required by Section 12 of the Constitution) via the UN Convention on the Carriage of Goods by Sea (Ratification and Enforcement) Act 2005.

The COGSA expressly states that the Hague Rules apply in respect of outward carriage of goods from ports in Nigeria to ports outside Nigeria, or other ports within Nigeria. Consequently, the choice of law clauses of most bills of lading in respect of shipments to Nigeria, providing for reliance on the terms of the Hague Rules, has been upheld.

The UN Convention on the Carriage of Goods by Sea (Ratification and Enforcement) Act 2005, which introduced the Hamburg Rules as a schedule, failed to expressly repeal and denounce the Hague Rules, as required by Article 15 of the Hague Rules. It is therefore arguable that the Hague Rules and the Hamburg Rules currently apply in Nigeria.

Notwithstanding the foregoing, it is the author's view that the Hamburg Rules, by virtue of the UN Convention on the Carriage of Goods by Sea (Ratification and Enforcement) Act 2005, applies in Nigeria by force of law to all carriage of goods by sea (inwards and outwards) to the exclusion of any other international convention, including the Hague Rules.

Nigeria is not a party to the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules), but it signed the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (the Rotterdam Rules) and would need to make the same an Act of the National Assembly for the Rotterdam Rules to apply in Nigeria once the Act comes into force.

iii Cargo claims

Cargo disputes may arise as a result of loss or damage during carriage or in port during discharge. The right to sue with regard to cargo claims was originally contained in the Bill of Lading Act 1855 (the 1855 Act), being a pre-1900 United Kingdom statute of general application in Nigeria. By virtue of the 1855 Act, only the consignor, consignee and endorsee have privity and right to sue, often referred to as *locus standi*.[36]

The essential features of the 1855 Act were imported into the Merchant Shipping Act 2004 (the MSA 2004), in Section 375. Regrettably, when the MSA 2004 was repealed by the MSA 2007, this Section was not preserved. As such, there is now a lacuna regarding applicable legislation detailing the right of suit principle in Nigeria, the cases that provide judicial precedent notwithstanding.[37] At best, it remains applicable as a common law principle of contract in Nigeria.

There are some notable exceptions to these rules as have been recognised, including the *Brandt v. Liverpool*[38] doctrine, whereby the holder of the bill of lading can maintain an action at common law where the court is able to infer or imply a contract on the bill of lading terms between the holder and the carrier in circumstances where the holder:

a takes delivery of the goods;

36 This principle is well illustrated in the cases of *Fasasai Adesanya v. Leigh Hoegh and Co* (1968) 1 All NLR, p. 325 and *Nigerbrass Shipping Line Limited v. Aluminium Extrusion Industries* (1994) 4 NWLR Pt. 341, 733.

37 See footnote 39 and *Kaycee (Nig) Ltd v. Propmt Shipping Corp*. No. 3 – NSC Vol. 2 p. 431.

38 [1924] 1 KB 575.

b pays freight or demurrage; or
c presents the bill of lading.

The lack of capacity of a notified party to sue on a bill of lading was underscored by the Supreme Court in *Pacers Multi-Dynamic Ltd v. MV Dancing Sisters & Anor*.[39] However, when the bill of lading is endorsed to the person named as the 'notify party', the Supreme Court held in *Basinco Motors Limited v. Woermann-Line and Anor*[40] that the action would be maintainable because property in the goods would have passed to the notify party, whose position changes to that of an endorsee.[41]

iv Limitation of liability

Under Nigerian law, not all claims against a shipowner are susceptible to limitation of liability. As a signatory to the Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC Convention 1976) (which replaced the 1957 International Convention Relating to the Limitation of Owners of Seagoing Ships) and the Protocol to amend the LLMC Convention 1996 (the 1996 LLMC Protocol),[42] Nigeria domesticated the Convention and the 1996 LLMC Protocol in its laws through the provisions of Section 335(1)(f) of the MSA 2007.

The LLMC Convention 1976 and the 1996 LLMC Protocol formed the basis of the limitation of liability for maritime claims as stated in Sections 351 to 359 of the MSA 2007, which set out the circumstances in which shipowners (including the owners, charterers, managers and operators of a ship), salvors and their insurers may limit their liability for maritime claims, as well as the computation for that limitation.

Section 352(1), Paragraphs (a) to (g) of the MSA 2007 state the types of claims that are subject to limitation, while Section 353, Paragraphs (a) to (e) list the claims that may not be subject to limitation, such as claims for salvage or contribution in general average, oil pollution liability and claims in respect of nuclear damage.

The following underlined provision of Section 356(1) of the MSA 2007 creates room for discussion as to whether there is a lacuna in the determination of the general limits of liability: 'The limits of liability for claims other than those mentioned in this Act, arising on any distinct occasion, shall be calculated as follows:'

One interpretation of this would be that the maritime claims subject to limitation under Section 352 of MSA 2007 would not be subject to the limits stated in Section 356(1). If so, how would the limit of such claims be calculated? Conversely, the above provision of the MSA 2007 could mean that the general limits of liability for claims, other than claims for which specific limitations have been provided in the MSA 2007 (such as passenger claims under Section 57), shall be calculated as provided.

The above provision of the MSA 2007 is clearly a case of inelegant drafting as the words 'other than those mentioned in this Act' create room for ambiguity as to what specific

39 (2012) LPELR-7848(SC).

40 (2009) 13 NWLR (Pt 1157), p. 149.

41 L Chidi Ilogu SAN, *Foundation of Carriage of Goods by Sea – The Nigerian Perspective* (2016) at pp. 199 to 206.

42 Entered into force on 1 December 1986 and 13 May 2004, respectively.

cases the limitation of liability provisions are applicable. The author concurs with the first interpretation. Pending judicial interpretation of this provision, there are calls for a revision of the MSA 2007 to address this ambiguity as well as other salient issues highlighted herein.

The entry into force of the amendment to the limit of liability in the 1996 LLMC Protocol on 8 June 2015 (the Protocol Amendment 2015)[43] presupposes an increase in liability for the relevant maritime claims. This may not be the case in Nigeria as it is arguable that the Protocol Amendment 2015 does not automatically apply in Nigeria, pursuant to Section 335(1)(f) of the MSA 2007, as the Constitution requires every convention to be domesticated via an Act of the National Assembly before it can have force of law in Nigeria. The matter is further compounded by the fact that the MSA 2007 states expressly, in Sections 356 to 359, the limits provided for in the 1996 LLMC Protocol.

It is therefore imperative that the MSA 2007 be amended to accommodate amendments to the 1996 LLMC Protocol (including the Protocol Amendment 2015) and how the amendments would be incorporated into the express thresholds of limitation of liability as set out in the MSA 2007 to enable Nigerians to benefit from these developments in line with international best practice.

Order 15, Rule 1(4) of the AJPR provides that a limitation of liability proceedings shall be commenced through the filing of an originating summons at the registry of the Federal High Court. An originating summons is expected to be accompanied by the following:

a an affidavit setting out the facts relied upon;
b copies of all the exhibits to be relied upon; and
c a written address.

An action for limitation is commenced as an admiralty action *in personam* against at least one of the (possible) claimants in a maritime claim (as a defendant), who must be served before the case may be set down for hearing or determination given in default of appearance. After determination of the applicant's entitlement to a limitation of its liability, the court may order advertisement of its determination to allow anyone with a maritime claim against the vessel or such other parties named above to apply to set aside, vary the court's determination or lodge its interest.

V REMEDIES

i Ship arrest

The AJA and the AJPR govern admiralty matters. A party seeking to arrest a ship in Nigeria must satisfy the court that its claim qualifies as a 'maritime claim' as defined in Section 2 of the AJA. This generally means that it must be a proprietary maritime claim or a general maritime claim.

A proprietary maritime claim[44] includes a claim relating to the possession of a ship, title to or ownership of a ship or a share in a ship, mortgage of or a share in a ship, mortgage of a ship's freight or claims between co-owners of a ship relating to the possession, ownership,

43 Thirty-six months after it was adopted by the Legal Committee of the International Maritime Organization, when the Committee met for its 99th session in London.

44 AJA, Section 2(2).

operation or earning of a ship. A claim for the satisfaction or enforcement of a judgment given by a court (including a court of a foreign country) against a ship or other properties in an admiralty proceeding *in rem* is also a proprietary maritime claim.

Section 2(3) of the AJA states the claims that fall under a general maritime claim, which include, but are not limited to, claims:

a for damage done or received by a ship (whether by collision or otherwise);
b in respect of goods, materials or services (including stevedoring and lighterage services) supplied or to be supplied to a ship for its operation or maintenance;
c for loss of life, or for personal injury, sustained in consequence of a defect in a ship or in the apparel or equipment of a ship; and
d arising out of an act or omission of the owners or characters of a ship.

The AJA stipulates that an action *in rem* can be brought only if there is a proprietary maritime claim or if, in the case of a general maritime claim, the action can be brought *in personam* against the proprietor of the vessel in question. Consequently, whenever there is a general maritime claim, an action *in rem* can be brought before the court only if, at the time of commencing the action, the person against whom an action *in personam* may have been brought (referred to as the 'relevant person') is the owner of the vessel in question, the owner of a sister vessel or the demise (bareboat) charterer of the vessel in question.[45]

In addition to the foregoing, an action *in rem* may be commenced against a ship if there is a maritime lien or other charge on that ship.[46]

An application for the arrest of a vessel is brought via an *ex parte* application (if the vessel is within Nigerian territorial waters[47] or expected to arrive there within three days) disclosing a strong *prima facie* case for the arrest order. This application must be supported by an affidavit deposed to by the applicant, its counsel or its agent. The applicant is required to provide the following with the *ex parte* application:

a an undertaking to indemnify the ship against wrongful arrest; and
b an undertaking to indemnify the Admiralty Marshal in respect of any expenses incurred in effecting the arrest.

The applicant is also required to pay, fortnightly, the Admiralty Marshal's minimum cost of 100,000 naira for maintaining the vessel under arrest.

ii Court orders for sale of a vessel

A court of competent jurisdiction can order a ship under arrest in proceedings within its jurisdiction to be valued and sold on application by an interested party before or after final judgment.[48] The application can be made only if the vessel has been under arrest for six months and the owner has failed to provide security for her release or the vessel is depreciating in value. When a sale is ordered by the court, a valuation of the ship is carried out, after which an advert is published in two national newspapers. The sale is conducted by the Admiralty

45 ibid., Section 5(4).
46 ibid., Section 5(3).
47 According to the Territorial Waters Act, Cap. T5, LFN 2004, the territorial waters of Nigeria extend to 12 nautical miles off the coast, measured from the low-water mark, or of the seaward limits of inland waters.
48 Admiralty Jurisdiction Procedure Rules 2011 (AJPR), Rule 1, Order 16.

Marshal within 21 days of the newspaper advertisements appearing. The proceeds of the sale are paid into court and the Admiralty Marshal files an account of sale and vouchers of the account.

VI REGULATION

i Safety

NIMASA, pursuant to the NIMASA Act, the MSA 2007, the Cabotage Act and other related legislation, is empowered, inter alia, to regulate maritime safety, security, marine pollution and maritime labour.

Section 20 of the NIMASA Act empowers the Agency to establish the procedure for the implementation of international maritime conventions of the International Maritime Organization (IMO), the International Labour Organization (ILO) and other conventions on maritime safety and security to which the government of Nigeria is a party, especially by making regulations in respect of any implemented convention.

Some of the maritime safety conventions that have been implemented and their corresponding regulations (where applicable), pursuant to Section 215 of the MSA 2007, are as follows:

a the International Convention for the Safety of Life at Sea 1974 (SOLAS);

b the 1988 Protocol relating to SOLAS and Annexes I to V thereto;

c the International Convention on Maritime Search and Rescue 1979 (the Search and Rescue Convention); and

d the ILO Convention Concerning the Protection Against Accidents of Workers Employed in Loading or Unloading Ships (the Dockers Convention).

In 2019, the long-awaited Suppression of Piracy and Other Maritime Offences Act was enacted. By so doing, relevant provisions of certain international conventions (on safety, piracy and armed robbery at sea, etc.),[49] which Nigeria had ratified but had yet to domesticate, were given effect under Nigerian law.

ii Fiscal incentives for acquisition of ships by Nigerians

NIMASA is the leading authority tasked with the obligation of providing the relevant environment that encourages Nigerians and indigenous investors to be actively involved in ship acquisition. The government acting through NIMASA has therefore continued to take steps over the years to encourage local ownership of vessels by way of interventionist policies, provision of funding to aid such interested investors, among others.[50] Reports by the United Nations Conference on Trade and Development, issued in 2021, show that 198 vessels are owned by Nigerians and fly the Nigerian flag, while 73 other vessels are owned by Nigerians

49 This includes the United Nations Convention on the Law of the Sea 1982 (UNCLOS) and the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation 1988 (SUA) (and its protocols).

50 See https://guardian.ng/business-services/maritime/enhancing-ownership-of-nigerian-flag-vessels/ (last accessed 12 March 2023).

but fly a foreign flag. This puts the total number of vessels owned by Nigerians at 271.[51] While this is an impressive figure, placing Nigerians among the top 35 (34th) ship owners in the world, the government believes that there is more to be done.

Therefore, in October 2021, it was not surprising when the Director-General of NIMASA, at the Nigerian International Maritime Summit (NIMS), announced that Nigeria had approved a waiver of import duty on the acquisition of ships as a fiscal incentive aimed at substantially boosting the Nigerian maritime industry.[52] This step is an impressive development because this will no doubt encourage locals to invest in the industry. This step also comes at a time when Nigeria already has its Nigerian Content Development and Monitoring Board, providing vessel acquisition facilities to indigenous oil and gas services companies at a single-digit interest rate with a maximum tenor of five years from a US$350 million fund.[53]

In 2022, the President of Nigeria, Muhammadu Buhari, approved the immediate disbursement of the Cabotage Vessel Financing Fund (CVFF) of 16 billion naira to qualified Nigerians as part of the federal government's commitment to grow the capacity for Nigerians to own vessels. Several commercial banks were appointed as the primary lending institutions (PLI). Although stakeholders were of the view that the funds accruing to the CVFF in its many years of its existence exceed the sums declared by the government, the approval to disburse the funds was a welcome development given that no fund has been deployed to finance indigenous ship ownership since the establishment of the CVFF under the Cabotage Act in 2010 and the contribution of a 2 per cent surcharge of the contract sums earned by vessels engaged in coastal trade in Nigeria. As of February 2023, the federal government, through the Minister of Transportation, urged banks and stakeholders to work towards the quick disbursement of the CVFF. The Minister also noted that the President approved that the two per cent charge that makes up the CVFF should continue to accrue to the Central Bank of Nigeria Treasury Single Account, and each time the account realises US$50 million, the Minister of Transportation should, on the recommendation of NIMASA, direct the Central Bank of Nigeria to release the amount to any of the five banks recognised as the PLIs for disbursement.[54]

iii Port state control

NIMASA is the authority tasked with undertaking port state control (PSC) duties. Nigeria facilitated the development of the Memorandum of Understanding on Port State Control for West and Central African Region 1999 (the Abuja MOU) on PSC; 16 states have signed the MOU, 11 of which have deposited an instrument of ratification with the Secretariat of the Abuja MOU. In 2019, the Abuja MOU, with the aim of continually developing a unified system of PSC inspection procedure for the region, held its 10th Port State Control Committee Meeting in the Republic of Gabon.

51 See https://unctad.org/system/files/official-document/rmt2021_en_0.pdf (last accessed 13 March 2023).

52 See https://www.hellenicshippingnews.com/nigerian-maritime-industry-2021-in-review/ (last accessed 13 March 2023).

53 See https://www.bloomfield-law.com/sites/default/files/2022-02/NIGERIAN%20MARITIME%20INDUSTRY%20-%202021%20IN%20REVIEW_0.pdf (last accessed 31 March 2022).

54 Lilian Ukagwu, 'Minister tasks finance insttutions on disbursement of Cabotage fund', *The Punch* (24 February 2023), https://punchng.com/minister-tasks-finance-institutions-on-disbursement-of-cabotage-fund/.

Although vessel inspection under PSC is relatively low when compared to vessel traffic, Nigeria is one of the leading nations in Africa, having inspected more than 821 ships in 2019 and detaining 17.[55] Furthermore, Nigeria was one of the countries with the highest positive performance indicators in the 2020/2021 Shipping Industry Flag State Performance Table prepared by the International Chamber of Shipping.

Continuous efforts are being made to train PSC monitors, inspectors, surveyors and other key officials. This is germane to Nigeria's quest to have port facilities that are on a par with those in the developed world. The idea of making Nigeria a hub in port operations cannot be removed from an effective PSC in the country and other Member States of the Abuja MOU.

iv Registration and classification

The Nigerian Ship Registry (NSR) is domiciled with NIMASA and, ordinarily, only Nigerian citizens or bodies corporate, or partnerships subject to Nigerian law and having their principal place of business in Nigeria, can register their interests in a vessel under the Nigerian flag. There is no provision for dual registration, as a vessel may fly the flag of only one country. Consequently, there is a requirement for vessels already registered under a foreign flag to deregister their current port or state registries in order to be registrable in Nigeria. However, the NSR permits provisional registration of a vessel for six months to allow it sail into Nigeria with the Nigerian flag before completing a full registration on arrival.

The NSR is equally responsible for maintaining the Cabotage Register for vessels eligible to participate in the Nigerian cabotage trade. Additionally, in April 2019, NIMASA set a five-year period for the cessation of the nation's cabotage waiver regime (implemented pursuant to the provisions of the Cabotage Act, which came into force in 2003) that has given, inter alia, an advantage to foreign-flagged vessels and foreign-owned vessels, as well as foreign crew, to operate in Nigerian cabotage. This move by NIMASA is quite commendable and in consonance with the spirit and letters of the Cabotage Act, which primarily aims to reserve commercial transport of goods and services within Nigerian coastal and inland waters to only those vessels built, owned and operated by Nigerians. NIMASA has commenced the termination of the cabotage waiver regime with the stoppage of manning waivers (with the exceptions of captains and chief engineers), while the final phase of the termination is expected to end in three years. The move by NIMASA to end cabotage waivers for foreign-owned vessels was a welcome relief to the indigenous operators as well as other domestic stakeholders, who have long been greatly concerned that cabotage waivers had become the norm rather than an exception. It is believed that the demise of the waiver regime, if properly effected, would allow cabotage to flourish for Nigerians who would be better positioned to reap the benefits of coastal trade in Nigerian waters.[56]

In July 2021, NIMASA announced the introduction and issuance of new certificates of ship registration that will be embedded with quick response codes to enable shipowners, stakeholders and regulatory officers to verify the validity of certificates. NIMASA also

55 http://www.abujamou.org/index.php?pid=jfjygkghjstat19 (last accessed 13 March 2023).

56 Anna Okon, 'NIMASA to end 16-year cabotage waivers regime', *The Punch* (11 April 2019), https://punchng.com/nimasa-to-end-16-year-cabotage-waivers-regime/ (last accessed 13 March 2023).

announced the automation of ship registration automation verification in September 2021.[57] This is for security and the ease of verifying the registration of ships and carrying on business in general.

As part of the requirements for Nigerian ship registration, an applicant is required to provide a current certificate from an approved international classification society. In this regard, NIMASA has established collaborative links with the following leading classification societies by signing memoranda of understanding with them and has issued marine notices to this effect: American Bureau of Shipping, Bureau Veritas, Det Norske Veritas, Lloyd's Register, the International Naval Survey Bureau and the International Register of Shipping.

v Environmental regulation

NIMASA's Marine Environment Management Department (MEMD) is statutorily responsible for ensuring a clean marine environment through the implementation of all relevant IMO conventions. The MEMD draws its statutory powers from Part XXIII Section 335 of the MSA 2007 and Sections 22(2) and 23(9)(b) of the NIMASA Act.

The functions of the MEMD are generally derived from the IMO conventions relating to the protection of the marine environment against pollution and any other related conventions adopted by the IMO from time to time. Broadly, the MEMD implements and enforces compliance to the IMO conventions for protecting and preserving the marine environment and resources, including the International Convention for the Prevention of Pollution from Ships 1973 (as modified by the Protocol of 1978) (MARPOL (73/78)), the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (the London Convention) and its 1996 Protocol, the Convention for the Control and Management of Ships' Ballast Water and Sediments 2004 (the Ballast Water Management Convention) and the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969 (the Intervention Convention).

vi Collisions, salvage and wrecks

The MSA 2007 contains various provisions in respect of collisions, salvage and wrecks. The Act mandates the observance of the Merchant Shipping (Collision) Rules 2010 (the Collision Regulations), which are significantly modelled after the International Regulations for Preventing Collisions at Sea 1972 (COLREGs) and provide practical guides for ships' conduct, inter alia, in anticipation and prevention of, or in reaction to, a collision. The Collision Regulations further provide for the rights of NIMASA-approved inspectors to inspect ships for the purpose of enforcing the Regulations, as well as for the duty of a ship master (to other ships and occupants of ships with which they collide) to report collisions.

Pursuant to Section 387 of the MSA 2007, the International Convention on Salvage 1989 (the 1989 Salvage Convention) forms the basis of Nigeria's salvage regime set out in Part XXVII of the MSA 2007. The Act also provides for the Merchant Shipping (Wrecks and Salvage) Regulations 2010, which essentially set out the procedure for investigating wrecks and salvage.

Whereas the Cabotage Act provides that only vessels that are wholly owned and wholly manned by Nigerian citizens, as well as being built and registered in Nigeria, are entitled

57 Eromosele Abiodun, 'NIMASA Automates Ship Registration Verification, Begins Enforcement of Marine Environment Protection Regulations', *THISDAYLIVE*, 10 September 2021.

to engage in domestic coastal carriage of cargo and passengers within Nigerian waters, Section 8 of the Act permits foreign vessels engaged in salvage operations, as determined by the Minister of Transportation to be beyond the capacity of Nigerian-owned and operated salvage vessels and companies, to operate in Nigerian waters. The foregoing requirement for ministerial determination, however, shall not apply to any foreign vessel engaged in salvage operations for the purpose of rendering assistance to persons, vessels or aircraft in danger or distress in Nigerian waters.

According to the MSA 2007, the responsibility for removal of any ship that becomes a wreck is placed on the shipowner.[58] However, this is difficult to implement as most shipowners are usually insolvent at that stage. The MSA 2007 further provides for the Receiver of Wrecks to take possession, raise, remove or destroy the whole or any part of the vessel. It is an offence for any person other than the Receiver of Wrecks (or the shipowner) to carry out any of the aforementioned without the written permission of the Receiver. Furthermore, in a manner it thinks fit, the Receiver may sell any part so raised or removed and any property recovered in the exercise of its powers.

Despite the foregoing provisions, the Receiver of Wrecks, owing to the paucity of funds and administrative bottlenecks, has been unable to efficiently remove identified hazardous wrecks when shipowners have failed to do so. This is further compounded by several claims from alleged shipowners when the Receiver seeks to exercise its power of sale to raise the required funds or remove the wrecks after the shipowners have failed to remove them within the time limit set by the Receiver. It is expected that the Receiver of Wrecks and NIMASA would put in place the framework for a mutually beneficial relationship with recyclers, with whom the Receiver can partner to remove and efficiently dispose of wrecks.

Nigeria is a signatory to the Nairobi International Convention on the Removal of Wrecks 2007 (the Nairobi WRC 2007). However, the Nairobi WRC 2007 does not have the force of law in Nigeria, as it is yet to be ratified and enacted as legislation or a law of the National Assembly, as required by Section 12 of the Constitution.

vii Passengers' rights

The Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974 (the Athens Convention), and its Protocol of 1990, is applicable in Nigeria pursuant to Section 215 of the MSA 2007. To date, no regulations have been made pursuant to the Athens Convention and its Protocol.

Sections 340 and 341 of the MSA 2007 provide that passengers may claim for loss of life or injury and nothing shall deprive any person who has claimed against the right of defence or the right to limit liability where it exists; and where the proportion of damages recovered from a ship exceeds the proportion of its fault where two or more ships are involved, the ship from which the excess damages was recovered may recover the excess amount from the owners of the other ships involved to the extent of their faults. There is, however, very minimal organised international carriage of passengers by seagoing vessels into and from Nigeria.

Actions in relation to passenger claims under the MSA 2007 must be brought to court within two years of the date on which the loss or injury was caused.

58 See Merchant Shipping Act 2007 (MSA 2007), Sections 360 to 385 and 398.

viii Seafarers' rights

Several conventions on seafarers' rights have been implemented pursuant to Section 215 of the MSA 2007. These include rights regarding:

a employment contracts (and the obligations of employers), including wages, leave benefits and discharge from service; and

b general welfare, health and accommodation.

Some MSA 2007 regulations regarding seafarers' rights pursuant to international conventions have already been implemented in Nigeria. The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 (the STCW Convention) was domesticated through the rule-making authority of the Minister[59] by way of subsidiary legislation in the Merchant Shipping (Medical Examination of Seafarers) Regulations 2001 and the Merchant Shipping (Safe Manning, Hours of Watchkeeping) Regulations 2001.[60]

Other conventions domesticated by the MSA 2007 are the ILO Convention (No. 32 of 1932) on Protection Against Accident of Workers Employed in Loading or Unloading Ships (Dockers Convention Revised 1932) and the Placing of Seamen Convention 1920.

In June 2013, Nigeria deposited an instrument of ratification for the Maritime Labour Convention 2006 (MLC) at the ILO Secretariat in Geneva. However, Nigeria is yet to domesticate the MLC, which was adopted by the International Labour Conference of the ILO in February 2006.

The AJA provides seafarers and masters with the right (as general maritime claims and maritime liens) to bring an action (including the arrest of a ship) against a shipowner for unpaid wages. However, the Court of Appeal, per its 2020 decision in the *MT SAM PURPOSE* case,[61] states that pursuant to Section 254(c)(1) of the Constitution of the Federal Republic of Nigeria (Third Alteration) 1999, the National Industrial Court is the appropriate court to deal with an action for unpaid crew wages.

VII OUTLOOK

The outlook for the Nigerian economy is rather unpredictable at this time. Nigeria is currently in a year of general elections, and this usually affects investors and the way in which business is conducted. While the government appears to be keen on ensuring that the situation within the nation is not seriously affected by activities and politicking of the elections, we are not completely certain how things will play out post-election and the consequent change of government.

Following on from the activities that took place in 2022, below are some of the events that we anticipate for 2023:

59 Section 408 of the MSA 2007 empowered the Minister to make regulations for the general carrying into effect of the Act.

60 Regulations 3 and 4 place duties on masters of Nigerian ships to ensure, insofar as is reasonably practicable, that a seafarer on board a ship does not work more hours than is safe in relation to the safety of the ship and performance of the seafarer's duties. Section 5 places the duty on both masters and seafarers, insofar as is reasonably practicable, to ensure that they are properly rested before commencing duty on a ship and that they obtain adequate rest during periods when off duty.

61 Pending consideration of this issue by the Supreme Court or amendment of the Constitution, this remains the position of the law in Nigeria.

a Removing Nigeria as a Listed Area for war risk insurance: there has been a steady and consistent decline in the incidences of piracy at sea and maritime offences within Nigerian waters and the Gulf of Guinea. This decline has led to continued calls by the Director-General (DG) of NIMASA and other officials of the Nigerian government for Nigeria to be removed as a Listed Area[62] as designated by the Joint War Committee (JWC)[63]. In December 2022, the DG of NIMASA, Bashir Jamoh, was reported to have promised that Nigeria would resubmit an application to be delisted from the Listed Areas for which war risk insurance ought to be taken out.[64] Earlier in February 2023, NIMASA issued a statement where it announced that Nigeria had been delisted from the list of countries designated as risk maritime nations by the International Bargaining Forum (IBF) owing to a confirmation of the improved global ratings of security in the Nigerian Maritime Domain. While the IBF is not quite the same as the JWC, delisting Nigeria from the IBF list is a commendable improvement, and if the current momentum is kept up, this would aid the delisting of Nigeria from the JWC's Listed Areas.

b Maritime bills before the National Assembly: as discussed above, there are a number of very important maritime bills before the National Assembly with huge positive implications for Nigeria's maritime industry. These bills received a high level of attention from the legislative authority. Therefore, we believe that some, if not all, of these bills will be seriously considered and passed into law. It is also hoped that the passage of these bills will bring significant change in the Nigerian maritime sector. As of January 2023, the House of Representatives had passed three major maritime bills, which have now been sent to the Senate for confirmation. These bills are: the Cabotage Bill, the Merchant Shipping Bill and the Nigerian Maritime Administration and Safety Agency (NIMASA)Bill.[65] The current session of the National Assembly ends in June 2023, and we hope that the Senate passes the bills and that the bills receive presidential assent before the end of the session. However, where the bills are not passed before the end of the current session of the National Assembly, they will have to be reintroduced once the next session of the National Assembly is constituted.

c Shipbuilding and ownership: as previously mentioned, the government has taken some very definite steps to promote Nigerians owning ships and also to encourage indigenous

62 The Listed Areas are areas where war risk insurance – a special insurance cover – is required to be taken out by charterers and owners of vessels because said waters have been recorded to be unsafe for sailors and vessel owing to the high incidences of piracy and other sea crimes. Unfortunately, Nigeria's Listed Area status makes it much more expensive for vessels to sail to and from Nigeria because they need to procure war risk insurance.

63 The JWC comprises of underwriting representatives from both the Lloyd's and International Underwriting Association company markets, representing the interests of those who write marine hull war business in the London market. For further information on the JWC, see https://www.lmalloyds.com/lma/jointwar.

64 Blessing Ibunge (2022). 'Nigeria to Resubmit Request for Removal from War Risk Insurance Status', https://www.thisdaylive.com/index.php/2022/12/10/nigeria-to-resubmit-request-for-removal-from-war-insurance-risk-status/, accessed 13 January 2022.

65 Godwin Oritse, 'House passes 3 major maritime bills for opertaonal efficiency', (12 January 2023) *Vanguard*, https://www.vanguardngr.com/2023/01/house-passes-3-major-maritime-bills-for-operational-efficiency/amp/.

shipbuilding in the country. NIMASA has already made some very definite steps in ensuring that this is a reality. Therefore, we expect that greater implementation of fiscal incentives in 2023 for the Nigerian maritime industry will continue to promote this.

d Increased implementation of the process Manual on Port Operations: the Process Manual on Port Operations was launched in December 2020 by the Vice President of Nigeria. The Manual outlines the implementation chain and provides clarity on the time required for each process. To date its implementation has not been far-reaching, but its impact has lead to the efficiency and reduction of corruption and to the elimination of bureaucratic bottlenecks faced by port users.[66]

e The commissioning of the Lekki Deep Sea Port: the Lekki Deep Sea Port was commissioned in January 2023. It is Nigeria's first deep sea and fully automated port. It is expected to accommodate the world's largest ships and reduce cargo wait time from 50 days and beyond to two days. It is predicted that this will make Nigeria a regional hub and boost the country's GDP as it will allow for an increase of local, regional and international trade with fewer drawbacks.[67]

f The Dangote Refinery: it is proposed that the Refinery may affect the shipping industry negatively because there will be less demand for exporting crude oil for refining overseas and importing it; hence, shipping activities in this regard will be greatly reduced as the Refinery is expected to produce about 650,000 barrels per day. However, it is opined that the Refinery will increase the likelihood of more oil exports to African and other countries in the world and encourage indigenous shipping activities.

66 A downloadable copy of the Port Process Manual can be accessed at https://nigerianports.gov.ng/wp-content/uploads/2021/03/Port-Process-Manual-2020.pdf.

67 Ayodeji Olukoju, 'Nigeria's new Lekki port has doubled cargo capacity, but must not repeat previous failures', *The Conversation*, https://theconversation.com/nigerias-new-lekki-port-has-doubled-cargo-capacity-but-must-not-repeat-previous-failures-197426.

Chapter 32

PANAMA

Juan David Morgan Jr[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The Panama Canal (the Canal) is considered one of the seven wonders of the modern world. Because of the Canal, Panama is at the crossroads of some of the world's most important shipping lanes. The Canal has been serving the shipping industry since its inauguration in 1914 and, particularly since the Torrijos-Carter Treaties of 1977, has been a catalyst in the development of the country. In 1914, 1,000 ships passed through Canal; it now handles up to 14,500 transits each year. The Canal is run by the Panama Canal Authority (PCA), a Panamanian government agency, which took over from the Panama Canal Commission, an agency of the US government, in 2000.

Since the PCA took over the administration of the Canal, waiting time for passing through the Canal has fallen substantially and there are now fewer accidents per year. Revenues from the Canal have risen exponentially. For the fiscal year of 2022, the Canal registered 14,239 transits, totalling 518.8 million PC/UMS tonnes,[2] representing an increase of 2.12 million PC/UMS tonnes compared to the tonnage of the previous fiscal year and amounting to more than US$3 billion in revenue.

In 2007, after it was approved by a national referendum, Panama embarked on a US$5.3 billion expansion project. The expanded Canal was officially inaugurated on 26 June 2016. Its main feature is the addition of a much bigger set of locks on the Atlantic and Pacific ends of the waterway, more than doubling its cargo capacity. The size of the new locks is 1,400 feet long (a 25 per cent increase) by 180 feet wide (a 51 per cent increase), with a draught of 60 feet (a 26 per cent increase). Traditional Panamax vessels have a maximum deadweight tonnage (DWT) of 80,000, and Neopanamax vessels are of up to 170,000 DWT. The biggest container vessels that could transit the Canal before its expansion could carry up to 5,000 twenty-foot equivalent units (TEUs), whereas those that are now able to transit can carry up to 14,000 TEUs. The expansion project also included deepening the Gatun Lake and the access channels at both sides of the Canal, as well as deepening, widening and straightening the Gaillard Cut. The expanded Canal reached its sixth anniversary with more than 17,000 transits. The expansion has bolstered the growth of the maritime sector of Panama's economy and generated record profits for the country.

The port system at both ends of the Canal, particularly the privately operated container ports, is efficient and constantly growing. The vast majority of cargo that comes to Panama is for transshipment purposes. There are currently five privately operated container ports at the

1 Juan David Morgan Jr is a partner at Morgan & Morgan.

2 The Panama Canal/Universal Measurement System (PC/UMS) is based on net tonnage, modified for Panama Canal purposes.

ends of the Canal, with a railway linking four of them; in effect, they constitute an integrated logistical port system. Furthermore, new oil terminals have recently been or are being built at both ends of the Canal. In the western part of the country, there is an oil pipeline linking the Atlantic and Pacific oceans, with port terminals capable of handling very large crude carriers. It has been in operation since 1982 and new storage tanks have been built at both ends of the pipeline.

The maritime sector in Panama has grown substantially, fuelled by the Canal. As of 2022, the Panama Chamber of Shipping had more than 200 members, whereas 40 years ago it had fewer than 30. These include regional offices of shipping companies, shipping agents, bunkering companies, shipyards, port operators, dredging companies, surveying companies, banks and insurance companies. According to the Panama Maritime Authority (PMA), Panama closed 2022 with 8,650 registered ships, totalling more than 245 million gross tonnage.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Panama has a unicameral National Assembly with 71 legislators elected every five years. The main pieces of maritime legislation are the Organic Law of the PCA and the Organic Law of the PMA. The Canal has a special chapter in Panama's Constitution, the objective of which is to keep it as far away as possible from local politics. Panama has ratified most of the International Maritime Organization (IMO) conventions. Their implementation and enforcement are carried out by the PMA, which has directorates dealing with the merchant marine, seafarers, and ports and auxiliary industries. Maritime substantive law is contained in the Law on Maritime Commerce (LMC), passed in 2008 by the National Assembly to replace Book II of the Code of Commerce, enacted in 1917, which had hitherto contained Panama's substantive maritime laws. The Code of Maritime Procedure (CMP) regulates the two maritime courts operating in Panama and contains the procedural laws applicable to all maritime cases. The CMP has a section that incorporated the Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC Convention 1976) into domestic law. The contents of the Protocol to amend the LLMC Convention 1996 (the LLMC Protocol 1996) have not been passed into law.

III FORUM AND JURISDICTION

i Courts

Two maritime courts have exclusive jurisdiction over all maritime judicial claims filed in Panama. Appeals are heard by the Court of Maritime Appeals, which comprises three justices. This is the only appeals court for maritime cases. After the relevant appellate briefs are submitted, there is a hearing in the Court of Maritime Appeals for the parties to present their cases before the justices. Under Article 19 of the CMP, the maritime courts have exclusive jurisdiction to hear and adjudicate cases that arise from within the territory, or the territorial waters, of the Republic of Panama. As per Article 19, the maritime courts also have jurisdiction to adjudicate cases arising outside the Republic of Panama when:

a a vessel or other property of the defendant is arrested in Panama;
b the defendant is found within Panama;
c the involved vessels are Panamanian;
d Panamanian substantive law is applicable to the dispute; and

e the parties submit themselves, either expressly or tacitly, to their jurisdiction.

Under Article 22 of the CMP, cases arising out of Panama may be stayed in favour of a foreign forum when the court considers that the Panamanian forum is not convenient, when the parties have expressly agreed by contract to submit to the jurisdiction of a foreign forum or arbitration tribunal, and when the dispute has previously been submitted to a foreign arbitration tribunal and court and a decision is pending. The CMP was amended in 2009 to, inter alia, make it more difficult to stay an action in favour of a foreign forum when the relevant forum selection clause is not contained in a contract that has been negotiated by the parties. Article 22(3) of the CMP expressly states that pro forma or adhesion contracts are not considered 'previously and expressly negotiated'. Two Supreme Court decisions have interpreted the modified Article 22(3) of the CMP in the context of forum-selection clauses in contracts of carriage evidenced by bills of lading. In a decision dated 30 May 2012 in *Mund & Fester GMBH & Co KG v. 'Nagoya Bay' and Nagoya Bay Inc*, the Supreme Court affirmed a ruling of the Second Maritime Court that denied a motion to stay an action based on the standard arbitration clause contained in the 1994 Congen Bill Form, which incorporated, by reference, the arbitration clause in the charter party. In a decision dated 6 January 2014 in *Harvest Fresh Growers Inc v. Maersk Line*, the Supreme Court affirmed a ruling of the First Maritime Court that denied a motion to stay an action in favour of the High Court of England and Wales based on a forum-selection clause in a standard liner bill of lading. The lower court decision was affirmed, even though the parties had negotiated a service contract that incorporated the standard terms of the Maersk bill of lading. In both cases, the Supreme Court found that there was no evidence of a prior negotiation by the parties of the corresponding forum-selection clauses. It must be said that the reason behind the legislative amendment to Article 22(3) of the CMP was to prevent stays of action based on forum-selection clauses in bills of lading. If the relevant forum-selection clause is contained in a charter party or memorandum of agreement, which are normally actively negotiated by the parties, the Panamanian courts would tend to enforce it.

Article 566 of the CMP contains conflict-of-laws rules. In general, in contractual claims, the maritime courts apply the substantive laws agreed by the parties to the contract to resolve the dispute. In tort claims, the substantive law of the flag state of the relevant vessel, or the laws of the place where the tort occurs, are applied to resolve disputes.

ii Arbitration and ADR

The Maritime Law Association of Panama and the Panama Chamber of Shipping joined forces to create a maritime arbitration centre (CECOMAP). The rules and a table of fees were approved for the CECOMAP and an agreement with one of the established arbitration centres in the Chamber of Commerce or the Construction Chamber is being worked on for the CECOMAP to be able to use its facilities. The CECOMAP is intended to be an arbitration centre in which the growing number of companies in the Panama Chamber of Shipping can resolve their disputes efficiently and cost-effectively. The eventual aim is that the CECOMAP becomes an option for dispute resolution for the whole of Latin America.

iii Enforcement of foreign judgments and arbitral awards

Final foreign judgment and arbitration awards can be enforced in Panama. Before enforcement, the party seeking enforcement of its judgment or award must have it recognised and declared enforceable by the Fourth Chamber of the Supreme Court of Panama through *exequatur*

proceedings. These proceedings normally last between six months and one year, depending on the opposition presented by the judgment or award debtor, who must be notified of the *exequatur* proceedings and may file opposition pleadings and evidence. The general rule is that a final judgment or award would be recognised and then enforced in Panama if the action that resulted in the judgment or award was properly and personally served on the defendant, so that it was not rendered by default, and if the obligation for which the judgment and award were sought would be considered a legal obligation in the Republic of Panama.

The only additional requirement is that of reciprocity. As per Article 424 of the CMP, if the judgment or award comes from a country that would not recognise judgments or awards rendered in Panama, Panama would not recognise judgments or awards from that country.

In 1982, Panama ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). This makes the recognition and enforcement of arbitration awards issued in countries that are also parties to the Convention simpler and somewhat faster than a normal *exequatur* for recognition of a foreign judgment.

One important feature of enforcing a maritime foreign judgment or arbitration award is that the maritime courts may attach assets of the judgment or award debtor, and thereby obtain security for the enforcement while the *exequatur* proceedings are pending in the Supreme Court. This is important because, much of the time, such assets (e.g., ships, cargoes and bunkers) would be passing through the Canal or calling at Panama ports for only a brief period.

IV SHIPPING CONTRACTS

i Shipbuilding

The shipbuilding industry is not well developed in Panama. Ships built in Panama are basically small craft used in local trade or the local maritime service industries. There is one shipyard in Panama with a current Panamax-size dry dock, which is located at the Pacific entrance to the Panama Canal: MEC Shipyard. The facility is used for maintenance and repair of vessels, rather than shipbuilding. Ship repairers have standard form contracts, which may be amended by the parties to accommodate their needs.

ii Contracts of carriage

Chapter I of Title II of the LMC contains substantive maritime law on contracts of carriage. Although Panama has not ratified any of the international conventions dealing with contracts of carriage, Chapter I basically incorporates the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules), with some minor additions. Article 58 of the LMC contains the same defences available to a carrier as under Article IV, Rule 2 of the Hague-Visby Rules, including the 'act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation and management of the ship'. Article 63 of the LMC determines how any loss to cargo interests is to be calculated and includes the same limitations of liability to the carrier by package (666.67 special drawing right (SDRs) per package) and weight (2 SDRs per kilogram). Article 57 contains the concept of when a deviation would be considered a 'reasonable' deviation. Article 58 provides liability to the carrier for damage or loss caused by delay, unless the delay was caused by one of the exempted perils. It also establishes that, unless the parties have agreed on a specific duration, there is a delay when the goods have not been delivered in the designated port or place within a 'reasonable' time. The duties of the shipper

are contained in Section 3 of Chapter I and again mirror those of the Hague-Visby Rules. In general, the LMC transposes the Rules to domestic maritime law, except that it provides for carrier liability for loss or damage caused by delay.

Although very modern legislation exists on contracts of carriage, the vast majority of contracts of carriage cases in Panama's maritime courts are not resolved in accordance with Panamanian substantive law. Article 566(10) of the CMP provides that the applicable substantive law to determine the effects of contracts of carriage are those agreed by the parties and, only when there is no governing-law clause, by the laws of the place of shipment. Since most contracts of carriage nowadays contain a governing-law clause, and it is only very seldom that the parties have agreed on Panamanian substantive law, cargo claims almost invariably end up being litigated in accordance with the substantive laws of other countries.

Article 244 of the LMC contains the list of claims that give rise to maritime liens on ships or 'preferred maritime credits'. The list contains 13 types of claims. Contract-of-carriage claims can give rise to a maritime lien against the carrying ship under items 7 and 12. Claims that give rise to liens on cargo are listed in Article 248 of the LMC. Among other things, contract-of-carriage claims for unpaid freight and contributions to general average give rise to liens on cargo in favour of the carrier that may be exercised by possession.

iii Cargo claims

Of the claims filed in Panama's maritime courts, cargo claims are the most common. Most involve damage to containerised cargo, but there are also bulk cargo claims. Claims for damage to fruit cargoes carried from Panama and Latin America to Europe and the United States are fairly common. Under Panamanian substantive law, whichever party suffered the loss – either the shipper or the consignee – can sue the contractual carrier, the actual carrier or the servant of the carrier that was entrusted with the care and custody of the cargo when the damage occurred. Subrogated cargo underwriters have title to sue. Under Article 202 of the LMC, upon payment by an insurer to its insured, the insurer is vested with title to sue by operation of law; a formal assignment of rights is not required. In Panama, it is normally the cargo underwriter who files suit; however, when the claim is subject, for instance, to English law, a prudent litigator would always include the consignee under the bill of lading as a claimant to avoid title-to-sue issues under that law. The Panamanian courts uphold the incorporation by reference of charter party clauses into contracts of carriage evidenced by bills of lading. The leading case on incorporation by reference is *Agrowest SA, COMEXA & Dos Valles SA v. Maersk Line*. In a decision dated 6 February 2006, the Supreme Court held that an arbitration clause in a service contract could be incorporated by reference into contracts of carriage. Since then, the maritime courts incorporate, by reference, charter party terms into contracts of carriage. However, although the governing-law clause in a charter party may be incorporated by reference into the contract of carriage, a forum-selection clause incorporated by reference may be ineffective to stay an action in favour of the contractually selected forum, unless negotiation between the parties can be evinced (see discussion of *The 'Nagoya Bay'* in Section III.i).

iv Limitation of liability

Panama has incorporated the LLMC Convention 1976 into domestic law, without the LLMC Protocol 1996, almost verbatim. Procedurally, the limitation action is regulated by Articles 517 to 529 of the CMP.

The following are some of its most important features:

a the action must be commenced within six months of the receipt of a claim in writing by the person seeking to limit;
b the limitation fund may be constituted not only by a cash bond but also through a guarantee issued by a bank or an insurance company licensed in Panama; and
c the party seeking to limit may also petition the court for a finding of no liability.

For oil pollution claims, limitation of liability is regulated by the International Convention on Civil Liability for Oil Pollution Damage 1969 (the CLC Convention) and its 1992 Protocol.

Cargo claims may be limited in accordance with the package and weight limitation of the Hague-Visby Rules, which have been incorporated into the LMC.

V REMEDIES

i Ship arrest

With more than 14,000 transits of the Canal per year and the busiest container ports in Latin America, Panama is an ideal place to arrest not only vessels but also cargoes, bunkers and any other assets that may enter the jurisdiction. The arrest procedure is fairly simple, and the maritime courts are open 365 days a year and 24 hours a day for urgent matters, such as arrests or the lifting of arrests. There are three types of arrests contemplated in the CMP:

a arrests merely to secure an *in personam* claim: in this type of arrest, the defendant is a company with operations in Panama and that can be served with process within the court's jurisdiction. The claimant or arrestor must post between 20 and 30 per cent of the arrest amount as counter-security with the court;
b arrests to confer jurisdiction to Panamanian maritime courts over the defendant: this type of arrest has the effect of serving the complaint on the defendant, as well as securing the claim. Defendants are companies that cannot be served with process within Panama – normally foreign companies with no operations in Panama or Panamanian companies that do not have any operations within Panama. Only US$1,000 is required as counter-security, irrespective of the claim amount, but *prima facie* evidence of the claim and its quantum must be filed with the complaint and arrest petition; and
c arrests to enforce a maritime lien or other *in rem* right: in this type of arrest, the defendant is not a person but the vessel itself. To effect these arrests, the claimant must have a claim that gives rise to a maritime lien or other *in rem* right (for instance, a statutory right *in rem*) against the vessel. The counter-security is US$1,000 irrespective of the claim amount, but the claimant must provide the same *prima facie* evidence requirement as in point (b).

Most arrests in Panama are of the types in points (b) and (c), above. When the complaint and arrest petition are filed, the corresponding maritime judge reviews the *prima facie* evidence and, if he or she considers that it sufficiently supports the claim and its quantum, immediately issues the arrest order. The court marshal then serves the arrest order on the vessel, normally when at anchor while waiting to transit the Canal at either Balboa or Cristobal anchorages, or at any of the ports. If feasible, an arrest order may also be served by helicopter on the target vessel, provided the vessel is within Panamanian territorial waters. When the target vessel is the vessel in respect of which the claim has arisen, the claimant may also request an

inspection of documents on board the vessel to obtain evidence. Inspection of documents is particularly important in arrests of bunkers or cargoes, to confirm that the defendant owns the bunkers or cargoes.

An arrest cannot be effected in Panama to secure proceedings in another jurisdiction. It is a requirement that substantive proceedings be commenced in Panama simultaneously with the arrest petition; however, the case can later be stayed in favour of a foreign forum. The security obtained through the arrest can be replaced with security in the foreign forum, or the security in Panama can be maintained in the maritime courts to the order of the foreign forum.

Amounts to be posted as security may be consigned to the court in the following forms:

a a guarantee certificate drawn on cash from Panama's central bank (Banco Nacional de Panama);

b a letter of guarantee from a bank operating locally;

c a guarantee issued by a local insurance company; or

d any other form of security on which the parties may agree.

Protection and indemnity letters of undertaking, which fall under point (d), above, are probably the most common form of security for the lifting of arrests in Panama; however, they are not accepted as a matter of law and the claimant must consent to this form of security before the maritime court will accept it to lift an arrest. The amount of security is determined by the quantum of the claim, the legal interest and the provisional judicial costs (including attorneys' fees) set by the maritime judge. If the claim amount exceeds the value of the ship, the security may be limited to that value. However, if the parties cannot agree on the value of the ship, the court will have to order an appraisal, which could cause a substantial delay in the lifting of the arrest. Once adequate security is posted, the maritime court will promptly issue the order lifting the arrest, which the marshal of the court will serve on the master of the vessel, returning the documents removed from the vessel and removing the custodians from the vessel. The whole process could last from one to several hours, depending on the location of the vessel (Balboa or Cristobal).

In the event of a wrongful arrest, the CMP provides the aggrieved party with summary proceedings to lift the arrest. This is called *apremio*, consisting of a special motion to lift the arrest on showing sufficient evidence that the arrest was wrongful, which, under the CMP, means it was effected:

a over property (e.g., ship, cargo and bunkers) not belonging to the defendant;

b in contravention of a previous express agreement by the parties to refrain from arrests; or

c when a maritime lien has been extinguished or is inexistent (*in rem* claims).

Upon the filing of an *apremio* motion with the required supporting evidence, the maritime judge will immediately consider and resolve the motion. If the motion is admitted, the judge will call the parties to a special hearing to be held in the shortest possible time (usually within one day), in which the claimant would have the burden of proving that the arrest was not wrongful and should therefore be maintained. If it fails to carry that burden of proof, the maritime judge will order the immediate release of the vessel or other property arrested. The claimant may appeal the decision but this does not prevent the lifting of the arrest.

ii Court orders for sale of a vessel

A prejudgment judicial sale of a vessel can be, and normally is, ordered when it becomes apparent that the defendant will not, or cannot, lift the arrest. When the judge orders the judicial sale of a vessel, he or she appoints an appraiser to issue a report on the market value of the vessel. The court then sets three dates for the judicial auction of the vessel by the marshal. On the first date, the lowest bid may be no lower than three-quarters of the appraised value of the vessel. If there are no bidders in the first auction, the lowest bid in the second auction may be half of the appraised value of the vessel. If the vessel is not sold in the second auction, there is no minimum bid in the third auction. The vessel is sold by the marshal to the highest bidder. Usually, vessels sell for less than their appraised value.

VI REGULATION

i Safety

Panama has passed the International Convention for the Safety of Life at Sea 1974 (SOLAS) into law; this is the most important legislation on safety for Panamanian merchant vessels. It is implemented by the PMA and it relies on its recognised organisations (ROs) for the certification of the merchant vessels registered in Panama. The International Regulations for Preventing Collisions at Sea 1972 (COLREGs) have also been passed into law in Panama. They apply to Panamanian merchant vessels and are the 'rules of the road' for navigating Panamanian territorial waters. However, the PCA has adopted its own COLREGs (PCA COLREGs) with certain variants from the IMO COLREGs, which apply to all vessels in Canal waters. These include the designated anchorage areas at both ends of the Canal (Balboa and Cristobal). The PCA COLREGs are almost identical to their IMO counterparts, but have slightly different regulations dealing with instances when the master is required to be on the bridge, navigation in the Gaillard Cut and through the locks, and lookout duties.

ii Port state control

The port state control (PSC) entity in Panama is the PMA. The PMA's Directorate of Merchant Marine and its Directorate of Ports and Auxiliary Industries execute random inspections of merchant vessels of any nationality entering Panamanian waters. Panama subscribes to and is part of the Viña del Mar memorandum of understanding, which groups the maritime authorities of South America, Mexico, Panama and the Caribbean.

iii Registration and classification

Panama has the biggest open registry in the world. Shipowners of any nationality – except those from countries to which the United Nations has applied restrictions (currently North Korea and Iran) – may register their vessels in Panama. The procedure is very quick and simple. The shipowner just needs to complete a form with the ship's particulars and present it to the Directorate of Merchant Marine of the PMA, with a copy of the minimum safe manning certificate from the previous registry – newbuilds are exempted from the latter requirement. Upon payment of the registration fees and annual tonnage taxes, which vary according to the ship's type, the vessel is issued a provisional patent of navigation, which is valid for six months.

The registration procedure can be carried out in Panama through a lawyer or at one of the many Panamanian consulates in key ports and maritime centres throughout the world. A

lawyer must always be appointed as the vessel's legal representative before the PMA. After the provisional registration, the shipowner has six months to complete permanent registration of the vessel. To do so, title over the vessel must be duly registered in the Registry of Titles and Mortgages of the PMA, the deletion certificate from the previous registry must be filed before the PMA and the corresponding technical certificates evidencing compliance with the various IMO conventions must be issued by the classification society or RO selected by the shipowner. For fishing and fishing support vessels (reefers that carry fish), a certificate of compliance from the Authority of Aquatic Resources of Panama must be obtained before the permanent registration of the vessel can be accomplished.

The permanent patent of navigation, issued after the foregoing requirements are met, is valid for five years, after which an application for renewal can be filed. Vessels that are continually detained by the PSC of the various memoranda of understanding can be deregistered by Panama. Upon receiving the corresponding PSC reports, the Director of Merchant Marine can commence an *ex officio* cancellation process, which may lead to the vessel's cancellation from the registry, unless the vessel is mortgaged and the mortgagee bank, which must be served with notice of the process, appears before the Directorate of Merchant Marine and opposes the cancellation. Technical certificates evidencing compliance with the various IMO conventions are issued by Panama through the classification societies and ROs authorised by Panama to issue certificates on its behalf. All members of the International Association of Classification Societies (IACS) are authorised by Panama. There are also a number of non-IACS ROs authorised by Panama. Most are Panamanian but some are foreign ROs authorised by Panama. There have not been any cases filed against classification societies or ROs in Panama's maritime courts but, in principle, there is nothing in Panamanian law that would exempt them from liability for negligence in the issuance of certificates, if the negligence were to cause damage to shipowners or third parties.

On 17 November 2017, Panama and China entered into a Maritime Transport Agreement in Beijing that grants most-favoured-nation treatment to vessels under the Panama flag calling at Chinese ports. This means that Panama-flagged vessels will be charged preferential rates in Chinese ports and thus reduce their operational expenses.

Panama completed the required internal approval process on 27 March 2018 when the law that enacts the Maritime Transport Agreement, Law No. 24 of 20 March 2018, was officially published. The Agreement came into force on 17 May 2018.

iv Environmental regulation

Panama has ratified the International Convention for the Prevention of Pollution from Ships 1973 (as modified by the Protocol of 1978) (MARPOL (73/78)), which is the primary legislation regulating pollution from ships. The PCA also has its own regulations in place to prevent pollution from ships and to sanction those ships that cause oil pollution while transiting the Canal. For severe offences, PCA fines can reach US$1 million. Panama also has a Ministry of the Environment, whose jurisdiction includes Panamanian territorial waters. Normally, its focus is on pollution events on land but it could also fine any vessels causing pollution. In 2002, the *Sydney Star* was in a collision with the *Royal Ocean* in Cristobal. As a result, one of its bunker tanks was ruptured and it spilled bunkers at the north entrance of the Canal. Both the PMA and the PCA fined the vessel. It was ruled by the Supreme Court that both entities could fine the vessel independently of each other, but the PMA did reduce its fine, taking into account that the PCA had already levied a fine of US$25,000 against the vessel.

v Collisions, salvage and wrecks

Collisions and salvage are regulated in Chapters I and II, respectively, of Title III of the LMC. In general, for a salvor to collect any salvage award, the salvage must be at least partially successful.

vi Passengers' rights

Panama ratified the Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974 (the Athens Convention) and the Protocol of 2002 on 7 November 2013. There have not yet been any cases litigated in the maritime courts to which the Athens Convention has been applied.

vii Seafarers' rights

Panama ratified the Maritime Labour Convention 2006 (MLC) in January 2009. There have been no detentions in Panama resulting from a breach of the MLC. In addition to the MLC, Panama has a Maritime Labour Law (MLL), passed in 1998, which regulates all labour issues not dealt with in the MLC. There is a minimum compensation table for seafarers who have suffered accidents on board Panamanian vessels established by virtue of Article 82 of the MLL. The maximum compensation under this table is US$50,000 in the event of death or permanent disability; however, this compensation is considered of a labour nature and seafarers could also sue the shipowner for civil liability, in which case they must prove the negligence of the shipowner in the causation of the accident. Any payment under the compensation table would be deducted from any damages arising from any civil liability. Under Article 92 of the MLL, the shipowner and the seafarer may agree on any law and jurisdiction other than Panama in their contracts. In a judgment dated 26 March 2006, in *Edwin Cabungcag et al v. Diamond Camellia SA & Mitsui OSK Lines*, the Supreme Court of Panama upheld a decision from the lower labour courts dismissing for lack of jurisdiction a claim arising on board a Panamanian vessel because the parties had agreed on Philippine law and jurisdiction in the applicable labour contract. Panama's two maritime courts have jurisdiction for any civil claims against a shipowner, whereas labour claims against shipowners of Panama-flagged vessels must be filed in Panama's labour courts.

VII OUTLOOK

After 10 years of the establishment of the PMA, Panama enacted Law No. 57 of 6 August 2008 (Law No. 57), commonly referred to as the Law of the Merchant Marine. The purpose of Law No. 57 was to collate all guidelines, rules and procedures that had been enacted concerning the registration of vessels. In that same year, Law No. 56 (the Ports Law) was passed to establish the rules and guidelines to be followed within port terminals, whether administered by the government or by private entities. The Ports Law also regulates the maritime concessions authorised by the PMA and the auxiliary maritime services (AMS).

Notwithstanding all these maritime laws, Panama was missing one particular and important piece of law that is found in many other maritime nations. This law was one through which not just the AMS within the jurisdictional waters of Panama were regulated but also maritime cabotage. This new Cabotage Law also encompasses other relevant aspects pertaining to the safety and security of inland water transportation.

After much deliberation within the main sectors of the Panamanian economy, the Cabotage Law came into force in December 2021. The Cabotage Law regulates cabotage and the AMS within the jurisdiction of Panama. However, it also establishes:

a the minimum safety requirements for vessels navigating inland waters;
b guidelines for inspections that should be carried out on every vessel that calls at a Panamanian port; and
c how the PMA should proceed with shipwrecks located in our waters.

The Law defines cabotage as the 'maritime transportation of cargo, passengers and services, with origin and final destination within the jurisdictional waters of the Republic of Panama, for which an operating license is required' and AMS as 'a complementary service to maritime transport, cargoes, vessels, crew members, passengers or port terminals and to exploitation of marine resources, oceanography, aquaculture, and for which an operation license will be required'.

Law No. 57, the Ports Law, the CMP and now the new Cabotage Law establish a legal framework through which Panama, as an eminently maritime nation, can further develop its economy, motivate its citizens to invest in the maritime industry, safeguard its inland waters and become a forum for maritime disputes by being open to the world and protecting its national shipowners in the same manner as other maritime nations.

Chapter 33

PARAGUAY

Juan Pablo Palacios Velázquez[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The shipping industry in Paraguay has been growing steadily, mainly as a consequence of the significance that agribusiness has for the local economy and the need to transport these commodities overseas.

Paraguay's economy is dependent on foreign trade[2] – it is one of the five largest soya exporters in the world;[3] in the past 25 years, the major international agri-commodity companies have settled in the heart of South America[4] and, with them, their shipping arms. Traditional international carriers, such as MSC, P&O Maritime, Imperial Shipping and CMA CGM, and South American shipping companies such as ATRIA (formerly UABL), Mercopar and Hidrovias, have invested heavily and are fully operational in Paraguay. Similarly, local carriers, led by Navemar and Copanu, play their part in meeting the continuous demand for hold space for Paraguayan products.

The registered fleet size currently authorised by the Merchant Shipping Authority of Paraguay[5] is of 2,327 vessels, of which 2,192 are barges. Of these totals, 90 per cent of the vessels and 80 per cent of the barges fly the Paraguay flag. The rest of the ships operating in Paraguay are registered under Argentinian, Bolivian, Brazilian and Uruguayan flags.[6] The Paraguay–Paraná waterway – a system of rivers that starts in Puerto Cáceres (Brazil), passes through Bolivia, Paraguay and Argentina, and ends in Nueva Palmira (Uruguay) – is the regular route used by the Paraguayan fleet.

Paraguay's most important ports are concentrated in Asunción, Villeta, San Antonio and Encarnación, cities that are strategically located for river connections to the sea through Argentina, Uruguay and Brazil. Virtually all the cargo that leaves Paraguayan ports through the waterway in river carriers is transshipped to Argentinian, Uruguayan and – to a lesser extent – Brazilian ports, and from there transported by sea carriers to their final destinations.

With the investment of carriers, the shipbuilding industry has been flourishing in Paraguay. Local companies such as Astillero Chaco SA, La Barca and Astillero Aguape SA remain a valid alternative to Argentinian and Brazilian shipyards.

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2 www.worldbank.org/en/country/paraguay/overview.

3 www.capeco.org.py.

4 http://cappro.org.py.

5 Created by Law No. 429 in 1957.

6 Source: Centro de Armadores Fluviales y Maritimos (CAFYM), the shipowners' union in Paraguay.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Book III of the Code of Commerce, 'Rights and obligations arising from navigation', was the only one in this old Argentinian statute (1889) not repealed by the current Paraguayan Civil Code.[7] It was adopted by Paraguay in 1903 and contains the legal framework for private maritime law. Both dry and wet domestic shipping is controlled by this law, which contains provisions relating to ships, shipowners, charterers, captains, crew, contracts of affreightment, charter parties, bills of lading, collisions, shipwrecks, salvage, cargo claims, general average, ship mortgage and maritime liens.

The Paraguay–Paraná River Transport Agreement adopted by Law No. 269/1993 is an international agreement entered into between Argentina, Bolivia, Brazil, Paraguay and Uruguay to regulate international river transport through the most important waterway in South America. The agreement contains five additional protocols on customs matters, navigation and safety, insurance, equal opportunities for increasing competitiveness and dispute resolution.

International carriage of goods by sea is governed by the UN Convention on the Carriage of Goods by Sea 1978 (the Hamburg Rules), adopted in Paraguay by Law No. 2614/2005.

In the administrative sphere, the most important statutes are the Code of Fluvial and Maritime Navigation, adopted in Paraguay by Law No. 476/1957, and the Capitanias Rules, adopted by Law No. 928/1927.

Other key international legislation adopted by Paraguay includes the following:

a the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910 (the Collision Convention 1910);

b the International Convention on Civil Liability for Oil Pollution Damage 1969, replaced by the 1992 Protocol (the CLC Convention);

c the International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision and Other Incidents of Navigation 1952 (the Criminal Collision Convention 1952);

d the International Convention Relating to the Arrest of Sea-Going Ships 1952 (the 1952 Arrest Convention);

e the United Nations Convention on the Law of the Sea 1982 (UNCLOS);

f the International Convention for the Safety of Life at Sea 1974 (SOLAS); and

g the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation 1988 (SUA).

III FORUM AND JURISDICTION

i Courts

There is no admiralty court or all-encompassing special jurisdiction in Paraguay for shipping disputes, which are normally filed in the ordinary civil and commercial courts. Admiralty accidents, such as salvage, wrecks and collisions, could also lead to procedures in criminal courts to ascertain criminal liability. Furthermore, there would normally be an open investigation to determine the administrative fault of the captain and crew before the Paraguayan coastguard (General Naval Prefecture) in the administrative court.

7 Law No. 1183/1985.

Domestic cargo claims – involving transport between Paraguayan ports – must be filed within a year, counted from the day on which the goods were delivered or should have been delivered. If the dispute concerns international river carriage, the time bar for initiating the claim is 18 months, whereas if the cargo claim concerns an international maritime transport, the time bar is the same as that contained in the Hamburg Rules, namely two years.

ii Arbitration and ADR

Paraguay does not have a specific maritime arbitration court, nor does it have any special procedures. The arbitration and mediation proceedings are normally directed to the Paraguayan Centre of Arbitration and Mediation, a body of the Paraguayan Chamber of Commerce,[8] where specific and complex commercial disputes are resolved.

Within the legal framework of the Arbitration and Mediation Law No. 1870/2001, the Centre has developed its own rules of procedure, which are far more flexible than the procedural law that regulates ordinary proceedings in the courts.

The vast majority of bills of lading and charter parties drafted by local carriers refer the resolution of disputes to the ordinary courts, which is why there is not a great deal of arbitration activity relating to shipping disputes in Paraguay.

International carriers normally prefer to litigate in foreign jurisdictions with legislation that is friendlier to shipowners. Hence, it is not unusual to find clauses selecting foreign courts or moving arbitration proceedings abroad. Time bars on starting arbitral proceedings are the same as those noted in Section III.i.

iii Enforcement of foreign judgments and arbitral awards

Local courts do not impose restrictions on the enforcement of foreign judgments and arbitral awards; however, the enforcement of foreign judgments is regulated by Book III, Title IV, Chapter II of the Civil Procedural Code (Law No. 1337/1988) and the enforcement of foreign arbitral awards is governed by Chapter VIII of Law No. 1879/2002 on Arbitrage and by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention).

Applications for the enforcement of foreign judgments and arbitral awards have to be made before the civil and commercial court of first instance of the domicile of the person against whom the award is meant to be executed, or in the place in which the property of the defendant is located. The party that wants to enforce the judgment or the award has 10 years to do so,[9] counting from the day of the ruling.

IV SHIPPING CONTRACTS

i Shipbuilding

Local shipyards have grown significantly in the past 10 years, with a lot of carriers buying new barges to increase their fleets as a result of the high demand for space on the Paraguay–Paraná waterway.

8 www.camparaguay.com.

9 Civil Code, Article 659b; Civil Procedural Law, Articles 526b and 534; Law No. 1879/2002, Article 48.

The contract to build a ship is neither a typical nor a nominate contract in Paraguayan law. In this sense, what the parties have specifically agreed, exercising their freedom of contract, with the general principles of Book III of the Civil Code (which regulates the law of contracts) will rule shipbuilding contracts.

Law No. 928/1927 obliges carriers to notify and obtain permission from the General Naval Prefecture for the construction of any ship. The General Naval Prefecture is in charge of navigational safety and issues most of the statutory certificates that are needed to navigate, polices the rivers and is responsible for enforcing navigational rules.[10] In that role, the General Naval Prefecture is competent to monitor the construction of a ship that is going to be incorporated into the local fleet.

ii Contracts of carriage

Paraguay has two sets of rules in force: one for international carriage of goods by sea and the other for the domestic carriage of goods by river.

Until 2005, the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (the Hague Rules) was in force in Paraguay by virtue of Law No. 1025/65. This was rather curious as Paraguay is clearly considered a cargo-owning country rather than a shipping force. In 2005, Congress adopted a radical change by approving the Hamburg Rules through Law No. 2614/2005. The Hamburg Rules, which are friendlier to cargo owners, are currently in force for international carriage of goods by sea. In addition to the Hamburg Rules, the carriage of goods by river is governed by Book III of the Code of Commerce, which contains detailed provisions relating to contracts of carriage.

The Code of Commerce establishes a strict liability regime, with few exceptions in favour of the carrier. One could easily conclude that the legal framework of the Code of Commerce is less advantageous to the carrier than international conventions.

The carrier must transport the goods from the loading port to the port of discharge, and must discharge the goods in the same condition as at the time of loading. The contract of carriage under the Code of Commerce does not envisage 'best-effort' obligations – namely, obligations to use diligence and to give one's best efforts to carry out an obligation – but end results. The carrier promises a specific result and not conduct aimed at producing a result that it is not possible to assure. Hence, when the goods are not returned in the same condition – the result promised – the fault of the carrier is presumed by the courts until the latter can demonstrate cause for exemption.

The carrier is liable for any damage or loss to the cargo during transport, unless it can prove:

a an inherent flaw in the goods;
b *force majeure*; or
c the fault of the shipper.

These are the only exceptions established by law in favour of the carrier. Normally, the carrier will try to argue the case through the *force majeure* defence; under this domestic regime, there are no exceptions covering errors in navigation or in the management of the ship.

The Code of Commerce also recognises the liability of the shipper in Articles 1,068 and 1,069. The carrier might be entitled to claim against the shipper for unpaid freight, for

10 Law No. 1,158/85 organising the General Naval Prefecture; Law No. 928/1927 on the Capitanias Rules; Law No. 476/1957, the Code of Fluvial and Maritime Navigation.

damage to the ship caused by the cargo, for loading dangerous or prohibited goods damaging other cargo, or, for instance, for deposit charges where the consignee fails to collect the goods. This liability is also recognised in general terms in the Civil Code.

With regard to security for the freight, Article 958 of the Code of Commerce provides that the owner is entitled to exercise a lien on freight payable on delivery, general average contributions and costs of preserving the goods. Moreover, the contract of carriage will normally contain detailed provisions entitling the owner to retain the cargo until it has been paid the sums that the lien covers, and these provisions will normally be respected by the courts.

As shown, the Code of Commerce and the Hamburg Rules have significantly different regimes, including in respect of the liability of the carrier, time bars and limitation of liability. Accordingly, it is essential to establish from the outset which legislation applies. In this regard, when it is proven that the damage occurred during the river leg of the journey, Paraguayan jurisprudence states that the local rules, established by the old Code of Commerce, will apply rather than the international conventions on sea carriage.[11]

In terms of charter parties, the Code of Commerce regulates the contract of carriage.[12] Within that legal framework, the shipowner and charterer are otherwise free to negotiate their own terms.

As regards choice-of-law clauses (which usually opt for English or US law), it remains to be seen whether the Paraguayan courts will apply the legal regime established by the contract of carriage, superseding the regime established by local law. This appears to be banned by Article 1,901 of the Code of Commerce, although this interpretation is likely to be reviewed in the light of Law No. 5,393/2015 on the Rule of Law Applicable to International Contracts.

iii Cargo claims

In the landlocked country of Paraguay, all cargo arrives by sea or by river. As a consequence of the hydrological features of its rivers, seagoing ships are normally unable to navigate internal waters, which is why cargo is customarily transshipped in Argentina or Uruguay. For both means of transport, bills of lading are issued. Bills of lading can differ not only in their terms but also in the legal parties to the contract and the rules and legislation applicable. This peculiarity raises several questions about the identity of the carrier, title to sue and the terms of the contract of carriage.

The contractual parties to any bill of lading are the shipper, the carrier and the consignee. The only party that will normally remain unchanged in both an ocean bill of lading and a river bill of lading is the consignee. The carrier will probably change, because in an ocean bill of lading, the carrier is the entity with which the shipper is contracted (ocean or sea carrier), whereas in a river bill of lading, the carrier is the ship that took the cargo from the transshipment port, normally known as a feeder (river carrier). As regards the shipper, in an ocean bill of lading it is the supplier of the cargo, whereas in a river bill of lading it may be the ocean carrier. This is a typical situation, however, which can have another layer of complication if special agreements are made between carriers.

11 *Garantía SA de Seguros y Reaseguros v. Compañía Marítima Paraguaya SA y otros*, first instance judgment of the Civil and Commercial Court of Asunción, 11th Session, SD No. 261, 15 June 1987.

12 Articles 1,018 to 1,102.

The consignee, as it normally appears in both bills of lading, is entitled to sue any of the carriers. The shipper also has title to sue; this is true under both the Hamburg Rules and the Code of Commerce. Finally, the question of who will be sued will depend on which carrier is liable, which in turn will normally depend on where the damage took place.

If the damage occurred during the river journey, the consignee *prima facie* will be entitled to sue the river carrier under the river bill of lading. The river carrier is liable for this leg of the journey only by virtue of the river bill of lading that it issues. The consignee might also be entitled to sue the ocean carrier, since under the ocean bill of lading, the ocean carrier undertakes to carry the cargo from the loading port to the port of discharge (Paraguay), notwithstanding the fact that, in reality, the ocean carrier only transports the goods to the transshipment port. The ocean carrier contractually promises to carry the cargo into Paraguay; in this situation, the ocean carrier will normally have recourse against the river carrier.

If the damage took place during the sea leg, the consignee should only sue the ocean carrier, as the river carrier is not liable for the ocean leg of the journey: it neither carried out that leg of the journey nor issued a bill of lading promising to do so.

The Code of Commerce recognises the possibility of incorporating charter party terms in the bill of lading in Article 1,029.

iv Limitation of liability

When the Hamburg Rules apply, a carrier can limit its liability in cargo claims according to Article 6. Although highly unlikely to happen in practice, the right to limit can be lost under the circumstances cited in Article 8, which describes conduct barring limitation.

Under domestic law, Paraguay has not subscribed to any of the international conventions on limitation of liability: the Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC Convention 1976) and its 1996 Protocol, the International Convention on the Limitation of Liability of Owners of Sea-going Ships 1957 or the International Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Owners of Sea-Going Vessels 1924.

In these circumstances, the only option that the carrier has to limit any kind of liability when domestic rules apply is the abandonment of the ship, which is legislated under Article 880 of the Code of Commerce.

V REMEDIES

i Ship arrest

The rules that govern the procedure for arresting a ship are found in both the Code of Commerce and the Civil Procedural Code. Recent jurisprudence has established that the general rules and requirements of injunctions and interim relief apply to the arrest of ships.[13]

To arrest a ship, the party that has a privileged[14] or unprivileged[15] credit against the ship can either file a specific claim for the sole purpose of obtaining the arrest or can initiate the

13 *Nautimill SA v. Naviera Chaco SRL s/ Cobro de Guaraníes Ordinario*, AI No. 77, 7 March 2013, Civil and Commercial Appeal Tribunal, Third Chamber.

14 Code of Commerce, Article 868. Maritime privileges are governed by Articles 1368 to 1378.

15 ibid., Article 869.

principal claim on its merits.[16] In any case, if the arrest is requested before the principal claim, the claimant has 10 days to initiate the claim on its merits, or the arrest will be lifted by the court, which might also grant damages in favour of the arrested ship.[17]

The other general requirements that must be met to obtain an arrest order are that the claimant must:

a prove the verisimilitude of its right (a good, arguable and accrued case);
b prove the urgency of arresting the ship (there must be a real risk of dissipation); and
c offer security to meet the costs and damages that may result if the order is granted without right.

In this respect, Article 702 of the Civil Procedural Code establishes a claim for wrongful arrest when the claimant has abused or exceeded its rights in the use of the right to arrest a ship. The order granted by the court needs to be communicated to the General Naval Prefecture, which will execute the arrest.

The arrest is considered a provisional and ancillary measure[18] and the arrested party can always offer equivalent security to free the ship.[19]

ii Court orders for sale of a vessel

The judicial sale of the ship has a similar legal regime to that of the judicial sale of real property[20] and is regulated under Articles 475 to 494 of the Civil Procedural Code.

An unpaid creditor needs to initiate a special procedure to execute a court order that recognises its right of credit. Within that procedure, the court will issue an order to sell the ship at public auction. Before the buyer pays the price at the public auction, the debtor is entitled to release the ship by depositing the capital, interests and costs.

VI REGULATION

i Safety

The Paraguay–Paraná River Transport Agreement contains a regulation in its Second Additional Protocol concerning safety and navigation. The Protocol contains detailed provisions relating to safety standards of vessels and cargo, safety of the crew, safety of navigation on inland waters, safety rules for ports and guidelines for the prevention, reduction and control of pollution of ships and boats. The Capitanias Rules also regulate the safety of vessels under Articles 216 to 224.

Furthermore, Paraguay has approved SOLAS, by Law No. 2367/2004, and SUA.

16 Civil Procedural Code, Article 691.
17 ibid., Article 700.
18 ibid., Article 697.
19 ibid., Article 698; Code of Commerce, Article 870.
20 Code of Commerce, Article 864.

ii Port state control

The General Naval Prefecture has jurisdiction over all port activities. As the river authority, it has competence to control the entry and exit of all vessels to monitor compliance with local laws and regulations. It also inspects docks and piers to monitor loading and discharging operations, and determines the order of entry, departure, berthing, anchoring and the placement of vessels in port.

The duties of the General Naval Prefecture include the provision of public services within ports and maintaining harbours and channels, keeping them clean, safe and to depth, removing any obstacles that may interrupt navigation. The Prefecture also provides assistance to assure the rights of the Treasury when the customs authorities require its policing services, executes court orders for the arrest and seizure of ships, and monitors compliance with health regulations.

iii Registration and classification

The procedure for registration of ships used to be extremely bureaucratic in Paraguay. In 2014, the government issued a new regulation aiming at speeding up the process. Currently, it starts with the Directorate General of the Merchant Marine, which issues a decision on the proposed registration. If favourable, the opinion is then elevated for final consideration by the Ministry of Public Works and Communications, which issues the resolution incorporating the ship into the Paraguayan fleet and grants the right to use the Paraguay flag. Once this resolution is obtained, the owner must go to the General Naval Prefecture for a certificate of registration and finally, with the resolution and the certificate, the owner requests the registration of the ship ownership title before the Public Records Office.

The regime for the incorporation, registration and flagging of ships is regulated by Decree No. 3,154/2019. The regulations set forth all the requirements for incorporating newbuilds and second-hand ships, registering bareboat charters and incorporating ships under lease.

iv Environmental regulation

The additional Navigation and Safety Protocol of the Paraguay–Paraná River Transport Agreement establishes detailed rules for preventing pollution accidents. Title VII contains guidelines for the prevention, reduction and control of pollution from ships and boats, and regulates the carriage of dangerous substances on the waterway. In this respect, carriers are punished for any breach of their duties in respect of transport and dumping and they need to strictly observe the rules relating to the discharge regimes. Similarly, the carriage of hydrocarbons, noxious liquid substances, harmful substances and dangerous goods is regulated.

Paraguay has not approved any of the IMO conventions on environmental regulation.[21] The International Convention for the Prevention of Pollution from Ships 1973 (as modified by the Protocol of 1978) (MARPOL (73/78)) and its protocols and annexes are therefore not in force. The same is true in respect of the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969 (the Intervention Convention),

21 www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx.

the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (the OPRC Convention) and the CLC Convention – none of these Conventions apply in Paraguay.

v Collisions, salvage and wrecks

Paraguay has approved the Collision Convention 1910, the International Convention for the Unification of Certain Rules relating to Civil Jurisdiction in Matters of Collision 1952 (the Collision Convention 1952) and the Criminal Collision Convention 1952.

Locally, collisions are regulated by the Code of Commerce, in Articles 1,261 to 1,273, and by the law of tort. Typically, collisions will give rise to a cause of action in negligence. There are certain points that the claimant needs to prove to obtain a favourable judgment:

a any damages suffered by the innocent ship;
b the fault of the guilty ship in the collision;
c that the fault caused the collision; and
d that the collision caused the damage.

Liability will be imposed by the court in proportion to the fault of the ships involved; if the relative degrees of fault cannot be determined, the court will apportion fault equally. To determine the fault of the ships, the International Regulations for Preventing Collisions at Sea 1972 (COLREGs) will apply: these were approved as the official navigation rules by Article 46 of Protocol II of the Paraguay–Paraná River Transport Agreement. Disputes arising from collisions need to be filed within two years of the date of the accident.

The law of salvage is entirely contained in the Code of Commerce (Articles 1,303 to 1,311) as Paraguay is not a party to the International Convention on Salvage 1989 (the 1989 Salvage Convention). Broadly, under the local regime, the party claiming a judgment for salvage will succeed as long as it proves in court that:

a the salvage was in a maritime or river situation;
b there was a recognised subject of salvage;
c the subject of salvage was in a position of danger necessitating a salvage service to preserve it from loss or damage;
d the claimant did not have a pre-existing contractual or legal duty to save the ship; and
e the salvage was successful or contributed to the success of preserving the subject from danger.

The quantum of the salvage award is calculated by taking into account the promptness and nature of the service, the number of people and facilities involved in the service, and the degree of danger faced by the salvors.

Wreck removal is legislated in Articles 1,283 to 1,302 of the Code of Commerce. The General Naval Prefecture is in charge of removing any wreck and initiating the administrative proceedings for establishing responsibility for any obstruction to navigation.

vi Passengers' rights

The Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974 (the Athens Convention) has not been approved by Paraguay. The law relating to the carriage of passengers by sea is restricted to Articles 1,103 to 1,119 of the Code of Commerce. The articles of the Code of Commerce are extremely outdated and inappropriate for the realities of modern transport.

vii Seafarers' rights

The legislation that regulates seafarers' rights is dispersed throughout the legal framework. In the international domain, Paraguay is not a signatory to any International Labour Organization conventions on maritime work. Some seafarers' and captains' rights are contained in the Code of Commerce and in the Fluvial Navigation Code; nevertheless, local courts continue to apply the rules of the Labour Code (Law No. 213/93) to maritime labour disputes – something that is not entirely satisfactory as the provisions of the Labour Code were not conceived to deal with the specialist nature of this work.

VII OUTLOOK

Paraguay has started the lengthy process of adapting its legislation to the current needs of the maritime business, which is expected to continue to expand alongside the balanced economy that the country has shown in recent years. Ninety per cent of foreign trade in or out of Paraguay passes along its rivers, a fact that demonstrates that navigation is extremely important to the country.

The current Merchant Marine Authority and the other competent bodies are making a significant effort to restructure safety regulations to responsibly accompany the continued growth of the fleet and port activities in Paraguay, applying international safety standards to the Paraguay–Paraná Waterway, on which traffic is also expected to increase.

In the current environment of economic stability in Paraguay and with the increasingly strong presence of the agribusiness sector, it appears that local and foreign capital will continue to be invested in the maritime sector in Paraguay in the coming years.

Chapter 34

PHILIPPINES

Valeriano R Del Rosario, Maria Theresa C Gonzales, Daphne Ruby B Grasparil and Jennifer E Cerrada[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

There are two sides to the Philippine shipping industry, and both can only be described in superlative terms. On one hand, the Philippines, an archipelagic country of over 7,000 islands, has a flourishing domestic shipping industry. In 2021, the Philippine domestic operating fleet consisted of 31,814 registered vessels, which moved people and cargo throughout the archipelago.[2] The domestic industry, however, is probably most remembered for the ill-fated collision between the passenger ferry *Doña Paz* and the petroleum product tanker, *Vector*, which happened on 20 December 1987 and resulted in over 4,000 deaths – the worst disaster at sea in peacetime. As could be expected, it spawned litigation in the Philippines and the United States.

On the other hand, the Philippines is the top provider of both seafarers and officers to the world's merchant marine fleet, while Indonesia took third place for ratings and fifth for officers, and China was third for officers and fourth for ratings.[3] In 2019, the Philippines deployed 507,730 seafarers internationally; however, owing to the covid-19 pandemic, based on preliminary data as of 5 January 2021, the numbers dwindled to 217,223 in 2020.[4] Like the rest of the world in 2020, however, the global covid-19 pandemic greatly affected seafarer deployment. At the peak of the Philippine lockdown, instead of being able to deploy seafarers on the average of 45,000 monthly, reports show only about 20,000 were deployed in total for March to June 2020.[5] Figures were at its lowest on April 2020 with only 597 deployed as a result of the lockdowns and travel restrictions in the Philippines and other countries.[6] Considering the very low figures of deployment and the government realising and prioritising

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2 Maritime Industry Authority Statistical Report 2017–2021, https://marina.gov.ph/wp-content/uploads/2022/06/2017-2021-MARINA-Statistical-Report_FINAL_revised.pdf.

3 United Nations Conference on Trade and Development (UNCTAD), 'Press Release: Asia expands its lead in maritime trade and business', 18 November 2021, https://unctad.org/press-material/asia-expands-its-lead-maritime-trade-and-business.

4 Philippine Overseas Employment Administration, 'Accomplishment Report Jan-Dec 2020 (Preliminary date)', https://www.poea.gov.ph/transparency/2020/2020%20PAR.pdf.

5 Betheena Unite, 'PH eyes employing more seafarers after sending only 20,000 for 4 months', Manila Bulletin, 17 December 2020, https://mb.com.ph/2020/12/17/ph-eyes-employing-more-seafarers-after-sending-only-20000-for-4-months/.

6 Samuel Medenilla, '136,000 filipino seafarers deployed aboard international vessels overseas since July.' Business Mirror, 1 October 2020, https://businessmirror.com.ph/2020/10/01/136000-filipino-seafarers-deployed-aboard-international-vessels-overseas-since-july/.

the plight of seafarers, various government agencies, including the Department of Foreign Affairs, Department of Transportation and Department of Health, issued Joint Circular No. 1, series of 2020, on the Guidelines for the Establishment of the Philippine Green Lane to Facilitate the Speedy Travel of Seafarers.[7] Thereafter, the industry slowly picked up, starting in the third quarter of 2020.[8] By 2021, a total of 345,517 seafarers were deployed, which is a substantial increase from the total of 217,223 seafarers deployed in 2020.[9]

In 2022, the Philippines earned a total of US$36.14 billion from overseas Filipino workers, breaking the record from the previous total of US$34.88 billion in 2021.[10] This is a 3.6 per cent growth rate compared to previous year, and of that total, over US$6.715 billion came from Filipino seafarers, which increased from US$6.545 billion in 2021.[11] In 2022, the remittances of overseas Filipino workers constituted 8.9 per cent of the Philippines' GDP.[12]

The largest port in the Philippines is Manila, located on the island of Luzon in the northern part of the country. In the central Philippines, the Philippines' second-largest city, Cebu, serves as the main hub for the distribution of goods within the central islands. Davao and Cagayan de Oro are the major ports in the southern Philippines' island of Mindanao, which is largely the source of Philippine agricultural exports.

In December 2022, the Philippines imported US$10.26 billion (free on-board value) worth of goods, while at the same time exporting goods worth US$5.67 billion.[13] This trade is almost entirely dependent on shipping, which is the vital link between the islands of the Philippines and the rest of the world.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The Philippines is a civil law country. The New Civil Code of the Philippines,[14] which was enacted in 1949, was based on the Spanish Civil Code. The Philippines is no longer a Spanish-speaking country, so all enacted laws are in English and court proceedings are conducted in English. The Philippines also has a Code of Commerce, which is based on the Spanish Code of Commerce 1885. The Law on Obligations and Contracts is part of the Civil Code, while the rules on domestic carriage of goods are set out in both the Civil Code and the Code of Commerce. The latter also provides for the law on charter parties, collision and general average. Salvage is covered under a special law.

7 Philippine Overseas Employment Administration, 'Green Lane for Seafarers Joint Circular 1-2020', https://www.poea.gov.ph/advisories/2020/Green%20Lane%20for%20Seafarers%20Joint%20Circular%201-2020.pdf.

8 Ferdinand Patinio, '49K Pinoy seafarers deployed in September', Philippine News Agency, 2 October 2020, https://www.pna.gov.ph/articles/1117341.

9 See footnote 2.

10 Lawrence Agcaoili, 'Remittances hit record high of $36.1 billion in 2022', The Philippine Star, 16 February 2023, https://www.philstar.com/business/2023/02/16/2245201/remittances-hit-record-high-361-billion-2022.

11 Bangko Sentral ng Pilipinas statistics, 'Overseas Filipinos' Cash Remittances, By Country, By Source', https://www.bsp.gov.ph/Statistics/External/ofw2.aspx.

12 See footnote 13.

13 Philippine Statistics Authority, 'Highlights of the Philippine Export and Import Statistics: December 2022 (Preliminary)', https://psa.gov.ph/content/highlights-philippine-export-and-import-statistics-december-2022-preliminary.

14 An Act to ordain and institute the Civil Code of the Philippines, Republic Act No. 386 (1950).

The Philippines also follows the system of judicial precedents and, therefore, the decisions of the Philippine Supreme Court, written in English, interpreting the provisions of the Civil Code, the Code of Commerce and other legislation, have the force of law. For carriage of goods to and from Philippine ports in foreign trade, the Philippines adopted the United States Carriage of Goods by Sea Act of 1936 (the Philippine COGSA),[15] which is basically the Hague Rules.

The Philippines is a major provider of seafarers to the world's merchant marine fleet. More recent shipping-related legislation has tended to be with regard to overseas Filipino workers. On 13 March 2014, the Philippine Congress enacted Republic Act No. 10635,[16] establishing the Maritime Industry Authority (MARINA), a single maritime administration responsible for the implementation and enforcement of the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1995 (the STCW Convention), as amended, and the international agreements or covenants related thereto.

In August 2012, the Philippines became the 30th member country of the International Labour Organization to adopt the Maritime Labour Convention of 2006 (MLC). The adoption of the MLC, the 'seafarer's bill of rights', was a concrete effort to protect the rights of Filipino seafarers at home and overseas. By doing so, the Philippine government recognised the significant contribution of Filipino seafarers to the growth of the country's economy.[17]

III FORUM AND JURISDICTION

i Courts

Jurisdiction of courts

The Philippine courts' jurisdiction over shipping disputes is determined by law. Under the Judiciary Reorganisation Act of 1980 (BP 129), as amended by Republic Act No. 11576,[18] the regional trial courts have exclusive original jurisdiction over admiralty and maritime matters where the demand or claim exceeds 2 million Philippine pesos, while the metropolitan trial courts, municipal trial courts in cities, municipal trial courts and municipal circuit trial courts in civil cases have exclusive original jurisdiction in admiralty and maritime actions where the demand or claim does not exceed 2 million Philippine pesos. Prior to 2019, there were no special courts designated as admiralty courts. Only very recently has the Philippines, through its Supreme Court, adopted new rules to designate existing trial courts as admiralty courts.[19]

15 Carriage of Goods by Sea Act, Public Act No. 521 (1936).

16 An Act establishing the maritime industry authority (MARINA) as the single maritime administration responsible for the implementation and enforcement of the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, as amended, and international agreements or covenants related thereto, Republic Act No. 10635 (2014).

17 Press Release, Manila Philippines, International Labour Organization, 21 August 2012, www.ilo.org/manila/public/pr/WCMS_187754/lang--en/index.htm.

18 An Act Further Expanding the Jurisdiction of the Metropolitan Trial Courts, Municipal Trial Courts in Cities, Municipal Trial Court, and Municipal Circuit Trial Courts Amending for the purpose Batas Pambansa Blg 129, otherwise known as the Judiciary Reorganisation Act of 1980, as amended, Republic Act No. 11576.

19 Pursuant to the 1987 Philippine Constitution, the Philippine Supreme Court has the power to promulgate rules concerning procedure in all courts and exercises administrative supervision over all courts (Article VIII, Sections 5(5) and 6).

Effective since 1 January 2020, a Supreme Court order entitled the Rules of Procedure for Admiralty Cases (the Rules for Admiralty Cases)[20] aims to provide 'fast, reliable, and efficient means of recourse to Philippine courts' to parties in admiralty and maritime jurisdiction.

To date, the Supreme Court has designated 10 courts with jurisdiction over maritime claims under the Rules of Admiralty Cases. Two courts have been designated in Manila, San Fernando, Subic Bay, Cebu and Davao.

The Rules of Admiralty Cases further provide for their interpretation in accordance with international standards and norms used in the international shipping industry that may be found in international conventions and instruments, such as:

a the United Nations Convention on the Law of the Sea 1982 (UNCLOS);
b the International Convention for the Safety of Life at Sea 1974 (SOLAS);
c the STCW Convention;
d the International Convention for the Prevention of Pollution from Ships 1973 (as modified by the Protocol of 1978) (MARPOL (73/78));
e the International Convention relating to the Arrest of Sea-going Ships 1952 (the Brussels Convention);
f International Regulations for Preventing Collisions at Sea 1972 (COLREGs); and
g other conventions of the International Maritime Organization, to which the Philippines is a party or signatory.

Limitation period

Actions based on written contracts have to be filed within 10 years of the date the cause of action occurred, and four years in the case of quasi-delict, which is similar to tort under common law.

The 10-year prescriptive period is applied to contracts of carriage of goods by sea in domestic trade, but not to cases covered by the Philippine COGSA. In particular, Section 3(6) of the Philippine COGSA provides that the carrier is discharged from liability for loss or damage of the goods unless suit is brought 'within one year of delivery of the goods or the date when the goods should have been delivered'. However, the period during which the goods have been discharged from the ship and given to the custody of the *arrastre*[21] operator is not covered by the Philippines COGSA. The *arrastre* operator cannot invoke as a defence that the suit was instituted beyond the one-year limitation period.[22]

ii Arbitration and ADR

An international commercial arbitration concerning the carriage of goods or passengers by air, sea, rail or road, where the seat of arbitration is in the Philippines, shall be governed by the Model Law, as provided in Republic Act No. 9285 and its Implementing Rules and Regulations. Before the constitution of an arbitral tribunal, a party may request interim or provisional relief from the court. After the constitution of an arbitral tribunal or during the arbitration proceedings, the request may be directed to the court but only to the extent that the arbitral tribunal has no power to act or is unable to act effectively. The provisional relief

20 AM No. 19-08-14-SC.

21 '*Arrastre*' is a Spanish word (meaning dragging, pulling) but is defined in the Philippines as 'the operation of receiving, conveying and loading or unloading merchandise on piers or wharves', www.merriam-webster.com/dictionary/arrastre.

22 *Insurance Company of North America v. Asian Terminals*, GR No. 180784, 15 February 2012.

may be granted in any of the following instances: (1) to prevent irreparable loss or injury; (2) to provide security for the performance of any obligation; (3) to produce or preserve any evidence; or (4) to compel any other appropriate act or omission.

iii Enforcement of foreign judgments and arbitral awards

A party to an international commercial arbitration may petition the regional trial court for the recognition and enforcement of an international commercial award in accordance with Rule 12 of the Special Rules of Court on Alternative Dispute Resolution (ADR).

A party to a foreign arbitration may likewise petition the regional trial court to recognise and enforce a foreign arbitral award, which shall be governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention).

A foreign corporation not licensed to do business in the Philippines may seek recognition and enforcement of a foreign arbitral award in accordance with the provisions of the ADR Act of 2004.

Under the Rules for Admiralty Cases, the enforcement of an arbitral award or judgment against a ship is regarded as an *in rem* action, upon which an application for a warrant of arrest may be made.

Foreign arbitral awards as opposed to foreign judgments are easier to enforce in the Philippines due to the summary enforcement procedure adopted in the ADR Act of 2004 and Rule 12 of the Special Rules of Court on ADR. On the other hand, seeking to enforce a foreign judgment is difficult compared to an arbitration award because the foreign judgment is treated as presumptive evidence of a right against a person or a thing, such as a ship. Fresh proceedings will need to be commenced in court for the enforcement of the judgment, and live witnesses will be required. A foreign arbitration award from a New York Convention country can be enforced within about two years, which is comparatively quicker than the five to seven years needed to enforce a foreign judgment. The big difference lies in the judicial appeal process because an appeal from a judgment enforcing a foreign arbitration award will not prevent the execution of the judgment, which is not the case with foreign judgments.

IV SHIPPING CONTRACTS

i Shipbuilding

Recognising that shipping is a necessary infrastructure and that the shipping industry plays a vital role in the country's economic development, the Philippine Congress has passed a law[23] granting certain incentives to domestic or foreign corporations wishing to engage in shipbuilding within the country. Among the incentives granted[24] is the tax-free importation of capital equipment to be used in the construction or repair of any vessel.

In 2017, the Philippines was ranked as the fourth-largest shipbuilding nation in the world in terms of new build completion volume, following South Korea, China and Japan.[25] This was mainly attributable to the presence of industry heavyweights such as Tsuneishi

23 An Act promoting the development of Philippine domestic shipping, shipbuilding, ship repair and ship breaking, ordaining reforms in government policies towards shipping in the Philippines and for other purposes (the Domestic Shipping Development Act of 1994), Act No. 9295 (1994).

24 ibid., Chapter V, Section 14.

25 Review of Maritime Transport 2018, United Nations Conference on Trade and Development, https://unctad.org/en/PublicationsLibrary/rmt2018_en.pdf.

Heavy Industry of Japan, which owns and operates a shipyard in Balamban, Cebu, and Hanjin Heavy Industries of Korea, which then owned and operated a shipyard in Subic Bay, Olongapo. Unfortunately, Hanjin Heavy Industries filed for bankruptcy in 2019. As at the first quarter of 2020, Hanjin Heavy was still searching for a white knight to bail out the US$400 million owed to Philippine banks and the US$900 million owed to Korean lenders.[26] As a result, it is unlikely that the Philippines will maintain its standing as a global leader in shipbuilding.

With respect to shipbuilding contracts entered into with MARINA-accredited Philippine shipyards, there is no specific law governing the same. As such, they are governed by the general rules on contracts under the New Civil Code, which recognises freedom of contract. Title, as well as risk, to the vessel is passed from builder to buyer upon signing of a protocol of delivery and acceptance. With respect to dispute resolution, the parties are also free to stipulate their preferred mode. Ordinarily, parties opt for arbitration.

ii Contracts of carriage

The New Civil Code, the Code of Commerce and the Philippine COGSA apply to contracts of carriage by water. The Code of Commerce and special laws apply in matters not regulated by the New Civil Code,[27] while the Philippine COGSA applies to the carriage of goods by sea to and from Philippine ports in foreign trade.

The Philippines has not adopted the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules), the UN Convention on the Carriage of Goods by Sea 1978 (the Hamburg Rules) or the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (the Rotterdam Rules).

The New Civil Code requires extraordinary diligence in the carriage of goods by common carriers,[28] while in the Philippine COGSA,[29] the carrier is bound only to exercise due diligence. For private carriers of goods by water under the Code of Commerce, the requirement is only ordinary diligence.[30]

Under the Ship Mortgage Decree, maritime liens are exercised through an action *in rem*.

With regard to the shipowner's lien on the cargo for unpaid freight,[31] the lien can be exercised only as long as it has possession. Once the cargo is unconditionally delivered to the consignee at the port of destination, the shipowner is deemed to have waived the lien.

Under Republic Act No. 10668[32] promulgated on 28 July 2014, foreign vessels are now allowed to transport and co-load foreign cargoes for domestic transshipment. The Philippine COGSA, and not the Civil Code, applies in the determination of the liability of the foreign vessel for the loss of, or damage to, the goods carried on board the vessel. Foreign vessels engaging in carriage conducted in accordance with Republic Act No. 10668

26 Henry Empeño, 'Hanjin, A Year After', *Business Mirror*, 19 January 2020, https://businessmirror.com.ph/2020/01/19/hanjin-a-year-after.

27 Civil Code, Article 1766.

28 ibid., Article 1753.

29 Philippine COGSA, Section 3(1).

30 Code of Commerce, Article 362.

31 *Ouano v. Court of Appeals*, 211 SCRA 740 (1992).

32 An Act Allowing Foreign Vessels to Transport and Co-Load Foreign Cargoes for Domestic Transshipment.

are neither considered common carriers with the duty to observe extraordinary diligence in the transportation of goods nor are they considered to be offering public service so as to fall under the provisions of the Domestic Shipping Development Act of 2004.

iii Cargo claims

There are two sets of rules for cargo claims in the Philippines. For claims arising out of domestic carriage, the rules are stated in the Code of Commerce and the New Civil Code. For international carriage of goods, the applicable rules are set out in the Philippine COGSA.

For domestic carriage, notice of loss or damage to the goods must be provided by the cargo owner to the carrier within 24 hours of delivery of the goods. The 24-hour notice is a condition precedent, and provided such notice is given, the cargo owner has 10 years within which to sue for the loss or damage to cargo. However, the 10-year time bar can be reduced by contract. The duty of care for common carriers is set out in the New Civil Code, and the threshold is very high: extraordinary diligence. Under the New Civil Code, in the event of cargo loss or damage, the carrier is presumed to be at fault, and the burden of proof shifts to the carrier, which must show that it had discharged its duty to exercise extraordinary diligence. Through judgments of the Supreme Court during the past 20 years, the lines between private carriers and common carriers have been blurred to the point of being almost indistinguishable: all cargo claims against carriers are treated as if they are common carriers. Common carriers have only three defences available under the New Civil Code: (1) force majeure, (2) inherent fault in the goods, and (3) defects in the packaging.

For the international carriage of goods to and from the Philippines in foreign trade, the carrier's liability is based on the Philippine COGSA. However, the Supreme Court judgments in COGSA cases have applied the high threshold of care as found in the New Civil Code, and the COGSA defences are being ignored. In the case of *Planters Products v. Court of Appeals (Sun Plum)*,[33] which involved a cargo of fertiliser from an overseas port to the Philippines, the Supreme Court applied the common carrier rules to the ship, and that precedent has been reiterated in subsequent Supreme Court judgments. The cargo of fertiliser was carried by the ship *Sun Plum*, and there was cargo shortage and damage. The ship was on time charter and the question arose whether the shipowner was a common carrier or a private carrier. If the *Sun Plum* was a common carrier, then the ship would be presumed to be at fault, and the burden would be on the shipowner to prove that he discharged his duty of care. On the other hand, if the *Sun Plum* was a private carrier, then the consignee would have the burden of proving the ship's fault or negligence in order to recover. The Supreme Court ruled that a shipowner who had time-chartered its vessel should be considered a common carrier, and therefore *Sun Plum* had the burden of proving that it had exercised extraordinary diligence in the care of the cargo. As a result of this case and those that followed, the liability regime stated in the Philippine COGSA is more often disregarded by Philippine courts in favour of the common carrier regime, which is set out in the New Civil Code. The only constant from the Philippine COGSA that is applied by Philippine courts is the limitation amount of US$500 per package or customary freight unit.

33 GR No. 101503, 15 September 1993.

The Supreme Court noted in the *Sun Plum* case, as an obiter, that in instances when the charter gives control of both the vessel and its crew, as in a bareboat or demise charter, the shipowner is converted into a private carrier by virtue of the charter. The definitive answer was provided by the Supreme Court in a 2015 case.[34]

The shipowner, Fortune Sea Carriers, Inc (Fortune Sea), time-chartered its ship *Ricky Rey* to Northern Mindanao Transport Co Inc (Northern Transport). The time-charter party included provisions that gave control of both the ship and the crew to Northern Transport.

While the *Ricky Rey* was on charter, Northern Transport transported 2,069 bales of abaca fibres, which caught fire. The cargo was insured by Federal Phoenix Assurance Co Ltd (Federal Phoenix), which commenced proceedings against the shipowner, Fortune Sea, alone, after paying the insured.

Fortune Sea denied liability and insisted it was acting as a private carrier at the time the incident occurred.

The Supreme Court rendered judgment in favour of Fortune Sea and held that Fortune Sea was a private carrier. The Supreme Court also held that the time-charter party agreement and the evidence demonstrated that the control of the ship and its crew had been given to the charterer. The issue that remained unanswered was whether the charterers, having the full control of the ship and the crew, would be treated as the common carrier. The issue never came up because Federal Phoenix did not implead the charterer Northern Transport. As a matter of practice, Federal Phoenix should have named the ship, its owners, the charterers and the ostensible carrier in the proceedings. Federal Phoenix failed to do so and, as a result, was unable to recover for the damaged cargo.

As far as demise clauses are concerned, the judgment in the case of *Federal Phoenix Assurance Co Ltd v. Fortune Sea Carriers, Inc* seems to indicate that the Philippine Supreme Court will be willing to distinguish between the owners and the charterers as to which should carry the heavy burden of being identified as a 'common carrier'.

There is a party in the logistics claim that is peculiar to the Philippines. That party is the *arrastre* operator, a term that harks back to the Spanish colonial era. The Spanish word *arrastre* refers to the act of dragging a dead bull from the ring. In the Philippines, the term has been adopted and refers to the cargo handler who loads and unloads the cargo between the ship and the pier side. In the modern world, the *arrastre* operator can be equated with the terminal operator.

The duty of care of the *arrastre* operator in the event of loss or damage to the goods was the subject of the judgment in *Asian Terminals Inc v. Allied Guarantee Insurance Co Inc*.[35] A shipment of 72,322lb of kraft liner board was offloaded by the *arrastre*, Marina Port Services Inc (Marina Port Services), from the vessel M/V *Nicole*. Fifty-four rolls were found to have been damaged while in the custody of Marina Port Services. The lower court found Marina Port Services liable for the damaged cargo, and the matter was eventually elevated to the Supreme Court. The *arrastre* insisted that it was not liable for the 54 damaged rolls.

The Supreme Court judgment declared that the *arrastre* operator, in the performance of its function, should observe the same degree of care as that required of a common carrier. As a consequence, the *arrastre* operator is presumed to be at fault for the damage and carries the burden of proof to disprove liability. In this case, Marina Port Services failed to discharge the burden of proof and was found liable.

34 *Federal Phoenix Assurance Co Ltd v. Fortune Sea Carriers, Inc*, GR No. 188118, 23 November 2015.

35 GR No. 182208, 14 October 2015.

As an update, the Supreme Court's 2016 decision in *Designer Baskets Inc v. Air Sea Transport Inc and Asia Cargo Container Lines*[36] concerned the usual practice of carriers releasing cargo against an indemnity letter in instances where the consignee did not have possession of the original bill of lading. The judgment clarified that the carrier cannot be held responsible to the unpaid seller for the value of the goods by delivering the cargo without presentation of the original bill of lading.

iv Limitation of liability

The limitation of liability in the Philippines is based on the value of the ship and freight at risk. The Rules for Admiralty Cases provide the mechanism for a limitation action, which did not exist before. The limitation action is available only in the following cases: collisions; injuries to a third party; and acts of the captain or master of a ship. A limitation action is not available in cases of death of or injury to passengers.[37]

The right to limit liability has been curtailed since the *Doña Paz* tragedy. Before that event, a shipowner could limit liability provided that it was not at fault or negligent. Based on the judgment in *Aboitiz v. New India*,[38] the new rule is that as long as there is a finding of any kind of unseaworthiness against the vessel, the owner loses the right to limit liability, regardless of whether the unseaworthiness arose through the owner's fault or negligence.

V REMEDIES

i Ship arrest

Prior to September 2019, the Philippines did not have a genuine procedure for the arrest of ships. The procedure equivalent to a ship arrest in the Philippines was through an application for the issuance of a preliminary attachment under Rule 57 of the 1997 Rules of Civil Procedure. A preliminary attachment is akin to a *Mareva* injunction under English law.

At present, the Rules for Admiralty Cases now sets out the procedure for the application of a warrant of arrest of a vessel, cargo or freight.[39]

The party applying for a warrant of arrest must provide a bond equivalent to 30 per cent of the claim in favour of the other party to answer for damages in the event of a wrongful arrest.[40] The party against whom the warrant is issued may lodge a bail bond sufficient to answer the arresting party's claim to obtain the release of the arrested property.[41] Discharge of the cargo is likewise allowed while the ship is under arrest.[42]

Under the Ship Mortgage Decree, the mortgagor may apply for a warrant of arrest of the mortgaged vessel. The procedure to be followed is as described above pursuant to the Rules for Admiralty Cases.

36 GR No. 184513, 9 March 2016.
37 AM No. 19-08-14-SC, Part IV, Rule 8, Section 2.
38 GR No. 156978, 2 May 2006.
39 AM No. 19-08-14-SC, Part III, Rule 6.
40 AM No. 19-08-14-SC, Part III, Rule 6, Section 3.
41 AM No. 19-08-14-SC, Part IV, Rule 8, Section 7.
42 AM No. 19-08-14-SC, Part IV, Rule 6, Section 5.

ii Court orders for sale of a vessel

The Rules for Admiralty Cases was intended to provide an expeditious process for the sale of ships under arrest, for which a bail bond had not been posted. However, the vessel can only be sold after a final judgment. Nonetheless, there may be situations when a quick sale is not possible. It may still be possible to sell a ship that remains under arrest prior to a final judgment. In *Shuhei Yasuda v. Court of Appeals and Blue Cross Insurance Inc*,[43] the Supreme Court allowed the sale of the vessel as it had been left to rot at the pier without a crew to guard it and was in grave danger of losing its value.

VI REGULATION

i Safety

Safety means two things to the Philippines: safety regulations, which are applied to the domestic fleet, and the qualification and certification of Filipino seafarers who work on ships throughout the world's fleet. The safety regulations of both domestic shipping and certificates for seafarers overseas-bound are regulated by two government entities – MARINA and the Philippine Coast Guard (PCG).

In domestic shipping, MARINA is mandated to set the safety standards of all domestic vessels in accordance with government regulations and conventions,[44] including the implementation and enforcement of SOLAS, and to promulgate rules and regulations to ensure compliance with these standards. To verify that the required safety standards are met, MARINA is empowered to inspect vessels and all equipment on board[45] and, accordingly, to impose penalties and fines, and suspend or revoke certificates of public convenience or other licences.[46] In June 2008, Sulpicio's *Princess of the Stars* capsized, and of the reported 851 passengers on board, only 32 survived. The relatives of the victims filed an administrative complaint with MARINA, and on 23 January 2015, Sulpicio, which also owned and operated the *Doña Paz*, was prohibited from carrying or transporting passengers. Criminal proceedings for reckless imprudence resulting in multiple homicide, serious physical injuries, and damage to property were also commenced against Mr Edgar Go, the team leader of the Crisis Management Committee of Sulpicio, for allowing the vessel to sail during a typhoon. In December 2018, the Philippine Supreme Court upheld the criminal indictment.[47]

MARINA was previously responsible only for keeping the register of Filipino seafarers and issuing their seaman books. Its role was expanded in view of the Philippine legislature's enactment of Act No. 10635,[48] which effectively designated MARINA as the single and central maritime administration tasked with ensuring effective implementation and compliance with the STCW Convention. In line with this, MARINA adopted rules for the administrative

43 300 SCRA 385 (2000).

44 Act No. 9295, Section 10(6). MARINA is also in charge of issuing, inter alia, certificates of public convenience for operation of all domestic vessels, special permits for international vessels operating in the Philippine territory and certificate of inspection. With MARINA's power to issue these permits or certificates also comes the power to revoke the same.

45 ibid., Section 10(8).

46 ibid., Section 10(16).

47 *People v. Go*, GR No. 2018816, 10 December 2018.

48 The Implementing Rules and Regulations of RA 10635 were published in the Philippines' Official Gazette on 13 March 2014 and were deemed effective 15 days after publication.

investigation of Filipino seafarers holding management and operational functions for acts or omissions involving violation of the Code of Ethics of Marine Deck/Engineer Officers and rules issued by MARINA.[49]

The PCG, on the other hand, is responsible for the enforcement of regulations for both domestic and international shipping relating to all relevant maritime conventions, treaties and national laws to ensure safety of life at sea within the Philippine territory. The PCG also has authority to inspect merchant ships and vessels, including but not limited to inspections before departure to verify compliance with all the rules and safety standards.[50]

ii Port state control

The Philippines Coast Guard Law of 2009 vested the PCG with the authority to, inter alia, enforce regulations pertaining to maritime international convention, treaties, national laws, rules and regulations for the promotion of safety of life and property at sea within the maritime jurisdiction of the Philippines; to implement port state control; to conduct vessel inspections; and to detain ships that do not comply with safety standards.

Memorandum Circular No. 01-00[51] was promulgated to ensure the effective implementation of the PCG's port state control functions. This Memorandum Circular applies to all foreign-flagged vessels engaged in international trade calling at any Philippine port. It does not apply to ships of war, troop ships, government vessels not engaged in trade, fishing vessels or pleasure yachts not engaged in trade.

iii Registration and classification

In general, ships need to be listed on the Register of Philippine Ships of MARINA to fly the Philippine flag or to trade within Philippine waters.[52] The rules for registration apply regardless of the size of ship or use thereof, regardless of whether the ship is with or without power, and excluding warships and naval ships, PCG ships, rubber craft, and ships of foreign registry temporarily used in Philippine waters under special permit. Ships wishing to ply Philippine waters must obtain a certificate of Philippine registration and a certificate of ownership by MARINA as well as a certificate of public convenience. Ships already registered may also be deleted from the Register by the owner, voluntarily or involuntarily, as in the case when MARINA, after due process, orders deletion for having violated government rules and regulations, or in the case of dual-flagged vessels where approval of the charter or lease contract is revoked for cause.[53] Currently, the International Association of Classification Society members recognised by MARINA include:

a the American Bureau of Shipping;
b Bureau Veritas;

49 STCW Circular No. 2015-11 issued by MARINA on 22 July 2015.

50 An Act establishing the Philippines Coast Guard as an armed and uniformed service attaches to the Department of Transportation and Communications, thereby repealing Republic Act No. 5173, as amended, and for other purposes (the Philippines Coast Guard Law of 2009), Act No. 9993, Section 3 (2010).

51 Port State Control, Philippine Coast Guard Memorandum Circular No.1, series of 2000 (28 September 2000).

52 MARINA Circular No. 2013-02 (pursuant to Presidential Decree No. 474, Executive Order No. 125, Act No. 9295 and the Philippine Merchant Marine Rules and Regulations of 1997) (18 January 2013).

53 ibid., Section VI.

c China Classification Society;
d Det Norske Veritas;
e Germanischer Lloyd;
f Hellenic Register of Shipping;
g International Register of Shipping;
h Korean Register of Shipping;
i Lloyd's Register Asia;
j Nippon Kaiji Kyokai; and
k Registro Italiano Navale.

There are also domestic classification societies that are authorised to classify domestic ships for domestic trade, namely:

a Filipino Vessels Classification System Association, Inc;
b Ocean Register of Shipping, Inc;
c Orient Register of Shipping, Inc;
d Philippine Classification Register, Inc;
e Philippine Register of Shipping, Inc; and
f Shipping Classification Standards of the Philippines, Inc.

In March 2022, Republic Act No. 11659 amended the existing Public Service Act. This was an extensive overhaul of the business activities that used to be reserved for Filipinos only. Regarding the shipping industry, a significant change was the repeal of Republic Act No. 9295, known as the Domestic Shipping Law, which restricted foreign participation in the domestic shipping business to a maximum of 40 per cent equity participation. Shipping business in the Philippines has now generally been opened to 100 per cent foreign ownership. However, the corporate vehicle must be a Philippines-organised corporation, the ownership of which can be 100 per cent owned by foreigners. All Philippine corporations must still apply for a franchise with MARINA before it can operate in the domestic trade. As mentioned, this new law only amended the Public Service Act. All new laws in the Philippines are accompanied by implementing rules and regulations, and we await their promulgation to see whether MARINA will abandon its cabotage policy, which has been entrenched in many regulations promulgated the institution for decades.

iv Environmental regulation

The Philippines is a signatory to three major environmental protection conventions relating to shipping: the International Convention on Civil Liability for Oil Pollution Damage 1969 (the CLC Convention); MARPOL (73/78) (Annexes I to V); and the 1992 Protocol to the Oil Pollution Fund Convention.

On 2 June 2007, Republic Act No. 9483, known as the Oil Pollution Compensation Act of 2007, was signed into law. This legislation aims to give more teeth to the implementation of the provisions of the CLC Convention and the 1992 Protocol to the Oil Pollution Fund Convention. Under this Law, an action for compensation for pollution damage as a result of an incident may be filed with the regional trial courts against the owner of the polluting ship, or the insurer or person providing financial security for the owner's liability for pollution. Contributions to the Oil Pollution Compensation Fund are supposedly to be made by oil tanker operators in the country's waters, but at the time of writing, no mechanism has been

propagated to establish such a fund.[54] The implementing rules of the Oil Compensation Act, which was adopted in 2016, authorised MARINA to establish or open a trust fund for the Oil Pollution Management Fund (OPMF).[55] The OPMF will comprise contributions from owners and operators of tankers, fines imposed by the OPMF committee and donations and grants from domestic and foreign sources. The fund can be used for expenses of any oil pollution-related incident.

Under the Philippine Clean Water Act (Republic Act No. 97275), enacted on 22 March 2004, and its implementing rules and regulations, the pollution of a water body – which includes oil spills – is a prohibited act that is subject to fines, damages and penalties. Pollution of a water is defined as 'discharging, depositing or causing to be deposited material of any kind directly or indirectly into the water bodies or along the margins of any surface water, where, the same shall be liable to be washed into such surface water, either by tide action or by storm, floods or otherwise, which could cause water pollution or impede natural flow in the water body'.

In August 2006, the MT *Solar I* sank off the coast of the Province of Guimaras in the central Philippines. The MT *Solar I* spilled more than 200,000 litres of bunker fuel, damaging marine sanctuaries, the tourism industry and the livelihoods of the people of Guimaras.[56] The affected communities and individuals filed damages claims with the International Oil Pollution Compensation Fund (the IOPC Fund) and by October 2012, the IOPC Fund had released 987 million Philippine pesos in compensatory damages to 26,870 claimants.[57]

v Collisions, salvage and wrecks

The Philippines collision regime is unique and is part of the Code of Commerce. Whereas most of the world apportions collision liability based on the proportion of blame attributed to each vessel, in the Philippines it is all or nothing. If both vessels are to blame, each vessel suffers its own loss, and both vessels are jointly and severally liable for the damage to cargo and passengers of both vessels. If one vessel is wholly to blame, the guilty vessel will bear both its own damage and loss, and that of the innocent vessel, including the cargo damaged or lost on both vessels, and passengers' claims for injury and death, if any.

The Philippine Salvage Law is set out in Act No. 2616.[58] In the Philippines, salvage is no different from the concept as it exists in the United Kingdom. The party that performs the salvage must be a volunteer, there must be danger and there must be resulting success. There is no specialised salvage arbitration forum similar to that in the United Kingdom, so most commercial salvors use the Lloyd's Open Form salvage agreement or, for a less complicated service, the salvage is negotiated for a fixed fee. The Philippines is not a signatory to the International Convention on Salvage 1989 (the 1989 Salvage Convention).

54 Gil C Cabacungan, 'House to summon Marina execs over oil pollution fund', *Philippine Daily Inquirer*, 21 December 2013, http://newsinfo.inquirer.net/550205/house-to-summon-marina-execs-over-oil-pollution-fund.

55 In *Department of Transportation, MARINA, and PCG v. Philippine Petroleum Sea Transport Association, et al.*, the Supreme Court upheld the constitutionality of the OPMF (GR No. 230107, 24 July 2018).

56 NCSB Factsheet, September 2006 published by the National Statistical Coordination Board.

57 'Oil spill victims seek compensation', *Manila Bulletin*, 15 August 2013, https://ph.news.yahoo.com/oil-spill-victims-seek-compensation-215341344.html.

58 Enacted 4 February 1916.

Any person who wishes to engage in the business or operation of salvaging vessels, wrecks, derelicts and other hazards to navigation, or of salvaging cargoes carried by sunken vessels, is required to secure a salvage permit from the PCG. Under Presidential Decree No. 890,[59] a salvage operation performed without a permit is a criminal offence.

vi Passengers' rights

The Philippine government has passed rules and regulations concerning the Air Passengers' Bill of Rights[60] and Sea Passengers' Bill of Rights.[61] MARINA rules also require all ships engaged in domestic trade to secure adequate protection and indemnity insurance to cover the shipowners' or operators' liability for marine accidents, including liabilities for wreck removal, pollution, loss of life or injury to passengers, third parties or seafarers, collisions, damage to fixed or floating structures, and loss or damage to cargo.[62]

vii Seafarers' rights

Seafarers' rights is an important topic when discussing Philippine shipping law because of the sheer number of Filipinos employed worldwide, given that Philippines is the top provider of both seafarers and officers worldwide.[63] The Philippine government has attempted to export Philippine law to protect its seafarers by imposing a standard seafarers' contract called the Philippine Overseas Employment Administration Standard Employment Contract (the POEA SEC).

Included in the POEA SEC is a feature to ensure seafarers' rights to procedural due process. A seafarer who commits a wrongful act must be (1) notified of his or her offence in writing, (2) given the right to explain him or herself, or to have a hearing, and (3) informed in writing of his or her penalty. Failure to observe procedural due process in termination cases, despite the existence of just and authorised causes under the Philippine Labour Code[64] or the POEA SEC will result in an award of nominal damages to the seafarer. The Labour Code provisions, meanwhile, provide seafarers with the right to terminate employment with their employers on specified grounds[65] as well as the implied right to file an illegal dismissal case should they be dismissed for causes not based on any of the valid and authorised grounds[66] stated therein. On the other hand, the POEA SEC not only provides procedural due process and grievance mechanisms to seafarers, but also enumerates seafarers' entitlements and benefits,[67] both monetary and non-monetary, the most important and controversial being the compensation and benefits for injury, illness and death. The Supreme Court clarifies that due process (in the context of illness and injury) means that notice of the seafarer's final

59 Penalising the unauthorised salvage of vessels, wrecks, derelicts and other hazards to navigation as well as cargoes carried by sunken vessels, Presidential Decree No. 890 (1976).

60 DOTC-DTI Joint Administrative Order No. 1, series of 2012.

61 MARINA Circular No. 2018-07, (20 September 2018).

62 MARINA Circular No. 2009-01, as amended (4 February 2009).

63 See footnote 3.

64 A Decree instituting a Labour Code thereby revising and consolidating labour and social laws to afford protection to labour, promote employment and human resources development and ensure industrial peace based on social justice (Labour Code of the Philippines), Presidential Decree No. 442 (1974).

65 ibid., Article 285.

66 ibid., Articles 282 to 284.

67 Includes seafarers' wages, leave pay, shore leave, benefits for illness, injury and death.

illness or injury assessment must be personally handed, or served through lawful means by the company-designated physician, to the seafarer; and contents of the assessment must be explained to him or her.[68]

Jurisdiction for claims by seafarers under the Labour Code and the POEA SEC lies with the National Labour Relations Commission. However, should there be a collective bargaining agreement (CBA) in place and the issue involves matters relating to the interpretation of the implementation of the CBA, the original and exclusive jurisdiction lies with the National Conciliation and Mediation Board (NCMB).[69] Prescription of actions for claims based on the POEA SEC is three years from the date the cause of action accrues.[70]

For seafarers working overseas, the most notable benefit provided by Philippine law is compulsory insurance coverage, which should be secured by the manning companies for the seafarers at no cost to them.[71]

The Philippines ratified the MLC in 2012. In view of this and to further protect seafarers and their employers, the Seafarers Protection Act was enacted into law on 26 November 2015.[72] This Law, which is implemented through the Department of Labour and Employment,[73] aims to protect seafarers from individuals who charge excessive fees and exhort the filing of unfounded labour cases, and their employers with respect to excessive claims.

VII OUTLOOK

The outlook for the Philippine shipping industry is bright and will depend largely on how the Philippines takes advantage of its leading position as a provider of seafarers to the world fleet. There is a core of management-level officers who can be the backbone for the creation of a substantial ship management industry in the Philippines, which could easily rival that of Hong Kong and Singapore. Unlike other business activities in the Philippines, in which foreign equity is restricted, a ship management business can be wholly owned by a foreign investor[74] – this is one of the best-kept secrets in the shipping industry. Apart from the core of potential port captains, port engineers and designated persons ashore who are available now from the officers currently sailing, the Philippines has improved the infrastructure for conducting business. In the next few years, the Philippines will manage to observe whether the shipping world will take advantage of its large pool of talent.

68 *Gere v. Anglo-eastern Crew Management Phils*, GR Nos. 226656 and 226713, 23 April 2018.

69 The NCMB was created under Executive Order No. 126, issued on 31 January 1987; *Estate of Nelson R Dulay represented by his wife Merridy Jane P Dulay v. Aboitiz Jebsen Maritime Inc and General Charterers Inc*, GR No. 172642, 13 June 2012.

70 The POEA SEC, Section 30.

71 Rules and Regulations Implementing the Migrant Workers and Overseas Filipinos Act of 1995, Republic Act No. 10022 (2010), Rule XVI.

72 Act Protecting Seafarers Against Ambulance Chasing and Imposition of Excessive Fees, and Providing Penalties Therefor (Republic Act No. 10706), approved on 26 November 2015.

73 Department Order No. 153-16 Implementing Rules and Regulations of Republic Act No. 10706, approved on 19 April 2016.

74 However, MARINA recently issued Memorandum Circular No. DS-2020-02 that requires corporations that engage in maritime business to be at least 60 per cent Filipino owned, which is in conflict with the Foreign Investment Act (RA 7042), which allows for 100 per cent foreign investment.

The Philippines has also relaxed its cabotage restrictions to allow foreign ships to carry goods between domestic ports. In 2015, a law was passed granting foreign vessels limited rights to transport or transship foreign goods and goods bound for export between different Philippine ports.

Republic Act No. 10668 granted foreign vessels the right to engage in limited cabotage under the following circumstances:

a a foreign vessel, arriving from a foreign port, shall be allowed to carry foreign cargo to its Philippine port of final destination, after being cleared at its port of entry;

b a foreign vessel, arriving from a foreign port, shall be allowed to carry foreign cargo by another foreign vessel calling at the same port of entry to the Philippine port of final destination of such foreign cargo;

c a foreign vessel, departing from a Philippine port of origin through another Philippine port to its foreign port of final destination, shall be allowed to carry foreign cargo intended for export; and

d a foreign vessel, departing from a Philippine port of origin, shall be allowed to carry foreign cargo by another foreign vessel through a domestic transshipment port and transferred at such domestic transshipment port to its foreign port of final destination.[75]

With the passage of this Law, foreign vessels may, in these limited circumstances, engage in trade without securing MARINA registration or a certificate of public convenience. The Philippines is changing and with change comes more opportunity.

75 Republic Act No. 10668, Section 4.

Chapter 35

POLAND

Marek Kacprzak, Michalina Kos-Kaczyńska and Dariusz Zdanowicz[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Poland has a well-developed shipbuilding industry dominated by private sector entities. In 2021, eight seagoing vessels (over 100 gross tonnage (GT)) with a total of 25,000 GT were commissioned.[2]

Poland is a significant producer of sections, hulls and partially equipped hulls. The production of specialised vessels is of significant importance.

The industry of the construction of seagoing leisure and sports boats (sailing and motor) is developing dynamically in Poland, producing 2,368[3] in 2021. This represents a significant increase compared to 2010 when 875 units were produced and 2020 when 1,677[4] units were produced.

Compared to other modes of transport, maritime transport in Poland does not play a key role in the national economy. Despite the fact that in 2021 19,477[5] ships with a net capacity (NT) of 105,829,000[6] arrived in Polish seaports, maritime transport in Poland accounts for only 0.4 per cent of passenger transport and 1.5 per cent of freight transport.[7]

The maritime transport of raw materials, including oil, gas and coal, is important for the economy.[8] There are no statistics for 2022 yet, but a significant percentage increase in raw material transport is expected as a result of the ongoing war in Ukraine and the desire to become independent from pipeline transport.

Poland functions as a fishing industry. In 2021, Poland had 823 seagoing fishing ships,[9] which caught 242,500 tonnes of sea fish.[10]

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2 Statistical Yearbook of Maritime Economy, Statistics Poland, Statistical Office in Szczecin, Warsaw, Szczecin 2022, p. 24.

3 Statistical Yearbook of the Republic of Poland, Statistics Poland ,Warsaw 2022, p. 523.

4 ibid.

5 Statistical Yearbook of the Republic of Poland, Statistics Poland, Warsaw 2022, p. 552.

6 ibid.

7 Statistical Yearbook of the Republic of Poland, Statistics Poland ,Warsaw 2022, p. 543–544.

8 Statistical Yearbook of the Republic of Poland, Statistics Poland ,Warsaw 2022, p. 544.

9 Statistical Yearbook of Maritime Economy, Statistics Poland, Statistical Office in Szczecin, Warsaw, Szczecin 2022, p. 25.

10 Statistical Yearbook of the Republic of Poland, Statistics Poland ,Warsaw 2022, p. 492.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The main source of maritime law in Poland is the Maritime Code (MC).[11] The Code regulates, in particular, the definition of a seagoing ship and its registration, rights *in rem* on the ship, marine insurance, contracts relating to the use of the ship, marine casualties and marine insurance. The Maritime Labour Act[12] regulates the conditions of work on Polish seagoing vessels, in addition to the Act on Maritime Areas of the Republic of Poland and Maritime Administration.[13]

Poland is a party to the most important international conventions on maritime law, in particular: the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules), the Convention on Limitation of Liability for Maritime Claims 1976, the International Convention on Civil Liability for Oil Pollution Damage 1969, the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea 1974 (the PAL Convention) and the International Convention on Salvage 1989 (the Salvage Convention).

Poland, as a member of the European Union, is subject to maritime law regulations adopted by the European Union.

III FORUM AND JURISDICTION

i Courts

As a rule, civil and criminal proceedings relating to incidents at sea are decided by ordinary courts (regional or district courts as courts of first instance and district or appellate courts as courts of second instance).

Poland also has arbitration courts specialising in maritime law disputes, including the International Court of Arbitration at the Polish Chamber of Maritime Commerce.[14] However, arbitration plays a marginal role.

Since 1961, there has been an independent system for settling the causes of marine casualties regulated by the Maritime Chambers Act.[15] The chambers operate at the District Court of Szczecin and at the District Court of Gdańsk. Appeals are decided by the Maritime Appeals Chamber at the Court of Appeal of Gdańsk. Decisions of the Maritime Appeals Chamber may be appealed to the Court of Appeal of Gdańsk. The maritime chambers adjudicate marine casualties involving ships of Polish nationality and ships of foreign nationality, if the casualty occurred in internal Polish maritime waters or Polish territorial sea or if the request to initiate proceedings was made by the shipowner or master of a vessel. In conducting proceedings, the chambers apply the provisions of the Polish Code of Criminal

11 Act of 18 September 2001 Maritime Code (Journal of Laws of 2021, No. 138, Item 1545, as amended).

12 Act of 5 August 2015 on work at sea (Journal of Laws of 2015, Item 1569, as amended).

13 Act of 21 March 1991 on maritime areas of the Republic of Poland and maritime administration (Journal of Laws of 1991, No. 32, Item 131, as amended).

14 The Rules of Court can be found here http://www.kigm.pl/images/izba/msa/MSA_regulamin.pdf (last accessed 2 March 2023).

15 Act of 1 December 1961 on maritime chambers (Journal of Laws of 1961, No. 58, Item 320, as amended).

Procedure.[16] In addition to settling the causes of casualties, the chambers also deal with, among other things, keeping the ship registry, sharing the remuneration for maritime rescue and protests.

The independent system of the investigation of the causes of marine casualties is regulated by the Act on the State Commission for Investigation of Marine Accidents[17] as a result of the implementation of the Directive 2009/18/EC of the European Parliament and Council, which is a part of the Third Maritime Safety Package (Erika III). The Commission will investigate:

a marine casualties and incidents involving ships of Polish nationality;

b ships of foreign nationality if the casualty or incident occurred in Polish internal maritime waters or Polish territorial sea; and

c ro-ro passenger ferries and high-speed passenger ships if the casualty or incident occurred outside the internal waters or territorial sea of a Member State of the European Union, where the last port of call was in Poland and Poland is a state with a material interest.

It is important that the purpose of the investigation of a marine casualty or incident is to establish the circumstances and causes of its occurrence to prevent future marine casualties and incidents and to improve maritime safety. The Commission will not decide on fault or liability. The evidence produced by the Commission and its expert opinions may not be made available either to the prosecution authorities in criminal proceedings or to any other authorities conducting proceedings aimed at establishing liability or fault.

ii Arbitration and ADR

As indicated above, Poland has an International Court of Arbitration attached to the Polish Chamber of Maritime Commerce in Gdynia. However, it is an ad hoc arbitration tribunal and is rarely appointed to settle disputes.

Some maritime law disputes are also referred to the Court of Arbitration at the Polish Chamber of Commerce in Warsaw.[18]

In recent years, the Polish legislature has placed emphasis on alternative dispute resolution. In any lawsuit, it is necessary to indicate whether the parties have attempted to settle the dispute amicably, and in most lawsuits, the courts urge the parties to resort to mediation. The use of mediation may result in a refund of up to 75 per cent of the claim fee.

iii Enforcement of foreign judgments and arbitral awards

Judgments of the courts of the Member States of the European Union are automatically enforceable in Poland in accordance with the Brussels I *bis* Regulation.[19] There is no need for a Polish court to grant an enforceability clause to the title. Enforcement is carried out on the

16 Act of June 6, 1997 Code of Criminal Procedure (Journal of Laws of 1997, No. 89, Item 555, as amended).

17 Act of 31 August 2012 on the State Commission for the Investigation of Maritime Accidents (Journal of Laws of 2012, Item 1068, as amended).

18 The Rules of Court can be found here https://sakig.pl/wp-content/uploads/2022/01/Regulamin-w-Sporach-Uchwalowych_11_11_21.docx (last accessed 2 March 2023).

19 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (OJ L 351, 20 December 2012).

basis of a foreign enforceable title accompanied by a certificate from the court of the issuing state in which the judgment is enforceable. The executing authority may request a translation of the decision. The debtor may defend against the enforceability of the judgment by initiating separate proceedings of refusal of execution before the district court. The grounds for refusal of enforcement are laid down in Article 45 of the Brussels I *bis* Regulation.

Judgments of European Economic Area (EEA) countries (Norway, Liechtenstein, Iceland and Switzerland) are enforced in Poland after a Polish court has declared their enforceability in Poland on the basis of the Lugano Convention 2007.[20] An application for permission to enforce a foreign court decision must be submitted to the district court.

Recognition and declaration of the enforceability of court judgments from countries to which Poland is bound by international agreements (e.g., Ukraine, Belarus and Russia) takes place in the manner and on the principles indicated in these agreements.

Recognition of the decisions of other countries takes place under Article 1145 of the Polish Code of Civil Procedure (CCP).[21] Judgments must be automatically recognised unless the negative conditions set out in Article 1146 CCP are fulfilled. Any person concerned may apply for recognition or non-recognition of the judgment.

The enforceability of judgments in other countries occurs after the declaration of enforceability in Poland in accordance with Article 1150 CCP. A declaration of enforceability in Poland will be granted if the judgment is enforceable in the issuing state or if the negative conditions of Article 1146 CCP are not met. The declaration of enforceability shall be decided by the district courts competent for the place where enforcement is to take place.

Owing to the frequent occurrence of United Kingdom court judgments, the recognition of judgments of these courts in Poland after the end of the Brexit transition period requires a separate analysis. The Brussels I *bis* Regulation and the Lugano Convention do not apply to the United Kingdom. With regard to the recognition of judgments in civil matters, the European Union recommends that the United Kingdom be treated as a third country and apply the provisions of the 2019 Hague Convention.[22] However, with regard to the content of Article 2 of that Convention, which states that it will not apply to matters relating to the carriage of passengers and goods, transboundary marine pollution, marine pollution in areas beyond national jurisdiction, ship-source marine pollution, limitation of liability for maritime claims and general average, this regulation will have very limited application to the issues covered by this review.

Poland is also party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1959.

IV SHIPPING CONTRACTS

i Shipbuilding

In the past, most contracts for shipbuilding or repair in Poland were concluded under foreign law. At present, there is a clear trend of concluding construction and renovation contracts based on Polish law, especially for smaller units.

20 Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (OJ L 339, 21 December 2007).

21 ibid.

22 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention).

The contract for the construction and repair of the ship is not specifically regulated in the Polish legal system. The regulations of the Polish Civil Code (CC) concerning contracts for work (Articles 627–646 CC) [23] apply to this agreement. Construction work may be done with materials from the contracting authority or materials from the contractor. Remuneration is usually a lump sum (but it is also possible to calculate cost estimates). The limitation period for claims is two years from the date of delivery of the vessel or the date on which the vessel was to be delivered.

Even for contracts under foreign law, the provisions of Polish substantive law apply to ships built in Poland.

According to the regulations of the MC, a ship and a ship under construction may be entered into the ship register. For some categories of vessels, registration is compulsory and some are subject to registration at the request of the owner. A vessel built in the Poland may be entered into the ship register if its keel has been laid or equivalent construction work has been carried out at the launching site.

The agreement on the transfer of ownership of a vessel in the ship register, including a vessel under construction, requires a written form with notarised signatures.

On a vessel in the ship register, a pledge in that register (maritime mortgages) may be established. This also applies to vessels under construction. A maritime mortgage must, in addition to the ship and its ownership, also encumber the shipowner's claims arising after the mortgage has been established for: compensation for damage to or loss of the vessel, including insurance compensation, rescue fees to the extent that they compensate for damage to the vessel caused by the rescue, the vessel's participation in a joint accident and charges for chartering or leasing the vessel.

ii Contracts of carriage

Poland is party to the Hague-Visby Rules changed by the Special Drawing Rights Protocol 1979 (the SDR Protocol).

Poland is also party to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008, but this Convention has not yet been ratified in Poland.

Contracts of carriage of goods are regulated by the MC in Articles 103-171. This regulation is essentially in line with the Hague-Visby Rules.

According to Article 156 MC, creditors are entitled to a statutory lien on the cargo with priority over other claims, even if secured by a lien arising from a contract or a court decision, to secure their preferential claims. Preferential claims are those for, inter alia, damage caused by the cargo and the carrier's receivables from the carriage of this cargo. Preferential claims will be settled, together with interest and the costs of the proceedings.

Multimodal bills of lading are governed by the provisions of Article 138 MC, which states that, as a general rule, the provisions on the bill of lading will apply *mutatis mutandis* to a direct bill of lading issued by a maritime carrier undertaking a carriage to be performed on a part of the journey by another carrier (sea, river, land or air). As a general rule, the carrier who has issued the direct bill of lading will be responsible for the proper performance of the carrier's obligations throughout the route covered by the bill of lading until the cargo is delivered to the entitled consignee. Each of the other carriers will be jointly and severally

23 Act of 23 April 1964 Civil Code (Journal of Laws of 1964 No. 16, Item 93, as amended).

liable for the performance of these obligations on the part of the route it operates with the carrier issuing the direct bill of lading. Carriage on non-maritime sections of the route is governed by the law applicable to the type of carriage concerned. If it is not possible to determine on which part of the route an incident occurred, the provisions of the MC will be applied to assess its consequences.

Poland does not have a separate regulation on maritime cabotage. In this respect, the provisions of Regulation 3577/92 of the European Union[24] apply.

As a rule, claims under contracts of carriage are time-barred after two years from their due date. However, claims against the carrier relating to cargo arising from the bill of lading expire one year from the date on which the cargo was or was to have been delivered. As an exception, an action for damages against a third party in cargo-related matters may be brought even after the expiry of one year within the time limit specified in the provisions on the expiration of claims, but no longer than six months from the date on which the person bringing this action has satisfied the claim or has been served the lawsuit.

iii Cargo claims

As indicated above, Polish national regulations in the field of the maritime carriage of goods comply with the Hague-Visby Rules and the SDR Protocol.

As a rule, the person entitled to pursue claims under the contract of carriage is entitled under the bill of lading.

Pursuant to Article 144 MC, the carrier must deliver the cargo at the destination port to the legitimate holder of at least one copy of the bill of lading. The legitimate holder of a bill of lading is:

a for a straight bill of lading: the consignee indicated in the bill of lading;

b for a negotiable bill of lading: the person on whose behalf the bill of lading has been issued that has not been transferred by an endorsement, or a holder of a bill of lading showing his or her right by an uninterrupted endorsement series, even if the last endorsement was blank;

c for a bearer bill of lading: the bearer of the bill of lading.

If no bill of lading has been drawn up, the cargo will be delivered at the destination to the consignee designated by the shipper or a person authorised by him or her.

The entity passively legitimated is the carrier indicated in the contract of carriage or, more often, in the bill of lading. If the carrier is not mentioned in the bill of lading, the shipowner is deemed to be the carrier. If the carrier is incorrectly or falsely mentioned in the bill of lading, the owner of the ship on which the cargo has been loaded will be liable to the consignee for the damage resulting therefrom and will be entitled to a refund from the carrier.

According to Article 166 MC, compensation for the loss of cargo is determined according to the normal value of the cargo, and compensation for damage to the cargo is determined according to the difference between the normal value of the cargo in undamaged condition and its value in damaged condition. For the purpose of determining the amount of compensation, the value of the cargo at the place and time at which it was or should have been unloaded from the ship in accordance with the contract of carriage is relevant. That value is determined on the basis of the commodity exchange price or, failing that, on the basis of the current market price;

24 Council Regulation (EEC) No. 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage).

if both prices cannot be ascertained, the value of the cargo is determined by comparing it to the value of goods of the same kind and quality. Where the value of the cargo has been declared prior to loading by the shipper and is shown on the bill of lading or on another document under which the carriage is carried out, compensation will not exceed the declared value of the cargo. The declaration of the shipper, as shown in the bill of lading, as to the nature and value of the goods, creates a presumption that the carrier may refute by proof to the contrary.

iv Limitation of liability

Pursuant to Article 167 MC, when carried under a bill of lading in which the value of the cargo has not been shown, the compensation for loss of or damage to one item of cargo or another customarily accepted unit of cargo may not exceed the amount calculated in accordance with the rules laid down in the Hague-Visby Rules and the SDR Protocol. To a foreign creditor whose state has established a lower limit of liability of the carrier than that determined pursuant to the Hague-Visby Rules and the SDR Protocol, the carrier is liable to the extent of that lower limit of liability. The carrier may not avail itself of the limitation of liability if it is proved that the damage resulted from an act or omission of the carrier committed either with intent to cause damage or recklessly and with knowledge that damage is likely to occur.

V REMEDIES

i Ship arrest

Poland is a party to the International Convention Relating to the Arrest of Sea-Going Ships of 1952 (the Brussels Convention). The provisions of this Convention and the provisions of the CCP concerning precautionary proceedings constitute the basis for arresting a ship. The closed list of claims that may be secured by arrest is laid down in Article 1 of the Convention.

The application for the provision of security must be submitted to the competent court where the security is to be provided. The application is subject to a court fee. To speed up the examination of the application, it is recommended that the documents attached to the application be translated into Polish by a sworn Polish translator. In the application, the creditor must substantiate the existence of his or her claim and demonstrate that he or she has a legal interest in providing security (simply, that the failure to provide security will make it impossible or significantly difficult to enforce the judgment). The second condition does not have to be demonstrated for claims less than 70,000 zloty between entrepreneurs from EU Member States, European Free Trade Agreement Member States, parties to the Agreement on the European Economic Area and Switzerland.

The court should consider the application immediately, within seven days. A court order to grant security is enforceable once it has been issued. The arrest is made by the bailiff at the request of the creditor. The court may order to secure the claims by arrest while the dispute is pending or before an action for a claim is instituted. If the ship is arrested before an action for a claim is brought, the court will oblige the creditor to bring an action within 14 days. If no such action is brought before a Polish or foreign court, the arrest of the ship will be lifted.

ii Court orders for sale of a vessel

The CCP provides for a separate procedure for enforcement against seagoing vessels in a ship register (Articles 1014–1022(4) CCP).

Enforcement will be carried out by the bailiff of the court in whose district the ship is located at the time of the commencement of enforcement. The creditor should attach to

the application for enforcement proof that the ship is on a register, unless it is impossible or excessively difficult to do so. At the same time as sending the debtor an order for payment, the bailiff will order the detention of the ship and establish supervision. The sale will take place by public tender after prior valuation of the vessel.

Execution from foreign ships is carried out in a similar manner. In the application for enforcement, the creditor will indicate the register in which the ship is entered, unless it is impossible or excessively difficult to do so. The bailiff will also notify the foreign registry authority about the detention of the vessel. If the order for payment cannot be served on the debtor because he or she does not reside or have his or her registered office at the address indicated in the ship documents, the court will, at the request of the creditor, appoint a liquidator for the debtor. In addition, in the event of death or liquidation of the debtor after the commencement of enforcement proceedings, the court appoints a curator for the creditor at his or her request.

VI REGULATION

i Safety

The legal act regulating maritime safety in Poland is the Maritime Safety Act.[25]

It is a comprehensive act implementing several EU directives and many international agreements, in particular, the:

a International Convention for the Safety of Life at Sea 1974, with the 1978 and 1988 Protocols;

b International Convention on Load Lines 1966, with the 1988 Protocol;

c Convention on the International Regulations for Preventing Collisions at Sea 1972 (COLREGs);

d International Convention for the Prevention of Pollution from Ships 1973, with the 1978 and 1997 Protocols;

e International Convention on Maritime Search and Rescue 1979; and

f International Convention on Standards of Training, the Certification and Watchkeeping for Seafarers 1978.

ii Port state control

Poland is a party to the Paris Memorandum of Understanding on Port State Control (the Paris MOU). The legal framework for the conduct of inspections provides the above-mentioned Maritime Safety Act and its implementing regulation. The inspection is carried out by independent inspectors in accordance with the Paris MOU as part of the activities of the maritime offices located in Gdynia, Słupsk and Szczecin and the results of the inspection are transmitted to the joint Paris MOU database.[26]

iii Registration and classification

There are four ship registers in Poland.

The register of ships provided for in Article 23(1) of the MC kept by the maritime chambers is of the utmost importance. As a rule, seagoing ships belonging to Polish citizens are subject to registration. A maritime mortgage may only be established on a ship entered in this register.

25 Act of 18 August 18 2011 on maritime safety (Journal of Laws of 2011 No. 228, Item 1368, as amended).

26 https://www.parismou.org/detentions-banning/current-detentions (last accessed 8 March 2023).

The second register is the register of yachts provided for in Article 23, Section 3, of the MC, in which sports and recreational ships up to 24 metres in length are registered. The register is maintained by sports associations.

Ships not entered in the above registers, if not engaged in international navigation, may be entered in the administrative register provided for in Article 39 of the MC and kept by maritime administrations. The ship must be entered in the register before the start of its operation and the vessel must be under construction before the start of the test voyage if it is to take place outside the Polish territorial sea.

A separate register is kept for fishing boats by the Minister of Agriculture.

The only recognisable Polish classification society is Polski Rejestr Statków SA, which dates back to 1936.[27]

iv Environmental regulation

Poland is a party to the Convention on the Protection of the Marine Environment of the Baltic Sea Area 1992.

The main internal act is the Act on the Prevention of Marine Pollution by Ships.[28] The Act regulates, among other things, the issues of the supervision of ships and carrying out inspections. The law provides for administrative and criminal sanctions.

v Collisions, salvage and wrecks

National regulations on maritime collisions are contained in the MC.

Poland is also a party to international agreements on maritime collisions, such as the Brussels Convention, the COLREGs and the International Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision 1952.

The MC also contains basic local regulations for marine salvage.

Poland is a party to the Salvage Convention.

Poland has not yet ratified the International Convention on the Removal of Wrecks of 2007 (the Nairobi Convention).

The removal of wrecks is subject to national regulations. In accordance with Article 282 MC, the owner of property (ship, cargo or other object) sunk within internal Polish maritime waters or Polish territorial sea should, within six months of the date of the sinking of the property, notify the competent maritime authority of the intention to extract the property and specify the deadline by which he or she intends to complete the extraction.

Under Article 284 MC, if sunken or abandoned property on the shoreline or on the surface of the water obstructs navigation or work in a port, on a network or waterway, or threatens navigation, the Director of the Maritime Authority may order that the obstruction be removed at the expense of the owner, setting an appropriate time limit for the receipt of the property and reimbursement of the costs incurred.

Under Article 286 MC, the extractor is entitled to reimbursement of costs and expenses and remuneration, the amount of which is determined by the appropriate application of the provisions on marine salvage.

27 https://www.prs.pl/home (last accessed 9 March 2023).

28 Act of 16 March 1995 on preventing pollution of the sea by ships (Journal of Laws of 1995 No. 47, Item 243, as amended).

vi Passengers' rights

Passenger transport is regulated locally in the MC.

EU regulations such as Regulation 392/2009[29] and Regulation 1177/2010[30] are also applicable to Poland.

Poland is also a party to the PAL Convention.

vii Seafarers' rights

The Maritime Labour Law is the national regulation in this regard.[31]

Poland is a party to the Maritime Labour Convention 2006.

Poland operates drilling platforms (exploration and exploitation) in the Polish Baltic Sea Economic Zone. For persons working on drilling platforms, in addition to the regulations applicable to seafarers, the regulations applicable to miners also apply.

VI OUTLOOK

Poland has embarked on a programme to build offshore wind farms in the Polish economic zone. The programme provides state support to the construction and operation of wind farms with a total capacity of 10.9 GW. The project is to be implemented in two stages: the first stage is the construction of 5.9 GW farms and the next stage is the construction of 5 GW farms. Nine projects are currently at different stages of implementation. The legal framework for state support in the implementation of these projects is the Act on the Promotion of Electricity Generation in Offshore Wind Farms.[32]

The project is to be implemented with the participation of national suppliers (local content). In 2030, offshore wind farms will account for 13 per cent, and in 2040 for 19 per cent, of electricity generated in Poland. The first offshore wind farms are expected to start producing energy in 2026. The estimated value of investments in offshore wind energy is expected to amount to about 130 billion zloty.

In the investment phase, the projects are expected to generate 34,000 jobs, while in the operational phase (servicing ready-made wind farms) about 29,000 jobs.[33]

The programme will force Poland to develop installation and exploitation ports. Planned investments for the development of the ports amount to €437 million.[34]

It will also be necessary to expand the installation and service fleet.

29 Regulation (EC) No. 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents.

30 Regulation (EU) No. 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No. 2006/2004.

31 Act of 5 August 2015 on work at sea (Journal of Laws of 2015, item 1569, as amended).

32 Act of 7 December 2020 on promoting electricity generation in offshore wind farms (Journal of Laws of 2021, Item 234, as amended).

33 Development programme for offshore wind farms (https://www.gov.pl/web/morska-energetyka-wiatrowa/program-rozwoju-morskich-farm-wiatrowych (last accessed 13 March 2023)).

34 Installation and service ports (https://www.gov.pl/web/morska-energetyka-wiatrowa/porty-instalacyjne-i-serwisowe (last accessed 13 March 2023)).

Chapter 36

SINGAPORE

Toby Stephens and Christopher Ong[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

With more than 130,000 vessels calling at the port of Singapore annually, Singapore is an extremely important global business centre, acting as a maritime gateway to Asia. According to the Maritime and Port Authority of Singapore (MPA), it is 'one of the largest and most important bunkering ports in the world'.[2] As well as the business that Singapore receives from the traffic passing through its ports, it is also home to more than 140 of the world's top international shipping groups[3] and has more than 4,400 vessels registered with the Singapore Registry of Ships.[4] The most recent figures for Singapore's seaborne cargo put the volume at 577.732 million tonnes for 2022,[5] with container throughput at a notable 37.289.6 million twenty-foot equivalent units.[6]

The scale of the maritime industry in Singapore, and its importance to Singapore and the rest of the world, explains its sophisticated maritime legal framework.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Singapore has incorporated the following International Maritime Organization (IMO) conventions into its legislative framework:

a the International Convention for the Safety of Life at Sea 1974 (SOLAS), 1978 SOLAS Protocol, 1988 SOLAS Protocol (HSSC) and 1996 SOLAS Agreement;

b the International Convention on Load Lines 1966 (the Load Lines Convention) and 1988 Protocol;

c the Convention on the International Regulations for Preventing Collisions at Sea 1972 (COLREGs);

d the International Convention on Tonnage Measurement of Ships 1969 (the Tonnage Convention);

e the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 (the STCW Convention);

f the Operating Agreement on the International Maritime Satellite Organisation 1976;

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2 https://www.mpa.gov.sg/port-marine-ops/marine-services/bunkering.

3 https://www.mot.gov.sg/what-we-do/maritime/global-maritime-hub.

4 *Year Book of Statistics Singapore 2019*, Department of Statistics, Singapore at page 185 and https://www.mpa.gov.sg/singapore-registry-of-ships.

5 https://www.singstat.gov.sg/find-data/search-by-theme/industry/transport/latest-data.

6 https://www.singstat.gov.sg/find-data/search-by-theme/industry/transport/latest-data.

g the Convention on the International Maritime Satellite Organisation 1976;
h the Convention on Facilitation of International Maritime Traffic 1965 (the FAL Convention);
i the International Convention for the Prevention of Pollution from Ships 1973 (MARPOL) (Annexes I to V) and the 1997 Protocol to the International Convention for the Prevention of Pollution from Ships (Annex VI);
j the 1976 and 1992 Protocols to the International Convention on Civil Liability for Oil Pollution Damage (the CLC Convention);
k the 1992 Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage;
l the Convention on the Limitation of Liability for Maritime Claims 1976 (the LLMC Convention);
m the Protocol of 1996 to amend the LLMC Convention;
n the International Cospas-Sarsat Programme Agreement 1988 (COS-SAR);[7]
o the International Convention on the Control of Harmful Anti-Fouling Systems on Ships 2001 (the Anti-Fouling Convention);
p the International Convention on Maritime Search and Rescue 1979 (the SAR Convention);
q the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 (the SUA Convention) and the 1988 SUA Protocol;
r the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (the OPRC Convention) and the 2000 Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances (HNS-OPRC);
s the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (the Bunker Convention);
t the Convention for the Control and Management of Ships' Ballast Water and Sediments 2004 (the Ballast Water Management Convention);
u the Maritime Labour Convention 2006 (MLC), and Amendments of 2014;[8] and
v the Nairobi Convention on the Removal of Wrecks 2007 (the Nairobi Convention).

Singapore's international obligations with respect to the IMO conventions are administered by the Maritime and Port Authority of Singapore (MPA) through eight key Singapore statutes and regulations made thereunder:

a the Maritime and Port Authority of Singapore Act, which regulates the functions, duties, and powers of the MPA, the employment of seafarers, port regulation and licensing, among other things;
b the Merchant Shipping Act, which covers the registration of ships, manning and crew matters, and safety issues;
c the Prevention of Pollution of the Sea Act 1990, which empowers the MPA to take preventive measures against pollution;

7 Note: the 1988 Cospas-Sarsat Programme Agreement is a multinational agreement, rather than an International Maritime Organization (IMO) convention.

8 Note: the Maritime Labour Convention is an International Labour Organization convention, rather than an IMO convention.

d the Merchant Shipping (Civil Liability and Compensation for Oil Pollution) Act 2008, which addresses liability for oil pollution;

e the Merchant Shipping (Civil Liability and Compensation for Bunker Oil Pollution) Act, which considers liability for bunker oil pollution;

f the Merchant Shipping (Wreck Removal) Act 2017, which gives effect to the Nairobi International Convention on Wreck Removal, setting out the requirements for the removal of wrecks following upon a maritime casualty;

g the Maritime Offences Act, which incorporates certain conventions, such as the SUA Convention, that deal with criminal offences; and

h the Merchant Shipping (Maritime Labour Convention) Act 2014 (Act 6 of 2014), which safeguards the well-being and working conditions of seafarers aboard ships.[9]

III FORUM AND JURISDICTION

i Courts

The Supreme Court of Singapore consists of the High Court and the Court of Appeal.

On 5 December 2020, the High Court of Singapore was restructured into two divisions, namely the General Division and the Appellate Division.[10] The Court of Appeal of Singapore remains the apex court and appeals arising out of the General Division will be allocated between the Appellate Division and the Court of Appeal, with the Appellate Division having no criminal jurisdiction. Any appeals against the decisions of the Appellate Division shall only be allowed with leave of the Court of Appeal.

The General Division of the High Court exercises original jurisdiction in respect of criminal matters that are of particular gravity, as defined by statute law, and tries civil matters where the subject matter in question is in excess of S$250,000 in monetary value. All admiralty matters must be commenced in the General Division of the High Court, which alone exercises admiralty jurisdiction by statute.

The Singapore courts take an active role in case management, particularly through regular pretrial conferences, to advance litigation proceedings to resolution, whether by trial or mediated resolutions in as cost-effective a manner as possible. Currently, civil actions that are commenced in the High Court typically take 12–15 months from the commencement of the suit to completion of the trial.

As part of the plan to position Singapore as the leading dispute resolution hub in Asia, the Singapore International Commercial Court (SICC) was constituted on 5 January 2015, following a series of legislative amendments. The judges of the SICC are the existing Supreme Court justices and a panel of 17 international judges with a mixed common law and civil law background. The SICC constitutes a division of the General Division of the High Court and it is primarily designed to hear and try international commercial disputes.[11]

The SICC has jurisdiction to hear claims or actions:

a that are international and commercial;[12]

b in which the parties have expressly submitted to the jurisdiction of the SICC by a written jurisdiction agreement; and

9 www.mpa.gov.sg/web/portal/home/port-of-singapore/maritime-legislation-of-singapore.

10 Supreme Court of Judicature (Amendment) Act 2019.

11 https://www.sicc.gov.sg/about-the-sicc/judges.

12 Singapore International Commercial Court Rules 2021, Order 2, Rule 1.

c in which the parties to the action do not seek any relief in the form of a prerogative order.

In addition, the SICC can hear cases relating to insolvency, restructuring and dissolution that are international and commercial in nature, cases relating to international commercial arbitration, and applications for pre-action remedies (which are explained in further detail below).[13] It is possible for the High Court to transfer cases to the SICC, of its own motion, if the claim satisfies the criteria and the parties have submitted to the jurisdiction of the Singapore courts.

On 9 January 2018, the Parliament of Singapore passed the Supreme Court of Judicature (Amendment) Bill, which provides that the SICC (as a division of the High Court) has jurisdiction to hear matters under the International Arbitration Act (IAA), such as applications for interim reliefs under Section 12A of the IAA and applications to set aside an arbitral award made in Singapore. However, only Singapore-qualified lawyers practising in Singapore law practices are allowed to argue IAA-related matters before the SICC, even if foreign law governs the subject matter of the dispute or when the parties in the SICC proceedings or the original arbitration appoint foreign lawyers.[14]

ii Arbitration and ADR

The Singapore courts have incorporated alternative dispute resolution (ADR) options into the judicial process with the aim of creating a holistic judicial system that provides litigants with access to both modes of resolving disputes, namely the ADR process and the trial process. Since May 2012, the state courts have implemented a 'presumption of ADR' for civil matters (i.e., all civil disputes in the state courts are automatically referred to the most appropriate type of ADR, unless any party opts out of the ADR). There may be subsequent cost implications for a party who opts out of the ADR for unsatisfactory reasons.

Originally established in 2004 under the umbrella of the Singapore International Arbitration Centre (SIAC), the Singapore Chamber of Maritime Arbitration (SCMA) was reconstituted and became separate from the SIAC in May 2009 to meet the growing needs of the maritime community, which preferred a model similar to the London Maritime Arbitrators Association, whereby the arbitration body does not manage the arbitration process. The SCMA provides a framework for maritime arbitration. The SIAC is a non-sector-specific arbitration organisation that was established in 1991.

The SCMA released the fourth edition of their rules on 1 December 2021, which govern any SCMA arbitration commenced on or after 1 January 2022. The new rules make changes to the procedure throughout the arbitration process starting with the service of documents. Under Rule 3.1, any notice or communication sent by email with proof of delivery or receipt is deemed to have been effectively served and received. Service in person, by courier or post is still permitted but no longer essential. Rule 44 introduces an expedited procedure for claims and counterclaims that do not exceed US$300,000 in value. This replaces the small claims procedure, which had a lower claim and counterclaim value of US$150,000. The expedited procedure aims, where no oral hearing is required, for the sole arbitrator to issue their award within 21 days.

Rule 45 of the SCMA Rules sets out the SCMA Expedited Arbitral Determination of Collision Claims (SEADOCC), a procedure that provides a fair, timely and cost-effective

13 ibid.

14 Singapore International Commercial Court Rules 2021, Order 3, Rule 1 read with Order 3, Rule 3.

means of determining liability for a collision through mediation in circumstances where it has not been possible or appropriate to reach such an apportionment of liability using other means of dispute resolution.[15] The purpose of arbitration under the SEADOCC procedure is to provide a binding decision on liability for a collision between two or more ships by a single arbitrator. The procedure is governed by the SEADOCC Terms, which include directions on early termination and parties' submissions.

The SCMA ARB-MED

The SIAC continues to become an increasingly important global forum for international dispute resolution. In 2020, SIAC's caseload crossed the 1,000-case threshold for the first time, with 1,005 new cases as at 30 October 2020. SIAC also opened a new representative office in New York, US; it is the first office outside Asia.[16] The keys to success appear to be Singapore's logistical and cultural connectivity with the region and the world, the lack of corruption, a sophisticated legal industry and a developed economy.

The SIAC's primary rules of arbitration are the SIAC Rules but parties can also choose to adopt the UNCITRAL Arbitration Rules for the conduct of arbitration at the SIAC. Although the UNCITRAL Rules are generally designed for ad hoc forms of arbitration, parties can still elect for institutional administration of the arbitration by the SIAC. These are both consensual regimes that respect the principle of party autonomy.

Following amendments made to the IAA in 2012, awards issued by emergency arbitrators in arbitrations seated within and outside Singapore are enforceable under Singapore law.[17]

Since 2013, Singapore has been a named arbitral forum to the BIMCO[18] Standard Dispute Resolution Clause, in addition to London and New York, to reflect the global spread of maritime arbitration venues. Within the new SCMA BIMCO Arbitration Clause,[19] disputes would be resolved under the IAA and conducted in accordance with the SCMA Rules in force at the time the arbitration proceedings are commenced, offering parties the choice of applying Singapore or English law as the governing law of the contract.

Third-party funding of international arbitration became available in March 2017. In particular, a funder who carries on the principal business of funding dispute resolution proceedings and has a paid-up share capital or has managed assets of not less than S$5 million (or the equivalent amount in foreign currency) is permitted to fund the following:[20]

a international arbitration proceedings;

b court proceedings arising from or out of or in any way connected with international arbitration proceedings;

c SICC proceedings for as long as those proceedings remain in the SICC;

d mediation proceedings arising out of or in any way connected with international arbitration proceedings, or arising out of SICC proceedings;

15 SCMA Rules (Fourth Edition, January 2022), Rule 45.

16 https://www.siac.org.sg/our-rules/69-siac-news/684-siac-opens-office-in-new-york-and-announces-new-record-caseload.

17 International Arbitration (Amendment) Act 2012 (Singapore), Section 2(a).

18 The Baltic and International Maritime Council.

19 https://www.scma.org.sg/Default.aspx?sname=scma&sid=126&pageid=2969&catid=4185&catname=Model-Clauses.

20 Regulations 3 and 4 of the Civil Law (Third-Party Funding) Regulations 2017.

e an application for a stay of proceedings referred to in Section 6 of the IAA (Chapter 143A) and any other application for the enforcement of an arbitration agreement; and

f proceedings for or in connection with the enforcement of an award or a foreign award under the IAA.

It bears noting that the Honourable Justice Aedit Abdullah, in *In Re Fan Kow Hin*,[21] clarified that the 2017 amendments allowing for third-party funding for international arbitration and related proceedings were not exhaustive and did not preclude common law developments.

Mediation is used in tandem with court proceedings in that the court can suggest that parties refer disputes to the Singapore Mediation Centre (SMC). Mediation is voluntary and would only be adopted with the consent of all parties involved. On 20 December 2018, the United Nations General Assembly (UNGA), at its 73rd session in New York, passed a resolution to adopt the United Nations Convention on International Settlement Agreements Resulting from Mediation, and to name it after Singapore – the Singapore Convention on Mediation. The Convention has entered into force in Singapore.[22] The Convention will provide for the cross-border enforcement of mediated settlement agreements. This will give business greater certainty that mediated settlement agreements can be relied on to resolve the cross-border commercial disputes.

The SMC offers mediation schemes such as the commercial mediation scheme, which is particularly suitable for large complex commercial disputes, and the med–arb scheme, which is a hybrid dispute resolution process that brings together the elements of both mediation and arbitration, and is overseen by the SMC in collaboration with the SIAC. The mediation services offered by the SMC, where the panel of mediators largely comprises local mediators, generally focus on domestic disputes. A maritime panel, which comprises professionals from the maritime industry, is also available for mediation of maritime-related disputes referred to the SMC.

Since November 2014, mediation has also been available under the auspices of the Singapore International Mediation Centre (SIMC). The SIMC administers mediation under the SIAC–SIMC Arb–Med–Arb (AMA) Protocol (when disputes have been submitted to the SIAC for resolution under the Singapore Arb–Med–Arb Clause or other similar clause, or where parties have agreed that the AMA Protocol shall apply) or the SIMC Mediation Rules (i.e., in cases where the AMA Protocol does not apply).

iii Enforcement of foreign judgments and arbitral awards

The Reciprocal Enforcement of Foreign Judgments Act 1959 (REFJA) allows the enforcement of certain specified court judgments of Australia, Brunei, India, Malaysia, New Zealand, Pakistan, Papua New Guinea, Sri Lanka, the United Kingdom (which are Commonwealth countries) and Hong Kong. The types of judgment that may be enforced under the REFJA include monetary judgments, non-money judgments, interlocutory judgments and consent judgments.

To enhance Singapore's position as an international dispute resolution hub, Parliament enacted the Choice of Court Agreements Act (CCAA) on 14 April 2016. The CCAA applies

21 [2018] SGHC 257.

22 https://sso.agc.gov.sg/Act/SCMA2020.

only to international civil or commercial disputes and not matters such as insolvency, consumer matters, most maritime claims, tortious claims not arising from contracts, antitrust and intellectual property (other than copyright).

The CCAA implements the 2005 Hague Convention on Choice of Courts Agreements (HCCCA) to which Singapore is a signatory. Where a Singapore court is the chosen court under an exclusive choice of court agreement, the courts of other contracting states will be obliged to suspend or dismiss parallel proceedings brought in their jurisdiction, in favour of the Singapore court, and the Singapore court judgment must be recognised and enforced by all other contracting states. Singapore will similarly have reciprocal obligations to afford the same treatment to exclusive choice of court agreements in favour of the courts of other contracting states and to the judgment of their courts.

There may be instances where a foreign judgment falls within the scope of both the CCAA and the REFJA (e.g., judgments of the superior UK courts). In instances of overlap, the CCAA overrides the REFJA. For the avoidance of doubt, the REFJA have been amended to make them inapplicable to judgments falling under the CCAA. Notably, Clause 2(2) of the CCAA provides that where the 'High Court' is designated in an exclusive choice of court agreement, the designation is to be construed as including the SICC unless a contrary intention appears in the agreement. Hence, a party specifying the Singapore High Court as the chosen forum would be taken to have included the SICC as a chosen court. This evidently bolsters the services offered by the SICC and the enforceability of SICC judgments.

Judgments from other countries that are not gazetted under the CCAA or the REFJA may be enforced under common law. This requires an action on the foreign judgment (i.e., the foreign judgment creditor commences a suit in a Singapore court, suing on the original cause of action, and using the foreign judgment as evidence of the defendant's *in personam* liability on the claim). Typically, a summary judgment application is possible on a common law enforcement action.

On 2 September 2019, the Reciprocal Enforcement of Foreign Judgments (Amendment) Bill 2019[23] and the Reciprocal Enforcement of Commonwealth Judgments (Repeal) Bill[24] were passed by Parliament to consolidate the reciprocal recognition and enforcement of foreign judgments (i.e., REFJA and RECJA) under a single statutory regime, by (1) repealing the RECJA and (2) amending the REFJA and the IAA. The Reciprocal Enforcement of Foreign Judgments (Amendment) Bill 2019 was intended to expand on the types of judgments that can be reciprocally recognised and enforced in Singapore beyond the current monetary judgments, to include, inter alia:

a non-money judgment;
b interlocutory judgments;
c judgments from lower courts in foreign jurisdictions; and
d consent judgments.

Where enforcement of foreign arbitral awards is concerned, the centrepiece avenue under Singapore law is that of the New York Convention, to which Singapore is a signatory. The approach of the Singapore courts and, uniformly, the Commonwealth jurisdictions that are

23 Reciprocal Enforcement of Foreign Judgments (Amendment) Bill No. 19/2019, read for the first time on 5 August 2019 and passed on 2 September 2019.

24 Reciprocal Enforcement of Commonwealth Judgments (Repeal) Bill No. 18/2019, read for the first time on 5 August 2019 and passed on 2 September 2019.

party to the New York Convention, is to be pro-enforcement when asked to enforce foreign arbitral awards under the Convention.[25] The pro-enforcement purpose of the Convention is underscored by the exclusive and exhaustive grounds, under Section 31 of the IAA, by which enforcement of a Convention award may be refused.[26] Consistent with the legislative objective, the Singapore court has endorsed and applied a mechanistic approach to the process of enforcing foreign awards under the Convention insofar as the first stage of enforcement, which pertains to the initial grant of leave to enforce, is concerned. At the second stage of the two-stage process of enforcement, which is invoked when a party against whom an award is made resists enforcement on the grounds set out in the IAA, that party must prove the grounds on which it relies on a balance of probabilities.

In *CDI v. CDJ*,[27] wherein AsiaLegal acted for the plaintiff, the Singapore High Court confirmed that the same grounds for resisting enforcement of a foreign arbitration award under Article 36(1) of the UNCITRAL Model Law on International Commercial Arbitration are equally applicable to a party seeking to resist the enforcement of a domestic international arbitral award under the IAA. The Singapore court's approach is 'undergirded by the overarching principles of limited curial intervention and recognition of the autonomy of the arbitration process'. The High Court summarised the Singapore court's overall approach when a challenge is mounted on an alleged breach of natural justice and reiterated the heavy burden and high threshold that an applicant must cross. Furthermore, the approach in *Glaziers Engineering Pte Ltd v. WCS Engineering Construction Pte Ltd (Glaziers Engineering)* [28] was adopted in analysing whether an issue or finding was foreseeable to the parties. It was emphasised that a party cannot seek to challenge an award on its merits 'in the guise of a complaint dressed up as a breach of natural justice'.

IV SHIPPING CONTRACTS

i Shipbuilding

Singapore has long been a leading centre for ship repair and building. Singapore corporations Keppel Corporation and Sembcorp Marine are among the world's top offshore rig builders.

A shipbuilding contract is regarded both as a contract for sale and purchase as well as a contract for the supply of workmanship and materials.

Shipbuilding disputes usually involve issues of whether the ship complies with the description and contractual specifications.[29] The conditions and implied warranties under the Sale of Goods Act 1979 apply if the shipbuilding contract is governed by Singapore law (e.g., there is an implied condition that the ship will correspond with the description and be reasonably fit for its intended purpose).

The parties may contract for title to pass gradually as the construction progresses or at certain stages or milestones. Generally, in the absence of any provisions to the contrary, the risk will pass with the title.

25 See *Aloe Vera of America v. Asianic Food (S) Pte Ltd* [2006] 3 SLR 174 at [41] to [46].

26 id.

27 [2020] SGHC 118.

28 [2018] 2 SLR 1311.

29 For example, *Pacific Marine & Shipbuilding Pte Ltd v. Xin Ming Hua Pte Ltd* [2014] SGHC 102, in which the issue in dispute was whether the propulsion units contracted for were defective.

Typically, payment of the purchase price is made in instalments before delivery and, in return, a performance guarantee or refund guarantee will be furnished by the yard under the shipbuilding contract. Provided that the guarantee is an on-demand guarantee, the buyer would be entitled to call on the guarantee immediately without having to establish liability of the seller, provided that other conditions that entitle the buyer to call on the guarantee are satisfied.

The Singapore courts have not had the opportunity to consider, in any reported decision thus far, the presumption applied by the English Court of Appeal in *Marubeni Hong Kong and South China Ltd v. Mongolian Government*[30] *(Marubeni)* that in construing a guarantee given outside the context of a banking instrument or by a non-financial institution, the absence of language appropriate to a performance bond or something having similar legal effect creates a strong presumption against the parties' intention to create a performance bond or on-demand guarantee (the *Marubeni* presumption). Although the Singapore High Court in *China Taiping Insurance (Singapore) Pte Ltd (formerly known as China Insurance Co (Singapore) Pte Ltd) v. Teoh Cheng Leong*[31] *(China Taiping)* briefly referred to *Marubeni* as support for the general principles on the construction of guarantees and on-demand guarantees or performance bonds, on the facts of that case, the Singapore court did not have to consider application of the *Marubeni* presumption. It therefore remains to be seen whether the *Marubeni* presumption will gain judicial support locally, bearing in mind that the English court's decision is persuasive authority in the Singapore courts.

Under Singapore law, there are two separate and distinct exceptions to a guarantor's obligations to pay promptly upon a demand being made by the beneficiary within the terms of the guarantee, irrespective of any dispute between the account party and the beneficiary – namely, fraud and unconscionability.[32] The fraud exception is meant to safeguard the account party from a dishonest call being made upon the guarantee by the beneficiary.[33] Conversely, the unconscionability exception was developed as it was recognised that in certain circumstances, even where the account party cannot show that the beneficiary had been fraudulent in calling on the bond, it would nevertheless be unfair for the beneficiary to realise its security pending resolution of the substantive dispute.[34] Therefore, under Singapore law, where a beneficiary acts fraudulently or unconscionably when calling on an on-demand guarantee or performance bond, the court can grant injunctive relief to restrain a call on or payment out under such a guarantee or performance bond.

However, it is now possible under Singapore law for parties to incorporate a carefully worded clause in their contract to restrict the grounds on which an obligor may object to a beneficiary's call on a performance bond. The Singapore Court of Appeal considered the issue of whether parties could contractually restrict the right of the obligor under a performance bond to apply for an injunction (which is an equitable remedy) to restrain the beneficiary from calling on the bond.[35] Under the subject clause in the main contract in *CKR Contract Services*, the obligor was not entitled to restrain the beneficiary from calling on the performance bond

30 [2005] 1 WLR 2497.

31 [2012] SGHC 2.

32 *Arab Banking Corp (B.S.C.) v. Boustead Singapore Ltd* [2016] SGCA 26 at [51].

33 ibid., at [60].

34 ibid., at [104].

35 *CKR Contract Services Pte Ltd v. Asplenium Land Pte Ltd* [2015] 3 SLR 1041 (*CKR Contract Services*).

on any ground, except in the case of fraud.[36] The obligor applied for an injunction, on the ground of unconscionability, to restrain payment from being made to the beneficiary. The Court of Appeal ruled that the clause merely sought to limit the obligor's right to an equitable remedy and was not an ouster of the jurisdiction of the court or void and unenforceable for being contrary to public policy, and therefore dismissed the obligor's appeal against the decision of the judge at first instance, refusing to grant the injunction (albeit on slightly different grounds). The Court of Appeal nevertheless stressed that it may still be open to the obligor to rely on the usual doctrines or principles at common law or the relevant provisions under the Unfair Contract Terms Act to argue that such a clause is unenforceable (since these issues did not arise or were not raised in *CKR Contract Services*).[37]

To allocate the risks of delays in completion, it is also usual for shipbuilding contracts to provide for liquidated damages in the event of delay. Such liquidated damages provisions are enforceable, provided that the agreed level of compensation is a genuine estimate of loss. Otherwise, the provision will be treated as a penalty clause and will be struck out.

Failure by a yard to construct or complete a ship in accordance with the terms of the contract may entitle a buyer to claim damages from the yard, which is the usual remedy. Specific performance may be ordered whereby the buyer can prove that damages will not be an adequate remedy.

ii Contracts of carriage

Singapore is a state party to the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules), which was introduced into domestic legislation by the Singapore Carriage of Goods by Sea Act (1998 edition), without variation.

These Rules apply by force of law to shipments of goods under a bill of lading when the port of shipment is a port in Singapore or when the requirements of Article X of the Rules otherwise apply. Under the Singapore Carriage of Goods by Sea Act (COGSA), the Rules can be contractually applied to the carriage of goods by sea under a sea waybill or straight (non-negotiable) bill of lading. The Hamburg Rules do not apply. Singapore has not acceded to or ratified the Rotterdam Rules. Cabotage is not applicable in Singapore. The Convention on the Contract for the International Carriage of Goods by Road 1956 (the CMR Convention) has not been ratified in Singapore and the liability of carriers of goods by road is governed by common law principles.

Importantly, in terms of legislation, Singapore has enacted by statute its Bills of Lading Act, which is in *pari materia* with the UK COGSA 1992. Under the Singapore Bills of Lading Act, title to sue and transfer of liabilities can be effected by mere endorsement of a negotiable bill of lading, without the requirement under the old English Bills of Lading Act 1855, which linked transfer of title to sue to transfer of property in the cargo.

Where contracts of carriage subject to the Hague-Visby Rules are concerned, the carrier's limitation of liability for any loss of or damage to or in connection with the cargo is statutorily defined as S$1,563.65 per package or unit, or S$4.69 per kilogram of gross weight of the goods lost or damaged, whichever is higher. The time bar for cargo claims under the Hague-Visby Rules is one year from the date of delivery or from the date when the goods

36 ibid., at [5].

37 ibid., at [20] to [24].

should have been delivered. In the recent case of *The Navios Koyo*,[38] the Singapore courts reiterated that, in deciding whether to make a stay of proceedings in favour of arbitration conditional on a waiver of this time bar, they would consider two factors:

a whether the plaintiff's own conduct in not commencing arbitration, before the claim was time-barred, was reasonable; and

b whether the defendant should be faulted for the plaintiff's failure to commence arbitration before the claim became time-barred.

The Singapore courts would generally be slow to condition a stay of proceedings on a waiver of this time bar. Therefore, cargo owners would be well advised to ascertain the applicable jurisdiction or arbitration clause and commence proceedings in the chosen forum.

In respect of contracts of carriage of goods by sea, the relevant liens applicable are as follows:

a the shipowner's lien on cargo, which is a possessory lien that can arise at common law in respect of freight, or in a bailee of necessity context,[39] or under contract for amounts payable to the shipowner under the contract of carriage;

b the shipowner's lien on sub-freight or sub-hire, which is a contractual lien under a contract of carriage validly incorporating a charter party lien clause; and

c liens on the ship exercisable by an action *in rem* following arrest of the vessel.

This is the claimant's statutory right of action against the ship if the claim is listed as falling within the subject matter of Admiralty jurisdiction in the High Court (Admiralty Jurisdiction) Act.

Under the Companies Act (CA), charges have to be registered under Section 131 of the CA, failing which they are unenforceable against a liquidator in a winding up or against any secured creditor of the company. In July 2017, the Singapore High Court, in *Duncan, Cameron Lindsay v. Diablo Fortune Inc*,[40] considered for the first time the issue of whether a shipowner's lien is a charge on the company's property and whether it is registrable under Section 131 of the CA. The Court of Appeal affirmed the High Court's decision[41] that a shipowner's lien is a security in the form of a charge over the company's book debts or as a floating charge, and is therefore registrable under Section 131. From a practical perspective registering a shipowner's lien is difficult because vessels are typically subject to a continual series of charter parties, each entered into as quickly as possible to ensure the vessel is gainfully employed. As charter periods can be short, it would mean that the charter party could be completed even before the 30-day registration period is up. Furthermore, given the large number of charter parties concluded every day, imposing a registration requirement would mean significant administrative burden and additional costs for shipping companies.

In light of industry concerns and feedback, the Singapore government amended the CA on 3 September 2018. The Companies (Amendment) Act 2018 exempts shipowners'

38 [2022] 1 SLR 413.

39 See *Liu Wing Ngai v. Lui Kok Wai* [1996] 3 SLR(R) 508, citing *The 'Winson'* [1981] AC 939, that where a bailor fails to take delivery of the bailed goods from a bailee, a bailment for reward can become a gratuitous bailment. Even then, the duty of care is still owed, although what is required to discharge it may be less onerous. From this relationship giving rise to a duty of care, a correlative right is vested in the gratuitous bailee to reimbursement of expenses incurred in taking measures to preserve the property.

40 [2017] SGHC 172.

41 *Diablo Fortune Inc v. Cameron Lindsay Duncan and Anor* [2018] SGCA 26.

liens from registration under Section 131 of the CA. Under the amendments, a shipowner's lien is exempted from registration but still retains its essential nature as a security (charge). Therefore, notwithstanding that it is not registrable, it remains a security and will take priority over unsecured creditors and other secured creditors whose security was created after the relevant shipowner's lien was created.

With regard to shipowners' liens that are already in existence or that were created before the implementation of the amendments, the new Section 131(3AC) of the CA provides that these will be considered registrable only if, as at the effective date of the amendments, the company has been wound up, or a creditor has acquired a proprietary right or interest in the subject matter of the lien.

The shipper has a duty to properly identify and to pack the goods shipped. Pursuant to Article III(5) of the Hague-Visby Rules, the shipper is deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by it, and the shipper must indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in the particulars. The shipper has a strict liability at common law for shipment of dangerous goods without notice to the carrier. This strict liability regime is extended by the indemnity regime of Article IV(6) of the Hague-Visby Rules, which imposes broad liability on the shipper for all damages and expenses directly or indirectly arising out of or resulting from the shipment of any cargo that causes or threatens to cause loss of life, damage to the ship or other cargo, delay or expense to the carrier.

The Singapore courts have handed down decisions on principle in relation to the interpretation of the Hague-Visby Rules. Notable examples are the decision in *Sunlight Mercantile Pte Ltd v. Every Lucky Shipping Co Ltd* on the carriage of deck cargo,[42] in which the Court of Appeal declined to follow the English court decision in *The 'Imvros'*[43] on the effectiveness of a contractual exclusion of the carrier's liability for unseaworthiness, and the reasoning of the Singapore Court of Appeal in *APL Co Pte Ltd v. Voss Peer*[44] on the role of a straight consigned bill of lading and the carrier's delivery obligations thereunder, which has been followed by the English Court of Appeal in *The 'Rafaela S'*.[45]

In *Toptip Holding Pte Ltd v. Mercuria Energy Trading Pte Ltd*, the plaintiff sent an email enquiry to the defendant (through a broker), which contained, inter alia, a term incorporating the *pro forma* charter party of Vale SA. The defendant later amended this term to reject the Vale SA charter party and incorporate a previous charter party, which shall be subject to the defendant's further review (the draft charter party). Thereafter, the defendant rejected the amended draft charter party, which the plaintiff claimed to be a repudiatory breach of the charter party by the defendant. The Singapore High Court was of the opinion that no valid charter party was concluded. The Singapore Court of Appeal reversed the Singapore High Court decision and held that a binding charter party was formed notwithstanding the presence of a 'subject to review' clause.[46]

In *The Luna*[47], the defendants were the demise charterers of *Luna*, a bunker barge used for the delivery of bunkers to ocean-going vessels that would then be on-sold to the

42 [2004] 1 SLR(R) 171.

43 [1999] 1 Lloyd's Rep 848.

44 [2002] 2 SLR(R) 1119.

45 [2002] 1 Lloyd's Rep 113.

46 *Toptip Holding Pte Ltd v. Mercuria Energy Trading Pte Ltd* [2017] SGCA 64.

47 [2021] SGHC 84.

claimants' customers. The claimants were leasing fuel oil storage tanks from Vopak Terminal Pte Ltd and selling bunkers, mostly on fob terms, for delivery through bunker barges like the *Luna*. Upon the loading of the bunkers onto vessels at Vopak Terminal, the Terminal issued documents including one issued in triplicate and titled 'bills of lading' (the Vopak BLs). The bunker barges supplied various vessels with bunkers without the production of the original Vopak BLs, and the claimants commenced proceedings against the barge owners. The Singapore Court of Appeal, in ascertaining the parties' intentions behind the issuance of the Vopak BLs, held that, despite the documents being labelled as bills of lading, they were not true bills of lading as they were not intended to operate as such. Despite being independent, the bills of lading worked in tandem with the underlying sale contracts, which were critical in determining the actual function of the documents in question.

iii Cargo claims

Pursuant to Section 2(1) of the Singapore Bills of Lading Act, a person who becomes the lawful holder of a bill of lading shall have transferred to and vested in him or her all rights of suit under the contract of carriage as if that person had been a party to that contract. Section 5(2) of the Act defines a holder of a bill of lading as a person with possession of the bill:

a who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;

b as a result of the completion, by delivery of the bill, of any endorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill; or

c as a result of any transaction by virtue of which he or she would have become a holder falling within point (a) or (b), above, had the transaction not been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates.

Importantly, the Bills of Lading Act also provides for the transfer of liabilities under a bill of lading or any carriage document to which the Act applies. The Bills of Lading Act covers not just the transfer of rights or liabilities of bills of lading but also sea waybills and ship's delivery orders. In Singapore, the transfer of bill of lading rights and liabilities is regulated by this Act; it is essentially a re-enactment of the UK Carriage of Goods by Sea Act 1992. The Singapore courts take a stringent view of the principle of the bill of lading being a document of title. There is very little scope for the carrier to defend a misdelivery claim under Singapore law, as exemplified in decisions at the High Court and Court of Appeal levels.[48] Examples in which misdelivery claims have been successfully defended usually centre around the claimant's failure to prove title to sue. For completeness, the *Singapore Court of Appeal APL Co Pte Ltd v. Voss Peer*[49] has extended the presentation rule to straight bills of lading as well.

However, there may be rare instances where a bill of lading may not be considered a document of title or a contract of carriage. In the 2016 High Court decision of *The 'Star Quest'*,[50] the High Court held, among other things, that it was at least arguable that the bills of lading could not be relied on as contractual documents, and that their express terms indicated

48 See *Bandung Shipping Pte Ltd v. Keppel TatLee Bank Ltd* [2003] 1 SLR(R) 295, *BNP Paribas v. Bandung Shipping Pte Ltd* [2003] 3 SLR(R) 611, and *The 'Jian He'* [1999] 3 SLR(R) 432.

49 [2002] 2 SLR(R) 1119.

50 [2016] 3 SLR 1280.

that they did not operate as documents of title required for the delivery of the bunkers. The bills of lading stated that the bunkers were 'bound for bunkers for ocean-going vessels'. As no destination or range of destinations was specified, the High Court's view was that the contract of carriage would be too uncertain to be enforceable. Furthermore, notwithstanding that the bills of lading bore the common notation 'one of which is accomplished, the others to stand void', they specifically contemplated delivery of the bunkers to multiple ocean-going vessels, and it would have been unworkable to have expected delivery of each sub-parcel to be accomplished only against production of a single set of the bills of lading.

In *The 'Yue You 902' and another matter*, the Singapore High Court had the opportunity to consider the defence of whether the plaintiff had consented to the carrier discharging the cargo without presentation of the bills of lading in a misdelivery claim.[51] On the facts, the High Court found that the act of delivery against a letter of indemnity to a person who is not entitled to delivery under the bill of lading does not cause the bill to be spent. Furthermore, the Court held that even if the bills of lading were considered spent, the plaintiff bank would have obtained the rights of suit as the loan from the plaintiff was 'a transaction in pursuance of the sale contract' within the ambit of Section 2(2) of the Singapore Bills of Lading Act.

Apart from bringing a claim in contract, Singapore law, again as exemplified by decisions at the High Court, also recognises and applies common law principles of bailment and tortious duties of negligence and conversion (as the case may be) to supplement a cargo claimant's rights to claim. This can be crucial when, in a given case, the cargo claimant is unable to prove title to sue in contract under a bill of lading.[52] The Singapore High Court visited this issue in *Wilmar Trading Pte Ltd v. Heroic Warrior Inc*, in which it was held that although there was no contract of carriage between the shipowner and the cargo interests (as the bills of lading to be issued were the charterer's bills of lading), the plaintiff cargo interests could sue the defendant shipowners under the tort of negligence as a free-on-board buyer of the palm oil products, following the decision of the Singapore Court of Appeal in *NTUC Foodfare Co-operative Ltd v. SIA Engineering Co Ltd and another*,[53] which had rejected the decision in *Leigh and Sillavan Ltd v. Aliakmon Shipping Co*,[54] and held that there was no legal requirement of proving ownership or possessory interest in cargo to bring a claim in negligence for loss flowing from the damage. The Court also found that the defendant owed the plaintiff a duty of care as carriers.

Where incorporation of charter terms into bill of lading contracts is concerned, Singapore law generally follows English law principles on contractual incorporation of terms. General words of incorporation will suffice to incorporate terms linked to the carriage or delivery of the goods, provided that the incorporating document identifies, either expressly or implicitly, the charter party to be incorporated. Specific words of incorporation are required to incorporate 'collateral' or 'ancillary' clauses, such as law and jurisdiction or arbitration clauses. As long as the law and jurisdiction (or arbitration) clause in the charter party is validly incorporated in the bill of lading, it is binding on a third-party lawful holder of the bill of lading. A demise clause providing that the parties to the contract evidenced by the bill of lading are the shipper and the shipowner is generally upheld and valid.

51 [2019] SGHC 106.

52 See *The 'Dolphina'* [2012] 1 SLR 992 and *Antariksa Logistics Pte Ltd v. McTrans Cargo (S) Pte Ltd* [2012] 4 SLR 250.

53 [2018] 2 SLR 588.

54 [1986] AC 785.

iv Limitation of liability

Singapore is party to the LLMC Convention 1976, which came into force on 1 May 2005 pursuant to Part VIII of the Merchant Shipping (Amendment) Act 2004 and the 1996 Protocol (as amended in 2012) to the LLMC Convention 1976 pursuant to the partial commencement of the Merchant Shipping (Miscellaneous Amendment) Act 2019 on 29 December 2019. The Singapore Merchant Shipping Act contains various provisions that either operate in tandem with or modify the provisions of the LLMC Convention 1976, as amended by the 1996 LLMC Protocol. These provisions are found in Sections 134 to 144 of the Act.

A ship, for the purpose of limitation, is any kind of vessel used in navigation by water and includes barges, hovercraft and offshore industry mobile units. The persons entitled to limit their liability are as per Article 1 of the LLMC Convention wording, which is unamended, and include:

a shipowners;
b demise, time, voyage and slot-charterers;
c managers or operators of a seagoing ship;
d salvors;
e any person for whose act, neglect or default the parties listed above are responsible; and
f an insurer for claims subject to limitation can limit to the same extent as its assured.

The following claims are subject to limitation of liability:

a in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;
b in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;
c in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connection with the operation of the ship or salvage operations; and
d of a person other than the person liable in respect of measures taken to avert or minimise loss for which the person liable may limit his or her liability (but not if under contract with the person liable).

The claims are subject to limitation even if brought by way of recourse or indemnity under contract.

A person is not entitled to limit his or her liability if it is proven that the loss resulted from his or her personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

Limitation proceedings can be brought by a party seeking to establish its right to limit. A party can also rely on its right to limit as a form of defence for claims brought against it that are subject to limitation. It is not necessary to constitute a limitation fund until the court has determined whether a party has the right to limit its liability. A limitation fund can be constituted by way of a cash payment into court, or bank guarantee. The likelihood is that an International Group of P&I Clubs letter of undertaking will also be acceptable to a Singapore court for the purposes of Article 11(2) of the LLMC Convention, following practical instances where this has been done in Singapore, and the approach in the England and Wales Court of Appeal decision in *Kairos Shipping Ltd v. Enka & Co LLC (The 'Atlantik*

Confidence').[55] In the case of *AS Fortuna Opco BV & anor v. Sea Consortium Private Limited & 3 anors*, in which a limitation fund had been constituted by way of a letter of undertaking from a P&I Club, the Singapore High Court considered the issue of the applicable interest rate to be provided for in respect of the period after the constitution of the limitation fund. In this regard, the Court held that for a letter of undertaking to be adequate or acceptable, it should place the claimant in a position no worse than if the limitation fund had been constituted by payment into court.[56]

In *Thoresen Shipping Singapore Pte Ltd and others v Global Symphony SA and others*,[57] the plaintiffs applied for the return and cancellation of the letter of undertaking from a P&I Club previously deposited in court to constitute the limitation funds as well as a declaration that the limitation fund be deemed exhausted and that no further claims be brought against the plaintiffs. The Court found that a declaration that the limitation fund 'be deemed exhausted' as opposed to 'is exhausted' was not appropriate, as such a declaration did not appear to be a concrete finding and was of uncertain legal and practical effect. Instead, the Court was prepared to make an order in addition to ordering the return of the letter of undertaking for cancellation since the letter of undertaking provides that it 'shall continue and be in place until further Order of the Court', and as a function of the court's authority over the limitation fund, it would be open to the court, by order, to discharge the letter of undertaking.

If a shipowner has obtained a limitation decree in Singapore and a claimant commences an action in a foreign jurisdiction where higher limits of liability apply, without challenging the Singapore limitation decree or participating in the distribution of the limitation fund constituted under the Singapore limitation decree, the Singapore courts can grant an anti-suit injunction to restrain the claimant from proceeding with its action in the foreign jurisdiction on account of the claimant's vexatious or oppressive conduct in effectively compelling the shipowner to set up another limitation fund when there already exists a properly constituted limitation fund in Singapore. The right to claim limitation in any particular forum is a right that belongs to the shipowner alone, and a claimant cannot pre-empt the shipowner's choice of forum or dictate the limitation forum, even in circumstances where the appropriate forum on the adjudication of liability was elsewhere.[58]

However, when the Singapore courts are asked to stay proceedings commenced in Singapore on the grounds of *forum non conveniens* in actions to determine liability on collision claims, the Singapore courts take the view that the fact that the law in the alternative foreign forum may be less favourable to the plaintiff because lower limits of liability apply in that jurisdiction does not *per se* necessarily justify dismissing the stay application, if the claim bears greater jurisdictional connections to the foreign jurisdiction. The existence of different limitation regimes is not considered a personal or juridical advantage under the *Spiliada*[59] principles that the Singapore courts apply when considering a stay application.[60]

55 [2014] EWCA Civ 217.

56 [2020] SGHC 72.

57 [2020] SGHC 153.

58 See *Evergreen International SA v. Volkswagen Group Singapore Pte Ltd* [2004] 2 SLR(R) 457, applying *The Volvox Hollandia* [1988] 2 Lloyd's Rep 361.

59 *Spiliada Maritime Corporation v. Cansulex Ltd* [1987] AC 460.

60 See *The 'Reecon Wolf'* [2012] 2 SLR 289.

V REMEDIES

i Ship arrest

The Singapore courts have developed their own jurisprudence in relation to the law of ship arrest, which is now clearly divergent from English law. Singapore has not acceded to either the 1952 or 1999 Arrest Conventions, neither is it a signatory to the International Convention on Salvage 1989, under which an expanded jurisdiction for arrest for salvage claims is now available to signatory countries, such as the United Kingdom, although Singapore had passed the Merchant Shipping (Miscellaneous Amendments) Bill on 14 January 2019 providing for the implementation of the Salvage Convention on a date to be stipulated.[61]

The statutory provisions for ship arrest in Singapore are primarily set out in the High Court (Admiralty Jurisdiction) Act (HCAJA) and Order 33 of the Rules of Court 2021, which flesh out the procedural aspects.

Section 3(1) of the HCAJA, which was modelled on equivalent provisions in the English Supreme Court Act 1981, provides an exhaustive list of claims for which a claimant may invoke admiralty jurisdiction of the General Division of the High Court.

Arrest can only be made against a ship that is owned by or demise-chartered to a person who is liable for an *in personam* claim and who was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the same ship that gave rise to the claim.[62]

In proving ownership of a vessel for the purposes of an arrest, ship registers serve as records on which *prima facie* inferences of ownership can be made, but these inferences can be displaced by evidence that another party is the beneficial owner. In *The 'Min Rui'*,[63] the plaintiffs arrested a vessel that they alleged belonged to the defendants at the time the admiralty writ was filed, as the defendants were named as the vessel's registered owner under the Hong Kong Shipping Register. The defendants argued that they had sold the vessel to a *bona fide* purchaser for value before the writ was filed and were no longer the owners, even though they were still named as such in the Register. Examining the facts, the High Court found that the defendants were no longer the owners as the sale was genuine and title and risk in the vessel had passed a few days before the writ was filed. The defendants retained no beneficial interest in the vessel thereafter and, pending deregistration from the Hong Kong Shipping Register, the defendants essentially held the Hong Kong-registered title over the vessel on trust for the buyer. The writ and the arrest were thus both set aside.

The case of *The 'Echo Star' ex 'Gas Infinity'*[64] considered the issue of whether the proper party to enter appearance as defendant in the context of a maritime lien (specifically a damage lien) was the owner of the colliding vessel at the time of issuance of an *in rem* writ or the owner at the time of the collision. The High Court held that even in there was a change of ownership, the offending ship could be validly arrested to obtain security for the injured party's claim and to compel the wrongdoer to enter appearance. This is on the basis that a maritime lien travelled secretively and unconditionally with the *res*, surviving changes of ownership (otherwise than via a judicial sale), even if the *res* was transferred to a *bona fide* purchaser without notice. In the context of an *in rem* writ issued in respect of a claim for

61 Merchant Shipping (Miscellaneous Amendments) Bill No. 49/2018, read for the first time on 19 November 2018 and passed on 14 January 2019.

62 High Court (Admiralty Jurisdiction) Act [HCAJA], Section 4(4)(i).

63 [2016] 5 SLR 667.

64 [2020] SGHC 200.

collision damage, the damage maritime lien was premised on fault and the only party that could bear personal liability in respect of the collision damage was the owner at the time of the collision. Therefore, the *in rem* writ should be addressed to the owner (or the demise charterer) of the ship at the time of the collision, even when the ownership of the offending ship had changed between the date of the collision and the issuance of the writ. The proper *in personam* defendant should be the owner of the offending ship at the time of the collision.

Sister ship arrest is possible in Singapore in circumstances where the *in personam* defendant owner of the ship that gave rise to the claim is also the beneficial owner of another vessel, so that the other vessel may be arrested for the claim.[65] It is not possible to arrest ships in associated ownership. Maritime liens are recognised for limited categories of priority claims, such as claims for salvage, damage done by a ship (typically in collisions), crew wages, bottomry and master's disbursements. Cargo may exceptionally be arrested for priority claims, such as maritime liens.

Critically, a ship should not be arrested in aid of legal proceedings in a foreign court. As yet, there is no statutory provision in Singapore empowering the courts to arrest property or retain arrested property for the satisfaction of foreign court proceedings.[66]

Procedure, documents and costs

An admiralty action *in rem* is commenced by the court issuing a writ *in rem*. This needs to be endorsed with a statement of claim, or at least a statement of the nature of the claim. The court fee for issuing a writ is between S$500 and S$1,500 depending on the size of the claim. The validity of the writ is 12 months from the date on which it was issued. The court may extend the validity, at its discretion, if there is, for instance, no opportunity to serve it on the ship (because it has not called at Singapore).

The documents required to be filed in court on an application for a warrant of arrest include the writ of summons (*in rem*), warrant of arrest, request to issue a warrant of arrest, supporting *affidavit* of the arresting party, *caveat* searches confirming that there are no subsisting *caveats* against the arrest of the vessel, an undertaking to indemnify the Sheriff and a letter of authority or the particulars of the person effecting service of the warrant of arrest and writ. If all documents are in place, a warrant of arrest order can be obtained within about half a day.

The Singapore Court of Appeal has clarified that although the Singapore courts will not consider the merits of a plaintiff's claim in deciding whether the plaintiff has properly invoked admiralty jurisdiction, the plaintiff must satisfy the various steps and relevant standards of proof for invoking admiralty jurisdiction in Singapore under Sections 3 and 4 of the HCAJA.[67] In this respect, a plaintiff need not prove who 'the person who would be liable on the claim in an action *in personam*' is for the purposes of establishing admiralty jurisdiction (until and unless the defendant subsequently challenges the plaintiff's action by applying to strike out the action under Order 9, Rule 16, of the Rules of Court or the inherent jurisdiction of the court), but the plaintiff must identify in its supporting *affidavit* for a warrant of arrest, without having to show in argument, the person who would be liable on the claim in an action *in personam*. In the event that a plaintiff's invocation of admiralty

65 HCAJA, Section 4(4)(ii).

66 *The 'Eurohope'* [2017] 5 SLR 934 at [27] to [30].

67 *The 'Bunga Melati 5'* [2012] 4 SLR 546 at [112].

jurisdiction or its arrest of the defendant's vessel is subsequently challenged, the plaintiff would need to show, in addition to the requirements under Sections 3 and 4 of the HCAJA, a good arguable case on the merits of its claim.[68]

The case of *The 'Chem Orchid' and another matter*[69] clarifies that a shipowner who wishes to set aside an *in rem* writ and a warrant of arrest on the ground of a factual issue (which determines whether the court's admiralty jurisdiction was validly invoked) has the option of relying solely on *affidavit* evidence or proceeding with a full hearing on the same (i.e., with oral testimonies and cross-examination of the shipowner's witnesses). If the former approach is adopted, the court will make an interlocutory decision, which means that the jurisdictional issue could be raised again at trial (albeit on a different standard of proof of balance of probabilities). The court's findings on admiralty jurisdiction will be conclusive, however, if the latter approach is taken.

The arresting party has a duty to make full and frank disclosure to the court of all material facts in the supporting *affidavit* filed in its application for a warrant of arrest.

The duty to make full and frank disclosure is to disclose all material facts, even if these facts are prejudicial to the plaintiff's claim.

If material facts were not disclosed, the warrant of arrest may be set aside. Furthermore, in *The 'Miracle Hope'*,[70] a sub-voyage charterer was given leave to intervene and was found to have *locus standi* to apply to set aside the warrant of the arrest based on material non-disclosure by the applicant of the warrant of arrest. The High Court confirmed that a person who was not a party to an *in rem* action but has an interest in the arrested vessel or the proceeds of sale in court, or whose interests are affected by an order made in the *in rem* action, may be permitted to intervene in the action to protect that interest.

The arrest warrant is issued by the High Court on the application of the plaintiff. Civil liability will not arise should the arrest turn out to be unjustified and set aside later, unless it can be shown that the plaintiff acted with bad faith or with gross negligence implying malice. A mistake in itself would not make an arrest wrongful, neither would a weak case for the plaintiff: actions for wrongful arrests are rare and seldom succeed. In practical terms, a plaintiff will face exposure for liabilities following an arrest only if it can be shown that it had no reason to believe it had an arguable claim or that the ship was owned by the defendant, or was intent on abusing the court process. It should be noted, however, that a failure to make full and frank disclosure of all material facts is a ground for awarding damages for wrongful arrest if the non-disclosure was deliberate, calculated to mislead, or if it was caused by gross negligence or recklessness.[71]

A ship can be arrested only if it comes within the territorial waters or within the port limits of Singapore. The ship is arrested when the warrant of arrest is affixed for a short time on any mast of the ship or on the outside of any suitable part of the ship's superstructure. Owing to covid-19, it was permitted from 22 January 2021 to 28 March 2022 to serve a warrant of arrest or a writ of summons in an admiralty *in rem* action on the agent of the ship instead.[72] Based on the Covid-19 (Temporary Measures) (Control Order) (Amendment

68 ibid., at [96].

69 [2016] 2 SLR 50.

70 [2020] SGHCR 3.

71 *The 'Xin Chang Shu'* [2016] 1 SLR 1096.

72 Order 70, Rule 10A of the Rules of Court, introduced by the Rules of Court (Amendment) Rules 2021. See also the Supreme Court Practice Directions Amendment No. 1 of 2021.

No. 4) Regulations 2022, Paragraph 3(b), this measure no longer seems to be applicable.[73] After a vessel is arrested, it comes under the custody of the Sheriff of the Supreme Court of Singapore.

An undertaking to indemnify the Sheriff of the Supreme Court for costs of maintenance of the vessel under arrest is required, which includes the cost of a guard service. In practice, a deposit of S$10,000 is usually required on account of the costs of the Sheriff.[74] In addition, a local law firm employed to prepare and file the arrest papers and carry out the arrest usually requires a cross-undertaking from the arresting client, or funds sufficient to secure the firm's undertaking to the Sheriff. Since it will be responsible to the Sheriff, the practice is for the local law firm to ask for a payment on account of its fees and disbursements, including the Sheriff's costs.

Security

A plaintiff arresting party need not furnish any counter security to the defendant shipowner when applying to arrest.

The defendant can apply to the court, at a later stage of the court action, to require the plaintiff to furnish security for the defendant's costs, which is the same general rule as for all civil litigants. The court has discretion to require security for costs of the defendant if the plaintiff is ordinarily resident out of the jurisdiction, or is shown to be financially unsound so as to be unable to meet an adverse order of costs if ordered against it. The type of security if ordered is for costs only and does not cover damage suffered in other forms, for which the plaintiff will not be required to provide counter security.

To avoid an arrest or to release a vessel under arrest, a defendant can provide security for the underlying claim. This typically includes bail bonds (effectively a cash deposit with the court) and guarantees or letters of undertaking from a first-class bank or underwriter, such as an International Group P&I Club. Additionally, a defendant shipowner who apprehends an arrest of its vessel calling into Singapore can file a *caveat* against arrest via a local law firm with the High Court, provided that the shipowner or his or her solicitors provide an undertaking to enter an appearance in any action that may be brought against that vessel, and furnish satisfactory security in the action to the plaintiff within three days of being notified that an action has been commenced.

ii Court orders for sale of a vessel

As a corollary to an arrest in an *in rem* action, the High Court has the power to order a judicial sale *pendente lite* of an arrested vessel, if the shipowner fails to furnish security in exchange for a release. The High Court would typically permit the plaintiff arresting party to apply for a judicial sale order should the shipowner fail or refuse to provide security within, say, three weeks of the arrest. A key justification for allowing a judicial sale *pendente lite* is that, otherwise, the value of the *res* as security will diminish as expenses on the upkeep of the vessel under arrest are incurred, and the condition of the vessel deteriorates.

73 Maritime and Port of Authority Singapore (Port) Regulations, Regulations 61A, 61B and 61C, and Covid-19 (Temporary Measures) (Control Order) (Amendment No. 4) Regulations 2022.

74 Supreme Court Practice Directions 2013, Part XVI, Paragraph 124(4).

From the time of arrest, the main steps (in chronological order) following a successful application for judicial sale order, culminating in an actual sale to a buyer, are broadly as follows:

a surveying and appraising the vessel;
b advertising the sale of the vessel;
c time for sealed bids to be made; and
d acceptance of the bid to completion of sale.

A judicial sale is typically carried out by closed tender or public auction by the Sheriff of the Supreme Court, who is commissioned in all cases to undertake the appraisal and judicial sale of the arrested ship. A key guiding principle is that the court will scrutinise judicial sale applications carefully to ensure due process to best realise the market value of the arrested ship to be judicially sold. This is why the High Court has ruled in recent cases that applications for direct private sale of the arrested ship will generally not be allowed in Singapore.

In *The 'Turtle Bay'*,[75] the mortgagee bank arrested two vessels and commenced *in rem* proceedings against the defendant shipowner, later obtaining default judgment. It filed applications seeking the court's approval of a private direct sale of each vessel on terms of contract entered into with named purchasers for a specified price each. The prices were above, but not significantly higher than, the court valuation. The court emphasised that it has to strike a balance between the two competing concerns in a judicial sale to benefit all persons interested in the *res*: that of accepting the highest bid price at a fairly conducted Sheriff's sale on the one hand, and weighing that concern against the purpose to be achieved by a judicial sale, on the other hand. Where a party seeks to enter into a private direct sale, there is a divergence in its own interest to obtain benefits for itself, and the interest of the Sheriff acting pursuant to a commission for appraisal and sale. As a result, the court has to be circumspect when dealing with such a sale application and has to carefully scrutinise each application. The court will not allow a direct sale unless there exist 'powerful special features' or 'special circumstances', and these were lacking on the facts of the case. In *The 'Sea Urchin'*,[76] a similar situation arose, though the named buyer tabled an offer price above the value of the vessel, and had agreed to allow the vessel to sail with its cargo, then on board for delivery to the sub-charterer of the vessel. The court reaffirmed the position set out in *The 'Turtle Bay'* and held that the costs of discharging the cargo where a vessel is under arrest is not a relevant factor in allowing a direct sale. Furthermore, the alleged special circumstance as to the impossibility of landing the cargo in Singapore and that transshipping would be slow and costly are, in reality, typical consequences of an arrest of a cargo-laden vessel. As such, powerful special features or special circumstances justifying an order for a direct sale were lacking on the facts of this case as well.

In the case of *The Swiber Concorde*,[77] the High Court held that where an arrested vessel is sold successfully by the Sheriff following an earlier abortive sale, the deposit forfeited by the Sheriff in the earlier abortive sale shall be treated as part of the proceeds of sale of the vessel and be paid out to claimants with the proceeds of sale.

75 [2013] 4 SLR 615.
76 [2014] SGHC 24.
77 [2018] SGHC 197.

In another High Court decision, *The Long Bright*,[78] it was held that an order for sale would have to be discharged before the vessel might be released. In a judicial sale, the Sheriff was required to act for the benefit of all interested parties. The plaintiff was not entitled to unilaterally stop such a sale, thus preventing the Sheriff from carrying out the sale order, without first seeking a discharge of the order of sale from the court. In considering whether to discharge a sale order, the court had a duty to protect the interests of all persons with *in rem* claims against the vessel, including the defendant shipowner. Therefore, even if the plaintiff's claim had been extinguished, the court retained the power to let a judicial sale proceed to completion. The proceeds of the sale might be paid out to any intervener who had obtained judgment in its own *in rem* action.

In the distribution of sale proceeds following a judicial sale of the vessel, the Singapore Admiralty Court generally ranks the priority of claims as follows:

a port dues and Sheriff's commission and expenses of arrest, appraising and sale of the vessel;

b arresting party's legal costs of arrest, appraising and sale being costs of the producer of the fund;

c maritime lien claims (e.g., crew wages, collision and salvage claims, save for prior accruing possessory liens);

d possessory lien claims (i.e., shipyards in possession of a vessel after effecting repairs or conversion); and

e mortgagee claims.

All other maritime claims rank *pari passu* (for example, charter party, cargo and necessaries claims).

Although the established order of priorities is well recognised and not readily departed from, the court is entitled to depart from the usual order of priorities when warranted by the demands of justice. For example, an alteration of the general order of priorities would be justified if the mortgagee allows the bunker arrangements to proceed despite being fully aware that the mortgagors were insolvent and where the mortgagee would, in some manner, benefit from the supplies at the expense of the bunker supplier. However, the court in *The 'Posidon' and another matter*[79] refused to subordinate the mortgagee's claim to the claim of the bunker supplier for a few reasons. In particular, the court found the argument that the mortgagee's security could be maintained by providing motive power to the vessel to be too simplistic, as a highly mobile vessel could, in fact, expose itself to a wider spectrum of risks as a trading asset. Furthermore, there was no evidence that the mortgagor was liquidated or subject to winding-up proceedings or that the mortgagee was in *de facto* control and management of the finances for vessel's operations and, hence, aware of the mortgagor's purported insolvency at the material time. The mortgagee must also be 'fully aware, in advance' of the arrangements made by a bunker supplier to alter the general order of priorities. The fact that a vessel would require bunker fuel for motive power is insufficient to show that the mortgagee has satisfied the requisite level of knowledge.

It is accepted that, in general, in actions against the proceeds of sale of property arrest *in rem*, costs have the same priority as the claim in respect of which they have been incurred.

78 [2018] SGHC 216.

79 *The 'Posidon' and another matter* [2017] SGHC 138.

In *The 'Songa Venus'*,[80] the court held that the existence of a possessory lien in respect of a claim would affect the priority to be given to the costs incurred in enforcing that claim in an admiralty action *in rem*. The possessory lien holder surrendered the vessel to the admiralty court in return for an undertaking from the admiralty court to put him in the same position as if he had not surrendered the vessel. Once the possessory lien holder surrendered the vessel, he would have to commence an *in rem* action against the vessel to obtain a judgment so that he could participate in the distribution of the proceeds of the judicial sale of the vessel. To make good its undertaking to the possessory lien holder, the admiralty court ought to protect the possessory lien holder's costs incurred in the *in rem* action to the same extent as the possessory lien itself.

iii Interim relief

The Singapore court is empowered to grant interim relief in the form of injunctions under Section 4(10) of the Civil Law Act, including but not limited to the following:

a prohibitory and mandatory injunctions;

b *Mareva* injunctions; and

c anti-suit injunctions.

Under Order 13, Rule 1, of the Rules of Court, a party may apply for an injunction by way of a summons and supporting affidavit. In an urgent situation, the application may be made *ex parte*, subject to the Singapore Supreme Court Practice Directions and the requirement of full and frank disclosure of all material facts.

In respect of international arbitrations, the Singapore courts are empowered to grant interim injunctions in aid of arbitral proceedings under Section 12A of the IAA.

VI THE HCAJA IN THE CONTEXT OF CROSS-BORDER INSOLVENCIES

The UNCITRAL Model Law on Cross-Border Insolvency has come into force in Singapore (the Model Law).[81] In broad terms, the Singapore courts will be bound to recognise foreign insolvency proceedings if the conditions listed at Article 17.1 of the Model Law are satisfied. Once these foreign insolvency proceedings are recognised in Singapore, there will then be an automatic and mandatory moratorium against commencement and continuation of all proceedings and a stay of execution against the debtor company's property.

If *in rem* proceedings are commenced before the insolvency proceedings are recognised in Singapore, this will generally not be a problem. In particular, an *in rem* proceeding would be unaffected by the debtor company's liquidation if the *in rem* writ was filed and served before the commencement of insolvency proceedings. Similarly, Singapore courts are generally inclined to grant leave to proceed with an *in rem* action if the *in rem* writ was filed – but not served – before insolvency proceedings commenced. In contrast, *in rem* proceedings are likely to be stayed by the Singapore courts if the writ was issued after the application for winding up.

However, the statutory automatic moratorium that comes into effect upon an application for a scheme of arrangement might result in some tension with the HCAJA.

80 [2020] SGHC 74.

81 Insolvency, Restructuring and Dissolution Act 2018, Third Schedule.

Section 211B of the CA imposes an automatic moratorium of 30 days from the application date whereas previously it was discretionary. How the automatic moratorium provisions can be reconciled with the rights of *in rem* claimants was previously an open question.

This interaction between insolvency law and admiralty law, including, in particular, the extent to which the protections afforded to the statutory moratoria for schemes of arrangement conflict with the ability of maritime claimants to protect their interests was discussed in the case of *The 'Ocean Winner' and other matters*.[82] PetroChina International (Singapore) Pte Ltd (PetroChina) was the 'owner of and/or shipper and/or consignee and/or lawful holder' of certain bills of lading in respect of cargo shipped on board four vessels demise-chartered by Ocean Tankers (Pte) Ltd (OTPL). OTPL initially applied for moratorium relief pursuant to Section 211B of the CA but later withdrew the application and filed for judicial management instead, which was allowed. During the time there was a subsisting automatic moratorium pursuant to OTPL's application under Section 211B of the CA, PetroChina filed four writs against the four demise-chartered vessels. In the suit, the judicial managers of OTPL applied to set aside or strike out the four writs on the basis that there was a subsisting automatic moratorium at the time the writs were filed. The Singapore High Court was of the view that there were two main issues to be determined:

a whether the filing of the admiralty *in rem* writs constituted commencement of 'proceedings' against 'the company', OTPL, under Section 211B(8)(c) of the CA; and

b whether the filing of the admiralty *in rem* writs was an 'execution, distress or other legal process' against 'property' of OTPL under Section 211B(8)(d) of the CA.

If the answer in either case were in the affirmative, that would mean that the writs were filed without leave of court as required under Section 211B(8), Paragraphs (c) and (d) of the CA. After considering the two issues, the High Court found that the mere filing of the writs did not come within the meaning of Section 211B(8), Paragraphs (c) and (d) of the CA (although it did hold that a demise (or bareboat) charter interest comes within the meaning of 'property' under Section 211B(8)(d)). As such, no leave of court was required to file the writs. Consequently, there was no basis to set aside or strike out the writs. For completeness, the Court also opined that the filing of the writs did not come within the meaning of Section 211B(8)(e) of the CA as the mere filing of the admiralty writs only created security interest in the form of statutory liens over the vessels and was not a step taken to enforce that security (which would not have existed without the filing of the writs).

Given that Section 211B of the CA has since been repealed and re-enacted as Section 64 of the Insolvency, Restructuring and Dissolution Act 2018 (IRDA) as of 30 July 2020, the holding in *The 'Ocean Winner'* should similarly apply to *in rem* writs filed where there is an automatic statutory moratorium in place pursuant to Section 64 of the IRDA. However, it remains to be seen whether service of an *in rem* writ when there is an automatic statutory moratorium in place would necessitate leave of court, although the Court in *The 'Ocean Winner'* did opine *obiter* that leave was needed to serve the *in rem* writs.

82 [2021] SGHC 8.

VII REGULATION

i Safety

Being a major port and flag state, Singapore is a white-list country. It is party to all major IMO conventions, including the four pillar conventions: MARPOL (73/78), the STCW Convention, SOLAS and the MLC.

In the Singapore Straits, a mandatory ship reporting system (STRAITREP) has been adopted by the IMO. STRAITREP, together with the operation of a vessel traffic information system, enhances the navigational safety for ships in transit and facilitates the movements of vessels in the Singapore Straits.

In terms of security, the International Ship and Port Facility Security Code 2004 (the ISPS Code) was introduced and adopted by amendments to SOLAS; it entered into force on 1 July 2004. The ISPS Code was implemented by using the wide powers of the MPA given under the Maritime and Port Authority Act and the Merchant Shipping Act to give effect to the provisions of any international conventions in relation to shipping to which Singapore is a party.

ii Port state control

The MPA is the government agency responsible for implementing all IMO conventions. It was established by the Maritime and Port Authority of Singapore Act in 1996.

Singapore is a founding member of the Tokyo Memorandum of Understanding on Port State Control in the Asia-Pacific Region 1994, which is a regional port state control organisation consisting of 20 members in the Asia-Pacific region.[83]

The MPA performs all regulatory and administrative functions in respect of merchant shipping, marine and port, including port state control inspections. Between April 2017 and February 2018, 10 ships were detained by the MPA for various deficiencies and non-conformities.[84]

The MPA has wide-ranging powers. The port master may board any ship in port and issue orders and directions to ships within the port and Singapore territorial waters. Port clearance may be refused for ships that do not comply with the port master's directions.

iii Registration and classification

In recent years, the Singapore Registry of Ships, which is an open registry, has introduced several tax benefits and, as a result, has attracted a large number of foreign shipowners.[85] It is currently ranked in the top 10 registries in the world in terms of registered tonnage, with more than 4,400 registered vessels, totalling in excess of 96 million gross tonnage (GT). It also has one of the youngest fleets.[86]

83 http://www.tokyo-mou.org/.

84 http://www.tokyo-mou.org/inspections_detentions/detention_list.php.

85 https://www.mpa.gov.sg/web/portal/home/singapore-registry-of-ships/about-srs-and-what-new/benefits-of-srs.

86 https://www.mpa.gov.sg/web/portal/home/singapore-registry-of-ships/about-srs-and-what-new.

The Singapore Registry of Ships is administered by the MPA. Eight internationally recognised classification societies[87] are authorised to survey and issue tonnage, safety and pollution prevention certificates to Singapore-flagged ships.

The requirements and conditions for registration of ships are set out in Part II of the Merchant Shipping Act and the Merchant Shipping (Registration of Ships) Regulations 1996.[88]

The MPA also maintains the register of ship mortgages, which can be recorded as soon as a vessel has been entered into the Registry.

iv Environmental regulation

The Singapore Straits is one of the busiest shipping routes in the world and collisions occur frequently. Collisions can have a detrimental effect on the environment if a cargo or bunkers are spilled into the sea. Having the necessary legislation and administrative bodies to deal with any environmental impact is vital.

Singapore is party to the following international conventions relating to pollution:

a MARPOL (73/78) (Annexes I to VI);

b the CLC Convention;

c the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (the Oil Pollution Fund Convention);

d the Bunker Convention;

e the OPRC Convention;

f the Ballast Water Management Convention; and

g the 2020 Regulations to Annex VI of the International Convention for the Prevention of Pollution from Ships (MARPOL).

These international conventions are given effect by domestic legislation, as follows:

a the Prevention of Pollution of the Sea Act, as amended, gives effect to MARPOL (73/78) and the Ballast Water Convention,[89] and to other international agreements relating to the prevention, reduction and control of pollution of the sea and from ships;

b the Merchant Shipping (Civil Liability and Compensation for Oil Pollution) Act gives effect to the CLC Convention and the Oil Pollution Fund Convention; and

c the Merchant Shipping (Civil Liability and Compensation for Bunker Oil Pollution) Act 2008 covers the liability of ships that cause bunker oil pollution in Singapore. This Act gives effect to the Bunker Convention.

87 https://www.mpa.gov.sg/web/portal/home/singapore-registry-of-ships/register-with-srs/additional-information: American Bureau of Shipping, Bureau Veritas, China Classification Society, DNV, Korean Register of Shipping, Lloyd's Register of Shipping, Nippon Kaiji Kyokai and Registro Italiano Navale.

88 https://www.mpa.gov.sg/web/wcm/connect/www/c7290236-12d8-4a2e-b396-552ebca1fc50/english-version.pdf?MOD=AJPERES.

89 The following national legislation also plays a part in implementing the Ballast Water Convention in Singapore: Prevention of Pollution of the Sea (Ballast Water Management) Regulations 2017; and Prevention of Pollution of the Sea (Reception Facilities and Garbage Facilities) (Amendment) Regulations 2017.

v Collisions, salvage and wrecks

Collisions

Singapore is party to the COLREGs, the regulations of which are incorporated as a Schedule to the Merchant Shipping (Prevention of Collisions at Sea) Regulations. The legal regime for collisions is governed by the Maritime Conventions Act 1911 and the Merchant Shipping Act. The Maritime Conventions Act 1911 gives effect to the International Convention for the Unification of Certain Rules Relating to Collisions between Vessels 1910, to which Singapore had acceded. Section 8 of the Maritime Conventions Act 1911 provides a two-year time bar in relation to collision and salvage claims, though the limitation period may be extended by agreement between the parties, or pursuant to Section 8(3)(b) if there has been no reasonable opportunity to arrest an offending vessel within the limitation period, or at the court's discretion under Section 8(3)(a).[90]

In the decision of *The 'Dream Star'*,[91] which is the first written judgment by the Singapore courts involving a collision between two vessels since 1979, the Singapore High Court considered whether there was a crossing situation within the meaning of Rule 15 of the COLREGs or an overtaking situation within the meaning of Rule 13 of the COLREGs. The case involved a collision between the *Meghna Princess* and the *Dream Star*. Although the High Court held that this was a crossing situation at least from 12.25 onwards and not an overtaking situation (as alleged by the owners of the *Dream Star* (the defendants)), the Court held that the owners of the *Meghna Princess* (despite being the stand-on vessel) were more to blame and apportioned liability 70:30 in the defendants' favour. First, the Court took issue with the incorrect use by the *Meghna Princess* of the VHF communications to give contradictory directions to the *Dream Star*. Second, the Court held that the *Meghna Princess* ought not to have transited through the Eastern Boarding Ground B, which was exacerbated by her decision to increase speed instead of reducing it in breach of Rules 6 and 8 of the COLREGs, requiring her to maintain a safe speed and avoid any risk of collision.

This is an interesting decision that is potentially useful in avoiding a possible loophole whereby one vessel can force another into a less favourable situation by making a short manoeuvre to alter the relative bearings of two vessels. At the time of writing, the case is being appealed and is one to watch.

Subsequently, the High Court of Singapore in *The 'Mount Apo'*[92] discussed the applicability of Rule 15 of the COLREGs. Two vessels collided with each other in the westbound lane of the Traffic Separation Scheme (TSS) in the Singapore Straits. *Hanjin Ras Laffan* was transiting from east to west, navigating to overtake another vessel, *Dalian Venture*, while *Mount Apo* was attempting to cross the westbound lane of the TSS to enter the eastbound lane to continue its journey eastward. The Court adopted the conditions as set out in *Alcoa Rambler*[93] that to constitute a crossing situation, the essential conditions are that the vessels must be (1) crossing vessels (2) in a manner that involves a risk of collision. Since there are two conditions to be fulfilled, it follows that a situation that fulfils only one would not be a crossing situation. Thus, the fact that there is a risk of collision would not give rise to a crossing situation if the vessels were not crossing vessels. The Court clarified that even though the two-step approach in *Alcoa Rambler* may at first appear to be inconsistent with

90 See *The 'Orinoco Star'* [2014] SGHCR 19 at [11] and [24].

91 [2017] SGHC 220.

92 [2019] SGHC 57.

93 [1949] 1 AC 236.

the approach adopted in *The 'Dream Star'*, in which the enquiry on the existence of a crossing situation focused on when the risk of collision materialised, in fact there is no inconsistency. In *The 'Dream Star'*, it was clear that the vessels were on a crossing course, as the stand-on vessel had been on a steady course for quite some time and there was no uncertainty as to her intention. Thus, the first condition in *Alcoa Rambler* – that of determining whether the two vessels were on a crossing course – was not at issue in *The 'Dream Star'*. Consequently, it is also not anomalous that risk of collision could arise before there was a crossing situation – *Alcoa Rambler* being a case in point. Furthermore, the Court observed that even when Rule 15 of the COLREGs is inapplicable, vessels are subject to the duty to maintain a proper lookout, to proceed at a safe speed, and to generally take precautions required by the duty of good seamanship. This case is also on appeal, and is another case to watch.

In the Singapore High Court case of *The 'Tian E Zuo'*,[94] HFW London, HFW Singapore and AsiaLegal LLC worked collaboratively for the plaintiff, the owner of *Arctic Bridge*. The action arose out of two related collisions on 12 June 2014 involving an anchored vessel, *Stena Provence*, *Tian E Zuo* and *Arctic Bridge*, at the Western Petroleum B Anchorage in Singapore.

Justice Belinda Ang apportioned liability between *Arctic Bridge* and *Tian E Zuo* at 50:50. She held that although *Arctic Bridge* was dredging her anchor, she was a vessel under way. In contrast, *Tian E Zuo* was a vessel at anchor until the time the involuntary towage started. In the Singapore High Court's opinion, *Arctic Bridge* was at fault, inter alia, in drifting into close quarters with *Tian E Zuo*, passing ahead and crossing *Tian E Zuo*'s bow at close quarters, increasing the risk of fouling and picking up the anchor chains of both vessels, failing to stop at any point in time as she proceeded towards *Stena Provence*, failing to maintain a proper lookout that resulted in the failure to appreciate the risk of commencing and continuing the involuntary towage, maintaining the speed and direction of *Arctic Bridge*, which set *Tian E Zuo* on a collision course and failing to appreciate a further risk of collision after the first contacts. *Tian E Zuo* was held to be at fault, inter alia, for failing to keep a proper lookout and in failing to alert *Arctic Bridge* of the entanglement and the involuntary towage, and for the decision of the master to stop her engines, causing him to have no control over *Tian E Zuo*, which resulted in the collision with *Stena Provence*.

In *The 'Caraka Jaya Niaga III-11'*,[95] the High Court considered the application of the single liability principle when the claim of one shipowner against another is time-barred. When two vessels are involved in a collision and both are to blame for the collision occurring, the loss and damage suffered by the owners (which reference includes demise charterers) of the respective vessels will ordinarily give rise to claims and cross-claims by one owner against the other. The general rule is that liability is apportioned according to the degree to which each vessel was at fault. Depending on the apportionment of liability and the recoverable quantum of each shipowner's loss and damage based on that liability apportionment, one shipowner may be either the net payor (i.e., net paying party) or the net payee (i.e., net receiving party). This is because, in practice, the quantum of the smaller recoverable claim is deducted from the quantum of the larger recoverable claim, leaving only one net balance to be paid by the net payor to the net payee. This outcome is the result of applying what is known as the single liability principle. In the event that a shipowner's claim against another is time-barred, the single liability principle was held not to apply, as the principle was found to presuppose that both the claim and cross-claim or counterclaim were not time-barred.

94 [2018] SGHC 93.

95 [2021] SGHC 43.

Salvage and wreck removal

Singapore is not a party to the 1989 Salvage Convention. The legal regime governing salvage and wreck removal is set out in the Merchant Shipping Act, the Maritime and Port Authority of Singapore Act and the Merchant Shipping (Wreck Removal) Act 2017. The MPA has general supervision over all wrecks in Singapore.

The Nairobi International Convention on the Removal of Wrecks 2007 (the Nairobi WRC 2007) came into force in Singapore on 8 September 2017. The Nairobi WRC recognises the potential danger that wrecks pose to safe navigation at sea and to the marine environment, and seeks to provide a legal basis for the prompt and effective removal of wrecks from exclusive economic zones of Member States and for the payment of compensation associated with the costs involved.

The Nairobi WRC 2007 requires owners of all seagoing vessels of more than 300 GT to take out insurance or provide other financial security to cover the costs of wreck removal to the limits of liability under the applicable national or international limitation regime. All Singapore-registered ships and those calling at the port of Singapore are required to carry on board a Wreck Removal Convention Certificate to attest that insurance or other financial security to cover liability for wrecks is in place.

vi Passengers' rights

Singapore is not a signatory to the Athens Convention or any of its protocols.

The LLMC Convention 1976 provides the limitation regime for passenger claims. Article 7 of the LLMC Convention addresses claims for loss of life and personal injury to passengers. The limitation of liability of a shipowner is 46,666 special drawing rights (SDRs) multiplied by the number of passengers that the ship is authorised to carry according to the ship's certificate, subject to a maximum limit of 25 million SDRs. On 14 January 2019, Parliament passed the Merchant Shipping (Miscellaneous Amendments) Bill to implement the 1996 LLMC Protocol in Singapore. When the amendments come into force, the limitation of liability for claims for loss of life and personal injury will increase to 175,000 SDRs multiplied by the number of passengers the ship is authorised to carry. The absolute maximum will be abolished.

vii Seafarers' rights

Singapore has ratified the MLC and accepted the subsequent amendments. The Merchant Shipping (Maritime Labour Convention) Act (the MLC Act) came into force with effect from 1 April 2014, thus implementing Singapore's obligations under the MLC. There are specific regulations in place dealing with matters relating to, inter alia, health and safety protection, repatriation, seafarer recruitment and placement services, seafarers' employment agreements, crew list and discharge of seafarers, training and certification of cooks and catering staff, and wages.

The MLC Act generally applies to all Singapore-flagged ships. Any ship of 500 gross registered tonnage and above is also required to carry and maintain a maritime labour certificate and a declaration of maritime labour compliance.

Port state control extends to any ship in Singapore (not being a Singapore ship) engaged in commercial activities. Similar to most international conventions, certificates issued by the flag state administration are accepted as *prima facie* evidence of a ship's compliance with the requirements under the MLC. Similarly, under the MLC Act, port state inspections in Singapore will be limited to verifying that a valid maritime labour certificate and a valid

declaration of maritime labour compliance are carried on board the ship.[96] This limitation, however, is fairly arbitrary as Section 58(4) of the MLC Act sets out a significant list of situations in which the port state control surveyor is permitted to inspect beyond the certificates. In particular, detailed port state inspection will be carried out in the following situations, among others:

a when the maritime labour certificate and the declaration of maritime labour compliance are not produced or are falsely maintained; or

b there are clear grounds for believing that the living conditions on board the ship do not conform to the requirements of the MLC Act or the MLC, or the working and living conditions of the ship constitute a clear hazard to the safety, health or security of the seafarers.[97]

The MLC Act implements the MLC requirements for the shipowner to have in place financial security to meet any liabilities that may arise from, inter alia, repatriation of a seafarer, medical and other expenses incurred in connection with a seafarer's injury or sickness, and burial or cremation of a seafarer.[98] Although neither the MLC nor the implementing legislation has defined 'financial security' (in respect of repatriation, death or long-term disability), Singapore has produced a list of accepted providers, which includes the International Group of P&I Clubs and certain fixed premium and other P&I insurers.[99] Certificate of entry from these clubs will be acceptable as evidence of financial security.

Ships that do not conform to the requirements of the MLC Act or the MLC may be detained, for example, when the conditions on board are 'clearly hazardous' to the safety, health or security of seafarers or if it constitutes a serious or repeated breach of the seafarers' rights under the Act.

To date, there have been no known detentions in Singapore for non-conformity with the MLC. With the implementing legislation in place, there is no doubt Singapore will enforce the provisions of the MLC through, inter alia, port state control and flag state control.

VIII OUTLOOK

In recent years, Singapore has positioned itself as the jurisdiction and forum of choice for resolution of maritime disputes, and cross-border disputes generally.

In tandem with the overall growth in maritime activity and trade, Singapore has made great strides in establishing itself as a key hub for maritime and trade-related arbitrations alongside London and Hong Kong. This is evident from statistical data showing a record number of disputes being arbitrated in Singapore.[100]

In a statement issued in March 2018, the MPA said it will strengthen the connectivity and inter-linkages of Singapore's maritime cluster, build a vibrant innovation ecosystem and develop a future-ready and skilled maritime workforce to continue to grow the maritime

96 Merchant Shipping (Maritime Labour Convention) Act [MLC Act], Section 58(2).

97 See MLC Act, Section 58(4) for further details.

98 ibid., Section 34.

99 https://www.mpa.gov.sg/web/wcm/connect/www/e3a258eb-3847-452f-a734-49f4a4f4791b/List+of+MPA+approved+MLC+financial+security+providers+%28caa+June+2017%29.pdf?MOD=AJPERES.

100 www.siac.org.sg/.

cluster and to capture new opportunities. The MPA will enhance and top up the Maritime Cluster Fund by S$100 million in support of its vision for maritime Singapore to be a 'global maritime hub for connectivity, innovation and talent'.[101]

In terms of jurisprudence, Singapore case law in the context of maritime law has continued to gain traction as a sound authority cited in other common law courts. During the past 10–15 years, the decisions reached by the Singapore High Court and the Court of Appeal have regularly featured in English law reports, such as Lloyd's Law Reports, on an array of legal issues that are of topical interest to the industry, such as principles concerning bills of lading, cargo misdelivery claims and the exercise of admiralty jurisdiction.

101 Dr Lam Pin Min, Senior Minister of State for the Ministry of Transport and Ministry of Health speaking at the annual Singapore Maritime Foundation reception in January 2018.

Chapter 37

SOUTH KOREA

C J Kim[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

i Shipping industry

Historically and geographically, the trading and shipping industries have always been a major part of South Korea's economy. South Korea has adopted an open economic system that promotes foreign trades and imports raw resources for processing and merchandising, whereby final products are then exported to other countries. Since South Korea is surrounded by sea and the only access to the continent is blocked by North Korea, 99.7 per cent of imports and experts are carried out by sea vessels. By the end of 2022, Korea had the sixth largest total trade volume in the world.

ii Imports and exports

The main imported items and their regions in 2022 are listed in the table[2] below.

Regions of import, 2022

Country	Per cent	Cargo
China	21.2	Steel, petrochemical products, electronic products
Middle East	15	Crude oil, petroleum products
ASEAN	11.3	Coal, wooden products, steel
United States	11.2	Electronic products, machinery, petroleum products
European Union	9.3	Machinery, cars, petroleum products
Japan	7.5	Petrochemicals, steel, machinery, electronic products
Australia	6.1	Coal, iron ore, petrochemicals
Central and South America	4.5	Iron ore, grain, crude oil

The main exported items of Korea in 2022 are listed in the following table.[3]

Top 10 exports, 2022

Cargo	US$ (million)	Per cent
Semiconductors	129,227	20.2
Cars	63,932	9.3
Petroleum products	63,022	9.2

1 C J Kim is a partner at Choi & Kim.

2 MOTIE of Korea, 1 January 2023.

3 ibid.

Cargo	US$ (million)	Per cent
Petrochemicals	54,289	7.9
Steel	38,455	5.6
Flat panel displays and sensors	36,051	5.3
Car parts	23,319	3.4
Shipbuilding	18,198	2.7
Wireless communication device	17,238	2.5
Computers	15,961	2.3
	459,692	100

iii Fleet

By the end of 2022, the size of the Korean-owned total fleet was 92.3 million deadweight tonnage (DWT), which is the sixth largest in the world. The type of fleet and amount of DWT are listed in the table[4] below.

Fleet type and tonnage

Type of fleet	(DWT, million)
Bulk	28.73
Crude oil carrier	15.67
Ore carrier	12.61
Full container ship	8.89
LNG/LPG carrier	4.37
General cargo ship	2.93
Car carrier	1.31

iv Shipyards

South Korean shipbuilders, including Hyundai Heavy Industries Co, Ltd (HHI), Samsung Heavy Industries Co, Ltd (SHI), Daewoo Shipbuilding & Marine Engineering Co, Ltd (DSME), are world leaders in the industry. HHI's attempt to merge with DSME was thwarted by the European Commission's objection in January 2022. There was an announcement in September 2022, however, that Hanwha Group (a South Korean business group that provides energy and defence solutions) intends to acquire DSME. Hanwha Group's plan is highly likely to succeed.

The table[5] below shows the total number of shipbuilding orders to Korean shipyards for 2019–2021.

Shipbuilding orders to Korean shipyards

Year	Amount (US$ billion)
2019	11.4
2020	8.8
2021	11.1

4 Korea Shipowners' Association, 2022.

5 Clarkson World Shipyard Monitor, May 2021.

v Ports

The major container terminals in South Korea are located in Busan, Incheon and Gwangyang. Specifically, the Port of Busan, which is the busiest port in South Korea, is regarded as highly competitive as a transshipment port because 43 per cent of all containers that were handled in 2022 were for transshipment, mostly from China.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

i The Korean Commercial Code

South Korea, being a civil law country, does not have a separate statute specifically dealing with shipping and maritime trades. Instead, it has a separate volume, Volume 5 of Maritime Law, within the Korean Commercial Code, which generally governs issues related to commerce and trade. Therefore, Volume 5 is the most important law as far as shipping and maritime trade are concerned. While Volume 5 deals with rights and obligations of civil nature that are related to shipping and maritime trades, the Korean Civil Code and other civil law principles provide further guidance in the absence of any clear provisions.

ii Special acts

South Korea has enacted special acts, such as the Ship Safety Act, the Maritime Safety Act, the Marine Environment Management Act and the Public Order in Open Ports Act. The Private International Law Act contains conflict of law rules.

iii Maritime conventions

South Korea is a signatory or member state to only a few international maritime conventions. The international treaties that have been ratified by the National Assembly, the South Korean legislature, are given the same force and effect as local laws.

South Korea has signed and ratified:

a the International Convention for the Safety of Life at Sea (SOLAS), 1974;
b the International Convention for the Prevention of Pollution from Ships (MARPOL), 1978;
c the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), 1995;
d the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC), 1990;
e the CLC, 1969 and its 1992 Protocol;
f the Fund Convention, 1971 and its 1992 Protocol and 2003 Protocol;
g the Load Lines Convention, 1996;
h the Tonnage Measurement Convention, 1969; and
i the Convention on the International Regulations for Preventing Collisions at Sea (COLREGs), 1972.

However, instead of officially ratifying international maritime conventions, South Korea has selected or borrowed clauses from certain maritime conventions and incorporated them into its own statutes. For instance, South Korea has in its Commercial Code provisions that are almost identical to the following:

a the Hague-Visby Rules, 1968;

b the Convention on Limitation of Liability for Maritime Claims (LLMC), 1976, and part of its Protocol of 1996;
c International Conventions on Salvage, 1989; and
d the Convention on Maritime Lien and Mortgage, 1926.

As such, there may be conflicts between the international treaties and local laws, and also there is a risk that measures taken based on local laws may not be recognised internationally.

III FORUM AND JURISDICTION

i Courts

In South Korea there is no separate court for specifically handling maritime disputes. Instead, civil divisions of district courts have jurisdiction over maritime cases.

South Korea has a three-level court system. A lawsuit should first be filed at a relevant district court as being the first instance court, an appeal against that district court's judgment is brought at its high court as the second instance court, and a further appeal against that high court's judgment is brought at the Supreme Court as the final level court. The right of appeal is automatic and thus there is no need for leave for a defeating party to file an appeal.

In principle, an agreement on jurisdiction is respected. However, if the agreed jurisdiction does not have a reasonable connection with South Korea and the agreement is substantially unfair and unreasonable to the other contracting party, the jurisdiction agreement will be held invalid and unenforceable. In practice, a jurisdiction clause in a bill of lading in a claim for cargo damage that is not substantial is held invalid by Korean courts for the same reason.

ii Applicable law

Pursuant to the Private International Law Act, in principle, a contract is governed by the law that the parties have chosen. The Supreme Court of Korea has held that a clause paramount in a bill of lading is also held to be an agreement on governing law superior to a general governing law clause in a bill of lading. A claim sounding in tort and a claim in contract are regarded as mutually exclusive, and for a tort claim the law in the place in which the tort was committed becomes the governing law over the claim. But, in the event that a contract is breached due to a tortious act, the contractual governing law governs the tort.

Nevertheless, pursuant to the Private International Law Act, the following are determined by the law of the country in which the ship was registered:

a the ownership and the mortgage on a ship, the maritime lien and a real right on a ship;
b the order of priority of security interests on a ship;
c the availability and scope of the shipowner's right to limit liability in respect of maritime claims; and
d general average.

iii Time bar

Under South Korean law, the extinctive prescription for a tort claim is three years and for a contractual claim of commercial nature it is five years, unless it is specifically fixed elsewhere in the Korean statutes. The extinctive prescription may not be extended based on the parties' agreement.

For the claims and obligations of a carrier under a bill of lading, it is one year from the date of delivery; in case of a charter (voyage, time or bareboat) governed by Korean law, the shipowner and the cargo interest have two years from the date of delivery of cargo to bring an action against its counterparty. Claims arising from a ship collision shall be extinguished unless an action is brought within two years from the date of the collision. The time bar applicable to maritime claims, unlike extinctive prescription, may be extended based on the parties' agreement.

iv Arbitration and ADR

The arbitration agreement between the parties is valid and binding as a matter of Korean law and practice. If a lawsuit is filed in breach of valid arbitration agreement, the lawsuit will be dismissed from the outset. There is an arbitration institution called the Korean Commercial Arbitration Board (KCAB) where most arbitration matters in South Korea are resolved.

As a type of ADR, mediation during the court proceedings, which is frequently used in practice, may be held at the request of the parties or discretion of the judge. If mediation is held, the hearings outside the proceedings are conducted to reconcile the respective positions for amicable settlement. If a dispute is resolved through such mediation, the result shall have the same effect as the final and conclusive judgment.

v Enforcement of foreign judgments and arbitral awards

To enforce a foreign court judgment in Korea, a civil lawsuit should be commenced at the Korean court to seek a judgment that recognises and allows enforcement of the foreign court judgment in South Korea. A prerequisite for the Korean court to enforce a foreign court judgment is reciprocity.

The Korean court has found thus far that reciprocity has existed with the courts of the following jurisdictions: the United States; Canada; Japan; Taiwan; Germany; Argentina; the United Kingdom; Australia; New Zealand; Israel; Cambodia; and Hong Kong.

The Korean court and jurisprudence consider that there is no reciprocity with the courts of China, Denmark and Thailand.

South Korea is a signatory to the 1958 New York Convention for the recognition and enforcement of an arbitral award, and therefore an arbitral award obtained in a contracting state is enforceable in accordance with the 1958 New York Convention by obtaining a recognition and enforcement judgment from the Korean court. For an arbitral award obtained in a non-contracting state, the above reciprocity requirements applicable to court judgments would need to be satisfied before it can be recognised for enforcement in South Korea.

IV SHIPPING CONTRACTS

i Shipbuilding

Shipbuilders in South Korea generally use an international standard shipbuilding contract (mostly, a Shipbuilders Association of Japan (SAJ) form) with English law as the governing law and London as the forum for the resolution of disputes. In practice, the English governing law and the choice of forum clause in favour of arbitration in London are held to be valid and binding by the Korean court.

Where a shipbuilder enters into insolvency proceedings, the shipbuilding contract is expected to have been terminated pursuant to the *ipso facto* clause in the shipbuilding contract. However, in Korean practice, South Korea's insolvency law compulsorily applies and the *ipso facto* clause in the shipbuilding contract may be held invalid.

Commonly, a dispute arising under a shipbuilding contract or a refund guarantee is arbitrated in London. In this regard, where a tort claim is filed against a Korean shipbuilder for defect and damages that arose after expiry of the warranty period, Korean courts may have jurisdiction over the claim if the claimant is a third party other than the parties of the shipbuilding contract. Furthermore, for refund guarantees issued by Korean banks, there are court cases where local shipbuilders sought to obtain a preventive injunction from a Korean court to block the issuing bank from complying with the demand of payment by an overseas holder of a refund guarantee, based on arguments that the demand was made fraudulently and in bad faith.

ii Contracts of carriage

South Korea has not formally ratified the Hague, Hague-Visby, or Hamburg Rules. Instead, it has borrowed mostly from the Hague-Visby Rules and incorporated them into the Commercial Code. Nevertheless, in practice, by virtue of the governing law clause or the paramount clause in the bill of lading, the above Rules or other laws such as Carriage of Goods by Sea Act BE 2534 (1991) (COGSA) may be applicable to substantive issues when a dispute arising in respect of the carriage of goods by sea is brought before a Korean court.

Charter parties entered into in Korea mostly prescribe English law as the governing law and London (or Singapore or Hong Kong) as the choice of forum for arbitration, and these clauses are regarded as valid by Korean courts.

As regards multimodal transportation, the governing law clause agreed between the parties is regarded as valid by Korean courts. If Korean law is applicable, the Commercial Code provides that each carrier shall be responsible for its own segment of transport, pursuant to the law applicable to such segment. If the place of damage is unknown or the damage is not limited to any particular area in its nature, the carrier shall take responsibility in accordance with the law applicable to the segment of transportation that has the longest distance.

iii Cargo claims

The Korean Commercial Code has adopted many of the provisions of the Hague-Visby Rules. Therefore, the general interpretation under the Hague-Visby Rules is acceptable to Korean courts. The Supreme Court of Korea has held that a clause paramount in a bill of lading is also held to be a valid agreement on governing law superior to a general governing law clause in a bill of lading.

If the actual carrier is different from the contractual carrier, the holder of the original bill of lading may sue the actual carrier in tort.

iv Limitation of liability

South Korea is not a signatory to the 1976 LLMC. If a foreign ship is involved and wishes to limit liability in South Korea, pursuant to the Private International Law Act it shall be determined under the laws of the ship's flag whether the owner of the foreign ship is entitled to limit liability for claims and, if so, what the limitation amount should be for the foreign ship. Even if the ship's flag is a flag of convenience, the law of the flag would still govern.

However, as South Korea is not a signatory of the 1976 LLMC, whether or not limitation proceedings in Korea would be recognised in a contracting state of the 1976 LLMC is still up for debate.

For a shipowner to enjoy the limitation of liability under applicable laws in South Korea, the shipowner must file an application at the court to commence the limitation proceedings in accordance with the Act on the Procedure for Limiting the Liability of Shipowners and Others. The limitation fund can be established by way of a letter of undertaking issued by a P&I Club. It is also possible to commence the limitation proceedings while reserving the right of exemption based on an act of God and *force majeure* or the package and kilogram limitation.

V REMEDIES

i Ship arrest

There are two types of ship arrest: prejudgment attachment and attachment for auction sale of the ship. If the vessel is arrested by prejudgment attachment, it is for security purposes and thus the arrest will not undergo any auction procedure. Conversely, if the vessel is arrested based on a maritime lien or mortgage claim, the auction procedure will commence upon arrest.

If the party arrests a vessel by prejudgment attachment, as a matter of Korean law and practice, the arresting party will be required to provide 10 per cent of its claim as counter security. If the party arrests a vessel by attachment for auction sale of the vessel, no counter security is required. The counter security can be provided in the form of surety bond available from a local surety company.

If the application for an arrest is evidently meritorious, it takes generally one to two days for the Korean court to render a decision to grant the arrest of the vessel. A writ of arrest can be issued only after the target ship has entered a Korean port because this is a prerequisite for Korean courts to exercise jurisdiction over the target ship. Under Korean law, a caveat against arrest is not available.

The quickest way for the shipowner to get release of the ship from arrest without the agreement of the creditor is to make a cash deposit in full with a Korean court. Korean courts do not accept a letter of undertaking issued by a P&I Club or a bank in lieu of the cash deposit for release of the arrested ship.

ii Court orders for sale of a vessel

The auction sale of an arrested vessel is by public auction through court proceedings. A Korean court puts a public notice to invite creditors who have a claim against the owner of the vessel to file their claim for distribution, as well as to set a date for the first auction hearing for receiving bids generally within three to six months from the issuance of the arrest order.

Before the first auction hearing, the Korean court arranges appraisal of the vessel for auction. The Korean court puts up the vessel for sale at the appraised price of the vessel at the first auction hearing and if the vessel does not get sold, then the Korean court opens subsequent hearings usually at four-week intervals thereafter until the vessel is sold and, in general, discounts the price of the vessel by 20 to 30 per cent at each hearing. After the Korean court has received the payment from the winning bidder, it publishes a list of the creditors who have a valid claim against the proceeds of the sale. Only those claims to which a third party does not object are paid from the proceeds of the sale in a pro-rata basis while a reserve is set aside for those claims to which an objection has been raised.

Assuming that the vessel can be sold early, such as at the second or third auction hearings, the whole process can take approximately six to nine months. However, depending on the market and the number of potential buyers, the process may finish quickly or it may take a long time.

The highest bidder is not automatically the winner of the auction. Although, in practice, it would be a formality, the Korean court has to approve the highest bidder to be the winner of the auction. Every bidder is required to make a deposit of monies equal to 10 per cent of the reserve price. The Korean court orders the winning bidder to make the payment of the full price for the sale in two to three weeks from the date on which the winner is announced.

iii Lien on cargo

Pursuant to the Korean Private International Law Act, the law that governs a carrier's lien over a cargo is the law of the place where the cargo is located at the time the right of lien is exercised. A carrier is entitled to exercise a lien on cargo for freight, demurrage, damages or costs, among other things. The cargo can be disposed through judicial auction to satisfy the carrier's claim.

That being said, the Korean Supreme Court has restrictively construed a carrier's right to judicial auction of the cargo under lien by stating that, if there is an arbitration agreement between the carrier and the charterers for all disputes arising out of the charter party, the carrier will not be able to apply for judicial auction against the cargo. The Korean Supreme Court's rationale is that, if there is an arbitration agreement between the owners and the charterers, then to allow the judicial auction would disregard the purpose of the arbitration agreement between the parties. Although this decision has been heavily criticised, it still remains as good authority in Korea.

iv Cabotage

Under the Ships Act in Korea, cabotage, which is the transport of goods or passengers between two places within Korea by a foreign operator, is prohibited in principle, although there are some instances where cabotage is allowed under limited conditions. The Korean Prosecutors' Office has recently determined that foreign-flagged ships can operate within Korea for the transshipment of goods for export purposes and has exempted their criminal liability.

VI REGULATION

i Safety

South Korea has adopted the International Safety Management (ISM) Code and the International Code for the Security of Ships and Port Facilities (ISPC Code) under SOLAS. It has incorporated the ISM Code into the Maritime Safety Act and the ISPC Code into the Act on Security for Ocean-going Ships and Port Facilities. The two Acts apply to both domestic vessels and foreign vessels. The Maritime Safety Act requires shipping companies to undergo inspection for approval on their safe management and to acquire a document of compliance for the shipowner and safety management certificate for vessels to promote maritime safety and the smooth traffic of ship by establishing a safety control system for safe navigation of ships. The Act on Security for Ocean-going Ships and Port Facilities requires the shipowner to take measures to detect security threats and take preventive measures against security incidents that affect ships and port facilities.

ii Port state control

In December 1993, South Korea signed the Memorandum of Understanding on Port State Control in Asia-Pacific Region (Tokyo MOU) and, since April 1994, it has in place port state control (PSC). South Korea incorporated PSC into various domestic laws, such as the Ship Safety Act, the Maritime Safety Act, the Marine Environment Management Act and the Act on Security for Oceangoing Vessels and Port Facilities. There are numerous reports in which various sanctions have been put in place, including ship detention and administrative fine.

iii Registration and classification

South Korea is not a contracting state of the United Nations Convention for the Conditions of the Registration of Ships, 1986. There are two types of domestic public registry that are kept for ships in South Korea: one is kept by the district courts and the other by the Ministry of Oceans and Fisheries. The former, namely, the ships registry of Korean courts, is to keep the public record of the rights and interests of a civil nature to and in the ships, and the establishment, preservation, transfer, change, restriction on disposition, or extinction of the rights of the ownership, mortgage or lease may be registered. The legal effect of registration varies depending on the matter being registered.

To increase international competitiveness of the shipping industry, South Korea has enacted the International Ship Registration Act, providing a secondary system for ship registration. A ship registered under the Act is referred to as an 'international ship', and an international ship is permitted to have crew members of foreign nationality for posts other than master and chief engineer, and has such privileges as tax exemptions.

In South Korea, there is a class society called the Korean Register of Shipping (KR). In principle, KR can be held liable for damages arising from fault under the contract between itself and the shipowner, as well as damages in tort sought by a third party without a contractual relationship, when it is found that there was fault or negligence on the part of KR.

iv Environmental regulation

There are several domestic laws that regulate the environment aspect of a ship's operation. The purpose of the Marine Environment Management Act is to define the obligations of the people and the responsibilities of the government for the preservation and management of the marine environment and prescribe basic matters for the preservation of the marine environment. The marine environment stated in the Marine Environment Management Act includes both sea and air. Basically, this Act based on the 'polluter pays principle' stipulates that any person whose act or business activity results in the deterioration of the marine environment or in marine pollution is liable to restore the deteriorating or polluted marine environment and to bear the expenses incurred for the rectification of the damage caused.

The International Maritime Organization (IMO) regulation to limit the sulphur content of the ship's fuel to up to 0.5 per cent has been in effect in South Korea since 2020. To comply with the regulation, Korean ships are using fuel with lower sulphur content or are installing sulphur scrubbing systems. In addition, the Korean government is also regulating Busan and four other ports to limit the sulphur content of the fuel to 0.1 per cent, the breach of which may be subject to criminal punishment. Beginning in 2022, the regulation also applies to ships that pass by the five areas.

v Collisions

Pursuant to the International Private Act, the liability resulting from collision of ships at an open port or on a river or territorial waters is governed by the laws of the place of the collision, and that resulting from collision of ships on the high seas is governed by the laws of the ship's flag, if each ship has the same flag or if different, by the law of the flag of the ship that caused the damage.

When a collision occurs in South Korea, the Maritime Safety Tribunal (MST) investigator interviews the duty officer and any other crew member or party involved in the collision. The MST is a quasi-judicial administrative tribunal that investigates accidents that have happened at an open port, a river or ocean and, at the end of investigation, it issues a decision containing its conclusion on the cause of the accident and administrative sanctions against involved parties, if appropriate. The MST investigation is independent and separate from the coastguard's investigation.

The MST proceedings are not to adjudicate a civil dispute between private parties. Therefore, other than the blame ratio between navigation officers involved in a collision at sea, the MST does not apportion the liability or specify blame ratio in relation to civil liability between the owners. Nevertheless, in practice, because the MST determines the cause of accident and the faults of involved vessels or entities, and the apportionment of civil liability between the concerned parties may be deduced, the MST decision becomes an important piece of evidence in the event that a civil lawsuit is instituted between involved parties. In practice, Korean courts are reluctant to take a different view from the final conclusion reached in the MST proceedings because, in general, the MST is regarded as the most impartial expert on maritime cases.

vi Salvage and wrecks

Although South Korea did not ratify the 1989 Salvage Convention, the Korean Commercial Code incorporated into it a majority of the 1989 Salvage Convention and, in doing so, special compensation rules on environmental protection works were added and the Commercial Code is to be applied to salvage contracts.

If a ship sinks, the Korean government has to order the owner of the wreck to lift and remove the wreck and prevent pollution due to fuel spillage. If the owner does not comply with the order, it will be subject to a criminal penalty.

If the cost of removing the wreck is astronomical, the reasonableness of the wreck removal order comes into question. In a recent lower court case, the Korean court invalidated the wreck removal order issued by the government authority, holding that enforcing the wreck removal order was considered virtually unfeasible from a common sense view of the fact:

a the tremendous cost of removing the wreck did not justify the need to undertake the unrealistic task of removing the wreck (a general cargo ship that sunk at a depth of 120 metres);

b it was not possible to find salvors with a lifting capacity of over 150,000 tonnes;

c dismantling the wreck in pieces might cause additional serious harm to environment; and

d the wreck did not pose pollution risk since the remaining fuel had been already removed.

vii Passengers' rights

South Korea is not a member state to the 1974 Athens Convention. Unless agreed or prescribed otherwise, compensation for damages arising from an accident involving the carriage of a passenger by sea is governed by the relevant provisions in the Commercial Code.

These provisions have been borrowed from the 1976 LLMC and part of the Protocol of 1996 to amend the same. Under the Commercial Code, a claim for the loss that has resulted from death of, or bodily injury to, a passenger is limited to 46,666 special drawing rights (SDRs) per passenger.

viii Seafarers' rights

South Korea has adopted the 2006 Maritime Labour Convention. Furthermore, it has the Seafarers Act to maintain order on a ship, ensure and improve the basic welfare of seafarers, and promote the improvement of their life by prescribing matters concerning duties, service, standard of labour conditions, employment security, welfare, education and training of seafarers.

Pursuant to the Korean Private International Law Act, unpaid wages of seafarers constitute maritime liens if the unpaid wages are recognised as such under the law of the ship's flag, including the flag of convenience. Accordingly, seafarers with claims for unpaid wages can apply for auction sale of the ship based on maritime liens in a Korean court and recover them from the sale proceeds.

VII OUTLOOK

South Korea ratified the United Nations Framework Convention on Climate Change in 1993 and the Kyoto Protocol in 2002. In 2021, the Korean government announced a target to reduce the emission of greenhouse gases from 727.6 million tonnes in 2018 to 436.6 million tonnes by 2030. To reach that high goal, renewable energy and environmentally friendly policies are being implemented. The environmental policies will pose new challenges to the trading and shipping industries of South Korea.

Chapter 38

SWITZERLAND

William Hold[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Switzerland does not immediately come to mind when considering shipping law. Nonetheless, it has been in contact with the shipping industry for many years. Swiss companies and individuals financed many voyages to the New World and a Swiss insurance company was one of the co-insurers of the *Titanic*.

Nowadays, there is a Swiss ship registry based in Basle and there are about 50 ships on the oceans under the Swiss flag. The registry came into being when the Swiss government acquired vessels during World War II to secure the supply of essential resources. In the aftermath of the war, the Swiss government wanted to ensure that a Swiss-flagged fleet would be available for that purpose in the event of emergencies and took measures to encourage the existence of a private merchant fleet.

Moreover, many goods are still shipped in and out of Switzerland along the Rhine, through the port of Basle, and to or from the port of Rotterdam.

A substantial number of trading companies are based in Switzerland, many of which regularly charter seagoing vessels; some of them own their own vessels. According to some estimates, more than 20 per cent of the global transportation of commodities such as petroleum products, grains, cotton, coffee and sugar is organised out of Switzerland.[2]

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The main legislative act for navigation on the high seas is the Federal Law on Navigation under the Swiss Flag (Navigation Act), which is completed and implemented by numerous pieces of secondary legislation, including the Ordinance implementing the Federal Law on Navigation under the Swiss Flag (the Navigation Ordinance) and the Ordinance on Swiss Yachts Navigating on the High Seas.

Moreover, Switzerland is a signatory to numerous International Maritime Organization conventions, which are imported into Swiss law, and therefore are directly applicable to vessels flying the Swiss flag.

There are also specific pieces of legislation that apply to navigation on Swiss lakes and on the Rhine.

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1 William Hold is a partner at HFW. The information in this chapter was accurate as at May 2021.

2 Source: Swiss Shipping and Trading Association.

The Swiss Ship Registry is based in Basle, and the administrative body tasked with implementing the legislation on merchant ships is the Swiss Maritime Navigation Office (the Office), which is a department of the Federal Department of Foreign Affairs. The Office also maintains a separate registry for ocean-going yachts and small boats.

III FORUM AND JURISDICTION

i Courts

As a rule, Swiss courts will recognise choice-of-law and jurisdiction clauses in contractual matters.

In the absence of a jurisdiction clause, the Swiss courts will determine whether they have jurisdiction under the standard civil procedure rules as far as contractual matters are concerned. In general, this means that the home court of the defendant has jurisdiction.

The civil courts in Basle have mandatory jurisdiction for all actions *in rem* with respect to a vessel entered in the Swiss Ship Register, for all claims arising out of unauthorised acts carried out on board a Swiss seagoing vessel and for actions in connection with proceedings to limit the liability of the ship operator or for confirmation by the court of a general average adjustment.

The criminal courts in Basle have jurisdiction for offences committed under the Navigation Act or on board a seagoing vessel, unless different courts are specifically provided for in special provisions.

ii Arbitration and ADR

Switzerland does not have a specific maritime arbitration procedure. However, it does have a very long tradition of hosting arbitrations of all sorts. For example, the International Chamber of Commerce (ICC) usually administers more arbitrations seated in Switzerland than in any place outside France, where the ICC is based.[3]

Moreover, given the number of commodity traders based in Switzerland, there is a deep pool of arbitrators and experts with strong industry experience in the shipping and commodities fields. Accordingly, it is by no means unusual for commodity and shipping arbitrations to take place with a seat in Switzerland. The fact that the underlying contracts are not governed by Swiss law is no barrier at all.

These arbitrations can be administered on an ad hoc basis or may be administered according to institutional rules, such as the ICC Rules or the Swiss Rules of International Arbitration, which were established by the Chambers of Commerce and Industry of Basle, Berne, Geneva, Lausanne, Lugano, Neuchâtel and Zurich.

Arbitration proceedings with a seat in Switzerland are governed by the Private International Law Act, which grants arbitral tribunals a large degree of discretion and broad powers.

Appeals against arbitral awards must be brought directly to the highest court – the Federal Tribunal – within 30 days of receipt of the award or interim award. The grounds under which an appeal may be brought are the following:

a if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;

3 See, for example, International Chamber of Commerce, *Dispute Resolution Bulletin* 2017.

b if the arbitral tribunal wrongly accepted or declined jurisdiction;
c if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim;
d if the principle of equal treatment of the parties or the right of the parties to be heard was violated; and
e when the award is incompatible with public policy.

Interim awards can only be annulled on the grounds stated in points (a) and (b).

The appeal is generally dealt with on paper and is usually decided within four to six months.

Effectively, the only way an appeal can be brought against the merits of an award is under point (e), by claiming that the award is against public policy. As a rule, the Federal Tribunal is extremely reluctant to allow appeals on grounds of public policy. Although no official statistics are available, the overall success rate of appeals against arbitral awards is understood to be lower than 10 per cent for all grounds combined.

Furthermore, if none of the parties has its domicile, habitual residence or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, fully waive the right to appeal, or they may limit it to one or several of the grounds listed above. The insertion of a clause that disputes will be 'finally' heard by a given tribunal would most likely not be sufficiently explicit to achieve this result, so a more express renunciation of the right to appeal is necessary.

Mediation is also a well-accepted mechanism for alternative dispute resolution in Switzerland. The Swiss Civil Procedure Code provides that a judge or parties may suspend proceedings in favour of a mediation attempt, and the Chambers of Commerce of Basle, Berne, Geneva, Lausanne, Lugano, Neuchâtel and Zurich also offer their services in commercial mediation based on the Swiss Rules of Commercial Mediation.

iii Enforcement of foreign judgments and arbitral awards

Arbitral awards are readily enforceable in Switzerland pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention).

Similarly, foreign commercial judgments issued in signatory states of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007 (the Lugano Convention) are also readily recognised and enforced. The Lugano Convention binds the EU Member States, Switzerland, Iceland and Norway, and closely mirrors the Brussels I Regulation. Although the Lugano Convention does not require non-EU Member States to refer questions of interpretation to the European Court of Justice, it does require courts to take into account decisions made by courts in other signatory states in similar matters. The interpretation of the Lugano Convention is therefore very similar to the interpretation of the Brussels I Regulation.

Both arbitral awards and foreign commercial judgments issued in signatory countries to the Lugano Convention are usually registered at the same time as the application for enforcement is made. Assuming the formal requirements for recognition are met and the foreign judgment is executory, the Swiss courts will usually register the judgment and order whatever measures the creditor is entitled to under the relevant debt-enforcement provisions.

As regards civil judgments issued by courts in states that are not signatories of the Lugano Convention, the Swiss courts will recognise and register the judgment if the court

that issued the judgment had jurisdiction to do so, if the judgment cannot be appealed under ordinary proceedings and if the recognition of the judgment does not conflict with Swiss public policy.

IV SHIPPING CONTRACTS

i Shipbuilding

No commercial seagoing vessels are built in Switzerland.

ii Contracts of carriage

Swiss-flagged vessels often perform contracts of carriage governed by the law of another country, usually England.

The main Swiss legislation that deals with contracts of carriage is the Navigation Act, as supplemented by the general contract law rules found in the Swiss Code of Obligations. Swiss contract law, including the law relating to contracts of carriage, is derived from German contract law. Accordingly, in the presence of *lacunae*, the courts may consider the relevant position according to German case law as well as international commercial practice.

The relevant provisions are to be interpreted according to the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules) and its various protocols, which have been imported into Swiss law. The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (the Rotterdam Rules) has been signed but has yet to be ratified.

During the time from reception of the cargo until its delivery, the freight carrier will be liable for the loss, complete or partial destruction of, or damage to, the goods and for any delay in the delivery unless it proves that neither the carrier nor the master, crew or other persons on duty on the vessel, or persons helping the carrier to effect the transportation, are responsible.

In the event that the loss, destruction or damage of goods or the delay has arisen from acts, omissions or negligence of the master, pilot or other persons working on the vessel in connection with navigating or technical operations, or if it is due to fire, the carrier will not be held liable, provided that there is no direct fault on its part. Measures that are principally taken in the interest of the cargo are not considered as falling within the scope of the technical operation of the ship.

In the event that claims for the loss, destruction or damage of the goods or delay are made against the master, crew or other persons working on the vessel, or persons helping the carrier to effect the transportation, they may rely on the exemptions from, and restrictions of, liability in the same way as the carrier, whatever the legal basis on which the claim relies, unless the damage was caused intentionally or through recklessness.

The carrier will not be liable for the loss, destruction or damage of goods or delay if one of the following causes is proven:

a *force majeure*, accident, danger or incident on sea or other navigable waters;
b act of war, riot or public disturbance;
c an official measure such as sequestration, quarantine or other limitation;
d a strike, lock-out or other work impediment;
e the saving (successful or attempted) of life or property at sea or other justified deviation from the course of travel that does not constitute any violation of the contract of freight;

f an act or omission of the shipper, consignee or owner of the goods, their agents or representatives;
g the shrinkage of volume or weight or other damage as a result of concealed defects of the goods;
h the special nature or peculiar condition of the goods;
i unsuitability of the packaging, or unsuitability or inaccuracy of the markings; and
j concealed defect of the vessel impossible to discover by exercising normal due diligence.

The exemption from liability will not apply if it is proven that the damage was due to the carrier or its auxiliaries. 'Auxiliaries' in this sense means the master, crew or other persons working on the vessel or persons helping the carrier to effect transportation.

In the event that the charterer is responsible for the loss or complete destruction of the goods, it will be required to pay only the value of the goods at the place of destination on the day the vessel is or should be unloaded according to the freight contract. The value of the goods will be determined by the market price, or in the absence of such a value, according to the common value of goods of the same type or character.

In the event of partial destruction, damage or delay, the charterer will be required to pay only the amount of the reduction in value of the goods without further damages, but under no circumstances more than in the event of total loss.

Subject to damage being caused intentionally or through recklessness, the carrier will in no case be liable, whatever the legal basis on which the claim relies, to pay damages in excess of those stipulated in the Navigation Ordinance. These amounts are calculated according to a rate determined either for every unit or other transporting unit, or for each kilogram of gross weight of the lost or damaged goods, whichever amount is higher.

The carrier may not rely on these maximum amounts in the event that the shipper has expressly stated the particular nature and the maximum value of the goods before the commencement of loading, and this value, which may be refuted by the charterer, has been entered in the bill of lading, or if maximum liability amounts have been agreed.

Any agreement in the bill of lading that has the direct or indirect purpose of excluding or of limiting the statutory liability of the carrier for the destruction or loss of, or damage to, the goods, or of shifting the burden of proof for such liability will be unenforceable unless the agreement refers to the carrier's liability for the period before the loading of the goods and after their unloading.

In the event that a container, a pallet or a similar device is used to collect goods, every piece or transport unit mentioned in the bill of lading contained in or that is on such a device shall be regarded as a separate piece or transport unit; in all other cases, the whole device will be regarded as a piece or a transport unit.

The carrier and its auxiliary staff taken together may not be held liable for an amount in excess of the maximum amount for which the carrier alone would be liable.

Neither the carrier nor its auxiliaries may rely on the exemptions from and restrictions of liability if it is proven that they caused the loss or damage through an act or omission perpetrated with the intention of causing loss or damage, or by acting carelessly in the knowledge that loss or damage was likely to occur.

The authorised holder of a bill of lading is entitled to receive the goods from the carrier that issued the bill of lading, and therefore has title to sue the carrier if the goods are not delivered.

Whoever demands delivery of the goods will become the debtor for the freight and other debts attached to the goods, but the receiver will be liable only for demurrage and other debts that accrued at the loadport if these debts are recorded in the bill of lading, or if the receiver otherwise found out about the claims.

The provisions of the York Antwerp Rules 2016 apply to general average claims.

iii Cargo claims

See Section IV.ii for a general overview. It is possible to incorporate charter party terms into other agreements, provided that the parties to the agreement have had the opportunity to find out the terms of the charter party. If these terms are widely available to the general public, such as for standardised charter party forms, the standard will be somewhat lower, especially if the parties are commercially experienced. Under these conditions, there are suggestions that parties can be held to have incorporated an arbitration clause. Whether a demise clause is enforceable probably depends on the facts. If the parties to the bill issued are experienced commercial parties, there is a good chance that the clause would be upheld.

iv Limitation of liability

Under the Navigation Act, two limitations of liability are possible. First, Swiss federal law limits the liability of shipowners, and that of the shipper and carrier, by applying Articles 1 to 13 of the Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC Convention 1976). Accordingly, liability may be limited for two types of claims: for loss of life or personal injury and for property claims. The limits under the LLMC Convention are based on the tonnage of the ship.

The second area of liability covered by the Navigation Act concerns 'loss or damage due to hydrocarbons'. This is governed, as stipulated in Article 49, by the International Convention on Civil Liability for Oil Pollution Damage 1969, replaced by the 1992 Protocol (the CLC Convention).

In the case of the limitation of liability under both the LLMC Convention 1976 and the CLC Convention, the fault on the part of the shipowner, operator, charterer or carrier that justifies the exclusion of the limitation of liability must be proven by the party that asserts the existence of the fault.

In a case of limiting liability for loss, partial damage or complete destruction of goods, liability is limited to the total value of the goods lost or damaged. Inland operators (most generally in the case of barges on the Rhine) may limit their liability in accordance with the 1988 Strasbourg Convention on the Limitation of Liability in Inland Navigation, which is incorporated into Swiss federal law. The only *caveat* is that, in the case of push boats rigidly connected to pushed barges as a convoy set, liability will be calculated 'according to the engine output of the push boat and the carrying capacity of the pushed barges'.

V REMEDIES

i Ship arrest

It is possible to arrest a barge on the Rhine. A popular measure that is of more general interest is the arrest of bank accounts or other assets (including debts) that are located in Switzerland.

The holder of an unsecured debt may apply for an arrest of assets that are in Switzerland under certain conditions (the debt generally must be payable). An arrest may be granted, for example, if the debtor is preparing to flee or to conceal its assets, if the debtor is not domiciled

in Switzerland (provided that the debt has a sufficient connection with Switzerland), if the creditor has a valid recognition of debt from the debtor, or if the creditor has an enforceable judgment or arbitral award against the debtor.

The creditor will have to make a plausible case that the debt exists, that the conditions for an arrest to be granted are fulfilled, and that there are assets within the jurisdiction to be arrested.

ii Court orders for sale of a vessel

A court may order the sale of a vessel within the context of winding-up or insolvency proceedings against its owner.

VI REGULATION

i Safety

Pursuant to the Navigation Ordinance, the latest version of the following international conventions shall apply to Swiss seagoing vessels, their equipment and safety, to the protection of human life at sea and of the waters of the sea, and the training of seafarers:

a the International Convention on Load Lines 1966 (the Load Lines Convention);
b the International Convention for the Safety of Life at Sea 1974 (SOLAS);
c the International Regulations for Preventing Collisions at Sea 1972 (COLREGs);
d the Radio Regulations annexed to the International Communication Treaty of November 1982;
e the International Convention for the Prevention of Pollution from Ships 1973 (MARPOL) (with Annexes I to VI);
f the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1995 (the STCW Convention); and
g the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (the OPRC Convention).

These conventions are directly applicable under Swiss law, and the Office ensures that they are complied with.

ii Registration and classification

Seagoing vessels may be entered into the Swiss Ship Register if they are used, or intended to be used, for commercial activity. To be registered, the vessel's owner must first obtain a certificate from the Office to the effect that the legal conditions relating to the owners and the operators are fulfilled.

If the owner of the vessel is a corporate entity, its registered office and the actual centre of its business activities must be located in Switzerland. Broadly, the majority of the entity's management must be domiciled or resident in Switzerland, and must be Swiss citizens.

There are additional requirements with regard to the owner's financial resources and the origin of the funds: the requirements for operators who are not owners are similar. These restrictions reflect the strategic importance of the Swiss merchant fleet in times of crisis.

The idea is that the fleet remains firmly under Swiss control in times of need. Moreover, the name of the vessel must be approved by the Office. As a general rule, the vessel must hold the highest classification of a recognised classification society.[4]

The requirements are broadly similar for ocean-going yachts, except that the owner of the vessel must be a Swiss national or a Swiss foundation that encourages pleasure boating. The vessel's home port will be Basle.

Mortgages may be entered into the shipping register provided that certain requirements on the origin of the borrowed funds are satisfied. Moreover, the liens set out in the International Convention on the Unification of Rules relating to Maritime Liens and Mortgages on Seagoing Vessels 1926 rank ahead of any liens entered into the Swiss Ship Register.

Bareboat charters may also be entered into the register, so that in the event that the vessel is sold, the new owner must allow the charterer to use the vessel in accordance with the provisions of the charter party.

iii Environmental regulation

Switzerland is a signatory of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (the London Convention), the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (the Bunker Convention), the International Convention on the Control of Harmful Anti-Fouling Systems on Ships 2001 (the Anti-Fouling Convention) and the Convention for the Control and Management of Ships' Ballast Water and Sediments 2004 (the Ballast Water Management Convention).

A party that acts in breach of these conventions or any of the provisions of the acts that deal with environmental protection would be liable to a term of imprisonment or a fine. If the act were carried out negligently, the party would be liable to a term of imprisonment for up to six months or a fine of up to 20,000 Swiss francs.

iv Collisions, salvage and wrecks

In the event of a collision between two or more vessels, the provisions of the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910 (the Brussels Collision Convention) determine the rights and obligations of each party. Switzerland is also a signatory of the International Convention on Salvage 1989 (the 1989 Salvage Convention), which is directly applicable. The operator of the salvaged vessel will be required to pay the costs of salvage. It may have recourse in respect of the costs in proportion to its respective shares against the persons who hold rights to the other valuables salvaged.

v Passengers' rights

The provisions of Article 1 and Articles 3 to 21 of the Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974 (the Athens Convention) apply to the liability of a carrier and its personnel in respect of passengers and their luggage.

4 There is no case law on the liability of classification societies, to our knowledge, but, under general contract law principles, it is possible that a classification society would be found liable if it were found to have caused harm through a breach of its obligations.

vi Seafarers' rights

Seafarers' rights are governed by Articles 68 to 86 of the Navigation Act. These provisions are supplemented by the general provisions that deal with employment contracts found in the Swiss Code of Obligations and numerous provisions of the Navigation Ordinance.

In addition, Switzerland is a signatory of the Maritime Labour Convention 2006, which entered into force in Switzerland on 20 August 2013.

VII OUTLOOK

The shipping and commodity trading sectors together amount to a substantial portion of Switzerland's annual gross domestic product. By some estimates, they contribute about as much as the tourism industry. Therefore, there is every chance that Switzerland will continue to have a discrete presence on the shipping scene in general for a long time to come.

Chapter 39

THAILAND

Nathee Silacharoen, Ittirote Klinboon, Rawi Meckvichai and Chonlawat Rojanaparpal[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

In 2022, the value of the export and import trade in Thailand was around US$444 billion,[2] most of which was conducted through the carriage of goods by sea. Thailand has around 150 commercial ports[3] and 2,039 cargo ships[4] listed on the whitelist. The shipping industry plays a very important role in Thailand's economy. Recently, the Thai government announced a plan to establish a 'National Maritime Navigation Line' to enhance the carriage of goods by sea for Thai vessels and to boost export businesses in Thailand. The Thai government focuses on promoting and enhancing the shipping industry in Thailand.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Thailand is a civil law jurisdiction whereby laws are enacted by Parliament and regulations are issued by an administrative agency deriving authority from the legislature.[5] Precedents set by the Supreme Court's judgments are not officially recognised in the same manner as those of common law countries. However, certain precedents are formally published and can be referenced as guidelines for the construction of the provisions of applicable laws.[6]

Provisions of treaties or international conventions to which Thailand is a party are not legally enforceable in court actions until such treaties are enacted as domestic legislation. As of 9 February 2022, the maritime conventions that Thailand has ratified include:[7]

a the Convention on the International Maritime Organization (IMO), 1948;
b the International Convention for the Safety of Life at Sea (SOLAS), 1974;
c the International Convention on Load Lines (LL), 1966;
d the International Convention on Tonnage Measurement of Ships (TONNAGE), 1969;

1 Nathee Silacharoen is a partner, Ittirote Klinboon is counsel, and Rawi Meckvichai and Chonlawat Rojanaparpal are senior associates at Chandler MHM Limited.

2 https://www.mreport.co.th/news/statistic-and-ranking/356-Export-Thailand-2022-December.

3 http://www.mkh.in.th/index.php?option=com_content&view=article&id=66&Itemid=172&lang=th.

4 Information as of March 2023: https://whitelist.md.go.th/ship.

5 Lasse Schuldt, *Introduction to the Civil Law*, https://www.law.tu.ac.th/lecture-summary-introduction-to-the-civil-law/#:~:text=Civil%20Laws%20are%20written%20law,Additional%20sources%20of%20law.

6 Waree Shinsirikul, Nathee Silacharoen, Rawi Meckvichai and Soidara Budnean, Chandler MHM Limited, *Doing Business in Thailand*, 3rd Edition, https://www.chandlermhm.com/content/files/pdf/publications/Doing%20Business%20in%20Thailand%20(Third%20Edition%20Book).pdf.

7 https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx; and http://old.md.go.th/md/index.php/2014-01-19-05-02-28/2014-01-19-05-22-26/implementation.

e the Convention on the International Regulations for Preventing Collisions at Sea (COLREG), 1972;
f the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), 1978 as amended 1995;
g the Convention on the International Maritime Satellite Organization (IMASAT), 1976;
h the Convention on Facilitation of International Maritime Traffic (FAL), 1965;
i the International Convention for the Prevention of Pollution from Ships (MARPOL), 1973 as modified by the Protocol of 1978;
j the International Convention on Civil Liability for Oil Pollution Damage (CLC), 1992;
k the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND), 1992;
l the International Convention on Salvage (SALVAGE), 1989;
m the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC), 1990; and
n the Maritime Labour Convention (MLC), 2006.

For several of the other areas of maritime law in which international conventions are not ratified, including carriage of goods, arrest of ships and civil liability arising from collisions, Thai legislation partly resembles the relevant international conventions or a mixture of local regulation and international conventions. Notably, Thailand does not have domestic legislation for some aspects of maritime law, such as tonnage or global limitations, even though long-established rules apply worldwide by virtue of the Convention on Limitation of Liability for Maritime Claims (LLMC), 1976, and its Protocol of 1996. Thus, Thailand is, in some respects, a haven for maritime catastrophe claims that can involve large claim amounts.

III FORUM AND JURISDICTION

i Courts

Forums and procedure

The majority of shipping claims are heard in a specialist court, namely the Central Intellectual Property and International Trade (CIPIT) Court, where a panel consisting of an ordinary and lay judge who has specific knowledge in the maritime industry oversees the proceedings. The proceedings are generally governed by the Civil Procedure Code (CPC) with some specific overriding rules prescribed in the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court, B.E. 2539 (1996). Appeals against judgments rendered by the CIPIT Court can be filed with the Court of Appeals for Specialized Cases and the Supreme Court.

Claims that are outside the jurisdiction of the CIPIT Court, such as claims on breach of contract of domestic carriage of goods by sea, claims on marine insurance covering domestic carriage of goods by sea or tort claims arising from collision where both parties are not

seagoing vessels or from allision (a seagoing vessel striking a stationary object), are heard in ordinary courts of justice.[8] Appeals on judgments of these courts can be filed with the Court of Appeal and the Supreme Court.

Choice of law

Where there is a conflict of law and the Conflict of Laws Act BE 2481 (1938) (CLA) directs to foreign law, the court will apply a foreign country's substantive law in place of domestic laws, which is presented by the parties and proven that such law is not contrary to the public order or good morals of Thailand.[9] However, some specific legislation, such as the Carriage of Goods by Sea Act BE 2534 (1991) (COGSA), prohibits the application of foreign laws and international conventions in certain circumstances, namely, where one party in the dispute is of Thai nationality or is a juristic person established under the laws of Thailand.[10] Notably, marine insurance policies are not governed by Thai substantive law. This is because standard clauses in marine insurance policies usually provide for English law and practice.[11] Even in the absence of an English law clause, the Supreme Court will still apply English law as a general principle of law for marine insurance claims.[12]

Prescription and limitation periods

General limitation periods for maritime claims are listed below. Each time limitation has details and exceptions that need to be further construed:

a cargo claims under the contract of carriage of goods by sea: one year from the date of delivery;[13]

b cargo claims under multimodal transport: nine months from the date of delivery;[14]

c sea passenger claims: 10 years from the date of incident;[15]

d collision claims:

- if one party is a seagoing vessel, two years from the date of incident;[16] and
- if no party is a seagoing vessel, one year from the date on which the tort and tortfeasor became known but not exceeding 10 years from the date of the incident;[17]

e salvage claims: two years from the date on which the salvage operation finishes;[18]

f general average claims:

8 Waree Shinsirikul, Nathee Silacharoen, Rawi Meckvichai and Soidara Budnean, Chandler MHM Limited, *Doing Business in Thailand*, 3rd Edition, https://www.chandlermhm.com/content/files/pdf/publications/Doing%20Business%20in%20Thailand%20(Third%20Edition%20Book).pdf.

9 Sections 5, 8, 13 and 15 of the Conflict of Laws Act BE 2481 (1938).

10 Section 4 of COGSA.

11 Ittirote Klinboon and Rawi Meckvichai, First-step analysis: bringing insurance litigation proceedings in Thailand, https://www.lexology.com/library/detail.aspx?g=c73598c8-e060-4f69-b0c9-95972b6a615f.

12 Supreme Court's Judgments No. 999/2496 and No. 7350/2537.

13 Sections 46 and 47 of COGSA.

14 Section 38 of the MTA.

15 Section 193/30 of the CCC.

16 Section 21 of the Civil Liability Arising from Collision BE 2548 (2005).

17 Section 448 of the CCC.

18 Section 31 of the MSA.

- claimed by the shipowner, one year from the date the amount of general average contribution is advised to the contributor but not exceeding five years from the date of general average act; and
- claimed by other party, one year from the date the amount of general average contribution is advised to the contributor but not exceeding seven years from the date of general average act;[19]

g oil pollution from ship claims: three years from the date on which the damage appears but not exceeding six years from the first date of incident;[20] and

h ordinary tort claims: one year from the date on which the tort and the tortfeasor became known but not exceeding 10 years from the date of incident.[21]

Notably, the limitation periods in (a) and (b) above are extendable with agreement between the parties under certain conditions set out by the law. Although the periods are not extendable with agreement, limitation periods may be interrupted by provisions of the law in some circumstances.

ii Arbitration and ADR

Validity of arbitration clauses

It is normal that a charter party or bill of lading (or both) contains an arbitration clause of which part of it prescribes arbitration in London and other foreign forums. However, Thai courts seem to be relatively conservative on validation and application of arbitration clauses. The Thai court has decided that, in several cases, the arbitration clauses were not lawfully applicable. For disputes that solely involve a bill of lading and not a charter party, there are many rulings that hold the arbitration clause invalid because the consignee did not sign either the bill of lading or another form of standard terms and conditions that contains an arbitration clause, as required by the Arbitration Act B.E. 2545 (2002) (AA).[22] Interestingly, where the charterer and shipowner properly signed a charter party that contains the arbitration clause, the court has ruled that the arbitration clause did not bind a cargo insurer who had subrogated the charterer's rights (and the cargo insurer was the plaintiff in this case). The rationale given by the court is that the third party would be bound by the arbitration clause in the charter party only in the circumstance that the rights under the charter party are transferred from the charterer to a third party by way of assignment of rights, namely, by virtue of a juristic act, pursuant to a provision of the AA.[23] However, where the rights are transferred by way of subrogation, namely a legal act, as in this case, the insurer would not be bound by the arbitration clause. The claims must therefore be filed with the competent court.[24]

19 Section 21 of the Contribution in General Average Loss from Maritime Adventures Act BE 2547 (AD 2004).

20 Section 33 of the Civil Liability for Oil Pollution Damage Caused by Ships Act BE 2560 (AD 2017) and Section 28 of the Requirement of Contributions to The International Fund for Compensation for Oil Pollution Damage Caused by Ships Act BE 2560 (AD 2017).

21 Section 448 of the CCC.

22 Section 11 of the Arbitration Act.

23 ibid., Section 13.

24 Court's Order in the Case No. IT 251/2561.

Arbitration institutions and procedures

There are no specific maritime arbitration institutes or procedures in Thailand. The following arbitration institutes in Thailand hear maritime disputes:

a the Thai Arbitration Institute (for ordinary maritime disputes);

b the Arbitration Institute of the Office of Insurance Commission (for disputes between an insured and insurer under a contract for marine insurance); and

c the Arbitration Institute of the Thai General Insurance Association (most non-life insurance companies in Thailand have entered into compulsory arbitration agreements in which disputes on recourse claims between insurance companies will be submitted to this institute).

All institutes have their own specific procedural rules but are still under the umbrella of the AA.

Mediation

Generally, where the claim is submitted to the court, the court will try to mediate both parties to have the disputes settled amicably before a trial, or as soon as possible. In addition to court-supervised mediation, out-of-court mediation is also available. Out-of-court mediation will generally not be automatically recognised or be enforceable by Thai courts. When a party fails to comply with any of the obligations set forth in an out-of-court settlement agreement, the non-defaulting party must file a lawsuit with the competent court for a judgment to enforce the performance of the obligations under the settlement agreement.

At the end of 2020, the CPC was amended making it possible for disputing parties to request court-supervised mediation without having to start litigation proceedings with the court. After the court receives a request made by a party's motion for mediation, the court will seek the other party's consent to commence mediation. If the mediation process leads to an amicable settlement, a compromise agreement may be drafted and endorsed by a judgment. Such judgment is enforceable in the same manner as a court judgment rendered through litigation. There are no court fees for the mediation process.[25]

iii Enforcement of foreign judgments and arbitral awards

Judgments

Presently, a judgment rendered by a court of a foreign country is not automatically enforceable in Thailand. At best, the foreign court judgment serves as persuasive evidence during litigation in a Thai court on the same claim.

Arbitral awards

Thailand is a contracting state of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention). As such, an arbitral award rendered in a foreign country that is a contracting state of the New York Convention will be recognised for enforcement by Thai courts. The AA provides that an arbitral award rendered in any country is binding on the parties concerned, and that enforcement can be sought

25 Waree Shinsirikul, Nathee Silacharoen, Rawi Meckvichai and Soidara Budnean, Chandler MHM Limited, *Doing Business in Thailand*, 3rd Edition, https://www.chandlermhm.com/content/files/pdf/publications/Doing%20Business%20in%20Thailand%20(Third%20Edition%20Book).pdf.

in Thai courts. The AA does not only give ratification to the New York Convention; an arbitral award rendered in a foreign country that is not a contracting state to the New York Convention can also be enforced in accordance with international treaties and agreements to which Thailand is a party.[26]

IV SHIPPING CONTRACTS

i Shipbuilding

Thailand is not a key player in the global shipbuilding industry. The shipbuilding activity in Thailand mainly involves the building of small to middle-sized or special purpose ships. As a result, there are neither specific laws nor standard forms for contract in this respect.

If a ship is built in a foreign country and the buyer is a Thai entity, it is likely that the shipbuilding contract will be governed by foreign law as agreed to by the parties in a standard form widely used in that jurisdiction. Where the shipbuilding contract is governed by Thai law, the Civil and Commercial Code (CCC) will play a crucial role in imposing rights and obligations on the parties. However, the parties have the freedom to agree to deviate from the default law and this agreed term will be held enforceable in so far as the law in this respect does not relate to public order or good morals.[27]

ii Contracts of carriage

Key legislation, rules and conventions

Thailand is not a contracting state to the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 1924 (the Hague Rules), the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1968 (the Hague-Visby Rules), the United Nations Convention on the Carriage of Goods by Sea, 1978 (the Hamburg Rules) and the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2009 (Rotterdam Rules). However, in certain situations, such rules may still be applicable through the 'paramount clause' in a bill of lading or a charter party.

Contracts for international carriage of goods by sea are usually governed by COGSA, which is said to be a combination of the Hague-Visby Rules and Hamburg Rules with some variations. COGSA applies to the international carriage of goods by sea where the port of loading is in Thailand and a port of discharge is in a foreign country and vice versa.[28] However, COGSA provides that it does not apply to any type of charter party. This is because the parties to a charter party contract, which are supposed to be firm business entities, have equal power of negotiation. Therefore, the law intends to leave the parties to an agreement to decide their own rights and obligations under the principle of freedom of contract without state intervention by means of the legislation. Nevertheless, if a bill of lading is issued under a charter party, and it is transferred to a consignee who is not one of the original parties to the charter party contract, the relationship between the carrier and the consignee will be governed by COGSA.[29]

26 id.

27 Section 151 of the CCC.

28 Section 4 of COGSA.

29 ibid., Section 5.

An agreement to invoke foreign law or convention to govern the contract of carriage of goods by sea (not including a charter party) will be void if one party to the contract has Thai nationality or is an entity established under Thai law. Where the parties do not have Thai nationality and are not an entity established under Thai law, the agreement will be valid and enforceable.

For the domestic carriage of goods by sea or river, the contract will usually be governed by the CCC, which has considerable differences to COGSA. Notably, the parties to a domestic carriage of goods can agree to apply COGSA to their contract as an applicable law.[30]

Main duties

The main duties of the carrier under COGSA are as follows:

a to exercise due diligence to ensure seaworthiness of a vessel;[31]
b handle the cargo with proper care;[32]
c issue a bill of lading as requested by the shipper;[33]
d proceed with reasonable dispatch;[34] and
e deliver the cargo to the holder of the bill of lading after it is surrendered to the carrier.[35]

The shipper's main duties are as follows:

a to mark and label dangerous cargo as listed in the International Maritime Dangerous Goods Code (IMDG);
b to declare such dangerous characteristics to the contractual or actual carrier (or both) upon handing over the cargo to them;[36] and
c make a payment for the freight.[37]

The person who is obliged to make a payment for the freight, namely, the shipper or consignee, and is due for the payment depends on the applicable trade terms, such as INCOTERMS, in the sale of goods contract and the agreement between the shipper and the carrier.

Unlike the Hague-Visby Rules, liability of the carrier under COGSA for loss of or damage to cargo is not restricted to 'tackle to tackle'. The liability still attaches in so far as the cargo is in the custody of the carrier[38] as in the Hamburg Rules. Unlike the Hamburg Rules, COGSA contains a long list of the exclusions of liability for the carrier, some of which are the same as the Hague-Visby Rules. Details of cargo claims, including relevant common terms in a bill of lading, will be further discussed below.

30 ibid., Section 4.
31 ibid., Section 8.
32 ibid., Section 10.
33 ibid., Section 12.
34 ibid., Section 39.
35 ibid., Section 28.
36 ibid., Section 33.
37 ibid., Section 14.
38 Section 39 of COGSA.

Liens

In connection with the carriage of goods, where the freight is not duly paid to the carrier, the carrier is entitled to exercise a possessory lien on the cargo and detain it until the freight is paid or the shipper or consignee provides adequate security.[39] Thailand has no specific laws on the lien on sub-freights and sub-hires under a charter party, and as a consequence, general provisions of the CCC will be applicable. If the time charter does not pay the hire to the shipowner (or disponent shipowner), the shipowner may exercise a lien on sub-hire or sub-freight, provided that the terms in this respect are properly drafted in the charter party and a written notice is properly served[40] on the subcharterer who is responsible for paying the sub-hire or sub-freight.

Multimodal transport

Multimodal transport is governed by the Multimodal Transport Act BE 2548 (2005) (the MTA). The main duties under the MTA are relatively similar to COGSA with some variations, such as claims against the actual carrier, exclusion of liability, limits of liability, time limitations or prescription periods, and agreement on choice of forum. An issue that is usually misunderstood by foreign and Thai lawyers is how the MTA operates when the loss can be specifically localised as occurring during sea, land or air transport that may involve a specific piece of the legislation, namely, COGSA, the CCC, the International Carriage of Goods by Roads Act BE 2556 (2013) (ICOGRA) and the International Carriage by Air Act BE 2558 (2015) (ICAA). There is no issue where the loss or damage cannot be localised because there is no doubt that the MTA will govern the dispute in question. However, where the loss or damage can be localised, it does not mean that the MTA will be completely substituted by the legislation for a specific leg of transport. In such cases, the MTA still predominantly governs the dispute in question and specific legislation will be merely invoked for the issue of limit of liability.[41] In other words, the MTA still plays the predominant role in determining most of the issues, such as the liable party, exclusion of liability, limitation or prescription period and choice of forum, except the limit of liability.

iii Cargo claims

Cargo claims make up around 70 per cent of maritime disputes in Thailand.

Title to sue

The CPC provides a very broad prescription on the title to sue, which reads 'where there is a dispute involving the rights or duties of any person under the civil law, . . . , that person must submit the case to the court',[42] and there is no specific provision under COGSA to deal with this issue. Where there is no transfer of risks during transit, for example where company A ships its own cargo from country X to Thailand, the cargo owner who is also the shipper and consignee will have title to sue the carrier for loss.

Most cargo claims involve an underlying contract of international sale of goods, which unavoidably entails transfer of risks during transit. In theory, the person who has title to

39 ibid., Section 15.

40 Section 306 of the CCC.

41 Section 31 and 37 of the MTA.

42 Section 55 of the CPC.

sue should be the person who suffers loss, and is the person who bears the risks at the time of loss. To determine who, between the seller and buyer, holds the risks at the time of loss, it is necessary to look at the trade term, such as INCOTERMS, to which the parties to the contract of sale agree. For instance, if they agree on free on board (FOB) and the loss takes place before the cargo is shipped on board the vessel at the port of loading, the seller is the person who suffers loss and has title to sue. If the loss takes place during the sea voyage after the cargo has been shipped on board, the buyer is the person who suffers loss and has title to sue. Nevertheless, in practice, the court may not strictly follow this approach. There is a case where the FOB seller was held entitled to sue even where the loss occurred after the cargo had been shipped on board the vessel. In that case, the facts show that the seller had sent new cargo in substitution of the damaged cargo to the buyer.

Another point to note is a situation where a cargo insurer indemnifies the cargo owner. In this case, the title to sue will pass on to the subrogated insurer. This is different to the approach in some jurisdictions where the cargo owner still has title to sue and the subrogated insurer merely has controlling power.

Who can be sued?

COGSA provides that a cargo interest is entitled to sue both a contractual and actual carrier for the part of the carriage for which they are responsible, or that they actually handled.[43] Conversely, the MTA differs slightly: the cargo interest is entitled to sue only the multimodal transport operator, namely, the contractual carrier, under the MTA,[44] but the title to sue against the actual carrier will be determined by tort law under the CCC. However, the actual carrier under a multimodal transport arrangement can avail itself with immunities, such as, exclusion of liability, limit of liability and limitation or prescription period as prescribed in the MTA.

An action *in rem* is not recognised under Thai law, and this sometimes results in difficulty in considering who can be sued. There is no doubt that the carrier can be sued, but the problem is who is the carrier. Identification of the carrier is easy in cases of liner trade where a name of the carrier is clearly specified in the bill of lading. However, it often becomes difficult in claims for bulk cargo carried under a charter party, in which the bill of lading is usually signed 'on behalf of the master of vessel X' without stating the name of the carrier. In this circumstance, it is essential to further examine the sub- and head- charter party to identify whether the shipowner or charterer has the power on navigational control of the vessel, which depends on type of charter party involved in each particular shipment.

In addition to the above-mentioned, the CCC provides that an agent (in Thailand) of a carrier (in a foreign country) who enters into a contract of carriage on behalf of the carrier can also be sued as a co-defendant, provided that the contract of carriage does not expressly exclude this agent's liability.[45]

43 Section 43s and 44 of COGSA.

44 Section 20 of the MTA.

45 Section 824 of the CCC.

Exclusions of liability

A long list of exclusions of liability in COGSA and the MTA are similar to the Hague-Visby Rules. The notable difference is that COGSA merely provides an exclusion for errors in navigation resulting from a deficiency in any act performed in the duty or in accordance with the pilot's instructions,[46] while the MTA provides a much broader exclusion in relation to the fault in navigation, that is, a wilful act, negligence or error in navigation or in ship management whether committed by the master, mariner or pilot of the carrier's employee.[47] Therefore, it is significantly easier for the multimodal transport operator to escape from liability when compared to a carrier under COGSA.

Himalaya clause and covenant not to sue

The *Himalaya* clause in a bill of lading that provides employees, crew, stevedores, terminal operators, actual carriers and other independent subcontractors, among others, with exclusions and limits of liability in line with the contractual carrier should be held valid in so far as the standards are not lower than the standards set out in COGSA[48] and the MTA.[49] However, in most circumstances, a covenant not to sue is unlikely to be valid, as it leads to standards lower than those in COGSA and the MTA. This covenant will only be workable where its wording is properly drafted to exclude the liability of an agent (in Thailand) of a carrier (in a foreign country) who enters into a contract of carriage on behalf of the carrier.[50]

Limitation or prescription periods

The limitation or prescription period for claims for loss of, damage to or delay of cargo is one year under COGSA[51] and nine months under the MTA.[52] Agreements on extension of the limitation or prescription period are allowed under both regimes with some conditions.[53]

iv Limitation of liability

Thailand is not the contracting state of the LLMC and does not have domestic legislation on tonnage or global limitation; only package limitations under COGSA, the MTA and other legislation on the carriage of goods are available. Consequently, claimants are likely to benefit from this regime if the claim arising from a huge catastrophe is heard by a Thai court under Thai law. This has been proven where two claimants made different decisions on forum shopping. The first claimant, who decided to apply to the limitation funds and proceedings in a foreign country in which the LLMC applies, was eventually awarded 10 per cent of the claimed amount, while the second claimant who decided to file a lawsuit in a Thai court was awarded nearly 100 per cent of the claimed amount.

46 Section 52 (12) of COGSA.
47 Section 27 (7) (a) of the MTA.
48 Section 17 of COGSA.
49 Section 8 of the MTA.
50 Supreme Court Judgment No. 9629/2558.
51 Section 46 of COGSA.
52 Section 38 of the MTA.
53 Section 47 of COGSA and Section 38 of the MTA.

V REMEDIES

i Ship arrest

Grounds

Grounds for ship arrest are prescribed in the Arrest of Ships Act, BE 2534 (1991) (the ASA). In brief, this covers claims for loss of life, personal injury or property damage due to the operation of a ship, salvage, a contract relating to use or hire of a ship or other similar contracts, including a charter party, a contract of carriage of goods by sea under a bill of lading, general average, damage to cargo, towage and pilotage, supply of any materials to a ship, shipbuilding, repair or shipyard fees, port charges and dues, stevedoring, master's or crew's wages, ship expenses, ownership of the ship, and disputes between co-owners and ship mortgages.[54]

Notably, not every claimant who has a maritime claim is entitled to arrest a ship in Thailand; only the claimant who has his or her domicile in Thailand is entitled to do so.[55]

Procedures

A claimant is required to apply for a ship arrest to the CIPIT Court with prima facie evidence on the grounds for the arrest; a deed of a lawyer appointment signed by an authorised representative of the claimant is required to be submitted together with an application. The Court will then hold an *ex parte* witness examination. If the Court is satisfied with the evidence, it will grant the arrest and a warrant of arrest of a ship will be issued on condition that the claimant has deposited counter security as specified in the court's order. A claimant must then bring the warrant of arrest to the relevant legal execution office and request the executing officer to lead and proceed on to the target ship to serve the warrant of arrest. Where the ship is not at berth, the claimant and executing officer may use any means to get on to the ship. This may be carried out by boat or even helicopter provided that the ship is in territorial waters. This process will take around two to three days after the lawyer has obtained all the required documents from the claimant. The ship may be rearrested by other parties who also have sufficient grounds.

Sister and associated ships

The ASA allows for the arrest of a sister ship with certain conditions and provided that the debtor was the owner, demise charterer or in possession of the sister ship at the time when the cause of action arose and at the time of the application for arrest.[56] Unlike in some jurisdictions, Thailand does not have appropriate measures to deal with single ship companies. The concept of piercing the corporate veil or beneficial ownership (or both) is not currently recognised in Thailand; therefore, arrest of an associated ship would be unlikely to be successful in Thailand.

54 Section 3 of the ASA.

55 Section 4 of the ASA.

56 Sections 4 to 6 of the ASA.

Security and counter security

Generally, the CIPIT Court will require security from the shipowner (for release of the vessel) and counter security from the claimant (for issuing the warrant of arrest) in the form of cash or a cashier cheque. Other forms of security might also be possible subject to judicial discretion.

Wrongful arrest

The test for wrongful arrest is not well established in Thailand. There is no doubt that *mala fides* constitutes a wrongful arrest. However, it is still uncertain as to what degree of negligence will amount to a wrongful arrest. According to some academic articles, wrongful arrest should be decided by relying on ordinary tort law under the CCC, where action ranging from wilfulness down to an ordinary degree of negligence is required.[57]

Bunker arrest

The ASA does not contain any provisions that entitle a claimant to arrest a bunker. Nevertheless, the claimant may request the court to seize a bunker under the CPC, which has different requirements and is more difficult.

Requirements on pursuing substantive claims

An arrested ship or security in lieu may be released if the claimant does not commence legal proceedings for the substantive claim within 30 days from the date on which the warrant of arrest is served on board the ship.[58] However, in circumstances where the claimant does not wish to file a lawsuit for the substantive claim within 30 days, but is still interested in getting some form of security, the claimant may negotiate with the shipowner, out-of-court, requesting a bank guarantee or letter of understanding with some discounts as an incentive. The claimant may then request the court to release the ship after the security is provided directly to it.

ii Court orders for the sale of a vessel

Thailand does not have a specific law on the judicial sale of a vessel. The proceedings will be governed by the CPC in the same manner as a sale in execution for other kinds of property.

VI REGULATION

i Safety

Thailand is a signatory of SOLAS, the COLREGs, the Load Lines Convention and the STCW Convention. These conventions have been implemented in the Navigation in Thai Waters Act, BE 2456 (1913), Prevention of Collision of Ships Act, BE 2522 (1979) and bylaws. The IMDG Code is well recognised by Thai authorities and the court as a manual on identification and the handling dangerous cargo.

57 Tansinee Laoveeratam, *Problems on Responsibility for Custody and Damage of Arrest of Ship*, Thammasat University, 2020.

58 Sections 23 and 27 of the ASA.

The Marine Department is the key authority responsible for maritime safety. The Marine Department has its main mission to support and develop water transportation and maritime activities to meet international standards as well as to implement related laws on navigation in Thai territorial waters.

ii Port state control

Thailand has entered into Memorandum of Understanding on Port State Control in the Asia-Pacific Region (Tokyo MOU), implementation of which is in the Navigation in Thai Waters Act, BE 2456 (1913) and bylaws. These provide the authorities with a wide range of powers, including the power to detain foreign vessels that are below standard. Nevertheless, there is a proposal to amend the laws in this respect for more clarity and efficiency.

The main authority for port state control in Thailand is the Marine Department.

iii Registration and classification

Registration

To be registered as a Thai vessel, the shipowner must be:

a a natural person of Thai nationality;
b an ordinary partnership having all partners who are natural persons of Thai nationality;
c a state enterprise under Thai law; or
d a juristic person under Thai law with specific conditions.

Thai-flagged vessels can enjoy the benefits under the Thai Revenue Code and are eligible to carry goods for Thai Government. Registration is to be applied for, and considered by, the Marine Department under the Thai Vessel Act BE 2481 (1938).

Classification

The classification societies that are recognised by the Marine Department must fulfil the following conditions:

a meet the standards of the Code for Recognized Organization of IMO;
b be a full member of the International Association of Classification Societies (IACS); and
c have its office and has, at least, one exclusive surveyor stationed in Thailand.

A classification society that fulfils the above criteria can submit an application to the Marine Department to be recognised for inspecting vessels and issuing certificates on behalf of the Marine Department.

iv Environmental regulations

Thailand is a signatory of MARPOL and OPRC. These conventions have been implemented in the Navigation in Thai Waters Act, BE 2456 (1913) and bylaws.

Regarding the compensation arising from oil pollution caused by ships, Thailand is a member state of CLC and FUND. The local legislations that implement the aforementioned conventions are the Civil Liability for Oil Pollution Damage Caused by Ships Act BE 2560 (2017) and the Requirement of Contributions to The International Fund for Compensation for Oil Pollution Damage Caused by Ships Act BE 2560 (2017).

The Marine Department, Pollution Control Department and Royal Thai Navy are the key authorities that are responsible for the marine oil pollution.

v Collisions, salvages and wrecks

Collisions

Thailand is a signatory of the COLREGs, which has been implemented in the Prevention of Collision of Ships Act, BE 2522 (1979) and its Ministerial Regulations.

Regarding liability arising from a collision, even though Thailand is not a member state of the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels, 1910, Thai local law, the Civil Liability and Damages Arising from Collision of Vessels Act, BE 2548 (2005) is similar to the Convention for the Unification of Certain Rules of Law but with additional details on calculations of damages. The Civil Liability and Damages Arising from Collision of Vessels Act only applies with collisions where at least one party is a seagoing ship.

Salvages and wreck removals

Thailand is a signatory of the SALVAGE, which has been implemented in the Marine Salvage Act, BE 2550 (2007). There are no domestic standard agreements for salvage operations; therefore, the industry tends to use tailor-made agreements for insignificant operations and the Lloyd's Open Form for significant ones.

The Marine Department is the key authority that has power to monitor and control salvage and wreck removal operations.

vi Passengers' rights

Thailand has not ratified the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974. In addition, Thailand has no specific legislation concerning the carriage of passengers by sea. Passengers' rights are provided under the general law of carriage under Sections 634–639 of the CCC. The main concept is that the carrier of passengers is liable to passengers for personal injuries and for damages resulting from delays suffered by reason of transportation, unless the injury or delay is caused by *force majeure* or by the fault of the passenger.[59]

vii Seafarers' rights

The MLC was ratified in Thailand in June 2017 and is reflected in the Maritime Labour Act BC 2558 (2015), which was enacted to enhance and set minimum standards for Thai maritime labour to be in line with international standards. The Maritime Labour Act requires a shipowner to provide employees with good working conditions and good welfare (e.g., living accommodation, food and limitations of working hours). The shipowner also has duties to provide medical care on board to ensure the health and safety of all employees on the vessel.

59 Section 634 of the CCC.

VII OUTLOOK

There have been attempts to draft a local law for marine insurance over the course of nearly 20 years, without success. However, a bill on marine insurance, which is mainly based on English law, is currently under review by the Council of State. Factoring in delays due to covid-19, it is expected that this bill will be enacted in a couple of years.

The Ministry of Transport plans to launch a national shipping line, the 'National Maritime Navigation Line'. For business flexibility, it will be run as a private company with the government owning 49 per cent through the Port Authority of Thailand. It is believed that a national shipping line would make Thailand more competitive by helping to boost Thai exports and by reducing shipping costs.[60] According to their previous plan, the National Maritime Navigation Line should start operation in 2023. However, owing to the political situation in Thailand, where parliament was dismissed in March 2023 and must wait for a new government, this project has been delayed.

In 2021, the Court of Appeal for Specialised Cases delivered a judgment on a landmark piracy case. This case involved a cargo claim against a shipowner under a time charter party for a tanker vessel of which the cargo, gasoline, was hijacked by pirates in the Singapore Straits while the vessel was en route from Malaysia to Thailand.[61] This piracy case was reported to the IMO[62] and the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP).[63] The plaintiff claimed that the vessel did not apply the necessary preventive measures to prevent piracy even though it was known that there was a high risk of piracy for that route, that is, the vessel was unseaworthy. The defendant argued that the loss was attributable to force majeure and piracy, which both fall under an exclusion of liability. It was found, inter alia, by the court that the vessel failed to appropriately arrange for a lookout, and as a result the shipowner was held liable in full.

60 https://thaiembdc.org/2021/10/18/thailand-to-launch-national-shipping-line-next-year/.

61 Court of Appeal for Specialised Cases, Judgment No. 25/2564.

62 https://wwwcdn.imo.org/localresources/en/OurWork/Security/Documents/219_Annual_2014.pdf.

63 https://www.recaap.org/resources/ck/files/reports/2014/ReCAAP%20ISC%20October%202014%20Report.pdf.

Chapter 40

UNITED ARAB EMIRATES

Yaman Al Hawamdeh and Tariq Idais[1]

I INTRODUCTION

The United Arab Emirates (UAE) is a vibrant region that continues to thrive, despite the global downturn and covid-19 pandemic. The UAE holds approximately 6 per cent of the world's proven oil reserves, of which roughly 98 per cent are located in Abu Dhabi. In addition, the UAE ranks as the seventh-largest holder of natural gas reserves in the world.[2] Moreover, 'the UAE seeks to develop unconventional oil and gas production. In 2020, the UAE announced the discovery of over 80 trillion cubic feet of gas resources at Jebel Ali. The country is seeking to become self-sufficient in gas supply by 2030, but currently imports natural gas from Qatar through the Dolphin pipeline. In 2021, Mubadala Investment Company, Abu Dhabi National Oil Company (ADNOC), and ADQ announced the Hydrogen Alliance to pursue producing blue and green hydrogen for export'.

The economic free zones are also important to the economy as they permit 100 per cent foreign ownership of companies that would otherwise have to have an emirati majority shareholder. There are around 40 free zones in the UAE,[3] of which Jebel Ali Free Zone, with more than 8,000 companies from 140 countries, is the largest by size of company.[4]

Dubai is to the Middle East what Singapore is to Asia – a flourishing maritime hub with global reach. Dubai is purpose-driven and aims to grow and cement its role as one of the major players in the maritime industry by, for example, improving investors' confidence in the market. For this purpose, Dubai set up its first Maritime Advisory Council (of which HFW partner Yaman Al Hawamdeh is a member) a few years ago, which aims to facilitate exchanges between regulators and maritime businesses within the private sector.

UAE courts remain ahead of others in the Middle East in enabling claimants to successfully enforce foreign arbitration awards. In this regard, HFW's Dubai team has been successful in a number of landmark judgments in the past few years and has obtained a particularly significant judgment from the Dubai Court of Cassation, recognising a London arbitration award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), despite the underlying charter party not

1 Yaman Al Hawamdeh is a partner and Tariq Idais is a senior associate at HFW. The information in this chapter was accurate as at May 2022.

2 www.eia.gov/countries/cab.cfm?fips=tc www.trade.gov/country-commercial-guides/united-arab-emirates-oil-and-gas.

3 www.uaefreezones.com.

4 https://How many companies are in Jebel Ali Free Zone? – Runyoncanyon-losangeles.com.

having been signed, which in the past would have resulted in the recognition and enforcement being rejected. With supportive courts and new maritime institutions, Dubai and the UAE are securing their place as a leading global maritime hub.

II COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The UAE is the shipping centre of the Middle East, with 12 commercial trading ports (other than oil ports). The key ports include Jebel Ali in Dubai, Zayed and Khalifa in Abu Dhabi, Khor Fakkan Container Terminal in Sharjah, Mina Saqr in Ras Al Khaimah and Fujairah, the latter being one of the biggest bunkering hubs.

Jebel Ali Port, as well as its free zone area, is the biggest logistics hub within the Middle East. It is ranked in the top 10 of the world's largest sea ports and has the world's largest man-made harbour.

The UAE's ports contribute significantly to the UAE's gross domestic product, with thousands of companies currently working in the maritime sector; these include all leading container shipping lines that have offices in the UAE. Most multinational shipping agents operate out of the UAE in relation to their Middle East business and we have seen an increasing number of ship managers moving to Dubai and Fujairah from Asia and Europe. The marine sector includes offshore operators serving their operating fleets from Abu Dhabi for the entire region. It also includes all marine support functions, such as top offshore consultants, surveyors, marine insurance brokers and leading law firms within the marine industry.

III GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The UAE was founded in 1971 and is a federation formed of seven emirates. The UAE civil law system was influenced by the Egyptian legal system, which was based on French and Roman law.

The oil boom in the 1970s kick-started the development of the UAE's modern legal system, as *Shari'a* law was not designed to regulate international trade. The Commercial Maritime Law (Federal Law No. 26 of 1981 (the Maritime Code)) was enacted in 1981. This was influenced by Kuwait's maritime law, which in turn was influenced by international maritime conventions, and Italian and French maritime laws. The Maritime Code includes sections dealing with various maritime issues, from the registration of vessels and ownership, mortgage and arrest, crews and their contracts, charter parties and contracts of carriage, towage and pilotage, collisions and salvage to general average and marine insurance.

IV FORUM AND JURISDICTION

The UAE has two parallel court systems, comprising a federal judiciary that runs at the UAE federal level. This was adopted by Ajman, Fujairah, Sharjah and Umm Al Quwain, whereas Abu Dhabi, Dubai and Ras Al Khaimah have each retained their own local court system.

i Courts

Federal courts are spread within each emirate (except those that retained their local court system) with a court of first instance and a court of appeal. Appeals from a court of appeal are heard by the High Federal Supreme Court in Abu Dhabi. Appeals from the local courts of appeal in Abu Dhabi, Dubai and Ras Al Khaimah are heard by their own courts of cassation (known as the Supreme Court in Abu Dhabi).

There is an automatic right to appeal before the Courts of Appeal for all cases with a value of above 50,000 dirhams, which can prolong court proceedings as no leave to appeal is required. Moreover, all cases with a value of above 500,000 dirhams can be appealed before the Cassation Courts or the Federal Supreme Court (whichever one is applicable). There is also no duty of disclosure on the parties other than the documents a party seeks to rely on, or in limited certain circumstances as directed by the court. This can reduce the cost and duration of legal proceedings significantly, in particular in comparison to legal proceedings in England.

However, in 2004, Dubai expanded its existing court system, in its drive to attract business and increase investors' confidence in the region, by setting up what so far appears to be a successful 'international' court system in the Dubai International Financial Centre (DIFC).

The DIFC court system mirrors the English court system and procedures. The Cabinet Resolution No. 57 of 2018 concerning Civil Procedures Law (the CR) or the UAE Civil Procedure Rules (or both) do not apply and, as a result, the DIFC provides an independent administration of justice system that has its own laws and regulations; if these do not legislate for a particular issue, the law defaults to English common law. Unlike the local court system, there is no automatic right to appeal and costs are recoverable. This, and a proven track record of DIFC court orders and judgments being enforceable in onshore Dubai and abroad, has made the DIFC courts a very popular option for litigation in Dubai.

There is no equivalent in the UAE to the English Admiralty Court. All maritime disputes are heard by the civil and commercial courts of the relevant emirate.

Similar steps have been taken in Abu Dhabi with the creation of the Abu Dhabi Global Market Courts in 2015, which were broadly modelled on the English judicial system.

ii Jurisdiction

The UAE courts will seise jurisdiction in a number of circumstances, including where:

a one or more of the defendants is domiciled or has its place of business in the UAE;

b the loss or damage was suffered in the UAE; or

c the contract was concluded or performed, or was supposed to be performed, fully or partly in the UAE.[5]

The Civil Procedures Law (CPL) invalidates any agreed clause between the parties that gives jurisdiction to a foreign court in circumstances where the UAE courts would have jurisdiction over the dispute. On this basis, the UAE courts readily accept jurisdiction regardless of

5 Civil Procedure Code (CPC), Article 31, of Federal Law No. 11 of 1992 as amended (the Civil Procedure Law (CPL)).

the existence of a foreign jurisdiction clause. The position is slightly different in relation to arbitration clauses, which the courts do recognise, provided the arbitration clause is in writing, clearly set out and has been signed by both parties.[6]

iii Limitation periods

The following limitation periods apply to maritime claims in the UAE:

a three years for claims in tort;[7]
b one year for charter party and cargo claims and 90 days for third-party recourse actions;[8]
c two years for salvage claims;[9]
d two years for marine insurance claims;[10]
e two years for passenger claims relating to death or personal injury;[11]
f six months for claims for delays;[12]
g one year for claims for the carriage of luggage;[13]
h two years for compensation claims arising out of collisions;[14] and
i one year for rights of recourse of a defendant ship against another ship for settled claims for death or personal injury.[15]

The UAE has not adopted the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (the Hague Rules), the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules) or the UN Convention on the Carriage of Goods by Sea 1978 (the Hamburg Rules), and their limitation periods therefore do not apply. However, terms similar to the Hague-Visby Rules are incorporated into the UAE Maritime Code.

iv Arbitration and ADR

In May 2018, the UAE legislature enacted a federal arbitration law based on the UNCITRAL Model Law.[16]

Some basic requirements relating to arbitration procedures are set out in Articles 22 to 36 of the Arbitration Code.

There are four arbitration centres in the UAE: the Dubai International Arbitration Centre (DIAC), the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC), the International Chamber of Commerce UAE and the Dubai International Financial Centre and London Court of International Arbitration (the DIFC Arbitration Centre). Except for the ADCCAC, these arbitration centres are based offshore in the DIFC.[17]

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6 Law Federal Law No.(6) of 2018 (Arbitration Code), Article 6.
7 Civil Code (Federal Law No. 5 of 1985), Article 298.
8 Federal Law No. 26 of 1981 as amended in 1988 (the Maritime Code), Articles 224 and 287.
9 ibid., Article 337.
10 ibid., Article 399.
11 ibid., Article 299.
12 ibid.
13 ibid., Article 302.
14 ibid., Article 326.
15 ibid., Article 326.
16 Law Federal Law No.(6) of 2018 (Arbitration Code).
17 The Dubai International Arbitration Centre [DIAC] is still located onshore but its seat will be moved to the DIFC once its new arbitration rules come into force in 2018.

v Enforcement of foreign arbitral awards

The UAE is a signatory to the New York Convention. Although there has been some uncertainty in the past with regard to the UAE courts enforcing local requirements for the recognition and enforcement of awards under the New York Convention, the UAE courts of cassation have made it clear that foreign arbitration awards are enforceable. It is also possible, in certain circumstances, to seek recognition of foreign arbitration awards through the DIFC offshore court system, thereby circumventing some of the uncertainties still associated with enforcement in the UAE.

Recognising and enforcing foreign arbitration awards through the civil courts

Articles 85 and 86 of the CR set out the procedure for enforcing foreign arbitration awards in the UAE.

The first step is to apply an order for enforcement of a foreign arbitration award to the Enforcement Judge, who will issue the order within five working days.[18] The enforcement order of the foreign arbitration award can be appealed to the Court of Appeal.

The second step involves an application to the Enforcement Judge, who will notify the debtor of the enforcement order to settle the awarded amount, plus interest and court fees, within 15 days, failing which the court will proceed with the enforcement in the form of attaching and enforcing against the debtors' assets.

Recognising and enforcing foreign arbitration awards through the DIFC

The DIFC Arbitration Law No. 1 of 2008 (the DIFC Arbitration Law) is based on the UNCITRAL Model Law. Articles 42 to 44 cover the process for recognising and enforcing foreign arbitration awards. The process is in line with the New York Convention and provides a straightforward way of recognising foreign arbitration awards.

The grounds for refusing recognition are limited to:

a incapacity of the arbitration agreement;
b the judgment debtor not being properly informed of the appointment of the arbitrator;
c the award addressing points not covered by the submissions;
d the arbitral procedure not being in compliance with the arbitration agreement; or
e the award not yet being binding, as it is subject to appeal.[19]

Defendants wishing to challenge the DIFC court's jurisdiction in favour of the onshore UAE courts will face difficulties, as case law has confirmed the following:

a the question of the DIFC courts' jurisdiction is determined by its own laws and not by the CPL; and
b the DIFC Arbitration Law does not require there to be a connection with the DIFC for the DIFC to have jurisdiction.

However, under certain circumstances, defendants to recognition proceedings might be able to rely on Decree No. 19 of 2016 concerning the establishment of a judicial tribunal for the Dubai and DIFC courts (the Decree). Pursuant to the Decree, a party can refer disputes to a judicial tribunal to ascertain whether the DIFC or the Dubai court has jurisdiction to hear a

18 Cabinet Resolution No. 57 of 2018 concerning the CR, Article 85.
19 DIFC Arbitration Law, Article 44(1)(a).

matter. The orders issued by the tribunal thus far appear to confirm that the DIFC can still be used as a conduit jurisdiction for seeking recognition of foreign arbitration awards and arbitration awards issued in offshore Dubai, but not for onshore Dubai arbitration awards, which have to be enforced via the onshore Dubai courts.

Recognising and enforcing foreign judgments through the UAE courts

The UAE courts will enforce foreign judgments, provided:

a the UAE courts do not have exclusive jurisdiction over the dispute;

b the judgment or order has been issued by a court in accordance with the law of the country in which it has been issued and duly certified;

c the defendants were properly summoned and represented;

d the judgment or order has acquired the legal effect of *res judicata* according to the law of the issuing court, provided that a certificate is furnished, indicating that the judgment has acquired the legal effect of *res judicata*, or where such legal effect is already stated in the judgment itself; and

e the judgment neither conflicts with a judgment or an order previously issued by a court of the state nor involves anything that violates the public order or morality.[20]

This makes enforcement of foreign judgments difficult, as in accordance with Article 31 of the CPL, the UAE courts will have jurisdiction if the defendant is domiciled or has its business in the UAE, or the contract was entered into and performed in the UAE, or the loss or damage occurred in the UAE.

However, the UAE is a party to treaties for the reciprocal enforcement of judgments, such as the 1996 Gulf Cooperation Council Convention for the Execution of Judgments, Delegations and Judicial Notifications (the 1996 GCC Convention) and the 1983 Riyadh Arab Agreement for Judicial Cooperation. The UAE has also entered into treaties with France, India, China and Tunisia for the enforcement of judgments issued in those jurisdictions.

Recognising and enforcing foreign judgments via the DIFC court

A claimant might be able to circumvent the onshore UAE court system by seeking recognition of a foreign judgment through the DIFC courts.

Article 7(6) of the DIFC Judicial Authority Law[21] sets out that judgments and orders rendered by any court other than the UAE courts shall be executed within the DIFC. Therefore, in theory, a claimant should be able to use the DIFC courts as a conduit jurisdiction to enforce foreign judgments. The DIFC court has confirmed this position.[22]

However, in 2016, the Judicial Tribunal (JT) for the Dubai and the DIFC courts was established by Dubai Decree No. 19 of 9 June 2016. The JT's purpose is to determine conflicts of jurisdiction between the Dubai and DIFC courts when there are competing invocations of jurisdictions or competing judgments from both courts.

20 The CR, Article 85 (2).

21 Law No. 12 of 2004 in respect of the Judicial Authority at Dubai International Financial Centre, as amended.

22 *DNB Bank ASA v. Gulf Eyadah Corporation & Gulf Navigation Holding PJSC* (CA/007/2015).

Although there have been decisions in which the JT has held that the DIFC court did not have jurisdiction to hear the recognition of a foreign judgment,[23] these decisions have not changed the statutory basis on which the DIFC court recognises the foreign judgments nor the enforceability of DIFC court orders in the Dubai court.[24]

Although DIFC orders recognising foreign judgments are being enforced in the Dubai courts, we have not yet received first-hand confirmation that the Dubai onshore courts are actively enforcing such an order. Seeking enforcement of a foreign judgment therefore remains difficult, unless it falls under one of the above-mentioned conventions.

V SHIPPING CONTRACTS

i Shipbuilding

Although there are several shipyards in the UAE, the Maritime Code provides little guidance on how shipbuilding contracts are dealt with, except for the following:

a they are void unless in writing;
b ownership does not pass until delivery of the vessel after sea trials; and
c the builder guarantees the vessel is free of latent defects.[25]

Claims for latent defects are time-barred for one year after discovery or two years after delivery of the vessel.[26]

ii Contracts of carriage

As previously stated, the Hague Rules, Hague-Visby Rules and Hamburg Rules have not been ratified by the UAE, but Articles 256 to 302 of the Maritime Code deal with contracts of carriage by sea. These Articles are loosely modelled on the Hague-Visby Rules and achieve a similar result.

Contracts of carriage are defined as those undertaken by the carrier for the carriage of goods from one port to another in consideration of freight, and the carrier is responsible for the goods from the time of taking receipt of the goods until delivery to the consignee.[27]

The carrier's duties under the Maritime Code mirror those of the Hague-Visby Rules. The vessel has to be seaworthy before and at the commencement of the voyage, and the carrier has to take care when loading, stowing, carrying and discharging the cargo.[28]

Similarly, a carrier can limit liability under the Maritime Code for loss of or damage to cargo resulting from unseaworthiness, provided the carrier can prove the vessel was seaworthy prior to and at the commencement of the voyage.[29] Article 276(1) permits a carrier to limit liability to a sum not exceeding 10,000 dirhams for each package or unit, or a sum not exceeding 30 dirhams per kilogram of gross weight of the goods, whichever is the

23 Cassation No. 3 of 2018 – *Farkehad Teimar Bely Akhmedov v. (1) Tatiana Mikhailovna Akhmedova (2) Straight Establishment with Ruling*; Cassation No. 4 of 2017 – *Endofa DMCC v. D'Amico Shipping*.
24 2009 Memorandum of Understanding Between Dubai Courts and DIFC Courts.
25 Maritime Code, Articles 67 to 68(1).
26 ibid., Article 68(2).
27 ibid., Articles 256(2) and 282.
28 ibid., Article 272.
29 ibid., Articles 275 and 272.

higher. These limitations shall not apply if the shipper declared the value of the goods.[30] The Maritime Code does not incorporate a provision akin to Article IV.5(e) of the Hague-Visby Rules, explicitly excluding the carrier's ability to limit liability if loss or damage resulted from an act or omission committed with intent to cause damage, or recklessly with the knowledge that damage would probably result. However, the general principles of the UAE Civil Code and practice exclude the party's ability to limit liability when the loss or damage arises out of gross negligence or fraud.

Liens

To exercise a lien over cargo, a party must obtain a court order and, provided the order is granted, store the cargo in a bonded warehouse. The carrier has a duty to discharge the cargo and cannot exercise the lien on board.

Pursuant to Article 222 of the Maritime Code, an owner has a right to withhold cargo for unpaid freight. However, as the Article refers only to freight, it is unclear whether it includes hire. Furthermore, reference to the 'civil court' in Article 222 causes 'urgent matters' judges to be reluctant to accept jurisdiction, and therefore refer lien applications to the civil courts when a notice of the application must be served on the defendant. As a result, although the right to withhold cargo exists, in practice an application to withhold cargo is likely to fail.

Article 360 of the Maritime Code grants a vessel's master the right to refuse delivery of goods until the receiver has provided security for general average.

iii Cargo claims

Liabilities of carriers and shippers that frequently form the basis of cargo claims are set out in Articles 258 and 272 of the Maritime Code, which are modelled on Articles III.1 and III.3 of the Hague-Visby Rules.

Although the Maritime Code does not deal with the issues regarding which party has title to sue, the UAE courts consider the lawful holder of a bill of lading or the ultimate endorsee to have title to sue.

Similarly, the Maritime Code offers limited guidance in identifying the carrier, except for defining the carrier as the party who uses the vessel on his or her own account in his or her capacity as owner or charterer.[31] The UAE courts will recognise a party as being the carrier if that party has been identified as a carrier on the bill of lading, even if the bill of lading was signed by an agent on behalf of the carrier. Shipping lines are usually recognised as carriers on their traditional form liner bills. Bills of lading using the Congenbill form[32] are usually more challenging and do create uncertainty when issued on behalf of the master. There have been different approaches to these bills before the UAE courts in various emirates. A contract of carriage must be evidenced by a signed, dated bill of lading that identifies the goods, their condition and quantity. The bill of lading is conclusive evidence of the condition of the cargo and proof to the contrary is not permissible if the bill of lading has been transferred to a third party acting in good faith.[33]

30 ibid., Article 276(3).

31 ibid., Article 135.

32 Congenbill is a type of charter party bill of lading widely used in international transportation, issued and approved by The Baltic and International Maritime Council (BIMCO).

33 ibid., Articles 258 and 259(1).

Unlike Article III.5 of the Hague-Visby Rules, under the Maritime Code the shipper does not guarantee the accuracy of the contents of the bill of lading, but merely states that the shipper is responsible to the carrier for any inaccuracies in the information provided.[34] Arguably this shifts the burden of proof from the shipper to the carrier.

Articles 282 to 303 of the Civil Code set out the circumstances in which a party can pursue a claim in tort for loss of or damage to goods. The loss suffered can be direct or indirect, whereby the indirect loss or damage must have arisen out of a wrongful or deliberate act.[35] Compensation will be assessed according to the level of harm suffered and can include loss of profit.[36]

It can be inferred from Article 263(2) of the Maritime Code that charter party terms can be incorporated in a bill of lading by way of express reference. In practice, however, UAE courts may find the holder of the bill of lading had insufficient knowledge of the charter party terms to be bound by them and a party seeking to incorporate a law and jurisdiction clause into the bill of lading by express reference thereto may therefore fail. Similarly, the UAE courts frequently disregard terms on the reverse of the bill of lading for the same reason, that the holder of the bill of lading had insufficient knowledge of the terms.

iv Limitation of liability

Articles 138 to 142 of the Maritime Code entitle an owner, charterer or operator to limit liability with reference to the tonnage of the vessel. These provisions are based on the International Convention Relating to the Limitation of Liability of Owners of Seagoing Ships 1957. In 1997, the UAE ratified the Convention on the Limitation of Liability for Maritime Claims 1976 (the LLMC Convention 1976).[37] Moreover, the UAE ratified the 1996 Protocol on the Limitation of Liability for Maritime Claims (the Protocol). The Protocol entered into force for the United Arab Emirates on 23 May 2021.[38]

Notwithstanding any contractual arrangement, maritime claims that are subject to limitation may differ in the UAE depending on whether limitation of liability is sought under the LLMC Convention and the Protocol or the Maritime Code. Very broadly, however, under either the LLMC Convention or the Maritime Code:

a maritime claims that can be limited usually include claims arising out of:
- loss of life, personal injury and property damage arising out of the operation of a vessel; and
- salvage or wreck removal operations; and

b the persons who may usually limit their liability include vessel owners, charterers, managers and operators, P&I clubs, as well as salvors.

The UAE has ratified the LLMC Convention 1976 without reservations. Therefore, in theory, liability for maritime claims can be limited in the UAE. However, in practice, this may not always be straightforward. For example, there does not appear to be any UAE judgment upholding limits of liability under the LLMC Convention: this may be because few disputes

34 ibid., Articles 259(4) and 266.

35 Civil Transactions Law, Article 283.

36 ibid., Article 292.

37 Federal Decree No. 118 of 1997.

38 Federal Decree No. 167 of 2020. Circular No. (3) of 2021 issued by the Ministry of Energy and Infrastructure dated 25 February 2021.

in this respect are litigated, as opposed to the fact that local courts are reluctant to uphold the terms of the Convention. For instance, the Dubai Court of Cassation overruled a Court of Appeal judgment that ignored the limits under the LLMC Convention.[39] This seems indicative of a willingness at the highest levels of the judiciary to implement the LLMC Convention. The case was then returned to the Court of Appeal for retrial. However, the dispute settled before the Court of Appeal could potentially confirm the right to limit under the LLMC Convention. Accordingly, although the right to limit under the Convention is likely to be upheld, there remains some uncertainty in this respect.

> *There is also uncertainty about whether limitation funds can be created. These are defined by Article 11(1) of the LLMC Convention: Any person alleged to be liable may constitute a fund with the Court or other competent authority in any State Party in which legal proceedings are instituted in respect of claims subject to limitation. The fund shall be [in the limitation amount], together with interest thereon from the date of the occurrence giving rise to the liability until the date of the constitution of the fund. Any fund thus constituted shall be available only for the payment of claims in respect of which limitation of liability can be invoked.*

In theory, a legal person seeking to limit its liability under the LLMC Convention and the Protocol can apply to court to create a fund against which all valid claims would be settled, up to the applicable limitation amount.

However, Article 14 of the LLMC Convention adds that 'the rules relating to the constitution and distribution of a limitation fund, and all rules of procedure in connexion therewith, shall be governed by the law of the State Party in which the fund is constituted'.

The issue is that the UAE has not yet enacted legislation to regulate the creation or distribution of limitation funds. This could explain why local courts have usually rejected applications for the creation of limitation funds.

On 15 January 2018, however, in a collision case in which HFW was acting as a co-counsel for one of the parties, the Dubai World Tribunal issued a judgment accepting the creation of a limitation fund. It also decided that the limitation fund could take the form of a P&I club letter of undertaking (LOU) placed with the Dubai World Tribunal. Although this judgment was a first in the UAE, whether it will have any wide-reaching influence is questionable. Some of the reasons for this are as follows:

a the Dubai World Tribunal is a specialist court, which has jurisdiction only over claims by or against Dubai World entities;

b it is not clear whether other UAE courts will adopt the Dubai World Tribunal's approach. There is currently no indication that they would and they are not bound by decisions of the Dubai World Tribunal. If they did, they would be unlikely to accept P&I club LOUs for the constitution of a limitation fund, as a matter of UAE court practice. A limitation fund would be likely to take the form of cash security or bank guarantee; and

c even if a limitation fund was created in a specific UAE court (in this case the Dubai World Tribunal), it is unclear whether and how this would be recognised and upheld by other courts in the UAE. In other words, when a limitation fund is created in one

39 Dubai Court of Cassation Judgment No. 24 of 2008 dated 13 May 2008.

court, there currently appears to be no legal basis on which all claims must be brought against it. In theory, a claimant could still bring its claim in the courts of any other relevant emirate as if there were no limitation fund.

Before the UAE adopted the LLMC Convention 1976, the approach of the Federal Supreme Court was that the local limitation regime under the Maritime Code was not mandatory, unless incorporated into a contract between the parties.

VI REMEDIES

i Ship arrest

Obtaining an order for the arrest of a ship in UAE waters is effective. It is even possible to arrest ships for a charterer's maritime debt. It is at the discretion of the courts whether counter security is required. In this regard, the courts of Abu Dhabi and Dubai usually do not request counter security, whereas those of other emirates may request counter security, usually between 50,000 and 500,000 dirhams. Although P&I club LOUs are widely accepted in most jurisdictions, UAE courts will accept a local bank guarantee or a cash payment into court only as an alternative security to release a vessel.

The UAE did not ratify the International Convention Relating to the Arrest of Ships 1952 but the corresponding sections of the Maritime Code[40] are based on its provisions.

It is not possible to obtain an arrest order for security only, as the arresting party has to file substantive proceedings with the relevant court or tribunal to maintain the arrest order.

Article 115 of the Maritime Code confers the right to arrest a vessel calling at any UAE port to secure a 'maritime debt', which has broadly been defined as any amounts due for supplies made to the vessel and contracts relating to the use of the vessel.[41]

Alternatively, under Article 84 of the Maritime Code, a vessel can be arrested for 'priority debts', which include port charges, dues, taxes and pilotage fees, damage to the port, wreck removal, salvage and collision claims, contracts of employment of the master and crew, contracts made by the master for the maintenance and continuance of the vessel, breakdown or damage giving rise to a compensatory claim in favour of the charterer and claims for insurance premiums. Priority debts attach to the vessel and the vessel can be arrested even if it has been sold to a third party.

Procedure for ship arrests

To obtain an order for the arrest of a vessel an *ex parte* application is made to the Urgent Matters Judge and, provided the arrest order has been granted, a substantive claim has to be filed with the relevant court within 8 days following the date of issuance of the arrest order, otherwise the arrest will be null and void.[42] An application can be made to the relevant UAE court for a stay of the substantive proceedings pending the outcome of existing arbitration proceedings, or to give effect to the contractual law and jurisdiction clause.

40 Maritime Code, Articles 115 to 134.

41 ibid., Article 115(2), Paragraphs (a) to (o).

42 The CR, Article 114/2.

Sister ship and associated arrests

A sister ship can be arrested, provided the vessel was owned by the debtor at the time the debt arose.[43] Strong evidence, such as evidence of fraud, is required to persuade UAE courts to lift the corporate veil to effect an associated ship arrest, as the UAE courts 'respect the concept of legal independence of single ship-owning companies'.[44]

Wrongful arrest claims

The Maritime Code does not define or contain any provisions in relation to wrongful arrest. However, there is an argument that an arrest is wrongful if the arrest order was malicious based on forged documents and obtained in bad faith or with the intention to cause harm. The burden of proof is on the party claiming wrongful arrest. In practice, however, to the best of our knowledge, no party has yet been able to succeed with a claim for wrongful arrest.

Arrest by helicopter

The arrest by helicopter of a vessel at anchor in territorial waters, but not yet at berth, is not applicable in the UAE. Vessels are usually arrested by the coastguard and the relevant port authority, even if the vessel is at anchor.

Bunker arrest claims

The Maritime Code does not include express provisions granting contractual or physical bunker suppliers the right to arrest for unpaid bunkers. Nevertheless, the courts consider contracts relating to the use of a vessel to include contracts for the supply of bunkers. Contractual bunker suppliers can arrest a vessel for unpaid bunkers. However, physical suppliers would not be able to arrest a vessel because they do not have any contractual relationship with the owner, charterer, operator or manager of the vessel in relation to the bunker supply contract.

ii Court orders for the sale of a vessel

Under UAE law, the enforcement process following the arrest of a vessel is only possible through a court order.

Once the court has ordered a judicial sale, it will fix an opening bid price and publicise the time and place of the sale in the local newspapers. The judicial sale cannot take place earlier than 15 days after the publication of the sale but no later than 90 days after issuance of the court order, otherwise the debtor can apply for the arrest to be declared null and void.[45] The judicial sale is conducted in three separate auctions at seven-day intervals and the highest bid at each session forms the base price for the next.[46] The successful bidder must pay the funds into court within 24 hours, failing which the vessel will be resold. Appeals against an order for sale must be filed within 15 days of the date of the order and can be made only on the ground of a defect in form.[47]

43 Maritime Code, Article 116.

44 *The Maritime Laws of the Arabian Gulf Cooperation Council States*, Volume I by Richard Price (1986, Graham & Trotman), p. 197.

45 Maritime Code, Article 126.

46 ibid., Article 127.

47 ibid., Article 130.

VII REGULATION

i Safety

The UAE has ratified most of the international conventions relating to ship safety,[48] including:

a the International Convention for the Safety of Life at Sea 1974 (SOLAS), as amended;
b the Protocol of 1978 relating to SOLAS;
c the International Convention on Maritime Search and Rescue 1979 (the Search and Rescue Convention 1979);
d the International Convention for Safe Containers 1972 (the CSC Convention), as amended; and
e the International Convention on the Tonnage Measurement of Ships 1969 (the Tonnage Convention), as amended.

Conventions that have not been ratified by the UAE are often dealt with in similar terms by local laws. Broadly, these deal with the following:

a ship safety documentation: ships are required to carry on board a basic set of safety certificates in compliance with international conventions in force in the UAE;
b ship inspection procedures: the National Transport Authority (NTA) controls and inspects ships within UAE territorial waters; and
c administrative decisions and penalties for any breach of the applicable laws and conventions.[49]

In addition, as of 1 September 2014, the UAE adheres to the GCC Code implementing safety regulations for ships that are not covered by the international conventions.[50]

ii Port state control

Port state control is governed by Commercial Maritime Law No. 26 of 1981 and the provisions of the Riyadh Memorandum of Understanding on Port State Control in the Gulf Region (the Riyadh MOU).

The Riyadh MOU was signed in June 2004 by Bahrain, Kuwait, Oman, Qatar, the Kingdom of Saudi Arabia and the UAE. It commits the maritime authorities of the six Gulf States to a unified system of port state control measures. The relevant port state control authority is the NTA.[51]

Further to the Riyadh MOU, the NTA has the power to:

a inspect ships to check the validity of certificates, and more generally to satisfy itself that the crew and the ship are up to the required standard;[52] and
b detain vessels that it considers hazardous to safety, health or the environment until the hazard is remedied.[53]

48 International Maritime Organization (IMO), www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx.

49 Richard Price and Andreas Haberbeck, *The Maritime Laws of the Arabian Gulf Cooperation Council States*, Volume I.

50 See www.tasneef.org.

51 IMO, www.imo.org/blast/blastDataHelper.asp?data_id=28163&filename=6-Annex1-FlagStates-31Mar10.pdf.

52 Riyadh Memorandum of Understanding on Port State Control in the Gulf Region, Article 3.1.

53 ibid., Article 3.14.

The NTA must inspect approximately 10 per cent of the estimated number of foreign merchant ships entering UAE waters each year[54] and must provide appropriate safety training programmes.[55]

iii Registration and classification

The registration of vessels in the UAE is governed by the Maritime Code and the competent authority is the Marine Affairs Department at the Ministry of Communication.

A 'vessel' is defined as any structure normally operating at sea, without regard to its power and tonnage; hovercraft and drilling rigs can therefore be registered. However, pursuant to Article 18(1) of the Maritime Code, fishing and pleasure boats, lighters, barges and those vessels not exceeding 10 tonnes are exempted from registration.[56] Oil and gas tankers that are more than 10 years old require permission from the Council of Ministers to be registered.[57]

Only UAE nationals are able to register a vessel in the UAE; in the case of companies, the majority shareholder must be a UAE national.[58] Vessels still under construction may not be registered for the purpose of registering a mortgage.

The first UAE classification society, Tasneef, was established in 2012. It is the only classification society in the Arab region.

Although, in theory, a shipowner might be able to sue a classification society if its negligence causes damage, it is difficult to predict how the UAE courts would assess such a case.

iv Environmental regulation

Law No. 24 of 1999 for the Protection and Development of Environment (the Environment Law) outlines the regulations relating to environmental protection and development in the UAE. The objective of the law includes controlling all forms of pollution and ensuring compliance with international and regional conventions ratified by the UAE regarding environmental protection.

Articles 21 to 34 of the Environmental Law deal with pollution from marine transportation. The master or officer in charge must take sufficient measures for protection from the effects of pollution from oil. In addition, the responsibility of notifying the authorities and carrying out immediate measures to control any oil spill lie with the master or officer in charge. Vessels transporting oil are further required to be equipped with the necessary equipment to undertake operations to combat the effects of any incident of pollution.[59]

The matter of air pollution is addressed in a number of articles of the Environmental Law, including Article 48, which stipulates that establishments producing air pollutants must not exceed the acceptable permissible limits specified in the Executive Order.

54 ibid., Article 1.3.

55 ibid., Article 6.

56 Maritime Code, Article 18.

57 ibid., Article 19.

58 ibid.,Article 14.

59 Environment Law, Articles 22 to 24.

On 1 January 2020, the UAE Federal Transport Authority declared that all UAE-flagged and foreign-flagged vessels entering UAE waters are to use fuel oil with content not exceeding 0.50 per cent m/m. However, exemptions apply to vessels using alternative measures such as the exhaust gas cleaning system or other fuels that comply with the required emission level.[60]

The United Arab Emirates ratified the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage, which came into force in the UAE (the Bunker Convention). Under this Convention, all UAE-flagged ships, including oil tankers over 1,000 gross tonnage, are required to obtain a Bunker Convention Certificate from the Federal Maritime Authority of United Arab Emirates (the FMA). The FMA will issue the Bunker convention certificate upon presenting a valid blue card issued by a member of the International Group of Protection and Indemnity Clubs (the IG). Moreover, all foreign-flagged ships on UAE waters and calling at UAE ports will be required to present a valid Bunker Convention certificate issued by its flag or a flag of a country that has been ratified by the Bunker Convention, from the date on which the Bunker Convention was enforced in the UAE.[61]

v Collisions, salvage and wrecks

Collisions

The UAE has not ratified the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910 (the Collision Convention 1910); however, Articles 1 to 6 and 8 of the Convention are contained in Articles 318 to 326 of the Maritime Code. The Convention on the International Regulations for Preventing Collisions at Sea 1972, as amended (COLREGs), has been ratified by the UAE. The collision provisions of the Maritime Code apply to all collisions that occur between seagoing vessels, to compensate for damage occasioned by a vessel to another vessel, object or person on board if the damage arises out of the manoeuvring, or the negligence or failure to observe national legislation or international agreements.[62]

Questions of liability, as set out in Articles 3 to 5 of the Collision Convention 1910, are essentially provided for in Articles 320 to 322 of the Maritime Code.

Although the UAE did not ratify the International Convention for the Unification of Certain Rules relating to Civil Jurisdiction in Matters of Collision 1952 (the Collision Convention 1952), provisions regarding jurisdiction are set out in Article 325 of the Maritime Code.

Salvage

The Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea 1910 (the 1910 Salvage Convention) has not been ratified by the UAE but, similar to other conventions, the main sections of it are contained in the Maritime Code. The UAE is a party to the International Convention on Salvage 1989 (the 1989 Salvage Convention). Pursuant to Article 12 thereof, 'salvage operations which have had a useful result give right to a reward'.

60 UAE Federal Transport Authority Circular No. 11, 2019.

61 Circular No. (04) of 2021 issued by the Ministry of Energy and Infrastructure on 8 April 2021.

62 Maritime Code, Article 318.

The Maritime Code also recognises the salvor's right to a reward. Articles 328 to 335 reflect the wording of Articles 2 to 8 of the 1910 Salvage Convention, which outline that acts of salvage must have achieved a useful result giving rise to a claim for fair salvage, the amount of which is to be agreed by the parties. Failing this, the relevant civil code will determine the salvage award to be paid. Factors that the court should take into account under the Maritime Code when determining the salvage award reflect those of Article 8 of the 1910 Salvage Convention.[63] The duty of a master to assist any vessel or person in danger at sea, and punishments for failure thereof, is set out in Articles 336 and 337.

The Maritime Code does not prescribe a mandatory form of salvage agreement and, in principle, freely negotiated salvage agreements will be upheld by the local courts. However, when the salvage operation takes place in UAE waters and the salvaged and salving vessels are UAE-flagged, any agreement purporting to confer jurisdiction on a non-UAE court or arbitration tribunal is null and void and the local courts will assume jurisdiction.[64] Furthermore, when the party against whom the salvor may wish to enforce an arbitration award has assets located in the UAE, a UAE law and jurisdiction clause may be more appropriate than, for example, an English law and arbitration clause incorporated in the Lloyd's Open Form. Last, Article 334 reflects the wording of Article 7 of the 1910 Salvage Convention, permitting the courts to annul or vary the terms of the salvage agreement.

Wreck removal

The UAE has not ratified the Nairobi International Convention on the Removal Wrecks (the Nairobi WRC 2007), which came into force on 15 April 2015, nor are its provisions incorporated in the Maritime Code. The only two references in maritime law to wreck removal are as follows:

a the costs of removing obstacles to navigation caused by a vessel rank as priority debts;[65] and

b the relevant maritime authority has the right to seize a wreck as security for removal costs and may carry out an administrative sale of the wreck to recover its debts.[66]

No federal body exists to deal with wreck removal in the individual emirates.

However, on 1 July 2021, Cabinet Decision No. 71/2021 Concerning Marine Wrecks and Violating Ships was issued (the Resolution) and came into force on 16 September 2021. The provisions of the Resolution apply to all national and foreign ships located in the waters and ports of the UAE and, as long as the ships are deemed as wrecks, violating ships (i.e., ships violating UAE legislation) and arrested ships. Among many other issues, the Resolution has introduced Article (4), which requires the owners of UAE- and foreign-flagged ships that weigh over a gross tonnage of 300 or more, calling at a UAE port or anchoring in the UAE's territorial waters, to obtain insurance or provide a financial guarantee issued by a bank or financial institution to cover responsibility for the removal of wrecks in accordance with the rules and conditions determined by the of UAE Ministry of Energy and Infrastructure.

63 1910 Salvage Convention, Article 335.

64 Maritime Code, Article 339.

65 ibid., Article 85(a).

66 ibid., Article 95.

Moreover, a wreck is not to be recovered without prior approval from the UAE Ministry of Energy and Infrastructure, and if the wreck is within the port limits, the approval of the concerned port authority is to be obtained in coordination with this Ministry.

Ship recycling

The UAE has not signed up to the Hong Kong Convention for the Safe and Environmentally Sound Recycling of Ships 2009 (the Hong Kong Convention). No similar provisions exist in other UAE codes.

vi Passengers' rights

The UAE is not a party to the Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974 (the Athens Convention), but Articles 288 to 302 of the Maritime Code cover contracts of carriage of passengers.[67] In addition, Article 162 stipulates that the master is required to take necessary steps to protect the interests of passengers and, if the need arises, perform any urgent act required for the safety of lives. The carrier will be held liable for death or personal injury arising out of any fault of the carrier or failure to make the ship seaworthy. The level of compensation is determined by the amount of 'blood money' defined by *Shari'a* rules in the criminal code and any attempts by the carrier to limit its liability below such sums are void.[68] Under Article 84(d), compensation due for bodily injuries to passengers and crew is considered a priority debt.

vii Seafarers' rights

The UAE has not ratified the Maritime Labour Convention 2006; instead UAE seafarers' rights are set out in Articles 169 to 198 of the Maritime Code. The Code mainly deals with seafarers' remuneration, working hours and treatment in the event of illness and death. UAE laws governing labour relations, workers and social security also apply to maritime labour contracts.[69]

67 ibid., Articles 288 to 302.

68 ibid., Articles 290, 295, 296 and 297.

69 ibid., Article 169(2).

Chapter 41

UNITED STATES

Thomas Nork, James Brown, Chris Hart and Alejandro Mendez[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The United States has a diverse maritime landscape comprising the Arctic, Pacific and Atlantic Oceans; the Gulf of Mexico; the Great Lakes; and thousands of canals, rivers and bays that make up its inland waterways. These extensive bodies of water have made the US water transportation industry a major player in international commerce.

The United States is one of the world's largest trading countries, making up one-quarter of the world's imports and exports, which includes more than 2.2 billion metric tonnes of cargo. In 2020, the value of total US trade with foreign countries was US$7.7 trillion. Despite this volume of international trade, the US-flagged merchant fleet (ocean-going vessels of more than 1,000 gross tonnage) comprises only 181 vessels, 100 of which are Jones Act eligible vessels that benefit from laws protecting US citizens' participation in domestic trade.

The expansion of liquefied natural gas (LNG) exports is expected to further increase the activity of US ports. Exports of LNG are forecasted to average 11.35 billion cubic feet per day in 2022 and 12.13 billion cubic feet per day in 2023.

The US shipbuilding industry has remained consistent during the past 30 years. US shipyards have built on average more than 1,600 vessels a year since 1987, ranging from military vessels to small barges. The Biden Administration has announced an ambitious clean energy plan with many states adopting green energy plans. It is forecast that the evolution of the US offshore wind energy industry will increase the demand for Jones Act eligible vessels, which may boost the shipbuilding industry. For example, in 2021, the first Jones Act compliant wind turbine installation vessel was being built at a Texas shipyard.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Admiralty and maritime law is one of the oldest sources of US common law. The Constitution extends admiralty jurisdiction to federal courts and provides that Congress may pass legislation in this field. There are four main sources of admiralty law: general maritime law, federal statutes, international agreements and state law when not pre-empted.

The primary source of admiralty law is judge-made general maritime law. This is a body of principles, rules, customs and concepts that have been developed over time by the federal courts. In addition to the federal judiciary, Congress can exercise its constitutional powers

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to enact legislation governing maritime issues such as death on the high seas, seafarers' rights and workers' compensation. These enactments often pre-empt the general maritime law and courts will conform to the will of Congress in these areas.

The United States is a party to a number of significant international conventions, such as:

a the International Regulations for Preventing Collisions at Sea 1972 (COLREGs);
b the International Convention for the Safety of Life at Sea 1974 (SOLAS);
c the International Convention for the Prevention of Pollution from Ships 1973 (MARPOL);
d the International Convention on Load Lines 1966 (the Load Lines Convention); and
e the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1995 (the STCW Convention).

There is a large body of federal law that governs maritime activities. Statutes such as the Carriage of Goods by Sea Act (COGSA), the Jones Act, the Shipowner's Limitation of Liability Act, the Oil Pollution Act and the Clean Water Act cut across a wide area of maritime activity. Federal regulators such as the US Coast Guard (USCG), Customs and Border Protection, and the Federal Maritime Commission have a significant role in regulating maritime commerce.

Federal maritime law strives for uniformity given its unique environment. However, when there is not a federal rule that pre-empts an area, state law is often applied by maritime courts. For example, marine insurance is governed by state law. In some instances, activities that appear to be maritime in nature, such as shipbuilding, are in fact governed by state law.

The common law and statutory framework that affects maritime commerce is a composite mixture of international conventions, federal statutes, case law and, to a lesser extent, state law. The bulk of the body of law, however, that affects maritime activities remains federal statutory and the general maritime law.

III FORUM AND JURISDICTION

i Courts

The United States is a federal system with federal and state judicial jurisdictions. Federal district courts have original jurisdiction over admiralty and maritime claims. Under the Constitution's 'savings to suitors' clause, a claimant may bring a common law claim in a state court. Federal admiralty courts have exclusive admiralty jurisdictions over *in rem* claims and several statutes, such as the Limitation of Shipowner's Liability Act and the Ship Mortgage Act, provide for exclusive jurisdiction in federal courts.

An original proceeding in the federal judicial system starts in the district court. Decisions from federal district courts may be appealed to one of the 11 federal courts of appeals, which are organised geographically. In view of their location, the Ninth Circuit Court of Appeals (West Coast), Fifth Circuit (Gulf of Mexico region) and Second Circuit (New York area) have well-developed bodies of maritime case law. The United States Supreme Court is the nation's highest court and its decisions are binding on all federal and state courts. Rarely employed by US courts, the doctrine of *forum non conveniens* can be applied to transfer a case, improperly filed in a federal district court, to another country's courts where it can be more conveniently litigated.

Each state has its own independent judicial system that generally has a three-tiered court system – trial court, intermediate court of appeals and state Supreme Court. Although substantive admiralty law should be applied, the procedural rules applicable to the jurisdiction in which a claim is filed will govern.

Where a claim is filed is often a strategic decision and may depend on whether a claimant is seeking a trial by jury. If a claim is brought in admiralty in federal court, the trial will be before a judge who will serve as the fact finder. Note that some statutes, such as the Jones Act, confer a right to a jury trial. In the federal system, a claimant could forgo its right to proceed in admiralty and instead file an action based on diversity of citizenship to obtain a jury trial.

Whether filed in state or federal court, cases generally follow a similar pattern. A complaint is filed and thereafter responsive pleadings are filed. If a case cannot be summarily dismissed or jurisdictional objections are not successful, discovery ensues. Under US practice, discovery is very broad and will typically involve written interrogatories, document production, depositions and the retention of expert witnesses. Discovery often involves obtaining evidence and deposition testimony from third parties. The costs associated with discovery can often be significant. Mandatory pretrial mediation is increasingly becoming part of most courts' scheduling orders. Mediation is often conducted by a private independent mediator retained by the parties.

If a pretrial resolution is not achieved, cases are tried and typically appealed. If an appeal is taken, a panel of three judges will typically render a ruling. It is not unusual for it to take anywhere between 18 months and three years, if not longer, to resolve a case through an appeal. Under the American Rule, attorneys' fees are not generally recoverable unless provided for by statute or in the parties' agreement.

Although certain statutes have express statute of limitations (e.g., the COGSA has a one-year statute of limitations), there is no uniform statute of limitations applied to admiralty claims. Rather, the admiralty law applies the doctrine of laches, which is an equitable concept. The laches doctrine will look to analogous state law statute of limitations for guidance. The concept behind the laches doctrine is that the defendant should not be prejudiced by a claimant's failure to assert a timely claim.

ii Arbitration and ADR

Contractual arbitration provisions are commonly found in maritime contracts. Since the United States Supreme Court's 1972 decision in *Bremen v. Zapata Offshore Co* and its 2013 decision in *Atlantic Marine Construction Co v. United States District Court for the Western District of Texas*, forum selection clauses, including arbitration clauses, and choice of law clauses are presumptively valid.

The United States has a well-developed body of law relating to arbitration. In addition to the Federal Arbitration Act (FAA), the United States is a party to the Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention) and the Inter-American Convention of International Commercial Arbitration (the Panama Convention).

Whether crew claims for personal injuries are subject to an arbitration agreement is an often hotly contested issue. A US crew member will contend that he or she is exempt from arbitrating a claim under the Jones Act and general maritime law as seafarers' contracts are

exempt from arbitration under the FAA. In *Dahir v. Royal Caribbean Cruises Ltd*,[2] a federal court found that the claim of a US seafarer working in international waters for a foreign employer was subject to arbitration as the FAA did not apply. Foreign seafarers' claims are generally subject to the New York Convention and will be subject to arbitration.

For commercial arbitration, the American Arbitration Association, the Society of Maritime Arbitrators and the Houston Maritime Arbitration Association administer arbitrations and provide a body of arbitrators who are well versed in maritime matters. Parties may also agree to an ad hoc arbitration to suit their needs. For smaller claims, most arbitration bodies' rules provide for a shortened procedure, which involves a sole arbitrator. For more significant matters, a three-person tribunal is the norm. Discovery in arbitration often mirrors the costs incurred in court proceedings. Unlike the United Kingdom, the FAA[3] provides a very limited right to appeal the decision of an arbitration panel. A challenge to a panel's award is often centred on fraud, allegations of misconduct or an assertion that the panel made a manifest error of law.

Provisional remedies are often used to obtain security in aid of a maritime arbitration. The FAA specifically permits an action for security utilising an *in rem* arrest proceeding or a process of marine attachment. Although the merits of a claim may be resolved by the parties via arbitration, a pre-arbitration security proceeding filed in federal court is quite common.

iii Enforcement of foreign judgments and arbitral awards

Under the New York Convention, which is encompassed in the text of the FAA, a valid final foreign arbitration award may be enforced via an original proceeding in a federal district court. Under the Convention, defences by a party resisting enforcement are primarily limited to due process or fraud. If a New York Convention recognition action is successful, the foreign arbitration award will be converted into a judgment, which can be enforced.

Although there is not an international agreement concerning judgment enforcement to which the United States is a party, a similar procedure is used by US courts to enforce a valid foreign judgment. Both federal and state laws contain procedures to recognise a foreign judgment and convert it into a domestic US judgment. Most states have adopted some variant of the Uniform Foreign Judgments Recognition Act, which provides the framework for state courts to recognise a valid final foreign judgment. Similar to New York Convention recognition proceedings, there are limited defences predicated upon fairness and due process to a judgment and enforcement action.

IV SHIPPING CONTRACTS

i Shipbuilding

The US shipbuilding and repairing industry comprises establishments that are primarily engaged in operating shipyards, which are fixed facilities with dry docks and fabrication equipment. Shipyard activities include ship construction, repair, conversion and alteration, as well as the production of prefabricated ship and barge sections and other specialised services.

2 *Dahir v. Royal Caribbean Cruises Ltd*, 275 F. Supp. 3d 826 (S.D. Tex. 2017).

3 9 USC Section 10.

The industry also includes manufacturing and other facilities outside the shipyard, which provide parts or services for shipbuilding activities within a shipyard, including routine maintenance and repair services from floating dry docks not connected with a shipyard.

In 2018, there were 124 shipyards in the United States, spread across 26 states that are classified as active shipbuilders. In addition, there are more than 200 shipyards engaged in ship repairs or capable of building ships but not actively engaged in shipbuilding. The majority of shipyards are located in the coastal states, but there also are active shipyards on major inland waterways, such as the Great Lakes, the Mississippi River and the Ohio River. Employment in shipbuilding and repairing is concentrated in a relatively small number of coastal states, of which the top five account for 63 per cent of all private employment in the shipbuilding and repairing industry. The federal government, including the US Navy, US Army and USCG, is an important source of demand for US shipbuilders. Although just 8 per cent of the ocean-going vessels delivered in 2020 (18 of 205) were delivered to US government agencies, 15 of the 17 large deep-draft vessels delivered went to the US government: eight to the US Navy and seven to the USCG.

There are no statutory formalities or requirements (beyond standard contractual requirements) with which parties must comply when entering into shipbuilding contracts for commercial vessels.

What may surprise some observers not familiar with the US legal system is that a contract to build a ship is not considered a 'maritime contract', and therefore it is not within admiralty jurisdiction and not governed by general maritime law. Shipbuilding contracts are subject to state law and commonly contain choice of law and forum clauses. It is common for dispute resolution clauses to contain a referral to the classification society, such as the American Bureau of Shipping (ABS), for a determination of technical disputes. Even foreign choice-of-law clauses will be enforced if there are sufficient contacts present. For instance, in *Hartford Fire Insurance Co v. Orient Overseas Containers Lines (UK) Ltd* (decided on 27 October 2000), it was held that '[a]bsent fraud or violation of public policy, a court is to apply the law selected in the contract as long as the state selected has sufficient contacts with the transaction'.

Performance and quality standards are often subject to classification society rules or International Maritime Organization (IMO) standards. The flag state authority is the USCG, which has delegated a significant portion of its monitoring of newbuilds to the ABS or similar classification societies.

A ship repair contract, in contrast to a newbuild contract, is a maritime contract governed by general maritime law. There is warranty of workmanlike performance that is implied in common law. Depending on the governing law, common clauses such as warranty, indemnity and additional insured provisions could have dramatically different results. Common law remedies for breach of contract and the availability of liquidated or consequential damages may also vary by state.

Commercial shipyard disputes often arise out of claims by subcontractors, which may be subject to the provisions of the Uniform Commercial Code or state lien law. In addition, a security interest can be created in favour of third-party creditors of either the buyer or the builder over both a vessel under construction and related equipment.

Shipyard workers are covered by the Longshore and Harbor Worker's Compensation Act (LHWCA), which provides a federal worker's compensation scheme for injured workers.

Indemnity provisions in shipyard contracts are often affected by the LHWCA, which precludes certain indemnity schemes. Contracts to build or repair vessels in the United States should account for that possibility.

Owners of US-flag vessels who purchase equipment for, and repair, a vessel outside the United States are subject to declaration, entry and payment of *ad valorem* duty, an imposition of 50 per cent duty on all repairs conducted in foreign yards. When the US vessel returns home, it must file a vessel repair declaration with Customs and Border Protection (CBP), even if the vessel underwent no foreign repairs.

If a vessel incurred foreign repair-related expenses, the entry generally must show all foreign voyage expenditures for equipment, parts of equipment, repair parts, materials and labour. US-flagged vessels are exempt for the repairs if they were made in countries with which the United States has a free trade agreement or were done by the regular crew members of the vessel.

Prior to CBP making a determination of duty, an application for relief of duties can be filed with CBP within 90 days of the vessel's arrival in the United States – applications for relief are very detailed and need to include items such as itemised bills, receipts, invoices, photocopies of relevant parts of vessel logs, certification or permits.

In addition to issuing a determination of duty, CBP may issue penalties for failure to report, enter or pay duty and for a false declaration.

Depending on CBP's determination of duty, a protest may be filed under 19 USC 1514(a)(2). A protest is the basic means of challenging a Customs Service decision. The protest must be filed within 180 days of issuance of the duty.

A protest is typically decided at the port level; however, an importer could also request that Customs Headquarters review the protest. A denied protest may be challenged in the United States Court of International Trade (CIT). To begin a case in the CIT, a summons is filed with the Clerk of the Court within 180 days of the date Customs denied the protest or two years from the non-protestable decision being challenged.

Importers are reluctant to bring a claim in the CIT because of the perceived expense of litigation, a general reluctance on the part of some importers to be seen suing the US government and the incorrect notion that Customs will always prevail.

ii Contracts of carriage

The movement of goods over the water is complex and involves various interlinked systems, particularly in multimodal carriage. Often there are overlapping contracts in place between shippers, ocean carriers, freight forwarders and non-vessel owning common carriers (NVOCCs).

Contracts of carriage are generally frequently governed by the COGSA and its precursor, the Harter Act. Enacted in 1936, COGSA is the US enactment of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (the Hague Rules). The United States has not adopted the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules) or the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (the Rotterdam Rules).

Contracts of carriage for common carriage are generally evidenced by bills of lading or contracts of affreightment. Contracts of private carriage are generally reflected in charter parties. Bills of lading can serve as the contract of carriage and as documents of title. The

interpretation of the clauses in a bill of lading is the focal point of many cargo damage suits. Many carriers and NVOCCs will maintain a copy of their tariff with the standard terms of their bills of lading on file with the Federal Maritime Commission.

Charter parties are maritime contracts governed by US general maritime law, although courts typically enforce a clause choosing other law to govern, subject to choice-of-law rules. Disputes under charter parties are usually resolved in arbitration pursuant to an arbitration clause. Courts have fashioned some principles of general maritime law applicable to charter parties. The US Supreme Court has interpreted a safe berth clause in a voyage charter. In *Citgo Asphalt Refining Co v. Frescati Shipping Co* (decided 30 March 2020), the Supreme Court held that an unqualified safe berth clause constitutes a warranty that imposes on the charterer an absolute duty for safety of the berth it selects. Parties remain free to contract around the warranty, such as by a clause expressly limiting the charterer's obligation to an exercise of due diligence to nominate a berth or port that is safe.

A charter party includes an owner's implied warranty of seaworthiness at the commencement of every voyage, unless express contract language limits or extends this warranty. Breach of a charter party can give rise to a maritime lien.

By its terms, the COGSA applies to 'all contracts for carriage of goods by sea to or from ports of the United States in foreign trade'. The 'contract of carriage' covers 'only . . . contracts of carriage covered by a bill of lading or any similar document of title'. Section 1305 of the COGSA specifically excludes charter parties, unless bills of lading are issued under the charter party. The definition of 'goods' excludes live animals and certain deck cargo. Furthermore, the definition of 'carriage of goods' covers only 'the period from the time when the goods are loaded on the ship to the time when they are discharged from the ship'.

The COGSA applies to most international ocean shipments to or from the United States during the tackle-to-tackle period. It may be extended by contract to cover the entire period that the goods are in the carrier's possession. Via a *Himalaya* clause in the contract of carriage, the COGSA defences and limits may be further extended to the agents and contractors of the carrier, such as stevedores, or connecting carriers. The extension of the COGSA by contract is generally motivated by the desire to benefit from the Act's US$500 per package or customary freight unit limitation of liability.

The Harter Act frequently comes into play on inland shipments (i.e., tug and barge movements) for domestic US shipments. The Harter Act generally applies to domestic carriage (in the absence of a contrary agreement), shipments under charter parties, most deck cargo and damages outside the tackle-to-tackle period. The Harter Act does not contain any specific language regulating the extent to which a carrier may limit its liability. Although the Harter Act has no package limitation, common practice made the US$100 agreed valuation clause the effective equivalent and some carriers have used even lower amounts.

Under the Harter Act, a carrier is never exempted from liability for cargo loss unless it exercised due diligence to make the ship seaworthy at the beginning of the voyage. If unseaworthiness and a lack of due diligence are found, the carrier cannot invoke the Harter Act exoneration clause even if there is no causal connection between the unseaworthiness and the loss or damage. The Harter Act makes unlawful any provisions in a bill of lading or shipping document that relieves the manager, agent, master or owner of any vessel transferring property between ports of the United States and foreign ports from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery.

Both shippers and consignees may be bound by the terms of a bill of lading. Accordingly, indemnity claims by a carrier for vessel or property damage arising out of a contract of carriage could involve claims against both the shipper and the consignee. As explained below, the consignee may also be bound by a forum selection or choice of law clause in a bill of lading that it may never have seen.

Since the 1972 United States Supreme Court decision in *Bremen v. Zapata*, contractual choice of law and forum selection clauses in maritime contracts have been held to be presumptively valid. Subsequently, the US Supreme Court in *Vimar Seguros y Reaseguros, SA v. M/V Sky Reefer* declined to nullify foreign arbitration clauses in contracts for carriage of cargo as a lessening of the carrier's liability under the COGSA. Cargo claims often involve litigation over which law to apply, as some parties try to avoid the COGSA US$500 package limitation in favour of a more advantageous limitation scheme.

An interesting phenomenon is the extension of the COGSA, its defences and limits to inland portions of the carriage of goods under a 'through bill of lading'. A through bill of lading is issued for the 'door-to-door' transportation of goods whereas a 'port-to-port' bill of lading covers transportation from loading to unloading. In 2004, in *Norfolk Southern Railway Co v. Kirby*, the US Supreme Court held that a through bill of lading was a maritime contract and therefore the COGSA limits could apply to a rail company that was not a party to the bill of lading. The *Kirby* decision was reinforced by the Supreme Court's decision in 2010 in *Kawasaki Kisen Kaisha Ltd v. Regal-Beloit Corp*, which extended the reach of a forum selection clause to a rail company under a through bill of lading.

Towage contracts are considered maritime contracts within admiralty jurisdiction and are subject to general maritime law. Nonetheless, several principles of towage law have been developed that treat towage contracts differently, so principles applicable to charter parties, contracts of affreightment and bills of lading should not be assumed to also apply to contracts between tugs and tows. For example, in 1955 in *Bisso v. Inland Waterwasy Corp*, the Supreme Court held that a clause in a towing contract that purports to release the tug from liability for negligence is invalid. Subsequent cases have held that crew of the tug cannot be considered employees or servants of the tow, and also that contractual indemnity from the tow in favour of the tug is not enforceable. However, some courts have ruled that indemnity from the tug in favour of the tow can be enforceable.

Contracts of carriage with common carriers, as opposed to private carriers, are generally subject to regulation by the Federal Maritime Commission (FMC). The FMC enforces the Shipping Act of 1984, the Ocean Shipping Reform Act of 1998, the Foreign Shipping Practices Act of 1988 and related statutes. The FMC is responsible for regulating the US international ocean transportation system for the benefit of US exporters, importers and US consumers. The FMC's mission is to ensure a competitive international ocean transportation system and to protect the public from unfair and deceptive trade practices. FMC regulations apply to tariffs, service contracts, NVOCC service arrangements, NVOCC negotiated rate arrangements and various contracts related to common carriage of goods by ocean transportation. During 2021 and 2022, the FMC focused on enhanced scrutiny of common carriers' practices for compliance with regulations, and it has announced a proposed rulemaking that potentially would change regulations pertaining to detention and demurrage billing practices.

iii Cargo claims

Given the sheer volume of goods that move in and out of US ports, cargo damage and loss claims are bound to occur. Small claims typically do not generate lawsuits. Rather, marine surveyors inspect the damage, exchange customary documents, and insurance adjusters negotiate settlements.

For large matters or more difficult claims, suits are often filed in federal district courts under admiralty jurisdiction. A cargo claim also gives rise to an *in rem* claim against the vessel. As such, cargo suits are often started with a vessel arrest or the furnishing of a letter of undertaking or a surety bond by the ocean carrier's insurer. Damage claims filed in state courts arising out of ocean carriage are far less frequent than federal suits.

The COGSA provides carriers with strong statutory defences, such as errors in navigation, perils of the sea or insufficiency of the packaging, and a time bar that requires a lawsuit to be commenced within one year. The COGSA also requires the ocean carrier to exercise due diligence at the beginning of the voyage to make the vessel seaworthy, and the carrier must properly load, stow and care for cargo.

The COGSA sets up a complex system of shifting burdens of proof and accompanying presumptions of liability. The COGSA 'ping pong ball' burden of proof follows a well-established path. The shipper must establish a *prima facie* case that the cargo was loaded in good order and upon discharge it was lost or in damaged condition.

A shipper's *prima facie* case creates a presumption of liability, which may be rebutted by the carrier.

The carrier is required to establish that (1) it exercised due diligence to prevent the cargo loss or damage, or (2) the cargo loss or damage falls within one of the enumerated COGSA defences.

If the carrier successfully rebuts the shipper's *prima facie* case, the burden returns to the shipper to establish that the carrier's negligence was at least a concurrent cause of the loss.

If the shipper establishes that the carrier's negligence is at least a concurrent cause of the loss then the burden shifts once again to the carrier, which must establish what portion of the loss was caused by other factors.

If the carrier is unable to prove the appropriate apportionment of fault, then it becomes fully liable for the full extent of the shipper's loss.

The application of the COGSA package limitation is often hotly contested. Depending on the facts of a case, cargo claimants may assert that there was an improper geographical deviation or improper deck stowage, so as to deprive the carrier of the right to limit. Oddly enough, although the COGSA itself does not do so, a well-defined body of case law outlines what is a COGSA package. For non-containerised cargo, a package may be prepared for shipment by being fully or partially boxed or wrapped, regardless of the size of the cargo. For containerised cargo, the wording on the bill of lading often determines whether the container or its contents are the 'packages'.

The measure of the shipper's recovery when cargo is damaged is normally the difference between the fair market value of the goods at the port of destination in the same condition in which they were in when shipped and their value in damaged condition. Incidental damages, such as survey costs, are recoverable. Damages for delay are more problematic to establish and will often be determined based on whether the contract of carriage is on a 'time is of the essence' basis. Consequential damages are potentially recoverable but are often excluded as a matter of contract.

iv Limitation of liability

Background

In 1851, the United States Congress enacted the US Limitation of Liability Act (the Act). Limitation of liability for shipowners was common in the admiralty law of most nations well before 1851. In 1734, a limitation of liability scheme was enacted under British law. Prior to 1851, US shipowners were uneasy facing potentially unlimited personal liability, which also put them at a competitive disadvantage with respect to shipowners in countries that offered a limitation of liability scheme. The US shipowners pressed Congress to remedy this perceived disparity. As a result, Congress passed the 1851 Act. Whereas many countries have since amended their limitation of liability schemes, the US Limitation Liability Act of 1851 remains essentially unchanged.

Purpose and benefits

In general, limitation liability schemes seek to limit the exposure of the shipowner to its interest in the vessel and any pending freight. This was the heart of the Act and remains so today.[4] When a vessel sinks or suffers extreme damage, there may be little or nothing in the limitation fund to pay personal injury and death claimants. In 1935, Congress amended the Act to ensure that in cases of personal injury or death, the shipowner would have to establish a fund in the amount of US$420 per gross tonne solely to pay personal injury or death claims.

Not all participants with an interest in a voyage are permitted to take advantage of the Act; it is reserved solely for the owner or demise charterer. 'Owner' is defined by the Act to include a demise charterer that 'mans, supplies, and navigates the vessel'. Time and voyage charterers do not fall within this definition.

The limitation fund is to be equal to the value of the vessel at the conclusion of the voyage or casualty, plus any pending freight. The owner stipulates this amount in court. The claimants can demand that security be deposited with the court in the same amount. Claimants to the fund can also challenge the sufficiency of the limitation fund and seek to have it increased. A vessel owner may limit only for tort claims, including property damage, personal injury and death. Under the 'personal contract doctrine', a vessel owner cannot limit liability for contractual agreements entered into prior to the casualty.

Venue, concursus and injunction

The owner files its limitation proceeding in the district court. If the vessel owner has not yet been sued, it must file its action in the judicial district where the vessel lies. If the owner has been sued, it must file its limitation action in the judicial district where the first suit was lodged. If the vessel remains at sea outside any judicial district and the owner has not been sued, the owner can file its limitation action in any judicial district of the United States.

When a vessel owner files its own limitation of liability proceeding, the federal court will then issue an injunction staying any suits that have been filed in any other court. It will also order those suits, as well as all future suits, to be brought solely in the limitation proceeding commenced by the shipowner. It will order all claimants to file their claim in the shipowner's limitation of liability proceeding within four to six weeks. Claimants that fail to file by that date are subject to being defaulted by the court. This is an excellent tool for the shipowner not only to pick its forum but to force the many claimants that arise out of a major

4 46 USC Sections 30505 to 30512.

casualty to file their claims in the shipowner's action. Thus, time and expense are saved by not having to litigate multiple claims in various jurisdictions and venues. Shipowners must be mindful that they have six months from written notice of a claim to file their limitation of liability proceeding.[5] If a shipowner does not file within six months and a suit is filed against it, it still has the right to assert limitation of liability under the Act as an affirmative defence. However, it does not have the right to the injunction and marshalling of claims into its own proceeding.

Claimants' stipulation and the shipowner's privity and knowledge

If all the claimants agree and stipulate that they will not seek to enforce a judgment in excess of the federal court's limitation value set forth in the initial order, the court will allow the case to go back to state court for trial. If a judgment is obtained in excess of the limitation value, the parties then return to federal court to resolve the issues surrounding the limitation value and the right of the owner to limit in the first place. The theory behind the Act and all limitation liability schemes is to limit the owner's liability for the negligence of his or her crew, owing to the fact that the ship is at sea and the owner lacks control over the vessel's operation. If, however, the court finds that the negligent act or omission causing the casualty was within the privity and knowledge of the shoreside management, the vessel owner will be denied its right to limit liability. Although Congress has chosen not to amend or repeal the Act, the federal courts are often keen to find privity and knowledge, especially in cases of severe personal injury or death juxtaposed with a limitation value that is extremely low.

Should the limitation proceeding proceed to trial in the federal court, three results may be obtained:

a the vessel owner is totally exonerated;

b the owner is found liable, but damages are limited to the post-casualty value and pending freight; or

c the owners are found liable, the court finds the cause of the casualty within its privity and knowledge, and the owner must pay the full damages awarded by the court.

The Act has been used in every major maritime disaster from the *Titanic*, to the *Andrea Doria – Stockholm* collision, to the tragic sinking of the *El Faro*. It also continues to be used in cases involving smaller craft from rowing boats to jet skis. Recently, identical proposed bills amending the Act were introduced by a Senator and a Congressman from the state of California. The amendment is called the Small Vessel Passenger Vessel Liability Fairness Act. The proposal is a direct response to the tragic fire and multiple passenger deaths that occurred on the diving vessel *Conception* off the coast of California in 2019. The amendment remains in subcommittee and has not been enacted into law. The proposed amendment would lessen the protection afforded by the Act to owners of similar small passenger vessels (less than 100 gross tonnes, carrying between 49 and 150 passengers, on an overnight voyage). For the foreseeable future, it does not appear that the US Congress will alter or amend the Act. The Limitation of Liability Act is available to shipowners of any nationality. It remains a useful tool not only for limiting liability but also for fixing venue, marshalling claims in one convenient form, and maintaining control of what can be an expensive and complicated litigation.

5 Supplemental Rules For Admiralty or Maritime Claims, Rule F.

V REMEDIES

i Ship arrest

The United States is not a signatory to any arrest convention. Under US law, the two primary tools for arresting or attaching a vessel are found under Rule C and Rule B of the Federal Rules of Civil Procedure Supplemental Rules for Certain Admiralty and Maritime Claims.

Rule C

Under Rule C, a plaintiff can bring an *in rem* action against the vessel or property if a maritime lien exists or if the plaintiff has certain statutory rights against the vessel regardless of whether the defendant can be found in the district. Maritime liens are defined in the Federal Maritime Lien Act and the Ship Mortgage Act. Liens under maritime law include seafarers' wages, tort, salvage and general average. Suppliers of necessaries to a vessel that are authorised by the owner have a maritime lien on the vessel. Necessaries are defined by statute and include repairs, supplies, towage, use of a dry dock, bunkers, food and spare parts. A person providing necessaries must rely on the credit of the vessel.

Rule B

Under Rule B, a plaintiff with a prima facie *in personam* maritime claim may attach the defendant's vessel or property as security for the claim, which gives the plaintiff quasi *in rem* jurisdiction over the defendant, provided the defendant has property in the arrest jurisdiction and is not found in that jurisdiction. Whether or not a claim is 'maritime' is determined under US federal law. The prima facie validity of the claim is determined under the law that applies to the claim. Examples include a judgment or pending arbitration or litigation in another jurisdiction. A maritime lien on the vessel is not required under Rule B.

Property subject to arrest

Under Rule C, property subject to a maritime lien includes vessels, freight, bunkers and vessel equipment. Under Rule B, property subject to attachment includes vessels, tangible property bank accounts and debt owed by others (subject to garnishment). There is no associated or sister ship arrest regime in the United States under Rule C, which provides for *in rem* jurisdiction over only the vessel or other property that is subject to the lien.

Procedure

The two arrest procedures are alike in that the plaintiff must file a verified complaint that describes with reasonable particularity the property sought to be arrested, and states that the property is in the district. The court will then issue an order directing the clerk to issue a warrant for the arrest of the vessel or other property. In a Rule B attachment, the plaintiff includes an affidavit stating that the defendant cannot be found in the district in which the attachment is sought. The plaintiff must also pay a deposit to cover the cost of the arrest. The defendant may post security to release the property from arrest or attachment. The security is often in the form of a letter of undertaking furnished by the vessel owner's protection and indemnity (P&I) club.

Practicalities

The actual arrest of a vessel may not take place outside the territorial jurisdiction of the district. A vessel on the high seas – which is a distance beyond 12 nautical miles from shore – may not normally be arrested by the US Marshal. Under the doctrine of 'free passage', a vessel may transit territorial waters without being subject to arrest. The US Marshal may decide not to arrest a vessel in territorial waters in heavy seas, such as a vessel at anchor offshore during a storm. Usually, the USCG will assist in providing water transportation if necessary; however, the USCG will not use force to stop a vessel.

ii Court orders for sale of a vessel

Generally, the US Marshal handles the sale of seized or attached property; however, the court may order another person to do so. A vessel or property on board a vessel may be sold by a person assigned by the court if the US Marshal is a party in interest. In addition, Title 28 of the US Code, Section 1921 provides for the use of a public auctioneer. There are two types of sales: interlocutory and final.

Prior to the final disposition of a case, the court may authorise the sale of a vessel or other property under arrest or attachment in the following cases:

a the property is perishable, or the vessel or property is subject to decay, deterioration or damage;
b the cost of keeping the vessel or property is disproportionately expensive; or
c because there is an unreasonable delay in securing the release of the vessel or property.

A final judgment sale is based on the final judgment issued at the final disposition of the case.

The court will issue the order authorising the sale of the vessel or other property. Specific provisions must be followed by the US Marshal. Generally, the interested party will contact the US Marshal to determine a convenient date, time and place for the sale and the conditions or requirements that the US Marshal would like to see included in the order. The order for sale may include whether:

a a minimum bid amount has been set;
b there are required minimum increments in the bidding (e.g., US$1,000 or more);
c credit bids are allowed;
d a certain amount of deposit or down payment is required;
e the number of days for the balance to be paid is designated;
f there are any limitations regarding who may bid (e.g., an alien restricted from bidding on the purchase of a US-flagged vessel);
g any special methods of payment are designated (e.g., a cashier's or certified cheque);
h there are any provisions regarding the filing of objections with the court;
i in the absence of objections, the court or local rules provide for automatic confirmation of sale; and
j a successful bidder is required to file an order for the clerk of the court's signature stating that no opposition of the sale has been filed to provide a written record for the court and documentation for submission by the new owner to the USCG or other authority where the new owner may wish to register the vessel.

After the order of sale has been issued by the court, a notice of the sale must be prepared. This notice contains the date, time, location and all conditions connected to the sale as outlined in the order authorising the sale. The US Marshal will publish the notice of sale in accordance with the local rules and procedures.

VI REGULATION

i Safety

The USCG (a branch of the US Department of Homeland Security) is the prime agency charged with the regulation of marine safety. Accordingly, it also has a significant role in port and waterway safety and security.

The USCG's safety role cuts across a wide variety of activities. Although marine search and rescue is probably its best-known role, USCG personnel inspect commercial vessels, respond to pollution, investigate marine casualties and merchant mariners, manage waterways and license merchant mariners. The USCG also issues regulations across a wide range of topics, which include navigation rules, marine safety, crewing, licensing, manning requirements, and design and engineering standards. The USCG is also the agency that enforces international conventions, such as SOLAS, to which the United States is a party. From time to time, the USCG issues Marine Safety Information Bulletins, which in some cases can reflect the prudent standards of care and restrictions while navigating on certain waterways.

On 20 June 2016, the USCG published the Inspection of Towing Vessels, 81 Federal Register 40004. Referred to as 'Subchapter M', it necessitated that a fleet of nearly 6,000 uninspected vessels should be inspected and carry a certificate of inspection (COI). Now codified in the Code of Federal Regulations (CFR) at Part 46, Subchapter M, this USCG final rule established an inspection regime for commercial towing vessels. Owners or operators of towing vessels with keels laid on or after 20 July 2017 were required to have a percentage of their fleet (of two or more vessels) in compliance by 20 July 2018. With a current portfolio of 12,000 inspected vessels, the addition of nearly 6,000 towing vessels increased the USCG inspected fleet by 50 per cent. Subchapter M sets minimum safety standards for towing vessels. The issuance of COIs for existing towing vessels was phased in over four years (from July 2018 to July 2022).

Subchapter M establishes two paths to compliance for towing vessel operators: either annual USCG inspections or the implementation of a USCG-accepted Towing Safety Management System (TSMS). Prior to Subchapter M, the American Waterways Operators established the Responsible Carrier programme by which most operators voluntarily instituted safety management systems similar to that required by Subchapter M. Therefore, attaining compliance with the new regulation will not be too challenging for most major operators. The TSMS is the US towing industry's equivalent of the International Safety Management Code (the ISM Code).

All towing vessels, regardless of size, involved in the movement of barges carrying oil or hazardous material in bulk shall be certificated and manned in accordance with the vessel's COI. To acquire the COI and as the regulation unfolds, operators will complete internal vessel surveys and audits followed by external surveys and audits by a third-party organisation (TPO). The USCG then conducts the inspection and the COI is issued. The external TPO audit must be conducted six months prior to the issuance of the initial COI. Documentation of deficiencies by the USCG will depend on the type of inspection and the presence of the

vessel's TPO. Generally, deficiencies will be documented by the TPO in accordance with the vessel's TSMS. USCG inspectors will typically inspect TSMS vessels once in five years, unless the vessel is involved in a marine casualty.

In areas where the USCG may have overlapping jurisdiction with other federal agencies, it will enter into a memorandum of agreement (MOA). For example, it has several MOAs with the Bureau of Environmental Safety and Environmental Enforcement, which regulates offshore drilling. These MOAs promote collaboration and define each agency's role in regulating offshore drilling platforms, which are also vessels.

USCG regulations are set forth in the CFR at Parts 33 and 46. As is further described in other sections, a recent development is the expansion of USCG regulations under 46 CFR Subchapter M to establish towing vessel safety regulations, inspection standards and safety management systems. These regulations have had a large impact on the US inland marine industry.

A USCG investigator or a Marine Board of Investigation will investigate a marine casualty. A Marine Board of Investigation is the highest level of the investigatory process and will often include live testimony. With greater frequency, the National Transportation Safety Board's (NTSB) Office of Marine Safety has been getting involved in investigations of major marine accidents on or under navigable waters, internal waters or the territorial sea of the United States, and accidents involving US-flagged vessels worldwide. The NTSB is an independent federal agency mandated by Congress to investigate transportation accidents, determine probable causes of the accident, issue safety recommendations, study transportation safety issues and evaluate the safety effectiveness of government agencies involved in transportation. The NTSB makes its findings and recommendations public through accident reports or safety studies, which can be found on its website.

For USCG investigations, parties in interest may participate in the interviewing of key personnel and other aspects of the investigation. A 'party in interest' is defined by the USCG as any person with a direct interest in the investigation, including 'an owner, a charterer, or the agent of such owner or charterer of the vessel or vessels involved in the marine casualty or accident, and all licensed or certificated personnel whose conduct, whether or not involved in a marine casualty or accident is under investigation by the Board or investigating officer'.[6] Participation in USCG investigations is particularly crucial in circumstances in which another vessel's interest is involved since a party in interest will have an opportunity to be present when the other vessel's master and crew are interviewed, to request that other witnesses be interviewed, and to be present when the other vessel is inspected. When formal hearings are held by the USCG, a party in interest will have the additional rights to cross-examine witnesses under oath and to present witnesses on its behalf.

By statute, USCG and NTSB investigation findings are not admissible in civil suits.[7] The statutes make clear that the investigative reports are protected from discovery and inadmissible as evidence in litigation. There have been some courts that have held that attachments such as photographs, factual determinations, and documents that were not prepared as part of

6 46 CFR 4.03-10.

7 46 U.S.C. Section 6308(a); 49 U.S.C. Section 1154(b).

the investigation report can be admissible in litigation.[8] As investigation reports are public record, it is common practice in casualty litigation to obtain the investigation reports and provide the same to a party's retained liability expert.

Pursuant to 42 CFR Sections 70.2, 71.31(b) and 71.32(b), whenever the Director of the Centers for Disease Control and Prevention (CDC) determines that the measures taken by health authorities of any state or possession (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases from such state or possession to any other state or possession, he or she may take such measures to prevent the spread of the diseases as he or she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination and destruction of animals or articles believed to be sources of infection. Pursuant to that Regulation, on 14 March 2020, to preserve human life, to prevent further introduction, transmission and spread of the coronavirus (covid-19) disease into and throughout the United States, and to maintain the safety of shipping and harbour conditions, the Director of the CDC issued a No Sail Order[9] to cruise ships (all commercial non-cargo, passenger-carrying vessels operating in international, interstate or intrastate waterways and subject to the jurisdiction of the United States with the capacity to carry 250 or more individuals (passengers and crew) with an itinerary anticipating an overnight stay on board or a 24-hour stay on board for either passengers or crew).

The No Sail Order of 14 March 2020 was modified and extended by a No Sail Order of 9 April 2020, which requires a cruise ship operator wanting to continue operations to develop, implement and operationalise an appropriate, actionable and robust plan to prevent, mitigate and respond to the spread of the coronavirus on board cruise ships. The No Sail Order specifies the elements that a plan must address to be considered an appropriate plan. The measures include on-board surveillance of passengers and crew, daily reporting to the CDC and USCG of the number of persons on board with the coronavirus while the ship is in US waters, temperature checks, medical screening, on-board isolation and quarantine, an outbreak management and response plan, and many other elements. A cruise ship that does not comply with the rather comprehensive criteria mandated by the CDC will not be permitted to disembark passengers and crew members at ports or stations, except as directed by the USCG in consultation with the CDC, and will not be permitted to re-embark any crew member except as approved by the USCG. The No Sail Order is effective until the earliest of the expiry of the declaration that covid-19 constitutes a public health emergency, 100 days from the date of publication, or until the Director of the CDC rescinds or modifies the No Sail Order.

ii Port state control

The USCG's port state control programme is responsible for ensuring that foreign-flagged vessels operating in US waters comply with international conventions, such as SOLAS, MARPOL and the International Ship and Port Facility Security Code 2004 (the ISPS Code),

8 *Newill v. Campbell Transp. Co, Inc*, No. 12-cv-1344, 2015 WL 222438 (W.D. Pa. 14 January 2015); *Stepski v. M/V NORASIA ALYA*, No. 7:06-CV-01694, 2010 WL 6501649, at *5 (S.D.N.Y. 14 January 2010).

9 US Department of Health and Human Services Centers for Disease Control and Prevention, Order Under Sections 361 and 365 of the Public Health Service Act (42 U.S.C. 264, 268) and 42 Code of Federal Regulations, Part 70 (Interstate) and Part 71 (Foreign).

and US law.[10] The USCG focuses its investigations on vessels deemed substandard. The USCG bases whether a ship is substandard or not on a variety of factors, including ship management history, flag state detention ratio, vessel compliance history and a ship's particulars. If a vessel is not in substantial compliance with US law and international conventions, the USCG will impose controls on the vessel until compliance is achieved.

According to the USCG's most recent Port State Control Annual Report, in 2018, 10,418 individual vessels from 84 different flag administrations, made 84,141 port visits to the United States. In 2018, the USCG conducted 9,025 SOLAS safety exams and 8,819 ISPS exams on these vessels.[11] In 2018, the USCG detained 105 vessels for environmental protection and safety-related deficiencies (15 more than in 2017) and eight vessels for security-related deficiencies. The sectors of Houston/Galveston, Miami, New Orleans and San Juan had double-digit determination numbers, Houston/Galveston having the highest at 14 detentions. More than 30 per cent of the vessels detained were bulk carriers, followed by general dry cargo ships. Of the detentions in 2018, 22 per cent concerned firefighting and fire protection systems and 16 per cent concerned certificate or logbook errors. Port State Control states that these serious safety deficiencies suggest problems with the vessels' safety management systems. Even though the official numbers have not been released at the time of writing, the trend in the past few years is indicative that there has been a slight increase in the overall number of detentions since 2018.

Ballast water management (BWM) has been receiving a great deal of attention from Port State Control agents. The USCG conducted 8,140 ballast water examinations, which is similar to the number conducted in 2017 (8,229). In 2018, the USCG issued 119 deficiencies for BWM compliance issues. With the approval of more and more ballast water treatment systems by the USCG (as at 6 January 2021, 29 systems had received approval and eight others were under review),[12] the USCG is increasing its emphasis on BWM compliance and limiting the granting of extensions of time to comply.

The USCG's Quality Shipping for the 21st Century (QS21) programme, which allows eligible flag administrations and vessels to receive less frequent and reduced examinations, ended the 2018 calendar year with an enrolment of 2,213 vessels (an increase of more than 200 vessels from 2017). One flag administration lost its eligibility. Vessels from that flag administration that are currently enrolled in the programme will remain enrolled until their QS21 certificates expire. For 2018, nine additional flags (China, Croatia, Curaçao, Italy, Jamaica, Liberia, Norway, Taiwan and Thailand) became eligible.

The aim of the USCG's QS21 E-Zero programme is to add environmental stewardship to the existing QS21 programme. E-Zero focuses on compliance with international environmental conventions, anti-fouling and US ballast water regulations. Eligibility for an E-Zero designation requires:

a QS21 enrolment;
b no worldwide MARPOL detentions for three years;
c no environmental deficiencies in the United States for three years;

10 www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/CG-5PC/CG-CVC/CVC2/psc/AnnualReports/annualrpt16.pdf.

11 According to the Port State Control Statistics by port, the highest number of safety and security examinations took place in the sectors of New Orleans and Houston/Galveston, with each more than double the number of examinations of the next port.

12 www.dco.uscg.mil/Portals/9/MSC/BWMS/BWMS_Approval_Status_06JAN21.pdf.

d no letters of warning, notices of violation or civil penalties for Right Whale Mandatory Ship Reporting violations for five years; and
e a USCG-approved ballast water management system.

As of 9 February 2021, 147 ships had received an E-Zero designation.[13]

iii Registration and classification

Vessel registration is administrated by the USCG's National Vessel Documentation Center (NVDC). The NVDC maintains databases of recorded preferred ship mortgages, certificates of documentation, certificates of inspection and abstracts of title, all of which are public record. To the extent that a common lien is reported to the USCG, it will appear on the abstract of title. Preferred ship mortgages issued by both domestic and foreign banks may be recorded with the NVDC.

The USCG is one agency that is involved with the administration of the coastwise laws under the Jones Act. Under the Jones Act and the Passenger Service Act, a coastwise-qualified vessel must be employed to carry passengers and merchandise between two coastwise points in the United States, which can include certain US territories. The CBP enforces penalties associated with violations of the coastwise laws. An advisory opinion may be requested from the CBP as to whether any potential movement violates the coastwise law. In 2017, the CBP proposed altering its interpretation of vessel equipment, which would have overruled dozens of past rulings. If the CBP proposal had gone forward, the items formerly classified as vessel equipment would not be considered merchandise, which would require a coastwise-qualified vessel. After receiving significant public comment, the CBP withdrew its notice of intent to modify its prior ruling until additional research has been conducted.

Classification societies are important in many aspects of maritime business. To all intents and purposes, it is impossible for a vessel to operate and trade without being classed and certified by a classification society. Both port and flag states rely on classification and, in some respects, statutory certification has been delegated to these societies. The ABS is a major US classification society. Foreign classification societies may inspect US-flagged vessels assuming that USCG authorisation is obtained.

In *Otto Candies, LLC v. Nippon Kaiji Kyokai Corporation*,[14] the Fifth Circuit Court of Appeals was the first to 'cautiously recognize' that classification societies could be liable to third parties in tort for negligent misrepresentation. This is a somewhat heavy burden of proof as to have an actionable claim in negligence, plaintiffs must prove that the classification society owed them a duty of care. Plaintiffs must prove the following:

a the classification society, in the course of its profession, supplied false information for the plaintiff's guidance in a business transaction;
b the classification society failed to exercise reasonable care in gathering the information;
c the plaintiff justifiably relied on the false information in a transaction that the classification society intended to influence; and
d the plaintiff thereby suffered pecuniary loss.[15]

13 www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/CG-5PC/CG-CVC/CVC2/psc/safety/qualship/List_of_EZero_Vessels22021.pdf.

14 346 F.3d 530 (5th Circuit 2003).

15 *Cargill, Inc v. Degesch Am, Inc*, 875 F. Supp. 2d 667, 674 (E.D. La. 2012) (citing *Otto Candies*, 346 F.3d at 535).

iv Environmental regulation

There is an extensive body of US environmental laws that regulate air and sea pollution, especially affecting the shipping industry. The US Department of Justice (DOJ) boasts that as at the end of fiscal year 2018, the United States had imposed US$260 million in civil and criminal penalties, totalling more than US$466 million in criminal fines and more than 319 months of confinement against shipping companies and their crew for intentional discharges of pollution from ocean-going vessels in the previous 20 years.[16]

The Act to Prevent Pollution from Ships (APPS) is the US codification of MARPOL and is intended to prevent the discharge of oily waste into the sea. Annex VI to MARPOL addresses pollution from ships. Annex VI, the APPS and implementing regulations are promulgated by the Environmental Protection Agency (EPA) under the Clean Air Act, and impose engine-based and fuel-based standards that apply to US-flagged ships, wherever located, and to non-US flagged ships operating in US waters. The APPS statute requires engine manufacturers, owners and operators of vessels, and other persons to comply with Annex VI of the MARPOL Protocol.

The EPA and the USCG will enforce these requirements pursuant to authority under the APPS, the Clean Air Act and a 2011 memorandum of understanding between the EPA and the USCG setting forth the terms by which the EPA and the USCG will mutually cooperate in enforcement and implementation. These regulations apply to vessels operating in US waters and to ships operating within the 200 nautical mile border around the United States, including the North American emission control area (ECA) and the US Caribbean ECA, which encompasses waters around Puerto Rico and the US Virgin Islands.

The APPS and MARPOL set limitations on the oil content that is allowed to be discharged into the sea. The APPS and MARPOL also require that vessels maintain an oil record book that documents all oily waste discharges or transfers. The USCG is entrusted with investigatory authority to ensure compliance and, if it suspects illegal discharges, it refers the matter to the DOJ for further investigation and potential prosecution.

The Clean Water Act (CWA) created the basic structure for the regulation of pollutant discharges into US waters. Under Section 312 of the CWA, the EPA and the USCG jointly regulate the sewage discharges of vessels within US waters. The EPA regulates the equipment used by vessels to treat or hold the sewage and establishes no-discharge zones. Section 402 of the CWA authorises the National Pollutant Discharge Elimination System permitting programme to regulate discharges that are incidental to the normal operations of commercial vessels, for example ballast water, bilge water, water from sinks and showers (grey water) and deck wash-down run-off.

The Oil Pollution Act (OPA) requires vessels to submit to the US government plans describing how they intend to respond to large discharges of oil. It focuses on preventing and responding to large oil spills but also created a liability and compensation scheme for oil pollution within navigable waters. OPA violations can carry civil and criminal penalties for vessel owners, operators and crew members.

These environmental regulations are typically enforced by the EPA and the USCG. After a violation has been alleged or investigated, the DOJ will decide whether to seek criminal or civil prosecution of the alleged violations. For example, in one case, the USCG inspected the oil record book of a Liberia-flagged vessel and found at least eight occasions

16 www.justice.gov/enrd/page/file/1174746/download.

when the vessel entered US waters with false and misleading entries. The oil record book did not accurately record the vessel's transfers and discharges of oily water. The USCG turned over its investigation to the DOJ's Environmental Crimes Section for further prosecution of the ship management company and the vessel owner.

Two international shipping companies were fined US$1.9 million for covering up illegal dumping of oily bilge water and garbage from their ships into the sea. The USCG received information from a crew member that the ship was illegally bypassing the oily water separator and dumping oily bilge water over the side. The companies pleaded guilty to violating the APPS and obstruction of justice. In addition to their monetary fine, the companies were placed on a four-year probation that includes strict compliance plans for all its ships operating in US waters.

Frequently, it is not only violation of the environmental regulations that are prosecuted but also the actions of the crew in covering up or providing false statements to the investigators of the alleged violations. In 2017, two Greek shipping companies were sentenced to pay US$2.7 million after being convicted of violating the APPS, obstructing justice, witness tampering and conspiracy. During a routine inspection by the USCG, it was discovered that two senior engineers were trying to hide the fact that the vessel had been dumping oily waste water into the ocean for months. The vessel owner and operator were each given a five-year probation and prohibited from sending ships into US ports until their fines were paid. The two senior engineers were found guilty of the same crimes as the shipping companies and were sentenced to a 12-month and a nine-month prison term, respectively.

Amendments to MARPOL Annex VI (Regulations for the Prevention of Air Pollution from Ships) require that from calendar year 2019, each ship of 5,000 gross tonnage and above collect the data specified in Appendix IX of MARPOL Annex VI, for that and each subsequent calendar year or portion thereof, as appropriate. The data specified in Appendix IX includes:

a identity of the ship;
b IMO number;
c period of calendar year for which the data is submitted;
d start date;
e end date;
f technical characteristics of the ship;
g ship type, as defined in Regulation 2 of the Annex;
h gross tonnage;
i net tonnage;
j deadweight tonnage;
k power output of main and auxiliary reciprocating internal combustion engines over 130kW;
l Energy Efficiency Design Index (if applicable);
m ice class;
n fuel oil consumption, by fuel oil type in metric tonnes and methods used for collecting fuel oil consumption data;
o distance travelled; and
p hours under way.

In addition, Annex VI includes a global cap on the sulphur content of fuel oil and allows for the designation of special areas (ECAs) where more stringent controls on sulphur emissions apply. The new sulphur limit set by Annex VI came into effect from 1 January 2020. Under

the new rules, the global limit for the sulphur content of ships' fuel oil is 0.5 per cent mass/mass (m/m) as opposed to the previous global limit of 3.5 per cent m/m. The United States ratified the amendments in October 2008; thus, the cap applies to US-flagged ships, wherever located, and to non-US flagged ships operating in US waters. Caution should be exercised in that the terms and conditions in fuel oil (bunker fuel) contracts for all ship types reflect consistent language regarding forum for litigation and applicable remedies.

Upon receipt of reported data, the Administrator of the EPA or any organisation recognised by it shall determine whether the data has been reported in accordance with MARPOL Annex VI and, if so, issue a statement of compliance.

Those classification societies that have received authorisation by the USCG to issue international energy efficiency certificates are also authorised to issue statements of compliance – fuel oil consumption reporting. Results of the verification performed by the EPA are to be reported directly to the IMO Ship Fuel Oil Consumption Database based on IMO resolution MEPC.293(71).

Wreck removal and salvage

A vessel grounded or sunk in the navigable waters of the United States is subject to the requirements of the Wreck Removal Act (part of the Rivers and Harbors Act of 1899, found at 33 USC Sections 409 to 415) (the Wreck Act). This Act imposes a strict, non-delegable duty on the owner of a wrecked vessel to mark the wreck as soon as possible. This includes a duty to use diligent efforts to locate the wreck. The vessel owner may ask the USCG to mark the wreck; however, this does not relieve the owner of the duty to exercise due care to see that the mark is maintained.

Section 409 of the Wreck Act also requires the owner to 'commence immediate removal' of the wreck if it is a hazard to navigation. Civil and criminal fines may accrue for failure to abide by the requirements of Section 409. Should the owner abandon the wreck, it is liable to reimburse the US government for removal costs incurred, except in the case of a non-negligent sinking. The owner of a wreck who has failed to mark or remove the wreck is liable for damage caused if another vessel collides with the wreck.

Salvage

The United States is a party to the International Convention on Salvage of 1989 (the 1989 Convention), which entered into force on 14 July 1996. The 1989 Convention gives rise to a right to a reward and a maritime lien in the salvaged property. Accordingly, the court may exercise jurisdiction both *in personam* and *in rem*, depending on the circumstances. The elements of a valid salvage claim are as follows:

a a marine peril that places the property at risk;
b the salvage is voluntarily rendered; and
c the salvage effort must be successful in whole or in part.

The two most popular salvaged contracts are the Lloyd's Open Form (LOF) and MARSALV contracts, which require the salvage award to be assessed under the 1989 Convention's criteria if a fixed cost for the salvage project was not agreed. The LOF and MARSALV contracts provide for arbitration if any dispute arises. The LOF is governed by English law and requires London arbitration, whereas the MARSALV form requires US arbitration.

Ship recycling

Shipbreaking primarily involves the dismantling and disposal of obsolete US Navy and Maritime Administration (MARAD) ships, commercial barges and mobile offshore drilling units. Exporting these vessels for scrapping in other countries was stopped by the Navy in December 1997 and by MARAD in January 1998 because of concerns about the safety and health or workers and adverse effects on the environment.

US ship scrapping and recycling are regulated for pollution issues by the EPA. The EPA has published 'A Guide for Ship Scrappers: Tips for Regulatory Compliance', which provides ship recycling facilities with an overview of the most pertinent environmental and worker health and safety requirements. The guide is structured by specific processes, including asbestos removal, metal cutting, PCB[17] handling and fuel and oil removal. The EPA has also published 'National Guidance: Best Management Practices for Preparing Vessels Intended to Create Artificial Reefs'.

Worker safety is regulated by Occupational Safety and Health Administration, which promulgates general regulations pertaining to protection from falls, the use of cranes and forklifts, cutting and welding, and fire prevention and protection, among other things.

US shipbreaking facilities are currently active in Brownsville, Texas, where most of the obsolete Navy and MARAD ships are taken for recycling. The ships are towed into slots dredged into the side of the channel, grounded and disassembled.

v Passengers' rights

The United States is not a signatory to the Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974 (the Athens Convention), a multinational treaty allowing a cruise carrier to limit its liability in damages to passengers, while guaranteeing compensation to injured passengers. Instead, US federal law prohibits the limitation of liability to a cruise passenger when the cruise docks in the United States.[18]

Several cruise lines, however, have incorporated certain limitations from the Athens Convention into their passenger ticket contracts and have attempted to enforce them against US passengers, in US courts, when the voyage is entirely foreign. Although the Supreme Court has not yet ruled on the legitimacy of these practices, lower courts have increased the burden on cruise carriers by narrowing the reasonable communicativeness test as applied to cruise line passage contracts, especially when they invoke international treaties such as the Athens Convention.[19]

Regarding passengers' rights before injury, the Cruise Lines International Association, of which most of the world's major cruise lines are members, introduced its 2013 Cruise Industry Passenger Bill of Rights. This makes certain promises to passengers in respect of mechanical failures, medical care, essential provisions and unspecified emergencies. However, the Bill of Rights states no specific compensation if a cruise line violates these rights.

17 Polychlorinated biphenyls.

18 46 USC Section 30509.

19 In the Ninth Circuit, see *Wallis v. Princess Cruises, Inc*, 306 F.3d 827 (9th Cir. 2002). In the Eleventh Circuit, see *Wajnstat v. Oceania Cruises, Inc*, No. 09-21850-CIV-COOKE/TURNOFF (S.D. Fla. 12 July 2011) (order denying defendant's motion for partial summary judgment); see also *Wajnstat v. Oceania Cruises, Inc*, No. 11-13670 (11th Cir. 12 August 2011); and *Wajnstat v. Oceania Cruises, Inc*, 684 F.3d 1152 (11th Cir. 2012).

vi Seafarers' rights

Seafarers' maritime claims may be adjudicated in state or federal courts, but federal maritime law applies.

Jones Act negligence

The Jones Act is a federal law providing a cause of action in negligence for seafarers injured in their employment. An employer is liable for the injuries to its employee by acts or omissions of the employer's officers, agents or employees.

The standard of care applicable in the Jones Act context is ordinary care. The employer's non-delegable duty under the Jones Act is to provide the seafarer with a reasonably safe place to work. The employer must have actual or constructive notice of the unsafe condition and an opportunity to correct the problem before liability attaches. Moreover, an employer exercises ordinary prudence when a safe procedure is used even though a safer or more preferable procedure might exist.

Similarly, the standard of care applicable to seafarers under the Jones Act is ordinary care and prudence under the given circumstances. Although a seafarer's contributory negligence or assumption of risk does not bar his or her recovery, comparative negligence applies, and fault is allocated on a comparative basis.

Once a seafarer proves his or her employer was negligent, and that the employer's actions were the cause of the seafarer's injuries (in whole or in part), he or she need only show that the employer's negligence 'played any part, even the slightest, in producing the injury or death for which damages are sought'.[20] Thus, the seafarer's burden of proof of causation is slight. The same causation standard also applies in determining whether the seafarer was contributorily negligent for his or her injuries. This is often called the 'featherweight' causation standard.

If successful in proving negligence under the Jones Act, a seafarer may recover for pecuniary losses, including loss of earning capacity, past lost wages, medical expenses, pain and suffering, mental anguish and physical discomfort. A seafarer may not recover non-pecuniary damages, including punitive damages or loss of society, from his or her employer.

Unseaworthiness

A seafarer may also maintain a cause of action for breach of the warranty of seaworthiness under the general maritime law against the owner of the vessel on which he or she worked. The doctrine of unseaworthiness imposes on the shipowner an absolute and non-delegable duty to furnish a seaworthy vessel and appurtenances reasonably safe and fit for their intended use.[21] Unseaworthy conditions may include:

a defective equipment, hull, tools or appliances;
b slippery decks;
c insufficient or incompetent crew;
d inadequate supplies;
e improper methods of work;
f failure to provide adequate safety equipment; and
g failure to provide safe means of ingress and egress from the vessel.

20 *Rogers v. Missouri Pac RR Co*, 352 US 500, 506 (1957).

21 *Seas Shipping Co v. Sieracki*, 328 US 85, 89 (1946), overruled on other grounds.

In addition to the unseaworthy condition, the seafarer must establish a 'causal connection between his injury and the breach of duty that rendered the vessel unseaworthy'. The mere fact an accident occurs does not establish unseaworthiness. Instead, a seafarer must prove that the unseaworthy condition was a direct and substantial cause of injury.

The damages available to a seafarer for the unseaworthiness of a vessel are virtually identical to those a seafarer may recover under the Jones Act. Specifically, a seafarer may recover pecuniary losses, including loss of earning capacity, past lost wages, medical expenses, pain and suffering, mental anguish and physical discomfort. In *Dutra Group v. Batterton*,[22] the US Supreme Court held that punitive damages are not available in seafarers' unseaworthiness actions.

Maintenance and cure

In addition to bringing a claim for negligence under the Jones Act and unseaworthiness under the general maritime law, a seafarer is entitled to receive maintenance and cure from an employer if the seafarer becomes ill or is injured while in the service of the vessel. An employer's obligation to pay maintenance and cure is regardless of fault. Moreover, an employer must continue to pay maintenance and cure until the seafarer reaches maximum medical cure. A seafarer reaches maximum medical cure once his or her condition becomes permanent and cannot be improved by further medical treatment.

The doctrine of maintenance entitles an injured seafarer to the reasonable cost of food and lodging comparable to what is received on board the vessel. The amount of maintenance is a factual determination based on evidence of the seafarer's actual expenditure for food and lodging. Some federal circuits allow the seafarer's union to negotiate a standard maintenance rate with the employer in a collective bargaining agreement.

Cure is the employer's obligation to pay for medical expenses for a sick or injured seafarer. However, a seafarer must mitigate his or her medical expenses. Although a seafarer may be treated by a physician of his or her choice, overly expensive or unnecessary medical costs will not be reimbursed.

In *Atlantic Sounding Co v. Townsend*,[23] the US Supreme Court held that a seafarer can recover punitive damages if an employer wilfully and wantonly denies maintenance and cure benefits. *Townsend* emphasised that marine employers and their claims handlers must ensure prompt and appropriate investigation of a seafarer's claim for maintenance and cure.

VII OUTLOOK

For a large nation with extensive coastlines and inland waterways, the maritime sector will always be a significant contributor to the US economy. The maritime sector is also affected by multiple, often disparate, geopolitical factors. With the current Congressional focus on infrastructure, it is hoped that US ports and terminals will receive significant and much-welcomed upgrades. Threatened protectionist tariffs issued by the Trump Administration could have an effect on imports. At the same time, strong domestic oil and gas production will allow the United States to become a net energy exporter in the years to come. With the emphasis on liquid natural gas – both as a maritime fuel and as an export commodity – coupled with the emergence of the offshore wind energy industry, domestic shipbuilding could see real gains.

22 139 S. Ct. 2275 (2019).

23 557 US 404 (2009).

Chapter 42

VENEZUELA

José Alfredo Sabatino Pizzolante[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Shipping and port activities are of paramount importance to the Venezuelan economy. The country's population of nearly 30 million people relies very much on the importation of bulk and manufactured goods, and exports of oil and steel-related products. In the past, according to figures held by the national shipping registry, the domestic fleet of over 500 gross tonnage (GT) comprised approximately 400 vessels totalling 1.2 million GT. Despite the absence of up-to-date official data, it is fair to assume that this figure may have decreased in recent years as a result of the current economic situation and sanctions.

The state remains the principal shipowner. In addition to the tanker fleet of Petróleos de Venezuela SA (PdVSA), it has acquired by expropriation Conferry, the firm in charge of transport services between the mainland and Margarita Island. In 2011, the state also incorporated by Presidential Decree No. 7,677 the Corporación Venezolana de Navegación SA (Venavega), a shipping company serving the riverine, coastal and international seagoing market. Through Executive Decree No. 769 dated 5 February 2014, all maritime cargo transportation functions of the public administration were centralised and transferred to Venavega. Therefore, the private fleet is rather modest.

A number of years ago, the PdVSA embarked on a renovation and expansion programme of its fleet, to enable it to carry a significant percentage of all exports and to diversify its clients, with China at the forefront. However, this programme did not work out as planned, to the extent that only two Chinese-made oil tankers were added towards the end of 2013 to the Venezuelan fleet, which is currently affected by a lack of investment and obsolescence. The public fleet has also been affected by a lack of maintenance and, in particular, resources to purchase new tonnage.

The port system involves petrochemical terminals in the east and west of the country (such as La Salina, El Tablazo, Puerto Miranda, Amuay, Cardon and José) under the control of the PdVSA; bulk terminals in the Orinoco river (including Sidor and Ferrominera) under the administration of Corporación Venezolana de Guayana; and the public ports (such as Puerto Cabello, La Guaira, Maracaibo and Guanta) under the control of Bolipuertos SA, a state-owned company exclusively in charge of warehouse and storage facilities. Stevedoring services within public ports, however, are performed both by this public agency and private port operators. Few private marine terminals operate port facilities. No recent official cargo and traffic figures have been released by Bolipuertos SA; nevertheless, because of the rigid exchange control, devaluation and a huge decline in oil prices in the past, there has been

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a significant reduction in cargo volumes, said to have reached 80 per cent nationwide. In 2007–2008, Venezuelan ports handled more than 1.2 million twenty-foot equivalent units (TEUs). Of this total, 800,000 TEUs were handled by Puerto Cabello, placing it the 100 top container terminals worldwide. By contrast, in October 2020, the unofficial figure was just 220,000 TEUs, approximately.

The construction of the Container Terminal at Puerto Cabello by China Harbour Engineering Company, at a cost of US$520 million and with the capacity to handle 700,000 TEUs in its first phase, was stopped because of a lack of funds. There is currently little chance of this being resumed. Fortunately, the expansion and modernisation of the port of La Guaira, entrusted to the Portuguese Teixeira Duarte Consortium, has been completed and the container terminal is currently open and handled by Bolipuertos SA.

The main shipyard and dry dock facilities are Diques y Astilleros Nacionales CA (Dianca) and Ucocar. Although these are mainly linked to the Ministry of Defence, rendering services to naval and PdVSA ships, they also serve private ships. Dianca designs, builds, repairs, modifies and maintains ships and naval structures in steel and aluminium up to 30,000 deadweight tonnage (DWT) and Ucocar up to 1,000 DWT.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

A comprehensive set of laws governing the maritime business was enacted in 2001. This legal framework includes the Organic Law of Aquatic Spaces, the General Law on Merchant Marine and Related Activities, the General Law on Ports, the Law on Maritime Commerce, the Fishing Law, the Coastal Law, the Law on Maritime Procedures and the adoption of the 1965 Facilitation Convention. In addition, Venezuela has adopted the principal International Maritime Organization (IMO) instruments, of which four deserve further comment.

The Organic Law of Aquatic Spaces (last amendment published in *Official Gazette Extraordinary* No. 6,153 of 18 November 2014) reorganises maritime administration and creates the maritime jurisdiction, setting out the general principles governing the shipping and port business throughout the country. The Law provides that maritime authority will rest with the Ministry of Infrastructure through a national body named the National Institute of Aquatic Spaces (INEA), based in Caracas, which exercises its functions locally through the port captaincies.

The General Law on Merchant Marine and Related Activities (last amendment published in *Official Gazette Extraordinary* No. 6,153 of 18 November 2014) sets out the rules for the administrative regime of navigation and seafarers, activities of national ships in domestic and international waters, the general principles applicable to the merchant marine, and the coordination of the involvement in the industry by the public and private sectors.

The Law on Maritime Commerce (*Official Gazette* No. 38,351 of 5 January 2006) incorporates into domestic legislation the main international conventions, repealing the old maritime rules inserted in the Commercial Code. It incorporates the provisions governing aspects of private law, such as maritime jurisdiction, carriage of goods, limitation of liability, arrest of vessels and salvage, based on the international conventions not ratified by Venezuela.

Finally, the General Law on Ports (*Official Gazette* No. 39,140 of 17 March 2009) aims to form a national port system by introducing general principles in respect of the ports regime and infrastructure, governing public and private ports nationwide, to ensure coordination to consolidate a modern and efficient port system. Title IV of the Law introduces provisions for the liability regime of port operators and port administrators, based on the 1991 United

Nations Convention on Liability of Operators of Transport Terminals in International Trade; however, some of the provisions have been reviewed to adjust them to particular Venezuelan port practices, whereas others have been introduced to cover situations that the Convention does not contemplate.

III FORUM AND JURISDICTION

i Courts

Shipping disputes are litigated in the courts with maritime jurisdiction and governed by the procedural rules introduced with the enactment of the Law on Maritime Procedure, published in the *Official Gazette Extraordinary* No. 5,554, dated 13 November 2001. Oral and abridged proceedings are the main features of the specialist jurisdiction. Appeals are heard by the superior courts, whose decisions are reviewed by the Supreme Court of Justice. The first instance courts and the superior courts with jurisdiction over maritime affairs and located in different states of the country are both unipersonal, corresponding to the Venezuelan jurisdiction to hear without any derogation whatsoever cases regarding contracts of carriage of goods (bills of lading under liner traffic) or persons that enter the national territory. Although provisions for the carriage of goods are compulsory, those for charter parties are complementary to the will of the contracting parties, and so enforcement of foreign arbitration clauses inserted in the charter party are allowed by maritime courts. Nevertheless, it has been ruled by the Constitutional Chamber of the Supreme Court of Justice that for a tacit renunciation of the arbitration clause, the defendant must avoid any initial activity in the proceedings other than to invoke the lack of jurisdiction of the arbitration.[2]

Nevertheless, maritime courts do not deal with a significant number of maritime-related matters, including drugs, pollution, personal injuries and customs fines, which are assigned to criminal, environmental and taxation courts.

ii Arbitration and ADR

The Centre for Commercial Conciliation and Arbitration (CEDCA) and the Chamber of Commerce, Industry and Services of Caracas through its Arbitration Centre both have proven experience in arbitration. The procedures are conducted in accordance with the rules set up by each arbitration centre; in the absence of rules, the procedure specified in the Law for Commercial Arbitration enacted in 1998 should apply. Few cases on maritime matters referred to conciliation or arbitration are known in the domestic forum; however, one notable decision is an interim measure by way of arrest granted by CEDCA, allowing the mortgagee (a bank) to enter in possession and exploitation of the vessel because of default in payment by the mortgagor, pursuant to Article 141 of the Law on Maritime Commerce (CEDCA, File No. 070-12). On assessment of the facts and the solvency of the petitioner, arbitrators agreed to place the ship in the possession of the mortgagee without requesting any guarantee, but holding the bank responsible for the damages that the measure might cause to the defendants or third parties.

2 *Astivenca v. Oceanlink Offshore III AS*, Constitutional Chamber, Supreme Court of Justice, File No. 09-0573.

iii Enforcement of foreign judgments and arbitral awards

Foreign judgments are only enforceable in Venezuela after obtaining an exequatur from the Supreme Court of Justice, pursuant to the provisions of the Code for Civil Procedure (Article 850). Nevertheless, an exequatur may be denied pursuant to Article 851, for instance, if the judgment deprives domestic courts of jurisdiction or if it falls within one of the scenarios provided for by the civil procedural rules, such as a judgment contrary to public policy or one resulting from proceedings that have not been properly served to the defendant or one where his or her right to defence was not guaranteed.

With regard to arbitral awards, Venezuela is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention) (since 1994) and the Commercial Arbitration Law (published in the *Official Gazette Extraordinary* No. 36,430 of 7 April 1998), of which Article 48 allows the execution of a final arbitration award before the competent court of first instance, wherever it is issued, without requiring an exequatur.

IV SHIPPING CONTRACTS

i Shipbuilding

No significant shipbuilding takes place in Venezuela; the existing shipyards are mainly involved with maintenance and repairs. However, at one time, the PdVSA embarked on an expansion of its fleet by entering into strategic associations with Japan, China and South Korea for the construction of Suezmax and Aframax vessels and very large crude carriers. Some agreements were also concluded with Spain, Brazil and Argentina. Unfortunately, these agreements either have not been properly executed or have not materialised. The Navy did the same with Spain. In these cases, financing was granted by foreign governments and bankers in the context of the agreements.

ii Contracts of carriage

Venezuela is not a signatory of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (the Hague Rules), the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules) or the UN Convention on the Carriage of Goods by Sea 1978 (the Hamburg Rules). Instead, the Law on Maritime Commerce adopts a mixed regime for the regulation of the carriage of goods by water, making it clear that these provisions shall apply whatever the nationality of the ship, carrier, actual carrier, shipper, consignee or any other interested person. However, these provisions do not apply to charter parties, unless a bill of lading is issued pursuant to a charter party that governs the relationship between a carrier and a holder of a bill of lading that is not the charterer. It follows that any shipment to or from Venezuela under liner traffic will be subject to these provisions in terms of, inter alia, liability regime, exoneration from and limitation of liability and time bar, irrespective of the nationality of the ship, being cargo claims under jurisdiction of the domestic maritime courts, whether the goods are moved in international trade or cabotage.

All actions derived from the contract of carriage of goods by water are subject to a one-year time bar, counted from the date of delivery of the merchandise by carrier to the consignee, or the date when the merchandise should have been delivered. Domestic law adheres to the period of responsibility, exoneration and limitation of liability as stated in the Conventions.

It is important to point out that a carrier is not entitled to retain goods on board to guarantee his or her credits; however, pursuant to Article 259 of the Law on Maritime Commerce and to safeguard the payment of freight, use of containers, demurrage, contribution to general average and signature of the bond, the carrier through an order of a maritime court may place the goods in the hands of a third party (warehouse). Should the carrier guarantee the corresponding fiscal credit, and in the absence of anyone claiming the goods, these will be taken to court auction. The carrier may also exercise a lien on the cargo for freight, demurrage and costs for loading and unloading operations, as well as other costs derived from the contract of carriage and the charter party. However, this lien shall cease if the action is not brought within 30 days of the discharge, provided the cargo has not passed into the hands of a third party.

With regard to the liabilities of the shipper, the Law on Maritime Commerce prescribes in Article 229 that the shipper (including its servant or agent) is not liable for loss sustained by the carrier or by the ship, unless it was caused by the shipper's fault. Specific provisions are set out in connection with dangerous goods, imposing on the shipper the obligation to suitably mark or label dangerous goods as such and to inform the carrier about the dangerous nature of any cargo and the precautions to adopt. Should the shipper fail to do so, the carrier may at any time unload or destroy the cargo, without payment of compensation and irrespective of the damages owed by the shipper towards the carrier (Article 231). Similarly, according to the General Law on Ports (Article 101), a port operator in charge of warehouses and container yards who has not been informed about the dangerous nature of goods, may also destroy or dispose of the cargo without payment of compensation to its owner and is entitled to have its costs reimbursed by the person who was obliged to notify the port operator of the dangerous nature of the cargo.

iii Cargo claims

As in the Hamburg Rules, the Law on Maritime Commerce defines a 'consignee' as a person entitled to receive goods, so domestic provisions allocate the title to sue on the former (Article 249). As to who can be sued, Article 197 states that for the purposes of the law, 'carrier' means 'any person who by himself or through another person acting on his behalf has concluded a contract of carriage of goods by water with a shipper'; whereas 'actual carrier' means 'any person to whom the carrier has entrusted the performance of the carriage of goods by water or of part of it'. Consequently, in light of the maritime provisions, the owners will be the carrier if they have direct exploitation of the ship, whereas charterers will be regarded as the carrier if undertaking the commercial operation of the ship and issuing the bills of lading. In other words, the responsible party for the execution of the contract of carriage is the one issuing the bill of lading.

The provisions for bareboat charters, as for charter parties (time and voyage), are complementary to the will of the parties (Article 150). It follows that dispute resolution clauses would be acceptable.

iv Limitation of liability

The Law on Maritime Commerce has incorporated the provisions of the Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC Convention 1976). Shipowners and their insurers are thus allowed to limit liability contractually in the same manner and in accordance with the limitation figures prescribed by Articles 2 and 6 of the Convention.

Anyone seeking to limit liability (such as shipowners, charterers, insurers and salvors) may appear before a maritime court and request the commencement of a proceeding to constitute a limitation fund (Maritime Law, Articles 52 to 74). This is set in motion by the submission of a petition that indicates the circumstances giving rise to the damages in respect of which limitation is invoked; the maximum amount of the limitation fund calculated in accordance with the Maritime Law; the list of creditors known by the petitioner and the definite or provisional amount of their credit and its nature; and any documentation to support the constituted fund, which may take the shape of cash, financial instruments or securities issued or guaranteed by the state. Any precautionary measure (arrest) on a ship will be suspended once the limitation fund is constituted.

V REMEDIES

i Ship arrest

The arrest of ships is governed mainly by the provisions of the International Convention on Arrest of Ships 1999 (the 1999 Arrest Convention), incorporated in the Law on Maritime Commerce, to the extent that Article 93, following the Convention, sets out the list of maritime claims giving rise to a ship arrest. Similarly, the governing provisions allow for the arrest of the ship in respect of which the maritime claim arose and of a sister ship. The maritime courts shall grant the arrest for a maritime claim when this is founded in a public document or a private document recognised by the other party, accepted invoices, charter parties, bills of lading or any other document proving the existence of the maritime claim. Otherwise, the court may request from the claimant the submission of a guarantee in the amount and subject to the conditions determined by the court before granting an arrest. However, the defendant may oppose the arrest or request the lifting of it if, in the opinion of the court, sufficient security has been provided, except when the ship has been arrested for any dispute as to the possession of the ship or any dispute resulting from a contract of sale. Under domestic provisions, the action for the arrest of a ship must be brought against the ship and her master at the same time, as prescribed by Article 15 of the Law on Maritime Commerce, otherwise the action will be dismissed.[3]

In practical terms, an arrest is executed through an order forwarded by the court to the port captaincy via fax or email, resulting in the withholding of clearance to sail by the maritime authority. Consequently, an arrest order granted on an unberthed ship within Venezuelan jurisdictional waters would be possible.

ii Court orders for sale of a vessel

Domestic provisions allow the anticipated auction of a ship. Thus, Article 106 of the Law on Maritime Commerce states that after 30 continuous days following the arrest of the ship, if the shipowner fails to attend proceedings, at the request of the claimant, the court may order the auction of the ship, subject to the claimant submitting sufficient guarantee, provided the claim exceeds 20 per cent of the value of the ship and it is exposed to ruin, obsolescence or deterioration. Mortgagees and holders of maritime privileges may also request the forced sale of the ship. In all cases, the court will arrange the sale subject to the publication in the national press of a notice of auction, with an indication of the parties involved, a description

3 First Instance Maritime Court, File No. 2005-000059.

of the ship, the estimated price, the time and date of the sale and identification of the port where the ship is located. In the case of a forced sale or execution, the court will notify the competent authorities of the flag state, owners, beneficiaries of mortgages and holders of maritime privileges. In the court sale of MV *Josefa Camejo*, the defendants attempted to obtain an injunction, arguing that the ferry performed a public service, an argument rejected by the Supreme Court of Justice after assessing the facts, as it was found that the vessel had been anchored for several years without carrying out any activities, and therefore was not performing any public service as a result of the lack of continuity in its activity.[4]

VI REGULATION

i Safety

Venezuela has adopted the main IMO safety instruments, namely the International Convention on Load Lines 1966 (the Load Lines Convention), the International Regulations for Preventing Collisions at Sea 1972 (COLREGs), the International Convention for the Safety of Life at Sea 1974 (SOLAS), the Convention on the International Maritime Satellite Organization 1976 (the INMARSAT Convention), the Torremolinos International Convention for the Safety of Fishing Vessels, the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1995 (the STCW Convention) and the International Convention on Maritime Search and Rescue 1979 (the Search and Rescue Convention 1979). Compliance with these safety conventions is monitored by the INEA through its Safety Department and the various port captaincies, as well as the coastguard exercising its port state control functions.

ii Port state control

Venezuela is a signatory to the Latin American Agreement on Port State Control of Vessels 1992 (the Viña del Mar MOU), by which port state control was implemented in Latin America. Port state control is carried out by the coastguard, a branch of the Navy that is in charge of the documentary and physical inspection of vessels. In the event of substandard conditions or deficiencies being noted, the coastguard inspectors will produce a report, notifying this to the port captaincy. It is for the latter to instruct a surveyor to determine the extent of the deficiencies. Once deficiencies have been corrected, the port captaincy will send a surveyor to check the work and will then inform the coastguard of whether the vessel should or should not be detained.

Inspectors check for compliance with the principal IMO instruments. The most common deficiency is a lack of the certificates prescribed by the International Convention for the Prevention of Pollution from Ships 1973 (as modified by the Protocol of 1978) (MARPOL (73/78)), the Load Lines Convention and SOLAS. Nevertheless, under Venezuelan legislation, the coastguard has no power to detain vessels and, to that end, the cooperation of the port captaincy is required to refuse port clearance to a vessel and to open the corresponding administrative file to apply for any potential fines.

Owing to the lack of a comprehensive legal framework governing the activities of different agencies in the maritime field, in many instances port state control is confused in its implementation, occasionally causing serious delays to ships.

4 Constitutional Chamber, Supreme Court of Justice, File No. 06-1803.

iii Registration and classification

The ship registration process has improved significantly since the turn of the century, after the dual registration procedure (requiring inscription of documentation with the maritime authority as well as the public registry) was repealed by the newly enacted legislation. Thus, the office of the Venezuelan Shipping Registry (Renave) is now located within the INEA and has branches in the various port captaincies. Ships or ships under construction with a tonnage equal to or above 500 GT will be registered with the Renave office located in Caracas. Vessels under 500 GT will be registered in the particular branch of Renave located in the port captaincy where the ship will be registered.

It is important to point out that, according to Article 108 of the Organic Law of Aquatic Spaces, cabotage is regarded as the carriage of cargo or persons between Venezuelan ports. Therefore, transshipment of cargo (either internal or in transit) between domestic ports comes under this category. Article 111 of the same Law defines 'domestic navigation' as any activity different from cabotage, carried out within jurisdictional waters of a particular port captaincy, such as fishery, dredging, leisure and scientific navigation. Cabotage and domestic navigation are restricted to ships registered in Renave. Despite this, the INEA shall grant, at the request of the interested party, and by way of exception, a special permit (waiver) to ships of foreign registry to carry out cabotage or domestic navigation. The grant of such a permit is dependent on a certification by the INEA that the ship complies with the requirements of national and international legislation regarding safety, and that there is no available tonnage in the shipping registry. Even so, irrespective of the granted waiver, the ship must comply with the process for temporary admission with the customs office before arrival.

A ship may be wholly owned by foreign parties; the only requirement is the incorporation of a domestic company, but 100 per cent of the shares may be wholly owned by a foreign interest. Furthermore, a foreign-registered ship bareboat-chartered to a Venezuelan company for up to or over one year may be registered with Renave. The basic documentation to be submitted is as follows:

a an application for inscription of the vessel with Renave, which must be submitted through the INEA website;
b a copy of the articles of incorporation of the company acting as owner or charterer;
c evidence of the deletion or suspension of the previous registration or equivalent document;
d the vessel's document of ownership or bareboat or leasing agreement, as the case may be, duly translated into Spanish; and
e plans and technical characteristics of the ships, including former GT certificates.

Customs procedure is a critical aspect of shipping registration in Venezuela, so the choice of the port of registry, and thus the customs office, is an important issue. In the case of vessels under bareboat or leasing agreements, since they will not be a definitive importation, it is generally accepted that the applicable customs regime will be that of a temporary admission, whereby the import duties will be suspended.

An important aspect in connection with flag registration is also the inspection and certification. There is no specific age requirement, but vessels more than 10 years old are subject to a special inspection regime for registry with Renave. In general terms, once the flagging process has advanced, inspection and certification of the ship by an appointed flag surveyor are needed. Note that maritime administration allows up to three months for the

homologation of the certified original, at which time the Venezuelan documents should be issued. Homologation must also be carried out for the International Safety Management Code documentation within three months.

iv Environmental regulation

Venezuela is a signatory to the International Convention on Civil Liability for Oil Pollution Damage 1969 (the CLC Convention), as amended in 1976 and 1984, and the 1992 Protocol. Therefore, shipowners bear strict liability for damages resulting from an oil spill, unless the damage has been caused by the events specified in the Convention. Shipowners are entitled to limit liability in accordance with the Convention, following the procedural rules set out in the Law on Maritime Commerce.

Venezuela has also enacted the Organic Law on the Environment (*Official Gazette Extraordinary* No. 5,833 of 22 December 2006) and the Criminal Law on the Environment (*Official Gazette* No. 39,910 of 2 May 2012), prescribing provisions concerning air and sea pollution. The first is a comprehensive set of provisions intended to establish the guiding principles for the conservation and improvement of the environment. It declares the conservation and improvement of the environment to be a matter of public utility and general interest, including within the activities capable of degrading the environment, and those that directly or indirectly pollute or cause a deterioration of the atmosphere, water, seabed, soil or subsoil, or that have an unfavourable effect on fauna or flora. The Criminal Law on the Environment defines those acts that violate the legal provisions for environmental conservation, imposing heavy penalties such as imprisonment, arrest and fines. A significant number of offences are set out, including:

a discharge of pollution in lakes, the coast or marine environment as a result of non-compliance with the technical rules in force;

b pollution of the marine environment resulting from leaks or discharges of oil and other products during transportation, exploration and exploitation on the continental platform and in the Venezuelan exclusive economic zone;

c construction of works without authorisation or in breach of the technical rules that are capable of causing contamination to the lakes, coast and marine environment; and

d breach of the international conventions on oil pollution.

Furthermore, the captain, shipowner or operator that negligently caused the polluting incident will be subject to imprisonment of between one and three years. A captain's failure to give notice of a polluting accident within the national waters will be subject to imprisonment of between four and eight months, and the responsible ship can be detained by court order. However, Article 96 of the Criminal Law on the Environment states that anyone emitting or allowing the escape of gases or biological or biochemical agents of any nature capable of deteriorating or polluting the atmosphere or air is in breach of the technical rules applicable to the matter and will be subject to imprisonment of between six months and two years and a fine of between 600 and 2,000 units.

v Collisions, salvage and wrecks

Rules on collision are included in the Law on Maritime Commerce, based on the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910 (the Collision Convention 1910). In this sense 'collision' does not solely refer to violent physical contact between two or more vessels, since the domestic rules also extend to repair

of damage caused by a vessel, even if a collision has not actually taken place and the damage is caused as a result of a negligent manoeuvring (e.g., without physical contact). In cases of damage to port infrastructure, including fenders, the port authority may request a guarantee to cover the repairs. P&I club letters of undertaking are usually accepted, with the guarantee remaining in place until the costs are paid or the responsibility is determined; nevertheless, the guarantee must be executed within six months of the incident. Legal actions in connection with collisions are subject to a two-year time bar.

The main provisions of the International Convention on Salvage 1989 (the 1989 Salvage Convention) are also incorporated into domestic legislation. The master and the shipowner are free to enter into contracts of salvage, but even so, such contracts can be annulled by the maritime court if they were executed under undue pressure, influence or danger, or if the conditions are not fair and the agreed reward is excessively high in relation to the services rendered. As regards the criteria for fixing the reward, domestic provisions follow Article 13 of the Convention. Any action relating to payment under salvage operations shall be subject to a two-year time bar.

Regarding wrecks, the Law on Merchant Marine and Related Activities (Article 92) sets out provisions regarding navigation channels, which also apply to wreckages in general. Thus, the obstruction of a navigation channel caused by the grounding of a vessel, collision, allision or sinking will impose on the shipowner a number of obligations, the aim of which is to give prompt notice of the incident to the maritime authority through the port captaincy to enable measures to be taken to reduce the risks for other ships sailing nearby and to remove the wreckage if necessary. Following casualties, the maritime authority will set up an investigation committee that, as well as determining the causes, may recommend steps to be taken, including publication in the press of a warning to mariners. In such cases, the authorities expect full cooperation from the shipowner or insurers in taking the necessary measures for marking, surveillance and eventual removal of the wreck; should they fail to do so, the maritime authority may carry out the necessary measures, in which case the shipowner is obliged to reimburse the costs incurred by a third party appointed by the authorities to this end.

vi Passengers' rights

The main provisions of the Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974 (the Athens Convention) have been included in the Law of Maritime Commerce. These provisions apply to the carriage of passengers in both international and domestic traffic. Pursuant to Article 278, 'carriage of passenger' comprises the following:

a in respect of a passenger and his or her cabin luggage, the period aboard the vessel or on any vehicle or means of access to board or disembark, and that period in which the passenger and his or her cabin luggage are carried by water to or from the vessel and always when the price of this service is included in the passenger's ticket, or the vehicle used to perform this carriage has been put at the disposal of the passenger by the carrier;

b in respect of the passenger, the period of carriage does not include that period when the passenger is at a terminal, maritime station, berth or any other port premises; and

c in respect of luggage that is not cabin luggage, this includes the period starting when the carrier, his or her employees or agents have taken care of the luggage while ashore or on board through to the time when this luggage is returned to the owner.

Provisions state that the carrier must hand to the passenger a ticket as proof of the contract and a bill of transport wherein any luggage that is not cabin luggage is properly described. The omission of these obligations shall prevent the carrier from exercising a limitation of liability in respect of damages to the passengers and their luggage, depending on the documents that the carrier omitted to deliver (Article 279).

The indemnity paid by the carrier in cases of death or personal injury to a passenger shall not exceed 46,666 special drawing rights (SDRs) per voyage (Article 298), whereas the limits of liability both for contractual and non-contractual liability of the carrier in respect of loss or damages suffered by the luggage are regulated by Article 299, in any case not exceeding the following limits:

a for cabin luggage – 833 SDRs per passenger and per voyage;
b for vehicles, including luggage carried inside or on top of vehicles – 3,333 SDRs per vehicle and per voyage; and
c for all other luggage – 1,200 SDRs per passenger and per voyage.

The time bar provisions set out in domestic legislation are similar to those of Article 16 of the Athens Convention.

vii Seafarers' rights

Labour provisions for domestic shipping can be found in the Organic Law on Labour and Workers (*Official Gazette Extraordinary* No. 6,076 of 7 May 2012), which is generally regarded as having generous provisions towards seafarers. Article 346 of the Law sets out the obligations of shipowners to provide seafarers with minimum standards on board, such as:

a clean accommodation;
b healthy, nutritional and sufficient food;
c medical care, hospitalisation and medicines where social security does not provide them;
d repatriation and travel for boarding expenses;
e notification to the authorities of any accident at work;
f granting licence for the exercise of electoral rights; and
g accommodation and food ashore when the ship is abroad for repairs and seafarers cannot remain on board.

The provisions of the Organic Law on Working Conditions and Accident Prevention (*Official Gazette* No. 38,236 of 26 July 2005) also have a significant effect on shipping in respect of loss of life or personal injury accidents. The Law prescribes a number of sanctions for the employer in the event of accidents suffered by employees during working hours, should the employer fail to properly instruct and warn the worker about the nature of the risks to which he or she is exposed, as well as to provide the worker with the safe means to perform his or her job. These sanctions may take the shape of fines or even imprisonment if it is proven that the employer was aware of the danger to which the employee was exposed while working. It should be borne in mind that accidents involving loss of life or personal injuries on board ship could well be the result of the employer's failure to instruct and warn the seafarer about the risks concerned with the assigned task. It follows that in the event of occurrence of an accident at work or occupational illness as a consequence of an employer's violation of legal regulations in respect of health and safety at work, the employer will be obliged to pay

indemnification to the worker or his or her heirs, in accordance with the degree of fault and the injury. Claims brought by seafarers for personal injuries or occupational illness are generally founded on the provisions of this Law.

Venezuela has not ratified the Maritime Labour Convention 2006, although the PdVSA has announced that its fleet has already been voluntarily certified, which makes it the first Venezuelan shipowner to comply with this instrument.

VII OUTLOOK

i Measures to address effects of covid-19

Following detection in the country of the first covid-19 cases in March 2020, the National Executive issued a Decree by which a state of alarm was declared to attend to the health emergency, published in *Official Gazette Extraordinary* No. 6,519, dated 13 March 2020. The Decree ordered the suspension of a significant number of activities nationwide; however, Article 9(8) stated that 'activities related to the national port system' would not be subject to suspension, and since then ports under the administration of Bolivariana de Puertos SA, have been working normally, as have the rest of the maritime terminals, as far as loading, unloading and reception of cargoes within port areas, not experiencing any disruption.

In addition, the INEA as the competent government authority, based on the recommendations issued by the IMO, has issued various circulars and administrative rulings facilitating shipping and crew changes up to the present.

ii Effects of US sanctions

Sanctions imposed on Venezuela by the US administration has certainly affected its trade in recent years. Nevertheless, the Department of the Treasury's Office of Foreign Assets Control (OFAC) initially issued General Licence No. 30, allowing it to engage in all activities and transactions with government entities that are ordinarily incidental to the use of a port, later amended as GL No. 30A, clarifying that all transactions and activities prohibited by Executive Order No. 13,850 involving INEA or any entity in which it owns, directly or indirectly, an interest of 50 per cent or more, ordinarily incidental and necessary to the operation or use of ports in Venezuela, are authorised. Pursuant to amended General Licence No. 30A, both US and non-US persons would not be sanctionable when using and paying pilotage, towage and launch services to the INEA deemed necessary for the operation or use of Venezuelan ports.

From the talks between Venezuela's government and the opposition held in Mexico City in November 2022, the OFAC issued a new modified Venezuela-related General Licence 41, issued 22 November 2022, authorising certain transactions related to Chevron Corporation's joint ventures in Venezuela. Although it is a limited authorisation, this move could be seen as a progressive lifting of US sanctions. No doubt there will further developments in this regard in 2023.

Chapter 43

VIETNAM

Dang Vu Minh Ha and Tran Trung Hieu[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Vietnam has the advantage of a long coastal line, and therefore the Vietnamese shipping and marine industry has been a traditional one with a long history. Furthermore, despite the impact of the covid-19 pandemic worldwide and the Vietnamese economy in particular, the shipping industry in Vietnam is still growing. In early 2023, the Vietnam Maritime Administration (VINAMARINE) issued a report on cargo operations at sea in Vietnam in 2022, showing a steady increase by 4 per cent compared to 2021. In particular, cargo processed through Vietnam sea ports reached 733.18 million tonnes, of which containerised cargo was 25.09 million twenty-foot equivalent units (TEUs). Imported cargo reached 209.26 million tonnes, of which containerised cargo was 8.58 million TEUs. The majority of cargo operations are conducted in three main cities, namely Ho Chi Minh, Vung Tau and Hai Phong, which have the busiest ports in Vietnam.[2]

Notably, 11,367 port calls for container ships in 2021 resulted in Vietnam being ranked 12th in the world for container ship calling countries. Vietnam is also among the top 25 countries, with the top speed of container handling. Besides, Vietnam continues to stay in the top 30 ship-owning countries in terms of deadweight tonnage (DWT), with a total capacity of 14,934,404 DWT and 959 vessels flying Vietnamese flag.[3] Regarding the leading flags of registration by DWT, with an increase from 10,269 to 12,331 DWT,[4] Vietnam has experienced the greatest increase to date and jumped from the 25th to 22nd among 35 leading countries.

The Vietnamese government also focuses on the development of port facilities. In late 2020, the Cai Mep International Terminal Port, being one of 20 ports in the world with sufficient facilities and capacity, welcomed a large container ship – MV *MARGRETHE MAERSK* – so that it could perform its cargo operations. Furthermore, in 2021, the Tan Cang – Cai Mep International Terminal became the first of Vietnam's green ports recognised by the APEC Ports Service Network. Diesel-powered equipment has been replaced with

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2 https://www.vinamarine.gov.vn/f/Th%C3%A1ng%2012.2022-1.pdf.

3 The Review of Maritime Transport 2022, available at https://unctad.org/system/files/official-document/rmt2022_en.pdf.

4 The Review of Maritime Transport 2022, p. 42; available at https://unctad.org/system/files/official-document/rmt2022_en.pdf.

electric-powered equipment, which is more environmentally friendly and can help reduce carbon emissions, saving on operating costs and waiting time.[5] As a result, Cai Mep Port was awarded 13th in the top 25 ports in the Container Port Performance Index 2022.[6]

From the above figures, it can be seen that the shipping industry in Vietnam is growing strongly and at a rapid speed.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The Maritime Code of Vietnam was first promulgated in 1990 and introduced the first code governing a specialised industry in Vietnam. The 1990 Maritime Code played an important role in the development of the maritime industry and the socioeconomic resources of the country. At the same time, the Maritime Code also played a role in improving the effectiveness and efficiency of the state management of maritime activities in Vietnam.

After a period of implementation along with economic development and international integration, several new regulations were issued together with Vietnam's participation in a number of international treaties on maritime issues. The maritime activities in Vietnam experienced significant changes, which required the 1990 Maritime Code to be amended and supplemented to be in compliance with maritime activities as well as to meet the requirements of international integration, contributing to the development of the country's economy in general and the shipping industry in particular. Accordingly, the 2005 and then the 2015 Maritime Code were promulgated.

The most current and effective legislation is the 2015 Maritime Code, which provides regulations on commercial contracts (carriage of cargoes and passengers by sea, charter party, bill of lading, ship agent and broker, and towage) admiralty (collision, salvage, general average and limitation of liability) and marine insurance. General matters that are not specifically regulated by the Maritime Code are further governed by the 2015 Civil Code and the 2000 Law on Insurance Business (amended in 2010, 2013 and 2019), and their guidance legislation. Vietnam adopts certain international rules and conventions, including the Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC Convention 1976), the Hague-Visby Rules, and other international conventions on safety at sea, which are further analysed below.

III FORUM AND JURISDICTION

i Courts

There are no specialised maritime or admiralty courts in Vietnam. Maritime disputes are usually handled by judges, who normally have limited or no expertise on shipping matters, of commercial or civil division of the court. In general, the district-level or province-level

5 Vietnam Seaports Association (2021), 'Tan Cang – Cai Mep International Terminal (TCIT) awarded Green Port 2020 by the APEC Ports Service Network (APSN) Council', available at http://www.vpa.org.vn/tan-cang-cai-mep-international-terminal-tcit-awarded-green-port-2020-apec-ports-service-network-apsn-council/.

6 The Review of Maritime Transport 2022, p. 85; available at https://unctad.org/system/files/official-document/rmt2022_en.pdf.

courts where the respondent resides or has his or her registered headquarters has jurisdiction to resolve the dispute. For tort claims, the claimant can also bring his or her dispute to the court at the place where the damage occurred.

Limitation periods

The limitation periods for shipping disputes are as follows:

a contract of carriage of goods by sea: one year from the time of cargo delivery or the time when the cargo should have been delivered;

b voyage charter parties: two years from the date on which the damaged party knows or should have known that their rights and interests were infringed;

c charter parties: two years from the termination date of the charter party;

d ship agent or broker contacts: two years from the date on which the dispute occurred;

e towage contracts: two years from the date on which the dispute occurred;

f collisions: two years from the date on which the collision occurred;

g salvage: two years from the date on which the salvage operation was completed;

h maritime insurance: two years from the date on which the dispute occurred;

i carriage of passengers: two years in the event of death, personal injury or loss, or damage of the luggage; and

j general average: two years from the date on which the general average event occurred.

ii Arbitration and ADR

Vietnam does not have a maritime-focused alternative dispute resolution mechanism. Generally, under the 2015 Maritime Code, parties are allowed to choose arbitration to hear their maritime dispute.

Domestic arbitration in Vietnam is governed by the 2010 Law on Commercial Arbitration (the LCA), which is relatively in line with the UNCITRAL Model Law on International Commercial Arbitration. The most dominant arbitration centre in Vietnam is the Vietnam International Arbitration Center (VIAC), which frequently resolves maritime disputes.

Furthermore, considering that a maritime dispute also has commercial characteristics, the parties can choose mediation to resolve their dispute. Commercial mediation in Vietnam is regulated by Decree No. 22/2017/ND-CP on Commercial Mediation. However, mediation is a relatively new form of dispute resolution in Vietnam and accordingly, to date, there have not been any maritime disputes that have been successfully settled by mediation.

iii Enforcement of foreign judgments and arbitral awards

Vietnam is a member of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards and the fundamental principles of this Convention are adopted in the 2015 Civil Procedure Code. Particularly, the recognition of a foreign arbitral award in Vietnam is regulated by the 2015 Civil Procedure Code. The 2015 Civil Procedure Code provides a limitation period for the application for recognition and enforcement of a foreign arbitral award in Vietnam, which is three years from the effective date of the award. Although the local courts have shown a pro-arbitration approach recently, owing to insufficient public information, there is no concrete record on the enforcement of foreign arbitral awards relating to maritime disputes in Vietnam. However, in the past two years, there were two foreign arbitral awards that were recognised and enforced by local courts, being the very first

few ad hoc and maritime-related awards that ever been recognised in Vietnam. In particular, both disputes arose from charter parties drafted in line with the Gencon Charterparty 1994 form, with the same arbitration clause and local award debtors.[7]

Vietnam is not a member of the Hague Convention on the Recognition and Enforcement of Foreign Judgments. Instead, foreign judgments are recognised by the Vietnamese courts under the procedure set out in the 2015 Civil Procedure Code in accordance with the bilateral treaties on judicial mutual assistance or in compliance with the principle of reciprocity.

IV SHIPPING CONTRACTS

i Shipbuilding

Vietnam is a reliable destination for the construction of small ships and ship reparation. SBIC, the largest shipbuilding company, which is under the supervision of the Vietnamese government, has 11 sub-companies in all three regions of Vietnam. The 2015 Maritime Code does not provide regulations on the shipbuilding of private parties but leaves it to their discretion. The major shipbuilding contracts in Vietnam are made with foreign companies, and therefore English law is the typical choice in contracts. The standard forms that are usually used by the parties are the SAJ form, the AWES form or the Norwegian form. In general, the title over a newly built ship will normally transfer at the time of delivery or under the agreed protocol between parties.

ii Contracts of carriage

Contracts for carriage of goods by sea are governed by the 2015 Maritime Code, which adopts certain provisions of the Hague-Visby Rules and the Hamburg Rules even though Vietnam is not a signatory to these Conventions. Other non-sea carriage contracts are regulated by relevant legislation on transport of cargo by road, by air, cabotage transportation and multimodal transportation.

Duties and liabilities of the shipper

The shipper is obliged to pack cargoes in a proper way; otherwise, the carrier is entitled to decline the loading of cargoes that are not properly packed. The shipper shall also be liable for the loss or damage caused to the carrier, passengers, crew and any other owners of damaged cargoes on board for their failure to provide accurate information, especially for dangerous cargoes. In respect of dangerous cargoes, the shipper is additionally obliged to mark the goods and to have previously notified the carrier of the description, its nature and relevant safety measures.

Liens

A carrier is entitled to exercise a lien over cargo if the consignee does not present or declines to receive the cargo, or delays in receiving the cargo exceeding the time agreed in the contract for carriage of cargo by sea, or if there is more than one party presenting bill of lading, sea waybill and other documents with similar value to receive a specific cargo. The carrier should unload

7 Decision No. 02/2021/QDST-KDTM dated 2 November 2021 of the People's Court of Dong Nai Province; Decision No. 01/2022/QDST-KDTM dated 18 February 2022 of the People's Court of Dong Nai Province.

the cargo and place it in a warehouse to exercise a lien over it. In theory, after 60 days from the day of arrival to the discharging port, and if there is no consignee or the debt relating to the cargo has not been settled, then the carrier is entitled to sell the cargo via auction. However, in practice, there are obstacles for the carrier to exercise his or her right to sell the cargo due to certain importation requirements for custom clearance.

Operation of multimodal bills of lading

The multimodal transport operator is responsible for all stages from the time of receiving the cargo until the time of delivery. If loss or damage to cargoes has been identified during a certain phase of the voyage, the limitation of liability pursuant to the rules governing such phase shall be applied; otherwise, the limitation of liability under the Maritime Code is to be applied.

iii Cargo claims

Vietnam recognises a bill of lading as a document of title and the proof of the contract of carriage of goods by sea. Both contractual and actual carriers can be liable for the cargo claims, except for where the name of the carrier is not identified in the bill of lading; in this case, shipowners are considered as carriers. Therefore, if the carriers deliver the cargo without presenting the original bill of lading, the cargo owner who has title over the cargoes has a legitimate right to claim the carriers. Thus, the carrier usually attempts to obtain a letter of indemnity or a court order to release the cargo without surrendering the original bill of lading.

Local courts do not often consider the incorporation of a charter party. For instance, if the main carriage contract already provides a provision on the liability of the carrier, then the court will find that there is no need for them to determine the terms in the incorporated Gencon Charterparty 1994.[8]

Furthermore, as previously mentioned, there is no specialised maritime court in Vietnam; therefore, local courts are currently struggling to identify the limitation period for claims for loss or damage of cargo. Particularly, if a cargo claim is made between a charterer and a carrier in a voyage charter party, the limitation period is two years from the date on which the claimant knows or should have known that their rights and interests were being infringed. Conversely, if a cargo claim is made between a consignee and a carrier based on the bill of lading, the limitation period is only one year from the date of delivery or the date on which the cargoes should have been delivered. For instance, in a recent case regarding the cargo damage, the seller as shipper hired a vessel under a voyage charter party to carry cargoes to Vietnam for delivery to the buyer as consignee. At the discharging port, damage was found and the buyer subrogated the claim to their underwriters to claim against the carrier. Accordingly, this claim should have been time-barred because the time limitation is only one year for claims between the carrier and the consignee (and their subrogated underwriters) under the bill of lading. However, without an explicit explanation, the local court determined that the claim for damage of cargo of the subrogated underwriters was based on the voyage charter party, and therefore the claim was not time-barred as the limitation period is two years.[9]

8 Judgment No. 94A/2008/KT-PT dated 29 April 2008 of the Hanoi Appellate Court of the Supreme People's Court.

9 Judgment No. 28/2020/KDTM-PT dated 6 May 2020 of the People's Court of Hanoi City.

Another notable case is the establishment of cargo shortage claims under 'said to weigh' bills of lading that was recently decided by Hai Phong Court, one of few local courts with expertise in maritime matters. In this case, the Court determined that if the shipper only declared the cargo weight without conducting a survey (e.g., a draft survey) with the shipowner, and accepted the bill of lading featuring 'said to weigh', the ship shall not be liable for the shortage of cargo. Notably, in this case, the local Court referred to applied the 1924 Hague Rules to determine this principle, given that Article 152.3 of the Vietnam Maritime Code is unclear on this issue.[10]

iv Limitation of liability

Even though Vietnam is not a contracting party of the LLMC Convention 1976, several provisions of the Maritime Code 2015 resemble this. Except for the claim for oil pollution damage as defined, the scope of claims subject to limitation under the Maritime Code 2015 is the same as under the 1976 Convention. According to the Maritime Code 2015, shipowners, charterers, ship operators, salvors and underwriters of the claims subject to limitation are entitled to limit their liability, unless it is proved that the loss was caused by their default. The value of the limitation is calculated at a rate similar to that in the 1976 Convention, with vessels below 300 GT having limitation at 83,000 special drawing rights (SDRs). In addition, the Maritime Code 2015 does have a provision on setting up a limitation fund and its distribution; however, the lack of specific guidance makes the establishment of limitation fund impractical in Vietnam.

For cargo loss or damage, if the nature and value of the cargo are not declared by shippers before loading or not specified in a bill of lading, sea waybill, or in any other documents with the same legal nature, carriers are only liable for the loss or damage of cargoes not exceeding the limitation of 666.67 SDRs per package or 2 SDRs per kilogram, whichever is higher. For containerised cargo, the whole container is considered as one package or shipping unit for calculation, unless otherwise stated in the bill of lading. On the contrary, carriers are liable for the loss or damage of cargoes as declared before loading and accepted by carriers, as well as described in bills of lading. For delays, the liability is calculated at 2.5 times the carriage charge of such delayed cargoes but is not to exceed the total carriage charge, pursuant to the contract for carriage of cargoes by sea.

The carriers will lose their right to limit liability if it is proved that the loss, damage or delay in delivery of cargoes are the result of an act or omission on their part with the intention to cause such loss, damage or delay, or from the carrier recklessly acting with the knowledge that such loss, damage or delay would incur.

V REMEDIES

i Ship arrest

Ship arrest is governed mainly by the 2008 Ordinance on the Procedures for Ship Arrest. While Vietnam is not a contracting party to the International Convention on the Arrest of Ships 1999, the Ordinance and the 2015 Maritime Code adopt a number of provisions of the

10 Judgment No. 06/2022/KDTM-ST dated 24 August 2022 of the People's Court of Hai Phong City.

International Convention. A draft of the new regulation on the arrest of ships, which replaces the 2008 Ordinance on Ship Arrest, was initiated in 2016–2017 after the establishment of the 2015 Maritime Code but, so far, has not yet been finalised and promulgated.

A vessel can be arrested in Vietnam in the following four circumstances:

a to secure a maritime claim;
b to serve as an interim relief;
c for the enforcement of a court judgment; or
d for judicial assistance.

The procedure for each circumstance is different but the two most frequent situations of ship arrest in Vietnam are to secure maritime claims and to serve as an interim relief.

Similar to the 1999 Ship Arrest Convention, Vietnamese law recognises five maritime liens and 17 maritime claims, which give rise to the ship being arrested to secure the claims. A vessel can be arrested to secure the maritime claim against the shipowner or demise charterer, who are liable for the claim and remain in their respective roles at the time of arrest. Sister ship arrest is also allowed in Vietnam.

To obtain an arrest order from the competent local court, the arresting party must submit the arrest application enclosing the following items:

a power of attorney;
b documents supporting the underlying maritime claims; and
c proof that the person alleged to be liable for the maritime claims was the owner or demise charterer of the vessel at the time of the application (if possible).

The court should make a decision within 48 hours of receiving the application. If the application is accepted, the applicant must submit the counter security for his or her request. The value of counter security will be subject to the determination of the court. Normally, the court can refer to the normal charter hire rate multiplied by the proposed time for arrest to decide the quantum of the counter security.

Arrest orders, however, can be issued for security purposes only. This means that the Vietnamese court cannot seize the jurisdiction to hear the merit of the case upon granting the arrest order. The arrested party may provide security for the vessel's early release. The acceptable form of the security shall be decided by the court and may vary from court to court and judge to judge.

Notably, the maximum period for arresting a vessel to secure the maritime claim in Vietnam is 30 days, and to maintain further arrest the arresting party must initiate the lawsuit against the arrested party, subject to the competent jurisdiction over their dispute.

ii Court orders for sale of a vessel

The judicial sale of arrested ships in Vietnam can be carried out in two circumstances. First, if the vessel is arrested under an interim measure and the sale of the ship is required for the enforcement of the judgment. The judicial sale of the arrested ship is governed by the Law on Civil Judgment Enforcement pursuant to the court's order in the judgment.

In particular, the local courts can consider all relevant circumstances before issuing a judgment, allowing the arresting party to initiate a judicial sale of the ship. The auction must be publicised in the media at least twice with a three-day interval between the two occasions. The length of time to complete a judicial sale can vary from case to case; in some circumstances, it may take longer than half a year before the title over the ship is transferred.

Second, if the ship is abandoned upon the expiry of the period to arrest a vessel to secure the maritime claim, then a judicial sale of ship is to be made in which the proceeds from the ship sale will be submitted to the state's budget. However, in practice, we have not experienced any judicial sale of arrested ship in this second circumstance.

VI REGULATION

i Safety

Vietnam is a contracting party to the following conventions relating to safety at sea:

a the International Convention on Load Lines 19966 (the Load Lines Convention) and the Load Lines Protocol 1988;

b the International Convention on the Tonnage Measurement of Ships 1969 (the Tonnage Convention);

c the International Regulations for Preventing Collisions at Sea 1972 (COLREGs);

d the International Convention for the Safety of Life at Sea 1974 (SOLAS) and its 1978 and 1988 Protocols;

e the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 (STCW);

f the International Convention for the Prevention of Pollution from Ships 1973 (as modified by the Protocol of 1978) (MARPOL 73/78), MARPOL Protocol 97;

g the Convention on the International Maritime Satellite Organization 1976 (the INMARSAT Convention);

h the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation 1988 (1988 SUA Convention);

i the Conventional Convention on the Control of Harmful Anti-Fouling Systems on Ships 2001 (the AFS Convention);

j the 1992 Protocol replacing International Convention on Civil Liability for Oil Pollution Damage 1969 (the 1992 CLC Convention);

k the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (the Bunker Convention); and

l the Maritime Labour Convention 2006 (MLC).

The provisions of the above Conventions are adopted into various laws, decrees and circulars for its domestic implementation.

ii Port state control

The various port authorities are state agencies that perform the management of maritime activities in seaports. There are currently 25 port authorities around Vietnam that are under the management of the VINAMARINE. The port director of each seaport has the authority to regulate, restrict and prevent the movement of vessels in the port and their approach to the port, and may direct the berthing and removal of any vessel in accordance with the 2015 Maritime Code, Circular No. 07/2018/TT-BGTVT and each seaport's internal regulations. In particular, the inspection of foreign vessels is to be conducted for their compliance with SOLAS, the Load Lines Convention, the MARPOL, the STCW Convention, the Tonnage Convention, the AFS Convention, the MLC and the COLREGs.

According to the Asia-Pacific Port State Control, in 2022, the Vietnam port authorities detained two foreign vessels for deficiencies. Both of the detained vessels were released within

two weeks. Conversely, in 2022, there were 15 Vietnamese vessels that were detained in Asian ports under the Tokyo MOU, two were detained in India and Myanmar under the Indian MOU, and three were detained in Italy, France and Norway under the Paris MOU.[11]

iii Registration and classification

Registration

Ship registration in Vietnam is governed by Chapter II of the 2015 Maritime Code and Decree No. 171/2016/ND-CP amended by Decree No. 86/2020/ND-CP.

Pursuant to those regulations, Vietnamese vessels must satisfy the following criteria to be registered:

a self-propelled with main engine capacity of at least 75 kilowatts;

b non-self-propelled with a gross tonnage of at least 50 GT or a deadweight tonnage of at least 100 tonnes or a designated lead waterline length of at least 20 metres; and

c seagoing vessels that have failed to satisfy the aforementioned criteria but travel international shipping routes.

Furthermore, foreign flags must not be more than 10 years old (for passenger ships) or 15 years old (for other ships) at the time of their first registration in Vietnam. For vessels under construction, once the keel has been laid, it can be registered.

Vietnamese and foreign companies, individuals and entities that have incorporated and are operating a branch in Vietnam or have established a representative office in Vietnam may file an application to register their vessels with local ship registers.

While dual registration is not allowed, flagging out of a vessel can be done in Vietnamese waters for demise charters or ship hire and purchase. To register the vessel in Vietnam, the current foreign-flag registration of the vessel needs to be suspended during the period of flagging out.

The required dossier for permanent registration of a vessel in Vietnam includes:

a the ship registration application as a standard form;

b for a sale, the deregistration or deletion certificate from the current register, or for new construction, acceptance minutes for ship delivery;

c the ship sale contract, shipbuilding contract or other prevalent proof of title over the ship to be registered;

d the ship tonnage certificate;

e the ship classification certificate;

f payment receipt of registration fee; and

g the shipowner's certificate of incorporation, branch or representative office licence in Vietnam for entities, or identity card for individuals.

Recently, the Vietnam Maritime Administration issued a document informing the shipowners on the newly established Decree No. 123/2021/ND-CP relating to the supplementation and aggravation of administrative sanctions on ship registration. Relating to ship registration and deregistration, certain provisions may generally be breached, including, inter alia, that the shipowner does not:

a register the change in ship information;

11 http://www.vr.org.vn/Pages/thong-bao.aspx?ItemID=2262.

b change the Minimum Safe Manning Certificate under the provisions of Regulation 14 of Chapter V of SOLAS 1974 as amended when the ship operator or manager changes; and

c carry out deregistration pursuant to the law.[12]

Classification

The only local classification society that has the authority to approve the classification of a vessel is the Vietnam Register (VR). However, there are 13 classification societies that are members of the International Association of Classification Societies with the approval of VR, from which the candidate vessel can obtain certificates, including:

a the American Bureau of Shipping;
b Bureau Veritas;
c the China Classification Society;
d Lloyd's Register;
e Germanischer Lloyd;
f Det Norske Veritas;
g the Korean Register of Shipping;
h Nippon Kaigi Kyokai;
i Registro Italiano Navale;
j the Russian Maritime Register of Shipping;
k the Croatian Register of Shipping;
l the Indian Register of Shipping; and
m the Polish Register of Shipping.

In theory, an injured third party may file a claim in tort against the classification society if a duty of care owned by the classification society is breached by negligent misstatement causing pecuniary loss to the claimant. To date, we have not experienced any such case in Vietnam.

iv Environmental regulation

Air and sea pollution is governed by the 2020 Law on Environment Protection. Recently, the Ministry of Transport has approved a project for the development of green ports in Vietnam. As a member of UNCLOS 1982, Vietnam has actively implemented various protection and preventative measures to protect sea environment and habitat, with the main focus on the reduction and prevention of oil pollution at sea.

The Vietnam Maritime Administration has also been conducting necessary measures to put a limit on the amount of sulphur in fuel oil and there are some limitations for the sulphur content in fuel oil used in different territorial waters of Vietnam

v Collisions, salvage and wrecks

Collisions

Vietnam is a member of the 1972 Convention on the International Regulations for Preventing Collisions at Sea. Furthermore, ship collision is also governed by the 2015 Maritime Code.

12 https://vinamarine.gov.vn/f/121.pdf.

Salvage and wreck removal

Vietnam has ratified the 1974 International Convention for the Safety of Life at Sea, and 1979 International Convention on Maritime Search and Rescue. However, Vietnam is not a contracting party to either the International Convention on Salvage 1989 or the 2007 Nairobi International Convention on the Removal of Wrecks. Therefore, the operation of salvage and wreck removal is mainly governed by the 2015 Maritime Code and Decree No. 05/2017/ND-CP (amended and supplemented by Decree No. 69/2022/ND-CP) regarding the regulation on treatment properties sunk in inland waterways, port waters and territorial waters of Vietnam.

Accordingly, the owner of the sunken properties (e.g., the shipowner) is responsible for performing the salvage and wreck removal. In the event of sunken ships, if the shipowner is slow or unidentified or fails to submit and perform the removal plan approved by the local authorities, the local authorities are entitled to initiate the wreck removal operation and seek reimbursement from the shipowner or sell the wreck through auction to reimburse the salvage costs.

In practice, the local authorities tend to chase the shipowners and their insurers for the salvage and wreck removal. In an emergency case, such as an oil leak, the local authorities usually perform certain preventative measures to reduce the risk of environment pollution at sea.

vi Passengers' rights

Vietnam is not a contracting party to the Athens Convention. The rights of passengers are governed by Chapter VIII of the 2015 Maritime Code and Chapter XVI of the 2015 Civil Code. Notably, Vietnam invalidates any agreement on the prevention of passengers' rights or release, which reduces the liabilities of the carrier under Chapter VIII of the 2015 Maritime Code.

Furthermore, the carriers are also liable to compensate the passengers, and the passengers are entitled to claim for personal death, injury or loss, or damage to luggage due to the default of carriers, their employees or agents. The default of carriers, their employees or agents is *prima facie* unless it is proven to be due to collision, wreck, destruction, draught, explosion, fire, defect or latent defects, or due to loss or damage to luggage (if it is proved that the loss or damage is not attributable to the cause of such loss or damage).

vii Seafarers' rights

Vietnam is the 37th country to have ratified the 2006 Maritime Labour Convention, on 23 March 2013. In late July 2013, the Prime Minister established a plan for the implementation of the Maritime Labour Convention.[13] Accordingly, the Vietnamese government has established a number of regulations guiding the implementation of certain provisions of the Convention, including, inter alia, Decree No. 121/2014/ND-CP dated 24 December 2014 of the government regarding the working conditions of seafarers employed aboard ships. These provisions were later adopted into Chapter III of the current 2015 Maritime Code. In addition to the 2015 Maritime Code, seafarers' rights are also governed by the 2019 Labour Code and the 2015 Civil Code, as well as their respective guiding regulations.

13 https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/97026/114950/F2074730156/VNM97026%20Vnm.pdf.

Vietnam also recognises several maritime liens attached with claims against the shipowner, charterer and operator. Among those claims, the claim with the highest priority for resolution is the claim for the seafarers' salary, repatriation cost, social insurance contribution cost and other monetary amounts, which must be paid to the master, officer and other seafarers in the crew aboard a ship.[14]

VII OUTLOOK

Vietnamese maritime law has not kept up with the pace of growth in trade and shipping because the shipping industry in Vietnam has faced rapid development. However, the impact of the covid-19 pandemic on the global shipping industry may cause the Vietnamese government to focus on the development of port facilities, benefiting ship fleets and capacities. Positive amendments and supplements of the regulations on maritime activities are expected to keep the Vietnamese shipping laws closer to international standards and to support the development of the shipping industry in Vietnam.

14 Article 41 of the Maritime Code 2015.

Appendix 1

ABOUT THE AUTHORS

ADEDOYIN AFUN

Bloomfield LP

Adedoyin Afun is a partner and chair of Bloomfield LP's acclaimed shipping and oil services practice group. He holds an LLB (Hons) from Nigeria's premier university, the University of Ibadan, and an LLM (international commercial and maritime law) from Swansea University, Wales, and is qualified to practise in Nigeria and England and Wales.

Adedoyin has advised extensively on the structure and implementation of complex, multimillion-dollar shipping transactions, oil and gas-related projects, matters involving cross-border joint ventures (to take advantage of the Nigerian Oil and Gas Industry Content Development Act and the Nigerian Cabotage Act), ship and aircraft finance and lease, registration of ship and aircraft mortgages and interests, port concessions, corporate restructuring, maritime claims and casualties – litigation, arbitration and mediation, regulatory compliance and other wider-ranging issues within the Nigerian aviation, logistics, shipping and oil services industries.

He has authored and presented papers on maritime law and practice in local and international publications and forums. He has also been recognised in the shipping and transport rankings of international directories such as Who's Who Legal and The Legal 500. Adedoyin also has considerable experience in aviation and logistics, asset management and private equity, corporate finance, commercial litigation and arbitration, and project and asset financing.

Who's Who Legal says: 'Adedoyin Afun is one of the foremost shipping lawyers in the Nigerian market and enjoys a stellar reputation for his work on transactions, financings, disputes and insurance matters across the sector'. Who's Who Legal also recognises him as a 'national leader' and 'global leader' in shipping. The Legal 500 (2018–2022) lists Adedoyin as a leading individual in its commercial, corporate and M&A rankings for Nigeria.

YAMAN AL HAWAMDEH

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Yaman Al Hawamdeh is a partner in HFW's office in Dubai. He qualified in 2002, and built up his regional practice and local litigation experience through working with top local firms in Jordan and the UAE. He is fluent in Arabic and English, and is registered as a foreign lawyer with the Law Society of England and Wales.

Yaman is highly regarded for both his shipping litigation expertise and his extensive experience within the Arabian Gulf region. His practice focuses on regional shipping disputes

and litigation, including cargo disputes, offshore collisions and fraud under bills of lading. He represents P&I clubs, charterers and shipowners, and has successfully litigated a substantial number of shipping disputes before UAE courts and other local courts within the Arabian Gulf and Middle East. Although his practice is mainly litigation focused, he also advises local port authorities on non-contentious shipping matters and regulatory issues.

Yaman also advises on a large number of non-marine-related matters, including civil and commercial disputes arising out of tort and negligence, personal injuries and commercial agencies. Yaman has extensive experience of handling criminal proceedings in the UAE involving corporate fraud, and has represented banks in respect of various finance disputes related to letters of credit and fraud in documentary credit transactions.

PETER APPEL

Gorrissen Federspiel

Peter Appel is a senior partner at Gorrissen Federspiel. He graduated with a master's degree in law from the University of Copenhagen in 1985. In 1990, he became a Master of Laws (LLM) from the London School of Economics. He has worked as an attorney with Gorrissen Federspiel since 1985, becoming a partner in 1994. He was managing partner from 2010 to 2015 and chairman of the firm from 2015 to 2020. He was admitted to the Danish Supreme Court in 1996 and regularly appears before the Court.

Peter works on all aspects of shipping as an adviser to a large number of Danish and foreign shipping companies. He has an extensive international network, among other things, from his time as chairman of the IBA's Maritime and Transport Law Committee. He provides assistance with infrastructure projects and has extensive knowledge about ferry service and train and harbour projects. He has extensive experience with matters pertaining to Greenland. Peter assists a number of Danish and international NGOs in the transport sector. He also has a political network and is often involved in cases that also involve social considerations and public opinion.

Peter is a co-author of the Danish-annotated Merchant Shipping Act 2020 and a contributor to a number of other publications.

GUDMUND BERNITZ

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Gudmund Bernitz is a finance lawyer with specialist experience in shipping, offshore and export financings. He acts for a range of finance providers and borrowers or sponsors on a variety of matters, including new financings, leasing transactions, restructurings, work outs and enforcements. He also advises a variety of corporates, particularly in the shipping and offshore sectors, on sale and purchase, charters, building contracts and other commercial matters.

He has spent time on a number of client secondments, including to the export finance team of a major international bank, the legal team of a specialist international asset finance bank, a geophysical services company and a leading shipping company. He regularly lectures on shipping and ship finance and has contributed to a number of publications on the subject.

According to *The Legal 500*: 'Gudmund Bernitz provides "very clear and efficient advice" for banks and borrowers in the shipping sector' and, according to *Chambers and Partners*, 'Gudmund Bernitz is noted for his shipping finance expertise'. Gudmund is qualified as a solicitor in England and Wales and as an *advokat* in Sweden.

RAMIRO BESIL EGUIA

Adame González de Castilla & Besil

Since 2005, Ramiro Besil Eguia has provided legal advice to companies in the maritime and offshore industries in issues involving contracts, pollution, regulations, liability and bankruptcy procedures and in administrative procedures before different Mexican authorities. He has also worked for owners, charterers, insurers, reinsurers and brokers, providing both advice and legal defence regarding liability, coverage and regulatory issues.

Before founding AGB, Ramiro worked for more than 12 years for a major Mexican law firm specialising in marine, insurance and reinsurance law, oil and gas, and transportation, where he gained expertise in contentious matters, providing legal advice and assistance to shipowners, charterers, P&I clubs and hull underwriters in casualties within Mexican waters, legal advice and assistance to shipowners, charterers, P&I clubs and cargo interests in respect of cargo issues and disputes.

Additionally, Ramiro provides legal advice and assistance in transactional matters, including aircraft and ship finance, building contracts, securities, registration of titles, mortgages and other guarantees.

Ramiro obtained his law degree from the University of Veracruz in 2005. He completed the Maritime Law Short Course at the University of Southampton in 2008 and worked on a secondment in a major London city firm between 2013 and 2014.

Ramiro is also a member of the Mexican Association of Insurance and Sureties Law and the Mexican chapter of the International Association of Insurance Law.

CARLITA BLOECKER

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Carlita Bloecker works across the shipping and commodities fields. In the shipping sphere, she has broad experience in contentious matters acting on behalf of vessel owners, P&I clubs, charterers, freight forwarders, stevedores, vessel repairers and warehousing operators across matters involving shipbuilding, vessel arrests and damage to cargo or vessels as well as defending criminal proceedings in respect of environmental or animal welfare obligations. She particularly enjoys a strong relationship with local and international P&I clubs. In the commodities sphere, she has acted on behalf of clients in respect of the contentious and non-contentious sale and purchase of commodities, and ancillary contracts of carriage (including bills of lading, charterparties and contracts of affreightment). Carlita has acted on behalf of clients in most states across Australia and arbitral proceedings before the LMAA. Carlita speaks English and German and is qualified in Victoria, Australia.

SIMON BLOWS

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Simon Blows acts in complex commercial litigation cases and international arbitrations, and advises on contract wordings. His clients are engaged worldwide in the construction and design of ships, the transportation, trading and insurance of goods and commodities, and the offshore industry.

Mr Blows has been involved in shipbuilding cases for more than 25 years. He has conducted substantial arbitrations and court actions involving shipbuilding and offshore for shipyards, banks and buyers, and has advised on many cancellations and renegotiations.

JAMES BROWN

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James Brown is the firm's shipping head for the Americas. He is licensed by the United States Coast Guard as master and first-class pilot. His practice focuses on maritime personal injury, collision and offshore energy matters. He also handles marine and energy administrative proceedings before state and federal regulatory bodies. Mr Brown is admitted to practise before the Supreme Court of the United States, the US Court of Appeals for the Fifth Circuit, the Southern, Eastern, Western and Northern Districts of Texas, and all Texas state courts. He is a maintaining member in the College of the State Bar of Texas and has served on the faculty of the State Bar's Advanced Personal Injury Law Course.

Mr Brown attended law school after working in industry. He received his BS in marine transportation with honours from Texas A&M University and is a graduate of the University of Houston Law Center. Mr Brown is a Proctor in Admiralty in the Maritime Law Association of the United States and served as a director of the Southeastern Admiralty Law Institute.

He has published articles in numerous journals, including *Journal of Maritime Law & Commerce*, *American Journal of Trial Advocacy* and the State Bar of Texas' *Texas Environmental Law Journal*.

JONATHAN BRUCE

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Jonathan Bruce specialises in marine and energy/property insurance and reinsurance, as well as shipping. He acts mainly for insurers, reinsurers, brokers, energy companies, shipowners, P&I and charterers. He has significant experience in Latin American matters (he speaks Spanish and Portuguese, as well as French) and has worked extensively with eastern European countries, as well as the Middle East, Africa and Asia.

On the marine side, Mr Bruce acts in coverage and recovery and defence claims arising from losses worldwide, including hull and machinery damage, groundings and collisions, salvage and towage, general average and defective bunkers. He also acts in charter party and bill of lading disputes. As to energy insurance, he acts in coverage and subrogation claims involving property and business interruption, pipeline damage and pollution, general liability, builders' risks and 'construction all risks', delay in start-up and control of wells in both onshore and offshore energy, extending also to the power, mining and industrial sectors.

JEAN CAO

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Jean Cao is a China-qualified lawyer with 18 years of practice in shipping and insurance law. Before joining HFW in 2009, she worked for China P&I as a claims executive for six years, where she gained extensive experience of marine claims handling, and for a local firm for eight years.

She graduated from Dalian Maritime University, and was awarded a master of laws degree from the University of Southampton.

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Simon Cartwright is a transport and trade law specialist, with expertise in shipping (wet and dry), insurance, logistics, trade finance and international debt recovery.

He was previously a partner in an international law firm, leading its shipping and commodities practice in the Middle East. He heads Hesketh Henry's trade and transport practice.

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Jennifer E Cerrada specialises in corporate law and taxation. She has almost 20 years of experience working on special projects to create appropriate corporate structures to maximise tax benefits for foreign corporations and individuals wishing to do business in the Philippines. In addition, she is active in ship deliveries, registration and deregistration of ship mortgages.

She completed her BSc in management, majoring in legal management and minoring in French studies at Ateneo de Manila University, and obtained her bachelor of laws degree at Arellano School of Law.

ANDREW CHAMBERLAIN

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

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

Andrew lectures regularly on salvage, wreck removal and casualty response and is an acknowledged expert in the field. He has been invited to be chairman of the Lloyd's Salvage and Wreck Removal conference in London (the leading global industry event) every year since 2013. He is consistently recommended in Chambers ('Andrew Chamberlain is highly respected in ship casualty work', Chambers 2022) and The Legal 500 for his work on shipping and casualty matters, with one source commenting, 'What he doesn't know about shipping isn't worth knowing' (Chambers 2016).

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Thomas E Christensen is a senior legal counsel at Gorrissen Federspiel. He graduated with a master's degree from the University of Copenhagen in 2013 and a *magister juris* decree from

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HOLLY COLAÇO

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Holly Colaço is a knowledge lawyer in London specialising in shipping litigation. She is responsible for knowledge management, and internal and external training on a range of shipping topics. She edits *The Shipping Law Review*, writes and edits legal briefings, and supports the work of the shipping practice globally.

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

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

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Geoffrey Conlin is a partner at HFW and a foreign law consultant at Costa & Albino Advogados in Brazil. He is an English lawyer and is registered as a foreign lawyer with the Order of Attorneys of Brazil, where he has been based since February 2013. Geoffrey acts mainly for charterers, commodity traders, insurers and reinsurers. He specialises in resolving complex marine insurance claims (cargo, hull and machinery, and liability) and is an expert in ports and terminals work. He is a member of the British Insurance Law Association and has presented on shipping, insurance and reinsurance related issues in the United Kingdom and in various countries in Latin America.

DANG VU MINH HA

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Dang Vu Minh Ha is a commercial and maritime expert. Her practice focuses on commercial and maritime arbitration, maritime insurance, all types of shipping, dry and wet work, collision, cargo claims, disputes in respect of bills of lading, seaway bills and charter parties, bunker disputes, exercise of liens, ship arrest and insurance policy disputes.

Specialising in international commercial law, Minh Ha actively participates in both shipping and arbitration and ADR groups of Dzungsrt & Associates LLC.

In addition to client work, Minh Ha is the co-author of a number of publications on arbitration, mediation and investor-state dispute settlement (ISDS). In particular, she is the co-author of very critical research on the mechanisms of ISDS under the European Vietnam Investment Protection Agreement, which is published by Cambridge University Press.

Minh Ha also contributed to the drafting process of parts of the 2015 Civil Procedure Code of Vietnam related to arbitration and mediation and Decree No. 22/2017/ND-CP on Commercial Mediation.

PAUL DEAN

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Paul Dean is global head of shipping at HFW, managing 200 specialist shipping lawyers across a worldwide network of 20 offices. Paul specialises in offshore and marine, focusing mainly on charter parties, bills of lading, shipbuilding, rig disputes, collisions, fire and explosion, salvage, general average, groundings, total loss, towage, seismic and limitation.

He regularly speaks at and chairs offshore vessel conferences and has been teaching on the BIMCO panel for its 'Using SUPPLYTIME' course for more than 10 years, the review committee for the SUPPLYTIME 2005 revision and on the drafting committee for BIMCO's new standard form Offshore Dismantling Services Agreement, DISMANTLECON. Experience gained working for an International Group P&I Club specialising in offshore vessels enables Paul to combine practical understanding with the legal role.

Paul is identified in the legal directories as one of the leading individuals in his fields and is recognised by Lloyd's List as one of the 100 most influential people in the maritime industry and one of the market's top 10 lawyers in 2019 and 2020.

Paul has also contributed to the two most recent editions of *The Law of Tug and Tow and Offshore Contracts* by Simon Rainey QC: 'Paul Dean of HFW, one of the leading and busiest practitioners in the field of offshore contracts and a veritable guru on the topic of the BIMCO forms, particularly "Supplytime", who as before very kindly gave me the benefit of his great experience and practical insights and with whom once again I have had the great good fortune to work.'

Paul is qualified in England and Wales.

MONA DEJEAN

HFW

Mona Dejean specialises in shipping law and has 15 years' experience in handling complex shipping and transport matters as part of HFW's Paris shipping team.

She advises and represents shipowners, P&I clubs, hull and machinery underwriters, charterers and cargo interests. She advises on all types of shipping disputes, including both major casualties (collisions, grounding, sinking) and other more common disputes, such as cargo claims, ship arrests, demurrage claims, marine insurance and shipbuilding contracts.

Mona Dejean represents clients before the French courts (court-ordered surveys, disputes before the commercial courts) and in arbitration. She also advises on the enforcement of foreign legal proceedings.

VALERIANO R DEL ROSARIO

VeraLaw (Del Rosario Raboca Gonzales Grasparil)

Valeriano R Del Rosario, managing partner of VeraLaw, has extensive education and business experience in the United States and Europe. He was admitted to the Philippine Bar in 1982. He obtained a master's degree in maritime law from the University of Wales, followed by three years' work experience at a prestigious shipping law firm in the City of London.

He is a shipping law specialist and has acted for the 4,000 victims of the *Doña Paz*, a case that has successfully been concluded. Lately, he has been active in ship pollution claims on behalf of owners.

He was president of the Maritime Law Association of the Philippines in 2000.

BERNARDO DE SENNA

Costa & Albino Advogados

Bernardo de Senna is a partner at Costa & Albino Advogados in Brazil. He assists the (re)insurance and shipping industries, representing foreign and Brazilian clients in court and in arbitration, both in Brazil and abroad. Bernardo also advises on coverage issues and non-contentious (re)insurance, as well as on dry and wet shipping matters, including in claims handling and loss adjustment procedures. He is well-versed in transnational disputes, having worked in cases throughout Latin America. Bernardo is a member of the International Insurance Law Association and the Brazilian Maritime Law Association, and is a former member of the Maritime Law Committee of the Rio de Janeiro Bar (2016–2018).

THOMAS DICKSON

HFW

Thomas Dickson specialises in international commercial dispute resolution, with a focus on shipping disputes. He advises on both wet and dry shipping matters, including salvage cases, wreck removal, groundings, collisions and cargo damage, and on various charter party-based disputes arising from these incidents.

Thomas spent six months in HFW's Geneva office, where he acted on a range of contentious matters.

Thomas has experience of English Commercial and Admiralty Court proceedings, and international arbitration. He is qualified in England and Wales.

PABITRA DUTTA

Bose & Mitra & Co

Pabitra Dutta is a principal associate at Bose & Mitra & Co and joined the firm in 2016. He completed his BSL LLB from the Indian Law Society's Law College, Pune. Pabitra appears before the Supreme Court, various high courts and arbitrations in various commercial matters of shipping and trade. Over the years, he has dealt with ship arrests and releases, marine insurance disputes, cargo-related disputes, mortgage disputes, court auctions, insolvency, customs related matters, personal injury claims, dredging disputes and enforcement and execution of foreign and domestic awards and judgments. Pabitra has experience in the transactional shipping sector and has dealt with transactions related to ship sale and purchase and ship financing. He has been enrolled with the Bar Council of Maharashtra and Goa since 2016.

CATHERINE EMSELLEM-ROPE

HFW

Catherine Emsellem-Rope is a transactional lawyer who specialises in complex contractual arrangements in the logistics, ports and terminals and shipping sectors, with a focus on major

projects and supply chain issues. She has a unique understanding of the logistics industry gained from many years working for leading logistics providers. Catherine advises on a broad range of commercial arrangements, including master agreements and general terms and conditions for use in her specialist sectors. She has extensive experience in contract drafting and negotiation on a national and international basis. Catherine also provides advisory services to all those involved in the supply chain, including logistics providers, freight forwarders, non-vessel operating common carriers and buyers of logistics services.

Before joining HFW, Catherine spent nine years in the logistics sector, where she led commercial negotiations with major blue chip customers.

Catherine is a qualified lawyer in England and Wales.

CAROLINA FRANÇA

Costa & Albino Advogados

Carolina França is a dual-qualified Brazilian lawyer and barrister-at-law in England and Wales, with broad international experience. As a maritime law practitioner, she advises clients in common law and civil legal systems conflict, notably the English legal system. Carolina França specialises in various consultative matters by dealing with marine and cargo claims, oil pollution, protection and indemnity, ports and terminals and regulatory matters. She has also been widely involved in emergency responses to complex accidents (e.g., on-board explosions, collisions, oil spill and ship grounding), working closely with maritime authorities and other regulatory bodies. Carolina França is also a member of Wista Brazil, the Ibero-American Institute of Maritime Law and the Brazilian Maritime Law Association.

JEAN-PIE GAUCI-MAISTRE

Gauci-Maistre Xynou

Dr Jean-Pie Gauci-Maistre is the managing partner of Gauci-Maistre Xynou. He specialises in ship and yacht registrations under the Malta flag, and ship and yacht finance. With the amendments to Maltese aviation law in recent years, he has also focused on the firm's aviation practice.

Dr Gauci-Maistre's focus throughout his career has been in different areas of the maritime industry. Following stints with the European Commission cabinet for Maritime Affairs and Fisheries and the internationally renowned ship management company Eastern Mediterranean Maritime Limited, he moved to Malta to head the legal department of GM International Services Limited and GM Corporate and Fiduciary Services Limited. Nowadays, he is actively involved in the management and operations of the group of companies.

Dr Gauci-Maistre is a guest lecturer at various institutions, notably the World Maritime University and the Malta Institute of Taxation, and contributes to various publications.

RUCHIR GOENKA

Bose & Mitra & Co

Ruchir Goenka, principal associate, has been with the firm for over six years and has been involved in a wide variety of contentious and non-contentious matters. He regularly deals with general commercial matters and shipping specific disputes, such as cargo claims, demurrage disputes, and the enforcement and execution of foreign awards and foreign judgments. He also addresses collisions and marine casualty investigations.

MARIA THERESA C GONZALES

VeraLaw (Del Rosario Raboca Gonzales Grasparil)

Maria Theresa C Gonzales is a partner in the law firm of VeraLaw. She has 25 years of legal experience in four practice areas: intellectual property law, commercial and maritime arbitration and litigation, and enforcement of foreign arbitral awards and foreign judgments. She obtained her law degree from San Beda College of Law and her master's degree in international commercial law at the University of Nottingham.

STEFFI GOUGOULAKI

HFW

Steffi Gougoulaki is an associate in the litigation team of the firm's Piraeus office. She regularly advises shipowners and their insurers, and specialises in international shipping dispute resolution, with a particular focus on disputes arising from contracts of affreightment, charter parties, bills of lading, shipbuilding and claims for total loss indemnity. Steffi is qualified in England and Wales. She is fluent in English and Greek.

DAPHNE RUBY B GRASPARIL

VeraLaw (Del Rosario Raboca Gonzales Grasparil)

Daphne Ruby B Grasparil has over 20 years' experience in various area of law, including corporate law, focusing on the establishment of shipping enterprises and obtaining government licences and regulatory approval, and crew claims, in which she acts for shipowners, P&I clubs and crewing companies for disability claims and termination cases before the National Labour Relations Commission and the National Conciliation and Mediation Board.

She has occupied various positions at the Maritime Law Association of the Philippines, such as internal vice president for resource development in 2016, vice president for internal relations in 2011 and vice president for legal education and training in 2010.

Ms Grasparil obtained both her bachelor of arts degree in economics and *juris* doctor degrees from Ateneo de Manila University. She was admitted to the Philippine Bar in 1996.

JOHN HARRIS[†]

Harris & Co Maritime Law Office

Advocate John Harris (1940–2023) was a founding partner with more than 48 years of experience. He was consistently highly recommended with a 'top tier' rating for shipping and maritime law (transportation) in Israel by leading international legal rating institutions. John Harris recently passed away.

YOAV HARRIS

Harris & Co Maritime Law Office

Advocate Yoav Harris graduated in 1999 *summa cum laude* from the law faculty of Haifa University. He specialises in maritime law and commercial litigation.

Advocate Yoav Harris contributes to articles in *The Cargo* – an Israeli monthly magazine – and is the co-author with Advocate John Harris of the Israeli chapters of the annual *Ship Arrest In Practice* guide of Shiparrested.com and for the *Shipping Global Practice Guide* for Chambers and Partners. He also writes for The Legal 500, ICLG, Lexology and Mondaq.

Advocate Yoav Harris regularly receives instructions from the foremost shipping and maritime law departments of international law firms and keeps abreast of English and other jurisdictions' maritime law judgments and publications.

Advocate Yoav Harris is ranked as a top tier lawyer by Chambers and Partners ('Yoav Harris is always available and very methodical'), The Legal 500, Duns 100 and BDI.

CHRIS HART

HFW

Chris Hart's practice focuses on shipping, marine and energy companies, including litigation and commercial transactions. He is an experienced trial lawyer, resolving disputes in federal and state courts and in arbitration. He advises clients in transactions involving charter parties, maritime contracts, offshore energy and master service agreements, and infrastructure projects with maritime law concerns. Chris also advises on regulatory compliance, including Jones Act coastwise trade and shipping regulations.

Chris has been a speaker and author for presentations and articles on topics including offshore wind farms, offshore drilling, coastwise trade laws, bunker contracts, offshore support vessel charter parties and many maritime law issues.

Chris is admitted to practise in Texas, in the Southern, Eastern and Western Districts of Texas, in the US Courts of Appeals for the Fifth and Tenth Circuits, and in the Supreme Court of the United States.

Before practising law, Chris sailed as a professional mariner.

WILLIAM HOLD

HFW

William Hold is a partner in HFW's Geneva office. He regularly acts for trading companies in charter party disputes and trade disputes involving a range of physical commodities. He has acted in arbitrations governed by the Swiss Rules of International Arbitration, and the rules of the International Chamber of Commerce, the Singapore International Arbitration Centre, the RSA and the German Institution of Arbitration (DIS).

Mr Hold also has a non-contentious practice and he often advises lenders and borrowers on commodity finance matters, and other parties on general commercial issues, which usually concern commodities trading.

Before joining HFW, he practised for several years as an *avocat* in Geneva and spent several further years in Singapore practising as a foreign lawyer in the shipping and trade department of one of the largest firms in South East Asia.

NICOLA HUI

HFW

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

COLIN HUNTER

Hesketh Henry

Colin Hunter is a maritime and insurance law specialist and previously worked with a specialist insurance firm focusing on maritime law. He joined Hesketh Henry in 2022 and primarily does trade and transport work.

Colin regularly speaks at private and maritime law conferences in New Zealand and Australia. He is on the committee for the New Zealand branch of the Maritime Law Association of New Zealand and Australia.

TARIQ IDAIS

HFW

Tariq Idais has been a Jordanian-qualified lawyer since 2008 and a shipping lawyer in the UAE for more than nine years.

MAREK KACPRZAK

Kacprzak Legal

Marek Kacprzak is a managing partner and an attorney-at-law at Kacprzak Legal. He has extensive experience advising and pursuing matters in the field of Polish and international commercial, civil, maritime and transportation law. He specialises in advising the maritime and shipbuilding sector on, in particular, offshore projects and shipbuilding projects for shipyards, shipowners and banks. As well as this, he advises foreign and domestic airlines and insurance companies on transportation law, including aviation law. His expertise also includes advising on infrastructure projects within the areas of road transport, rail transport, shipping, aviation and energy. He has been a speaker at many international conferences and training courses for foreign lawyers; for example, in Stuttgart in the area of transportation law, in Antwerp in the area of contract law and at the IHK Schleswig-Holstein in Kiel in the area of industrial and real estate law. Marek Kacprzak is a trusted lawyer of the Embassy of Austria in Warsaw and an Honorary Consul of Austria in Gdańsk. He is a senior lecturer at the Gdynia Maritime University in the postgraduate course 'Risk management in the offshore mining industry and wind energy' and in the MBA course 'Executive offshore wind MBA'.

PARIS KARAMITSIOS

PPT Legal

Paris Karamitsios is head of litigation at PPT Legal's Piraeus office. He specialises in Greek civil litigation, including insurance, shipping, transportation, commercial and banking law matters. He is fluent in Greek, English and German.

ANTONIS J KARITZIS

A Karitzis & Associates LLC

Antonis Karitzis is the founder of A Karitzis & Associates LLC. He is an advocate, a legal consultant and the managing partner of the firm. He is also a member of the Limassol Bar Association.

Antonis received his law degree from the University of Manchester in 2002. His knowledge and experience extends to various fields, including shipping, corporate, commercial, trusts, tax, property, litigation, admiralty and administrative actions.

He has successfully handled some of the firm's most high-profile cases, including multimillion-dollar claims. Antonis is currently studying with the Chartered Institute of Taxation, a programme that enhances his knowledge on tax issues. He has also completed all the core courses of the demanding and intensive MBA programme with the Cyprus International Institute of Management and this has equipped him with the requisite knowledge and skills to lead and manage the law firm in a well-organised and diligent manner.

NICHOLAS KAZAZ

HFW

Nicholas Kazaz is a senior associate at HFW. He is an experienced international commercial dispute resolution lawyer, specialising in offshore oil and gas, energy and marine. He focuses on disputes arising from installation contracts, charter parties, bills of lading, shipbuilding, rig disputes, towage, collisions, salvage, general average, groundings, total loss and limitation. Clients he advises include energy companies, cable owners and operators, contractors, shipowners, charterers, shipyards, ship managers, brokers, insurers and P&I clubs. His experience extends to all the major arbitral institutions, including LCIA, ICC, SIAC, SCMA, LMAA, ad hoc arbitration and the English courts.

ALEX KEMP

HFW

Alex Kemp predominantly advises clients on the legal issues arising from casualty management and crisis response, including salvage, wreck removal, groundings, collisions, fires and piracy, with a particular interest in container ship casualties and war risk claims. Alex has extensive experience in marine insurance, advising insurers, brokers and assureds in relation to hull and machinery, war, kidnap and ransom, increased value, cargo, builders' risks, yacht, and ports and terminals insurance policies. He is also part of the firm's dedicated yacht team.

Alex has been involved in a number of reported High Court cases, including *Osmium Shipping Corporation v. Cargill International SA (The Captain Stefanos)*, *Taokas Navigation SA v. Solym Carriers Ltd (The Paiwan Wisdom)*, *The Owners of the Ship 'Theresa Libra' v. The Owners of the Ship 'MSC Pamela'*, *The Owners of the Ship 'Stolt Kestrel' v. The Owners of the Ship 'Niyazi S'*, *The Atlantik Confidence* and *The Stema Barge II* in the High Court and the Court of Appeal.

He has spent time in the firm's Dubai office and has undertaken a secondment to the legal department of an oil major and a London market insurer.

Alex is an associate member of the Association of Average Adjusters. He has been part of the Association of Average Adjusters' Committee of Management and was involved in the UK Chamber of Shipping's working group on general average for the 2016 revisions to the York-Antwerp Rules.

Alex has been named as a Next Generation Lawyer in *The Legal 500: UK* 2017, 2018 and 2019 and a Next Generation Partner in *The Legal 500: UK* 2020.

C J KIM

Choi & Kim

C J Kim is a founding partner of Choi & Kim, the leading maritime and insurance law firm in Korea. For over 30 years, he has handled major maritime, insurance and cross-border matters of both a contentious and non-contentious nature. A PhD holder in commercial law, he has also authored extensive articles on a variety of topics, including 'Hanjin Shipping's Bankruptcy', 'Duplicate Limitation Proceedings for Shipowners in Korea', 'Anti-suit Injunction in Arbitration' and 'Window Dressing and D&O Policy'. Mr Kim advises the IOPC Fund for the *Hebei Spirit* case, the largest oil spill incident in Korean history. He served as a mediation commissioner for the Seoul High Court and still serves as arbitrator for the KCAB. He was also in charge of the government-initiated taskforce to investigate the *Sewol Ferry* incident, a tragic sinking of a passenger ferry that resulted in the deaths of over 300 people, a case that later became a political controversy in Korea.

ITTIROTE KLINBOON

Chandler MHM Limited

Ittirote Klinboon is counsel at Chandler MHM Limited in the litigation and dispute resolution practice group. Ittirote specialises in representing multinational organisations and has represented many business operators in a wide range of litigation and dispute resolution matters, civil and criminal cases, domestic and international arbitration, commercial, insurance and reinsurance, and labour and criminal cases.

TAKUTO KOBAYASHI

TMI Associates

Takuto Kobayashi is a senior associate in the shipping practice group at TMI Associates.

He graduated from Kyoto University and completed an MA in maritime law at Waseda University (Japan) after qualifying as an attorney in Japan. He completed his second master's degree at the University of Southampton (England). He advises shipowners, charterers, P&I clubs, underwriters, shipbuilders, trading houses, among other parties. He has experience in litigation and arbitration, such as cargo claims, tort claims and contractual claims on ship sales, shipbuilding and charter parties. He also advises on transactions for offshore projects, M&A and other corporate finance transactions for maritime industry.

MICHALINA KOS-KACZYŃSKA

Kacprzak Legal

Michalina Kos-Kaczyńska is an attorney-at-law at Kacprzak Legal. She specialises in maritime law and transportation law, and international court and arbitration proceedings. She represents insurers as well as transport and forwarding companies in court disputes regarding domestic and international transport claims. Michalina has many years of experience in representing clients in foreign court proceedings and international arbitration proceedings. She has substantial experience in advising and representing clients in the field of shipbuilding and offshore construction. She provides advice on maritime law, including drafting shipbuilding

agreements, the sale and purchase of vessels, ship management, casualties, salvage, registration in national and foreign registers. She is a graduate of the University of Gdańsk and gained her professional experience among other in the legal department of the largest Polish bank.

MARCO LOPEZ DE GONZALO

Studio Legale Mordiglia

Marco Lopez de Gonzalo has worked in the profession since 1982, acquiring in-depth knowledge in various fields of international commercial shipping. His expertise covers ship purchase and sale operations, reflagging and construction, financing, and debt restructuring. In the energy sector, Mr Lopez offers consultancy for the construction of regasification plants and trans-shipment plants. He has been appointed as an arbitrator by clients and courts both in Italy and abroad.

Mr Lopez has been a professor in maritime law at the University of Milan since 2001. He has also been a key speaker at many conventions and has authored a number of publications, including two research monographs, a university textbook and various articles. He is the chief editor of *Diritto Marittimo*, a member of the editorial committee of *Diritto del Commercio Internazionale* and is on the scientific committee for *Diritto del Turismo*.

ALLIE LOWETH

HFW

Allie advises clients on a wide range of marine, commercial and international matters in the offshore and energy sectors. She has extensive practical experience of both transactional and contentious work, including more than five years working in-house for a global energy service company. Allie's work comprises advising on regulatory issues, day-to-day operational matters, contracts (including charters, offshore service contracts, shipyard agreements, ship agency agreements, equipment leases, product sales and licence arrangements), complex projects and restructurings, disputes (arbitration and litigation), crisis response and general commercial matters. Clients that she advises include energy companies, shipowners, offshore service providers, charterers, ship managers, insurers and P&I clubs, intergovernmental bodies and scientific research institutes.

WILLIAM MACLACHLAN

HFW

William MacLachlan is a partner at HFW advising a wide variety of companies and financial institutions on a range of transactional shipping matters in both the commercial shipping and yachting industries. He has particular expertise in shipbuilding contracts, ship repair contracts, and sale and purchase of vessels, and spent eight months seconded to a leading European shipbuilder. William also has extensive experience of work in the field of private security and complex environments, acting for owners, private maritime security companies (PMSCs) and other stakeholders, including advising on and drafting contracts for the provision of security services, advising on standard operating procedures and rules for the use of force, drafting stand-alone agreements in respect of the provision of bespoke security services to the offshore industry and advising PMSCs and their logistics providers on the full spectrum of contractual, compliance and licensing issues.

AMITAVA MAJUMDAR

Bose & Mitra & Co

Amitava Majumdar (Raja) is the founding managing partner of Bose & Mitra & Co. He has consistently been rated as a Band 1/foremost lawyer in shipping by reputed organisations such as Chambers and Partners, The Legal 500 and India Business Law Journal. With Raja at the helm, Bose & Mitra & Co has consistently been rated as a Tier 1 law firm in shipping by both Chambers and Partners and The Legal 500.

Raja's expertise encapsulates all aspects of shipping and trade, which, inter alia, include contentious and non-contentious matters and regulatory practice. He has acted for shipowners, charterers, IG P&I clubs, the Indian government, and oil and commodity traders in shipping-related disputes wherein he regularly appears and argues before all the high courts of India, including Gujarat, Bombay, Karnataka, Kerala, Madras, Calcutta, Andhra Pradesh, Delhi and the Supreme Court of India, and in major commercial and maritime arbitrations in India, London and Singapore. He has also represented the Indian delegation at the legal committee meetings in the IMO.

In addition to having a high standing for dealing with contentious maritime disputes, he specialises in complex shipping transactions, including but not limited to ship finance, structuring, ship sale and purchase and in assisting foreign shipping companies wade through the Indian legislative framework (including regulatory and taxation issues) and has been a constant fixture in closings across the world.

Additionally, he has been an expert witness and has provided expert opinions and evidence on Indian law and Indian civil procedure in foreign-seated arbitrations as well as in commercial matters before the English High Court and the Singapore High Court. He has also authored numerous papers and publications with a special emphasis on Indian maritime laws, the latest of which are his chapter contributions to *Commercial Arbitration: International Trends and Practices*, published by Thomson Reuters.

DANIEL MARTIN

HFW

Daniel Martin read law at Downing College, Cambridge, and has been a partner at HFW since April 2013. He advises shipowners, operators, freight forwarders, insurers and brokers on a host of regulatory and compliance issues, including international trade sanctions, export controls, customs and anti-corruption legislation. He advises on all aspects of EU and UK legislation, and is familiar with the application of US sanctions to non-US persons.

Daniel initially specialised in advising clients on disputes arising from charter parties, bills of lading, marine insurance and logistics operations, and he uses that experience and expertise to provide detailed, practical advice that is tailored to clients in the shipping, logistics and marine insurance sectors.

As well as advising clients on the impact of international trade sanctions in particular circumstances, including ways to engage effectively with regulators, Daniel also advises on compliance procedures and controls that shipowners, logistics companies, banks, insurers and brokers should adopt to minimise risk. He regularly presents to insurers and others on recent developments in sanctions legislation and enforcement, and contributes to industry publications. Daniel also advises extensively on anti-corruption legislation, and his clients include the industry's Maritime Anti-Corruption Network.

Daniel is ranked in The Legal 500 and he was featured in Acritas Star Lawyers, in which clients described him as 'down to earth, commercially minded, understands my business and thinking outside the box'.

RAWI MECKVICHAI

Chandler MHM Limited

Rawi Meckvichai is a senior associate at Chandler MHM Limited in the litigation and dispute resolution practice group. Rawi has advised and represented clients in court and arbitral proceedings, mostly in the areas of maritime, insurance, international trade law, commercial contract and tort; including carriage of goods by sea, by land and by air, charter party, collision, general average, salvage, piracy, arrest of ship, limitation of liability, onshore and offshore casualty, insurance on marine, fire and carrier liability.

ALEJANDRO MENDEZ

HFW

Alejandro Mendez has built a solid track record of success in the areas of maritime, admiralty, logistics, transportation, labour and employment and corporate litigation. His primary focus is providing leadership in the areas of risk management, civil litigation, contract analysis, document drafting, and e-discovery to meet the client's needs. He is recognised by his clients for his attention to detail and ability to actively listen and address their concerns with fresh, yet grounded approach to interpreting laws and working within the legal system to achieve their goals.

Alex has extensive experience in conducting on-site investigations, including marine casualties, cargo and personal injury claims, draft reports detailing applicable law, legal strategy and possible outcomes. He has represented clients before government agencies, including the US Equal Employment Opportunity Commission, the National Labor Relations Board, US Customs and Border Protection Agency and US Coast Guard to minimise the impact of agency action on business operations and to mitigate potential liability.

Alex is admitted to practise in multiple jurisdictions, including Texas, Puerto Rico and Pennsylvania, and multiple United States federal courts. Alex is fluent in Spanish.

DEBORAH MIFSUD

Gauci-Maistre Xynou

Deborah Mifsud is an associate who joined the firm in 2020, working principally in the shipping, taxation and aviation sectors. Deborah completed a doctor of laws degree at the University of Malta in 2017 after successfully defending her thesis entitled 'Alternative means of raising finance with a special emphasis on the shipping and aviation industries'. She was admitted to the Bar in 2019. Deborah continued her studies by completing the advanced course on the interpretation and application of tax treaties delivered by the Malta Institute of Taxation. She furthered her studies in taxation by completing the professional certificate in taxation delivered by the Malta Institute of Taxation.

JUAN DAVID MORGAN JR

Morgan & Morgan

Juan David Morgan Jr obtained his bachelor of arts degree from Ohio Wesleyan University, having completed his junior year at Heidelberg University in Germany, and his *juris* doctor degree with specialisation in maritime law from Tulane University Law School in 1990. He joined Morgan & Morgan that same year and became a partner in 1997. He handles all kinds of maritime cases, dry and wet. He has been a director and secretary of finance of the National Bar Association (1995–1997), a director of the Panama Maritime Chamber (2001–2005), a director of the Panamanian-German Chamber of Commerce and Industry (2004) and its president (2006–2008), and a director of the Panama Maritime Lawyers Association (2004–2010) and its president (2009–2010). He is listed by *Chambers Global* and *Chambers Latin America* as a Band 1 practitioner in shipping litigation. He speaks Spanish, English and German.

TOM MORRISON

HFW

Tom Morrison specialises in shipping dispute resolution, and his practice encompasses a broad range of casualty, regulatory, and contractual matters. He has experience advising on criminal and civil litigation across the shipping and logistics sectors across the Asia-Pacific, including charterparty and bills of lading disputes, sanctions, pollution, ship arrest, live export, fire, groundings, collisions and detentions.

Prior to joining HFW, he worked in the operations department of a Hong Kong-listed shipping company, where he gained invaluable commercial experience of the Asian bulker market.

Tom speaks English and Swedish and is qualified in New South Wales, Australia.

RICHARD NEYLON

HFW

Richard is a partner of the international law firm HFW, based in London. He specialises in shipping and crisis response. He heads the firm's complex environments team.

He acts for a range of insurers, shipowners and charterers in shipping and insurance disputes. A large proportion of Richard's work involves resolving issues arising from marine casualties, and he has been involved in many of the recent high-profile incidents.

Richard also handles major incidents for liability, war, kidnap and ransom, cyber and special risks underwriters and their assureds. He has particular expertise in managing and resolving incidents in hostile environments.

He has played a central role in co-coordinating and resolving over 150 hijacking, kidnapping and extortion cases. He also regularly deals with unlawful detentions, drug seizures, fraud and similar complex problems that companies that operate globally are exposed to.

Richard has addressed various governments, law enforcement agencies, and governmental and non-governmental organisations on the industry's response to incidents of this nature, and has developed a network of contacts in government, the military, private military, financial institutions and intelligence agencies.

He is also a principal member of the Hostage Support Partnership, which was commended by the United Nations Security Council on 7 November 2017 in Security Council Resolution 2383 (2017) for its work securing the release of the 26 'forgotten' seafarer hostages who were held for four and a half years in Somalia.

THOMAS NORK

HFW

Thomas Nork is a partner at the firm, a graduate of the New York Maritime Academy and an experienced licensed master mariner. He practises in the areas of admiralty and tort litigation. His practice areas include personal injury claims under the Jones Act and Longshore and Harbor Worker's Compensation Act, collision and cargo claims, contract and general liability claims. He represents clients with energy, insurance, marine and land transportation-related disputes, including Carriage of Goods by Sea Act and Carmack Amendment issues. He is also experienced in maritime-related transactions, including vessel construction loans, shipyard contracts, vessel purchases and charter parties.

Mr Nork received his MBA from the University of Houston and graduated with a *juris* doctorate from the University of Houston Law Center. Mr Nork is a member of the State Bar of Texas, the Houston Bar Association, the Houston Mariners Club and the Council of Master Mariners. He is admitted to practise before the Supreme Court of the United States, the Eastern, Northern, Southern and Western Districts of Texas and the US Courts of Appeals for the Second, Third, Fourth and Fifth Circuits.

JOHANNA OHLMAN

HFW

Johanna Ohlman has acted for owners, charterers, offshore contractors, salvors and P&I clubs on a variety of disputes arising from charter parties, bills of lading, piracy, collisions and groundings. The majority of Johanna's work involves multi-jurisdictional litigation and arbitration. As well as dispute resolution, Johanna advises on international and regional environmental regulations that affect the maritime sector, including the IMO's and European Union's carbon emissions reduction initiatives.

During her training, Johanna undertook six-month international secondments to the firm's Geneva and Monaco offices, where she was involved in a range of contentious commodities and shipping matters, as well as ship sale transactions.

Johanna is qualified in England and Wales and is a native Swedish speaker.

Her April 2023 Decommissioning Bulletin can be read here: https://www.hfw.com/Decommissioning-Bulletin-April-2023.

CHRISTOPHER ONG

HFW

Christopher Ong is an associate in HFW's commodities team in the Singapore office, with a focus on commodities, carbon markets and climate finance. Christopher has experience advising clients in the energy, commodities and shipping sectors on trade finance facility agreements, insolvency matters, commodity sale and purchase contracts, pricing and sanctions matters, as well as purchases and charters of vessels. Christopher speaks English and Mandarin.

JUMPEI OSADA

TMI Associates

Jumpei Osada is the head partner of the shipping practice group at TMI Associates.

He advises on all aspects of maritime-related matters, whether contentious or non-contentious, including charter parties, bills of lading, insurance (both hull and P&I), shipbuilding contracts, ship sale and purchase, ship arrest and shipping finance. He graduated from Waseda University (Japan) with a postgraduate MA in law (shipping law) and from the University of Southampton (England) with an LLM in maritime law. He also trained with several English shipping law firms. He is now a visiting researcher for the Institute of Maritime Law of Waseda University. He has also written a number of articles and books, including co-authoring *The Law of Marine Collision*.

His shipping practice group has been listed as a recommended law firm in *The Legal 500* and *Asialaw Profiles*, and was awarded Maritime Law Firm of the Year at the ALB Japan Law Awards in 2016, 2018, 2019, 2020 and 2021. He was named a Rising Star lawyer for corporate and banking law in *IFLR1000* (2017–2021 editions).

JUAN PABLO PALACIOS VELÁZQUEZ

Palacios, Prono & Talavera

Juan Pablo Palacios Velázquez is a senior associate at Palacios, Prono & Talavera. His main areas of practice are maritime law, corporate law, contracts and litigation.

He works for the shipping and transport department of the firm, and advises ports and terminals, shipowners, charterers, P&I clubs and local insurers. He has experience in both dry and wet shipping and intervenes actively in cargo claims, general average claims, casualties and salvage claims, and marine insurance policy disputes.

He was educated at the Catholic University of Asunción (law, first-class honours, 2010), where he currently teaches maritime law, the University of Brasilia (2009) and the University of Southampton (LLM in maritime law with merits, 2011). He is a former clerk of the Supreme Court of Paraguay and speaks Spanish, English and Portuguese.

PIETRO PALANDRI

Studio Legale Mordiglia

Pietro Palandri has been a qualified lawyer since 1983. He is an expert on shipping and intermodal transportation, insurance, tourism and passenger transportation. In the past 10 years, he has been asked by shipowners and insurance companies to deal with some prominent casualty claims. He also assists shipowners and banks with the purchasing, building and financing of ships. He has acted as an arbitrator in many foreign arbitration and judicial proceedings, and he often provides affidavits on issues regarding Italian legislation for foreign judicial proceedings.

Mr Palandri is on the board of directors of the Italian Association of Maritime Law. He has written many articles for the specialist magazine *Diritto Marittimo* and for Lloyd's of London, and is often invited to speak at conventions, both in Italy and abroad.

NICHOLAS POYNDER

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Nicholas Poynder is a partner and office head in the Shanghai office of HFW, where he has been based for 15 years. He works principally on shipping and trading matters, specialising in charter party, bill of lading, international trade, memorandum of agreement and shipyard disputes, acting for both mainland Chinese and overseas clients.

I KETUT DHARMA PUTRA YOGA

Budidjaja International Lawyers

I Ketut Dharma Putra Yoga has handled various high-profile national and international shipping cases. He recently obtained his master of laws degree in international shipping law from Queen Mary University of London under the 2021/2022 Chevening Scholarship from the United Kingdom's Foreign, Commonwealth and Development Office.

Prior to pursuing higher education, Yoga honed his skills and gained experience in shipping, aviation, cross-border trade and taxation, dispute resolution, international trade, insurance and reinsurance, and environmental matters. He has also been involved in assisting foreign global companies, private companies and international foundations in establishing their presence in Indonesia. His skills and experience encompass not only shipping and other corporate matters, but also the areas of complex dispute resolution and litigation matters domestically and internationally.

MICHAEL RITTER

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Michael Ritter is a partner in the HFW shipping and transport team. Mike predominantly advises owners, their insurers and salvors on issues arising from marine casualties (collisions, fires, groundings, etc.), in particular in relation to jurisdiction, limitation of liability and wreck removal. Post casualty response, he also advises on the underlying liabilities both in tort and any underlying contracts of carriage, the defence of cargo claims and prosecution of general average and inter-ship collision recoveries. He also increasingly advises on dry shipping issues.

In relation to his hostile environment work, Mike was heavily involved in the release of the crews of eight vessels kidnapped in the Gulf of Guinea and in two of the Fujairah anchorage attacks in 2019; a further seven Gulf of Guinea kidnappings and two Persian Gulf attacks in 2020; further cases during 2021 and 2022 and three cases in 2023 to date; and various non-marine kidnap, extortion and related risks and vessel detentions. In connection with these cases, he has advised both owners and insurers in relation to the Terrorism Act 2000.

Mike was recognised as a 'rising star' in 2019 by *The Legal 500* for his handling of casualty response work, in 2020 for casualty work, including hostage matters, and a Next Generation Partner in 2021 and 2022. He is part of the Hostage Support Partnership, which was commended by the United Nations Security Council on 7 November 2017 in Security Council Resolution 2383 (2017) for its work securing the release of the 26 hostages from the vessel *Naham 3*, who were held for four and a half years in Somalia.

CHONLAWAT ROJANAPARPAL

Chandler MHM Limited

Chonlawat Rojanaparpal is a senior associate at Chandler MHM Limited in the litigation and dispute resolution practice group. He advises creditors and debtors in relation to restructuring and insolvency proceedings. In addition to corporate and commercial disputes, Chonlawat advises parties to arbitration disputes.

RICARDO ROZAS

Jorquiera & Rozas Abogados (JJR Law Firm)

Ricardo Rozas is a founder partner of Jorquiera & Rozas Abogados (JJR Law Firm) and chairman of its insurance, reinsurance and transport practice group. He is very experienced in all aspects of transportation, charter parties, bills of lading, cargo claims, admiralty law, pollution, personal injuries, ship finance, ship repair contracts, arrest of vessels, marine insurance and non-marine insurance and reinsurance. He was a recipient of the ILO Client Choice awards in 2011 and 2020–2022, is listed in *Chambers Latin America* (2013–2014) and profiled in *Who's Who Legal: Transport* (2010, 2011, 2016–2022) and *Who's Who Legal: Insurance & Reinsurance* (2011–2016, 2019–2022).

Ricardo is a past chair of the Maritime and Land Transport Committee of the International Bar Association (IBA). In addition, he is a member of the Insurance Committee of the IBA, the Maritime Committee of the IBA, the International Association of Insurance Law and the Chilean Maritime Law and Bar Associations.

Ricardo is a graduate of the School of Law of the Pontifical Catholic University of Chile (LLB) and holds a master of laws (LLM) from Southampton University. He is a regular speaker at insurance and transport conferences around the world and author of several publications.

JOSÉ ALFREDO SABATINO PIZZOLANTE

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José Alfredo Sabatino Pizzolante holds a law degree from the University of Carabobo (Venezuela). He studied at the University of Wales, College of Cardiff, where he obtained an MSc in port and shipping administration and an LLM in maritime law. Currently, he is a partner at Sabatino Pizzolante Abogados Marítimos & Comerciales, the managing director of Globalpandi SA (P&I correspondents) and a professor at the National Maritime Experimental University of the Caribbean (Caracas). He is also a legal adviser to the Venezuelan Shipping Association, past president and titular member of the Venezuelan Association of Maritime Law, executive vice president of the Venezuelan Association of Port Law and a titular member of the Comité Maritime International and the Iberoamerican Institute of Maritime Law. He has written extensively on the subject of Venezuelan maritime law, attending many international seminars and congresses as a speaker.

JENNY SALMON

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Jenny Salmon has a broad practice, including advising shipowners, cargo owners and salvors in casualty situations, and assisting owners, charterers and cargo interests in charter party and bill of lading disputes. She has worked in HFW's Piraeus and London offices.

She has particular experience of marine insurance disputes under H&M, war risks and kidnap and ransom policies, as well as protection and indemnity coverage issues and brokers' liability. Jenny has also assisted insurers and brokers by drafting policy terms and amending existing terms to reflect the changes brought in by the Insurance Act 2015. She regularly gives presentations on topical marine insurance issues, and has undertaken a secondment to the marine and energy claims department of a leading London insurer.

Jenny's reported cases include *Arash Shipping v. Groupama Transport* [2011] EWCA Civ 620, *Bunge SA v. Kyla Shipping Company Limited (The Kyla)* [2012] EWHC 3522 (Comm), *Kyla Shipping Company Limited v. Bunge SA (The Kyla)* [2013] EWCA Civ 734, *Caresse Navigation Ltd v. Office National de L'Electricite and others (The Channel Ranger)* [2013] EWHC 3081 (Comm), *Kairos Shipping Ltd v. Enka & Co LLC and Others (The Atlantik Confidence)* [2016] EWHC 2412 (Admlty), *Herculito Maritime Ltd and others v. Gunvor International BV and others (the 'Polar')* [2020] EWHC 3318 (Comm), *Herculito Maritime Ltd and others v. Gunvor International BV and others (the 'Polar')* [2021] EWCA Civ 1828, *McKeever v. Northernreef Insurance Co SA (the 'Creola')* [2019] WL 02261376, *Splitt Chartering APS v. Saga Shipholding Norway AS (the 'Stema Barge II')* [2020] EWHC 1294 (Admlty) and *Splitt Chartering APS v. Saga Shipholding Norway AS (The 'Stema Barge II')* [2021] EWCA CIV 1880.

MASAAKI SASAKI

TMI Associates

Masaaki Sasaki is a partner in the shipping practice group at TMI Associates.

He works principally on shipping disputes resolution, including charter parties, bills of lading, insurance and shipbuilding contracts. He also advises on international trade and bankruptcy cases. He graduated from Kyoto University (Japan) with a BSc and from Waseda University (Japan) with an MA in maritime law. He obtained a second master's degree in maritime law from Swansea University (Wales). He was seconded to a leading member of the International Group of P&I Clubs and trained in a London-based shipping law firm. He regularly contributes articles and has co-authored various shipping-related publications.

RISHABH SAXENA

Bose & Mitra & Co

Rishabh Saxena, principal associate, has been with the firm for over six years and has been involved in a wide variety of contentious and non-contentious matters. His primary area of expertise is matters involving crew claims and casualty-related claims. He regularly deals with general commercial matters disputes, such as enforcement and execution of foreign awards and foreign judgments, white collar crimes and insolvency matters.

SIMON SHADDICK

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Simon Shaddick deals with contentious shipping and marine matters, with a particular focus on disputes in the offshore energy sector, and he has broad experience in maritime dispute resolution. He has handled a wide range of shipping and offshore cases, including claims relating to marine casualties, charter parties, shipbuilding contracts, marine insurance, bills of lading, cargo damage and pollution. He has represented a variety of domestic and

international shipping and offshore energy interests in litigation, arbitration, mediation and commercial negotiations. Simon is qualified in both Australia and England, and worked for several years in HFW's London office.

NATHEE SILACHAROEN

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Nathee Silacharoen is a partner at Chandler MHM Limited in the litigation and dispute resolution practice group and has been with the firm since 2019. He specialises in dispute resolution, including litigation, arbitration, regulatory matters, international trade, corporate and commercial law, and labour and employment. Nathee has significant experience in representing both local and international multinational companies and individuals on various legal and regulatory matters in Thailand.

STEFANNY SIMORANGKIR

Budidjaja International Lawyers

Stefanny Simorangkir has handled numerous shipping disputes, including cross-border disputes arising from commercial transactions, marine incidents (e.g., collisions, sinking vessels and fatalities), cargo loss that results from fire on board a vessel and disputes that arise from pollution claims. She has also handled broad and various shipping non-contentious matters, including advising clients with regards to the sale and purchase of vessels, reflagging and registration of vessels, pilotage, contracts of affreightment, contracts related to freight payment, and establishing foreign investment shipping companies.

Recently, Stefanny has also worked on numerous international trade matters, including importation of certain goods for construction projects and the shipbuilder industry as well as compliance with the requirements related to the limitations of imported goods.

Stefanny graduated *cum laude* from the University of Padjadjaran with a bachelor of law degree and is a board member of the Indonesian Air Law Society (Masyarakat Hukum Udara). She speaks Indonesian, English and basic Korean.

TOBY STEPHENS

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Toby Stephens heads HFW's global crisis management team in the Asia-Pacific region and specialises in risk and crisis management and emergency response in the marine and energy sectors. Toby's work involves managing major marine and energy disasters, including undertaking the initial response, managing his clients' exposure to civil and criminal liabilities and resolving the subsequent disputes, which are often complex, involving a number of inter-related actions in a number of jurisdictions. Toby is also recognised for insurance coverage and other marine and energy-related commercial and contractual disputes.

Toby joined HFW as a solicitor in 2001 and became a partner in the admiralty and crisis management team in 2007. He has practical experience of working as a marine surveyor in Houston. He has also acted as head of the legal team at a leading Lloyd's syndicate dealing with marine, energy and war risks. Toby is qualified as a solicitor in England and Wales and is a registered foreign lawyer in Singapore.

DEREK TAM

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Derek is an associate in HFW's Hong Kong shipping group. Derek focuses on commercial and shipping matters, and has experience in ship sale and purchase, wreck removal contracts, charter party disputes, cargo claims, commercial litigation, fraud and recovery claims, and regulatory matters.

VANESSA TATTERSALL

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Vanessa Tattersall advises shipowners, shipyards, charterers and cargo interests in maritime, international trade and general contractual disputes, with a focus on claims arising under shipbuilding contracts, charter parties and bills of lading. She acts predominantly in multi-jurisdictional commercial litigation and arbitrations but also advises on contract wordings, including advising shipowners and shipyards on renegotiating shipbuilding contracts and refund guarantee wordings, and on charter party wordings and amendments.

TRAN TRUNG HIEU

Dzungsrt & Associates LLC

Tran Trung Hieu is an associate at Dzungsrt & Associates LLC. He graduated from Hanoi Law University with distinction. He is regularly involved in both shipping and ADR cases.

IOANNIS TTAVAS

A Karitzis & Associates LLC

Ioannis Ttavas is an advocate and legal consultant at A Karitzis & Associates LLC. He is also a member of the Limassol Bar Association.

Ioannis received his LLB degree (Hons) from De Montfort University of Leicester in 2017 and was awarded his LLM in maritime law from the University of Nottingham in 2018. His master's focused on law of the sea, charter parties, carriage of goods (by sea, air and road) and oil and gas, whereas, his dissertation was focused on the right of Cyprus to explore and exploit natural resources from its claimed exclusive economic zone in the context of the ongoing dispute with Turkey.

Ioannis started his career working as a litigation lawyer and afterwards working as a corporate lawyer. He joined A Karitzis & Associates LLC in February 2023 and has since been part of the firm's shipping department.

GAVIN VALLELY

HFW

Gavin Vallely has more than 25 years' experience in advising on contentious and non-contentious matters concerning commercial shipping, offshore oil and gas, and international trade. His work in the shipping sector includes advising on all forms of charter parties, ship sale and purchase and construction, Australian regulatory schemes (including HSE, coastal shipping, customs and tax) and port and terminal operations. He has acted for the operators of vessels, offshore installations and terminals in respect of numerous casualty and pollution incidents, managing the response to investigations by government authorities

and the defence of any related criminal and civil proceedings. He has also acted in several major claims in respect of damage to cargo (including petroleum products, chemicals, fertiliser and grain cargoes), berth damage, International Transport Workers' Federation boycotts, occupational health and safety prosecutions and port state control issues.

DIMITRI VASSOS

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Dimitri Vassos is the managing partner of HFW's Piraeus office. He specialises in shipping, focusing mainly on dispute resolution arising from charter parties, bills of lading, shipbuilding, collisions, fire and explosion, salvage, general average, groundings, total loss, towage, offshore and limitation, and international trade contracts. He is consistently recommended in legal directories, such as The Legal 500 and Chambers and Partners. He is fluent in English and Greek.

LEONIDAS VILLAGRAN

Villagran Lara

Dr Leonidas Villagran is a senior partner at Villagran Lara. He is a *juris* doctor, who graduated with distinction from the University of Guayaquil. He holds an LLM in international maritime law with distinction from the World Maritime University, the Lloyd's Maritime Academy prize and an LLM in constitutional law from the Espíritu Santo University. He obtained postgraduate diplomas in marine insurance from the World Maritime University and in international trade from the Catholic University of Guayaquil.

Leonidas' practice has been related to international commerce, shipping law and marine insurance for more than 15 years. He is a member of the Shipping and International Trade Committee of the Guayaquil Bar Association and professor of maritime law at the University of the Pacific and has been appointed as a maritime law professor at UEES Espíritu Santo University and ESPOL University in Guayaquil. He was invited as a researcher and lecturer to the Language and Culture University in Beijing, and lectured at Ulacit University in Costa Rica and Metropolitan University in Guayaquil. Several of his articles are published on the firm's website.

In the public sector, Leonidas has served as senior adviser for the Council of the Judiciary, undersecretary of the Ministry of Government and regional manager for the Ecuador Development Bank.

TOM WALTERS

HFW

Tom Walters worked for a naval architecture practice on the south coast of the United Kingdom for two years before retraining as a lawyer and joining HFW in 2002 as part of the shipping department, working in the admiralty and crisis management team. He has worked on various complex technical cases in the offshore oil and gas industry, dealing with construction disputes, decommissioning and disposal of marine assets, insurance claims, towage disputes, contractual disputes involving pipe lay vessels, and the salvage of offshore assets in various jurisdictions around the world. Tom is a member of the Royal Institution of Naval Architects,

was part of the BIMCO drafting subcommittee for DISMANTLECON (the standard form offshore dismantling contract) and is a member of the Society of Underwater Technology, participating in the Salvage and Emergency Subsea Response subcommittee.

His April 2023 Decommissioning Bulletin can be read here: https://www.hfw.com/Decommissioning-Bulletin-April-2023.

MATTHEW WILMSHURST

HFW

Matthew Wilmshurst is a partner in HFW's London shipping department. He works with shipowners, non-vessel operating common carriers and transport operators, cargo interests and insurers on logistics and supply chain-related disputes and projects. Matthew's dispute resolution and litigation practice includes claims arising out of the carriage of goods, which encompasses defence work, cargo recovery, and salvage and general average claims; representing ports and terminal operators on third-party liability, property damage and business interruption claims; and marine insurance policy and commercial disputes. Matthew also provides advisory services to transport operators on standard terms and conditions and contracts of carriage, and to insurers on products and policy wordings.

Matthew was ranked in *Chambers UK* (2014, 2015 and 2016) as an 'associate to watch'. He 'attracts a great deal of praise for his work in salvage claims'. Clients say that 'he knows the industry and the way it works'.

ANTHONY WOOLICH

HFW

Anthony Woolich read law at Jesus College, Cambridge, and has been a partner at HFW since May 2009. He specialises in competition law, public procurement, sanctions, export control, anti-bribery and anti-corruption, trade regulation, state aid, data protection and privacy, commercial contracts, joint ventures, intellectual property and information technology. He is admitted to practise law in England and Wales and the Republic of Ireland and by the Brussels Bar (Dutch section).

Anthony was ranked seventh in the most influential 10 lawyers in shipping worldwide by Lloyd's List for 2016, with his contributions on Brexit being highlighted. He is ranked in *Chambers* 2023 and *Chambers* 2022, which states: 'Anthony Woolich of HFW represents clients in a host of merger clearance procedures, as well as CMA investigations and compliance matters.' *Chambers* 2021 states 'Anthony Woolich has a "huge amount of experience in competition law and offers very pragmatic advice", according to interviewees. He represents clients in a host of merger clearance procedures as well as CMA investigations and compliance matters.' *The Legal 500* 2021 and 2022 ranks HFW saying: 'HFW has strength across the board on state aid, competition litigation and issues concerning the intersection of EU law, commerce and competition. Clients laud the team's "deep understanding of the shipping industry".' It quotes clients as saying: 'Anthony Woolich is very approachable and client-centric, has an excellent ability to analyse, and is able to utilise international connections very effectively.'

DESPOINA XYNOU

Gauci-Maistre Xynou

Despoina Xynou is a co-founder and partner of Gauci-Maistre Xynou. She has been actively practising law for more than a decade, specialising in maritime, civil and corporate law as well as being a litigation lawyer. To date, she has actively practised law in Greece and Malta. She specialises in maritime and corporate law, ship registration, ship finance, mortgages and international taxation. Her client portfolio comprises local and international law firms, financial institutions, ship owners and managers.

Despoina is warranted to practise her legal profession in both Greece and Malta, and she is fluent in English and Greek. She furthered her studies by completing the professional certificate in taxation delivered by the Malta Institute of Taxation and the Virtual Financial Assets for VFA Agents Programme delivered by the Malta Institute of Management.

DARIUSZ ZDANOWICZ

Kacprzak Legal

Dariusz Zdanowicz is an attorney-at-law at Kacprzak Legal. He is a specialist in providing legal services for energy enterprises (fuel, gas, district heating and electricity). He specialises in contract law. He is responsible for the standardisation of contracts, general terms and conditions in consumer and business-to-business trading. Dariusz Zdanowicz specialises in preparing general conditions for the shipbuilding and maritime industries. He is an expert in mergers and acquisitions. Dariusz performs as a project manager and is responsible for legal due diligence. He completed the executive MBA programme organised by the Rotterdam School of Management, Erasmus University and the Gdańsk Foundation for Management Development.

Appendix 2

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Appendix 3

GLOSSARY

INTERNATIONAL LEGISLATION

1910 Salvage Convention – Convention for the Unification of Certain Rules of Law with respect to Assistance and Salvage at Sea 1910

1989 Salvage Convention – International Convention on Salvage 1989

1952 Arrest Convention – International Convention for the Unification of Certain Rules relating to the Arrest of Sea-going Ships 1952 (also known as the Brussels Convention)

1999 Arrest Convention – International Convention on the Arrest of Ships 1999 (also known as the Geneva Convention 1999)

Aarhus Convention – Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 1998

Abuja MOU – Memorandum of Understanding on Port State Control for West and Central African Region 1999

AFS Convention – International Convention on the Control of Harmful Anti-Fouling Systems on Ships 2001

Agreement on Cooperation regarding Maritime Search and Rescue Services among Black Sea Coastal States 1998

Anti-Fouling Convention – International Convention on the Control of Harmful Anti-Fouling Systems on Ships 2001

Arrest Convention 1999 – International Convention on Arrest of Ships 1999

Athens Convention – Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974

Athens Convention Protocol 2002 – Protocol of 2002 to the Athens Convention

Ballast Water Management Convention – Convention for the Control and Management of Ships' Ballast Water and Sediments 2004

Barcelona Convention – Convention for the Protection of the Mediterranean Sea Against Pollution 1976

Convention for the Protection of the Marine Environment and Coastal Region of the Mediterranean 1995 (updating the Barcelona Convention)

Black Sea MOU – Memorandum of Understanding on Port State Control in the Black Sea Region 2000

Brussels Convention – see 1952 Arrest Convention

Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways 2005

Bunker Convention – International Convention on Civil Liability for Bunker Oil Pollution Damage 2001

Caribbean MOU – Memorandum of Understanding on Port State Control in the Caribbean Region

CLC Convention – International Convention on Civil Liability for Oil Pollution Damage 1969, replaced by the 1992 Protocol

Fund Convention – International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage – wound up in 2014

Supplementary Fund Protocol 2003 – Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage

CMR Convention – Convention on the Contract for the International Carriage of Goods by Road 1956

Collision Convention 1910 – Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910 (also known as the Brussels Collision Convention)

Collision Convention 1952 – International Convention for the Unification of Certain Rules relating to Civil Jurisdiction in Matters of Collision 1952

COLREGs – International Regulations for Preventing Collisions at Sea 1972

Convention and Statute on the International Régime of Maritime Ports 1923

Convention on the International Maritime Satellite Organisation 1976

Operating Agreement on the International Maritime Satellite Organisation 1976

COS-SAR – International Cospas-Sarsat Programme Agreement 1988

Criminal Collision Convention 1952 – International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision and Other Incidents of Navigation 1952

CSC Convention – International Convention for Safe Containers 1972

1993 Amendments to the International Convention for Safe Containers of 2 December 1972

Directive 93/75/EEC – Council Directive 93/75/EEC of 13 September 1993 concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods

Directive 2009/16/EC – Directive 2009/16/EC of 23 April 2009 of the European Parliament and the Council on port State control

Dockers Convention – Convention Concerning the Protection Against Accidents of Workers Employed in Loading or Unloading Ships 1932

FAL Convention – Convention on Facilitation of International Maritime Traffic 1965

Fund Convention – see CLC Convention

Geneva Convention – see 1999 Arrest Convention

Hague Choice of Court Convention – Convention of 30 June 2005 on Choice of Court Agreements

Hague Rules – International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924

Hague-Visby Rules – Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968

SDR Protocol 1979 – Protocol of 1979 to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924, as amended by the Protocol of 1968

Hamburg Rules – UN Convention on the Carriage of Goods by Sea 1978

HNS Convention – International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996, as revised by the Protocol of 2010

Hong Kong Convention – Hong Kong Convention for the Safe and Environmentally Sound Recycling of Ships 2009

IBC Code – see MARPOL

IMDG Code – see SOLAS

Immunity of State-Owned Ships Convention – International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Vessels 1926, and Additional Protocol 1934

IMSBC Code – see SOLAS

Indian Ocean MOU – Indian Ocean Memorandum of Understanding on Port State Control

INF Code – see SOLAS

INMARSAT Convention – Convention on the International Maritime Satellite Organization 1976

International Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Owners of Sea-Going Vessels 1924

International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships 1957 (and its amending Protocol of 1979)

Intervention Convention – International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969

Intervention Protocol – Protocol relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil 1973

IOMOU – Indian Ocean Memorandum of Understanding on Port State Control

IP Code – see SOLAS

ISM Code – see SOLAS

ISPS Code – see SOLAS

LLMC Convention 1976 – Convention on Limitation of Liability for Maritime Claims 1976

1996 LLMC Protocol – Protocol to amend the LLMC Convention 1996 (as amended in 2012)

Load Lines Convention – International Convention on Load Lines 1966

Protocol of 1988 relating to the International Convention on Load Lines 1966

London Convention – Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972

London Protocol 1996 – 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972

Lugano Convention – Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 1988, 2007

Maritime Cabotage Regulation – Council Regulation (EEC) No. 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (Maritime Cabotage)

Maritime Labour Convention 2006 (including the Amendments of 2014, 2016 and 2018)

Maritime Liens and Mortgages Convention – International Convention on Maritime Liens and Mortgages 1993

1926 Brussels Convention – International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages 1926

1967 Brussels Convention – International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages 1967

MARPOL (73/78) – International Convention for the Prevention of Pollution from Ships 1973 (as modified by the Protocol of 1978) (Annexes I to V)

1997 Protocol to the International Convention for the Prevention of Pollution from Ships (Annex VI)

IBC Code – International Code for the Construction and Equipment of Ships carrying Dangerous Chemicals in Bulk

Mediterranean MOU – Mediterranean Memorandum of Understanding 1997

Memorandum of Understanding on Port State Control in the Caribbean Region

MLC – see Maritime Labour Convention

Nairobi WRC 2007 – Nairobi International Convention on the Removal of Wrecks 2007

New York Convention – Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

Nuclear Convention – Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material 1971

OILPOL Convention – International Convention for the Prevention of Pollution of the Sea by Oil 1954 (as amended in 1962 and 1969)

Oil Pollution Fund Convention – International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992

OPRC Convention – International Convention on Oil Pollution Preparedness, Response and Co-operation 1990

OPRC-HNS Protocol – Protocol on the Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances 2000

Paris MOU – Paris Memorandum of Understanding on Port State Control 1982

Polar Code – International Code for Ships Operating in Polar Water

Riyadh MOU – Riyadh Memorandum of Understanding on Port State Control in the Gulf Region

Rotterdam Rules – UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009

SALVAGE – the International Convention on Salvage 1989

Search and Rescue (SAR) Convention 1979 – International Convention on Maritime Search and Rescue 1979

SOLAS – International Convention for the Safety of Life at Sea 1974

Protocol of 1988 relating to the International Convention for the Safety of Life at Sea

IMDG Code – International Maritime Dangerous Goods Code 2004

IMSBC Code – International Maritime Solid Bulk Cargoes Code 2011

INF Code – International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes on Board Ships 2001

IP Code – International Code of Safety for Ships Carrying Industrial Personnel 2024

ISM Code – International Safety Management Code 1998

ISPS Code – International Ship and Port Facility Security Code 2004

Special Trade Passenger Ships Agreement 1971

Protocol on Space Requirements for Special Trade Passenger Ships 1973

STCW Convention – International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 (revised in 1995 and 2010)

Strasbourg Convention – 1988 Strasbourg Convention on the Limitation of Liability in Inland Navigation

SUA – Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation 1988 and the 1988 SUA Protocol

Tokyo MOU – Tokyo Memorandum of Understanding on Port State Control in the Asia-Pacific Region 1994

Tonnage Convention – International Convention on the Tonnage Measurement of Ships 1969

Torremolinos International Convention for the Safety of Fishing Vessels 1977 (superseded by the 1993 Torremolinos Protocol; Cape Town Agreement of 2012 on the Implementation of the Provisions of the 1993 Protocol relating to the Torremolinos International Convention for the Safety of Fishing Vessels)

UNCLOS – United Nations Convention on the Law of the Sea 1982

Uniform Rules Concerning the Contract for International Carriage of Goods by Rail

United Nations Convention on a Code of Conduct for Liner Conferences 1974

United Nations Convention on International Multimodal Transport of Goods (Geneva 1980)

United Nations Convention on Liability of Operators of Transport Terminals in International Trade 1991

United Nations Convention on the International Effects of Judicial Sales of Ships 2022

Viña del Mar MOU – Latin American Agreement on Port State Control of Vessels 1992

York Antwerp Rules 2016

ORGANISATIONS

BIMCO	The Baltic and International Maritime Council
CAMP	Chambre Arbitrale Maritime de Paris
IACS	International Association of Classification Societies
ICS	International Chamber of Shipping
ILO	International Labour Organization
IMO	International Maritime Organization
LMAA	London Maritime Arbitrators Association
SCMA	Singapore Chamber of Maritime Arbitration
SIAC	Singapore International Arbitration Centre
UNCITRAL	United Nations Commission on International Trade Law

ABBREVIATIONS

ADR	alternative dispute resolution
DWT	deadweight tonnage
FOB	free on board
GA	general average
GRT	gross registered tonnage
GT	gross tonnage
LOF	Lloyd's Open Form
LOU	letter of undertaking
MOA	memorandum of agreement
NVOC	non-vessel operating carrier
NVOCC	non-vessel operating common carrier
P&I	protection and indemnity
SDRs	special drawing rights
TEU	twenty-foot equivalent unit
VLCC	very large crude carrier

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