

THE SHIPPING LAW
REVIEW

SIXTH EDITION

Editors

George Eddings, Andrew Chamberlain
and Holly Colaço

THE LAWREVIEWS

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Editors

George Eddings, Andrew Chamberlain
and Holly Colaço

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PUBLISHER

Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER

Nick Barette

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PREFACE

The sixth edition of this book aims to continue to provide those involved in handling shipping disputes with an overview of the key issues relevant to multiple jurisdictions. We have again invited contributions on the law of leading maritime nations, including both major flag states and the countries in which most shipping companies are located. We also include chapters on the law of the major shipbuilding centres and a range of other jurisdictions.

As with previous editions of *The Shipping Law Review*, we begin with cross-jurisdictional chapters looking at the latest developments in important areas for the shipping industry: competition and regulatory law, sanctions, ocean logistics, piracy, shipbuilding, ports and terminals, offshore shipping, marine insurance and environmental issues. A new chapter on decommissioning is also included, which seeks to demystify this interesting and fast-developing area of law.

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

The authors review the vessel safety regimes in force in their respective countries, along with port state control and the operation of both registration and classification locally. The applicable environmental legislation in each jurisdiction is explained, as are the local rules in respect of collisions, wreck removal, salvage and recycling. Passenger and seafarer rights are examined, and contributors set out the current position in their jurisdiction. The authors have then looked ahead and commented on what they believe are likely to be the most important developments in their jurisdiction during the coming year.

The shipping industry continues to be one of the most significant sectors worldwide, with the United Nations estimating that commercial shipping represents around US\$380 billion in terms of global freight rates, amounting to about 5 per cent of global trade overall. More than 90 per cent of the world's trade is still transported by sea. The law of shipping remains as interesting as the sector itself and the contributions to this book continue to reflect that.

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

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

Brexit continues to pull focus, with the withdrawal agreement reached between the EU and UK having been rejected three times and an extension of the Article 50 process granted until 31 October 2019. Much has been printed about the effects of Brexit on the enforcement of maritime contracts. However, the majority of shipping contracts globally will almost certainly continue to be governed by English law, as Brexit will not significantly effect enforceability. Arbitration awards will continue to be enforceable under the New York Convention and it seems likely reciprocal EU and UK enforcement of court judgments will be agreed.

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

George Eddings, Andrew Chamberlain and Holly Colaço

HFW

London

May 2019

SHIPPING AND THE ENVIRONMENT

*Thomas Dickson*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. New regulations, primarily emanating from the United Nations' International Maritime Organization (IMO), have been introduced to address aspects such as oil pollution risk, waste disposal and emissions. The rise of environmental regulation has highlighted the need for operators to maximise efficiency to maintain competitiveness. Although compliance is an administrative and financial burden, the received wisdom is that regulations are a necessary step towards the long-term sustainability of the industry.

II MARPOL

In 1973, the IMO adopted the International Convention for the Prevention of Pollution from Ships 1973 (MARPOL). MARPOL, currently formed of six Annexes, attempts to address major environmental issues that affect shipping, with a view to improving safety at sea and 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.

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 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 sufficiently promote preventive action.

The IMO's response to tackling incidents of oil pollution (both accidental and operational) has been the formulation of MARPOL Annex I, which 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, the segregation of ballast tanks, as well as crude-oil washing systems.

¹ Thomas Dickson is an associate at HFW.

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.

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 nearest land.³ The Antarctic is designated a special area of protection under MARPOL Annex II.⁴

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.⁵ Annex III came into force on 1 July 1992; the IMO's Marine Environment Protection Committee (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.⁶

2 Regulation 19, MARPOL Annex I.

3 Regulation 5(1), MARPOL Annex II.

4 Regulation 5(14), MARPOL Annex II.

5 Regulation 1, MARPOL Annex III.

6 Regulation 7, MARPOL Annex III.

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 facilities⁷ and a requirement for survey and certification.⁸ 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 comminuting and disinfecting system, and both a temporary storage tank and a holding tank of an appropriate capacity.⁹

Annex IV prohibits the discharge of sewage into the sea except at a distance of not less than three nautical miles from the nearest land when the ship is discharging comminuted and disinfected sewage using an approved system and not less than 12 nautical miles from the nearest land where the sewage has not been comminuted and disinfected.¹⁰ Furthermore, untreated sewage must not be discharged instantaneously, but instead should be moderately released during the course of the vessel's voyage at a rate of not less than 4 knots,¹¹ while not producing any visible floating solids or discolouration in the surrounding water.¹²

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

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.¹⁶ 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 Hold Cleaning/

7 Regulation 12, MARPOL Annex IV.

8 Regulations 4 and 5, MARPOL Annex IV.

9 Regulation 9, MARPOL Annex IV.

10 Regulation 11, MARPOL Annex IV.

11 Discharge rate is calculated according to the terms of Paragraph 3 of Resolution MEPC 157(55).

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

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

14 See Resolution MEPC 227(64).

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

16 Regulation 1(1), MARPOL Annex V.

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 will also be 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).

vi Annex VI – prevention of air pollution from ships

On 10 October 2008, the IMO adopted the revised Annex VI, which sets out the framework limiting emissions of nitrogen oxide (NO_x), sulphur oxide (SO_x) and particulate matter from ship exhausts. The framework provides for zones of enhanced limits, ‘emission control areas’ (ECAs), which can be designated for SO_x, NO_x or both emissions.¹⁷ The implementation of the limits has been on a graduated basis since 2012.

The rules in force require owners to reduce SO_x emissions and particulate matter to 0.10 per cent m/m¹⁸ inside SO_x ECAs, with levels of 3.5 per cent m/m outside ECAs. As of 1 January 2020, the global limit (outside ECAs) will drop to 0.5 per cent. This was confirmed by the IMO’s Marine Environment Protection Committee (MEPC 70) on 27 October 2016, ending years of uncertainty surrounding the effective date.

Options for emissions compliance fall under fuel-based and technology-based solutions. Low and ultra-low distillates are available on the market, although these are more expensive than conventional heavy fuel oil and questions have been raised regarding reliability and their impact on fuel systems that are more suited to conventional fuels. Alternative fuels, including liquid natural gas, biofuels and blended fuels are expected to be the preference for most shipowners. However, there are concerns as to supply of compliant fuels as well as the costly process of retrofitting engines in order to make them compatible with the new fuels. Operators are also investing time and resources in investigating the viability of exhaust gas cleaning systems, otherwise known as scrubbers, which allow vessels to burn conventional fuel by cleaning exhaust gases. A certain category of scrubbers known as ‘open loop scrubbers’ has been criticised on environmental grounds owing to concerns about the impact of waste water being dumped into coastal waters and scrubber wash water discharges have already been banned by a series of major ports in China as well as Singapore and Fujairah.

During 2019 BIMCO is expected to release new clause wording to accommodate the new regulations, including a ‘2020 Marine Sulphur Content Clause’ (to replace the BIMCO Fuel Sulphur Content Clause 2005) as well as a dedicated ‘Scrubber Clause’.

The EU Sulphur Directive had previously implemented its own cap of 0.5 per cent by 2020 and certain coastal states have begun introducing their own emissions standards. In March 2015, the Hong Kong Air Pollution Control (Ocean Going Vessels) (Fuel at Berth) Regulation was accepted, aiming to reduce the emission of air pollutants from ocean-going vessels using high-sulphur fuel while in berth in Hong Kong. The penalties for breaching the

¹⁷ SO_x and NO_x ECAs are currently in place on the North American Coastline and US Caribbean, and SO_x ECAs are in place in the North Sea and Baltic Sea.

¹⁸ Regulation 14, MARPOL Annex VI.

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

MARPOL Annex VI also imposes NO_x emission limits for diesel engines. The limits depend on the engine's maximum operating speed and are categorised into three levels of acceptable NO_x emissions depending on the vessel's age or the engine installation date.¹⁹ 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 NO_x ECAs only). In November 2014, reversing its previous decision for a five-year postponement, the IMO's MEPC 66 affirmed the 2016 implementation date for Tier III. The Tier III levels will be enforced in the North American ECA, US Caribbean ECA and any subsequently designated NO_x ECAs.

Ships 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 ECA-NO_x.²⁰

There is a general prohibition under MARPOL Annex VI on the emission of ozone-depleting substances from vessels, although installations that specifically contain hydro-chlorofluorocarbons shall not be subject to the prohibition until 1 January 2020.²¹

vii Annex VI – vessel efficiency

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

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

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

In light of historically high fuel costs, operators have been able to reduce their fuel expenditure and consequent emissions by 'slow steaming'. By proceeding at a slower or 'eco' rate, there are significant fuel savings to be made.²²

19 Regulation 13, MARPOL Annex VI.

20 Regulation 13, MARPOL Annex VI.

21 Regulation 12, MARPOL Annex VI.

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

III OIL POLLUTION LIABILITY REGIMES

i The Civil Liability Convention

The primary international liability framework for oil pollution can be found in the Civil Liability Convention 1969, as amended by the 1992 Protocol (CLC 1992).²³ 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,²⁴ 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.²⁵ The CLC 1992 is implemented in the majority of coastal states, although the United States remains a notable non-signatory.

Under the CLC 1992, a shipowner²⁶ is permitted to limit the level of its liability for oil pollution incidents on the basis of a reference to the tonnage of the vessel. The CLC 1992 furthermore obliges owners of ships covered by the Convention to maintain insurance equivalent to their maximum liability for one incident.

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

- a* for a ship not exceeding 5,000 gross tonnage (GT), liability is limited to 4.51 million special drawing rights (SDRs);
- 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 (OPA 1990).²⁷ Liability will attach to a 'responsible party' of a vessel or facility when there is a substantial threat or actual discharges of oil into or upon the navigable waters and shoreline of the United States.²⁸ For the purposes of the OPA 1990, the responsible party of a vessel can be the operator, owners or demise charterer of the vessel, excluding any federal or state governmental bodies. A manager of everyday activities will also most likely be considered to be an operator, and therefore a responsible party within the scope of the Act.²⁹

The OPA 1990 extends to all oil pollution in the United States, including incidents occurring within its territorial sea³⁰ and the EEZ,³¹ as per the US admiralty jurisdiction.

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

24 Article I, 1 CLC 1992.

25 Article II, CLC 1992.

26 Article I(3), CLC 1992: the MSA 1995 defines 'owner' as 'registered owner' at Section 153A(7).

27 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.

28 Section 1002, OPA 1990.

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

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

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

It imposes strict liability for the discharge of oil upon the responsible parties, with no *de minimis* principle;³² 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.³³

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.³⁴

IV BALLAST WATER MANAGEMENT

The unregulated discharge of ballast water has been recognised as enabling the transfer of potentially invasive foreign species between marine environments and consequently posing significant environmental harm. The 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 Ballast Water Management Convention (BWMC).³⁵ At the time of writing, 79 countries representing more than 80.94 per cent 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 now 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* hold 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 D-1 IMO standards; and

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

33 De La Rue and Anderson (see footnote 29), page 197.

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

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

- d* have on board an approved ballast water treatment system in line with D-2 IMO standards.

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

The IMO have stated that there are likely to be amendments made to the Convention (the months following implementation have been referred to as the ‘experience gathering phase’) in order to improve the methodology of data gathering and analysis.³⁶ In terms of the practicalities of implementation, 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 federal US Rules, which came into force in June 2012, individual states have also passed legislation, which has proven in places to be more onerous than the federal framework.

V CARBON EMISSIONS

In April 2018, the MEPC (convening at MEPC 72³⁷) reached an agreement to target a 50 per cent cut in carbon emissions (compared with 2008 levels) within international shipping by the year 2050. This agreement may lead to some of the most significant regulatory changes in the industry in recent years and is likely to lead to greater investment in the development of zero-carbon dioxide fuels. The IMO hopes that this agreement will pave the way for phasing out carbon emissions from the sector entirely.

The most significant document produced to date is the IMO’s Initial Strategy,³⁸ which divides the aims of the IMO into a set of candidate short, medium and long-term measures within a series of specified time frames. The IMO intends to incorporate as many candidate proposals as possible into a more concrete Revised Strategy to be implemented in 2023. The candidate measures have been divided up as follows:

- a* short-term measures to be implemented between 2018 and 2023; for instance 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 includes 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.

36 MEPC 72nd Session.

37 MEPC 72nd Session.

38 Note by the International Maritime Organization to the UNFCCC 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.

A number of the candidate short-term measures are subject to further data collection, which is intended to inform the development of the Revised Strategy. As of 1 January 2019 fuel oil consumption data is being collected from a sample of vessels over 5,000 gross tons. The Revised Strategy will also incorporate a Fourth IMO Greenhouse Gas Study, which is now under way and will gather historical emissions estimates for international shipping for the period 2012 to 2018.

More recently, at MEPC 73 in October 2018, the IMO approved the 'Follow Up Program', which is intended to be used as a planning tool for meeting the timelines identified in the initial IMO Strategy. In keeping with the Follow Up Program the MEPC has, in advance of MEPC 74 (due to be held in May 2019), invited committee members to submit:

- a* their concrete proposals for the short-term measures to be included in the 2023 Revised Strategy;
- b* proposed procedures for assessing the impacts of the measures on states, such as their geographic remoteness and connectivity to main markets. The aim is to take these assessed 'impacts' into account before the adoption of a measure; and
- c* further candidates for mid to long-term measures (to be discussed further at MEPC 75).³⁹

VI LOOKING TO THE FUTURE

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

Nowhere will this be more apparent than in the regulation of operations in polar areas. With the opening of new polar shipping routes and with considerable mineral deposits and oil and gas reserves being found within the polar territories, investment in these regions is likely to be extensive. However, the high level of care required in these waters is likely to be reflected in a correspondingly in-depth regulatory regime. Already, 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. At MEPC 73 the IMO agreed that a ban on heavy fuel oils should be considered for Arctic waters. The Pollution Prevention and Response Sub-Committee has been tasked with carrying out the necessary methodology and impact assessments during the course of 2019. Such a prohibition would bring the Polar Code in line with the Antarctic Code, which already prohibits the use of heavy fuel oil under MARPOL Annex I, Regulation 43.

39 IMO briefing 18 dated 22 October 2018.

INTERNATIONAL TRADE SANCTIONS

*Daniel Martin*¹

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

Given the 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 (and which have now been reintroduced in response to US concerns), and issues with respect to Russia in both the United Kingdom and the United States during 2018, the use of sanctions as a diplomatic tool is expected to continue, with new sanctions likely to be imposed in response to other diplomatic issues. It is also anticipated that there will be increased enforcement of the sanctions that are in place.

I BASIS FOR INTERNATIONAL TRADE SANCTIONS

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

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

The European Union adopts sanctions and other restrictive measures pursuant to 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 and, in the case of the United Kingdom, this can include up to seven years’ imprisonment and unlimited fines.⁴

1 Daniel Martin is a partner at HFW.

2 Article 24 of the UN Charter.

3 Article 25 of the UN Charter.

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

There is also scope in the United Kingdom for civil monetary penalties (of up to £1 million or 50 per cent of the estimated value of the funds that breach the sanctions). Deferred prosecution agreements are 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 two-pronged mandate: to help ensure that financial sanctions are properly understood, but also to ensure that the sanctions are properly implemented and enforced. There is more information about enforcement in Section V.

II EXTENT OF INTERNATIONAL TRADE SANCTIONS

As at 1 March 2019, there are EU restrictions in place against companies and individuals in or connected with more than 30 countries (including Libya, Venezuela and Sudan). The restrictions that are likely to have most impact on businesses engaged in shipping and international commerce are those restrictions imposed pursuant to the sanctions relating to Iran, Syria, North Korea and Ukraine (including measures affecting trade with Russia).

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

In January 2019 existing 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 designated on 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 further discussion of US sanctions and their impact on non-US persons in Section III).

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.

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,

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

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 specially designated nationals (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 the sanctions legislation (e.g., in Article 1 of Regulation 267/2012 relating to Iran) and will include virtually any asset that has any economic value. 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, which are not funds but which may be used to obtain funds, goods or services.

In addition, many of the programmes include bans on the trade in specific items. Some bans are common to many programmes (such as the prohibition on the supply to the sanctioned country of military and dual-use equipment, 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 1 March 2019 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.⁶ Likewise, licences are required for the sale, supply, transfer or export to Russia of listed oil and gas equipment, and no licences may be granted in respect of new contracts for supply to Russian Arctic, deep water or shale projects, other than in the event of an emergency.⁷

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.⁸ There are also export bans on commodities such as gold, coal, iron, lead, other metals and seafood.⁹

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

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

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

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

9 Articles 3, 16a and 16b of Council Regulation (EU) No. 2017/1509 as amended.

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

As of 1 March 2019, the majority of high-profile international sanctions enforcement has been by US authorities and particularly the Office of Foreign Asset Controls (OFAC) within the US Treasury. Notable examples include fines imposed or penalties agreed with a host of international banks, including BNP Paribas,¹⁰ HSBC,¹¹ Commerzbank,¹² ING,¹³ Credit Suisse,¹⁴ Barclays¹⁵ and Société Générale.¹⁶ In addition, penalties were imposed against businesses involved in shipping and international trade, including PDVSA,¹⁷ the American P&I Club¹⁸ and Dr Cambis/Impire Shipping.¹⁹

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

In June 2014, BNP Paribas entered into a plea agreement with the US Department of Justice, pursuant to which BNP Paribas agreed to pay total financial penalties of US\$8.9736 billion, including forfeiture of US\$8.8336 billion and a fine of US\$140 million. As part of the plea agreement, BNP Paribas acknowledged that, from at least 2004 until 2012, it knowingly and wilfully moved more than US\$8.8 billion through the US financial system on behalf of Sudanese, Iranian and Cuban sanctioned entities, in violation of US economic sanctions. The conduct also led to penalties being imposed by other US regulators, including the New York State Department of Financial Services, which announced at the time that BNP Paribas had agreed to, among other things, terminate or separate from the bank

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

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

12 www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20150312.aspx.

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

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

15 www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20100818.shtml.aspx.

16 www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20181119_33.aspx.

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

18 www.treasury.gov/resource-center/sanctions/CivPen/Documents/20130509_american_club.pdf.

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

13 employees, including the group chief operating officer and other senior executives, and suspend US dollar clearing operations through its New York branch and other affiliates for one year for business lines on which the misconduct centred.

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

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

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

In March 2017, Zhongxing Telecommunications Equipment Corporation (ZTE), 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 related to 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.²⁰

On 31 March 2016, the UK's Office of Financial Sanctions Implementation (OFSI) was established. Part of the OFSI's mandate is to ensure that sanctions are properly implemented and enforced. The March 2015 Budget²¹ referred to the 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, where 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

20 https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20170307_zte.pdf.

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

only needs to 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 2017.²²

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.²³

VI IRAN SANCTIONS – RELIEF AND RENEWAL

The full details of the Iran Deal under the JCPOA are outside the scope of this short chapter, but in essence the deal provided Iran with staged relief from the sanctions imposed by the United Nations and the European Union, and many of the sanctions imposed by the United States, in return for continued commitments by Iran in respect of its nuclear programme.

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

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

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

There were due to be further delistings on Transition Day, as well as further lifting of trade restrictions, but on 8 May 2018, President Trump withdrew the United States from the JCPOA. On 6 August and 5 November 2018 all of the US secondary sanctions on Iran that the JCPOA had removed were reinstated.

A number of difficult challenges continued to arise even when the sanctions were suspended, including the fact that the US domestic sanctions (i.e., those that apply to US persons, and therefore US banks processing US dollar transactions) were largely unaffected by the JCPOA, with the result that US persons were still largely prohibited from trading with Iran.

The US withdrawal from the JCPOA creates new challenges for non-US businesses who want to engage in trade with Iran. They risk exclusion from US markets, as well as challenges finding banks and insurers that are willing to support lawful trade with Iran. The EU Blocking Regulation was also expanded to make it unlawful for EU businesses to comply with these US secondary sanctions.

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

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

At the time of writing, Iran and the EU continue to uphold their respective commitments under the JCPOA despite the US withdrawal. In January 2019 the UK, Germany and France created a new payment mechanism or special purpose vehicle, which is intended to facilitate financial transactions with Iran.

VII SANCTIONS – IMPACT OF BREXIT

The United Kingdom is currently expected to leave the European Union in 2019, subject to the terms of any transitional arrangements for the withdrawal. EU sanctions will continue to have a direct effect on UK companies and individuals during that period. After this date, EU sanctions will no longer have any direct effect on UK companies or individuals.

However, it is not anticipated that this will have a major impact on UK businesses, as it is expected that the United Kingdom will adopt national measures that closely mirror those adopted by the European Union (in a manner analogous to the approach that Norway and Switzerland currently adopt). This is likely to be the case even in the event of a no-deal Brexit.

While it is possible that domestic sanctions could diverge from EU sanctions in particular areas (where, for example, the United Kingdom considers that the economic cost to the nation of adopting particular restrictions outweighs the benefits of those measures), it seems unlikely that there will be wholesale differences, given the United Kingdom's long-standing support for EU sanctions, including those against Iran and Russia.

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

VIII COMPLIANCE WITH INTERNATIONAL TRADE SANCTIONS

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

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

COMPETITION AND REGULATORY LAW

Anthony Woolich and Daniel Martin¹

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 Chapter 2.

II COMPETITION LAW

Historically, the global shipping industry has been exempt from many of the requirements of competition law; however, recent developments within the European Union, especially the repeal of the block exemption for liner conferences in October 2008² and the lapsing of the industry-specific guidance on anticompetitive practices,³ have made an awareness of competition law a priority within the industry. Given that EU competition law, administered by the European Commission (the Commission) places the most stringent competition restrictions on the shipping industry of any jurisdiction, this section will focus on EU law.

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

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

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.

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

1 Anthony Woolich and Daniel Martin are partners at HFW.

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

3 *ibid*.

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 who can show loss may sue for damages. Some practices may also be criminal offences.

The anticompetitive practices must have the object or effect of preventing, restricting or distorting competition within a particular market. 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 of Article 101 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. This investigation 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 related to price announcements for a period of 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.

Because of 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 will apply until at least April 2020. On 7 May 2018 the Commission published a road map for the evaluation of the BER and on 27 September 2018 it invited comments on the BER.⁸

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

4 Article 101(2) of the TFEU.

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) 906/2009 OJ L256/31, 28 September 2009.

8 IP/18/5921.

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. 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. It is interesting to note in this respect that 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, for vessel sharing arrangements, which shares common features with the BER.

While 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.

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 applies to collective abuse of a dominant market position as well as abuse by an individual company. While this would seem to replicate the position under Article 101, EU jurisprudence has stressed that the two Articles address different situations.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.

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

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.

iii Merger control

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

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

Mergers that meet the thresholds should be notified to the Commission before implementation, as the 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 on the EU merger control process, including the current turnover thresholds, may be found on the Commission's website.¹⁵

The Commission has recently reviewed the acquisitions of Hamburg Süd by Maersk¹⁶ and OOIL by COSCO Shipping,¹⁷ and the creation of Ocean Network Express through a joint venture between three Japanese lines.¹⁸ While the last two transactions were cleared unconditionally, Maersk committed to terminate the participation of Hamburg Süd in 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 Oriental Lines (NOL) by CMA CGM¹⁹ and of United Arab Shipping Company (UASC) by Hapag-Lloyd,²⁰ where similar commitments were required.

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

14 Council Regulation (EC) No. 139/2004 (OJ 2004 L24/1, 29.1.2004).

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

16 See the Commission's press release dated 10 April 2017 at http://europa.eu/rapid/press-release_IP-17-904_en.htm.

17 See the Commission's press release dated 6 December 2017 at http://europa.eu/rapid/press-release_MEX-17-5149_en.htm.

18 See the Commission's press release dated 29 June 2017 at http://europa.eu/rapid/press-release_MEX-17-1842_en.htm.

19 See the Commission's press release dated 29 April 2016 at http://europa.eu/rapid/press-release_IP-16-1631_en.htm.

20 See the Commission's press release dated 23 November 2016 at http://europa.eu/rapid/press-release_IP-16-3942_en.htm.

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.²¹ 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.²² On 2 May 2018, the European 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.²³

III ANTI-BRIBERY CONTROLS

The past decade has seen a substantial increase in international cooperation and harmonisation to combat bribery and corruption. These have been largely led by the efforts of two organisations: the Organisation for Economic Co-operation and Development (OECD), whose Anti-Bribery Convention has now been adopted by the 36 OECD Member States²⁴ and eight non-member countries;²⁵ and Transparency International, which publishes the hugely influential annual Corruption Perceptions Index (a survey that in 2018 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 (MACN).

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

i OECD Anti-Bribery Convention

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

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

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

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

23 Commission Daily News MEX/18/3647).

24 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.

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

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.vii).

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 and making it unlawful for US persons and entities to make payments to foreign government officials to assist in obtaining or retaining business.

The UK Bribery Act (UKBA) was passed on 8 April 2010, following criticism of the UK legislation by the OECD, and entered into force on 1 July 2011. The UKBA had two main objectives: to codify and consolidate existing UK legislation and to create a new offence, directed at commercial organisations that fail to prevent bribery being carried out by their agents. As a result, it is a criminal offence to pay a bribe,²⁶ to receive a bribe²⁷ or to bribe a foreign public official.²⁸ It is also an offence for a company to fail to prevent others paying a bribe on its behalf;²⁹ 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, while the FCPA criminalises only bribery of foreign public officials, the UKBA outlaws private (i.e., business-to-business) bribery. The UKBA criminalises not only the person paying the bribe (who would be caught by the FCPA) but also the person receiving the bribe (who would not be caught by the FCPA).

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

iv Facilitation payments and failure to prevent bribery

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

26 Section 1 of the UKBA.

27 Section 2 of the UKBA.

28 Section 6 of the UKBA.

29 Section 7 of the UKBA.

The corporate offence of failure to prevent bribery³⁰ is a new offence, created by the UKBA. In essence, a company (A) will have strict liability where a person (B) associated with A bribes another person (C), intending to obtain or retain business or an advantage in the conduct of business for A. There is a defence under which A can show that it had in place adequate procedures designed to prevent persons associated with it from paying bribes.

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

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

v Compliance with the UKBA

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

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

vi OECD monitoring

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

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

vii UK enforcement

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

In December 2014, the SFO reported on successful prosecutions of two individuals under the UKBA³¹ and one corporate under older legislation.³² At the end of 2015, we

³⁰ *id.*

³¹ 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/>.

³² 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/>.

saw the first UK settlement with enforcement agencies for a contravention of Section 7 of the UKBA,³³ 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.

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 2015.³⁴ The charge (which has been suspended pursuant to the DPA) related to a US\$6 million payment by a former sister company (Stanbic Bank Tanzania) to a partner in Tanzania that the SFO alleged was intended to induce local politicians to show favour to Stanbic Bank Tanzania and Standard Bank's proposal for a US\$600 million private placement to be carried out on behalf of the government of Tanzania. Under the DPA, Standard Bank plc agreed to pay a US\$16.8 million financial penalty, a US\$8.4 million disgorgement of profits, a further US\$7 million in compensation and the SFO's costs.

Smith & Ouzman Ltd was sentenced in January 2016³⁵ 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).

33 www.copfs.gov.uk/media-site/media-releases/1144-glenrothes-cablng-company-pays-212-800-after-reporting-itself-for-failing-to-prevent-bribery-by-a-third-party.

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

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

In the case of Smith & Ouzman,³⁶ 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.³⁷

The conduct spanned three decades and involved Rolls-Royce's Civil Aerospace and Defence Aerospace businesses and its former Energy business and related to 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 of approximately £671 million (including US\$170 million to the United States and US\$25 million to Brazil) by Rolls-Royce.

A DPA with Tesco Stores Limited, entered into on 10 April 2017, was revealed in January 2019 following the lifting of reporting restrictions.³⁸ The DPA relates to conduct between February and September 2014 where Tesco used illegal practices to meet accounting targets.

As part of the DPA, Tesco agreed to pay £129 million and investigation costs of £3 million. The company is also required to implement a compliance programme during the DPA's three-year term.

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

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

38 <https://www.sfo.gov.uk/cases/tesco-plc/>.

OFFSHORE

*Paul Dean*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.

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 in turn 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.

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 the SUPPLYTIME 75 form.

¹ Paul Dean is a partner at HFW.

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 carveouts 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'. These definitions 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-regime, SUPPLYTIME 2017 includes amendments to the included losses that fall within the knock-for-knock regime. Clause 14(a) now includes reference to 'non-performance' so that parties are protected under the knock-for-knock regime 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 form is now consistent with other recent forms in the offshore shipping sector, such as WINDTIME.

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

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.

In *Ferryways NV v. Associated British Ports*³ (and a number of earlier decisions), it was held that exclusions of ‘indirect or consequential’ losses were only effective 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,⁴ the court held that ‘consequential losses’ had the wider meaning of financial losses, as the words are typically used by commercial parties. There was therefore 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: (1) 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) 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.

³ [2008] 1 Lloyd’s Rep 639.

⁴ *Star Polaris LLC v. HHIC-PHIL Inc* [2016] EWHC 2941 (Comm).

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 charterer's 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, together with the International Salvage Union and the European Tugowners Association, debated 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 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)(i)).

One further interesting point worth highlighting in the context of Clause 25 is the operation of the knock-for-knock regime in circumstances where a tug and tow part and the tow is subsequently successfully salvaged. An argument could be made that on 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.

IV TOWHIRE

While TOWCON is a contract for a specific voyage, TOWHIRE is used for the hire of towage services for a certain period of time. The TOWHIRE 2008 form follows the same format as the TOWCON 2008, 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 form and the 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 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 Hague Rules and 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

A BIMCO contract – currently named DISMANTLECON – is in the process of being drafted, with a view to producing a decommissioning contract that is appealing to both the decommissioning company and contractors. The contract is intended to reflect the greater responsibility of a contractor in the planning and methodology of the decommissioning project, and will therefore allocate the contractor a greater share of risk. As such, it may contain limited carveouts from BIMCO’s usual knock-for-knock regime. 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. The LOGIC decommissioning contract 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

i MT Højgaard v. E.ON

The Supreme Court has handed down a significant judgment in *MT Højgaard v. E.ON*,⁵ which concerns the interpretation of offshore construction contracts. The ruling affirms the importance of complying with technical requirements incorporated into a contract, even if these are more onerous than general legal standards of design and workmanship.

5 [2017] UKSC 59.

MT Højgaard (MTH) was engaged by E.ON to design, fabricate and instal the foundations for 60 wind turbines comprising the Robin Rigg offshore wind farm. The contract required MTH to carry out this work in accordance with the international design standard DNV-OS-J101 (J101). The contract also required that in complying with J101, MTH had to ensure that (1) the design of the foundations had a lifetime of 20 years (the 'design life warranty'), and (2) the work was to be carried out with reasonable skill and care.

MTH carried out the work in compliance with J101 without negligence. Despite this, shortly after completion, grouted connections within the foundation structures failed. It was later established that J101 contained a serious design error that resulted in an axial capacity of the grouted connection being overestimated. This error meant the design life of the foundations was significantly less than 20 years, even when constructed exactly according to J101.

A schedule of remedial work was approved, the cost of which was €26 million. Litigation was commenced to determine which party should bear that cost. The Technology and Construction Court found MTH liable as J101 was not fit for purpose. Although MTH had reasonably relied on an international standard, its significant underlying error meant that MTH failed to install wind turbines that satisfied the design life warranty.

The Court of Appeal allowed MTH's appeal. It considered that the contract contained no enforceable design life warranty. Its reasoning for this was that reference to a 'lifetime of 20 years' was tucked away within two lines of the technical requirements, thus constituting 'too slender a thread' upon which to find a design life warranty. In any event, the Court of Appeal considered that MTH had fulfilled its obligations under the contract by carrying out the work with reasonable skill and care by complying with the requirements of J101.

E.ON appealed to the Supreme Court, which unanimously overturned the Court of Appeal's decision. Lord Neuberger considered the inconsistency between the design life warranty and the obligation to comply with J101. He considered that the courts were generally inclined to give full effect to the design life warranty, even if this was inconsistent with a specified design standard, as it is the contractor who takes this risk upon commencement of the work. The Supreme Court also disagreed that the brief reference to a 20-year lifetime in the technical requirements was 'too slender a thread' upon which to establish a design life warranty. The requirement was clearly stated in the contract, it was clear in its terms and should be given contractual force.

ii Seadrill Ghana Operations Ltd v. Tullow Ghana Ltd

The Commercial Court handed down a significant decision in *Seadrill Ghana Operations Ltd v. Tullow Ghana Ltd*, which addresses important questions relating to competing force majeure clauses and considers the meaning and effect of a reasonable endeavours obligation to avoid, overcome or to circumvent a force majeure event in the context of the employment of an offshore rig for drilling operations.

The dispute in this case concerned a long-term contract for Seadrill's West Leo semi-submersible drilling rig. The contract area was Ghana and Tullow intended to use the rig to carry out drilling and completion operations in the TEN and Jubilee fields, offshore Ghana, although primarily in the TEN field to execute work approved by the Ghanaian government under the long-term TEN Plan of Development.

Ghana referred the longstanding dispute concerning the position of its maritime border with the Ivory Coast to the International Law of the Sea Tribunal. The disputed area covered the entirety of the TEN field but not the Jubilee field. During the arbitration the Ivory Coast

made an application for a provisional measures order (PMO) to stop any new drilling in the disputed TEN field. Ghana directed Tullow to comply with the PMO and prohibited the spudding of new wells but allowed for the completion of pre-existing wells and for well workovers.

The Commercial Court found that the PMO was a 'drilling moratorium imposed by government', which was a force majeure event under the contract. However, the Commercial Court also found that Tullow was not entitled to terminate the contract for a force majeure event as the force majeure did not cause the ultimate lack of work of the rig or Tullow's inability to comply with its contractual obligation to provide Seadrill with a drilling programme for the rig prior to termination.

Tullow was planning to drill and complete a well in TEN then to move the rig to Jubilee, where it had expected the Ghanaian government to approve in Jubilee a plan of development. The Jubilee plan of development was not approved for reasons the Court found to be beyond Tullow's control. In short, the force majeure event in TEN and the planned work in both TEN and Jubilee ran out. Tullow declared force majeure and terminated the contract saying it had discharged a contractual obligation to use reasonable endeavours to avoid, overcome and mitigate force majeure.

The Commercial Court found that there were two reasons why Tullow was unable to provide the contractual drilling programmes to Seadrill. The first was the TEN related force majeure event and the second was the lack of government approval of the further Jubilee plan of development. The Court found that the effective cause was the latter as Tullow could not show that it was delayed or prevented by force majeure. This was found by the Court even though the approval for the further plan of development had never existed and the failure to obtain approval was not attributable to Tullow. The Court decided that it was enough that Tullow had expected to get approval (although the basis for that expectation was not analysed in evidence).

Rig scheduling in the offshore industry is speculative and subject to change and like the majority of contracts of this nature, Tullow was given the discretion to use the rig wherever it liked within the contract area.

The Commercial Court's decision in respect of causation places emphasis on Tullow's long-term plans for their rig schedule from immediately before and after the PMO. The judgment does not address evidence that was advanced by Tullow at the trial that were it not for the PMO, Tullow would have used the rig in the TEN field to drill new wells even if the Jubilee plans were not approved. The Court also found that Tullow had not exercised reasonable endeavours to avoid, overcome or mitigate the force majeure. The Court said that the rig should have been used to workover two other water injector wells in Jubilee by way of mitigation.

As to the Jubilee workovers, the Court said that although Tullow had acted reasonably when making the decision not to do the work when considering its own safety and commercial interests, the reasonable endeavours obligation meant that Tullow had to take Seadrill's interests into account when deciding whether or not to do the work. The Court placed emphasis on the fact that the rig had no other work to do after the time the force majeure event had taken place in assessing what was reasonable when considering Seadrill's interests.

An added issue was that even if the Jubilee workovers had been done (at significant cost), they would not have had any near-term impact on production from the field and there would be no return on investment for a significant time.

This finding has potentially serious ramifications. There are always works that can be carried out on an oil rig. Oil companies make decisions on the basis of business need, safety, costs of the works, return on investment and other factors. The Commercial Court's decision imposes a higher standard as well as additional issues that must be considered in the decision-making process when there is a force majeure event and a reasonable obligations endeavour to mitigate or avoid it.

Although the Court focused on the fact the rig was not doing other work to support its decision on reasonable endeavours, significant costs in addition to the rig rate would have to be incurred in doing workovers, completions and drilling. This judgment means an oil company has to do work and incur those costs, even when it is neither necessary nor in its interests, to be said to exercise reasonable endeavours.

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.

OCEAN LOGISTICS

*Craig Neame*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. Broadly speaking, 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 will examine both, but our focus will be 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:

- a* the demise (or bareboat) charter: this operates as a lease of the vessel itself for an agreed period of time in exchange for the payment of hire. With a demise charter, the charterer will usually provide the crew and operate the vessel technically and commercially;
- b* the time charter: this is a contract for the use of the ship and her crew for a specified period in exchange for the payment of hire during the period of use. Hire is usually calculated according to the vessel type on a daily or monthly basis. It is not therefore affected by the number of voyages during the period of hire, or the amount of cargo transported. This type of charter party is often used by carriers seeking to increase their fleet for a certain period of time; and

¹ Craig Neame is a partner at HFW.

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

In addition to the above, there are several hybrid forms of charter party, which are a combination 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 the charterer charts a fixed number of container spaces on a voyage basis and pays a set price per slot. Finally, under a consecutive voyage charter, a charterer may charter a vessel for a specific period of time, but the vessel is required to fulfil a number of voyages between fixed ports during the period of hire.

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

Over the years, a number of standard-form charter parties have been developed by various organisations and are commonly used throughout the shipping industry. In particular, BIMCO² has developed a number of well-known standard forms, such as the Standard Bareboat Charter (BARECON 2001 and 2017) for demise charters and the Standard Time Charter Party for Container Vessels (BOXTIME 2004). For voyage charters, 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 charters 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 charts 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 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.

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.

III BILLS OF LADING AND WAYBILLS

i Overview

A bill of lading is the transport document that will be 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 plays a pivotal role in international trade, as will be illustrated below. In broad terms, the bill of lading serves three functions within the context of international trade. First, it acts as evidence of the contract of carriage. The bill of lading is not the actual contract of carriage since the contract is usually made before the bill of lading was signed and delivered; however, it provides evidence of the terms of the contract of carriage. Second, the bill of lading acts as a receipt for the goods received or shipped. Bills of lading usually contain statements as to the description, quantity 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 their order or 'to order'. Bills of lading making goods deliverable to order are negotiable⁵ instruments. If a bill is negotiable, it will allow transfer of title, which will be effected by endorsement. Order bills will entitle any lawful holder of the bill to possession of the goods. Bills of lading that are not negotiable instruments are sometimes known as 'straight bills'. Although not negotiable, a straight bill of lading is, as a matter of English law, a document of title. Under a straight bill of lading, cargo is only deliverable to the named consignee. The fact that the bill of lading is a document of title differentiates it from other transport documents that may also be issued, such as waybills or forwarder's certificates of receipt, 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 Hague Rules or the Hague-Visby Rules will often apply to contracts of carriage covered by a bill of lading, or any similar document of title. These rules provide the carrier under the bill of lading with a number of important defences and limitations when faced with a cargo claim under the bill. The Hague and Hague-Visby Rules are examined in more detail in other chapters.

ii Different types of bills of lading

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

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

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

vessel, for example, the ‘Congenbill’ (1994 as revised in 2000 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

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

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

Multimodal transport combines at least two types of transport, without the need for the transport unit to be changed (e.g., when goods are transported in containers first by road, then by sea, then by road). If the place of receipt and place of delivery boxes are completed on the front face of the bill, then it is a multimodal bill, 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 Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules) was adopted in December 2008 by the UN General Assembly and was designed to regulate multimodal transport. However, very few countries have ratified the Rotterdam Rules and therefore they seem unlikely to enter into force internationally in the near future.⁸

In the absence of an international convention providing a liability regime for multimodal transport, the terms and conditions on the reverse side of a combined-transport bill of lading usually include very detailed and complicated cargo liability provisions (often referred to as network liability regimes). Network liability regimes set out how the liability of the carrier should be determined depending on where the loss or damage to cargo happened (i.e., whether it happened during the port-to-port element of the carriage or during any other part of the carriage not involving carriage of goods by sea). In addition, as multimodal

6 Against surrender of the received bill.

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

8 As of April 2017, only three countries (Spain, Togo and the Congo) have ratified the Rotterdam Rules; the convention will not come into effect until at least 20 countries have ratified it.

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 only be 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), 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

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

The role 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 (NVOCC), 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 NVOCC businesses, which sometimes trade under different names.⁹

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

Generally speaking, 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 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 together with a commission, can be evidence that the parties did not intend for the freight forwarder to be merely an agent; however, this is not conclusive evidence as it is possible, at least under English law, for the parties to agree that the agent should be remunerated on the basis of the profit the agent makes on the all-in rate (in practice, a lot of freight forwarders trade on this basis).

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

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

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) and very often the STCs will have been developed by trade associations representing the interests of freight forwarders.¹⁰

When a freight forwarder acting as a carrier or NVOCC also issues a house bill of lading, there may again be two sets of terms and conditions that apply to the same shipment. Ideally, the STCs should make it clear which terms and conditions will prevail; absence of an express statement to that effect will cause difficulties as the courts will 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 (2005A or the revised 2017 Conditions) 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.

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 UK has become a net importer of manufactured products, bringing in US\$655 billion of physical goods annually.²

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

As the manufacturing base has changed and the economy developed, so too has the ownership and operational structure of UK ports and terminals. 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 UK'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 UK, or the Landlord Port Authority model where 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 2005, the top three international terminal operators handled nearly 2 per cent of global throughput.⁴

ii Terminal operator's liability

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

1 Matthew Wilmshurst is a senior associate at HFW.

2 United Nations Commodity Trade Statistics Database, May 2014.

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

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

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

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

II CONTRACTUAL CLAIMS AGAINST TERMINAL OPERATORS

UK terminal operators will commonly seek to impose their terms and conditions on the users of their terminals, and there are a number of ways in which they seek to do this. Regular users of a terminal are likely to be asked to sign up to a terminal service agreement (TSA), which will contain the commercial terms between the parties (services provided, tariffs, key performance indicators, etc.) but will also include provisions designed to protect the terminal operator. Terminal operators will normally 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 show that (1) it was owed a duty of care by the terminal operator; (2) that there was a failure on the part of the terminal operator to exercise that duty of care and (3) that the terminal operator's breach of that duty of care caused the loss complained of.⁵ The burden of proof is on the cargo claimant to demonstrate that it has fulfilled these requirements (and the existence of at least a duty of care is normally fairly easy to establish in the context of loss or damage occasioned by a terminal operator). Of more difficulty to the cargo interest bringing a claim in negligence is the requirement that it either owned the goods at the time of the breach or had possessory title to them.⁶

ii Bailment

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

The 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.

For a *Himalaya* clause to be enforceable it must satisfy the four-part test laid down by Lord Reid in *Midland Silicones*,⁸ in that it must be clear that (1) the subcontractor is intended to be protected by the clause, (2) the carrier contracted as agent for the subcontractor, (3) the carrier has authority from the subcontractor to enter into the *Himalaya* clause (although later ratification would suffice) and (4) difficulties regarding consideration moving from the stevedore must be overcome. A *Himalaya* clause typically reads: 'every such person [subcontractor] or

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

6 See *The 'Aliakmon'* [1986] AC 785, 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.

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

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

A *Himalaya* clause will not necessarily offer complete protection to the terminal operator acting as the subcontractor of a bill of lading issuing carrier. In circumstances where the services provided by the terminal operator were not contemplated by the bill of lading, then the *Himalaya* clause will not come into operation. This issue was considered in *The ‘Rigoletto’*,⁹ 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

The liberty to subcontract clause

When a sub-bailee receives goods from a bailee pursuant to a contract between those two parties, it is in certain circumstances entitled to rely on the terms of that contract when facing a claim in bailment from the original bailor of the goods, through the doctrine of sub-bailment on terms. The leading case on sub-bailment on terms is often cited as *The ‘KH Enterprise’*,¹¹ 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.’

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 express.¹³

The circular indemnity clause

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

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.

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.

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.

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

However, this was considered by Rix LJ in *The 'Rigoletto'*, 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).' Rix LJ stated that where a sub-bailee seeks to speak for itself by setting out the terms on which it wishes to conduct business, 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.

SHIPBUILDING

*Simon Blows and Vanessa Tattersall*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 is now a major issue, especially in Korea, even among the big yards.

Asia continues to dominate shipbuilding. According to statistics for 2018,² published by the Shipbuilders' Association of Japan, of the 1,467 worldwide recorded orders for new ships of more than 100 gross tonnage (GT) in this period, 972 (more than 66 per cent) were placed with the big three Asian shipbuilding nations: Japan, South Korea and China. China accounted for 395 of those orders, about one-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 54,430 million GT ordered in 2016, about 46.3 million GT was with shipyards in the big three Asian shipbuilding nations, with Korea and China accounting for more than 9.9 million GT and 23.3 million GT, respectively, together about two-thirds of the world total.

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. 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.

1 Simon Blows and Vanessa Tattersall are partners at HFW.

2 'Provisional' figures.

II SHIPBUILDING CONTRACTS

There are a number of standard shipbuilding contracts. The most widely used remains the Shipbuilders' Association of Japan (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 hardly surprising that in its unamended form it is thought to favour the shipyard. Many of the amendments that are most frequently seen are made by buyers to redress this perceived imbalance. The Baltic and International Maritime Council (BIMCO) has in recent years produced its own form of shipbuilding contract, the Newbuildcon. BIMCO is a shipping industry trade association with many shipowner members, so it is 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 (FPSOs) and floating storage and offloading units (FSOs)), engineering, procurement and construction (EPC) 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.

III DEVELOPMENTS IN SHIPBUILDING LAW

There have been many disputed shipbuilding contract cancellations as collapses in asset values and chartering revenues have forced buyers to reassess their order books and shipyards have sought to hold reluctant buyers to their contracts. 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 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*⁴ 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 has 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 the completion of the ship.

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

4 [2011] EWHC 848 (Comm).

The judge found for the buyers and upheld their cancellation. He decided that Adyard's failure to give force majeure notices disqualified them from claiming any extension to the delivery date. His 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 termination.

The *Adyard* approach was followed in *Zhoushan Jinhaiwan Shipyard Co v. Golden Exquisite & ors*,⁵ 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 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.

There are also now several decisions by London arbitrators in shipbuilding cases where there has been a marked reluctance to allow shipyards to rely on prevention, including an anonymised award reported in summary form in 2013,⁶ 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. 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 recently in *Saga Cruises BDF Limited & Others v. Fincantieri SpA*.⁷ 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

5 [2014] EWHC 4050 (Comm).

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

7 [2016] EWHC 1875 (Comm).

responsible and for others the buyers were responsible) where 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. ('Unless there is a concurrency actually affecting the completion date as then scheduled the [shipyard] cannot claim the benefit of it.')

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*,⁸ a decision by the Court of Appeal 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. The buyers did not, however, limit their claims to contractual termination and refund of the instalments. They also sought to treat the shipyard's conduct as a repudiatory breach and claimed damages. In response, the shipyard argued what was then a widely held view of many practitioners and commentators – that the termination and refund provisions of the shipbuilding contracts amounted to a comprehensive code so that the buyers' exercise of these rights amounted to a waiver of their rights to treat the shipyard as being in repudiatory breach and to claim damages for loss of bargain at common law.

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

Although the decision of the Court of Appeal gives some buyers potentially valuable additional rights against shipyards, in practice its scope may be limited. This is because, unlike the contract in *Stocznia Gdynia*, many shipbuilding contracts contain an express stipulation that refund of instalments discharges the obligations of all parties.⁹ A clause of this kind should prevent a claim for damages for repudiation. Even where there is no clause of this nature, 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.¹⁰

It is not unknown for shipbuilding contracts, or for events occurring under them,¹¹ to be backdated to avoid the effect (and cost) of new regulatory requirements. One of the issues in *Crescendo Maritime Co and others v. Bank of Communications Company Ltd & ors*;

8 [2009] EWCA Civ 75, CA. This was an appeal from an arbitration award on a number of preliminary issues.

9 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.'

10 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).

11 For example, the date of keel laying.

*Alpha Bank AE v. Bank of Communications Company Ltd & ors*¹² was that the underlying shipbuilding contract was backdated to circumvent the application of the SOLAS amendments 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, the Bank of Communications Company (BOCC), the respondent refund guarantors, alleged that the backdating of the shipbuilding contract was a fraud on them, and that the fraud had induced them to issue the refund guarantees. After a procedural decision by the London tribunal,¹³ the 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 the 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 did make a declaration of non-liability in Alpha's favour.

Both the London arbitrators and the judge found that the 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 the 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 where 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 tended to be that compliance with specification does not excuse failures to comply with performance criteria, even when those criteria result in better performance than would be possible by compliance with the specification.

This principle has been restated in a recent Supreme Court case involving wind farm foundations.¹⁴ The contractor agreed to build to specified standards. These standards 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 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.

12 [2015] EWHC 3364 (Comm).

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

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

IV POST-DELIVERY WARRANTIES

Commercial shipbuilding contracts almost invariably contain a 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 a recent case.¹⁵ 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 provision¹⁶ 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.

V 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 he or she 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 English Court of Appeal considered whether refund guarantees given on behalf of a Spanish shipyard were payable on demand or only after the shipyard's liability (if any) had been decided in arbitration under the shipbuilding contract.¹⁷ 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. Prominvestbank*,¹⁸ 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

15 *Star Polaris LLC v. HHIC-PHIL Inc.* (2015) EWHC 2941 (Comm).

16 A bespoke modification of the SAJ warranty clause.

17 *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.

18 [2008] EWCH 1979 (Comm).

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 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 United Kingdom Supreme Court in *Rainy Sky SA and others v. Kookmin Bank*¹⁹ 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 of course 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 guarantees²⁰ 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. Based on Paragraph 2 of the guarantees, the buyers argued that all pre-delivery instalments were covered. But based on Paragraph 3, the bank argued that these words were to be construed more narrowly and covered only refunds payable following a termination, not refunds triggered by insolvency (for which the contracts gave the buyers no termination rights). The guarantees were ambiguous and both constructions were arguable.

The Supreme Court decided that when the commercial purpose of the guarantees was taken into account, the buyers' construction was correct. It concluded that there were no credible commercial reasons for the bank's 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 costs involved) but did not do so. The Court seemed happy to infer from this that no such rationale existed and in this case the inference was probably well-founded. But there are obvious dangers in judges seeking to

19 [2011] UKSC 50.

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

apply their own (necessarily subjective) 'commercial common sense' to resolve questions of this kind, except perhaps in those very rare occasions where ordinary legal analysis cannot provide the answer.

We have already seen an example of refund guarantors commencing defensive proceedings in their home jurisdiction, notwithstanding English law and London arbitration provisions in the refund guarantee itself in the *Crescendo Maritime Co* case mentioned in Section III. Similar events occurred in *Splithoff's Bevrachtungskantoor BV v. Bank of China Limited*,²¹ 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.²² The Chinese judgments were enforceable in China.²³

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, of course, 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 Court of Appeal 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 Court plainly wished to give effect to the contract jurisdiction provisions and took full account of the breaches of the London anti-suit injunction. It also doubted that the bank was at any real risk of criminal prosecution in China, and reasoned that because of its judgment compelling payment under the refund guarantees, the bank would be making payment under compulsion, so would not be acting voluntarily, 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,²⁴ which first had to decide whether the guarantee was payable on demand or only after the buyers' liability had been determined in arbitration. The payment guarantee had similar features to the wording of the refund guarantees in *Caja de Ahorros* and although the first instance judge found for the guarantor bank, the Court of Appeal determined that it was payable on demand.

21 [2015] EWHC 999 (Comm).

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

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

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

The potentially far-reaching consequences of on-demand guarantees are illustrated by a subsequent decision of the Court of Appeal in the same case.²⁵ The shipyard was entitled to retain substantial sums paid under the payment guarantee even though the arbitration tribunal appointed under the shipbuilding contract subsequently ruled that the shipyard had no right to receive the instalment in respect of which it had made its demand. This was because the demand was made in good faith and was valid when made, and there were no grounds to say that the payment was subject to a trust in favour of the guarantor bank if the instalment was found later not to be due.

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

(As a footnote, structured finance mechanisms such as interest rate and currency swaps are increasingly a feature of newbuilding finance and have themselves generated disputes.²⁶)

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

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

MARINE INSURANCE

Jonathan Bruce, Alex Kemp and Rebecca Huggins¹

I INTRODUCTION

Marine insurance was surely 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.

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

Lloyd's can be considered as consisting of two parts: the Market (which as at 2017 was home to 56 managing agents and 95 syndicates) and the Corporation of Lloyd's. The Lloyd's Market effectively provides a place at which underwriters (acting together in syndicates) can sell their insurance products to those wishing to buy them. It is a very dynamic and commercial environment whereby those looking for insurance are able to talk directly to the decision makers at each syndicate, and negotiate with them as to the premium that will be paid for the risk in question. Competing quotes can easily be obtained from competing syndicates by crossing the floor and talking to another underwriter.

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

1 Jonathan Bruce and Alex Kemp are partners and Rebecca Huggins is a professional support lawyer at HFW.

2 www.lloyds.com.

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

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

Given the extensive history of the English marine insurance market, there is a long history of marine insurance case law dating back several hundred years. 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, in 2016 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 entered into after 12 August 2016, at the time of writing its provisions have not yet been considered by the courts, although we expect the first claims under this new legislative framework might come before the courts during the next year.³ However, claims arising from policies written before 12 August 2016 are governed by the old law (and these are still going through the courts) and 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. We therefore deal with both regimes below.

In addition to the legislative framework, it can still be necessary to consider 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 not been codified. Since 1906, case law has continued to arise from the Act and other issues of relevance, and the highly experienced Commercial Court in London issues judgments on marine insurance and will continue to do so under the Insurance Act 2015.

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 and Voyage Clauses, which are used widely around the world. The most popular iteration of the Institute Time Clauses is the 1983 revision (they were subsequently revised in 1995). These Clauses are used around the world in many jurisdictions, regardless of the domicile of the underwriters. Crucially, they apply English law and jurisdiction.

The Institute Time Clauses included precedent wordings for several classes of marine insurance. The most common form of marine insurance placed in the London market is

3 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 Verisicherung AG v. Arab Insurance Group* [2017] EWCA Civ 96.

hull and machinery insurance. The Institute Time Clauses – Hulls 1983 (the 1983 Clauses) adopt a named perils approach that is usual under English law (though we note that Institute Cargo Clauses A (but not B and C) do operate an ‘all-risks’ approach). The perils that are covered by the policy are listed in Clause 6 and are broadly split into two categories: the first allows recovery simply where the loss is caused by one of the specified insured perils, and the second limits recovery where the loss is caused by a specified peril and where the loss or damage has not resulted from want of due diligence by the assured, owners or managers. This latter aspect is known as the *Inchmaree* clause and was included in the 1983 Clauses as a result of a judgment in a case of the same name.⁴ The *Inchmaree* clause seeks to widen the cover to include risks that are not caused by a peril of the sea. The 1983 Clauses then seek to subject the enumerated cover to various exclusions, in Clauses 8, 23, 24, 25 and 26. The 1995 revision to the Institute Time Clauses – Hulls introduced a widening of the *Inchmaree* clause such that the want of due diligence was extended to cover acts by the ‘Superintendents or any of their onshore management’, as well as the assured, owners or managers.

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

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

As matters stand, an assured would not usually be indemnified by his 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 and bespoke loss of hire insurance is often attractive.

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

II CLAIMS

A marine insurance policy will start by an assured instructing its broker to secure cover for a particular class of risk. It may be that there are several brokers in the chain. A local broker in a jurisdiction where the assured is based may need to refer the work to a London broker for placement at Lloyd’s. It should always be 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 upon what price, terms and conditions that cover can be procured. In weighing up a choice between competing insurers, the broker will consider their claims-handling expertise and who the ‘following’ subscribers to the policy will be. Once the broker has identified the best compromise between price, terms and expertise of underwriters, he or she will confirm the policy in writing to the assured.

⁴ *Thames & Mersey Mar Ins Co Ltd v. Hamilton, Fraser & Co (The ‘Inchmaree’)* (1887) 12 App Cas 484.

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 scenarios ever arising but, unfortunately, they do occasionally happen. If such coverage disputes do arise, the broker has to recall his or her role as the agent of the assured and will provide support to the owner in pursuing the insurers for the claim.

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

i Utmost duty of good faith

The general principle of the utmost duty of good faith is laid out in Section 17⁵ of the Marine Insurance Act 1906, which provides that: 'A contract of marine insurance is a contract based upon utmost good faith and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.' This is a reciprocal obligation but is often less relevant to the insurer than the assured.

The Marine Insurance Act 1906 placed a positive duty on the assured to disclose information to the insurer prior to the contract being concluded. This is a reflection of the asymmetry of information between the insurer and the would-be assured; however, under Section 18(3),⁶ the following matters need not be disclosed:

- a* any circumstance that diminishes the risk;
- b* any circumstance that is known or presumed to be known to the insurer;⁷
- c* any circumstance in which information is waived by the insurer; and
- d* any circumstance that it is superfluous to disclose by reason of express or implied warranty.

Section 20 of the Marine Insurance Act provides that any material representation made by the assured or its agent to the insurer during negotiations for the contract, and before the

⁵ Now omitted by Sections 14(3)(a) and 23(2) of the Insurance Act 2015.

⁶ *Id.*

⁷ 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.

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

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

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

ii Warranties

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

Under Section 34,⁸ it is no defence that a warranty that has not been complied with is subsequently remedied before the loss in question has occurred.

In the event that a warranty is not complied with, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred before that date.⁹ 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.¹⁰

While the parties are free to narrow the scope and application of warranties by amending the wording in the policy, in the absence of such steps having been taken the insurer is entitled to construe warranties strictly. If the insurer wishes to allege breach of a warranty, the burden is on the insurer to demonstrate that the warranty has actually been breached.¹¹

The Marine Insurance Act 1906 implies warranties into policies. The most important of these warranties 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

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

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

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

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

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.¹²

On first review, Section 39(5) seems to be a very useful warranty for insurers to rely upon. 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 that the loss in question was attributable to that deficiency. As far as we are aware, there have been no cases in which the defence has been successfully invoked in the past 100 years.

iii Constructive total loss and notice of abandonment

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

- a Section 57(1): where the subject matter is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.
- b Section 60(1): subject to any express provision in the policy, there is a constructive total loss where the subject matter is reasonably abandoned on account of its total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure that would exceed its value when the expenditure had been incurred. These provisions remain in force after the implementation of the Insurance Act 2015.

In essence, if the subject of the contract description is no longer available to the assured, there is an actual total loss, whereas if this is not the case, but avoidance of total loss appears impossible or is only achievable by expense exceeding the subject's value, then there is a constructive total loss.¹³

In the event that the assured wishes to claim for a constructive total loss (but not an actual total loss), it must give notice of abandonment to its insurer whereby it abandons all interest in whatever is left of the insured subject to payment for a constructive total loss. In the event that the assured does not accede to such abandonment, its claim may be treated as a partial loss rather than a total loss, which may result in a considerably lower payment.¹⁴

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.

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

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

14 Section 62 of the Marine Insurance Act 1906.

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.¹⁵

What is important from an owner's perspective is that once the notice of abandonment has been issued, and regardless of whether it has been rejected, it must not do anything that is inconsistent with the intention to continually and unconditionally abandon the insured property to the insurers. Therefore, for example, it is arguable that continuing to crew, manage, commercially operate a vessel or indeed selling a vessel¹⁶ 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 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.

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) 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'.¹⁷ 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) 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

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

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

17 Section 3(3)(b).

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.

ii Misrepresentation

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,¹⁸ depending upon 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 upon 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. In practice, an assured may seek to pay the additional premium amount so that it can recover the full amount of any claim.

iii Warranties

The Insurance Act 2015 has the effect of moderating warranties. It repeals the second sentence of Section 33(3) and all of Section 34 of the Marine Insurance Act 1906, which conclusively discharge an insurer's liability following a breach of warranty. Instead, a breach of a warranty will suspend an insurer's liability from the time of the breach until the breach is remedied. Again, it was felt that allowing the insurer to be discharged from liability as from the date of the breach is a disproportionate remedy in circumstances where, for example, the breach of warranty may not have caused the loss in question.

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

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

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

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 the case of *Versloot Dredging BV v. HDI Gerling Industrie Versicherung*.¹⁹ In this case, the insurers argued for a fraudulent device defence in that a crew member had deliberately or recklessly given a false account of the casualty in a letter to the insurers' solicitors. The account was to the effect that the crew had not investigated the bilge alarm that had sounded shortly after the ingress of water because the vessel was rolling in heavy weather at the time. It later emerged that the bilge alarm had not sounded and therefore the explanation as to why the alarm had not been investigated was false. The Court found that this evidence was false and misleading and that the crew member in question had no reason to believe it was true, and that he was reckless in his actions. The Court also found that the false account was intended to promote the claim.

Accordingly, the judges at first instance and in the Court of Appeal²⁰ 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 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 Supreme Court²¹ found in favour of the owners, ruling that where 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. While 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 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. Like 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

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

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

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

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.

It is 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 has come into force at a time when conditions in the insurance market generally are fairly soft, and brokers and assureds are 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).

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.

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

PIRACY

*Michael Ritter and William MacLachlan*¹

I INTRODUCTION

Piracy is defined in Article 101 of the 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 appears apt therefore that ‘piracy’ is used as an overarching label covering Somali or Gulf of Aden attacks, West African and South-East Asian incidents, albeit that they are different in nature, and that the legal definition of piracy may depend on the insurance policy or contract in question.

As at March 2019, the last successful hijack of a major commercial vessel off the Somali coast was the *Smyrni* on 10 May 2012. A combination of armed guards, increased naval presence and adherence to best management practices (BMP) are often cited as the chief drivers behind the drop in the number of incidents, together with some improvement in stability and capacity building onshore in Somalia. The continued decline of the piracy threat in this region prompted the co-sponsors of the BMP to reduce the boundary of the high-risk area (HRA) to longitude 065°E latitude 5°S.³ This reduction was mirrored in part by the Joint War Committee in December 2015 when it adjusted its HRA to longitude 065°E latitude 12°S.⁴

The HRA was further reduced in March 2019, with the changes coming into effect on 1 May 2019. The revised HRA coordinates are as follows:

- a* In the Southern Red Sea: Northern Limit: latitude 15°00’N.
- b* In the Indian Ocean a line linking from the territorial waters off the coast of East Africa at latitude 05°00’S to 050°00’E, then to positions:
 - Latitude: 00°00’N.
 - Longitude: 055°00’E.
 - Latitude: 10°00’N.
 - Longitude: 060°00’E.

¹ Michael Ritter is a senior associate and William MacLachlan is a partner at HFW.

² [1982] 2 Lloyd’s Rep 48.

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

⁴ www.lmalloyds.com/lma/jointwar.

- Latitude: 14°00'N.
- Longitude: 060°00'E.

c Then a bearing 310° to the territorial waters of the Arabian Peninsular.

That is not to say that Somali piracy and other security risks in the region are no longer a concern: the costs in terms of routing, additional premiums, hardening measures and who pays for these – the owners or the charterers – are a subject of daily debate. There have also been recent reports of pirate attacks in April 2019 against a Yemeni dhow and Korean and Spanish fishing vessels off of the Somali coast (as reported by EUNAVFOR), and in December 2018, UKMTO reported an armed security team firing on a number of skiffs near Point A of the IRTC. In some cases the aggressors are believed to have come from Yemen as opposed to 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 (ICS), BIMCO⁵ and Intertanko have published Interim Guidance,⁶ which includes steps for defending against water-borne improvised explosive devices. Further, an additional Maritime Security Transit Corridor has been established, as shown on the revised BA Chart Q6099.

There have also been numerous attacks in the Gulf of Guinea, in particular offshore from Nigeria (specifically *Bonny* and *Brass*). Precise figures are unclear due in part to suspected underreporting; however, the ICC IMB Piracy Reporting Centre has reported 79 incidents in the Gulf of Guinea in 2018, including at least 78 crew being kidnapped, as well as instances of hijack for cargo theft. This situation is compounded by the lack of a coherent regional or international naval force, coupled with the fierce opposition by the littoral states of the Gulf of Guinea to any encroachment by foreign navies of their respective maritime boundaries, alongside their inability to offer comprehensive protection against the pirate threat within their territorial waters (although, arguably, this is improving). Additionally, the prohibition on the use of foreign armed guards, the unsuitability of certain aspects of BMP in this region, the weakening naira and the lack of prosecutions contribute to favourable conditions in which pirates can prosper. Also in the region, there have been at least 21 crew kidnapped (in five incidents) so far in 2019.

The third 'hotspot' remains South East Asia, where mainly small tankers and fishing vessels are targeted, and those boarding vessels either steal possessions or cargo or kidnap the crew in conditions where 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.

Finally, there are increasing reports of an emerging piracy threat in and around the waters of Venezuela, as the economic and political situation further deteriorates in that country.

5 The Baltic and International Maritime Council.

6 www.imo.org/en/OurWork/Security/Documents/Maritime%20Security%20in%20The%20Southern%20Red%20Sea%20and%20Bab%20al-Mandeb.pdf.

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, where 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 cargo theft cases, up-to-date vessel positions and the close monitoring of any other vessels in the vicinity might also prove important. To this end, and with a view to future prosecutions, there is additional benefit in maintaining links with various international organisations and law enforcement agencies.

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

III COMPLIANCE AND LEGAL

Under English law, the payment of ransom to pirates is not unlawful. This has been affirmed by the Court of Appeal in *Masefield AG v. Amlin*,⁷ 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).⁸ Unfortunately, the payment of ransom is invariably the only viable option to secure the safe release of vessel, cargo and crew; however, as the judgment acknowledges, the position may be different in relation to terrorism and there are also sanction regimes in place that can have an effect on this issue.

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

Despite rhetoric from certain quarters, no substantiated link between Somali pirates and al-Shabaab has been made. Indeed, Dr Campbell McCafferty⁹ confirmed in June 2011, when Somali piracy and ransom payments were at their peak, that ‘there has not been any evidence of a link between the pirates and al-Shabaab, the terrorists in Somalia’.¹⁰ However, owners considering paying a ransom must 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 considered the meaning of ‘reasonable cause to suspect’ under Section 17(b) of the Terrorism Act 2000, in *R v. Lane and Letts* [2018]

7 [2011] EWCA Civ 24.

8 [2010] 1 Lloyd’s Rep 509.

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

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

UKSC 36. 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 under this head; however, in our view, the narrow definition of ‘criminal property’ under Section 340 means it is likely to be of very limited application. As made clear in *R v. GH* [2015] UKSC 24, 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 Section 17A Terrorism Act 2000) for insurers to reimburse a payment made by the assured to a person where 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.¹¹ As noted above, the incidents off Yemen and in South-East Asia involving Abu Sayyaf mean such due diligence is as important as ever where there is an English nexus. However, even for Nigerian incidents, this should be carried out to avoid contravention of English law.

One must also be mindful of other relevant legal regimes, including any jurisdiction the ransom might pass through, and 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 coast of Somalia. As amended, this Order names various individuals and one organisation (al-Shabaab). By a notice of 10 April 2019, President Trump extended Executive Order 13536 for a further year.¹²

IV SHIPPING OPERATIONS

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

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

12 www.whitehouse.gov/the-press-office/2017/04/06/notice-regarding-continuation-national-emergency-respect-somalia.

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

In the absence of any specific contractual right, the owners are obliged to proceed via the quickest or shortest route unless they can demonstrate that the charterers' orders would jeopardise the safety of the vessel in accordance with the common law principles set out in *The 'Hill Harmony'*.¹³ Otherwise, it is likely that the owners will be found to have breached their duty to proceed with utmost despatch and so be liable for damages.

In a piracy context, the High Court offered guidance on the Conwartime 1993 clause in *The 'Triton Lark'*,¹⁴ 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'*¹⁵ considered the more recent Conwartime 2004 clause. The court 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. Further, while naming the Gulf of Aden committed the owners to proceeding via the Gulf, it did not automatically commit them to calling at unnamed ports in the region, in that case Mombasa.

Whether a vessel is on 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'*,¹⁶ piracy is not an off-hire event under an unamended NYPE¹⁷ 1946 Clause 15, although the addition of 'whatsoever' to the clause may lead to a different result. However, following *The 'Captain Stefanos'*,¹⁸ it is clear that piracy is highly likely to be caught by a 'capture/seizure' provision under an amended NYPE 1946.

The leading 2014 piracy case was *The 'Longchamp'*,¹⁹ in which Stephen Hofmeyr QC sitting as a Deputy High Court Judge held that various expenses, including crew wages and

13 [2001] 1 Lloyd's Rep 147.

14 [2011] EWHC 2862 (Comm) and [2012] EWHC 70 (Comm).

15 [2012] EWHC 1888 (Comm).

16 [2010] EWHC 1340.

17 New York Produce Exchange form.

18 [2012] EWHC 571 (Comm).

19 [2014] EWHC 3445 (Comm).

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 [2016] EWCA Civ 708, 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. As mentioned in the previous edition, the Supreme Court²⁰ has now considered the case and by a majority of 4:1 overturned the Court of Appeal, holding that the bunkers and crew wages were recoverable by owners as substituted expenses under Rule F of the York-Antwerp Rules 1974.

Finally, in 2019 the English High Court in *Eleni Shipping Limited v. Transgrain Shipping BV*²¹ 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 applied 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 was suspended where the vessel was kidnapped by reason of piracy.

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.

Where a ransom has been paid to secure the release of a vessel, cargo and crew, the owners will often seek to recover this and their associated release expenses in general average (GA) from cargo interests. Case precedent stretching back to *Hicks v. Pallington* in 1590 confirms that ransom payments can be the subject of GA. Further, the Court of Appeal, in *The 'Lehmann Timber'*,²² held that an owner is entitled to require a GA bond and GA guarantee before releasing the cargo, and further (overturning the first instance decision) that they can recover their reasonable costs of exercising a lien until security is provided, including the cost of storage. The arbitration award (as referenced in the first instance judgment) also allowed the cost of the tow to Salalah, in addition to the ransom, in GA.

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

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

20 [2017] UKSC 68.

21 [2019] EWHC 910 (Comm).

22 [2013] EWCA Civ 650.

no GA contribution is payable. For this reason, it is important for the owners to secure evidence of the measures in place at the 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; however, in some cases the crew will be able to identify the lightering vessels, and in some cases the stolen cargo has been successfully located.

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

Perhaps the most interesting of all 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.

VI ARMED GUARDS

The use of privately contracted armed guards onboard merchant vessels played a key role in reducing the number of attacks off Somalia and in the Indian Ocean. Despite the unpredictable and continued threat of attack from groups based in Somalia and Yemen, some owners question whether they still need to incur the expense and administrative burden of carrying armed guards or whether they can at least carry smaller teams. Such questions must be decided on a case-by-case basis and, as long as the risk remains, it is up to each owner to conduct its own risk assessment in each case and to secure its vessel in the ways it deems appropriate.

Competition remains fierce among the private maritime security companies (PMSCs) and this combined with falling demand has driven down the rates commanded by them in the Indian Ocean. However, 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.

The PMSCs are in demand in West Africa, particularly in the Gulf of Guinea; however, the operational difficulties and risks faced by them in this region are much greater. In the Gulf of Guinea, where only local constabulary and military forces²³ are permitted to carry weapons, the model commonly adopted is for a PMSC to procure the deployment of (1) a vessel protection detachment (VPD) from the applicable local force either on board the merchant vessel or alongside in an escort vessel (as local law dictates), and (2) 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).

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

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 had to the way in which the VPD and any escort vessels are contracted. In Nigeria, this should only be through a local company holding a valid memorandum of understanding (MOU) with the Nigerian Navy. We understand that shortly before publication of this book, the Nigerian Navy revised the terms of their MOUs making explicitly clear that (1) the MOU should not be transferred to another company without the Navy's express consent and (2) 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 such company is operating in compliance with the terms of its MOU. No matter the jurisdiction, they should ensure that the VPD has been drawn from the constabulary or military authority with 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 governmental agencies and officials, as was demonstrated by the arrest of the crew and armed guards of the *Myre Seadiver* for alleged arms smuggling and 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. At the time of writing, the United Kingdom does not allow armed guards on UK-flagged ships in international waters off West Africa, although it will respect the laws of the coastal states and, if local military or constabulary forces can be deployed from those states in accordance with their laws, they may be deployed on a UK vessel. In addition, the United Kingdom does not issue export control licences to UK PMSCs for the deployment of armed guards anywhere other than the high-risk area of the Indian Ocean and, while non-UK PMSCs are often not restricted in the same way in international waters, they still do not have the logistical support of a network of 'floating armouries' that they enjoy in East Africa and they run the risk of arrest for infringement of local laws in much the same way as was demonstrated off India by the detention of the *Seaman Guard Ohio*.

In response to what was at the time the 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. GUARDCON 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, it is unsuitable for use in West Africa without considerable amendment. BIMCO declined requests to produce a revised standard contract for use in West Africa and instead issued, by Special Circular (No. 1) on 20 February 2014, a set of guidelines for owners contemplating using GUARDCON for the provision of PMSC services in this region.

In preparing the guidelines, the drafting subcommittee considered a number of issues, fundamental to which was the structured knock-for-knock liability regime and corresponding

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

As a final note, a recurring question for the industry has been the use of floating armouries in East Africa (they are not currently an option in West Africa). While the UK Department for Business, Innovation and Skills began approving floating armouries for use by licensed PMSCs in 2013 on a case-by-case basis, there remains little clarity on the approval process and it is up to each PMSC to ensure that it has done its due diligence and that the floating armoury is operated in compliance with all applicable laws, including those of its flag state. It is worth noting that many flag states do not allow vessels registered with them to be used as floating armouries.

DECOMMISSIONING IN THE UNITED KINGDOM

*Tom Walters*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 impacted by the sustained period of low oil and gas prices since 2014. In January 2016, crude oil prices dropped to their lowest level in 12 years and as a result of this, decommissioning of UKCS infrastructure has been put firmly on the agenda for many operators looking to reduce their balance sheet liabilities.

According to the latest report from Oil & Gas UK it is expected that 203 fields will see some form of decommissioning activity between 2018 and 2027 on the UKCS. To put this into context, it is anticipated that 1,465 wells will be plugged and decommissioned, 74 topsides will be lifted and removed, 71 structures will be dismantled and 18,136 concrete mattresses will be removed along with 5,724 kilometres of pipeline. This is equivalent to over 850,000 tonnes of topside and structure to be removed.

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 being steadily reduced over the past five years. For example, the cost of decommissioning a platform well has been reduced from £2.32 million per well to £1.70 million per well.

Total expenditure on decommissioning between 2018 and 2027 in the UKCS is expected to be in the region of £15.3 billion with an average spend of £1.5 billion per year for the next decade.

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.

There are already signs that 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.

¹ Tom Walters is a partner at HFW.

The recent market downturn is also serving to reduce the costs of retiring these sites, which means some companies are expediting decommissioning to take advantage of low charter rates, while others are deferring cessation of production due to cash-flow constraints.

Over the coming decades, large investment will be required to retire North Sea oil and gas fields. If that investment is well managed, and the necessary legal framework developed, the UK has the potential to build expertise in safe and responsible decommissioning of platforms and pipelines that can be exported around the world.

II PREVENTING A RUN ON 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 (Wood Review). Following the report, the government set out its proposals for implementing the Wood Review's recommendations. As part of this, the Oil & Gas Authority (OGA) replaced the Department for Energy and Climate Change (DECC) 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 OGA was established as a fully independent regulator in April 2015 and a government-owned company, with the Secretary of State for Business, Energy and Industrial Strategy as the sole shareholder was set up.

The strategy for maximising economic recovery in the UK (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 consequences of this means 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 in order to maximise the 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 of time.

III REGULATION OF DECOMMISSIONING ACTIVITIES

The Department for Business Energy and Industrial Strategy (BEIS) is 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 is also responsible for exercising many of the powers under the Petroleum Act 1998 and related legislation. A number of these powers were transferred to the OGA by the Energy Act 2016 upon it coming into force in May 2016 and have implications for those engaged and undertaking decommissioning activities in the UKCS.

IV HEALTH AND SAFETY AND DECOMMISSIONING

As part of the oil and gas lifecycle, decommissioning activities in the UKCS are underpinned by the health and safety legislative regime in the UK. The primary piece of legislation in the UK is the Health & 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 and there are additional regulations that apply to the oil and gas industry that sometimes impose strict liability and can also trigger civil liability. These include the Offshore Installations (Offshore Safety Directive) (Safety Case etc) Regulations 2015 and the Control of Major Accident Hazards Regulations (which came in to force on 1 June 2015, revoking the 1999 Regulations).

HSE's 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 such 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). Where an employer can demonstrate that they have taken all reasonably practicable steps to avoid a breach they 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 him 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;
- f* maintain the integrity of the wells and the pipelines throughout their lifecycle (this applies to well operators and pipeline operators); and
- g* prepare a plan for dealing with an emergency should one occur.

The Offshore Installations (Offshore Safety Directive) (Safety Case etc.) Regulations 2015 (SCR) now require the operator or owner of every offshore installation to prepare a safety case and submit it to the regulator for acceptance. These now incorporate additional requirements of the EU Offshore Safety Directive 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

In addition, the following regulations are central to the offshore regulatory regime:

- a* Offshore Installations (Management and Administration) Regulations 1995 (as amended) (MAR).
- b* Offshore Installations (Prevention of Fire and Explosion and Emergency Response) Regulations 1995 (PFEER).
- c* Offshore Installations (Design and Construction) Regulations 1996 (DCR).

However, there are many other relevant regulations, such as:

- a* Management of Health and Safety at Work Regulations 1999 (MHSWR).
- b* Control of Major Accident Hazards Regulations 1999 (COMAH).
- c* Provision and Use of Work Equipment Regulations 1999 (PUWER).

The DCR is relevant to decommissioning activities. The DCR is divided into two parts:

- a* 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 installations are designed and built so that, so far as is reasonably practicable:
 - it can withstand the forces acting on it as may be reasonably foreseeable;
 - its layout and configuration, including the plant and machinery fitted, do not prejudice its integrity;
 - fabrication, transportation, construction, commissioning, operation, modification, maintenance and repair of the installation can take place without prejudicing the installations integrity;
 - it can be decommissioned and dismantled safely; and
 - 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.
- b* 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:
 - periodic assessment of its integrity; and
 - 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 (ODU) 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 (OSPAR Convention) sets out the UK's international obligations on decommissioning.

The OGA works with BEIS and the ODU to ensure 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 who 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 (COP).

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. Where 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 maintenance of 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 latter legislative changes implemented by the EA08 and EA16 have broadened the parties upon 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.

The OGA has served Section 29 notices on additional stakeholders where 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 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.

Where 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 the OGA 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 their decommissioning liability. It is worth noting, however, that even if a former licensee is discharged from its Section 29 obligations either by agreement with the OGA or otherwise under contract, the Secretary of State can re-impose 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. Tax relief for such costs is given at the point they 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

BEIS' Offshore Environmental Inspectorate enforces offshore oil and gas environmental regulations and, through the OGA, can bring prosecutions against offshore permit holders, licensees and operators. The OGA can also issue notices and sanction an offending party using:

- a* Enforcement notices: these inform the party who is in breach of the requirements what time the OGA will allow for compliance with the prescribed conditions.
- b* Financial penalty notices: these require the party in breach to comply with the relevant requirement within a given time frame and to pay the financial penalty to the OGA.
- c* Revocation notices: these revoke the petroleum licence of the party in breach following a failure to comply with a specified petroleum-related requirement imposed on a licensee.
- d* Operator removal notices: these require the licence holder to remove the operator from its position following a failure to comply or a breach.

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. They 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
- 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 OGA has powers to issue fines of up to £1 million (Section 45(1) of the EA16). 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 over £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.

An operator or contractor undertaking decommissioning activities in the UKCS needs to ensure that they work 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 that are intended for use in the offshore environment, clarity of responsibility is important, both from a financial and 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 such 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.

At present there are two contracts that have been developed with the technical challenges of decommissioning in mind. The first is BIMCO's DISMANTLECON contract (due to be published later this year), and the second is the LOGIC Decommissioning Contract.

X 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 the DISMANTLECON 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 agreement does not contemplate that the contractor will deal with the disposal of the asset as the contract ends at the time of delivery. 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.

It should be noted, however, that 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.

XI LOGIC

The LOGIC contract was drafted by Oil & Gas UK's Decommissioning Working Group. This 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 BIMCO contract, title in the property remains with the operator.

XII INSURANCE

There is an obligation under both contracts 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 P&I policy is unlikely to provide adequate cover for decommissioning operations and so the contractor should be looking to obtain an extension to their 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 such circumstances, a contractor should also consider what additional cover might be needed over and above the operator's DAR insurance arrangements.

XIII 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. It is also 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. In order 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 further down the road.

ANGOLA

*João Afonso Fialho, José Miguel Oliveira and Ivo Mahumane*¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Oil continues to be the backbone of the Angolan economy. Despite the dramatic drop in oil prices that started in mid 2014, which substantially reduced the country's tax revenues and exports, with growth coming to a halt and inflation accelerating sharply, oil production and its supporting activities still account for more than 95 per cent of export revenue, 46 per cent of government revenue and 30 per cent of GDP. Economic growth slowed to 0.1 per cent in 2016 but recovered to an estimated 2.1 per cent in 2017, thanks to strong performances in the agriculture, fisheries and energy sectors. The economic prospects for the future are subdued, with growth projected to remain modest, at 1.2 per cent in 2019 and 3.2 per cent in 2020.²

Imports decreased to US\$3,909.72 million in the third quarter of 2018 from US\$4,092.50 million in the second quarter of 2018. Imports averaged US\$6,520.37 million from 2002 until 2018, reaching an all-time high of US\$2,2659.90 million in the fourth quarter of 2009 and a record low of US\$ 2,777.87 million in the first quarter of 2018.³

The country's major commercial ports are in Luanda, Cabinda, Lobito, Namibe and Soyo (which is mostly allocated to the oil and gas industry). Over the years, millions of US dollars have been invested in expanding, equipping and modernising ports and other infrastructure, such as railways and roads. In 2017, an investment of roughly US\$180 million was announced in the building of the first deepwater port in the country, a project to be developed in Caio, Cabinda province. This project, which is planned to feature a modern shipyard, a dry dock, an industrial zone and a duty-free zone, faced some significant drawbacks in 2018 (the original concession contract was terminated and a new tender was launched), but the government's plan for Caio remains in place. Moreover, two more projects contemplated within the National Development Plan 2018–2022 are worth noting: the first being the modernisation project for Namibe port, and the other being the construction of the new commercial port at Barra do Dande. Fisheries and coastal shipping are also sectors to which the government is paying close attention, not only to support local supplies and reduce imports, but also to promote effective transportation of goods and people along the country's coastline.

1 João Afonso Fialho is a partner, José Miguel Oliveira is a managing associate and Ivo Mahumane is a junior associate at Vieira de Almeida.

2 Source: www.afdb.org.

3 Source: <https://tradingeconomics.com/angola/imports>.

There are rumours that, with a view to enhancing competition and boosting the national economy, the Angolan government will soon pass a new set of policies aimed at attracting and easing investment in the fisheries and shipping sectors.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Since gaining its independence in 1975, Angola has been steadily revising its laws and regulations, alongside ratifying and adhering to several international treaties and conventions. In this respect, a number of pivotal conventions on maritime and shipping-related matters applicable in the country result from when Angola was still a Portuguese overseas territory (e.g., the 1952 Arrest Convention). In fact, although since its independence Angola has not specifically adhered to the treaties and conventions to which Portugal was already a party (as was formally required under the Vienna Convention on Succession of Treaties), it is commonly accepted that the treaties ratified by Portugal and extended to Angola at that time still apply in light of Articles 58 and 59 of the Angolan Constitution, which was approved immediately after the country gained independence and which provided for the survival of any Portuguese laws and regulations in force at the time of independence, as long as they did not conflict with the word and spirit of the Constitution.

In terms of domestic laws, many key statutes have been approved during the past few years, for example, Law No. 27/12 of 28 August 2012 (the Merchant Navy Law). The Merchant Navy Law is a landmark achievement in terms of shipping and maritime legislation, as it is the first statute that seeks to regulate all maritime and port activities in a consistent manner, governing matters relating to navigational, technical and security rules, registration duties and procedures for national and foreign vessels, licensing and other requirements applicable to marine and port-related activities, to name a few. In addition, a number of important statutes approved in 2014 have had an effect on local industry, notably: (1) Presidential Decree No. 50/14 of 27 February 2014, which approved the regulations applicable to the provision of shipping agency services; (2) Presidential Decree No. 51/14 of 27 February 2014, which approved the regulations applicable to the carrying out of ship management services; and (3) Presidential Decree No. 54/14 of 28 February 2014 (the Merchant Navy Regulations), which approved the rules applicable to merchants wishing to be engaged in the provision of cabotage or international transportation of goods and passengers (this statute limits the provision of cabotage to Angolan citizens). During 2016 a set of decrees was approved by the Angolan government on pilotage, maritime traffic control and assistance and salvage at sea. More recently, a regulation implementing a new beaconing system for the national maritime space and inland waterways entered into force. These statutes are a clear sign of the attention that the government is paying to the sector.

Angola is a party to the UNCLOS, the 1995 UN Fish Stocks Agreement, the 2010 African Maritime Transport Charter of the African Union and many other important treaties, as detailed later in the chapter.

III FORUM AND JURISDICTION

i Courts

The Angolan judicial system comprises three categories of court: (1) the Supreme Court, which is the highest body in the hierarchy; (2) courts of appeal; and (3) district courts. Courts

of appeal have jurisdiction to review and revise district courts' contested decisions. Likewise, the Supreme Court has power with regard to contested decisions rendered by the courts of appeal.

District courts have jurisdiction over the areas in which they are established and can be divided and organised by expertise under what are known as 'rooms of expertise'. Existing since 1997, the Room of Expertise for Maritime Issues has jurisdiction over any maritime dispute submitted to its jurisdiction, including disputes on shipbuilding and repair contracts, purchase and sale agreements, charter parties and bills of lading, and precautionary measures against ships and their cargo.

In general, Angolan courts will find themselves competent to rule on claims where parties in dispute and the claim itself has a close connection or link to Angola.

ii Arbitration and ADR

The primary domestic source of law relating to arbitration in Angola is Law No. 16/03 of 25 July 2003 (the Voluntary Arbitration Law (VAL)). The VAL governs both domestic and international arbitration.

According to the VAL, arbitration will be of an international nature when international trade interests are at stake, in particular (1) when the parties to the arbitration agreement have business domiciles in different countries at the time of the agreement's execution, (2) the place of performance of a substantial part of the obligations resulting from the legal relationship from which the dispute arises is situated outside the countries where companies have their business domiciles, or (3) when the parties have expressly agreed that the scope of the arbitration agreement is connected with more than one state.

The general rule under the VAL is that parties are free to submit their disputes to arbitration, except for disputes that fall under state courts' exclusive jurisdiction and disputes that relate to inalienable or non-negotiable rights. As such, disputes relating to the following issues, *inter alia*, may be submitted to arbitration: commercial and corporate law, maritime and shipping matters, securities transactions and intra-company disputes.

The arbitration agreement may consist of either an arbitration clause or a submission agreement. The arbitration clause concerns potential future disputes arising from a given contractual or extra-contractual relationship, whereas the submission agreement arises from existing disputes, whether or not they have already been submitted to a state court. The VAL treats both types of arbitration agreement on an equal footing.

Subject to any special law requiring a stricter form, the arbitration agreements must be made in writing. An arbitration agreement is considered to be in writing if documented either in a written instrument signed by the parties or in correspondence exchanged between them. The VAL allows arbitration agreements to be incorporated in a contractual document that is not signed by both parties, simply by reference to general terms and conditions on another contract.

Pursuant to the VAL, an arbitration agreement shall be declared null and void when entered into in breach of formal requirements or provisions on legitimacy, scope and arbitration exclusion.

Under the VAL, parties in both domestic and international arbitration are free to designate the substantive law or rules of law applicable to the merits of the case. Parties may also authorise the tribunal to decide *ex aequo et bono*, provided they do so expressly. If, however, parties in domestic arbitration fail to agree on the substantive applicable law,

the arbitral tribunal shall decide in accordance with Angolan substantive law. As regards international arbitration, failing party agreement, the tribunal shall apply the law resulting from the rules on conflict of laws.

In addition to the VAL, Law No. 12/16 of 12 August 2016 sets out the rules applicable to the establishment and organisation of the mediation and conciliation procedures as alternative dispute mechanisms. With the enactment of this statute, disputes in civil, commercial (including maritime), employment, family and criminal matters can now be submitted to mediation, provided that they regard waivable rights.

iii Enforcement of foreign judgments and arbitral awards

Angolan law allows the parties to a contract to agree on a foreign jurisdiction and arbitral tribunal to resolve any conflicts arising under the relevant agreement unless those conflicts are covered by provisions that, for any reason, are subject to mandatory Angolan law or jurisdiction.

Article 1094 of the Angolan Civil Code of Procedure sets out that any judgment issued by a foreign court is, as a rule, subject to review and confirmation by the Supreme Court in order to be valid and enforceable locally (obtain the *exequatur*). That is to say, unless a special regime applies, the enforcement of any foreign judgment is subject to the consideration of Angola's highest court.

Angola acceded to the 1958 New York Convention by means of Resolution 38/16 of 12 August 2016. Angolan courts are now *prima facie* to give effect to an arbitration agreement and award rendered in other signatories to the New York Convention. Where the arbitral award was not granted by another contracting state, to be enforceable it must have been previously reviewed and confirmed by the Supreme Court.

IV SHIPPING CONTRACTS

i Shipbuilding

Angola does not have specific legislation dealing with shipbuilding contracts. These contracts are often treated as sale and purchase agreements and therefore are subject to the principle of private autonomy of the contracting parties. The parties can negotiate the terms and conditions of the contract in accordance with Article 405 of Angola's Civil Code. Under the Civil Code, contractual risk and ownership is transferred upon delivery and full payment of the price, unless otherwise agreed.

The above notwithstanding, it is important to stress that pursuant to the Merchant Navy Law, it is mandatory to register shipbuilding contracts before the Maritime National Administration.

ii Contracts of carriage

The Hague Rules are applicable in Angola. Under the Hague Rules, the carrier is liable with regard to the consignee in relation to the loading, handling, stowage, carriage, custody, care and discharge of goods. Contracts of carriage are therefore governed by the terms of the Hague Rules and the Angolan Commercial Code (Article 538 et seq.) in the absence of detailed provisions set out in the relevant contract.

If the shipment is between two countries that are party to the Hague Rules (i.e., loading and place of destination), those rules shall apply. However, if the country of destination of the goods is not a signatory to the Hague Rules, then the applicable law would be determined by Angolan courts in accordance with the principle *lex rei sitae*.

iii Cargo claims

As a general principle, any party to a contract of carriage that holds an interest over the cargo and can demonstrate that it has suffered loss or damages arising from the carrier's actions or omissions is entitled to sue for loss or damages. Taking this into consideration, the right to sue under a contract of carriage rests with (1) the shipper, and (2) the rightful holder of the bill of lading. When in the presence of a straight bill of lading, the right to bring a claim remains with the named consignee; with an order bill of lading, only the latest endorsee is eligible to sue; and with a bill of lading to bearer, then it is up to the rightful holder at a given moment to sue.

In addition to the above, rights under a contract of carriage may also be validly transferred to third parties either by way of assignment of contractual position or subrogation in rights (which is typically the case when insurers indemnify cargo interests and then seek reimbursement from the carrier), as long as the relevant rules provided in the Civil Code are met.

iv Limitation of liability

The LLMC Convention is not applicable in Angola. Conversely, both the 1924 International Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Owners of Seagoing Vessels and the 1957 International Convention relating to the Limitation of the Liability of Owners of Seagoing Vessels are applicable. In addition to the aforementioned conventions, it is also important to consider the limitations arising from the Hague Rules, where applicable. It is also important to note that the Merchant Navy Law foresees some special rules with respect to the limitation and sharing of liability; for example, where collision was caused as a result of the fault or wilful misconduct of the crew, Article 78 of the Merchant Navy Act provides that damages will be computed and shared between owners *pro rata* to the severity of each party crew's fault, and that if it is not possible to determine which vessel caused the accident, all intervening vessels shall be jointly liable for damages and losses arising therefrom.

V REMEDIES

i Ship arrest

The Brussels Convention is applicable in Angola. Under the Brussels Convention, any person alleging to have a maritime claim (*fumus boni iuris*) is entitled to seek the arrest of a ship. A 'maritime claim' is one that arises out of one or more of the situations named under Article 1.1 of the Brussels Convention.

Outside the scope of the Brussels Convention, that is to say for the purposes of obtaining security for an unlisted maritime claim (e.g., arrest for a ship sale claim, unpaid insurance premiums, P&I dues) or to seek the arrest of a vessel sailing under the flag of a non-contracting state, the claimant must make use of the provisions of the Civil Procedure Code. In this case, aside from the jurisdiction issue that needs to be properly assessed, and in addition to providing evidence on the likelihood of its right or credit (*fumus boni iuris*),

the claimant shall also produce evidence that there is a risk that the debtor or arrestor may remove or conceal the ship (security for the claim) or that the ship may depreciate in such a way that at the time the final judgment is handed down in the main proceedings, the ship is no longer available or has substantially decreased in value (*periculum in mora*).

With the arrest in place, the claimant is required to file the initial claim for the main proceedings of which the injunction will form an integral part within 30 days of the arrest order. During the proceedings, the parties are free to settle by agreement and withdraw the claim. If the main claim should be filed with a foreign court, then the judge dealing with the arrest application must set out the period within which the claimant must commence proceedings on the merits in the appropriate jurisdiction. The defendant is entitled to post a security before the relevant court in the amount of the claim brought by the claimant and seek the release of the vessel pending foreclosure and auction.

ii Court orders for sale of a vessel

The arrestor or any interested party can seek the judicial sale of an arrested vessel. In principle, the sale cannot take place during the arrest proceedings, being therefore dependent on the outcome of the main claim and requiring the bringing of new enforcement proceedings. In a nutshell, with the enforcement application lodged, the court will notify the debtor (owner or charterer and other interested parties) to settle the claim or to oppose the sale. If the debtor fails to pay or if no opposition is lodged within an appropriate period of time, the court will order the sale. To that extent, the judge will determine how the sale will take place (public auction, private negotiation, sealed bids) and will appoint an auctioneer who will be responsible for the relevant proceedings and arrangements (such as organising the tender and visits to the vessel, collecting the bids, getting the proceeds of the sale and liaising with court). The vessel is sold 'as is and where is' and free from any charges or encumbrances.

Proceeds arising from the sale of the vessel will be used to pay the claimant or relevant creditors. In this regard, note that the 1926 International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages (the 1926 Convention) is also applicable in Angola. Generally, if a claim affords a maritime lien set forth by the 1926 Convention, then it would have priority over maritime liens established in the Commercial Code. Otherwise, Article 578 of the Commercial Code applies, which specifies the following ranking for maritime liens:

- a liens accruing from the last voyage:
 - legal costs incurred in the common interest of all creditors;
 - remuneration for salvage;
 - pilotage and towage;
 - harbour dues;
 - costs of custody;
 - crew wages;
 - supplies and repairs to the vessel;
 - insurance premiums; and
- b other maritime liens:
 - any unpaid portion of the purchase price;
 - repair costs accruing during the past three years;
 - unpaid amounts arising from shipbuilding contracts;
 - outstanding insurance premiums other than those relating to the last voyage;
 - sums due to shippers in respect of loss or damage to cargo;

- mortgages, hypothec and similar charges; and
- all remaining claims *in rem* rank *pari passu*.

VI REGULATION

i Safety

The Merchant Navy Law sets out in Article 45 et seq. the overriding rules and principles on the safety and security of navigation and life at sea. Under Article 52, the responsibility for supervising, controlling and licensing the activities carried out at sea lies with the Port and Maritime Institute of Angola (IMPA) in its role as maritime authority.

In addition, for the past few years Angola has made a consistent effort to adhere to and ratify the most relevant international conventions and treaties adopted by the International Maritime Organization and the International Labour Organization on safety and security, including the CLC Convention and other international conventions on pollution and environment, as detailed later in this chapter.

ii Port state control

The IMPA is also responsible for exercising port state control over all foreign vessels calling in and operating within Angola waters. The IMPA, either directly or through a classification society it has appointed, holds the authority to inspect all vessels operating in Angola and to assess fines for infringements detected. In addition to the assessment of (heavy) fines, the lack of compliance with the applicable laws and regulations may lead to the retention of the relevant vessel. In such cases, a guarantee must be put before the IMPA as a precondition to the release of the vessel.

iii Registration and classification

The requirements applicable to Angolan flagging and vessel registration are governed by the Merchant Navy Law and by old regulations that date back to the period prior to Angolan independence, in particular (1) the Commercial Code, (2) the Commercial Registration Code, and (3) the Harbour Master General Regulations. Despite its goal, the Merchant Navy Law did not manage to clarify the issues raised under the old regulations on vessel registration. It is expected that these clarifications will follow from the regulations that are yet to be approved.

In a nutshell, the registration of a merchant vessel in Angola is in two stages: (1) registration with the Harbour Master; and (2) registration with the Commercial Registry. The main steps required to register a vessel can be summarised as follows: (1) performance of a survey by the IMPA (directly or resorting to a classification society operating in the country (e.g., Bureau Veritas, DNV GL, to name but two); (2) registration with the Harbour Master; and (3) completion of the commercial registration with the Commercial Registry.

The above notwithstanding, note that before the Merchant Navy Law was enacted, Angolan authorities' interpretation and the practice relayed by the local authorities was that whenever a vessel was purchased by an Angolan entity and was imported to Angola to

perform operations therein, it was necessary to have the vessel registered before the IMPA. This interpretation was confirmed by two Circular Letters⁴ and seems to be aligned with the Merchant Navy Regulations.

Registration with the Harbour Master (and the IMPA), being an international standard, is dependent on the meeting of a number of legal and technical requirements, which vary according to the type of vessel (e.g., merchant vessel, fishing vessel, tug, SOV).

Neither the recently enacted Merchant Navy Law nor the old regulations are clear as to the situations in which it is mandatory to register a vessel in Angola and consequently acquire Angolan nationality and fly the Angolan flag. One of the few situations that raises no doubts in this respect refers to the carrying out of cabotage activities, which, in light of the Merchant Navy Regulations, seems to be limited to vessels flying the Angolan flag.

iv Environmental regulation

In addition to the Merchant Navy Law, the Environmental Law (Law No. 5/98 of 19 June 1998) and its ancillary regulations and related statutes (e.g., Law No. 6-A/04 of 8 October 2004 (Law on Leaving Aquatic Recourses, as amended)), the following international conventions and relevant protocols are currently in force in Angola:

- a* 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, as amended in 1973 and 1991;
- b* 1973 International Convention for the Prevention of Pollution from Vessels (MARPOL 73/78) and Annexes I/II, III, IV and V;
- c* 1990 International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC);
- d* 1992 Protocol to Amend the 1969 International Convention on Civil Liability for Oil Pollution Damage (CLC 1969);
- e* 1992 Protocol to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND);
- f* 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea; and
- g* 1996 Protocol to Amend the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, which regulates environmental protection.

v Collisions, salvage and wrecks

In regard to collisions, the following international conventions are enforceable in Angola: (1) the Collision Convention 1910; (2) the Collision Convention 1952; (3) the Criminal Collision Convention 1952; and (4) the COLREGs. These conventions are supplemented, as the case may be, by domestic regulation, namely Article 73 et seq. of the Merchant Navy Law and Article 664 et seq. of the Commercial Code.

Under the 1952 Convention, a claim for collision can be brought before an Angolan court in any one of the following situations: (1) Angola is the only country where the defendant has its habitual residence or place of business; (2) Angola is the country where the arrest of the defendant's vessel has been effected, or of any vessel belonging to the defendant

⁴ Circular Letter 264/DPP/SNA/2011 issued by the National Customs Service of Angola on 30 December 2011, and Circular Letter 02/GDN/2003 issued by the Angolan National Directorate of Merchant Navy and Ports on July 2003.

that can be lawfully arrested, or where arrest could have been effected and bail or other security has been furnished; or (3) collision occurred within the limits of an Angolan port or within its inland waters.

When there is a collision between a vessel flying under the Angolan flag and another vessel flying under the flag of a non-contracting state to any of the above conventions and regulations, one must resort to the rules set forth in the Civil Procedure Code, which provide that the claimant must commence an action before the court of the place where (1) the collision occurred (provided it was in Angolan territorial waters), (2) the defendant is domiciled, (3) the vessel took refuge, or (4) the vessel first called after the collision.

As a general rule, Angolan courts will rule in favour of compensating any sort of damage resulting from collisions. The claimant must demonstrate the causal link between the damage and the collision. From our experience, demonstration of the causal link can be problematic as Angolan law requires an adequate causal nexus between the action and damage for liability to occur (pursuant to Article 563 of the Civil Code). It should be noted that the concepts of indirect and consequential damage are not clearly distinguished for indemnity purposes. Compensation is only due for those damages that the party would probably not have suffered if the collision did not take place. This excludes consequential and indirect damages. In a nutshell, compensation should cover not only the damages directly caused by the collision but also the advantages from which the non-defaulting party would have benefited if the collision had not occurred.

Salvage is governed by the 1910 Salvage Convention and, where applicable, the provisions named in the Merchant Navy Law (Article 81 et seq.) and the Commercial Code (Article 676 et seq.). The salvage contract must be in written form (Lloyd's standard form of salvage agreement is acceptable). If there is no salvage contract and the parties fail to agree, the Commercial Code provides that the compensation amount shall be set by the court, on the grounds of equity, taking into consideration, *inter alia*, the nature of the salvage operation, the current value of the salvaged goods, after deducting expenses, the expenses and losses incurred by the salvor, the number of individuals who actively participated and the relative danger of the operation. Finally, the compensation amount needs to cover any expenses accrued by the salvors, except fees, costs, rights, taxes and conservation, storage and assessment expenses relating to the sale of the saved goods (if applicable).

Lastly, a judicial claim for the reimbursement of salvage compensation can be filed with (1) the court that has jurisdiction over the place where the salvage operation took place, (2) in the court of residence of the owners of the saved goods, or (3) of the vessel's flag, or (4) where the rescued vessel is found, as per the Commercial Code. According to the law, salvage claims ought to commence within two years of the day on which the salvage operations are concluded or were interrupted.

Finally, with regard to wrecks, Angola is not a signatory of the Nairobi WRC 2007. The removal of wrecks must therefore be dealt with in light of domestic law, namely the Merchant Navy Law, the Environmental Law and ancillary statutes and regulations.

vi Passengers' rights

Angola is not a party to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea. Generally, carriage of passengers is governed by the Angolan Commercial and Civil Codes and the Consumer Law, in addition to the individual terms of the contract

of carriage. Carrier's liability is mostly fault-based. In the event of delays, unexpected changes of route, damages or loss of carriage, passengers are entitled to claim compensation for loss and damages caused by an action attributed to the carrier, regardless of its wilful misconduct.

vii Seafarers' rights

Angola adopted the STCW Convention 1978. This convention prescribes minimum standards relating to training, certification and watchkeeping for seafarers, which countries are obliged to meet or exceed. In addition, with the enactment of the Merchant Navy Law and recent approval of the Regulations on Seafarers and Maritime Personnel, Angola now incorporates the overriding principles vested in the Maritime Labour Convention 2006 in domestic law.

VII OUTLOOK

With the aim of exiting recession and easing the country's economic dependency on the oil sector, Angola has announced the implementation of structural reforms, as outlined in the National Development Plan for 2018–2022. One of the main sectors of intervention for this programme is shipping, under which (1) the construction of new ports and other related infrastructures; (2) the improvement of inland waterways safety and navigability conditions; and (3) the creation of an electronic database that will assist on the monitoring of all maritime imports and exports of goods is expected. These reforms are in line with the maritime and shipping law revision promoted by the government between 2014 and 2016 and translate the country's commitment to develop and modernise the maritime and shipping industries.

In addition, it is worth mentioning that by means of Law 10/18, of 26 June 2018, the government has approved a new private investment regime, which is generally expected to increase both foreign and national investments, provide more legal certainty and boost investors' confidence in the country. Transportation and logistics will certainly continue to be the key in this challenge and a safe bet for private investors that may wish to benefit from the government's expressed goal to mark Angola as the continent's logistics hub.

Government confidence is that new opportunities will be available for investors willing to (re)invest in the country, in particular in the fishery industry and technology-based areas of seaport operations.

AUSTRALIA

Gavin Vallely, Simon Shaddick and Alexandra Lamont¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Ten per cent of the world's sea trade passes through Australian ports and 99 per cent of Australian exports are transported by sea.² In terms of its ocean freight requirement, Australia has the 'fifth-largest shipping task in the world – a task that is forecast to double over the next 15 years'.³ Notwithstanding the downturn in the energy and mining resources sector, the growth predictions principally to service the export of mining and agricultural commodities still hold. In addition, Australia has '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 more cruise passengers than any other nation, making it the fourth-largest cruise market in the world.⁶ However, because of the economics of operating Australian-flagged tonnage, the national fleet has only a small number of large cargo vessels, the majority of which are employed on Australian coastal trading services, access to which is largely restricted by federal cabotage legislation.⁷

1 Gavin Vallely and Simon Shaddick are partners, and Alexandra Lamont is an associate at HFW.

2 <http://www.australianindustrystandards.org.au/wp-content/uploads/2018/02/Maritime-Key-Findings-Paper2018V7Web.pdf>.

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 <http://www.australianindustrystandards.org.au/wp-content/uploads/2018/02/Maritime-Key-Findings-Paper2018V7Web.pdf>.

7 On 8 April 2014, the Hon Warren Truss, in his former capacity as Minister for Infrastructure and Regional Development, announced the release of an Options Paper on approaches to regulating coastal shipping in Australia. On 25 June 2015, the Shipping Legislation Amendment Bill 2015 was introduced to the House of Representatives; however, the Bill was rejected by the Senate on 26 November 2015 after attracting only two of the five cross-bench votes required to ensure its passage. In March 2017, the Minister for Infrastructure and Transport issued a Discussion Paper for Coastal Shipping Reforms calling for submissions by 12 May 2017. At the time of this update, the result of that process has yet to be concluded. However, if the Australian Labor Party is elected in this year's scheduled federal election, there is a high chance that shipping laws will change.

i Vessels registered on Australian shipping registers

As at 25 February 2019, 12,093 vessels were listed as being entered on the Australian shipping registers.⁸ In terms of vessel types, they can be grouped generally as follows: 224 cargo vessels, 325 passenger-carrying vessels, 8,357 pleasure craft, 1,951 fishing vessels and 504⁹ specific purpose-type vessels.

Of those vessels, only 738 hold IMO numbers,¹⁰ the composition being approximately 68 cargo vessels, 62 passenger-carrying vessels, 28 pleasure craft, 188 fishing vessels and 323¹¹ specific purpose-type vessels.

ii Australian coastal trading

Australia has a substantial coastal sea freight task, which in 2015–2016 was reported to be 103.5 million tonnes, a 2.2 per cent increase from 2014–2015.¹² To date, petroleum and dry bulk products remain the largest tonnage component of coastal freight. As at January 2019, there are approximately 134 vessels operating with a temporary licence¹³ and 85 vessels operating under a general licence.¹⁴

All vessels that had transitional general licences granted have since surrendered their licences or the licence has expired.¹⁵

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 (FPSOs), floating storage units, accommodation vessels, drilling vessels, construction vessels and pipe-laying vessels also form part of the Australian shipping industry and are regulated by NOPSEMA.

8 Australia Maritime Safety Authority (AMSA), 'List of Registered Ships', www.amsa.gov.au/vessels/shipping-registration/list-of-registered-ships/. All 12,093 vessels are on the Australian General Shipping Register and there are no vessels listed on the Australian International Shipping Register.

9 Note that approximately 284 of these vessels are tugs.

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

11 Of these, seven are floating production storage and offloading (FPSO) vessels, 243 are tugs and seven are dredgers.

12 Bureau of Infrastructure, Transport and Regional Economics, 'Australian sea freight 2015-2016 (2018)', page v, available at https://bitre.gov.au/publications/2018/files/asf_2015_16.pdf.

13 Department of Infrastructure, Regional Development and Cities, available at https://infrastructure.gov.au/maritime/business/coastal_trading/licencing/granted/general/index.aspx.

14 Department of Infrastructure, Regional Development and Cities, available at https://infrastructure.gov.au/maritime/business/coastal_trading/licencing/granted/temporary/2019/index.aspx.

15 https://infrastructure.gov.au/maritime/business/coastal_trading/licencing/granted/transitional/files/TGL_Granted_20190206.pdf.

NOPSEMA reported that, in 2017–2018, it conducted 155 inspections of offshore facilities in Australia, which was markedly higher than the number of inspections it had carried out in 2016–2017. According to NOPSEMA, this was due to a variety of factors, including the decommissioning of offshore platforms due to wells' exhaustion or profitability.¹⁶

iv Foreign-registered vessel calls to Australia

Data in relation to the exact number of foreign ships visiting Australia is limited; however, the Australian Maritime Safety Authority (AMSA) indicates that, in 2017, 5,873 (an increase of 2.7 per cent) foreign-registered vessels called at Australian ports. The average age of foreign flagged ships calling at Australia remained nine years old.¹⁷

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

An important characteristic of the Australian legal system is the distinction between federal and state or territory laws, both of which are relevant to shipping. From a constitutional perspective, the Commonwealth (i.e., the federal level of Australian government) has the power to make laws with respect to 'trade and commerce', which extends to laws relating to 'navigation and shipping'.¹⁸ This does not, however, preclude the six states¹⁹ and two territories²⁰ from also making laws relating to shipping; the primary constraint is that, in the event of inconsistency between Commonwealth and state or territory law, Commonwealth law prevails to the extent of the inconsistency.²¹

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

At the Commonwealth level, the primary legislation regulating shipping in Australia is the Navigation Act 2012 (Cth), which was redrafted and re-enacted in place of the 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.²⁵ The Navigation Act 2012 and other Commonwealth legislation also gives effect to a wide range

16 NOPSEMA, 'Annual Report 2017-2018, page 4, available <https://www.nopsema.gov.au/assets/Publications/A638600.pdf>.

17 AMSA, 'Port State Control 2017 Report Australia', page 7, available at https://www.amsa.gov.au/sites/default/files/port_state_control_report_2017_amsa13.pdf.

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

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

20 The Northern Territory and the Australian Capital Territory.

21 Section 109 of the Commonwealth of Australia Constitution Act.

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

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

24 *ibid*.

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

of international maritime conventions and treaties to which Australia is party. State and territory laws typically regulate recreational vessels, ports and harbours, and other maritime infrastructure located within state boundaries.

III FORUM AND JURISDICTION

i Courts

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

In practice, however, most shipping and maritime disputes are litigated in the Federal Court of Australia. One of the main reasons for this is that the Federal Court has jurisdiction with respect to much of the shipping-related legislation in Australia, such as the Navigation Act 2012, and other Commonwealth legislation giving effect to international conventions.²⁶ The Federal Court also frequently exercises jurisdiction in admiralty, pursuant to the Admiralty Act 1988 (Cth). That Act provides for the commencement of proceedings *in personam* and *in rem* with respect to a wide range of categories of ‘maritime claim’.²⁷ It is also fair to note respectfully that the Federal Court has developed greater experience in dealing with maritime litigation.

With regard to choice of law and jurisdiction, it is important to appreciate that there is no single common law of Australia, rather a separate common law in each state and territory. Accordingly, it is not appropriate for parties to stipulate that an agreement is governed by ‘Australian law’ and the law of a particular state or territory should be selected. Similarly, should contracting parties wish to submit to the jurisdiction of Australian courts, they should specify the courts of a particular state or territory. Finally, 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’.²⁸

ii Arbitration and ADR

Contracting parties are at liberty to agree to resolve their disputes by arbitration or other means of alternative dispute resolution, and Australian courts will give effect to such agreements. In particular, there is comprehensive legislation at both the Commonwealth and state or territory levels aimed at encouraging and facilitating the arbitration of commercial disputes. These laws regulate matters such as the commencement of arbitration, composition of tribunals,

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

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

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

arbitral procedure, awards, appeals and enforcement. The legislation also addresses the extent to which Australian courts may intervene in the arbitral process, including an obligation to stay court proceedings in favour of arbitration in certain circumstances.²⁹

Maritime arbitration in Australia is usually conducted pursuant to the International Arbitration Act 1974 (Cth), which regulates commercial arbitration in Australia between parties with places of business in different states. That Act gives effect to the most recent version of the UNCITRAL Model Law on International Commercial Arbitration.³⁰ It is noted that Australian courts generally recognise the related arbitration law principles of separability and competence.³¹

While there is no provision for maritime-specific arbitration under Australian law, parties may agree to resolve their disputes pursuant to the arbitration rules and procedures of the Australian Maritime and Transport Arbitration Commission (AMTAC).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.

It should also be noted that mediation is frequently used as a means of alternative dispute resolution in Australia, including in shipping cases, and court case-management procedures often require parties to mediate before the hearing of a dispute.

iii Enforcement of foreign judgments and arbitral awards

Certain foreign judgments may be enforced in Australia pursuant to the Foreign Judgments Act 1991 (Cth). A judgment creditor must apply to court to have a foreign judgment registered and the requirements for registration include that the judgment is 'final and conclusive' and, generally, that it is a money judgment and not for payment of foreign taxes, fines or penalties.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.

With regard to foreign arbitral awards, the Australian courts will generally recognise such awards and do so without significant delay. Australia is a signatory to the New York Convention, which is given local effect in the International Arbitration Act 1974 (Cth). Accordingly, foreign awards to which the New York Convention applies are generally recognised by and enforceable in Australian courts. The court may refuse to enforce a foreign award in certain circumstances, including the usual reasons (for example, relating to a defect

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

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

31 Or 'severability' and '*kompetenz-kompetenz*'. See, e.g., *Hancock Prospecting Pty Ltd v. Rinehart* (2017) 350 ALR 658.

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

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

In particular, it is to be noted that an Australian court may refuse to enforce a foreign arbitral award where the award itself, or the underlying contractual agreement, is considered invalid under Australian law, notwithstanding that it is valid under the law governing the substantive dispute. This was the case in a first instance decision of the Federal Court of Australia, which refused to enforce a London arbitration award on a claim under a voyage 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 Ro-Ro vessels and recreational vessels. Accordingly, there is no significant local jurisprudence, specific local laws or regulations concerning shipbuilding contracts.

ii Contracts of carriage

The Carriage of Goods by Sea Act 1991 (Cth) (COGSA) contains important, mandatory provisions concerning choice of law and jurisdiction in relation to contracts of carriage. Certain contracts for the carriage of goods from places in Australia to places outside Australia (outbound carriage) are deemed subject to Australian law (i.e., that of the state of the port of shipment). Any agreement to the contrary is invalid, as is any agreement that seeks to restrict the jurisdiction of Australian courts with respect to such contracts.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 These mandatory provisions do not, however, apply with respect to sea carriage between Australian ports.

The purpose of these provisions is to give local cargo interests the protection of Australia's laws and judicial system. The provisions are regularly relied upon by parties who may otherwise have to pursue a carrier in a less favourable jurisdiction or under a less favourable cargo liability regime. As discussed in Section III.iii, they can also be relied upon, for example, to resist local enforcement of a foreign judgment or arbitration award obtained pursuant to an agreement that contravenes the mandatory provisions.⁴⁰

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

36 *ibid.*, Section 8(7).

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

39 *ibid.*, Section 11(2)(c).

40 See, for example, the recent decisions referred to in footnote 34.

An important consequence of these mandatory provisions is that, where a contract of carriage is subject to Australian law through the operation of COGSA and in certain other cases in which an Australian court has jurisdiction, cargo liability may be regulated by a modified version of the Hague-Visby Rules (the Modified Rules).⁴¹ These rules primarily apply to contracts for outbound carriage.⁴² They also apply in respect of sea carriage between Australian ports, except where carriage is between ports within the same state or territory.⁴³ Further, the Modified Rules apply in respect of inbound carriage if another international cargo liability regime does not otherwise apply by agreement or law.⁴⁴

The Modified Rules regulate cargo liabilities in respect of 'sea carriage documents'. These are defined as including bills of lading and certain types of consignment note, sea waybill and ship's delivery orders,⁴⁵ which need not necessarily be documents of title. The Modified Rules, therefore, apply 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.⁴⁶

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

iii Cargo claims

The question of title to sue under bills of lading, sea waybills and ship delivery orders is the subject of uniform legislation in each Australian state and territory⁴⁷ based on the Bills of Lading Act 1855 (UK). In the case of a bill of lading, for example, a cargo interest will need to prove that it is the 'lawful holder' of the bill in order to have title to sue the carrier under the contract of carriage evidenced by the bill.⁴⁸

A cargo interest with title to sue must establish, based on the proper construction of the contract of carriage and the mandatory provisions of COGSA, which cargo liability regime regulates its claim. This can be a complex inquiry that will depend on the circumstances of each case. However, there is a range of scenarios in which the Modified Rules will apply to a cargo claim brought in Australia.⁴⁹

The obligations and immunities of the carrier under the Modified Rules are generally consistent with the Hague-Visby Rules, with three important qualifications. First, the period of the carrier's responsibility under the Modified Rules commences when goods are delivered to the carrier within a port, and ends upon delivery to the consignee within the destination

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

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

43 *ibid.*, Section 10, and Schedule 1A, Article 10(4).

44 *ibid.*, Schedule 1A, Article 10(2).

45 *ibid.*, Schedule 1A, Article 1(1)(g).

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

47 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).

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

49 The application of the Modified Rules is discussed generally in Section IV.ii.

port.⁵⁰ This extension is most relevant to containerised cargo, which is generally delivered to and by the carrier at the container terminal. Where cargo is shipped on a free in/free out basis, delivery to and by the carrier at both ends occurs on board, in which case the mandatory period of responsibility is limited to the 'tackle-to-tackle' period. Second, the Modified Rules apply generally to the carriage of goods on or above deck.⁵¹ Third, the Modified Rules contain additional provisions that render the carrier liable for delay in certain situations.⁵²

With regard to the carrier's right to limit liability, the Modified Rules incorporate the amendments to the Hague-Visby rules effected by the SDR Protocol of 1979. Accordingly, the carrier is generally entitled to limit its liability to the greater of 666.67 special drawing rights (SDRs) per unit or 2 SDRs per kilogram, unless the nature and value of the goods is declared.⁵³ As with the Hague-Visby Rules, the Modified Rules incorporate a one-year time bar for bringing suit against the carrier.⁵⁴ Finally, it should be noted that in the event that the Modified Rules apply, the carrier is not usually permitted to contract out.⁵⁵

iv Limitation of liability

Australia is party to, and has incorporated into domestic legislation, the LLMC Convention 1976, together with the LLMC Protocol 1996 (the Limitation Convention).⁵⁶ The 2012 Amendment to the Protocol of 1996 (which increases the limits of liability) entered into force in Australia on 8 June 2015.⁵⁷

Accordingly, an owner, charterer, manager, operator and salvor of a ship are entitled to limit liability with respect to certain maritime claims in accordance with the Limitation Convention, including the increased limits of liability in the amended Protocol of 1996. Australia is also party to, and has incorporated domestically, the Bunker Convention,⁵⁸ which preserves the right to limit liability under the Limitation Convention with respect to certain claims relating to bunker oil pollution damage.⁵⁹

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.⁶⁰ In another decision, the same Court determined that the facts of a marine casualty gave rise to two 'distinct occasions' with the result that a shipowner was required to constitute two limitation funds in respect of

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

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

52 *ibid.*, Schedule 1A, Article 4A.

53 *ibid.*, Schedule 1A, Article 4(5).

54 *ibid.*, Schedule 1A, Article 3(6).

55 *ibid.*, Schedule 1A, Article 3(8). See, however, Articles 6 and 6A.

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

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

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

59 Article 6 of the Bunker Convention.

60 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.

the casualty.⁶¹ 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.⁶²

It should be also noted that where a claimant seeks to argue that a shipowner is guilty of conduct barring limitation under Article 4 of the Limitation Convention, the shipowner may be required to provide security for claims in excess of the limitation amount, even if the claimant's argument is very unlikely to succeed.⁶³

Australia is also party to, and has incorporated into domestic legislation, the CLC Convention together with the Protocol of 1992 and the further amendments of 2000 (the Civil Liability Convention).⁶⁴ 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.⁶⁵

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.⁶⁶ The vexed question of exactly what amounts to a ship in these conventions is especially relevant in Australian waters, where a range of unique offshore craft is engaged in the exploration and production of oil and gas. The issue creates considerable uncertainty for many participants in the offshore marine sector, and remains the subject of debate.⁶⁷

V REMEDIES

i Ship arrest

Australia is an 'arrest-friendly' jurisdiction, where ships can be arrested quickly and efficiently. While Australia is not a signatory to the international conventions on ship arrest, the Admiralty Act 1988 (Cth) largely gives effect to the regime of the Brussels Convention. The Act also provides for the admiralty jurisdiction of certain Australian courts, and sets out other rules for arrests and *in rem* proceedings. It is widely accepted, however, that the Act does not permit the arrest of bunkers separately from the ship on which they are loaded.⁶⁸

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

- a a common law maritime lien in respect of the ship;⁶⁹
- b a defined 'proprietary maritime claim' concerning the ship, which includes claims relating to possession, title, ownership and mortgage;⁷⁰ and

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

62 As with, for example, the case of *The 'Pacific Adventurer'* in the State of Queensland in 2009.

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

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

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

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

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

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

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

70 *ibid.*, Sections 4(2) and 16.

- 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.⁷¹

The 'general maritime claims' listed in the Admiralty Act are broader in scope than the claims set out in the Arrest Convention 1952. For example, the Admiralty Act permits arrest for claims in relation to services supplied to a ship⁷² and claims for insurance premiums or P&I club calls in relation to a ship.⁷³ 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.⁷⁴

Further, while a claim in respect of bunkers supplied to a ship would fall within the definition of 'general maritime claim',⁷⁵ 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 the Full Court of the Federal Court,⁷⁶ it unanimously rejected a physical bunker supplier's asserted right to arrest a vessel, the *Sam Hawk*, based on a foreign law maritime lien arising under the bunker supplier's contract with the vessel's time charterers. Four of the five judges adopted the majority's approach in *Bankers Trust International Ltd v. Todd Shipyards Corporation (the Halcyon Isle)*,⁷⁷ 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.⁷⁸

The Admiralty Act also provides for the arrest of a sister ship in the event of a 'general maritime claim'.⁷⁹ To proceed against a sister ship, a claimant must establish that the interest in the ship on which the claim arises is also the owner of the sister ship at the time of arrest. While 'owner' is not defined, it has been decided that the term is not restricted to the registered owner and may extend to a beneficial owner in certain circumstances.⁸⁰ Beneficial ownership cannot, however, be established simply by reason of a company being a subsidiary or related company of another, and accordingly the concept of 'associated ship arrest' that exists in some jurisdictions does not apply in Australia.⁸¹

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.⁸² However, an arresting party must give full and frank disclosure of all known facts material to the arrest,⁸³ provide an upfront

71 *ibid.*, Sections 4(3) and 17.

72 *ibid.*, Section 4(3)(m).

73 *ibid.*, Section 4(3)(s).

74 See *Transfield ER Futures Ltd v. The Ship 'Giovanna Iuliano'* (2012) 292 ALR 17.

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

76 See *'Sam Hawk' v. Reiter Petroleum Inc* [2016] FCAFC 26.

77 [1981] AC 221.

78 See further: www.hfw.com/Arrest-of-the-SAM-HAWK-October-2016.

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

80 See *Malaysia Shipyard v. Iron Shortland* as surrogate for the *'Newcastle Pride'* (1995) 131 ALR 738.

81 The court will only pierce the corporate veil where there is evidence of fraud. See further *Comandate Marine Corp v. The Ship 'Boomerang I'* (2006) 234 ALR 169, *Safezone Pty Ltd v. The Ship 'Island Sun'* (2004) 215 ALR 690, and the recent decision in *Korea Shipping Corporation v. Lord Energy SA* [2018] FCAFC 201, in which HFW acted for the successful appellant.

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

83 See *Atlasnavios Navegacao LDA v. The Ship 'Xin Tai Hai' (No. 2)* (2012) 301 ALR 357.

deposit and give an undertaking in respect of the Admiralty Marshal's costs and expenses relating to the arrest.⁸⁴ The level of deposit to be provided depends on the place of arrest, but is usually between A\$5,000 and A\$10,000. Finally, it should be noted that an arresting party may be liable in damages for 'unreasonably and without good cause' demanding excessive arrest security, obtaining an arrest, or failing to consent to release from arrest.⁸⁵

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).⁸⁶ 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'.⁸⁷ 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.⁸⁸

The court has a wide general discretion to make an order for valuation or sale,⁸⁹ and may order a sale by auction, public tender or any other method, in each case to be conducted by the Admiralty Marshal.⁹⁰ 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.⁹¹

VI REGULATION

i Safety

The marine safety regulation regime in Australia is based upon SOLAS and other international conventions that adopt various international maritime safety standards.⁹² Australia's obligations under SOLAS extend to the recent '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.

In particular, Australia's marine safety regime incorporates IMO codes,⁹³ industry-recognised codes⁹⁴ 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.

⁸⁴ Rule 41 of the Admiralty Rules 1988 (Cth).

⁸⁵ Section 34 of the Admiralty Act 1988 (Cth).

⁸⁶ Rule 69 of the Admiralty Rules 1988 (Cth).

⁸⁷ *ibid.*, Rule 69(5).

⁸⁸ See, for example, *Bank of China Ltd v. The Ship 'Hai Shi' (No. 2)* [2013] FCA 225.

⁸⁹ See *Marinis Ship Suppliers Pty Ltd v. The Ship 'Ionian Mariner'* (1995) 59 FCR 245.

⁹⁰ Rule 70 of the Admiralty Rules 1988 (Cth).

⁹¹ *ibid.*, Rule 69(4).

⁹² See, for example, the International Convention on Tonnage Measurement of Ships and the International Convention on Load Lines.

⁹³ Examples include the IMDG Code, the IMSBC Code, Code of Safety for Special Purpose Ships, ISM Code and the International Code of Signals.

⁹⁴ See, for example, the ICS Guide to Helicopter/Ship Operations.

In 2013, the marine safety regulatory regime in Australia was restructured.⁹⁵ The 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.⁹⁶ The state and territory marine regulators have retained responsibility for marine safety regulation of recreational vessels only.

The Acts 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 orders⁹⁷ 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

The 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 the 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).⁹⁸

Australia has a rigorous system of port state control. In 2017, of the 28,502 foreign ship visits to Australia (by 5,873 foreign-flagged vessels), the AMSA performed 3,128 port state control inspections.⁹⁹ In that period 7,084 deficiencies were found, with 165 vessels being detained because of the severity of those deficiencies.¹⁰⁰ Deficiencies on detained vessels generally related to international safety management, emergency systems, life-saving appliances, fire safety, and water-tight or weather-tight conditions.¹⁰¹

The AMSA also publishes monthly detention lists on its website.¹⁰² These lists identify the particulars of a detained vessel: its registered owner, the ISM manager and classification society, and a description of the deficiencies found. In some cases, images of deficiencies are provided.

95 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.

96 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.

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

98 Environmental enforcement powers are dealt with separately.

99 AMSA, ‘Port State Control 2017 Report Australia’, page 4.

100 *ibid.*

101 *ibid.*, page 6.

102 See <https://www.amsa.gov.au/vessels-operators/port-state-control/ship-detention-list-december-2018>.

Australia has entered into port state control memoranda with the Indian Ocean Memorandum of Understanding (MOU)¹⁰³ and the Tokyo MOU.¹⁰⁴

In maintaining its rigorous port state control inspection strategies, the AMSA also participates in 'focused inspection campaigns' in cooperation with port state control MOU groups. Industry is advised publicly of any planned focused inspection campaigns one month before it commences through the issuance of an Australian notice to mariners.¹⁰⁵

iii Registration and classification

The primary legislation governing ship registration in Australia is the Shipping Registration Act 1981 (Cth) (SRA), with its associated regulations.¹⁰⁶ 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 the AMSA), whose responsibilities include the establishment of the ownership of ships, the granting of certificates, the issue of continuous synopsis records to ships required to carry them and providing public access to the information held in Australia's ship registries.¹⁰⁷

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

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

A guide to registering ships in Australia can be found on the AMSA website.¹⁰⁸ All Australian-owned commercial ships 24 metres and over in tonnage length capable of navigating the high seas must be registered.¹⁰⁹ All other craft, including government ships, fishing and pleasure craft need not be registered, but may be if the owners desire.¹¹⁰

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.¹¹¹

It is important to note that the Australian registers of ships only contain matters required or permitted by the SRA to be entered in the register. Registers no longer include details regarding mortgages, liens and other financial or security interests in a vessel. Any financial or security interests must be registered on the Personal Property Securities Register (PPSR), which is an entirely separate register operated by a separate government body.¹¹² The interest of an owner or bareboat charterer may also be registered on the PPSR.¹¹³

103 See <https://www.amsa.gov.au/about/who-we-work/memorandum-understanding-indian-ocean>.

104 See <https://www.amsa.gov.au/about/who-we-work/tokyo-memorandum-understanding>.

105 Notices to mariners are available on the AMSA website.

106 The Australian Shipping Registration Regulations 1981 (Cth).

107 Extract from the AMSA website: <https://www.amsa.gov.au/vessels-operators/ship-registration>.

108 AMSA, 'Guide to the Registration of a Ship'; see also: <https://www.amsa.gov.au/vessels-operators/ship-registration/australian-international-shipping-register>.

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

110 *ibid.*, Sections 13 and 14.

111 *ibid.*, Sections 9 and 14.

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

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

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

iv Environmental regulation

Regulation of environmental matters in the context of shipping is extensive, and at times complex 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 MARPOL (73/78). Other relevant environmental legislation prohibits pollution by ship anti-fouling paint¹¹⁴ and the introduction of invasive marine species from contaminated ballast water.¹¹⁵

Ship operational pollution prevention obligations under MARPOL are enacted in Australia under the Navigation Act 2012 (Cth) and Marine Orders.¹¹⁶ These obligations are applicable to Australian vessels anywhere in the world, as well as foreign vessels within Australian waters. The federal enforcement legislation relevant to pollution events is the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 (Cth) (MARPOL legislation).

Each state or territory also has its own applicable enforcement legislation used for ship operational pollution events.¹¹⁷

In its 2014–2015 annual report, the AMSA indicated that within the reporting year it had secured one successful prosecution for breach of the MARPOL legislation.¹¹⁸ However, since then no successful MARPOL prosecutions have been reported by the 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;¹¹⁹

114 Protection of the Sea (Harmful Anti-fouling Systems) Act 2006 (Cth) and Marine Order 98, which give effect to the International Convention on the Control of Harmful Anti-fouling Systems on Ships, 2001.

115 Quarantine Act 1908 (Cth). The 'Australian Ballast Water Management Requirements' information is available from the Department of Agriculture and Water Resources.

116 Marine Order 91 – Oil; Marine Order 93 – Noxious liquids substances; Marine Order 94 – Packaged hazardous substances; Marine Order 95 – Garbage; Marine Order 96 – Sewage; and Marine Order 97 – Air pollution.

117 Legislation includes: the Marine Pollution Act 2012 (NSW), Protection of Marine Waters (Prevention of Pollution from Ships) Act 1987 (SA), Pollution of Waters by Oil and Noxious Substances Act 1987 (WA & Tas), Pollution of Waters by Oil and Noxious Substances Act 1986 (VIC), Environment Protection Act 1970 (VIC), Transport Operations (Marine Pollution) Act 1995 (QLD) and Marine Pollution Act 1999 (NT).

118 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.

119 See <https://www.amsa.gov.au/marine-environment/pollution-response/oil-and-chemical-pollution-prosecutions>, prosecuted in the Brisbane Magistrates' Court.

- b* the container carrier *MSC Carla*, prosecuted under the Marine Pollution Act 1987 (NSW) for oil pollution in the port of Botany Bay; and¹²⁰
- c* the container carrier *Pacific Adventurer*, prosecuted under the Transport Operations (Marine Pollution) Act 1995 (QLD) for oil pollution offshore Moreton Island, Queensland.¹²¹

v Collisions, salvage and wrecks

Collisions

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

A peculiarity that arises from Australia's federal legal system is that the Commonwealth application of the COLREGs is restricted on the high seas¹²² to regulated Australian vessels,¹²³ domestic commercial vessels¹²⁴ and recreational craft¹²⁵ (collectively, 'Australian vessels'), and Australian vessels and foreign vessels¹²⁶ in:

- a* the Australian Exclusive Economic Zone;¹²⁷
- b* the Australian Territorial Sea;¹²⁸ and
- c* internal waters.¹²⁹

Domestic commercial vessels and recreational craft must comply with the COLREGs that apply to them through state or territorial legislation when a vessel is within the legislative jurisdiction¹³⁰ of that state or territory.¹³¹

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

120 (1 September 2009) *Filipowski v. Hermania Holdings SA; Filipowski v. Rajagopalan (No. 2)* [2009] NSWLEC 104.

121 (14 October 2011) Indictment No. 2355 of 2010, *The Queen v. Bernardino Gonzales Santos and Ors*.

122 As defined in the Law of the Sea Convention.

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

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

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

126 *ibid*.

127 As defined in the Law of the Sea Convention.

128 *ibid*.

129 *ibid*.

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

131 By way of example, the COLREGs in Queensland are applied 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.

of the Navigation Act 2012 (Cth)¹³² only applies to regulated Australian vessels and foreign vessels, and places a mandatory obligation on the owner and master to notify the AMSA of a wreck.¹³³

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.¹³⁴ It is also to be noted that Australia has not adopted the Nairobi Convention on wreck removal.

Salvage

Australia has adopted the Salvage Convention 1989 into Australian law, but not all its articles. At present, only certain articles are adopted through marine regulations permitted by Part 3 of the Navigation Act 2012 (Cth). The adopted Convention articles are listed in Regulation 17 of the Navigation Regulation 2013 (Cth), which also adopts the Convention's common understanding for Articles 13 and 14.¹³⁵

vi Passengers' rights

Although Australia is not a party to the Athens Convention, the Australian government recently conducted a consultation process regarding Australia's possible ratification of the Athens Convention. This is discussed further in the Outlook section, below.

A shipowner is obliged to report to the AMSA any incident that involves the death or serious injury of a person, including a passenger, and failure to do so is an offence.¹³⁶

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 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.

132 Relating to wrecks.

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

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

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

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

Passenger claims for loss of life or personal injury brought by a person carried in a ship under a contract of passenger carriage¹³⁷ 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.¹³⁸

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.¹³⁹

The MLC applies to all seafarers with few exceptions.¹⁴⁰ Where the MLC is not applicable, the provisions of the Fair Work Act 2009 (Cth) operate to require minimum terms and conditions for seafarers.

The 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 Australian port state control inspections by the AMSA, which will include checks to ensure that MLC requirements for working and living conditions are being met.

The AMSA has the power to detain vessels for failure to comply with the MLC¹⁴¹ and has done so as recently as 12 October 2018, when the Croatian-flagged chemical tanker *MV POMER* was detained for three days while an investigation into crew wage payments was conducted by the AMSA. The investigation, which revealed that several seafarers had not been paid in full at monthly intervals in accordance with employment agreement, on repeated occasions, caused the AMSA to require that seafarers be paid in full, and for class to conduct an additional MLC audit in three months and verify compliance with the MLC, as conditions of release of the vessel from detention.¹⁴²

VII OUTLOOK

On 13 September 2017, the federal government introduced the Coastal Trading (Revitalising Australian Shipping) Amendment Bill 2017 (Coastal Trading Bill) into Parliament,¹⁴³ which aimed to create a simpler and more flexible coastal shipping industry that carries

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

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

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

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

141 A list of all vessels detained by AMSA is available at <https://www.amsa.gov.au/vessels-operators/inspection-non-australian-ships/ship-detention-list-september-2017>.

142 <https://www.amsa.gov.au/vessels-operators/port-state-control/ship-detention-list-october-2018>

143 See HFW Australia's Briefing Note, 'Coastal Trading (Revitalising Australian Shipping) Amendment Bill 2017', www.hfw.com/Coastal-Trading-Revitalising-Australian-Shipping-Amendment-Bill-2017-September-2017.

an increased share of Australia's freight. However, in late 2018 the proposed reforms were debated in Parliament and the Coastal Trading Bill was rejected. A federal election will take place on 18 May 2019 and should the Australian Labor Party (ALP) defeat the incumbent Liberal/National Party coalition and be elected to form government, their publicly announced policy is to see 'more Australian seafarers crewing more Australian flagged ships carrying more Australian goods around our coastline and to overseas markets'.¹⁴⁴ This is likely to involve either major amendment or the repeal and replacement of the current cabotage legislation to impose greater regulatory impediments or cost burdens on foreign-flagged vessels performing Australian coastal voyages.

In November 2017, the Australian government released a discussion paper concerning the Carriage of Passengers and their Luggage by Sea (Athens Convention Discussion Paper).¹⁴⁵ The Athens Convention Discussion Paper was prepared as part of a consultation process on Australia's possible ratification of the Athens Convention. This matter is 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 is 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. Submissions were encouraged from stakeholders by the Department of Infrastructure and Regional Development and are now closed.¹⁴⁶ The submissions are likely to inform the Department's advice to the government on possible accession to the Athens Convention. If the government decides to proceed with accession, the process could take more than 18 months, given the need to develop new legislation.

Despite Australia's position as one of the world's largest producers and exporters of liquefied natural gas (LNG), parts of Australia are currently 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 lower cost foreign products, such as LNG and liquefied petroleum gas (LPG), for domestic use. In addition to an increase in shipping activity, such 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). FSRUs are now proposed for Pelican Point (SA), Newcastle (NSW), and Port Kembla (NSW), and a further unit is all but confirmed for Crib Point (VIC). Such projects, if they proceed, are expected to give rise to a range of novel operational, regulatory and commercial considerations, since no FSRU has previously operated in Australia.

In relation to maritime safety, the 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.¹⁴⁷

¹⁴⁴ See Anthony Albanese MP's speech to the Maritime Industry Australia Ltd Sea18 Conference: <http://anthonyalbanese.com.au/speech-to-maritime-industry-australia-ltd-sea18-conference-australian-ship-ping-charting-a-new-course-canberra-tuesday-16-october-2018>.

¹⁴⁵ Department of Infrastructure and Regional Development announcement dated 21 March 2017 is available at https://infrastructure.gov.au/maritime/business/liability/files/athens_convention_discussion_paper.pdf.

¹⁴⁶ At the time of this update, the result of the consultation process has yet to be concluded.

¹⁴⁷ AMSA, Annual Report 2015–2016, page 33. AMSA banned one vessel for periods of three or 12 months, namely, the *ANL Kardinia*.

We expect this practice to continue, and 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 costs implications. It is also expected that the Australian 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.¹⁴⁸

This year, all Australian ships, ports, refineries and fuel suppliers need to ensure they are ready for the global implementation of IMO 2020 in January 2020, which is prescribed in the Protection of the Sea (Prevention of Pollution from Ships) Act 1983. As with other nations, Australia anticipates that there will be sufficient availability of compliant fuel.¹⁴⁹

In last year's chapter we reported that the Maritime Union of Australia (MUA), the Construction, Forestry, Mining and Energy Union (CFMEU) and the Textile Clothing and Footwear Union of Australia (TCFUA) had, subject to any appeal, obtained approval to amalgamate to create what has been referred to as a 'super union'. In 2018, the appeal was dismissed and the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) was formed. Ahead of the upcoming federal election, the CFMMEU has been pressing the ALP to adopt policies for overhauling aspects of Australia's shipping sector, particularly with regard to industrial relations. With the number of Australian flagged and crewed vessels in sharp decline, the CFMMEU has been pushing for the establishment of a 'strategic shipping fleet' of Australian oil, container and gas carriers. These vessels should, in the view of the CFMMEU, be privately owned and operated but able to be requisitioned by the government in an emergency. The ALP has since announced a strategic shipping fleet as part of its election campaign, and is set to establish a task force to guide the creation of such a fleet in the event that it wins the election.

148 'Shipping company in court for allegedly underpaying seafarers by \$255,000', Fair Work Ombudsman: <https://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/april-2017/20170408-transpetrol-litigation>.

149 <https://www.theaustralian.com.au/national-affairs/policy/fuel-for-thought-in-coming-cap-crunch/news-story/bb79918421dca514989f8ce625742a6b>.

BRAZIL

*Larry John Rabb Carvalho*¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

In 2018 Brazilian ports handled a total of 1.119 billion tonnes of cargo, surpassing by 2.94 per cent the tonnage handled in 2017, when Brazilian ports handled a total of 1.086 billion tonnes of cargo, a 8.38 per cent increase in comparison to 2016.

During 2016, there had been a small decrease in cargo handling – 1 per cent – as compared with 2015, reversing a period of steady growth in Brazilian port evolution for several years: 5.62 per cent in 2011; 1.92 per cent in 2012; 2.76 per cent in 2013; 4.25 per cent in 2014; and 4.08 per cent in 2015.

There was no significant change to the public port: private port ratio, with the ratio of 1:2 being maintained.

The shipping industry in Brazil has always been focused on port support and offshore support rather than cabotage and marine navigation. Thus, the industry suffered greatly from the crisis in the oil and gas sector and the problems with Petrobrás. However, between the end of the second half of 2017 and early 2018, the industry has shown signs of improvement.

The growth potential of maritime transport in Brazil is vast, since the country has continental dimensions and has 8,500km of coast and 21,000km of economically navigable waterways. Also, 80 per cent of the Brazilian population lives within 200km of the coast and most of the country's industry is concentrated near the sea.

Cabotage and waterway shipping are the most logical modes of transport, not only because of Brazil's latent capacity, but also because of the increasing growth in the value of road freight. In recent years, there has been a steady increase in the use of these modes of transport.

During 2018, there was a 3.92 per cent increase in cabotage of containerised cargo, continuing a period of sustained growth: 12 per cent in 2017; 2.48 per cent in 2016; 7.6 per cent in 2015; 5.54 per cent in 2014; 26.92 per cent in 2013; 27.44 per cent in 2012 and 8.45 per cent in 2011.

However, a study carried out by the Brazilian Ministry of Transport indicates that cabotage and waterway shipping represents less than 12 per cent of the Brazilian logistics matrix. However, this is expected to rise to a 29 per cent share by 2025, while road transport will reduce its share of participation to 33 per cent. The Brazilian government has a programme to complete 205 interventions and projects on navigable waterways at a total cost of 15.8 billion reais by 2025.

1 Larry John Rabb Carvalho is a senior partner at Promare | Rabb Carvalho Advogados Associados.

In addition, multiple concessions have been made and are to be made. In February 2019, the Brazilian government signed contracts for the concession of terminals in the Port of Açu, in the state of Rio de Janeiro, and in the Port of Santarém, in the state of Pará, and 23 other concession auctions are to be realised, many of them in ports of the Northern Arc.

The Northern Arc is a term that covers northern states of Brazil that are better located, nearer to the foreign markets and with great potential that has just started to be explored. According to the Annual Bulletin of Transport Statistics released by the Ministry of Infrastructure, the Northern Arc handled a total of 51.2 million tonnes of bulk solid agricultural cargo in 2017, an 82 per cent increase from the 28.1 million tonnes handled in 2016. The Northern Arc is destined to become the number one route for the outflow of Brazilian commodities, and is already responsible for 41 per cent of the bulk solid agricultural cargo transport in the country.

The boom continues, amid improvements to the road, railroad and waterway shipping infrastructure in the states of the Northern Arc, which will make it even more attractive for the producers in the central-west region of Brazil to opt for the Northern Arc as the route for exporting goods.

Waterway shipping has already shown significant growth. Since 2015, the government has been encouraging the construction of pushers and dredgers for the domestic transportation of corn and soybeans.

In 2016, the Brazilian Merchant Marine Fund (FMM) made available a credit of 3.45 billion reais to build 119 new vessels. Private companies used 68 per cent of this resource to construct pushers and dredgers, totalling 81 new vessels.

In 2018 the fund made available a credit line of 5 billion reais, the majority of which has been used for construction of pushers and dredgers.

Logistics is one of the major challenges for grain producers in the State of Mato Grosso, given its distance from the country's main exportation ports. Therefore, using an alternative route for the flow of production via the North region would appear to be a viable solution through waterway shipping using Tapajós River and Madeira River.

The amount of cargo transported along waterways increased during 2017 by 22 per cent, indicating a speeding up in the logistics process relating to Brazilian commodities. It also demonstrates a move from the dependence on road transport towards waterway shipping for the carriage of Brazilian commodities.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The Brazilian shipping industry is regulated by several scattered laws, creating a very complex regulatory spectrum. The lack of consolidation of maritime legislation results in a difficult harmonisation between laws. They have been published at different times, and under different regimes of government, dating from the time of the Brazil Empire.

The Brazilian Commercial Code, which currently regulates maritime trade, maritime contracts, maritime lien, general average and maritime insurance, dates back to 1850, when Brazil was still an empire. The Civil Code of 2002 revoked much of the Commercial Code. However, the chapters regulating maritime transport are still in force.

In addition to the Commercial Code, there are several other laws in force (ordinary laws and decrees), as well as international treaties and conventions. The main pieces of legislation on maritime transport are Law No. 9,432, Decree Law 116, the Civil Code of 2002 and Law No. 9,611 of 1998 on Multimodal Transport of Goods.

The legal framework for regulation of the shipping and port sector is centred on a federal regulatory body, which has introduced a set of standards that are complemented by the provisions for the Brazilian navy. These regulations relate to safety of navigation, safeguarding human life at sea and prevention of sea pollution, as provided by Law No. 9,537 of 1997, Decree No. 2,596 of 1998 and Law No. 2,180. In this context, the Brazilian Navy Authority, by means of the Ports and Coasts Directory (DPC), issues Maritime Authority Norms (NORMAM).

The safety rules established by the Brazilian Navy Authority must be observed by Brazilian vessels and their crew, and anyone else on board, even when in foreign waters (where local regulations must also be observed). Foreign vessels operating under Brazilian jurisdiction waters must also comply with the Brazilian Navy Authority rules.

Law No. 2,180 of 1954 regulates the activities and jurisdiction of the Admiralty Court, which is the administrative body responsible for ruling on accidents and navigation incidents in order to identify the party responsible and to apply penalties.

The National Waterway Transportation Agency, ANTAQ, created by Law No. 10,233 of 2014, is responsible for regulating and supervising (1) the various modes of maritime navigation, (2) public ports, (3) private terminals and (4) the transportation of special and dangerous cargoes.

Nevertheless, ANTAQ regulations must comply with the rules set by the Brazilian Navy Authority regarding, *inter alia*, the safety of waterway navigation and the safeguarding of human life at sea.

One of the main statutes in terms of the regulation of shipping activity is Law No. 9,432 of 1997, which regulates procedures regarding waterway transportation, as provided in Article 178 of the Federal Constitution. It allows the opening of the national market for foreign vessels in both coastal and inland navigations, as well as maritime and port support navigation. However, this is subject to the proviso that a Brazilian shipping company has chartered the vessel, and that the shipping company is incorporated in Brazil and authorised by ANTAQ to operate in the shipping sector.

Thus, foreign companies are not allowed to operate in Brazilian coastal and inland navigations. However, ocean navigation is open to foreign shipping companies and foreign vessels, except for restricted cargo as listed under Decree Law 666 and for the export of oil and its by-products.

Brazilian legislation gives preference to Brazilian-flagged vessels operating in Brazilian jurisdictional waters. However, as stated above, it is possible for a Brazilian shipping company to charter a foreign vessel, but it is necessary to prove the non-existence or unavailability of a suitable Brazilian vessel. In this type of situation, is necessary to request authorisation from ANTAQ through a procedure of circularisation, which means that the market must be consulted regarding the availability of Brazilian-flagged vessels.

According to national legislation, a vessel may only fly the Brazilian flag if it is owned or chartered by a Brazilian shipping company. In the case of the bareboat charter of a vessel, it is necessary to request suspension of the original flag registration and register the vessel with the Brazilian Special Registry (REB). It is also necessary to prove that the Brazilian shipping company has tonnage under construction in a Brazilian shipyard or already has a Brazilian-registered vessel. If these requirements are fulfilled, it is not necessary for the national market to be consulted.

The Brazilian Labour Ministry has also outlined regulations regarding the operation of foreign vessels in Brazil. Normative Instruction 72 demands that a certain proportion of the crew must be Brazilian citizens. The proportion will depend on the length of time the foreign vessel remains in Brazil and its activity.

In relation to maritime labour, Brazil has not ratified the Maritime Labour Convention: the current legal framework applicable in Brazil is NORMAM 13/DPC of 2013, NR Nos. 30, 72 and ILO Convention No. 147.

Among the global conventions ratified by Brazil are the Collision Conventions, the 1924 International Convention for the Unification of Certain Rules relating to the Limitation of Liability of Owners of Seagoing Vessels (Brussels), the International Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages, MARPOL and the 1989 Salvage Convention.

III FORM AND JURISDICTION

i Courts

The Brazilian Code of Civil Procedure lays down the jurisdiction of the state courts to resolve disputes between private entities. The Brazilian federal courts only judge cases related to maritime law when it involves a federal entity or a ship of the Brazilian navy.

Brazilian courts have jurisdiction to hear cases when one of the following requirements is fulfilled, pursuant to Articles 21 and 22 of the Code of Civil Procedure:

- a* the defendant, whatever his or her nationality, is domiciled in Brazil;
- b* the obligation is to be performed in Brazil;
- c* in cases arising from an event that occurred or an act that was performed in Brazil;
- d* in cases arising from consumer transactions, when the consumer is domiciled or residing in Brazil; and
- e* when the parties, expressly or implicitly, submit to Brazilian jurisdiction.

The Brazilian judicial system is organised on different levels. At the first instance, a single judge decides the claims. Subsequently, the courts of appeal act as a second instance, when a group of judges will rule on the appeal. Judgments rendered by the courts of second instance may be subject to subsequent appeal to the Superior Court of Justice (STJ) or the Federal Supreme Court.

In addition to the judicial system, any navigational events or accidents are subject to administrative proceedings, since it is mandatory for the local navy authority to carry out an inquiry to determine the causes of the incident.

The inquiry is then forwarded to the Admiralty Court for review and judgment. The Admiralty Court is an administrative, not a judicial, court and subordinated to the Ministry of Defence. It has jurisdiction to issue penalties to crew members or shipping companies that are found liable.

The Admiralty Court has no jurisdiction regarding liability and damages awards between private entities.

ii Arbitration and ADR

Brazil is fourth highest in terms of the number of parties involved in arbitration, according to the 2017 global rankings by the International Chamber of Commerce, behind the United

States, Germany and France. The report states that 'the increase of parties from Brazil reported in 2016 was further confirmed in 2017, with a rise in the number of cases involving Brazilian parties from 36 in 2016 to 51 in 2017'.

Law No. 9,307 of 1996 regulates arbitration proceedings. Arbitration is very widespread in Brazil because of three essential points that guarantee the legal security of the procedure:

- a* recognition of the negative effect of the arbitration clause, which results in termination of the proceeding without judgment of merit, if the claim is brought to the Judicial Branch;
- b* recognition that the award is an executive title and therefore not dependent on approval by the judiciary system; and
- c* the possibility of submitting the other party to arbitration through enforcement.

Several changes were made to the Brazilian ADR system in 2015. The Arbitration Law has undergone several changes with the advent of Law No. 13,105 of 2015, allowing the use of an arbitration clause in contracts signed by public authorities and port authorities, and regarding regulated matters relating to emergency measures, among others.

Law No. 13,140 of 2015 regulates mediation between private entities, setting forth that the award must be approved by the judiciary.

Law No. 13,105 of 2015 (Code of Civil Procedure) instituted the stimulation of ADR (conciliation and mediation) methods to resolve conflict, in order to reduce the number of claims going through the courts. Thus, the general rule is that before presenting a case, the parties must be summoned to a mediation hearing, where they will be informed of the risks of proceeding through the judicial system. At the hearing, qualified professionals or a magistrate will aim to guide the parties towards an amicable settlement of the claim.

iii Enforcement of foreign judgments and arbitral awards

Before a decision rendered by the judiciary of another country can be enforced in Brazil, a process of recognition or ratification of the judgment through the STJ is required.

Any interested party can request the approval of a foreign decision by bringing a discrete approval action. However, there are some bilateral international treaties that restrict the filing of such an action. According to Provision No. 963 of the Civil Procedure Code 2015, for the foreign decision to be approved, it is necessary that:

- a* it has been issued abroad by a competent authority;
- b* the parties have been summoned or are legally absent;
- c* the decision is effective in the country in which it was issued; and
- d* it is accompanied by an official translation, unless otherwise formally agreed.

In addition, in order to be approved, the foreign decision must be a final judgment from the country of origin. The Superior Court of Justice will not approve a foreign judgment award arbitration that is contrary to public policy, national sovereignty or the dignity of the human person.

The Superior Court of Justice will not verify the merits of a case to grant the *exequatur*. Therefore, when all the requirements are present, the arbitral award or judgment will be approved, then sent to the federal court that holds jurisdiction over the domicile of the debtor in order to proceed with the restriction of assets.

IV SHIPPING CONTRACTS

i Shipbuilding

Under the terms of Law No. 2,180 of 1954 and Law No. 7,652 of 1988, a shipbuilding contract must be registered with the Maritime Registry and before the Admiralty Court, to allow the transfer of ownership of the vessel from the shipyard to the acquiring company.

The transfer of ownership through the Admiralty Court is essential for the process to be effective as regards to third parties. Registration must be completed within 15 days of the transfer of ownership, which may be the date of delivery of the vessel by the shipyard or other means of transfer of the property.

To encourage the use of the Brazilian flag, the government allows vessels built in shipyards in Brazil to join the Brazilian Special Regime, which affords certain tax benefits to shipowners, including the opportunity of seeking some insurance (hull and machinery, and P&I) abroad, the option for tax exemption on the construction, conservation, modernisation or repair of the vessel, and the exclusion of freight revenues from the base amount for calculation of PIS and COFINS contributions.²

All operations in a shipyard, including the supply of parts, are considered export operations and therefore benefit from the same tax exemptions.

ii Contracts of carriage

Brazil has protectionist legislation with regard to maritime transport contracts. Thus, the country is not a signatory to the Hague, Hague-Visby, Hamburg or Rotterdam rules.

The bill of lading has been recognised as a contract of adhesion by the Brazilian courts. Thus, clauses that have not been freely agreed between parties are invalid. In situations such as these, the judiciary has the power to annul a jurisdiction clause and other clauses that limit or exclude carrier liability.

Under Brazilian law, the carrier has an obligation of result, which starts when the cargo is loaded and only ceases with delivery – in the same condition as it was received – to the holder of the original bill of lading.

In the event of a cargo claim, the carrier may be held liable even without any clear fault. Thus, according to legal doctrine and jurisprudence, the carrier has strict liability. The burden of proof is therefore on the carrier, who will succeed in refuting liability only when it can prove (1) the exclusive fault of the victim, (2) the exclusive fault of a third party, (3) a chance event, (4) *force majeure* or (5) an inherent fault in the goods or in the packing thereof.

iii Cargo claims

In addition to the comments above in Section IV.ii, pursuant to the law, in the event of any loss or damage during carriage, both the cargo owner and the insurer will have title to file a claim against the carrier. However, the insurer will have to be subrogated to the rights of the cargo owner.

Pursuant to Decree Law 116 of 1967, the time bar for cargo claims before the Supreme Federal Court is one year. Similarly, the deadline for multimodal transportation is one year, according to Law No. 9,611.

2 The PIS (Program of Social Integration) and COFINS (Contribution for the Financing of Social Security) are federal taxes based on the turnover of companies.

However, as established in the Civil Code, the consignee only retains the right of action against the carrier if a protest has been lodged within 10 days of delivery, clearly stating the damage that has occurred.

iv Limitation of liability

Brazil has protectionist legislation with regard to the carriage of goods by sea. Thus, the country is not a signatory to the Hague, Hague-Visby, Hamburg or Rotterdam rules.

Likewise, Brazil has not yet ratified the LLCM Convention 1976. However, Brazil has ratified the Brussels Convention of 1924, despite the jurisprudence not accepting its application.

The jurisprudence is not without its problems on the subject of limitation of liability of the maritime carrier. Generally, in cases of extra-judicial liability, the rules of full liability are applied. However, in cases of contractual liability, there are several judgments applying the provisions of the Brazilian Civil Code that liability is limited to the value of the load.

Otherwise, as already discussed, the limitation of liability is generally considered invalid in contracts of adhesion, when such clauses are not freely negotiated by the parties.

Nevertheless, there have been some judgments in which it has been considered possible to limit liability, when there is no great discrepancy between the value of the damage and the indemnity limit. However, the parties must have equal status (economically and technically), and the clauses must have been freely negotiated between the parties, not in the form of a contract of adhesion.

V REMEDIES

i Ship arrest

Arrest is a cautionary measure to enable a future action to be brought. Thus, in order for a magistrate to investigate an arrest request, it is necessary for the Brazilian courts to have jurisdiction to try the main action. Brazilian jurisdiction will apply on the hypotheses described in Section III.

To date, Brazil has not ratified any of the Arrest Conventions, which makes it difficult to file an arrest warrant to secure a main suit filed in another jurisdiction. However, there are some judicial decisions that are in compliance with this practice, especially with regard to preliminary measures prior to arbitration proceedings in another jurisdiction.

The legislation currently regulating ship arrest and maritime liens is the Commercial Code, the Brussels Convention for the Unification of the Maritime Privileged Credit Rules and the Civil Procedure Code.

The following basic legal requirements are necessary before filing an arrest:

- a* the claimant must prove the *prima facie* evidence of a debt or maritime lien; and
- b* *periculum in mora*, that without the arrest, the claimant may be at risk of suffering serious and irreparable damage or it will be difficult to enforce if a guarantee is not obtained through the arrest.

The Brazilian Civil Procedure Code states that the court may impose, at its discretion, a counter-security. Furthermore, if a claim is lodged by a foreign plaintiff, the court may request a security for the court costs and legal fees incurred by the defendant lawyer, corresponding to between 10 and 20 per cent of the total amount claimed.

A letter of credit issued by a first-line bank headquartered in Brazil may be offered instead of a monetary deposit.

Brazil has only ratified and signed the International Brussels Convention of 1926. However, the Brazilian Commercial Code sets forth in Articles 470 and 471 some privileged credits, which are binding as maritime liens, following the vessel, notwithstanding any change of ownership or flag.

Among others, the following credits are considered to have *in rem* effects in relation to a ship, making it possible for the arrest to be required irrespective of who the debtor is:

- a* taxes due to the state;
- b* salaries or payments due for services rendered aboard ship or for the benefit of the ship;
- c* expenditure incurred in relation to the cost of the vessel and its upkeep;
- d* expenses incurred with depositaries, and storage costs relating to equipment;
- e* shortages on delivery of cargo and damage thereto;
- f* debts deriving from the contracts for construction and purchase of the ship;
- g* debts deriving from costs incurred in the repair of the ship and its installations and equipment;
- h* salvage indemnity claims;
- i* obligations assumed by the master while exercising the powers conferred by law;
- j* claims for general average;
- k* claims for marine accidents;
- l* credits secured by a marine mortgage; and
- m* state or private port operators' credits.

ii Court orders for sale of a vessel

According to civil procedure rules, the court can authorise the sale of a vessel at public auction when there is a *pendente lite* and the shipowner does not present a guarantee and is not conserving the asset, namely the vessel. This is in the interests of the plaintiff and to protect the environment from any risk of oil pollution or other hazard should the vessel become damaged or start to break up.

The judicial sale of a vessel follows the same general rules as asset bidding. Once the sale is duly performed, the judge will release an order of sale and the buyer will be able to register the vessel with the Admiralty Court, free from any impediment or debt.

The Brazilian Commercial Code provides that the legal sale of the vessel cancels any existing maritime credit or lien existing up to the date of the auction.

VI REGULATION

i Safety

The Brazilian Navy Authority issues regulations regarding the safety of navigation, the safeguarding of human life at sea and the prevention of water pollution. In this regard, the rules are established by Law No. 9,537 of 1997, Decree No. 2,596 of 1998 and NORMAM-07/DPC.

All safety matters established by the Brazilian Navy Authority must be complied with by both foreign and Brazilian vessels and their crew, and anyone else on board, even when in foreign waters (where local regulations must also be observed). (See also Section II.)

Brazil has also ratified several international conventions regarding safety, as discussed below in Sections VI.iv and VI.v.

ii Port state control

Foreign-flagged vessels are subject to port state control in accordance with the international conventions ratified by Brazil and with the Maritime Authority Regulations for the Operation of Foreign-Flagged Vessels in Brazilian Jurisdictional Waters (NORMAM-04/DPC).

Port state control is performed by qualified and accredited marine inspectors, according to NORMAM-04/DPC. Brazil is also a member of the Viña del Mar MOU.

iii Registration and classification

Vessels above 100 TEUs should be registered with the Admiralty Court and those of lower tonnage with the Navy Authority. Law No. 7,652 of 1988 regulates the registration of maritime property.

The Admiralty Court is also responsible for registering encumbrances and mortgages on vessels, and the Brazilian Special Regime deals with second registrations of vessels, by suspending the registration flag and providing benefits to shipowners (as discussed in Section IV.i).

Under NORMAM-06/DPC, the Ports and Coasts Directorate of Brazil accredits classification companies to act on behalf of the Brazilian government in the regulation, control and certification of vessels.

In addition to the duly appointed representatives of the Navy Authority, only the specialised entities formally recognised through a recognition agreement may perform, on behalf of the Maritime Authority, audits, inspections, surveys and issuances of certificates and other documents provided for in international conventions and codes of which the country is a signatory or in the applicable national law, except in special situations.

The authority to act on behalf of the Navy Authority relates to carrying out tests, measurements, calculations, surveys, inspections, audits in shipping companies, vessels and maritime structures, including their associated systems, equipment and facilities, and the issuance, renewal or endorsement of certificates, reports, licences or any other relevant document provided for in international conventions and codes and other applicable national legislation.

As a general rule, classification companies have no liability on the vessels they have certified. Similarly, there is no form of regulation on liability to third parties. However, obviously, in a proven case of negligence or impropriety, it is possible that the judiciary will hold them liable.

iv Environmental regulation

The Brazilian legal framework incorporates several international marine pollution conventions, such as MARPOL, the CLC Convention and the OPRC Convention. There is also extensive domestic legislation covering environmental matters, and supervisory bodies in all the federative jurisdictions. Thus, the environmental framework is quite complex, mainly due to the fact that it is not rarely verified the overlap of competence between environmental agencies.

- The most relevant legislation included in this environmental framework is as follows:
- a* the Brazilian Constitution of 1988 assures the protection of the environment and establishes criminal and administrative liability in the event of pollution, and the obligation to repair the damage caused; and

- b* Complementary Law No. 140, which regulates the Brazilian Constitution regarding jurisdiction, power and cooperation between the Union, the States, the Federal District and the Municipalities in administrative actions arising from:
- Law No. 6,938/81 (the National Environmental Policy);
 - Law No. 9,605/98 (the Environmental Crime Law); and
 - Law No. 9,966/2000 (the Oil Law).

v Collisions, salvage and wrecks

Brazil has ratified several international conventions, including the International Convention on Regulation for Preventing Collisions at Sea 1983, the COLREGs, the FAL Convention, UNCLOS, the Search and Rescue Convention 1979, MARPOL, the 1989 Salvage Convention and the Agreement to implement UNCLOS.

All vessels in Brazilian jurisdictional waters are obliged to provide assistance and rescue to vessels in dangerous situations. The applicable regulations are Law No. 7,542, Decree No. 8,814 and NORMAM-10/DPC. If no provision is made otherwise between the parties, no compensation is due if the salvage operations have not obtained a beneficial result.

However, if the rescuer has carried out a salvage operation and prevented environmental damage but has not received a reward, the rescuer shall be entitled to special compensation to be paid by the shipowner, to an amount equivalent to the salvor's expenses.

The Navy Authority is responsible for authorising the removal of wrecks. However, it may have interventions and follow-up through environmental agencies.

vi Passengers' rights

The applicable regulations are the Civil Code, the Consumer Code and Law No. 11,771 (in cases of cruise ships).

The rights of passengers are considered to be a consumer relationship and are therefore quite protectionist, and must comply with consumer legislation. The carrier is obligated to ensure the safety and well-being of passengers during the entire journey.

vii Seafarers' rights

Brazil has not yet ratified the Maritime Labour Convention. However, it has ratified several ILO conventions, among them Nos. 22, 92, 108, 134, 146, 147, 152, 163, 164, 166 and 185. The Brazilian judiciary has understood that it is competent to adjudicate demands for labour cases regarding foreign crew members when a vessel is abandoned in Brazilian jurisdictional waters, or when the vessel was operating in Brazilian jurisdiction waters.

VII OUTLOOK

At the end of 2017, ANTAQ published Normative Resolution 18/2017, which deals with the rights and duties of users, intermediary agents and companies operating in offshore support, port support, cabotage and ocean transport.

The Resolution also establishes administrative infractions to the actors involved in the shipping industry. These new rules will serve to balance conflicting interests and sanction the practices of certain service providers. The Resolution establishes a true regulatory framework for the industry.

Another point to highlight is that a bill for the New Commercial Code that will update Brazilian maritime legislation is currently going through due process at the National Congress. Much of the legislation currently in use dates back to the 1850 Commercial Code.

The bill provides for changes relating to maritime transport contracts, limitation of liability, charter agreements and other matters pertaining to shipping. This legislative amendment will be fundamental in updating the existing framework, and will incorporate several proceedings and rules established by conventions that are not yet ratified.

The bill has been in process since 2011, and it is necessary to wait for the entire legal process to be completed so that, if approved, it may become law.

Finally, the Code of Civil Procedure, as amended in 2016, now provides for the implementation of several simplifications to judicial processes, with the aim of reducing the number of claims going through the judicial system through the use of ADR methods.

CHILE

*Ricardo Rozas*¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

According to information provided by the Chilean Maritime Authority,² as at December 2017 there were 114 shipowners with approximately 247 Chilean-flagged merchant ships.

The top five shipping companies in terms of tonnage are Naviera Ultrana Ltda, Compañía Marítima Chilena SA, Naviera Los Inmigrantes SA, Sociedad Nacional Marítima SA, and CSAV Austral 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 (note that this rule does not apply to fishing vessels).

According to the Chilean Maritime Authority, the tonnage moved through Chilean ports in 2017 was 61,303,125 metric tonnes in export cargo and 54,268,004 metric tonnes in import cargo. In addition, Chilean seaports have connections with practically all the world's ports.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The Chilean 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* the Navigation Law (Decree Law 2222/78);³

¹ Ricardo Rozas is a partner at Jorquiera & Rozas Abogados.

² Available at <http://web.directemar.cl/estadisticas/maritimo/>.

³ DL 2222/78, published in the Official Gazette dated 31 May 1978.

- c* the Merchant Navy Law (Decree Law 3059/79);
- d* international conventions, such as the Hamburg Rules, SOLAS, MLC and the CLC Convention; and
- e* regulations issued by the Chilean Maritime Authority.

III FORUM AND JURISDICTION

i Courts

Article 1203 of the Chilean Commercial Code establishes the general principle that the resolution of any maritime dispute, including those relating to marine insurance, is subject to mandatory arbitration. In short, all maritime disputes must be resolved by an arbitrator.

However, 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 relating to oil pollution contained under Paragraph 4, Title IX of the Navigation Law;
- d* claims in which the state harbour or customs agencies are involved; and
- e* claims in which the amount at stake is less than 5,000 units of account (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, under Chilean law the general principle is that any action relating to maritime disputes is time-barred for two years. Note, however, that actions relating to 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 Commercial Code establishes special powers for maritime arbitrators as follows:

- a* ample freedom to admit any evidence that the arbitrator may deem relevant;

- b* a proactive role for the avoidance of delays within the trial; and
- c* the ability to consider the evidence under the ‘rule of the sane critic’, which allows the arbitrator to assess the evidence according to his or her own criteria.

Pre-judicial measures and special liens

If pre-judicial measures (whether preparatory, precautionary or evidential) or special liens need to be enforced before the arbitration tribunal is established, the interested party can petition for these before the competent ordinary civil court under the rules of the Tribunal Code or the Commercial Code.

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 related to the matter, 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 case 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 shall have 15 days (which may be extended depending on where the party is domiciled) to respond. An opinion from an independent court official is also requested by the Supreme Court.

The Supreme Court 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 entirely on the UNCITRAL Model Law – was passed in 2004.⁴ Article 35 of that law regulates the recognition and enforcement of foreign arbitral awards and Article 36 lists

⁴ Law 19971, published in the Official Gazette dated 29 September 2004.

the defences that can be asserted against enforcement and regulates orders of stay. Chile is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In this respect, Chilean courts have enforced all foreign arbitral awards that comply with the rules set out in the law for enforcement.

IV SHIPPING CONTRACTS

i Shipbuilding

Chile does not undertake a significant amount of shipbuilding.

ii Contracts of carriage

In 1982, Chile ratified the Hamburg Rules, which entered into force internationally as of 1 November 1992. Additionally, the Chilean legislature included the provisions of the Hamburg Rules in the Chilean Commercial Code in 1988,⁵ 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 where a previous public bid has been carried out by the user in advance; or
- b* cargo volumes are equal to or less than 900 tonnes when Chilean-flagged vessels are not available (provided that authorisation has been obtained from the Maritime Authority).

In addition, passengers cabotage on foreign cruise vessels is allowed provided that the following conditions are met:^{6, 7}

- a* having transport capacity equal to or greater than 400 passengers;
- b* counting with overnight stay facilities aboard; and
- c* performing the transportation of passengers for tourism purposes.

Liens

Chilean law recognises the concept of maritime privileges (see Section V.i).

How the duties and liabilities of the shipper are addressed

In accordance with the Chilean adoption of the Hamburg Rules, 'shipper' means 'any person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier, and any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea'. In line

5 Paragraph 3 of Title V of Book III.

6 Law 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.

7 The passengers cabotage restriction does not apply for calls at either the Archipelago of Juan Fernandez or the Easter Island.

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 relating to 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 Articles 1041 et seq. of the Chilean Commercial Code, which are based on the United Nations Convention on International Multimodal Transport of Goods (Geneva, 24 May 1980). Article 1041 defines the main concepts applicable to multimodal transport: multimodal transport, contract of multimodal transport and operator of multimodal transport. Furthermore, Article 1043 sets out the regime of liability applicable in multimodal transport. The relevance of this article is that, under Chilean law, the liability of all those involved in any part or parts of the multimodal transport is joint. Likewise, the Hamburg Rules must be taken into consideration when dealing with multimodal transport, especially in connection with the limitation of responsibility set out by the Hamburg Rules, of which Chile is a signatory.

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 it is important to note that clauses paramount have been held as unwritten by the Supreme Court⁸ as they would be contrary to public policy.

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.

⁸ *AJ Broom v. Exportadora*, Supreme Court of Chile, Case No. 683-98.

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 these Rules if it governs the relation between the carrier and the holder of the bill of lading other than the charterer. In the case of contracts providing for future carriage of goods in a series of shipments during an agreed period (e.g., tonnage or volume contracts used for cargo projects), the Rules apply to each shipment. However, where a shipment is made under a charter party, the Rules do not operate, except with the aforementioned exception.

Demise clauses

Chilean law recognises a basic distinction between the carrier (also known as the contractual carrier) and the actual carrier. The former is defined as ‘any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper’ and the latter as ‘any person to whom the performance of the carriage of the goods, or part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted’.⁹

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.

Where the performance of the carriage or part thereof has been entrusted to an actual carrier, the carrier nevertheless remains responsible for the entire carriage. In this respect, the carrier is jointly and severally responsible, in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his 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.¹⁰

iv Limitation of liability

Tonnage limitation

Chilean regulations that refer to tonnage limitation (i.e., Articles 889 to 904 of the Commercial Code) are inspired by both the international conventions signed in Brussels in 1957 (the 1957 Convention) and in London in 1976 (the 1976 Convention). With respect to the tonnage limitation figures, the Commercial Code follows the lines of the 1976 Convention. In addition, note that the Commercial Code establishes a specific set of procedural provisions in connection with the constitution and distribution of the corresponding limitation fund.

The 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);

⁹ Article 975 Nos. 1 and 2 of the Chilean Code of Commerce (based on Article 1.1 of the Hamburg Rules).

¹⁰ Articles 1006 to 1008 of the Chilean Code of Commerce (based on Articles 10.1 and 10.2 of the Hamburg Rules).

- c* loss or damage to other goods, including the cargo, caused by same person or people, grounds, places and circumstances as given in point (b); and
- d* resulting liability related to the damage caused by a vessel to harbour works, dry docks, basins and waterways.

The people entitled to limit pursuant to this regime are as follows:

- a* the shipowner as defined by Chilean regulations;
- b* the shipowner's staff;
- c* liability insurers;
- d* the operator, carrier, charterer and the ship's proprietor, if a different person or entity 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. On the other hand, the spillage of hydrocarbons from vessels not carrying oil in bulk as cargo, or spillage of other hazardous substances, is subject to the terms of the CLC Convention 1969 and supplementary norms set forth by the Chilean Navigation Law (among 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 case of delayed goods, the carrier's liability is limited to an amount equivalent to 2.5 times the freight payable for the goods delayed, but not exceeding the total sum of the freight payable under the 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,¹¹ liability can be limited in the following cases:

- a* passenger's death or personal injury: the maximum liability amount is obtained by multiplying 46,666 SDRs by the 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.

¹¹ Articles 1,044 to 1,077 of the Commercial Code.

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 Commercial Code ('About the Procedure to Arrest Vessels and its Release')¹² are loosely based on the principles set forth under the Brussels Convention.

Under Chilean law, a vessel may be arrested if the requesting party has a credit that entitles it to do so. These credits may be of two types:

- a* privileged credits as set forth by Articles 844, 845 and 846 of the Chilean Commercial Code (listed below); and
- b* credits other than those mentioned in 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 Commercial Code. Articles 844, 845 and 846 of the Commercial Code establish and distinguish the following groups of privileged credits.

Article 844 credits

- a* Legal costs and other disbursements caused by reason of a suit, in the common interest of the creditors, for the preservation of the vessel or for its forced alienation and distribution of the yield.
- b* The remuneration and other benefits arising from the contracts of embarkation of the vessel's crew, in accordance with labour regulations and civil law that regulate the concurrence of these credits, together with the emoluments paid to the pilots at the service of the vessel. This privilege applies to the indemnities that are due for death or bodily 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, in order to prevent or minimise pollution 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.
- 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.

¹² Article 1,231 et seq.

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* Credits in respect of the sale price, construction, repair and equipping of the vessel.
- b* Credits in respect of the supply of products or materials that are indispensable for the trading or conservation of the vessel.
- c* Credits arising from contracts of passage money, affreightment or carriage of goods, including the indemnities for damages, lack and short deliveries in cargo and luggage, and the credits deriving from damages in respect of contamination or the spilling of hydrocarbons or other contaminating substances.
- d* Credits in respect of disbursements incurred by the master, agents or third parties, for account of the owner, for the purpose of trading the vessel, including agency service.
- e* Credits in respect of insurance premiums concerning the vessel, be they hull, machinery or third-party liability.

The privileged credits of Article 844 enjoy privilege over the vessel in the order enumerated in Article 844 credits, 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 Commercial Code ('About Privileges and Naval Mortgage') in the specific matters to which they refer.

Procedure for ship arrest

An arrest order is usually granted quickly if the arrest petitioner supplies the court with sufficient supporting documents to justify the arrest petition, such as invoices, bills of lading, contracts and survey or loss reports.

Arrest or retention of a vessel is served by the maritime authority where the vessel lies or by official letter or notification to the Director General of the Maritime Territory and the Merchant Marine if the vessel is not in the jurisdiction of the court that decreed the measure. Prior 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 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 insurance (P&I) 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 a recent case of an arrest following a pollution case, the court hearing the arrest accepted a letter of undertaking with no prior approval from the arrest petitioner. This is a positive development, as Chilean courts seem finally to be aligned with international practice, whereby a letter of undertaking is accepted by the courts as sufficient security.

Wrongful arrest

First of all, 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, note that, except for the regulations related to 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 upon the creditor the right to pursue the vessel in whosoever's possession it may be.
- b* The arresting party must attach antecedents that constitute presumption of the right being claimed.
- c* If the court considers that the supporting documents are not sufficient or the petitioner states they are not yet available to him or her, the court may require that counter-security be provided for the potential 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 Commercial Code.

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. Note that the procedural obligations established must be met, namely filing the petitioner's complaint requesting that the decreed arrest remains in force for a period that, in principle, is 10 days but may be extended for up to a total of 30 days provided there is a sound basis for doing so. However, this is an option that has yet to be further tested in Chilean courts.

ii Court orders for sale of a vessel

In accordance with Commercial Code, the judicial sale of a vessel, whether voluntary or forced, must observe the rules and formalities set forth by the Code of Civil Procedure for the judicial sale of real estate. The procedure may take between a couple of months and one or two years depending on the debtor's behaviour towards the proceedings. Court costs are usually minor but other costs might be generated, such as those relating to the administration of the attached property (incumbent on a depositary who has to render account for his or her administration before the pertinent court).

VI REGULATION

i Safety

Chile has ratified the following conventions:

- a* SOLAS 1974 and its Protocols of 1978 and 1988;
- b* the Load Lines Convention 1966 and its Protocol of 1988;
- c* the COLREGs 1972;
- d* the STCW Convention 1978;

- e* the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation 1988 and its Protocol 1988; and
- f* the MLC and its Amendments of 2014 and 2016.¹³

These conventions are in force notwithstanding the domestic regulations issued by the local 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* the Large Vessels Registry;
- b* the Minor Vessels Registry;
- c* the Vessels in Construction Registry;
- d* the Naval Devices Registry; and
- e* the Mortgage, Liens and Prohibitions Registry.

The rules relevant to the organisation and operation of registries, and the procedures, formalities and requirements of registration, are contained in the applicable regulations. Note that the practice of registering vessels chartered on a bareboat basis does not occur in Chile.

In accordance with Article 15 of the Navigation Law, all large vessels (i.e., those of more than 50 GT) must be registered in the Large Vessels Registry, which is kept by the 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.

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 OILPOL Convention (with its amendments of 1962 and 1969);
- d* the London Dumping Convention;
- e* MARPOL (73/78); and

13 Maritime Labour Convention enacted by Decree No. 11 of the Chilean Ministry of Foreign Affairs, published in the Official Gazette dated 22 February 2019.

- f* Article 136 of the Fishing Law, which refers to criminal liability for spills that cause damage to hydro-biological 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 Collision Rules (1972) 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 Commercial Code ('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 1989 Salvage Convention.

Wreck removal

Wreck removal is regulated under the Chilean Navigation Law. Generally speaking, the Chilean Maritime Authority can order the pertinent proprietor, owner or operator to adopt all necessary measures, at his or her own cost, to proceed with removal of the wreck within a specified term. In February 2018, the Chilean Navigation Law was subject to an important amendment to strength marine environment preservation and navigation safety, and new faculties were granted to the Maritime Authority in respect of ships or craft whose condition poses a risk or danger represent a positive change. The main amendments introduced to the Navigation Law are as follows:¹⁶

- a* Wreck removal now comprises the cargo onboard 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 promptly adopt

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 Article 1,128 et seq.

16 Amended by Law No. 21,066, which introduced new wreck removal provisions, published in the Official Gazette dated 16 February 2018.

corrective measures. 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 its removal or disposal 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 onboard 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.
- 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 case of the presence of hydrocarbons or other hazardous substances.

Recycling

Chile has not signed the Hong Kong Convention; however, the IMO Guidelines on Ship Recycling (2003) are applicable.

vi Passengers' rights

The Athens Convention is not applicable in Chile. However, passengers' rights and the liability of the carrier are regulated by the Commercial Code (Articles 1,044 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 ratified the Maritime Labour Convention 2006. These matters are also regulated under a specific chapter in the Chilean Labour Code.

VII OUTLOOK

Courts clarify meaning of 'personal acts' of shipowners

Introduction

The owners of a Chilean tugboat constituted a limitation fund in Chile to respond to damages suffered by different parties in connection with the sinking of a towed vessel following a salvage and towage operation close to the Strait of Magellan. The owners based their request on being the owners and proprietors of the tugboat.

The plaintiffs opposed the fund's constitution, arguing – among other grounds – that 'personal acts' committed by the tug's owners exempted them from the right to limit liability.

Facts

On 16 January 2009, during a voyage from Punta Loyola, Argentina to Punta Arenas, Chile, the captain of a fishing vessel transporting approximately 9,500 kilograms of gold bullion reported steering problems while navigating in adverse weather conditions and sought rescue assistance. The crew were evacuated successfully by an Argentine navy helicopter, leaving the boat afloat and steaming ahead. Despite attempts by a Chilean tugboat to rescue the fishing vessel, the latter sank. The tugboat owners filed a request to constitute a limitation fund before the Valparaíso Second Civil Court for the potential liability associated with the sinking of the fishing vessel. The request was based on the company's capacity as owner of the tugboat.

Two opposition claims were filed against the constitution of the limitation fund. In this respect, one of the grounds argued by the plaintiffs was that 'personal acts' committed by the tug's owners exempted them from the right to limit liability.

Decision

The first instance court at the port of Valparaíso rejected the different opposition grounds alleged by the plaintiffs and upheld the limitation fund. With regard to the specific allegation concerning the tug owners' personal acts, Article 885 of the Commercial Code provides that:

The liability of the shipowner for their acts or personal acts, or resulting from acts of their dependents, or that take place on land, shall not be subject to the rules of [the Code of Commerce] and will be governed by ordinary rules of law.

According to the court, if the factual assumption of the above provision occurs, neither Article 1210 et seq of the Commercial Code relating to the establishment of a limitation fund nor the limitation of liability apply. Instead, the applicable regulatory body is the Civil Code's general rules on liability, which enshrine the principle of integral damage compensation.

In addition, the court held that where a defendant is a legal person and it commits personal acts or omissions, it must do so through its corporate bodies (i.e., natural persons acting individually or jointly and authorised by law or by-laws to make decisions). This means that the party that commits personal acts or omissions must be the shipowner. Such acts or omissions cannot be attributed to the captain of a vessel.

The court found that the plaintiffs had failed to demonstrate that the shipowners, in their capacity as owners of the tugboat, had committed personal acts that led to the sinking of the assisted vessel. Accordingly, the opposition was rejected.

Both the Valparaíso Court of Appeals and the Chilean Supreme Court upheld the decision.

Comment

The above decision is one of the most relevant substantive decisions confirmed by the Chilean Supreme Court and should provide future certainty regarding the interpretation and scope of shipowners' personal acts.

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 By 2017, China was the third largest shipowning country in terms of cargo-carrying capacity (165 million dead-weight tonnage (dwt)).³ In 2016, China had the second largest share of global shipbuilding gross tonnage with 22,179 thousand gross tons, and continued to have the largest share for dry bulk carrier and general cargo ship construction.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 in 2017 China imported 90.385 million tonnes of natural gas, 88.031 million tonnes of soybeans, 1.065 billion tonnes of iron ore and 461.9 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 Hague-Visby Rules, the Athens Convention, the Salvage Convention 1989, 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.

1 Nicholas Poynder is a partner and Jean Cao is an associate at HFW.

2 <http://www.hw560.com/News/Show?ID=91686a25-17b1-4fef-8eb9-1acf3eae3f0>.

3 Review of Maritime Transportation 2018, at page 28: https://unctad.org/en/PublicationsLibrary/rmt2018_en.pdf.

4 Review of Maritime Transportation 2018, at page 3: https://unctad.org/en/PublicationsLibrary/rmt2018_en.pdf.

5 <http://www.customs.gov.cn/customs/302249/302274/302275/2166506/index.html>.

III FORUM AND JURISDICTION

i Courts

Shipping disputes are heard by 10 maritime courts in China, located in Beihai, Dalian, Guangzhou, Haikou, Ningbo, Qingdao, Shanghai, Tianjin, Wuhan and Xiamen. China has approved the establishment of the country's 11th maritime court in the city of Nanjing in Jiangsu Province.

The maritime courts do not normally recognise foreign jurisdiction clauses in shipping contracts if the jurisdiction has no material connection with the contract or its performance; however, as China is a signatory to the New York Convention (the Convention – see Section III.iii), international arbitration clauses will generally be recognised by its maritime courts when it comes to enforcement. Where 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. The procedure is governed by the rules of the particular arbitration committee chosen by the parties to the dispute. The China Maritime Arbitration Commission (CMAC) is an example of a domestic arbitration committee nominated by parties.⁶

Equally, China has no specific mediation, expert determination or alternative dispute resolution procedures. 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, www.cmac-sh.org.

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 Convention provides five grounds for refusing recognition or enforcement, and these will be applied by the local courts when considering an application for recognition. Apart from these five grounds, the Convention permits a refusal of recognition or enforcement if the recognition or enforcement would be contrary to local public policy. Accordingly, the Chinese courts may also, as a matter of Chinese law:

- a* consider whether there is any social or public interest reason not to recognise the award (there is no clear guidance on what exactly this means); and
- b* if petitioned by one of the parties, investigate whether the arbitration agreement contained in the relevant contract is valid. An arbitration clause should be valid under Chinese law if it is in writing and if it:
 - contains an expressed intention to resolve disputes via arbitration;
 - describes which issues will be decided through arbitration (e.g., all disputes); and
 - identifies which arbitration tribunal or institution the parties agree to use.

If the local court of first instance (the Intermediate People's Court) refuses to recognise the award, it must refer the case to the Higher People's Court. If the Higher People's Court also refuses recognition, it must refer the decision to the Supreme People's Court, which is the only court that can ultimately refuse recognition of a foreign arbitration award.

In practice, enforcement of a foreign arbitral award in China, even though governed by the Convention, is not straightforward; it is well known that there can be problems. For example, some judges in the local courts may lack experience of applying the Convention. This can lead to inconsistent decisions and it can also slow down the recognition process.

Moreover, it can take a long time for the recognition application to be dealt with. First, it will take some time to put 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 of the PRC.

submitted. In one unreported case, a party applied for recognition of a foreign award and after 16 months the Chinese court had still not responded. In two other cases, it took seven months and 21 months respectively before the Chinese court's decision was issued.

IV SHIPPING CONTRACTS

i Shipbuilding

China has a very active shipbuilding industry and was ranked the second largest shipbuilding country in the world in terms of gross tonnage in 2017.⁸ China's 2016 shipbuilding figures showed that completed tonnage, new orders received and order backlog accounted for 36.3 per cent, 35.4 per cent and 35.8 per cent, respectively, of the global market share. China has the largest market shares in dry bulk carriers and general cargo ships and ranks second for oil tankers, container ships and gas carriers.⁹

Like the Japanese and Korean shipyards, Chinese shipyards tend to base their contracts on the SAJ Form, AWES Form or Norwegian Form. The CMAC published its own Standard Newbuilding Contract (the Shanghai Form) in March 2011, which is increasingly used by Chinese shipyards.

English law is the typical choice in contracts, coupled with dispute resolution provisions for arbitration in either London or Singapore. As such, a buyer wanting to contract with a Chinese shipyard must take into account very similar legal considerations to those that would apply if it were buying from other key shipbuilding centres.

As regards title, this will normally transfer at the time of delivery as per the standard clauses in the contracts described above. If the yard refuses to deliver a vessel, depending on the reason for refusal, the buyer may be able to apply to a Chinese maritime court for an injunction ordering the yard to deliver the vessel in accordance with the contract. Otherwise, for this issue and any others that may arise in the process, the parties would need to follow the dispute resolution procedure agreed in the contract – as noted above, this tends to be London or Singapore arbitration.

However, the buyer should be wary of potential pitfalls. If the buyer is successful at arbitration and the shipyard is ordered to pay a sum of money to the buyer – perhaps by way of a refund of the 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, at the outset, guarantee to the buyer 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 recently, some shipyards have persuaded local courts to issue injunctions preventing the bank from paying out under the guarantee even if the relevant arbitral tribunal has found in favour of the buyer.

8 Review of Maritime Transport 2018, at page 38: https://unctad.org/en/PublicationsLibrary/rmt2018_en.pdf.

9 Review of Maritime Transport 2018, at page 38: https://unctad.org/en/PublicationsLibrary/rmt2018_en.pdf.

ii Contracts of carriage

Contracts of carriage are governed by the Chinese Maritime Code, which contains similar provisions to the Hague-Visby Rules, although China is not itself a signatory to the Hague Rules, the Hague-Visby Rules, the Hamburg Rules or the Rotterdam Rules.

Trade between Chinese ports 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).

Further, the shipper is obliged to complete relevant formalities (port, customs, quarantine, etc.) in relation to the goods and submit documents to the carrier. Failing this, the shipper will be liable for the carrier's losses so caused (Article 67).

In respect of dangerous goods, the shipper is additionally obliged to mark the goods and to notify the carrier in writing of the description of the goods, their nature and any relevant safety measures to be taken. The shipper will be liable for any losses suffered by the carrier as a result of carrying the dangerous goods (Article 68).

Liens

A carrier is entitled to exercise a lien over cargo onboard for unpaid freight, general average contributions, demurrage and other necessary charges paid by the carrier on behalf of the owner of the cargo.¹² The lien can only be exercised over cargo owned by the party that is liable for the claim.¹³ Further, unless the relevant bill of lading states clearly to the contrary, the bill of lading holder is not liable for demurrage, dead freight or any other expenses at the loading port; accordingly, a carrier cannot usually exercise a lien over the cargo for those matters unless the holder of the bill of lading is also the charterer.

Interestingly, in a case heard by the Shandong Province High People's Court in 2013, it was held that the carrier (in this case, the shipowner) could not exercise a lien over cargo in circumstances where the shipper named on the bill of lading had already paid freight to the charterers but the charterers had failed to pay the shipowner. This was so even though the shipper had promised to pay the shipowner the freight and demurrage at the port of loading, and requested the shipowner to carry the cargo to the discharge port.

Multimodal bills

Under the Maritime Code, the multimodal transport operator is responsible for all stages of multimodal transportation (Article 104). Importantly, if loss of or damage to the goods

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 Article 87 of the Maritime Code.

13 Article 44 of the Maritime Special Procedure Code, promulgated in 1999.

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 onboard, which cannot be limited, the scope of claims subject to limitation under the Maritime Code is the same as under the LLMC Convention 1976; in short:

- a* owners (including charterers and operators) and salvors are entitled to limit their liability unless it is proved that the loss resulted from their act or omission with intent to cause such loss, or their recklessly acting with knowledge that such loss would probably result; and
- b* for cargo loss or damage, a carrier or actual carrier (the shipowner or demise charterer) may limit its liability on the basis of 'package limitation' (i.e., its liability is limited to the higher of 2 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 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

14 Promulgated on 13 May 2013 and entered into force on 1 March 2015.

15 Article 56 of the Maritime Code.

16 Article 57 of the Maritime Code.

17 Article 59 of the Maritime Code.

Limitation of liability for vessels below 300 gross tonnage (GT) and vessels trading or operating along the PRC coast line is subject to the Regulation of the MOT,¹⁸ which is 50 per cent of the figure calculated under the Maritime Code. Where there is a collision between international vessels and vessels trading or operating along the 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 Provision on Ship Arrest and Auction).²⁰ The Maritime Special Procedure Code adopts many of the provisions of the 1999 Arrest Convention.

To obtain an arrest order from a Chinese maritime court, the claimant must submit an arrest application to the court with the following items:

- a* power of attorney or certificate of legal representation in favour of the appointed Chinese lawyer;
- b* documents supporting the underlying maritime claims;
- c* proof that the person alleged to be liable for the maritime claims is the owner of the vessel at the time of the application; and
- d* counter-security.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 Provision On Ship Arrest and Auction, the counter-security shall also cover costs and expenditure of ship maintenance during the arrest period and costs incurred by the respondent to provide security for lifting the arrest.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 PRC insurance 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.

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 Article 5 of the Supreme Court's Provision On Ship Arrest and Auction.

It is possible to arrest sister ships; any ship that is owned by the party in question can be arrested. However, a ship that is not directly involved in the underlying dispute can only be arrested if that dispute does not relate to the ownership, mortgage or management of the ship.

Arrest of bunkers is also possible. This can be achieved where the claim is against the owner of the bunkers. The claimant must consider the practical difficulties and cost of removing and storing the bunkers while arrested. The Supreme Court's Provision On Ship Arrest and Auction now clarifies that a ship arrested under a bareboat charter can be sold,²³ thereby putting to an end the controversy that a ship can only be sold 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 goes on to lose the substantive proceedings, it will be arguable that the arrest was wrongful. There are, however, no provisions under Chinese law setting out the basis on which an arrest can be wrongful, so the point is unclear.

ii Court orders for sale of a vessel

When a vessel has been arrested in China for more than 30 days, the respondent has failed to provide security for its release and it is not appropriate to maintain the arrest, the claimant that commenced litigation or arbitration proceedings may apply to a Chinese maritime court for sale of the vessel by auction. If a sale order is granted, an affected party may apply for review within five days of receipt of the order. The court will then make its decision within five days 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. 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.

23 Article 7 of the Supreme Court's Provision On Ship Arrest and Auction.

VI REGULATION

i Safety

China is a party to the following international conventions relating to safety at sea:

- a* the FAL Convention;
- b* the Load Lines Convention and Load Lines Protocol 1988;
- c* the Tonnage Convention;
- d* the Intervention Convention;
- e* the Special Trade Passenger Ships Agreement 1971;
- f* the Oil Pollution Fund Convention;
- g* the COLREGs;
- h* the London Dumping Convention 1969, Protocol 1996;
- i* the Intervention Protocol 1969, Protocol 1973;
- j* the Protocol on Space Requirements for Special Trade Passenger Ships 1973;
- k* the Athens Convention, Protocol 1976;
- l* SOLAS 1974, 1978, 1988;
- m* the IMSO Convention 1976 and INMARSAT;
- n* the STCW Convention 1978;
- o* the Search and Rescue Convention 1979;
- p* the SUA;²⁴
- q* the 1989 Salvage Convention;
- r* the OPRC Convention;
- s* the OPRC-HNS Protocol;
- t* the Anti-Fouling Convention;
- u* the Bunker Convention;
- v* the CLC Protocol 1992;
- w* the CSC Convention 1972;
- x* MARPOL (73/78) (Annexes I–V), MARPOL Protocol 97 (Annex VI);
- y* 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;

24 The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.

- 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.²⁵ When compared with 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.²⁶ Information about vessels detained by the MSA is not publicly available after 2014.

iii Registration and classification

Registration

Registration of shipping interests in China is governed by the Regulations Governing the Registration of Ships and is administered by the MSA. The interests of ownership, mortgage and demise charter are all registrable.

To register ownership, the owner must file an application with the registry with documents showing its identity, the technical information of the ship and proof of ownership. If the application is in order, the registry will normally issue the ownership certificate within seven days.

To register a mortgage, the mortgagor and the mortgagee must apply together to the registry with a certificate of ownership or shipbuilding contract and the mortgage agreement.

If the application is in order, the registry will record the mortgage in the ship's certificates and ownership certificate, and will issue a certificate of mortgage to the mortgagee within seven days.

The owner or demise charterer must register a demise charter in the event that:

- a* the Chinese-flagged ship is demise chartered to a Chinese company;
- b* a Chinese company demise chartered-in to a foreign-flagged ship; or
- c* a Chinese-flagged ship is demise chartered-out to a foreign company.

To register the 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 Chinese 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 yard is entitled to engage any other classification society it wishes to oversee the build.

25 MSA, 'Annual Report on Port State Control 2014': <http://en.msa.gov.cn/u/cms/uploadfile/2015/0921/20150921104226666.pdf>, page 14.

26 MSA, 'Annual Report on Port State Control 2012': <http://en.msa.gov.cn/uploadfile/2013/0607/20130607094252896.pdf>, page 25.

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:

- a* The Marine Environment Protection Law: the law was enacted to protect and improve the marine environment, conserve marine resources and prevent pollution damage. It applies to 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.
- b* The Regulations on Administration of the Prevention and Control of Marine Environment Pollution Caused by Vessels: these regulations aim to prevent pollution caused by the discharge and carriage of pollutants by ships, and shipping-related operations such as hold clearing or cleaning, fuel supply, loading and unloading, shipbuilding, salvage, ship breaking, and containerisation of hazardous cargo. The regulations also cover the response to, handling and investigation of ship pollution incidents, and liability for such incidents. Further, they require cargo owners and their agents receiving oil cargoes in Chinese waters to pay into a compensation fund to cover oil pollution damage from ships.
- c* The Regulations on Emergency Preparedness and Response on Marine Environment Pollution from Ships (together, the Regulations): the Regulations require that owners or operators of (1) any ship carrying polluting and hazardous cargoes in bulk, or (2) any other ship above 10,000 GT, enter into a pollution clean-up contract with an MSA-approved ship pollution response company (SPRO) before the ship enters a Chinese port.²⁷
- d* The Prevention and Control of Atmospheric Pollution Law: this law was formulated for the purpose of preventing and controlling atmospheric pollution. It sets out the duties of the government in the prevention and control of atmospheric pollution, including that caused by the burning of coal and fuel by motor-driven vehicles and vessels. Motor-driven vehicles and vessels are prohibited from discharging atmospheric pollutants in excess of the prescribed discharge standards.²⁸ The MOT has promulgated the Implementation Scheme of Domestic Emission Control Area for Atmospheric Pollution from Vessels,²⁹ which provides a 0.5 per cent sulphur limit from 1 January 2019 and 0.1 per cent sulphur limit from 1 January 2020 for any fuel oil used onboard seagoing vessels operating in Domestic Emission Control Areas.

27 The list of SPROs can be found on the MSA's website at: <http://en.msa.gov.cn/marineEnvironmentProtection/index.jhtml>.

28 Article 51 of the Prevention and Control of Atmospheric Pollution Law.

29 <http://www.msa.gov.cn/public/documents/document/mtex/mzm1/-edisp/20181219111335546.pdf>.

In addition to the above-mentioned domestic laws, China is a signatory to the following international conventions:

- a* the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (the Basel 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 Basel Convention. In 2003, the Convention issued guidelines in relation to the dismantling of ships.³⁰ These Guidelines 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.³¹ In 2005, China's Development and Reform Commission promulgated the Green Ship Recycling General Regulation, which has similar provisions to the Guidelines, and is the industrial standard to be followed by ship recycling industries in China.

vi Passengers' rights

China is a party to the Athens Convention. Contracts for the carriage of passengers by sea are governed by the Maritime Code.

vii Seafarers' rights

A significant proportion of the world's seafarers are Chinese. Their rights and obligations are governed by the Chinese Labour Law, Labour Contract Law, Crew Regulations, Crew Assignment Regulations, and Administrative Measures on Seafarers' Working and Living Conditions on Board. China ratified the Maritime Labour Convention 2006 (MLC) 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.

30 Technical Guidelines for the Environmentally Sound Management of the Full and Partial Dismantling of Ships.

31 www.basel.int/Portals/4/Basel%20Convention/docs/meetings/sbc/workdoc/techships-e.pdf.

VII OUTLOOK

China's recent change of leadership brings with it the promise of a new industrial era for the country.

In September 2013, the first new free trade area was established in Shanghai to promote economic reform. The Chinese government has published incentives on registration, tax, banking, financing, customs supervision and foreign currency exchange. By 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.³² As this new area develops, Shanghai port is expected to expand further.

In addition, following the successful establishment of the Shanghai Free Trade Zone by 13 April 2018, the Chinese government approved proposals to set up free trade areas in Fujian, Guangdong, Tianjin, Liaoning, Zhejiang, Henan, Hubei, Chongqing, Sichuan, Shaanxi and Hainan.³³ The Chinese government promulgated a 144-hour transit visa policy for citizens of 51 countries to promote cruise development.³⁴ 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 five million in 2020 and 10 million in 2030. China's cruise market will become the most important in the world.³⁵ The outlook for trade, and the scope for continued growth in the shipping industry, is therefore encouraging.

It may be argued, however, that China's maritime laws have not kept up with the pace of growth in trade and shipping. Since the entry into force of the Maritime Code in July 1993, China's shipping industry has seen rapid development. Issues commonly faced in the industry, such as the legal position of NVOCCs and cargo forwarders, and delivery of cargo without production of an original bill of lading, are not covered in the Maritime Code. As a result, there are some significant areas of uncertainty in Chinese maritime law. 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.³⁶

In response to this, the PRC Supreme People's Court issued 'Several Opinions on Providing Judicial Services and Guarantee for the Building of One Belt One Road by People's Courts' (No. 9 [2015] of the Supreme People's Court) 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 deepen judicial reforms to help foreigners to attend trials. As a result, the Shanghai Maritime Court has, for example, simplified the legislative procedure for obtaining a 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.

32 <http://insurance.hexun.com/2016-10-09/186325838.html>.

33 http://www.gov.cn/zhengce/content/2018-10/16/content_5331180.htm.

34 www.mot.gov.cn/guowuyuanxinxi/201610/t20161012_2098204.html.

35 http://ex.cssn.cn/zk_zkbg/201610/t20161025_3248348.html.

36 www.whhsfy.hbfy.gov.cn/DocManage/ViewDoc?docId=0c3131ec-6e95-47c4-alaf-3e6c73354819.

The MOT drafted and issued the Revised Draft of Maritime Code for Comment on 5 November 2018 (the Draft for Comment). According to the Draft for Comment, revisions introduced include:

- a* expanding the scope of legal regulation: (1) the contract of carriage by sea is enlarged to carriage of goods and passengers by sea and navigable waterway connected with sea; and (2) the meaning of 'vessels' is extended to mobile units at sea or navigable waters connected with sea;
- b* adding two chapters: one chapter deals with contract 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: (1) clarifying the process for obtaining possessory liens and the circumstances required in order to terminate a possessory lien; and (2) 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 International Convention on Salvage (1989) 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 gross tonnage (GT) and vessels trading or operating along the PRC coast line;
- 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 over 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.

COLOMBIA

*Javier Franco*¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

i Overview

Colombia could be considered a non-traditional maritime jurisdiction despite having access to both the Atlantic and Pacific oceans. The fleet under the Colombian flag, for instance, is not large as compared with other countries. However, in 2018, 692 ships² were registered under the domestic flag for local use and 398 others were registered for use in international maritime traffic.³ Local ports are also growing, the most important of which are located in the cities of Buenaventura (on the Pacific coast), Cartagena, Santa Marta and Barranquilla (on the Atlantic coast).

ii Authorities

Three entities are involved in the maritime sector at the domestic level: the Ministry of Transportation, which is the government entity responsible for developing public policy on transport and infrastructure; the General Maritime Directorate (DIMAR) – the national maritime authority – which executes policies conceived by the Ministry of Transportation, coordinates the development of maritime activities and exercises competencies as coastal state, port state and flag state; and the National Superintendence of Ports and Transportation, which exercises surveillance, inspection and control of the public transport service.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Colombia does not have a proper maritime code or law as is in place in other countries. Thus, being a country affiliated with the Romano-Germanic family of law, there are several pieces of domestic law that deal separately with different maritime issues. The main pieces of legislation are as follows:

- a Book 5 of the Colombian Commercial Code (the Code), namely, the book of navigation, which deals with important subjects such as the general regime of the vessel and its property, risks and damage caused in navigation, assistance and salvage, contracts for the carriage of goods, charter parties and maritime insurance.

1 Javier Franco is a partner at Franco & Abogados Asociados.

2 Dirección General Marítima – DIMAR. ‘Registro Naves Colombianas’. Period: 2018. <http://app.dimar.mil.co/zonadescarga/Formularios/frmConsultasConsolidadas.aspx?IDReporte=2>.

3 Dirección General Marítima – DIMAR. ‘Registro Naves de Tráfico Marítimo Internacional’. Period: 2018. <http://app.dimar.mil.co/zonadescarga/Formularios/frmConsultasConsolidadas.aspx?IDReporte=8>.

- b* Decree 2324/1984, which sets out the basic structure of the DIMAR (modified by Decree 5057/2009) and establishes its main functions and attributions. Importantly, Decree 2324 still deals with the procedure that is to be followed by the investigating authority (i.e., harbour masters) in cases of maritime accidents, such as collisions and groundings, that occur within Colombian waters.
- c* Title III of Decree 1079/2015, which deals, *inter alia*, with local regulations applicable in particular to several aspects of the public service of the carriage of goods on maritime and inland waterways.
- d* Law 730/2001, regarding the registry of ships and naval artefacts under the Colombian flag and establishing the requirements to do so.
- e* Law 1/1991, dealing with local ports and their activities in Colombia.

Apart from these, other key matters are subject to the relevant international instruments that have been ratified by Colombia, namely SOLAS, the COLREGs, MARPOL (73/78), the FAL Convention, the Load Lines Convention, the STCW Convention 1978 and the 1992 CLC and Oil Pollution Fund conventions.

III FORUM AND JURISDICTION

i Courts

In the event of a maritime accident (i.e., a non-contractual dispute), such as a collision or grounding, in Colombian waters, the harbour master of the relevant area (as the local representative of the DIMAR) will initiate an investigation following the parameters set out in Decree 2324/1984. The aim of that investigation is to assess the liability of the parties involved and to determine whether any ship involved has violated domestic merchant marine rules. As part of this procedure, any party that is considered to have suffered any damage or loss as a consequence of the incident could claim damages and submit evidence to support any claim brought before the harbour master.

On the other hand, commercial and maritime disputes emerging from contracts should be addressed to civil judges and courts, according to the domestic general procedural rules established in the Colombian General Procedural Code. Thus, as a general rule, claims brought, for instance, on the basis of a contract of carriage of goods by sea or inland waterways, can be submitted to local civil judges unless there is an arbitration clause or a jurisdiction clause pointing to a different jurisdiction to deal with the merits of the claim.

ii Arbitration and ADR

Our jurisdiction is not a well-known arbitration forum for maritime-related disputes. Thus, local arbitrators have not dealt with many cases in this particular field of law at the domestic level. However, the institution of commercial arbitration itself is well developed in Colombia and arbitration centres at the chambers of commerce in cities throughout the country have reputed commercial arbitrators who could deal with claims of this nature.

A relatively recent arbitration law, Law 1563/2012, sets out new parameters for carrying out both national and international arbitration procedures in Colombia. Regarding national arbitration, the new law aims to promote this method of ADR, make the institution more flexible and modernise the institution.⁴ The key features of the new law are as follows:

- a* having all the relevant provisions in one piece of legislation;
- b* providing ample scope for the subjects that could be taken to arbitration;
- c* allowing parties to freely determine the rules of arbitration in cases where the Colombian state or any of its entities are not a party to the procedure;
- d* allowing hearings to be carried out by electronic means; and
- e* providing a maximum period of one year to carry out the proceedings, unless another time period is provided.⁵

In relation to international arbitration, the new law follows the basic parameters of the UNCITRAL Model Law on International Commercial Arbitration.⁶

iii Enforcement of foreign judgments and arbitral awards

Colombia has ratified both the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards and the Inter-American Convention on International Commercial Arbitration. Further, Article 111 et seq. of Law 1563/2012 establish the procedure for recognising and executing foreign arbitral awards, in whichever country said awards have been provided. Indeed, under No. 3 of Article 111, any foreign arbitral award must have previously been recognised by the domestic competent judicial body. Additionally, Law 1563/2012 provides some specifics regarding the cases in which recognition is to be denied. Under Article 116, the competent judicial authority would grant execution of the relevant arbitral award.

The procedure for recognition of foreign arbitral awards in Colombia is described in Article 115 of Law 1563/2012. The basics of this procedure are as follows: once the petition is filed along with the documents specified in Article 111, the judicial competent body will allow 10 days for other parties to submit any consideration regarding the petition. Once this period has expired, the judicial competent body will decide on the request within the following 20 days.

Article 605 et seq. of the Colombian General Procedural Code (the Code) establish that a foreign judgment will have the same force in Colombia as is given by the bilateral treaty with the relevant country, or if no treaty is in place on the issue in question, it will have the force that is given to Colombian judicial decisions in that country. Article 607 establishes the procedure for the *exequatur* to be carried out in Colombia and Article 606 states the requirements for the foreign judgment to have effect in the country. In general terms, *exequatur* procedures should be initiated before the Supreme Court of Justice and a copy of the foreign judgment translated into Spanish should be produced. If the Court grants the *exequatur*, a regular local judge should execute it, following the general parameters established by the Code.

⁴ Correa Palacio, Ruth Stella. 'Presentación' in *Estatuto Arbitral Colombiano*, Legis, Bogotá, 2013, page xxiv.

⁵ *ibid.*, pages xxiv to xxv.

⁶ *ibid.*, page xxvi.

IV SHIPPING CONTRACTS

i Shipbuilding

The shipbuilding industry is not well developed in Colombia. However, in recent years the industry has sustained significant growth resulting from the expansion of the local market for vessels used in offshore oil and gas projects, and for both defence and commercial purposes in inland waterways. There is no specific piece of legislation dealing with shipbuilding contracts in Colombia; only Paragraph 2 of Article 1438 of the Code states that shipbuilding contracts, despite their commercial nature, will be governed by civil law rules.

ii Contracts of carriage

Generalities

Colombia has not properly ratified any of the current international instruments, namely, the Hague Rules, the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules. However, to a certain extent, the country has purported to follow the parameters of the Hague Rules since the provisions of the Code on this subject were supposed to have been inspired by them.⁷ These provisions of the Code are applicable in particular to contracts of carriage of goods by sea ruled by Colombian law and to contracts for the carriage of goods through inland waterways (Article 28 of Law 1242 of 2008).

Regarding the similarities already mentioned between the Hague Rules and the Code, some of the basic features of the international scheme were incorporated into the Code. For instance, Article 1582 of the Code requires a carrier to exercise due diligence to make the ship seaworthy, although it also requires him or her to 'maintain' this obligation during the voyage (whereas the international convention refers only to said obligation in relation to 'before and at the beginning of the voyage'). Additionally, no reference whatsoever is made to due diligence where the Code requires a carrier to make the holds, cool chambers and other parts of the ship in which goods are carried, fit for carriage (as is the case under Article III Rule 1(c) of the Hague Rules). The obligation of 'care' for the cargo is provided for in the Hague Rules in a similar way as in Article 1600 No. 2 of the Code.

Duties and liabilities of the shipper

Article 1599 of the Code expressly states that, unless otherwise agreed by the parties, the shipper is obliged to place goods in a berth or warehouse, 'with the usual or appropriate expectation for loading'. Furthermore, Article 1617 of the Code expressly points out that the shipper guarantees the accuracy of the marks, number, quantity, quality and even the condition and weight of the goods, in the way said particulars are declared at the moment of handing over the goods to the carrier for transportation purposes. Additionally, Article 1616 requires the shipper to provide the carrier with any documents or information that may be needed for the carriage. The shipper is liable to the carrier in the event that these documents are not properly provided, and the carrier is not obliged to verify whether the documents or information are sufficient and legitimate. Note also that no limitation is provided for the shipper in the case of damage or loss caused to the carrier and third parties resulting from the breach of the shipper's obligations under the contract of carriage.

⁷ Commission for the revision of the Colombian Commercial Code, session of 21 February 1958, minute No. 271, page 5.

Carrier's exemptions

Regarding the subject of liability exceptions available to carriers, the Code emulates the provisions in Article IV Rule 2 of the Hague Rules, with the notable exception of Paragraph (q), which was discarded at the local level.

Liens

A carrier, under Article 1624 of the Code, can exercise a lien over the cargo if freight has not been paid by either the shipper or the consignee. The carrier can ask a judge to put the goods in a warehouse until the freight and any expenses are duly covered.

Multimodal transport

There are certain details regarding multimodal carriage at the domestic level that should be highlighted. First, Colombia is a party to the Andean Community (CAN). This is relevant, since the CAN has enacted Decision 331 (partially modified by Decision 393), which deals with multimodal contracts, despite there not being an authoritative instrument at the international level that deals with this subject. In a decision of 3 September 2015, the Colombian Supreme Court took the view that said regulation must be applied even in cases when the maritime transport commences in a non-member country, so long as the destination port is in Colombia (as a member country of the CAN). In that specific case, the Court considered Decision 331 as modified by Decision 393 applicable to a situation where the place of origin of the cargo was in the United States and the place of destination was in Colombia. In our view, this opens a door for local judges to follow said parameter in other cases where either the origin or discharge is to be effected in Colombian territory.

iii Cargo claims

Under domestic law, the person entitled to claim the goods or to demand fulfilment of the obligations imposed by the law on the carrier will be the legitimate holder of the bill of lading if such a document has been enacted. In this respect, the Colombian Supreme Court has clarified that (1) the legitimate holder is the person entitled to claim delivery of the goods and to exercise the rights derived from the contract of carriage (decision of 16 December 2010, LJ Arturo Solarte Rodriguez), and that (2) even if the bill of lading does not have the complete set of requirements that the Code establishes for it to be considered a negotiable title, said document could in any case authorise the holder to claim delivery of the goods (decision of 24 May 1990, LJ Carlos Esteban Jaramillo Schloss).

iv Limitation of liability

Neither the LLMC Convention nor the 1996 Protocol has yet been ratified by Colombia. Instead, Article 1481 of the Code states that the shipowner will only be responsible up to the value of his or her vessel, the vessel's accessories and freight, and for any breach of obligation related, among others, to:

- a* damage or loss suffered during navigation or while in berth as a consequence of negligence of the master or crew;
- b* damage caused to cargo delivered to the carrier for transportation purposes or cargo on board;
- c* other obligations emerging from contracts of carriage or charter parties;
- d* obligations related to the removal of a wreck; and
- e* payments to be made as a consequence of assistance or salvage.

As has already been explained, domestic legislation has some similarities with the Hague Rules and Hague-Visby Rules, but there are some important differences – in particular the way the Code has addressed a carrier's limitation of liability. Article 1643 of the Code states that the carrier is to be responsible for the declared value of the cargo; however, if no declared value is provided, but the nature of the cargo is so described, then, under Article 1644, the carrier will be liable to the value of the carried goods at the place of loading. However, the provision adds that in such a case, a maximum liability could be agreed, thereby not clarifying whether said limitation could be higher or lower than the original parameter already mentioned in the Code. This discussion was solved to a degree in a decision of 8 September 2011, in which the Supreme Court of Justice analysed the aforementioned provision and declared that for these purposes any limitation will be valid whenever it is not a derisory one. In our view, this constitutes a clear departure from the Hague Rules and Hague-Visby Rules.

V REMEDIES

i Ship arrest

Decision 487/2000 of the CAN, which was inspired by the Arrest Convention 1999, is the domestic legislation that deals with ship arrest. Under Decision 487, any 'maritime credit' could be the basis for requesting an arrest. The concept of maritime credit as stipulated in Decision 487 is in line with what is considered to be a 'maritime claim' under the Arrest Convention 1999 (Article 1). Thus, a maritime credit under Decision 487 could emerge from situations such as loss or damage caused by the operation of a ship, loss of life or personal injury in direct connection with the operation of a ship, salvage operation, damage or threat of damage to the environment, any agreement related to the use or hire of a ship, or any agreement relating to the carriage of goods or passengers: all these situations are specified in Article 1 of the Arrest Convention 1999. Bunkers are specifically considered to be a maritime credit in No. 12 of Article 1 of Decision 487 in the same manner as they are considered to be a maritime claim under Paragraph (l) of Article 1 of the Arrest Convention 1999.

In Colombia, an arrest order must be issued by a regular civil judge, not by a harbour master. Under Article 40 of Decision 487, domestic procedural rules are applicable in carrying out an arrest. This has created confusion as there is no specific local procedure appropriate to this type of claim. Thus, an arrest in Colombia could take much longer than in other jurisdictions. What usually happens is that the judge will initiate proceedings, analyse the basis of the claim and then request counter-security to provide the arrest. To date, there are no known cases setting out the parameters of what could be considered a wrongful arrest in our jurisdiction. However, it should be borne in mind that under Article 51 of Decision 487, a creditor could be liable if the arrest is unlawful or unjustified or if there has been a request of an excessive security.

In any case, it is clear under Decision 487 that a party obtaining an arrest could pursue the claim on its merits in a different jurisdiction (Articles 38 to 52).

ii Court orders for sale of a vessel

As Colombia is not a traditional maritime jurisdiction, an order for sale of a vessel in Colombia is quite unusual. In any case, Article 1454 of the Code states that the judicial sale of a ship would take place in accordance with regular provision of domestic procedural law, but that the sale will be announced additionally by posting notices on the ship and in the harbour master's office at the place of registry and at the place where the ship is located.

Nevertheless, under Article 10 of Decision 487, creditors covered by a mortgage retain their right to request the judicial sale of a ship even if the ship has passed into the domain of a third party with just title and good faith.

VI REGULATION

i Safety

Colombia has adopted SOLAS (and the 1978 Protocol), which is incorporated in Law 8 of 1980. Further, Decree 730 of 2004 deals with some aspects of Chapter XI-2 of SOLAS internally and established the DIMAR as the designated authority for the purposes of applying said provisions.

There has been some discussion as to whether automatic amendments of SOLAS could enter into force at the domestic level without any ratification of the amendment itself. With the debate still unresolved, the Ministry of Transportation enacted Resolution 2793/2016, regarding requirements and procedures for verifying the gross mass of containerised cargoes; this was followed by Resolution 4/2016 of the DIMAR, which has the same objective. These domestic regulations essentially reproduce what is in the SOLAS amendment and take into account what the IMO has explained on the subject in the Guidelines Regarding the Verified Gross Mass of a Container Carrying Cargo.

Colombia has ratified, among others, the COLREGs, MARPOL (73/78), the FAL Convention, the Load Lines Convention, the STCW Convention, and the 1992 CLC and Oil Pollution Fund 1992 conventions.

ii Port state control

The DIMAR, as the national maritime authority, exercises port state control in Colombian territory. Thus, it exercises its authority over any ship while in a Colombian port to verify the fulfilment of requirements in relation to maritime safety and other obligations established by international conventions. Colombia is also a member of the Operational Network for Regional Cooperation of Maritime Authorities of the Americas (ROCRAM), which allows national maritime authorities in member countries to share views on maritime safety and security, facilitation of maritime traffic, protection of the marine environment, among other important issues.⁸ Member countries to the ROCRAM have further entered into the Viña del Mar MOU, which relates specifically to port state control and, in particular, makes it compulsory for any foreign ship that enters into their ports to fulfil all the obligations imposed by the applicable international conventions.⁹

iii Registration and classification

The procedure for registration of ships in Colombia is contained in Law 730/2001. Under this law, there are two methods of registration: provisional and definitive. The basic difference is that in the case of provisional registration some of the documents that should be produced with the request for registration can be submitted in the form of a statement that the required

8 ROCRAM: www.rocram.net/prontus_rocram/site/artic/20080512/pags/20080512223345.php.

9 Acuerdo de Viña del Mar: <http://alvm.prefectura naval.gob.ar/cs/Satellite?c=Page&cid=1434394750120&pagename=CIALA%2FPage%2FtemplateSeccionCialaFULLTEXT>.

certificate has already been requested from the relevant authority (although not yet formally obtained). Said certifications should be produced in a full, formal way in order to be eligible for definitive registration under the Colombian flag.

Originally, Law 730/2001 was applicable to both ships and naval artefacts only if they were involved in transportation and fishing operations. However, according to Decree 19/2012, said regime is applicable to any ship or naval artefact (i.e., not self-propelled) even one still under construction, irrespective of its destination (navy vessels excluded). In an attempt to make the registration system more efficient, Resolution 115/2013 of the Ministry of Information, Technologies and Communications delegated to the DIMAR some of the functions regarding maritime frequencies, maritime radio navigation and mobile satellite services.

iv Environmental regulation

Colombia has ratified the CLC Convention 1992 (under Law 55/89 and Law 523/89), the Oil Pollution Fund Convention (under Law 257/1996 and Law 523/1999) and MARPOL (73/78) (under Law 12/1981). Otherwise, Decree 321/1999 adopts the National Contingency Plan Against Spills of Hydrocarbons, Derivatives and Harmful Substances. Regarding offshore activities, the DIMAR has enacted Resolution 674/2012, which establishes certain conditions, procedures and security measures for developing such operations in the country.

v Collisions, salvage and wrecks

Collisions

Colombia has not ratified the Collision Convention 1910. However, the COLREGs were ratified by Law 13/1981. Article 1531 et seq. of the Code provide rules that establish the parameters for collisions caused by force majeure events or through the fault of the master, crew members or pilot of one the ships involved, and those in which both vessels are at fault.

Salvage

Colombia is not a party to the 1989 Salvage Convention. Nonetheless, the Code includes provisions regarding salvage in Article 1545 et seq.

Wreck removal

Resolution 071/1999 of the Ports and Transport Superintendence entitles the Colombian government to recover expenses incurred in the removal of a wreck whenever said wreck has not been removed by the master, shipowner or ship agent involved.

vi Passengers' rights

Colombia is not a signatory to the Athens Convention. However, the Code includes provisions regarding passengers' rights in Article 1585 et seq.

vii Seafarers' rights

Colombia has not yet ratified the Maritime Labour Convention 2006. Despite the fact that the Code has incorporated some provisions for dealing with this issue (mainly establishing specific obligations for seafarers in Article 1508), there is no proper labour regime in place in Colombia for seafarers apart from provisions in Decree 1015/1995, which refer – in a very incomplete manner – to some aspects of seafarers' employment contracts.

VII OUTLOOK

Colombia needs to improve and update its legal framework in the field of maritime law. Despite some valuable efforts that have taken place in the field (i.e., modifications to Law 730/2001 to make it applicable to all types of vessels and naval artefacts, and the enactment of Resolution 674/2012 regarding offshore activities), a piece of legislation dealing integrally with all major aspects of maritime law at the local level, and modernising some old-fashioned regulations, is without doubt much needed. In this regard, the DIMAR has initiated a project called 'Legal strengthening of the maritime authority', which aims, among other things, to contribute substantially to finding a solution to this problem.

DENMARK

*Jens V Mathiasen and Christian R Rasmussen*¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

As of April 2018, the Danish merchant fleet comprised 703 vessels.² Danish vessels account for 19.4 million gross tonnage (GT)³ or 82.4 million GT if including Danish-owned vessels under foreign flags and chartered vessels,⁴ which makes Denmark the fifth-largest shipping nation in the world. Between April 2017 and April 2018, the Danish flagged merchant fleet grew in size by 3.8 million GT, corresponding to an increase of 25 per cent, which is the largest increase ever in size for the Danish flagged fleet.⁵ Danish shipping companies transport approximately 10 per cent of world trade.⁶ Foreign currency earnings for the shipping industry reached 189 billion kroner in 2017.⁷ Roughly 96,000 people are employed in the Danish maritime cluster.⁸

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)⁹ constitutes the main legislative framework for Danish maritime law and is to a large extent based on international maritime conventions such as the Hague-Visby Rules, the Hamburg Rules, the LLMC Convention 1976, the CLC Convention, the 1989 Salvage Convention and the Nairobi WRC 2007. The MSA is supplemented by the Administration of Justice Act (AJA)¹⁰ on general procedural issues

1 Jens V Mathiasen is a partner and Christian R Rasmussen is an attorney at Gorrisen Federspiel.

2 'Danish Shipping Facts and Figures', June 2018, page 4, published by Danish Shipping, see www.danishshipping.dk/.

3 'Danish Shipping Facts and Figures', June 2018, page 4-5.

4 'Danish Shipping Facts and Figures', June 2018, page 12.

5 'Danish Shipping Facts and Figures', June 2018, page 4.

6 Report ('Blue Denmark Commerce Competence Cooperation') available at www.dma.dk.

7 'Danish Shipping Facts and Figures', June 2018, page 6.

8 Report of 2018 made by COWI prepared on behalf of the Danish Maritime Authority, see www.dma.dk.

9 Consolidated Act No. 1505 of 17 December 2018. For an English translation of the Merchant Shipping Act, see www.dma.dk.

10 Consolidated Act No. 1284 of 14 November 2018, as last amended by Act No. 1719 of 27 December 2018.

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, 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. For further information, see www.dma.dk.

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.¹¹ This court is therefore 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, and the Maritime and Commercial High Court's decisions can be appealed to either the High Courts or the Supreme Court of Justice.¹²

The international competence of the Danish courts, in relation to maritime disputes, will in most cases be determined by Regulation (EU) No. 1215/2012 (Brussels I *bis* Regulation), which 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 2005.¹³ 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. The limitation periods 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.^{14,15} 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.

11 See Section 225 of the AJA.

12 See Section 368 of the AJA.

13 See Act on the recognition and enforcement of certain foreign judgments etc. in civil and commercial matters No. 1282 of 14 November 2018.

14 See Section 3 of the Limitation Act.

15 Consolidated Act No. 1238 of 9 November 2015 as amended by Act No. 140 of 28 February 2018.

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.¹⁶ In maritime disputes, it is also very common with *ad hoc* arbitration.

Arbitration proceedings are governed by the Arbitration Act¹⁷ (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 the Danish Parliament.

A new Nordic Offshore and Maritime Arbitration Association (NOMA) was established in late 2017 by leading forces in the maritime sector, including specialised lawyers and trade associations from the Nordic countries. The 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 Arbitrations 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, BIMCO refers to the NOMA rules on their website as an alternative dispute resolution centre for Nordic countries, and as of 1 January 2019, the Nordic Marine Insurance Plan adopted NOMA as the default solution in cases where the claim leader is non-Nordic and as an option where 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, however, be refused on certain grounds, including public policy, insufficient service of the writ to the defendant (default judgments) and if the judgment is irreconcilable with an earlier judgment.¹⁸ Judgments from the EEA states (Norway, Liechtenstein, Iceland and Switzerland) can be recognised and enforced based on the Lugano Convention, which is similar in many respects to the former Brussels I Regulation (Council Regulation (EC) No. 44/2001).¹⁹

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 used. Apart from a few provisions on specific types of cases, there is no generally applicable statutory basis for the recognition and enforcement of foreign judgments. However, based on recent case law, it has been asserted in Danish legal literature that foreign judgments might in some instances be recognised if the parties had agreed upon the jurisdiction of the foreign court issuing the judgment.

In May 2017, a bill was adopted in the Danish Parliament regarding the ratification of the 2005 Hague Convention on Choice of Court Agreements (Hague Convention), which entered into force on 1 July 2017. Following this adoption, judgments from Mexico,

¹⁶ See www.voldgiftsinstitutet.dk.

¹⁷ Act No. 553 of 24 June 2005 as amended by Act No. 106 of 26 February 2008.

¹⁸ See Articles 39 and 45 of the Brussels I *bis* Regulation.

¹⁹ See Article 34 of the Lugano Convention (Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters); see Act on the recognition and enforcement of certain foreign judgments etc. in civil and commercial matters No. 1282 of 14 November 2018.

Singapore, Montenegro and other contracting states can also be recognised and enforced in Denmark, provided that the parties to the dispute have agreed on jurisdiction of the foreign court in question. Within the EU and the EEA, the ratification entails no changes as the Brussels I *bis* Regulation and the Lugano Convention take precedence over the Hague Convention.

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 New York Convention of 1958. Recognition and enforcement may only be denied on a few specific grounds, including public policy and non-arbitrability.²⁰

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).²¹ However, the SGA only applies to the extent that the parties have not departed from its provisions in their contract. Given the detailed nature of most shipbuilding contracts, the SGA will most often not be applied.

ii Contracts of carriage

Chapter 13 of the MSA governs contracts of carriage, based on the Hague-Visby Rules, including the 1979 SDR Protocol, which Denmark has ratified. Although Denmark has not ratified the 1978 Hamburg Rules, these have in part been incorporated in the MSA. Denmark has signed but not yet ratified 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 of the MSA, 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.

²⁰ Sections 37 and 38 of the AA.

²¹ Consolidated Act No. 140 of 17 February 2014.

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 delays to the cargo caused while the cargo was in the carrier's custody.²² The carrier can counter this presumption of negligence and avoid liability by proving that the carrier and its crew acted with due care in the carriage of the cargo. Further, a number of exemptions from liability apply.²³ 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.²⁴ 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.²⁵ The carrier is not liable for loss because of error in navigation or fire that was not caused by the carrier,²⁶ unless the loss was caused by unseaworthiness.²⁷ An exclusion of liability for deck cargo and transport of live animals is set out in Sections 263 and 277.

The carrier is entitled to limit liability for cargo claims.²⁸ 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.

iv Limitation of liability

Chapter 9 of the MSA, which is based on the Convention of Liability for Maritime Claims of 1976 as amended by the 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.²⁹ The claims for which limitation applies (including damage to property and personal injury, and loss resulting from delay) are listed in Section 172, 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 upon if the loss or damage was caused by a wilful act or gross negligence. Danish law follows the 'single liability' principle.³⁰

The limits for liability in the MSA have been amended in accordance with the 2015 increase to the LLMC Convention.^{31, 32} The increased limits apply to all incidents occurring on or after 8 June 2015.

Under Section 175(1) of the MSA, claims for death of a vessel's own passengers are limited to 400,000 SDRs times the number of passengers.

22 See Section 274(1) of the MSA.

23 The exemptions are incorporated from the Hague-Visby Rules and the Hamburg Rules.

24 See Section 275(2) of the MSA.

25 See Section 275(3) of the MSA.

26 See Section 276(1) of the MSA.

27 See Section 276(2) of the MSA.

28 See Sections 280 to 283 of the MSA.

29 See Section 171 of the MSA.

30 See Section 172(2) of the MSA.

31 See Section 175 of the MSA.

32 Executive Order No. 13 of 13 January 2015.

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 2,000 tonnes or less. 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 only 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 2,000 tonnes or less.³³ 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.

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 the Passenger Liability Regulation (PLR),³⁴ Annex I, Article 7. As for other personal injury claims, the general applicable limits under the LLMC 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 1952 Brussels Arrest Convention, as security for 'maritime claims', or under Chapter 56 of the AJA for other claims. In cases where 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.

33 The limits for liability for vessels of 300 tonnes or less are set out in Ministerial Order No. 463 of 11 May 2018.

34 Regulation (EC) No. 392/2009 on the liability of carriers of passengers by sea in the event of accidents.

Under the MSA, a vessel can only be arrested as security for a 'maritime claim' (listed in Section 91 of the Act) against the owner and only if the vessel is present in Danish waters. For certain claims, sister ship arrest may be made.³⁵ However, for other claims (notably disputes concerning the ownership 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.³⁶ 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.³⁷

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 1967 Brussels Convention on Maritime Liens and Mortgages. 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.³⁸

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.

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 477 e(2) of the AJA;
- c* negotiated settlements of disputes entered into by the parties before the above-mentioned authorities (intrajudicial);
- d* other negotiated settlements of disputes relating to 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 (d) above, provided it is explicitly decided in the document that it is enforceable;
- f* mortgage deeds; or
- g* bills of exchange.

³⁵ See Section 93(1) of the MSA.

³⁶ See Section 629 of the AJA and Section 94 of the MSA.

³⁷ See Section 634 of the AJA.

³⁸ See Section 627 of the AJA.

In addition, arbitration awards can form the basis of execution under the same rules as judgments under (a) above with some exceptions (which are 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 a priority in the distribution of the proceeds of the sale.

When an execution has been levied on a vessel, the creditor may request the bailiff's court in which the execution was levied to schedule a judicial sale.³⁹ 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.⁴⁰

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.⁴¹ The Act is based on international conventions such as SOLAS, the Load Line Convention, the STCW Convention, 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.⁴²

ii Port state control

Denmark has ratified SOLAS and the Paris MOU, the latter requiring the contracting states to execute efficient port state control on ships from any state. The Danish Maritime Authority (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 the 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,⁴³ respectively. The income generated by vessels registered under the Danish flag (whether in 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 the taxation are primarily set out in the Tonnage Taxation Act.⁴⁴

39 See Section 539 of the AJA.

40 See Section 28(1) of the MSA.

41 Consolidated Act No. 1629 of 17 December 2018.

42 Consolidated Act No. 74 of 17 January 2014 as amended by Act No. 400 of 2 May 2016.

43 Consolidated Act No. 68 of 17 January 2014.

44 Consolidated Act No. 945 of 6 August 2015, as last amended by Act No. 1726 of 27 December 2018.

When a vessel is registered to 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 in the DAS

Danish vessels must be registered under the Danish flag.⁴⁵ For a vessel to be considered Danish, the owner of the vessel must be Danish, which will be the case if the owner is (1) a Danish citizen, (2) a legal person established pursuant to Danish legislation, or (3) a legal person registered as a Danish company, foundation or association in this country. No licences are required to establish a business in Denmark with the purpose of owning or commercially operating vessels.

Registration in the DIS

The criteria for registration with the DIS are less strict than for registration with the DAS. Also, 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 to the DIS subject to certain requirements. Vessels not considered Danish under the MSA (see above) may be registered to the DIS if the (foreign) owner fulfils two conditions.⁴⁶ 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 if (1) the vessel fulfils the requirements to be covered by the tonnage tax regime (see above), or (2) 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 in the DIS even though the actual 'economic activity' is not substantial in Denmark, which may open the way for a substantial increase of vessel registrations in the DIS.

Bareboat registration in the DIS

A legal entity in the EU or the EEA that complies with the criteria for registration in the DIS may also make a bareboat registration to 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 in the DIS does not allow for other rights, such as mortgages, to be registered in the DIS.

45 See Section 10 of the MSA.

46 Executive Order No. 1654 of 20 December 2017.

Registration fee

On 26 April 2018, the government adopted a bill abolishing the regime of registration fees.⁴⁷ Ship registration is now only subject to an annual fee, which is due for payment each year on the 1 March. The annual fee is calculated on the basis of the ship's GT.⁴⁸

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 easily and individually identified. 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.

Classification

The following classification societies are recognised by the Danish Maritime Authority to undertake statutory certification and services on Danish-flagged vessels:⁴⁹

- a* the American Bureau of Shipping;
- b* Bureau Veritas;
- c* the China Classification Society;
- d* Class NK (Nippon Kaiji Kyokai);
- e* DNV GL;
- f* the Korean Register;
- g* Lloyd's Register;
- h* the Polish Register of Shipping; and
- i* Registro Italiano Navale (RINA).

There is some uncertainty as to whether classification societies will be subject to liability for negligence in carrying out their work; however, the exclusion of liability clauses in the terms and conditions of classification societies has not been set aside by the Danish courts.

iv Environmental regulation

Ship-source pollution and environmental damage is primarily governed by the MSA and the Protection of the Marine Environment Act (PMEA),⁵⁰ while supplementary rules follow from, *inter alia*, the Environment Protection Act,⁵¹ the Environmental Damage Act,⁵² the

⁴⁷ Act No. 359 of 29 April 2018.

⁴⁸ See dma.dk for an overview of the annual fees.

⁴⁹ Agreement Governing the Authorisation of [Recognised Organisation (RO)] to undertake Statutory Certification Services on behalf of the Danish Maritime Authority Danish RO-Agreement 2015.

⁵⁰ Consolidated Act No. 1033 of 4 September 2017, as last amended by Act No. 1552 of 18 December 2018.

⁵¹ Consolidated Act No. 1121 of 3 September 2018, as last amended by Act No. 1713 of 27 December 2018.

⁵² Consolidated Act No. 277 of 27 March 2017.

Nature Protection Act⁵³ and the Coastal Protection Act (CPA).⁵⁴ 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 1992 Convention on Civil Liability for Oil Pollution Damages (CLC) is implemented in Chapter 10 of the MSA. Danish law on liability for oil pollution differs to some extent from the CLC. The channelling provisions of the CLC are implemented in Danish law, albeit with some important changes as set out in Sections 193(2) and 193(3) on shipowners' recourse claims against charterers and cargo owners. Danish law on recourse claims by shipowners is considered more onerous for charterers and cargo owners than Article III.4 of the CLC.

In addition to the CLC, the following international conventions and EU legislation are some of the regulations that are in force in Denmark:

- a* the Oil Pollution Fund Convention;
- b* the 2003 Protocol establishing an International Oil Pollution Compensation Supplementary Fund;
- c* the Bunker Convention;
- d* MARPOL (73/78);
- e* the Ballast Water Management Convention;
- f* Directive (EC) 2005/35 on ship-source pollution and on the introduction of penalties for infringements and Directive (EC) 2009/123 amending Directive (EC) 2005/35;
- g* Directive (EC) 2008/99 on the protection of the environment through criminal law;
- h* Directive (EC) 2008/98 on waste and repealing certain Directives;
- i* Regulation (EC) No. 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH);
- j* Regulation (EC) No. 1013/2006 on shipments of waste (relevant to ship recycling); and
- k* Regulation (EC) 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 of the vessels involved, liability for the damage is to be divided between the parties on the basis of each of 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.

⁵³ Consolidated Act No. 1122 of 3 September 2018, as last amended by Act No. 1518 of 18 December 2018.

⁵⁴ Consolidated Act No. 57 of 21 January 2019.

⁵⁵ See Section 161(1) of the MSA.

⁵⁶ See Section 161(2) of the MSA.

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) are to be considered. Generally speaking, 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 of a threat to the environment, salvage may be payable even if the salvage operation was not successful.⁵⁸

Wrecks

The Danish authorities may, depending on the dangers and other circumstances relating to a wreck, order the removal of the wreck or demand reimbursement for any government expenses incurred in connection with wreck removal, pursuant to either the CPA, the PMEA, the Act on Additions to the Act on Wreckage⁵⁹ or Chapter 8a of the MSA, which incorporates the 2007 Nairobi International Convention on the Removal of Wrecks.

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.

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 EU and cruises departing from an EU port. The Regulation provides additional rights for disabled persons and persons with limited mobility.

The PLR governs the liability of carriers of passengers in the event of accidents based on the Athens Convention. It applies to all carriers involved in international carriage, including carriage between EU Member States and some types of domestic carriage.

Sections 401 to 432 of the MSA contain provisions regarding passengers' rights, including claims relating to delay. Note, however, that the majority of regulations regarding passengers' rights are to be found in the PLR and 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.

Denmark is a party to the Maritime Labour Convention (MLC), which became effective on 20 August 2013. At least one vessel has been detained by the Danish Maritime Authority on violations of the MLC.

57 See Section 441(a) of the MSA.

58 See Section 449 of the MSA.

59 Consolidated Act No. 838 of 10 August 2009 as amended by Act No. 1384 of 23 December 2012.

60 Consolidated Act No. 1662 of 17 December 2018.

VII OUTLOOK

As at June 2018, Danish shipowners had 87 vessels on order.⁶¹ This level of investment indicates an opportunistic approach to the headwinds in the shipping industry among Danish shipowners. Danish shipowners would be in a good position to take advantage of any reversal of the downturn in the shipping cycle, as the new vessels are more efficient than the existing fleet.

61 'Danish Shipping Facts and Figures', June 2018, page 22.

ENGLAND AND WALES

George Eddings, Andrew Chamberlain, Holly Colaço and Isabel Phillips¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The shipping industry has for centuries played an important role in the United Kingdom's island-nation economy. As at December 2018, the UK Ship Register was ranked 18th on world fleet tonnage volume statistics, with a gross tonnage of 16 million.² In economic terms, shipping accounts for 95 per cent of exports and imports and is reported to make a total economic contribution of £12.5 billion (direct, indirect and induced impact) each year. The wider maritime sector also contributes approximately £14.5 billion and 186,000 jobs to the UK economy every year.³ According to the most recent statistics, total port freight traffic through the UK's major ports between October 2018 and December 2018 was 470 million tonnes.⁴

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

England and Wales is a common law jurisdiction where the legal framework is founded upon a mixture of case law and legislation. Shipping law in particular has historically been developed primarily by decided cases, although there are statutes in key areas. The Merchant Shipping Act 1995, consolidating previous statutes dating back as far as 1894, is a particularly important piece of overarching legislation in this field and various statutory instruments have been made under it.

International conventions that are ratified by the United Kingdom are usually implemented through domestic legislation. The United Kingdom has ratified all the major international maritime conventions.

While the United Kingdom remains a member of the European Union, Regulations and Directives made by institutions of the European Union have either a direct or indirect effect in the jurisdiction of England and Wales. A referendum on the UK's membership of the European Union was held in June 2016, in which the majority voted to leave the

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

2 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785497/shipping-fleet-statistics-2018.pdf.

3 Maritime and Coastguard Agency Business Plan 2018–2019, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/694386/MCA_Business_Plan_18-19_final_version_2.pdf.

4 UK Port Freight Statistics: October to December 2018, <https://www.gov.uk/government/statistics/port-freight-quarterly-statistics-october-to-december-2018>.

European Union. Following the triggering of Article 50 in March 2017, the UK may leave the EU in June or October 2019 and, if the United Kingdom leaves the European Union with an exit agreement, there will then be a transition period ending on 31 December 2020. EU Regulations may no longer have effect after 31 December 2020. Unlike EU Directives, which are left to Member States to implement by way of national legislation, Regulations are automatically and directly applicable in Member States. UK legislation dealing with matters covered by Directives could therefore remain substantively unaltered, as the UK laws passed to implement them will remain in place, potentially requiring only minor changes. However, any critical gaps currently covered by Regulations will need to be addressed by new domestic legislation. While the outcome of negotiations between the United Kingdom and the European Union is impossible to predict, Brexit could potentially affect a number of areas. These could include the return of border controls, the loss of the right for UK entities to perform cabotage services throughout the European Union and the loss of ‘passporting’ rights for the UK’s marine insurance and ship finance sectors.

III FORUM AND JURISDICTION

i Courts

Forum and jurisdiction

Shipping disputes in England and Wales are heard in the Commercial Court or the Admiralty Court, depending on the precise nature of the claim. These are specialist courts experienced in dealing with shipping disputes and in which a number of highly experienced commercial and maritime judges sit. There are currently 14 judges attached to the two courts.⁵

Proceedings commenced in the Admiralty and Commercial Courts are governed by the general procedural rules contained in the English Civil Procedure Rules (CPR). There is also, however, a specialist Admiralty and Commercial Court Guide,⁶ which sets out detailed information regarding the conduct of litigation in these courts. The CPR also contains specific rules and practice directions relating to admiralty claims (CPR 61 and Practice Direction 61) and claims commenced in the Commercial Court (CPR 58 and Practice Direction 58).

Under English law, the following claims must be commenced in the Admiralty Court: salvage, collision, limitation and *in rem* proceedings for the arrest of a vessel. Claims that fall within the jurisdiction of the Commercial Court include carriage of goods, import or export of goods, insurance and reinsurance disputes, and shipbuilding.

Several particularly significant shipping disputes have recently come before the English courts, including *The Ocean Victory* (safe port warranties, restoring the traditionally understood position),^{7, 8} *The Maersk Tangier* (a significant Hague-Visby Rules judgment on package limitation for containerised cargoes),⁹ *The Aqasia* (judgment on the non-applicability of the package or unit limitation to bulk cargoes under the Hague Rules).¹⁰ *The Aconagua*

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

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

⁷ *Gard Marine & Energy Limited v. China National Chartering Co Ltd and another (The Ocean Victory)* [2017] UKSC 35.

⁸ *Navalmar UK Ltd v. Kale Maden Hammaddeller Sanayi Ticaret AS (The Arundel Castle)* [2017] EWHC 116.

⁹ *AP Moller-Maersk t/a 'Maersk Line' v. Kyokuyo Co Ltd (The Maersk Tangier)* [2018] EWCA Civ 778.

¹⁰ *Vinnlustodin HF Vatryggingafelag Islands HF v. Sea Tank Shipping AS (formerly known as Tank Invest AS) (the 'Aqasia')* [2018] EWCA Civ 276.

*Bay*¹¹ (on the interpretation of the ‘always accessible’ warranty in voyage charters), *The Songa Winds*¹² (judgment confirming previous decisions on letters of indemnity for delivery of cargo without production of the original bills of lading), *The Alhani*¹³ (on the applicability of the Hague Rules time bar to a misdelivery claim) *The Yangtze Xing Hua*¹⁴ and *The Maria*¹⁵ (on construction of the term ‘act’ and ‘a similar amendment’ in the context of the inter-club agreement), *The Pacific Voyager*¹⁶ (on owners’ obligation to proceed approach voyage with utmost dispatch under a charter with no ETA or ERTL at load port), *Volcafe*¹⁷ (Supreme Court case reversing the Court of Appeal position and clarifying the scope of the burden of proof on carriers seeking to rely on the Hague Rules’ inherent vice exemption), *The New Flamenco* (limiting the scope of what will be regarded as acts of mitigation),¹⁸ *The Yusuf Cepnioglu* (supporting the terms of an insurance policy over the direct rights of action against insurers under foreign legislation),¹⁹ *The Merwestone* (fraudulent devices in insurance claims)²⁰ and *Atlantik Confidence* (a rare case in which the exceptional facts justified breaking tonnage limitation).²¹ One of the most notable disputes to pass through the English courts all the way up to the Supreme Court is the primary test arising out of the insolvency of Danish bunker supplier OW Bunkers. The Supreme Court confirmed that a bunker supply contract that contains a retention of title clause in favour of the bunker supplier, and that permits the buyer to use or consume the bunkers before title passes, does not fall within the scope of the English Sale of Goods Act 1979.²²

The Recast Brussels I Regulation²³ (the Recast Regulation) covers jurisdiction as between courts of different EU Member States and replaces the 2001 Brussels I Regulation (the Brussels I Regulation).²⁴ The Recast Regulation took effect on 10 January 2015 and applies to all proceedings instituted on or after that date. The Recast Regulation contains provisions aimed at preventing parallel proceedings in the courts of different EU Member States. Under the Brussels I Regulation, it had been the case where proceedings involving the same dispute and the same parties were commenced in the courts of different Member States, and the court ‘first seised’ of a dispute had the ability to determine whether or not it had jurisdiction over it (the ‘first-in-time’ rule). In principle, this first-in-time rule still applies,

11 *Seatrade Group N.V. v. Hakan Agro D.M.C.C. (the ‘Aconcagua Bay’)* [2018] EWHC 654 (Comm).

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

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

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

15 *Agile Holdings Corporation v. Essar Shipping Ltd (‘Maria’)* [2018] EWHC 1055 (Comm).

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

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

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

19 *Shipowners’ Mutual Protection and Indemnity Association (Luxembourg) v. Containerships Denizcilik Nakliyat ve Ticaret AS* [2016] EWCA Civ 386.

20 *The Merwestone* [2016] UKSC 45.

21 *Cosmotrade SA v. Kairos Shipping Ltd (The Atlantik Confidence)* [2016] EWHC 2412 (Admlty).

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

23 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.

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

unless parties have agreed that the court of a Member State should have jurisdiction over the dispute (usually through a contractual jurisdiction clause). If such an agreement has been made, the court nominated by it will have jurisdiction over the claim regardless of whether it was first seised of the dispute. This provision will apply even if no party to the dispute is domiciled within the European Union. This new provision will help to give more certainty to commercial contracts, but significant concerns remain. First, the Recast Regulation does not clarify what should happen if the jurisdiction clause states that one party must bring its claim in one jurisdiction, but that the other party may bring its claim in a number of jurisdictions. Second, the Recast Regulation is unclear on whether a Member State court is bound to uphold an exclusive jurisdiction agreement that nominates a court outside the EU. Given these issues, the question of where to commence proceedings will continue to require careful thought.

Following the post-Brexit transition period (which will apply if the UK leaves the EU with an exit agreement), the Recast Brussels regime will cease to apply unless the UK government and the European Union agree otherwise. The UK government would also be free to adopt the Lugano Convention or the Hague Convention on Choice of Court Agreements 2005. There will also be a knock-on effect on the service of proceedings as the EU Service Regulations will cease to apply.

Limitation periods

The following limitation periods may apply to maritime claims in England and Wales:

- a* one year for cargo actions under the Hague Rules or Hague-Visby Rules;
- b* two years for passenger claims under the Athens Convention;
- c* two years for salvage claims under the London Salvage Convention 1989;
- d* two years for collision claims under Section 190 of the Merchant Shipping Act 1995;
- 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);²⁵
- 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);²⁶ and
- h* 12 years for 'upon speciality' claims, for instance, for claims based upon deeds.²⁷

It is possible to extend time limits by agreement. However, in most cases, agreement to extend must be reached before the relevant time limit expires. The limitation period for personal injury claims under Section 11 of the LA 1980 may be extended at the court's discretion under Section 33 of the LA 1980. Other specific tribunals may have further applicable limitation periods, and contractual limitation periods should always be checked.

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

26 Sections 2 and 5 of the LA 1980.

27 Section 8 of the LA 1980.

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.²⁸ 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 LMAA is an association of specialist maritime arbitrators operating in London. In 2018, the LMAA received approximately 2,599 new arbitration appointments and published 508 arbitration awards.²⁹

LMAA arbitration is frequently used to determine commercial shipping disputes, such as charter party and bill of lading disputes, ship sale and purchase disputes, shipbuilding and repair disputes, marine insurance disputes, and offshore and oil and gas disputes. LMAA arbitration is not usually used for collision and salvage matters, salvage being more commonly resolved by Lloyd's Salvage Arbitration (see Section VI).

The LMAA operates within the framework laid out in the Arbitration Act 1996 and publishes its own set of rules, which are structured to deal with small, intermediate and larger cases. The most recent rules were published in 2017, and apply to all LMAA arbitrations commenced on or after 1 May 2017.

Several forms of ADR are used within England and Wales, including expert determination, early neutral evaluation, early intervention and mediation. Mediation in particular is an increasingly popular option for settling maritime disputes. Both the Admiralty and Commercial Courts and the LMAA encourage parties to a dispute to engage in mediation before proceeding to trial or arbitration. If a party refuses to mediate without reasonable grounds for doing so, the court may make an adverse costs order against the refusing party. Additionally, if an English law contract contains a mediation clause, this clause will be enforceable by the parties to the contract provided the clause is sufficiently certain.

iii Enforcement of foreign judgments and arbitral awards

Foreign judgments

There are currently various reciprocal regimes allowing for the recognition and enforcement of foreign judgments in England. The most significant of these relate to European and Commonwealth judgments.

The Recast Regulation (or the Brussels I Regulation for claims initiated before 10 January 2015) and the Lugano Convention (as implemented into English law) govern the enforcement of judgments delivered by Member States of the European Union, Iceland, Norway and Switzerland. Enforcement of judgments from these countries is relatively straightforward and does not require the English courts to evaluate the merits of the underlying claim. The main circumstances in which the English courts will not enforce judgments from these countries are where the judgment is contrary to public policy, or where it is irreconcilable with a judgment issued in England involving the same dispute and the same parties. The principal change between the Brussels I Regulation and the Recast Regulation has been to simplify the procedure of enforcement, as no declaration of enforceability (*exequatur*) will

28 www.hfw.com/The-maritime-arbitration-universe-in-numbers-will-Brexit-impact-Londons-standing-March-2018.

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

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

The Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933 govern the recognition and enforcement of judgments made in the Commonwealth and other reciprocating countries. These Acts require judgments to be registered before they can be enforced in England. The requirements for registration are that the court that issued the judgment must have had jurisdiction and the judgment must not have been obtained by fraud or be contrary to public policy. Once registration has occurred, the judgment will take effect as if it were an English judgment.

Enforcement of judgments from countries that are not party to the above statutory regimes is governed by English common law and requires the commencement of a new action based on the judgment itself. The English courts will not examine the merits of the judgment. However, it will be necessary to show that the court that made the judgment had jurisdiction to do so under the English conflict-of-laws rules, that the judgment is for a debt or a limited sum and that it is final, conclusive and not contrary to public policy.

Foreign arbitral awards

Many foreign arbitration awards are enforceable within England and Wales. The United Kingdom is a party to the New York Convention. Accordingly, most awards from other contracting states are enforceable. Enforcement is governed by Section 66 of the Arbitration Act 1996.

It is also possible to enforce an award issued by a non-contracting state. Again, enforcement is covered by Section 66 of the Arbitration Act 1996 and by common law. The key criteria for enforcement are that the award is valid under its own governing law and that it is final. Brexit will not affect enforcement of arbitration awards as London arbitration awards will continue to be internationally enforceable after Brexit in the same way as they are now, under the New York Convention.

IV SHIPPING CONTRACTS

i Shipbuilding

English law continues to be the governing law of choice for parties entering into shipbuilding contracts and so England and Wales remains a key jurisdiction in this respect. See the chapter on 'Shipbuilding' in this publication for further discussion of the law in this area.

The United Kingdom itself has a proud history of shipbuilding spanning many centuries; however, since the closure of many yards in the 1970s and 1980s, commercial shipbuilding in the United Kingdom has been in significant decline.

ii Contracts of carriage

The Hague-Visby Rules, incorporated into English law by the Carriage of Goods by Sea Act 1971, are the salient convention rules applicable in this jurisdiction. The Rules will apply compulsorily to bills of lading where the port of shipment is in England and Wales or where the bills are issued there. Further legislation on the function of bills of lading and contracts of carriage has been enacted by the Carriage of Goods by Sea Act 1992. There is no specific legislation governing multimodal contracts of carriage, although it is generally accepted

that the Hague-Visby Rules will apply to the seagoing leg of such contracts for carriage. At the time of writing, the United Kingdom is not a signatory to the Hamburg Rules or the Rotterdam Rules.

The Carriage of Goods by Sea Act 1971 qualifies that for contracts falling under that Act (including bills of lading governed by English law), there is no absolute implied term as to seaworthiness. The effect of this is to make the carrier's general duty regarding seaworthiness one of exercising 'due diligence'. Following Article III.1 of the Hague-Visby Rules, a carrier must exercise due diligence to (1) make the ship seaworthy, (2) properly man, equip and supply the ship, and (3) make holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe. The duty is upon the carrier personally, and is not delegable to servants, agents or contractors. Deck and live animal cargoes are excluded from the provisions of the Hague-Visby Rules.

Pursuant to Article III.2 of the Hague-Visby Rules, the carrier must properly and carefully load, handle, stow, carry, keep, care for and discharge the goods under the contract for carriage. Owners may rely on the defences at Article IV.2 if goods in their care are lost or damaged. These defences include the act or neglect of the master in the navigation or management of the vessel, act of war and arrest or restraint of princes, as well as latent defects not discoverable by due diligence (otherwise known as 'inherent vice').

Article IV.6 states that inflammable, explosive or dangerous goods may be discharged or destroyed at any time before discharge without compensation if the carrier has not consented (with full knowledge of their characteristics) to carry them.

Unless notice of loss or damage is given in writing to the carrier or his agent before or at the time of the receiver removing the goods into his custody (or within three days of doing so, if the loss or damage is not immediately apparent), the carrier will be deemed to have complied with their obligations, as per Article III.6. In any event, the time limit under which a claim can be brought under the Hague-Visby Rules is one year from the cargo's date of delivery or the date on which it should have been delivered.

Liens

The right to exercise a lien under English law may arise out of a variety of contexts, either pursuant to a contract or another legal relationship. Liens may be classed as 'maritime', 'statutory', 'equitable' or 'possessory' and each of these classes has a defined means of enforcement. A common characteristic of all liens is their function of conferring a proprietary interest in an asset as security for a claim and in enforcement against third parties. Liens generally do not have to be registered under English law.

Strictly speaking, maritime liens under English law are confined to five specific categories:

- a* bottomry and respondentia;
- b* damage done by a ship;
- c* salvage;
- d* seamen's wages; and
- e* masters' wages and disbursements.

These categories also overlap with the definitions under Section 20(2) of the Senior Courts Act 1981, and so maritime liens may be pleaded as statutory liens in the alternative. Purely statutory liens are defined under Section 20(2)(e)–(r) of the Senior Courts Act 1981, and include claims for loss or damage to goods carried in a ship, personal injury sustained in

consequence of a defect in or wrongful act done by a ship, claims relating to any agreement in relation to the carriage of goods in a ship, and claims arising out of general average acts. Maritime and statutory liens fall under the umbrella term ‘admiralty liens’, coming under the exclusive jurisdiction of the Admiralty Court, and may be brought as *in rem* claims (see Section V).

English common law recognises possessory liens, which confer the right to enforce a claim by means of retaining property already held by the claimant. Typical possessory liens include a shipowner’s lien on cargo for outstanding freight or general average contributions.

If an owner or disponent owner under a time charter party has not been paid hire by the charterer, the owner may be entitled to exercise a lien requiring the charterers down the charter chain to pay direct to the owner the sub-hire or sub-freight that would ordinarily have been payable to their owners. The Court of Appeal confirmed in the *Bulk Chile*³⁰ 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 salvaged property. Possessory liens can also be created by contract or statute.

An equitable lien is a right to proceed against an asset pursuant to a claim arising from a contract (the classic example being a floating charge) or pursuant to a course of conduct. Equitable liens will only bind third parties where they have acquired a legal interest in the liened asset with notice of the lien.

iii Cargo claims

The bill of lading evidences a contract for carriage, obliging the carrier to deliver cargo against that document. Aside from 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 1924, which is applicable to bills of lading, sea waybills and ships’ delivery orders, title to sue is vested in the ‘lawful holder’ of the bill of lading. The lawful holder is the person who becomes the holder of the bill in good faith, that is, a consignee or endorsee (following a valid endorsement, or chain of endorsements) in possession of the bill. The Court of Appeal recently confirmed that a bank that is the pledgee of goods under a letter of credit can also be classed as a lawful holder of the bill of lading, because it is entirely entitled to those goods.³¹

The party that is potentially liable for the cargo claim under the bill of lading is the carrier stated under the bill. Typically, this is the shipowner or head time charterer. English law will generally give effect to ‘identity of carrier’ and demise clauses in bills of lading, which seek to make clear that it is the shipowner that is to be regarded as the carrier under the bill, although the issue of on whose behalf the bill has been signed will also be an important factor in deciding who is actually the carrier.

Liability in tort – that is, a breach of the duty to take reasonable care not to cause damage or loss (i.e., negligence) – will usually be asserted by any cargo claimant against the shipowner, and may also arise between parties where no contractual relationship exists, for

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

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

example, between stevedores and cargo owners. The claimant must be able to prove physical loss or damage, and so cannot claim for pure financial losses in the absence of any cargo loss or damage (for example, in the event of cargo delay). Furthermore, only the person who owned the cargo, or was entitled to possession, at the time of the negligent act may claim. Apart from tortious liability, English law also recognises the effectiveness of *Himalaya* clauses in bills of lading in the context of losses caused by the acts of stevedores (for a deeper analysis of *Himalaya* clauses, see the Ports and Terminals chapter).

Where bills of lading are issued in respect of carriage on a chartered vessel, carriers may attempt to limit liability to cargo owners with reference to a charter party, by expressly incorporating terms of the charter party into the issued bills of lading. Provisions incorporating charter-party terms into bills of lading will only be recognised if they are relevant to the bill of lading contract, and terms as to choice of law or jurisdiction (including arbitration) must be expressly referred to if they are to apply. There is a general presumption that terms in a charter party will not be upheld if they are inconsistent with the terms of the bill of lading.

Parties will often attempt to incorporate the terms of the charter party into the bill of lading. This will, however, only be successful if (1) the wording purporting to incorporate the charter-party terms is wide enough, (2) the term of the charter party being incorporated makes sense in the context of the bill of lading, and (3) the incorporated term is consistent with the terms of the bill of lading itself.³² It is important when trying to incorporate charter-party terms into a bill of lading to refer to the exact charter party in question, as the charter may not otherwise be effectively incorporated. There is a presumption that in circumstances in which the parties failed to specify which charter party in a chain is being incorporated in the bill of lading, the head charter party is incorporated, but that presumption is subject to several exceptions.

Cargo claims can also be brought under charter parties. Such claims will usually be made within the framework of the Hague or Hague-Visby Rules, which have usually been incorporated into the charter by contract. The apportionment of liability for cargo claims as between owners and charterers who are party to a dry bulk time charter is often governed by the International Group of P&I Clubs' Inter-Club New York Produce Exchange Agreement (revised in 2011) (ICA).

iv Limitation of liability

The earliest legislation entitling shipowners to limit their liability was the Shipowners Act 1733. This permitted shipowners to limit their liability to the value of the ship and freight in respect of theft by a master or crew. Subsequent legislation seeks to strike a balance between a claimant's right to be adequately compensated in allowed situations and a shipowner's requirement for the insurance costs of an adequately high limitation fund to be affordable.

The LLMC Convention 1976 was given effect in the United Kingdom by virtue of the Merchant Shipping Act 1995 (MSA 1995) and is enclosed in Schedule 7 thereof. The 1996 LLMC Protocol was given effect in the United Kingdom by Statutory Instrument 1998 No. 1258, which varied the LLMC Convention (and Schedule 7 of the MSA 1995) to the extent set out in the LLMC Protocol. The main effect of the LLMC Protocol is to raise the limits.

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

As from 8 June 2015, the limits under the LLMC Protocol have automatically been increased by 51 per cent through the tacit acceptance procedure.³³

Who can limit liability and what claims are subject to limitation?

Under the LLMC Protocol, shipowners and salvors may limit their liability in accordance with the rules of the Protocol. The definition of ‘shipowner’ under Article 1(2) includes ‘the owner, charterer, manager or operator of a seagoing ship’. Each of these terms requires clarification and, while the ‘owner’ of a vessel may be reasonably clear, the English courts have not had an opportunity to define what is meant by ‘manager or operator’.³⁴ Charterers are entitled to limit their liability,³⁵ as are slot charterers,³⁶ but only in respect of certain claims. For example, they cannot limit in respect of damage to the vessel by reference to which the limitation fund is calculated.

Salvors are also entitled to benefit from limitation under the LLMC Convention provided the salvors are directly connected with the salvage. The LLMC Protocol does not change this.

An insurer may limit its liability to the same extent as its assured (under Article 1(6) of the LLMC Convention).

Before the LLMC Convention, shipowners were only able to limit liability in respect of claims for which they were liable in damages, as opposed to debts. Consequently, towage costs and wreck removal expenses claims brought by harbour authorities, for example, could not be limited. The LLMC Convention removed this requirement and now, per Article 2 of the LLMC Convention (which is unchanged by the LLMC Protocol), ‘claims whatever the basis of liability may be’ may be limited. There are, however, exceptions so that, for example, claims for salvage, contributions in general average, certain oil pollution claims and others (Article 3) may not be subject to limitation, nor can a party limit in respect of claims to the 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.³⁷

Generally, limitation may be invoked against all qualifying claims ‘arising on any distinct occasion’ (Article 6). Claims in respect of loss of life or damage to property that occur ‘on board or in direct connection with the operation of the ship . . . and consequential loss resulting therefrom’ may be subject to limitation (Article 2). Thus, the action leading to limitation does not have to occur on board a vessel.

Breaking limits

The LLMC Convention (unchanged by the Protocol) makes it very difficult to break the limitation limit. To do so it must be proved that the act or omission of the person seeking to limit was ‘committed with the intent to cause such loss or recklessly and with the knowledge

33 www.imo.org/en/MediaCentre/PressBriefings/Pages/24-LLMC-limits.aspx.

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

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

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

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

37 *The Breydon Merchant* [1992] 1 Lloyd’s Rep 373.

that such loss would probably result' (Article 4).³⁸ 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.³⁹

Overview of English procedure

As a matter of English law, it is not necessary to admit liability to take advantage of a limitation defence. Nor does invoking limitation constitute an admission of liability. The procedure for pleading limitation and constituting a fund is set out in Civil Procedure Rule 61.11 and the accompanying practice direction.

Two particularly important points are, first, that, as a matter of English law, it is not necessary for a liability action to already be pending before an owner is permitted to initiate limitation proceedings,⁴⁰ and second, bringing England in line with many other jurisdictions, a limitation fund can now be constituted by way of a letter of undertaking,⁴¹ which offers owners and insurers a significant cost saving.

Summary

States across the world have enacted the provisions of the LLMC Convention 1976 and 1996 Protocol in different ways, in particular in relation to wreck removal expenses and whether an owner is entitled to limit for these (many states have excluded Article 2(1) (d) from domestic law). Given that one state party should automatically recognise a fund constituted in another (Article 13), careful consideration is needed as to where to limit, as this may significantly mitigate against an owner's exposure following a casualty.

V REMEDIES

i Ship arrest

Vessel arrests may only be brought pursuant to an admiralty claim *in rem* (that is, in this case, against a vessel itself). As mentioned previously, the Admiralty Court has jurisdiction over such claims.

Grounds for admiralty claims are prescribed in an exhaustive list at Sections 20(2)(a) to (s) of the Senior Courts Act 1981. These include damage received or done by a ship, loss or damage to goods carried in a ship, claims in respect of a mortgage on a ship, towage and pilotage. It is not possible to base an arrest on a claim for bunkers.

The procedure for applying for an arrest pursuant to a claim *in rem* is set out in Part 61.5 of the Civil Procedure Rules (CPR) and the Practice Direction to that part (PD61). Additional procedural rules are contained within the Admiralty and Commercial Courts Guide and elsewhere in the CPR.

38 Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v. Securities Commission* [1995] 3 All ER 918 sets out a comprehensive discussion of the new test and its application.

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

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

41 *The Atlantik Confidence* (see footnote 21).

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 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 in order to procure release of the vessel in the form of a payment into court or by issuing a guarantee acceptable to the claimant. On the application of any party, the Admiralty Court may order that any security provided in order to procure the release of an arrested vessel, or to prevent an arrest, be reduced, or that a claimant may arrest or re-arrest the property to obtain further security (unless such security would exceed the value of the vessel itself).

Wrongful arrest claims

It is open for a defendant owner to claim damages for wrongful arrest. The defendant must prove that the basis for the application for arrest was made in bad faith or through gross negligence. In practice, satisfying these criteria is very difficult.

Requirement to pursue claim on merits or possibility of arrest to obtain security only

Pursuant to Section 26 of the Civil Jurisdiction and Judgments Act 1982, a claimant may apply for the arrest of the vessel by reason of security for purposes of arbitration or other proceedings in the United Kingdom or in another country.

Arrest by helicopter of a vessel at anchor in territorial waters but not yet in berth

In theory, this can be done as long as the target vessel is within the territorial jurisdiction of England and Wales. Ultimately, however, arrest is effected by the Admiralty Marshal and so the means by which the service of the arrest warrant is effected is at the Admiralty Marshal's discretion.

ii Court orders for sale of a vessel

The Admiralty Court has the jurisdiction to order the sale of a vessel that is under arrest. The judicial sale of a vessel is made free from encumbrances, liens and with good title.

An applicant must follow the procedure as prescribed in CPR 61.10. The application may be made by any party, and must be served on all parties, including those who have obtained judgment against the vessel and those who have been granted cautions against arrest.

As illustrated in *The Union Gold*,⁴² any order for sale must be preceded by an appraisalment 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, appraisalment and sale rank as first priority from sale proceeds.

The Admiralty Marshal acts as an impartial officer of the court, rather than the arresting party, and so this procedure is likely to be followed even if a claimant is able to procure buyers at ostensibly the best possible price unless there is an exceptional reason to deviate. In the case of *The Union Gold*, the reason was that 21 jobs were contingent on the urgent sale of a vessel that was unlikely to attract many buyers on the open market.

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 British 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* SOLAS;
- b* the COLREGs, as amended;
- c* the STCW Convention;⁴³ and
- d* the Search and Rescue Convention.

⁴² *Bank of Scotland Plc v. Owners of the Union Gold* [2013] EWHC 1696 (Admlty).

⁴³ The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978.

ii Port state control

England is a party to the Paris MOU. The provisions of the Paris MOU were incorporated into EU law through the EU Council Directive on Port State Control.⁴⁴ This was implemented into English law through the Merchant Shipping (Port State Control) Regulations 1995, Statutory Instrument 1995 No. 3128, as amended. This EU Directive was subsequently replaced by Directive No. 2009/16 on Port State Control, which was implemented into English law by the Merchant Shipping (Port State Control) Regulations 2011, which have been in force in England and Wales since 24 November 2011.

The port state control authority in England is the MCA. In this capacity, the MCA is responsible for checking that all vessels visiting UK ports and anchorages meet UK and international safety regulations and standards. Accordingly, the MCA has wide-ranging powers to carry out periodic checks on any vessels calling at UK ports and in-depth 'expanded inspections' on:

- a* vessels with a high-risk ship profile, as recorded on the Paris MOU database;
- b* oil, gas or chemical tankers over 12 years old;
- c* bulk carriers over 12 years old; and
- d* passenger ships over 12 years old.

An expanded inspection involves a detailed check of the construction elements and safety systems in place on vessels by inspectors from the MCA. Inspectors are required to ensure that their visits and inspections do not disrupt the safety of any on-board operations, such as cargo handling.

In the event that a vessel is found not to comply with any applicable safety or environmental convention, a deficiency may be raised against the vessel. If the deficiency is regarded as serious enough to require rectification before the vessel's departure, then the vessel may be detained. A detained vessel must then satisfy MCA surveyors that remedial work has been carried out before the vessel is permitted to leave the United Kingdom.

In 2016, the MCA's ship surveyors carried out 2,2,916 inspections, including 1,272 port state control inspections, and 40 subsequent detentions.⁴⁵

iii Registration and classification

Registration

The UK Ship Register consists of four parts: Part I relates to merchant vessels and pleasure vessels; Part II relates to fishing vessels only; Part III is known as the UK Small Ships Registry; and Part IV relates to the registration of bareboat charters of foreign registered ships. The Register does not allow registration of vessels under construction under the UK flag.

The following may be registered as shipowners on the UK Ship Register:

- a* British citizens;
- b* British dependent territory citizens;
- c* British overseas citizens;
- d* companies incorporated in one of the EEA countries;

⁴⁴ Directive 95/21/EC.

⁴⁵ Maritime and Coastguard Agency Business Plan 2019 to 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/790357/MCA_Business_Plan_2019_-_2020.pdf.

- e* citizens of an EU Member State exercising their rights under Articles 48 or 52 of the EU Treaty in the United Kingdom;
- f* companies incorporated in any British overseas possession that have their principal place of business in the United Kingdom or in that British overseas possession; or
- g* European economic interest groupings.⁴⁶

Where none of the qualified owners is resident in the United Kingdom, a representative person must be appointed who may be either an individual resident in the United Kingdom or a company incorporated in an EEA country with a place of business in the UK.⁴⁷

The UK flag is currently ranked among the top performing flags on the Paris MOU and Tokyo MOU 'white lists'.⁴⁸ The UK Registry also offers a potentially advantageous tonnage tax regime under the UK Tonnage Tax Incentive. The Incentive offers an alternative method of calculating corporation tax profits in accordance with the net tonnage of the ship operated. The tonnage tax profit replaces both the tax-adjusted commercial profit or loss on a shipping trade and the chargeable gains or losses made on tonnage tax assets. The Incentive is available to companies operating qualifying ships that are 'strategically and commercially managed in the UK'.⁴⁹

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:⁵⁰

- a* ABS Europe Ltd;
- b* Bureau Veritas;
- c* Class NK;
- d* DNV GL;
- e* Lloyd's Register Marine; and
- f* RINA UK Ltd.

Generally, classification societies exclude their liability in contract. Further, according to the leading House of Lords decision in *Marc Rich & Co v. Bishop Rock Marine (The Nicholas H)*, classification societies do not owe a duty of care to third parties in respect of their classification and certification duties.⁵¹

iv Environmental regulation

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

MARPOL 1973, as amended by the 1978 and 1997 Protocols, is in force in England and Wales. Annex I of MARPOL (as amended) details regulations on tanker design and technology to reduce the risk of oil spillage. Annexes IV and V of MARPOL are enforced in

46 UK Ship Register, Guide to Registration, www.gov.uk/government/publications/uk-ship-register-guide-to-registration.

47 *ibid.*

48 *ibid.*

49 HMRC website, www.hmrc.gov.uk/manuals/ttmmanual/index.htm.

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

51 [1995] 2 Lloyd's Rep 299.

England and Wales pursuant to the Merchant Shipping (Prevention of Pollution by Sewage and Garbage from Ships) Regulations 2008 (as amended), regulating the seaborne discharge and disposal of sewage and garbage. Annex VI of MARPOL, incorporated into English law through the Merchant Shipping (Prevention of Air Pollution from Ships) Amendment Regulations 2008 (as amended), contains specific provisions relating to the prevention of air pollution from ships. Annex VI was recently amended to introduce mandatory greenhouse gas emissions reduction measures. Since 1 January 2013, all ships are required to have a ship energy efficiency management plan and new ships must have an energy efficiency design index.

Annex VI imposes limits on the emissions of sulphur oxides (SOx) and nitrogen oxides (NOx) on a global scale as well as within specially designated emission control areas (ECAs). From 1 January 2020 the limit for sulphur content of fuel oil used by ships outside ECAs will be reduced to 0.50 per cent m/m (the current limit is 3.5 per cent).⁵² In relation to the reduction of SOx, compliance with Annex VI is normally attained via the use of low-sulphur fuel or approved equivalents such as exhaust gas cleaning systems known as 'scrubbers'. As for NOx reduction, the allowable emissions limits are split into three tiers. Tier I limits, being the least stringent, are applicable to ships built on or after 1 January 2000. Tier II limits apply to ships built on or after 1 January 2011. Ships built on or after 1 January 2016 now have to comply with more stringent Tier III standards if operating within the North American and Caribbean ECA-NOx.⁵³ Ships built on or after 1 January 2021 (or those fitted with non-identical replacement engines or additional engines on or after this date) must comply with Tier III standards if operating in the Baltic Sea and North Sea ECAs.⁵⁴

In parallel with MARPOL, EU legislation regulates emissions via the Sulphur Content of Marine Fuels (SCMF) Directive (2012/33/EU), which entered into force in England and Wales by virtue of the Merchant Shipping (Prevention of Air Pollution from Ships) and Motor Fuel (Composition and Content) (Amendment) Regulations 2014/3076, and have applied since 1 January 2015. The SCMF currently mandates a sulphur limit of 0.1 per cent for ships in the Baltic, the North Sea and the English Channel. It also imposes a ban on the marketing of marine diesel and gas oils with a sulphur content greater than 1.5 per cent and 0.1 per cent by mass, respectively.

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

The Bunker Convention has been brought into force through the Merchant Shipping (Oil Pollution) (Bunker Convention) Regulations 2006. This Convention ensures that adequate compensation is available to parties suffering damage caused by spills of bunker oil when carried as fuel in a vessel's bunker tanks.

The Oil Pollution Fund Convention 1992 and the Supplementary Fund Protocol 2003 also apply. These provide for the payment of supplementary compensation if the funds available under the CLC Convention are not sufficient.

52 <http://www.imo.org/en/MediaCentre/HotTopics/GHG/Documents/2020%20sulphur%20limit%20FAQ%202019.pdf>.

53 Lloyd's Register Marine, <https://www.lr.org/en/air-emissions/>.

54 [http://www.imo.org/en/OurWork/Environment/PollutionPrevention/AirPollution/Pages/Nitrogen-oxides-\(NOx\)-%E2%80%93-Regulation-13.aspx](http://www.imo.org/en/OurWork/Environment/PollutionPrevention/AirPollution/Pages/Nitrogen-oxides-(NOx)-%E2%80%93-Regulation-13.aspx).

On 13 February 2004, the IMO adopted the International Convention for the Control and Management of Ships' Ballast Water and Sediments. This was in response to the growing concern about the spread of invasive species as a result of them being carried in ships' ballast. The effects of this spread is recognised as one of the most serious threats to the aquatic environment. The Convention therefore aims to establish safer management of ballast water to stop the spread of invasive species. It is hoped this goal will be achieved by introducing various regulations to manage both the transfer and discharge of ballast water. The Convention is in force since 8 September 2017.⁵⁵

v Collisions, salvage and wrecks

Collisions

Several international conventions relating to collision claims operate in England and Wales. The 1910 Collision Convention was implemented into English law by the Maritime Conventions Act 1911 (repealed and replaced by the Merchant Shipping Act 1995). The 1910 Collision Convention sets out the basic rules regarding civil liability for collisions between vessels. Further, the COLREGs also apply to all foreign ships sailing in British territorial waters and to all British ships sailing anywhere in the world. These were also brought into force by the Merchant Shipping (distress signals and prevention of collisions) Regulations 1996 and are updated from time to time by reference to IMO Regulations.

Salvage

The Salvage Convention 1989 applies in England and Wales. There is no mandatory form of salvage agreement, but the 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 2011 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. Where the LOF is not used, parties to a salvage operation are free to agree their own terms and conditions for salvage and, in the absence of any contractual arrangements, the salvors may also bring a claim for common law salvage.

Wreck removal

The Merchant Shipping Act 1995 grants coastal authorities broad powers to intervene in relation to the handling of wrecks. These powers include the power to take possession of, remove or destroy the wreck, as required. The relevant authority is also permitted to contract with a third party for the removal or salvage of the wreck. The owner of the vessel remains liable for the costs of removing the wreck and this liability is unlimited (however, this is usually a P&I risk).

The Wreck Removal Convention Act 2011 allowed the United Kingdom to ratify The Nairobi International Convention on the Removal of Wrecks (Nairobi WRC), adopted in 2007, and, on 15 April 2015, the Convention came into force following ratification by

⁵⁵ [www.imo.org/en/About/conventions/listofconventions/pages/international-convention-for-the-control-and-management-of-ships'-ballast-water-and-sediments-\(bwm\).aspx](http://www.imo.org/en/About/conventions/listofconventions/pages/international-convention-for-the-control-and-management-of-ships'-ballast-water-and-sediments-(bwm).aspx).

Denmark on 14 April 2014. The Nairobi WRC imposes a number of obligations on ship owners, for instance, a requirement to obtain a certificate from a WRC state party confirming that insurance or other financial security is in force in line with the Nairobi WRC.

Ship recycling

Ships constituting waste and intended for export from the United Kingdom are subject to the EU Waste Shipment Regulation (No. 1013/2006) (WSR). The WSR gives effect to the Basel Convention of 22 March 1989 on the control of trans-boundary movements of hazardous wastes and their disposal (Basel Convention). The Basel Convention provides the framework for the international movement of hazardous wastes and all EU Member States have ratified it. It provides for a system of 'prior informed consent' whereby trans-boundary movements of hazardous wastes must be pre-notified to, and consented by, the relevant competent authorities. Contracts also have to be in place between the notifier and the consignee with a financial guarantee and insurance to cover foreseeable eventualities, including the requirement for the repatriation of the waste. An amendment to the Basel Convention also provides for an outright ban on the movement of hazardous wastes from OECD countries to non-OECD countries. This is not yet in force internationally but is a feature of the WSR. The applicability of the WSR to the export of ships is, however, a matter that has provoked debate and controversy for a long time. Aspects of the WSR that refer to EU Member State-flagged commercial vessels of more than 500 gross tonnage (GT) are repealed as a result of the EU Regulation on Ship Recycling (see further below).

The EU Regulation on Ship Recycling (No. 1257/2013) entered into force in England and Wales on 30 December 2013 and applied from December 2015. The Regulation is applicable to all ships of 500 GT or greater flying an EU Member State flag and ships flying a non-EU Member State flag calling at a port or anchorage of an EU Member State. The main aim of the Regulation is to prevent, reduce, minimise and, to the extent practicable, eliminate accidents, injuries and other adverse effects on human health and the environment caused by ship recycling, and to enhance safety and the protection of human health and of the marine environment throughout a ship's life cycle, in particular ensuring that hazardous waste from ship recycling is subject to environmentally sound management (Article 1). The Regulation also aims to provide an interim solution for the recycling of ships owned by EU companies or registered in EU Member States pending the entry into force of the Hong Kong Convention.

The key provisions of the Regulation are:

- a* the prohibition or restriction of the use of certain hazardous materials on EU-flagged ships, such as asbestos, ozone-depleting substances and certain anti-fouling compounds and systems (Article 4);
- b* all EU-flagged and other ships operating within EU ports must establish and maintain an inventory of the hazardous materials present on board the vessel;
- c* a list of approved ship-recycling facilities that are in line with the design, construction and operation requirements of the European Union;
- d* EU-flagged ships must contract a recycling facility from the approved list to prepare a ship-recycling plan before recycling; and

- ^e as of 31 December 2018 owners of EU-flagged ships have to ensure that their ships are only recycled in recycling facilities that have been approved and included in a 'European List', the latest version of which was published on 6 December 2018.⁵⁶

vi Passengers' rights

Passenger rights are dealt with by a mixture of common law, legislation, EU law and international conventions. In the first instance, the contract of carriage may apply to any disputes, subject to the protections of the Athens Convention and EU Regulations, such as the Package Travel, Package Holidays and Package Tours Regulations 1992 (as amended).

The Athens Convention was incorporated into English law via Section 183 of the Merchant Shipping Act 1995. The Athens Convention renders a carrier liable for damage or loss suffered by a passenger in the event that the incident giving rise to the damage occurred during the carriage and was caused by the fault or neglect of the carrier. Under the Athens Convention as amended by the 1976 Protocol, carrier liability for death of, or personal injury to, a passenger is capped at 46,666 special drawing rights (SDRs) per carriage; however, under Article 7, England increased the limit in respect of its own national carriers to 300,000 SDRs.

The 2002 Protocol to the Athens Convention entered into force in England on 23 April 2014. The 2002 Protocol increases the limit for carrier liability contained in the Athens Convention to 250,000 SDRs for each passenger's injury or death. The 2002 Protocol also introduces changes to the liability regime for the loss of, or damage to, cabin luggage (2,500 SDRs per passenger per carriage) and compulsory insurance of 250,000 SDRs per passenger.

Although the Athens Convention usually applies to international carriage, under the Carriage of Passengers and their Luggage by Sea (Domestic Carriage) Order SI 1987/60, English law extends the Convention's protections to domestic voyages where the points of arrival and departure are within the United Kingdom.

The Package Travel Regulations apply to packages where two elements of travel, accommodation and other services are sold together. This, therefore, covers cruises and potentially overnight ferries. These Regulations set out a consumer protection regime, which includes details of the information to be provided to passengers, and that the tour operator is responsible to the passenger for performance of the package.

vii Seafarers' rights

The Maritime Labour Convention 2006 (MLC) entered into force in England and Wales on 14 August 2014, the United Kingdom having been the 41st 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.

⁵⁶ <http://ec.europa.eu/environment/waste/ships/list.htm>.

Seafarers wholly or substantially employed in the United Kingdom may also benefit from the protection of English employment law, although many protective regulations contain exemptions for offshore work. Vessel owners and employers must also extend protection to seafarers regarding safety at work and (for example) providing suitable equipment.

VII OUTLOOK

London continues to be pre-eminent in global shipping, with around 40 per cent of international charter parties fixed in the city and more than one-fifth of all marine insurance policies globally being written through London. P&I insurers are mostly managed out of London and almost 20 per cent of the world fleet is classed by London's Lloyd's Register.⁵⁷

The majority of shipping contracts are governed by English law and London is the leading shipping arbitration centre, measured by a number of annual arbitrator appointments.⁵⁸ Singapore dealt with less than 10 per cent of London's case volume in 2016.⁵⁹ In addition, the specialist courts that hear the majority of shipping litigation (the Commercial and Admiralty Courts) continue to enjoy an excellent reputation internationally. This is highlighted by the fact that 72 per cent of cases heard in the English Commercial Court in 2016 to 2017 involved litigants based outside England and Wales.⁶⁰

London also continues to be a major centre for mediation, with a total value of cases mediated each year of around £11.5 billion, including many shipping cases. Mediation remains attractive as settlement rates continue to be high, with mediators reporting an aggregate settlement rate of around 89 per cent of all cases in an audit conducted in 2018.⁶¹

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

Arbitration awards will remain internationally enforceable and London is therefore likely to remain the leading maritime arbitration centre.

In this context, England and Wales seems set to remain a leading jurisdiction in relation to shipping law for the foreseeable future.

57 www.londoninternationalshippingweek.com/overview/.

58 There were 2,599 LMAA appointments in 2018. <http://www.lmaa.london/event.aspx?pkNewsEventID=208da443-7800-4720-84b3-7f4f3f5fc9ce>.

59 www.hfw.com/The-maritime-arbitration-universe-in-numbers-will-Brexit-impact-Londons-standing-March-2018.

60 <https://portland-communications.com/pdf/Who-Uses-The-Commercial-Court-2017.pdf>.

61 https://www.cedr.com/docslib/The_Eighth_Mediation_Audit_2018.pdf.

FRANCE

*Mona Dejean*¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The French flag is designated by the International Chamber of Shipping among the best flags in 2017 in terms of the quality of the fleet, the quality of port state control and the number of ratified international conventions.² It was classed first on the White List of the Paris Memorandum of Understanding (MOU) in 2018.

In July 2018, the merchant fleet under the French flag comprised 409 vessels of over 100 gross tonnage (GT), of which 168 vessels were dedicated to transport and 241 were service vessels, including 109 coastal and port service vessels (i.e., dredgers, lighthouse tenders, pilot boats and tugs). Owing to Brexit, container vessel *CMA CGM* may soon effect a flag change from the UK to the French flag, as advantages (such as tonnage tax) will cease to apply.

The average age of the French transport fleet is 10 years at 1 July 2018 (the global average is 14.6 years).³

For freight transport, 268.4 million tonnes were handled in the large ports of metropolitan France in 2017. The port of Marseilles has the most developed activity (80.4 million tonnes), followed by Le Havre (72 million tonnes) and then Calais (50.5 million tonnes).⁴

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

France has ratified most of the major international maritime conventions (the Hague-Visby Rules, SOLAS, the LLMC Convention, etc.). As a Member State of the European Union, France is also subject to European legislation addressing maritime issues (for instance, the extensive role of the Commission in port sectors). International conventions and European legislation can be directly applied by the French courts, but most of their provisions are also set out in domestic regulations.

Modern French shipping law was mainly developed in the 1960s under the impetus of Professor René Rodière, a famous maritime lawyer and university lecturer, who wrote France's five basic maritime laws, including the 18 June 1966 Act on Contracts of Chartering and Transport by Sea and the 3 January 1967 Act relating to Ships and Other Sea Vessels. In 2010, these laws and others relating to shipping and transport were codified in a Transport Code. Since December 2016, most of the decrees relating to shipping, which had not yet

1 Mona Dejean is a senior associate at HFW.

2 ICS, 'Shipping Industry Flag State Performance Table 2016/2017'.

3 Ministry of Ecology, Sustainable Development and Energy, 'Statistiques – Flotte de commerce sous pavillon français – janvier 2017'.

4 Ministry of Transport, 'Trafic 2016 des ports français millionnaires en tonnes'.

been codified, have hence been incorporated in the Transport Code. The Transport Code is now the main reference regarding legislation related to shipping and transport, although some related provisions can still be found in other acts and codes.

In civil law systems, case law is considered to be a secondary source of law – statutory law being the primary source – and there are no binding precedents, although higher court decisions can have a persuasive effect on lower courts.

III FORUM AND JURISDICTION

i Courts

Most shipping disputes are heard before the commercial courts, 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 at times somewhat inconsistent with the generally accepted understanding of the law. A shipowner or operator will, however, usually be sued before one of the principal traditional ‘maritime’ jurisdictions, where judges may have considerable practical experience of maritime matters.

Regional courts of appeal are competent to hear appeals against decisions rendered by commercial courts. The grounds for appeal are very broad, the underlying principle being that a party should always have access, as a matter of right, to two ‘levels’ of jurisdiction. An appeal can, therefore, always be made on questions of law or fact – the court of appeal is always free to reverse the court of first instance’s findings of fact. A final appeal can be lodged with the Court of Cassation but only on points of law.

An interesting feature of French court procedures is that, unlike proceedings before English or American courts, witnesses are not called to give evidence and there is no equivalent system of disclosure or discovery of documents before the French courts. Each party is only required to provide documents that may be necessary to prove its case (i.e., to support its arguments). For questions of fact that require specialist knowledge, French commercial judges often appoint ‘court surveyors’, whose terms of reference usually encompass assessing the causes of the relevant incident, the implications thereof, the extent of the damage caused thereby and, in certain cases, providing solutions and discussing issues of loss mitigation. This process permits the courts to be guided by the experts and assists judges with rendering their final verdicts. The court surveyor can be persuaded to request evidence that would be relevant or to hear witnesses, and if that evidence is not provided, the court surveyor may draw adverse inferences therefrom in his or her report.

On 8 February 2018, the Paris Court of Appeal made official the creation of an international chamber in the Court to deal with commercial litigation; it started hearing cases in March 2018. Parties are able to choose English as the oral proceedings language, judges are specialists in international commercial litigation and the procedure will be faster than average by using shorter deadlines and fostering parties’ cooperation.

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

provisions such as Articles 14 and 15 of the Civil Code, which respectively enable any French claimant to bring proceedings before the French courts against a foreign defendant, and enable a foreign claimant to do likewise when the defendant is domiciled in France.

As regards limitation periods, the general time bar under French law is five years. 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

Paris is an established seat of arbitration and several arbitral courts have their seats in the city, such as the International Chamber of Commerce. In addition, the Paris Chamber of Maritime Arbitration (CAMP) deals exclusively with maritime disputes.

Founded 52 years ago, the CAMP handles various types of shipping disputes, including charter parties, carriage of goods by sea, shipbuilding, salvage,⁵ collision, sale and purchase, and ship agency contracts.

Arbitrators must be chosen from the list of the CAMP's arbitrators, of which there are approximately 50. Of these, two are members of the London Maritime Arbitrators Association.

Arbitrators are sorted into three categories according to their professional background: professionals of maritime trade (shipowners, charterers, ship brokers, etc.), lawyers (maritime law professors, in-house counsel, etc., but not private practitioners) and technicians (naval architects, master mariners, chief engineers, maritime surveyors). Each party chooses its own arbitrator and the CAMP nominates the chairman.

The administration costs of the CAMP and the arbitrators' fees depend on the total amount of the claims and counterclaims advanced by the parties. A sliding scale of arbitration costs for a three-member arbitration panel is listed in the CAMP's Rules. Arbitration costs before the CAMP are generally considered attractive compared with other arbitral institutions. For example, the total amount due to the Chamber and arbitrators will be €3,850 for total claims of up to €15,000, €18,800 for total claims of €200,000 and €45,900 for total claims of €1 million. Where a sole arbitrator is appointed, the cost is approximately 60 per cent of these amounts. Costs are payable at the beginning of the proceedings, half by the claimant, half by the defendant. The arbitral tribunal will be free to decide how to apportion the final burden of costs between the parties when issuing the award. In the event that proceedings are withdrawn before the final award is issued, there are detailed provisions in the Rules setting out the sums that can be recovered from the CAMP in respect of the monies paid on account.

One of the major features of French arbitration rules is that no appeal against the award is possible before the courts of appeal. However, a peculiarity of the CAMP Rules – which is generally regarded as a downside – is the right to second-degree arbitration, which allows any party to request that a dispute for which an award has already been made be submitted to a second-degree examination, which will be conducted in the same way as the first arbitration. Any second award will override the first, which is then considered null and void. Apart from the obvious duplication of time and effort, as well as an almost redundant procedure, such an appeal leads to further expense.

5 Salvage rewards granted by the CAMP tend to be higher than those awarded by state courts.

An application for the annulment of an award rendered in France can be lodged by a party before the local court of appeal within one month of the award being issued, unless the parties have waived the right to apply for annulment. Article 1520 of the French Civil Procedure Code provides a limited list of grounds under which the nullity can be invoked, for example, if the tribunal was not lawfully constituted or failed to comply with its assignment, if the principle of contradictory debate has not been respected, or if the award infringes a rule of public interest.

iii Enforcement of foreign judgments and arbitral awards

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. Pursuant to Article 39, 'a judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required'. A declaration of enforceability from the Member State receiving the request is no longer necessary; the applicant only needs a certificate issued by the court of origin using the form set out in Annex I of Regulation (EU) No. 1215/2012, certifying that the judgment is enforceable and containing an extract of the judgment as well as, where appropriate, relevant information on the recoverable costs of the proceedings and the calculation of interest.

As regards judgments rendered outside the European Union, unless a bilateral convention on the reciprocal enforcement of judgments has been agreed by France, the question of enforcement of foreign judgments in France is subject to French procedural law. Pursuant to Article 509 et seq. of the Civil Procedure Code, the enforcement of foreign decisions is subject to *exequatur*.⁶ The French courts will not review the merits of the dispute. Contrary to European judgments, there are conditions to be met: the party requiring the *exequatur* will have to produce evidence testifying that the foreign court had jurisdiction, that the decision is enforceable in the country in which it was delivered, and that the decision was indeed notified to the defendant. The *exequatur* will not be granted if a conflicting judgment already exists in France on the same facts, if the decision contradicts French public policy, or if the French courts consider that the claimant introduced its claim before the foreign court for the sole purpose of avoiding the application of French law, which would have otherwise governed the dispute.

As for the procedure, the party wishing to enforce a foreign judgment in France must make an application to the French courts and give notice of this application to the defendant. The defendant has the right to file submissions in response to the application and will generally raise arguments based on the conditions set out above. Having heard the parties, the court will deliver a French judgment authorising or refusing the enforcement of the foreign judgment. Each party has one month to lodge an appeal against such a judgment. As a matter of French law, an appeal suspends enforceability unless the court orders otherwise, in which case it might be possible to take enforcement action while the appeal is pending.

Owing to Brexit, the European Union and the United Kingdom will likely negotiate a mutually beneficial recognition and enforcement regime. In any case, French law contains provisions that enable decisions of the English courts to be enforced.

⁶ A procedure resulting in the original decision being enforceable as a judgment of a French court.

With respect to arbitral awards, France has ratified the New York Convention allowing the enforcement of non-domestic awards in other Member States.

Pursuant to Article 1487 et seq. and Article 1514 et seq. of the Civil Procedure Code, an arbitral award (regardless of whether it was issued in France) is enforceable in France once the *exequatur* has been granted by a civil court. The party wishing to have the award enforced in France must file an *ex parte* application and disclose the original award, the arbitration agreement and certified copies thereof, with French translations if need be. If these conditions are met, the *exequatur* will be granted unless the decision is manifestly contrary to public policy.

IV SHIPPING CONTRACTS

i Shipbuilding

The French shipbuilding industry suffered a serious crisis in the early 1970s. Although still in decline, the sector is active and has proved increasingly promising in recent years. Built by the French shipbuilder STX, *Harmony of the Seas*, the biggest cruise ship in the world, was delivered to Royal Caribbean International in April 2016. The shipbuilder's order book is currently full until 2023. Up to 14 cruise ships have been ordered by clients MSC and Royal Caribbean International for a total sum of US\$14.2 billion. In 2017, STX Corporation avoided bankruptcy with the assistance of the French government and is now 50 per cent owned by the global leader in the shipbuilding industry, Fincantieri.

In 2017, the French Navy awarded a public procurement to the French shipyards CMN and Merré for the delivery of 29 12-metre tugs. In view of its prospective contracts (with Saudi Arabia and Angola, *inter alia*), CMN intends to extend its infrastructure.

CMN is also developing an activity in hydroelectric power. Its first marine turbine is under construction and will be installed in spring 2019 for a test period in Brittany on EDF's demonstration site.

Shipbuilding contracts are governed by Articles L5113-1 to L5113-6 of the Transport Code, which provide for a 'holistic approach' to contractual freedom. Pursuant to Article L5113-2, the main requirement is for the contract to be in writing. The shipyard is moreover required to make a declaration to the competent maritime administration, to enable the administration to determine whether the safety conditions related to the construction are met.

The guiding principle is thus contractual freedom. Two types of sales coexist: the parties must choose between a sale that will be completed on delivery, or a sale in which the ownership is transferred during construction. This second type of sale aims to protect the owner if the shipyard goes bankrupt.

Regarding the actions that can be engaged against the shipyard for defects, Article L5113-4 of the Transport Code provides that '[t]he builder guarantees any hidden defect of the vessel, even if the buyer has accepted the delivery without reservation'. This action is time-barred one year after the defect is discovered. This provision sets out a strict liability regime, reinforced by the applicability of Article 1643 of the Civil Code, which imposes on the seller an obligation to reimburse the purchase price, or to compensate damages that may have occurred 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 Hague-Visby Rules are enforceable in France. France signed the Hamburg Rules but did not issue the decree necessary for its entry into force; thus, the Hamburg Rules have not been ratified and are not applied by the French courts unless the parties have inserted a paramount clause in the contract of carriage. The Rotterdam Rules have also been signed but not ratified by France. The Geneva Convention on international multimodal transport of goods has been ratified by France, but is not yet in force and probably never will be.

The French Transport Code also contains provisions related to 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. For instance, Article L5422-1 of the Transport Code provides that the regime of the contract of carriage 'shall apply from the taking over of the goods until the delivery', which can occur after the period governed by the Hague Rules, 'from the time when the goods are loaded on to the time they are discharged from the ship'.

The duties and obligations of shippers are addressed by French law: the shipper is in charge of the wrapping and packaging of the goods; it must present the goods properly packed, secured and identified at the time and place specified in the parties' agreement. The shipper has an obligation to provide any relevant information about the goods and must indicate to the carrier the nature of the goods, and if it necessitates special requirements for transport by sea. Under Article L5422-10 of the Transport Code, the shipper is liable in the event of damages to the vessel or to any cargo owned by other cargo interests. Finally, the shipper owes the freight to the carrier. Under Article L5422-8, the carrier has a lien over the cargo until 15 days after its delivery, unless it has been sold to a third party. The carrier is also entitled to retain the cargo onshore.

As regards multimodal transports, French legislation does not contain specific provisions. Freedom of contract prevails, except in two cases where provisions on multimodal transport are set by an international convention: a rail-sea carriage 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 CMR Convention are applicable if the goods are not unloaded from the road vehicle. It must be highlighted that under French law, a party that organises a carriage (multimodal or otherwise), acting for the account of another party but in its own name, is considered to be a forwarding agent, governed by Article L132-3 et seq. of the French Commercial Code. A forwarding agent is liable for its own acts and omissions. Unlike a freight forwarder, it is also vicariously liable for the acts and omissions of its subcontractors, including the carrier. As such, it has a strict liability for loss or damage to the goods. A forwarding agent, moreover, has a general duty to advise and inform its customer.

Cabotage in France is reserved to French and European nationals: Article 257 of the Customs Code provides that transport between the ports of mainland France is reserved for vessels operated by shipowners who are nationals of and registered in EU or EEA Member States and are flying a flag of one or more of those states. Maritime cabotage is also governed by the Maritime Cabotage Regulation.

iii Cargo claims

As a contract of carriage will, most of the time, impose a strict liability on the carrier, cargo claimants will seek to 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). Where the name of the carrier is not provided on the bill, a rule established since 1987⁷ states that the registered owner of the vessel is deemed the carrier. Demise clauses cannot be invoked against shipowners in France.

Under French law, a party can claim full recovery of losses sustained – that is to say, not only resulting from the actual damage to the cargo but also as a consequence of, for example, the damage or loss and the extra costs incurred.

Both the Hague-Visby Rules and the Transport Code provide that action against the carrier for loss or damage is time-barred after one year. Pursuant to Article L5422-18 of the Transport Code, this period may be extended by agreement between the parties after the event that has given rise to the claim.

In contractual matters, French law attaches great importance to the parties' consent. A clause cannot be invoked against a party who has not accepted it. As a consequence, French courts have decided that the terms of a charter party to which a bill of lading refers cannot be invoked against the consignee or endorsee unless it is proved that these terms were known and accepted by it. Where reference is made to an arbitration clause, however, the Kompetenz-Kompetenz principle prevents French courts from deciding by themselves whether this clause applies.⁸ A few years ago the French Supreme Court also moderated its position regarding jurisdiction clauses and considered that where the consignee, upon acquiring the bill of lading, succeeded to the shipper's rights and obligations by virtue of the relevant national law, then a jurisdiction clause can be invoked against the consignee with no need to establish the specific agreement.⁹ A recent decision accepted the opposability to the consignee of a jurisdiction clause inserted in the bill of lading governed by French law, on the mere ground that it is part of the spirit of an international contract of carriage.¹⁰ By contrast, the French Supreme Court recently ruled that a jurisdiction clause could not be invoked by the carrier against the actual consignee whose name was not mentioned on the bill of lading and who was not an endorsee either.¹¹

7 Court of Cassation, Commercial Chamber, 21 July 1987 (*The 'Vomar'*).

8 Court of Cassation, First Civil Chamber, 22 November 2005 (*The 'Lindos'*); Court of Cassation, Commercial Chamber, 21 February 2006 (*The 'Pella'*).

9 On 16 December 2008, the Commercial Chamber and the First Civil of the Court of Cassation rendered similar decisions inspired by the ECJ ruling in *The 'Tilly Russ'* (C71/83 of 19 June 1984). These decisions were confirmed by the Commercial Chamber on 17 February 2015.

10 Court of Cassation, Commercial Chamber, 12 March 2013.

11 Court of Cassation, Commercial Chamber, 27 September 2017 (*The 'Santa Catarina'*); CA Versailles, 15 May 2018.

iv Limitation of liability

France has ratified the LLMC Convention 1976 and the LLMC Protocol 1996 has been in force in France since 2007. This applies to vessels flying foreign flags (regardless of whether they are party to the LLMC Convention). French domestic law, which applies to vessels flying the French flag and subject to proceedings before the French courts, contains similar provisions to those of the LLMC Convention under Article L5121-1 et seq. of the Transport Code.

Constituting a limitation fund in France is relatively quick and simple. An *ex parte* application requesting the court's permission to constitute a limitation fund can be presented to the president of a commercial court, who will appoint a liquidator and stipulate the way in which the fund can be constituted. Funds made up by way of a P&I club guarantee are generally accepted, especially when provided by a first-rank international club. Once the letter of undertaking or the cheque has been handed to the liquidator appointed by the court, a second application must be presented for the court to acknowledge the constitution of the fund.

France is known for being very strict with regard to shipowners seeking to limit their liability. The French courts have indeed adopted an objective approach of the conduct-barring limitation, considering that an inexcusable fault has been committed when the shipowner 'should have known' that the loss 'may' result from the conditions in which the voyage was undertaken. For instance, in *The 'Heidelberg'*, a 25-year-old saga that constituted the first major case in France to examine the right to limit under the LLMC Convention, a court of appeal deprived a shipowner of limitation as he failed to ensure that there existed between the master and the crew 'the confidence and cohesion indispensable to permit them to overcome difficulties which whilst unforeseen were not unforeseeable'.¹² Recent decisions, however, suggest that the French courts are gradually overcoming their claimant-friendly approach. In *The 'Rosa Delmas'*¹³ and in the latest decision in *The 'Heidelberg'*,¹⁴ the courts adopted a subjective approach in line with a strict application of the terms of the LLMC Convention.

V REMEDIES

i Ship arrest

The 1952 Brussels Convention relating to the arrest of seagoing ships has been ratified by France. Ships flying a flag of a country that is a signatory to the Brussels Convention can only be arrested on the grounds of securing maritime claims. Ships flying flags of states that are not signatories to the Brussels Convention can be arrested either on the basis of a mere allegation of a maritime claim as defined in the Convention, or under French domestic law in respect of any type of claim the arresting party might have against the owner of the ship; this is subject to demonstrating that the arresting party has a valid *prima facie* claim, as provided in Article L5114-22 of the French Transport Code.

Bunker arrest is 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

¹² Court of Appeal of Bordeaux, 31 May 2005, subsequently overruled by the Court of Cassation.

¹³ Court of Cassation, 19 October 2010, concerning the Hague-Visby Rules limitation.

¹⁴ 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. Many such arrests have taken place in France since the bankruptcy of OW Bunker A/S.

Arrest of an associated ship used to be possible in France as a result of the French courts' interpretation of the wording of the Brussels Convention that allows the arrest of associated vessels; however, the courts have narrowed their approach in recent years. Essentially, an applicant seeking authorisation to arrest an associated ship must now prove that either (1) there is a confusion of assets between the company whose assets have been arrested and the company that is alleged to owe the debt in question¹⁵ or (2) the shipowner or the debtor company is, in reality, fictitious. This is referred to as an absence of *affectio societatis*,¹⁶ meaning, for example, the shareholders have no participation in the profits and losses of the company, the shareholders are employed by the fictitious company or there is an inequitable allocation of the share capital.¹⁷

The procedure of ship arrests is set out by Articles R5114-15 to R5114-19 of the Transport Code. An *ex parte* petition to arrest the ship must be made to the enforcement judge¹⁸ 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. Where documents are in English, the relevant sections must be translated into French. A power of attorney from the claimant's solicitors is not required and documents do not need to be notarised in France. The arresting party is generally not required to provide counter-security in order to obtain an arrest order; however, the courts have complete discretion to decide otherwise, and systematically requiring counter-securities has become an idiosyncrasy of a few local courts.

In practice, an arrest order can be obtained within a few hours of a local lawyer having been fully instructed, if one is dealing with a straightforward arrest with 'simple' supporting documents. In serious emergencies, this period can be reduced, although much will depend on the availability of the magistrate, who rules on individual arrests. French law does, however, 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, this will need to be served by a bailiff on the ship's master and the port authority, which can be done within a few hours. Depending on the means available for serving the order on the ship's master, it is possible for a bailiff to arrest a vessel that is anchored in a port's roads when there are reasons to believe that the ship will try to escape arrest.

15 *Confusion de patrimoine.*

16 Shareholders' mutual intention to create and run the corporate entity together.

17 For a recent example of a company withheld fictitious see the decision of the Rennes Court of Appeal, 4 February 2014, *The 'AG Vartholomeos'*.

18 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.

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.

Although claims for wrongful arrests are admissible in theory, French courts have, to date, been reluctant to grant compensation unless the arresting party had manifestly acted in bad faith.

ii Court orders for sale of a vessel

Under French law, the judicial sale of a vessel requires a creditor holding an enforcement title against the owner of the vessel, to proceed with the executory arrest of the vessel. These proceedings generally follow a conservatory arrest (attachment) ordered 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. First, an order to pay must be served by a bailiff on the shipowner or the ship's master. Within 10 days of the order to pay being served, the creditor must instruct a bailiff to carry out the executory arrest of the vessel, the minutes of which must be served on the port authorities and the consulate of the state the flag of which the foreign ship flies. Notice of the arrest must be served on creditors having a publicly registered claim on the vessel. The judicial sale of the vessel takes place, upon the request of the claimant, by the civil court in the jurisdiction where the vessel is located, and is carried out by auction. The court sets the reserve bid, the sale conditions and the date of the sale. After the auction sale, creditors of the shipowner or those who have a lien on the ship must file an application 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.

The entire procedure generally takes between six and 12 months, and can be costly. For this reason, judicial sales are very rare in France, especially for merchant vessels, although the recent economic crisis has increased the use of this procedure.

VI REGULATION

i Safety

As in most EU Member States, maritime safety is covered under French law by several 'levels' of legislation. France is a party to SOLAS and its successive protocols,¹⁹ most provisions of which have been incorporated into EU legislation. France incorporated SOLAS into domestic law through an Act dated 5 July 1983 and the Decree of 30 August 1984. The former is now codified in the Transport Code and in some Regulations on the Safety of Life at Sea, which compile applicable rules in 'divisions' made available through the ministry in charge of transport and is frequently updated.

19 The International Regulations for Preventing Collisions at Sea 1972, the International Safety Management Code, International Ship and Port Facility Security Code, the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, etc.

On 1 July 2016, new requirements under SOLAS entered into force in France,²⁰ imposing gross mass verification of packed containers to ensure that the mass declared is accurate and to avoid injury, cargo damage or loss of containers.

The safety regime also includes provisions for the treatment of casualties: Directive 2009/18/EC was transposed into the French provisions relating to the French Marine Accident Investigation Office, which established a procedure for investigating and for facilitating the exchange of information in the event of marine incidents.²¹

A step was made towards cybersecurity, when France transposed the European Network and Information System Security (NIS) Directive, in May 2018, which prompts shipping companies to protect their navigation devices, database and every network technology against third-party intrusions.

ii Port state control

France is a member of the Paris Memorandum of Understanding, the provisions of which were incorporated in Council Directive 95/21/EC, now replaced by Directive 2009/16/EC on port State control, which has been transposed into French domestic law in particular under Division 150 of the Regulations on the Safety of Life at Sea.

Inspections are conducted by inspectors of the ships' safety centres, which are part of the Maritime Affairs Administration.

In 2004, France was found in breach of its obligations under Directive 95/21/EC by failing to carry out a total quota of annual inspections corresponding to at least 25 per cent of the number of vessels, as fewer than 15 per cent of vessels were inspected in 1999 and 2000.²² This performance has since improved, with 1,780 inspections in 2008 representing 30 per cent of ships calling at French ports,²³ and 1,132 inspections in 2016, thus reaching the 25 per cent objective.²⁴ Under the Erika III maritime safety package, the target has been increased to 100 per cent. In 2016, 50 per cent of inspections in France revealed deficiencies and 24 ships were detained – five for more than six days.

iii Registration and classification

There are six registers under French law: five national registers and one international register (the French International Register – RIF):

- a* the applicable register in metropolitan France and overseas departments;
- b* the RIF;
- c* the French Southern and Antarctic Lands (TAAF) Register;²⁵
- d* the New Caledonia Register;
- e* the Wallis and Futuna Register; and
- f* the French Polynesia Register.

20 Ministerial ruling of 28 April 2016 published on 28 May 2016 and modified on 30 December 2016.

21 Article L1621-1 et seq. of the Transport Code.

22 ICJ Case C-439/02, *Commission v. French Republic*.

23 Source: Union Professionnelle des Experts Maritimes.

24 Paris MOU, Port State Control, Annual Report 2015.

25 The RIF will eventually replace the TAAF register, which is used nowadays only for fishing vessels.

As at 1 January 2017, the French transportation fleet of more than 100 GT, now including coastal and port service vessels, comprised 175 vessels registered in the RIF, 179 in the metropolitan register and 51 in the overseas registers (including 26 in French Polynesia).²⁶

A distinction must be made between registration proceedings and 'francisation' proceedings. Although the two proceedings are quite similar in respect of administrative formalities, which were simplified by the law on 'the blue economy' of 20 June 2016, they have different purposes: francisation gives the ship French nationality whereas registration gives the ship the right to sail by issuing all the necessary sail and security certificates.

Francisation is the formality that gives the ship the right to fly the French flag and benefit from all advantages attached to it, and is officialised with a deed of francisation. The procedure is governed by the Transport Code and the French Customs Code, which lists several conditions: the vessel must have passed a safety inspection and it must have been built in an EU Member State, or the import costs and fees must have been paid in an EU Member State. A ship built outside the European Union can be francised if at least 50 per cent is owned (or intended for ownership or bareboat chartered) by nationals or companies from an EU or EEA Member State that have an actual presence in France. If these conditions are not met, francisation can also take place on a discretionary basis by the granting of a special licence by the government.

The criteria for registration will depend upon the register concerned. With regard to the RIF, which is most frequently used nowadays, there are some specific criteria as to the type of vessels that can be registered. Vessels employed in deep-sea trade or international cabotage, and commercially operated leisure vessels exceeding 15 metres in overall length manned by a professional crew, can be registered. In contrast, the following cannot currently be registered in the RIF: passenger vessels trading between EU countries and on some lines between the EU and third countries, vessels operating only on national cabotage or providing services in areas in which port regulations apply (such as boatmen and pilot launches, harbour tugs, signalling vessels and harbour maintenance dredgers) and professional fishing vessels.

Classification societies in France are subject to an amended ministerial order on ship safety dated 23 November 1987. There are currently three approved or recognised classification societies in France: Bureau Veritas, DNV GL and RINA Services. Classification societies can be held liable to shipowners, third parties (the victims) or the state when a party claims against the state in relation to control duties that have been delegated to classification societies. Their liability can be contractual, tortious or criminal. Both the managers and the classification society itself can be held criminally responsible. For instance, in the case of *The 'Erika'*,²⁷ 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

MARPOL is in force in France. Sea pollution is also addressed by EU Directives, in particular the Directive on Ship Source Pollution (2005/35/EC, modified by Directive 2009/123/EC), incorporated into French law by Act No. 2008-757, dated 1 August 2008, relating to environmental liability and other provisions. Criminal sanctions against oil pollution are set out in Article L218-10 et seq. of the French Environment Code, pursuant to which oil

²⁶ Ministry of Ecology, Sustainable Development and Energy, 'Flotte de commerce sous pavillon français' – July 2016.

²⁷ Cassation Court, Criminal Chamber, 25 September 2012.

spillage in breach of MARPOL can lead to up to 10 years' imprisonment and a €15 million fine. These sanctions can be ordered against the master, the registered owner and the operator of the vessel. They can also be ordered against the legal representatives or managers of the owner or operator, or against any other person exercising a control over, management in or running of the vessel, where the owner, operator or person is responsible for illegal spillage or has not taken the necessary steps to avoid it. Although the European Directive requires intent, recklessness or serious negligence, individuals can be held criminally liable under French law for mere negligence or imprudence, as illustrated in *The 'Erika'*.²⁸

The French courts are generally severe on polluting vessels. Each year, several vessels are diverted to the French coast and arrested by order of the authorities. Masters are generally found guilty on the basis of aerial pictures taken by the customs 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 the most recent decisions, the courts have imposed fines of €800,000 and €1.5 million, plus civil damages granted to environmental associations.³⁰ As regards civil liability, France has ratified the International Conventions on Civil Liability for Oil Pollution Damage and Oil Pollution Compensation Funds, and the Protocol of 2003 establishing an International Oil Pollution Compensation Supplementary Fund. France has also ratified the Bunker Convention, which came into force in 2011.

Pollution can also give rise to the application of provisions on waste³¹ as illustrated by the *Commune de Mesquer v. Total* case.³²

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, applicable as of 31 August 2017, to ships above 5,000 GT. A law was recently enacted (No. 2018-1317) to encourage shipping operators to use cleaner energy sources.

The International Convention for the Control and Management of Ships' Ballast Water and Sediments 2004 is applicable in France since 8 September 2017.

v Collisions, salvage and wrecks

France has ratified the Collision Convention 1910, the Collision Convention 1952 and the Criminal Collision Convention 1952. Furthermore, the Collision Convention 1910 regime has now been incorporated into French domestic law in Article L5131-1 et seq. 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,

28 Paris Court of Appeal, 30 March 2010, where Mr Pollara (director of Panship, the vessel's technical manager), Mr Savarese (director of Tevere shipping, the vessel's registered owner), RINA (the classification society) and Total (charterer) were found guilty of pollution.

29 The *Trefin Adam Maritime* case, Court of Cassation, 10 November 2015, conviction for marine pollution in absence of evidence other than the official report issued by the French Navy.

30 See *The 'Tian Du Feng'*, Rennes Court of Appeal, 27 February 2014; *The 'FastRex'*, Court of Cassation, 18 March 2014; *The 'Thisseas'*, Criminal Court of Brest, 16 January 2017; and the *Total oil refinery of Donges* case, Rennes Court of Appeal, 9 December 2016, illustrating damages granted to associations for environmental harm.

31 EU Directives and Article L541-1 et seq. of the Environment Code.

32 See ICJ Case C-188/07 of 28 March 2007.

according to the respective faults, is applicable. France has also ratified 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, and in 2002, France ratified 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 LOF or the French Villeneuve form, but most of the time the contract is made orally by radio. Moreover, there can be salvage without any salvage contract having been agreed upon between the parties in the event that special assistance is given to a vessel in great danger. Reciprocally, French courts can decide that no salvage reward is due, even if the parties have agreed a 'salvage contract', if the conditions of salvage are not met (e.g., where the danger was no longer an issue at the time assistance was provided).

French provisions relating to maritime wreckage are set out under Article L5142-1 et seq. of the Transport Code. Where a maritime wreck could be dangerous for navigation, fishing, the environment or the access to a port, the owner of the wreck has an obligation to proceed with recovery, removal, destruction or any other operation to remove all danger in relation to the wreck. Pursuant to Article L5242-18 of the Transport Code, the administration is entitled to carry out the removal of the wreck itself in three situations: in cases of emergency, if the owner does not carry out the removal operations within the time allotted to it, or if the owner is unknown. In these cases, the administration may remove or destroy the wreck itself, or hire a company specialising in this type of operation, and the owner of the wreck or its insurer will have to bear the final cost of the operation. In November 2015, France ratified the Nairobi WRC 2007, which came into force in France on 4 May 2016 and applies to wrecks in the exclusive economic zone (EEZ).

Ships that constitute waste and that are subject to a trans-boundary movement for recycling are regulated by the Basel Convention of 22 March 1987 and Regulation (EC) No. 1013/2006. More recently, Regulation (EU) No. 1257/2013 of 30 November 2013 on ship recycling, which applies from 31 December 2015, aims at 'facilitating a rapid ratification', in both EU Member States and non-EU countries, of 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. Regarding facilities for ship recycling, it applies to those located in the territory of a Member State and of a third country. According to the Regulation, such vessels can only be recycled in recycling facilities listed on a European list, following a ship recycling plan to be drawn up on the basis of the information provided by the shipowner and approved by the competent authority. Concerning the application for inclusion on the European list, the EU Commission adopted an implementing decision of 17 December 2015 (2015/2398) on the information and documentation needed for application from a facility located in a third country.

Inspections of ships to be recycled are carried out by the administration or by an accredited agency. All vessels under the Regulation must carry on board an inventory of hazardous materials present in the structure or equipment of the vessel, and which are listed in the Regulation's annexes. In this regard, France inserted Article L5242-9-1 in the Transport Code, which requires shipowners to notify the administration of its intent to recycle a vessel.

In November 2016, the EMSA published a non-binding Best Practice Guidance on the Inventory of Hazardous Materials for practitioners in the field, ship owners and national authorities.

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 came into force on 31 December 2012. This Regulation brought into force the 2002 Protocol to the Athens Convention for all EU Member States, despite the 2002 Protocol not having been ratified internationally at the time; it came into force internationally in April 2014.

This produced some important changes in French law, as France had never ratified the Athens Convention or any amending Protocol. Before the entry into force of the new PLR, carriage of passengers by sea was exclusively subject to the French law of 18 June 1966, enacted in the Transport Code in 2010, which did not provide for specific limitations of liability in cases of personal injury or death, but these are contained in the LLMC Convention, as amended by the 1996 Protocol.

The PLR applies to international carriage of passengers on seagoing vessels, but also, under certain conditions, to Class A and B vessels³³ engaged in domestic seagoing voyages in France.

The PLR covers the liability of the carrier for losses arising from incidents that occur during the course of carriage, which covers the period during which the passenger is on board the ship, in the process of embarkation or disembarkation, or being transported by water from land to the ship or vice versa.

In the event of death or personal injury caused by a shipping incident, the carrier is under a strict liability up to a limit of 250,000 special drawing rights (SDRs) per passenger, unless it proves that the incident resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible nature, or was wholly caused by an act or omission by a third party, carried out with the intention of causing the incident. The carrier is also liable for shipping and non-shipping incidents up to a limit of 400,000 SDRs unless the carrier proves that the incident that caused the loss was not through his or her own fault or neglect. Moreover, contributory fault on the part of the passenger may wholly or partially exonerate the carrier. The carrier will lose its right to limit liability where it is proven that the damage resulted from an act or omission intended to cause damage or a reckless act, done with the knowledge that such damage would probably ensue. The French courts have a wide interpretation of the carrier's fault.³⁴ The carrier's limit of liability for loss or damage to luggage varies, depending on whether the loss or damage occurred in respect of cabin luggage, of a vehicle or luggage carried in or on it.

A provision for compulsory insurance, of no less than 250,000 SDRs per passenger per occasion has been introduced. The ship's registry must issue a certificate evidencing the insurance.

33 Recreational craft designed for winds up to and including (Class B) or that may exceed (Class A) wind force 8 (Beaufort scale) and significant wave height of 4 metres, as defined by amended Directive 94/25/EC on recreational craft.

34 Court of Cassation, First Civil Chamber, 18 June 2014.

In some cases, maritime cruises will be considered package travel, governed by The French Tourism Code implementing EU Package Travel Regulation No. 90/314/EEC, which provides for a strict liability regime that differs from that of the PLR.³⁵

Finally, Regulation (EU) 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, cruise lines and not discriminating against disabled passengers.

vii Seafarers' rights

French legislation on seafarers used to be included in the French Maritime Labour Code. This has now been almost fully replaced by Article L5511-1 et seq. of the Transport Code, which contains some provisions specific to seafarers, such as 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, where no specific provisions depart from the general regime. These provisions relate particularly to the company's work council, staff representatives, minimum wage, collective bargaining agreements, procedures for dismissal, hours of work, and the committee on health, safety and working conditions.

France ratified the Maritime Labour Convention 2006 (MLC) on 28 February 2013. As with other states in the same situation, France wished to promote the universal application of the MLC by incorporating it immediately into its domestic legislation. Rules of the French Transport Code on Seafarers were thus adapted in July 2013 and April 2015. As the French social legislation is relatively comprehensive, the implementation of the Convention did not require major reform.

The Convention officially came into force in France on 28 February 2014, and over the three years of application of the Convention, approximately 24 vessels have been detained in France because of deficient labour conditions.

VII OUTLOOK

In January 2019, Prime Minister Édouard Philippe announced the launch of a 'plan linked to a Brexit without agreement', which comprises legislative measures to ensure that the rights of businesses are effectively protected. One of the government orders issued (No. 2019-36) pursuant to this plan provides for measures to restore border controls on goods. The forthcoming investments in French ports and airports are estimated to cost roughly €50 million.

A plan to support the fishing sector, which is likely to be severely impacted in the event of a no-deal Brexit, is also under study. Despite the diverse areas set to be affected, the French government is taking steps on several levels to minimise the impact of Britain's withdrawal from the European Union on businesses and on shipping.

35 See, for instance, Court of Cassation, 9 December 2015.

GREECE

Paris Karamitsios, Electra Panayotopoulos and Dimitri Vassos¹

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 20 per cent of the world's total merchant fleet. In terms of kinds of ships, Greeks rank in the top four for all kinds, being first for bulk carriers and tankers, second in liquefied natural gas (LNG) carriers, third in container ships and fourth in liquefied petroleum gas (LPG) carriers. At the beginning of 2019, the Greek-owned merchant fleet measured a total deadweight tonnage of approximately 365.45 million gross tonnes (GT) and 4,746 ships above 1,000 GT, representing almost half of the EU fleet. Although the dramatic drop in the freight market has negatively affected newbuilds, there is still a significant number of new vessels on order by Greek interests, mostly from shipyards in the Far East.

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 cargo import and export activities of 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 Shipping and MSC² as a hub; COSCO owns the majority share of the Port of Piraeus. The other two significant ports are Thessaloniki (also becoming more active in the recent years) and Patras (mainly as a ferry port and the main eastern gateway to the trans-Adriatic liner trade).

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The Code of Private Maritime Law (CPML) regulates private shipping law matters in Greece (such as crew claims, collisions, salvage and time bars). 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.

1 Paris Karamitsios is a partner at PPT Legal; Electra Panayotopoulos and Dimitri Vassos are partners at HFW.

2 MSC Mediterranean Shipping Company SA.

Greece has also ratified a number of international maritime conventions, which supersede the CPML to the extent that they contravene its provisions. The most important maritime conventions that apply in Greece are as follows:

- a* the Collision Convention;
- b* the Hague-Visby Rules;
- c* the 1989 Salvage Convention;
- d* the Arrest Convention 1952;
- e* the Athens Convention; and
- f* the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC) (including the 1996 Malta Protocol).

III FORUM AND JURISDICTION

i Courts

Shipping cases relating to the region encompassing Athens and Piraeus (i.e., the Prefecture of Attiki) are litigated before the Shipping Division of the Piraeus Court of First Instance or the Court of Appeal of Piraeus. The vast majority of shipping-related cases in Greece are litigated in Piraeus. Even if a shipping case does not have any link to Athens or Piraeus, the plaintiff has the option to litigate it before the maritime division of the Piraeus Court, instead of the otherwise local competent civil court.

The following claims have a limitation period of one year, starting at the end of the year during which the claim arises:

- a* claims relating to crew wages;
- b* owners' claims against the master and the crew arising from tortious actions committed by them;
- c* claims arising from the provision of supplies to (and works carried out) on ships relating to repair or to shipbuilding contracts;
- d* claims arising from charter parties or contracts for the carriage of passengers or the transportation of goods;
- e* general average; and
- f* collision claims (if the preconditions for the application of the 1910 Brussels Collision Convention, which provides for a two-year limitation period, are not fulfilled).

The limitation period for the following claims is two years, starting at the end of the year during which the claim arises:

- a* claims between co-owners of a ship or against the ship's manager arising from the exploitation or the management of the ship;
- b* insurance claims;
- c* salvage claims; and
- d* claims against a shipbuilder in respect of its work on a ship.

To the extent that international conventions apply, the provisions of the conventions supersede the provisions of the CPML (e.g., in salvage or collision claims).

ii Arbitration and ADR

Arbitration is not widely used in Greece. The two main tribunals that resolve maritime disputes are the Piraeus Association for Maritime Arbitration and the arbitration body of the Hellenic Chamber of Shipping. Both associations operate from Piraeus and each has its own rules. The vast majority of maritime cases are litigated in the Piraeus courts and not in arbitration. No special limitation periods apply to arbitration proceedings.

Mediation centres operate in the major lawyers' bar associations, such as the Piraeus Bar Association. As mediation has only recently been introduced into the Greek legal framework, it is not yet widely used.

iii Enforcement of foreign judgments and arbitral awards

To enforce a foreign judgment in Greece, the following conditions need to be fulfilled:

- a* the judgment must be enforceable in the country in which it was rendered;
- b* it must not be contrary to Greek public policy 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 seized jurisdiction over the dispute; and
- e* there must be no contradictory Greek judgment in the matter.

Greece has adopted the New York Convention. The Piraeus Court of First Instance declares a number of foreign judgments and awards as enforceable in Greece each year.

IV SHIPPING CONTRACTS

i Shipbuilding

Greece does not have a significant shipbuilding industry and only a very few small vessels are built in Greece each year (usually special-purpose vessels for local use, such as ferries and patrol boats). There are no notable local laws regulating shipbuilding contracts. That said, a ship may be registered while under construction.

ii Contracts of carriage

The Hague-Visby Rules apply compulsorily to bills of lading or other documents of title and local carriages by sea between Greek ports, regardless of whether a bill of lading is issued. Greece has not ratified the Hamburg Rules or the Rotterdam Rules.

Vessels that do not sail under an EU flag are still not allowed to transport passengers, vehicles or cargo between Greek ports in liner services; only Greek-flagged tugs are allowed to offer port towage services and salvage and wreck removal services within Greek territorial waters.

Under Greek law, maritime claims do not 'attach' to the vessel in the same way as maritime liens in other jurisdictions and the vessel cannot be sued *in rem* by a creditor. Where the previous owner of a ship owes a debt to a creditor, the creditor can, however, sue the new owner of the ship *in personam* provided that the circumstances of the sale of the ship have a sufficient link to Greece (e.g., the ship was sold from one Greek interest to another or the ship is managed by Greek offices before and after the sale). This principle applies even if the ship

was transferred under a memorandum of agreement subject to English law and jurisdiction. If the creditor is entitled to claim against the new owner under Greek law, the new owner's liability towards the creditor is limited to the price at which it purchased the ship.

There is no automatic right to lien under a bill of lading contract. The carrier cannot exercise a lien on cargo for non-payment of freight (nor demurrage, deadfreight, etc.). The carrier can, however, apply to the court for the following:

- a* cargo to be held by a trustee until freight is paid; and
- b* the sale of cargo (in the case of perishable cargoes).

The shipper is obliged to pay freight and all other charges of the voyage (such as demurrage) provided that it has 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 such particulars.

There is no legislation in Greece specifically regulating multimodal bills of lading. The Greek courts accept the validity of multimodal bills of lading and consider that they have the same functions as 'port-to-port' bills of lading. A multimodal bill of lading is therefore evidence of loading or receipt of the cargo, the contract of affreightment and a document of title.

iii Cargo claims

As a matter of principle under Greek law, if cargo is lost or damaged during sea carriage, the party entitled to claim in its own name is the shipper who entered into the contract with the carrier.

If, however, the original bill of lading was issued to the order of a consignee (or has been endorsed by the shipper to the consignee) and the latter has the original bill of lading, the consignee will be entitled to claim in its own name. The same applies to other legal holders of the bill of lading (e.g., other parties who bought the goods from the consignee) provided that they can establish their rights as legal holders of the bill of lading with an unbroken chain of lawful endorsements (or assignments – see below).

If the insurer compensates the legal holder of the bill of lading for losses sustained as a result of lost or damaged cargo, the insurer is subrogated to the rights of the assured and is entitled to claim in its own name against the carrier.

The cargo's pledgee or the assignee of the consignee's rights are entitled to sue the carrier provided that they are legal holders of the bill of lading. The shipper or charterer is also entitled to sue the carrier for damage or losses to the cargo if:

- a* it is the legal holder of the bill of lading;
- b* when it endorsed the bill of lading to the consignee or another third party, it bore the risk of the transportation (e.g., in a cost, insurance and freight sale); and
- c* it has compensated the consignee or legal holder of the bill of lading for the relevant loss or damage and subrogated to the rights of the legal holder of the bill of lading.

References in the bill of lading to the terms of a charter party are binding on the receiver provided that:

- a* such terms are appropriate as between the carrier and the receiver; and
- b* the bill of lading incorporates specified terms of the charter party and does not purport to incorporate all the charter party terms in general.

'Congenbill' bills of lading are, however, deemed to automatically incorporate all terms of the charter party.

The party that has agreed to carry the goods is deemed the carrier. If the shipowner has not entered into an agreement with the shipper to carry the goods but an agreement was made between the shipper and the charterer, only the charterer (and not the shipowner) is deemed the carrier.

The demise charterer is deemed to be the carrier if it agreed to carry the goods. In the event that it is not clear from the bill of lading whether it has been issued on behalf of the shipowner or the charterer, the shipowner is deemed the carrier provided that:

- a* it has full control over the vessel and has not assigned the vessel to the charterer (e.g., by authorising the charterer to employ the master and the crew); or
- b* there is an agreement between the shipowner and the demise charterer that the latter has full control over the vessel but the shipper or the legal holder of the bill of lading, acting in good faith, is not aware of such an agreement.

A demise clause is invalid, because it is contrary to Article 3(8) of the Hague-Visby Rules.

iv Limitation of liability

In accordance with the Hague-Visby Rules, the carrier is entitled to limit its liability either by unit (666.67 special drawing rights (SDRs) per unit) or by weight (2 SDRs per kilogram), whichever is higher. The limitation limits set out by the Malta Protocol 1996 following the LLMC Convention and the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC) also apply.

V REMEDIES

i Ship arrest

Under Greek law, the arrest of a vessel is carried out in two stages: the first by the issuance of a provisional order and the 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.

An arrest is deemed wrongful and set aside if the arrestor has obtained the arrest order by submitting fraudulent evidence.

Under Greek law it is extremely difficult to obtain an associated arrest as this involves piercing the corporate veils of the shipowning companies involved – a very difficult exercise under Greek law.

The arrest of a vessel's bunkers is possible provided that the arrestor has a claim against the owner of the bunkers. Arrest orders are enforced by the port authority while the vessel is in a berth or anchored at roads provided that the port authority has a boat available to enforce the arrest at the anchorage. Arrest by helicopter is not practicable.

ii Court orders for sale of a vessel

Judicial sales of vessels are carried out by way of public auctions. The enforcement procedure commences as soon as the creditor of the vessel's owner obtains an enforceable title against the owner (usually a final and unappealable judgment or a provisionally enforceable judgment in exceptional cases, such as in crew claims).

The claimant must first serve the enforceable title on the owner of the vessel. If the owner does not pay the awarded amount within 24 hours, the court bailiff attaches the vessel and schedules its auction at a date at least 40 days from the date of attachment.

The court bailiff sets the first bidding price, which is equal to 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 that is entitled to file an objection against the sale. They are also entitled to request an increase in the vessel's appraised value.

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, 15 days after the auction at the latest. 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.

On distributing the sale proceeds, the following claims will be deemed to be privileged and will have priority above all others:

- a* legal costs incurred for the common benefit of the creditors, dues and charges incurred by the vessel, taxes relating to navigation, dues payable to the Seamen's Pension Fund and fines imposed or to be imposed by the Bureau for the Provision of Marine Employment in favour of the Seamen's Fund for Sick and Unemployed Seamen;
- b* claims by the master and crew arising out of their employment contracts and the costs of guarding and maintaining the vessel from her arrival at the port where the auction takes place until the auction;
- c* costs payable in respect of marine salvage and the raising of wrecks; and
- d* damages due to vessels, passengers and cargoes as a result of collisions.

Privileged claims have priority over registered mortgages. 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.

VI REGULATION

i Safety

Greece applies all EU and IMO regulations and international conventions relating to safety at sea. The most important are:

- 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 (SOLAS) and all its protocols and amendments;
- c* the International Management Code for the Safe Operation of Ships and for Pollution Prevention (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 (MOU) and has implemented the port state control regime. The guidelines of the Paris MOU apply to all ships calling at Greek ports and anchorages, irrespective of their flags.

During 2017, 1,016 inspections were carried out, 567 deficiencies were recorded and 66 detentions were ordered.

iii Registration and classification

All major Greek ports have their own ship registries, kept by the local port authorities. The vast majority of ships under the Greek flag are registered in the port of Piraeus.

The following interests may be registered:

- a* title or transfer of ownership (or both);
- b* ownership of a ship under construction;
- c* the right of exploitation of the ship by a non-owner (usually the bareboat charterer);
- d* mortgages;
- e* arrest orders;
- f* prohibitions against any change in the ship's factual and legal condition (e.g., the right to carry out repairs, sell or encumber the vessel); and
- g* enforcement or auction proceedings against a ship.

To be registered in a Greek ship registry (i.e., under the Greek flag), a ship must be more than 50 per cent beneficially owned by Greek or other EU nationals. Various documents are required for the registration of a ship in a Greek registry, such as:

- a* documents evidencing title of ownership (such as a bill of sale);
- b* documents evidencing that the ship is beneficially owned by Greek or EU interests;
- c* a tonnage certificate; and
- d* a certificate of deletion from the vessel's previous registry (from certain registries) or a letter of undertaking by the new owner that a certificate will be submitted within one month of its registration.

The following classification societies are approved to issue certificates in respect of Greek-flagged vessels:

- a* the American Bureau of Shipping;
- b* Bureau Veritas;
- c* the China Classification Society;
- d* DNV GL;
- e* Lloyd's Register;
- f* the Korean Register of Shipping;
- g* Class NK (Nippon Kaiji Kyokai);
- h* Registro Italiano Navale (RINA);
- i* the Russian Register of Shipping;
- j* the Hellenic Register of Shipping;
- k* the International Naval Survey Bureau; and
- l* the Phoenix Register of Shipping.

Classification societies can be held liable to the owners of the ships 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 (MARPOL), as modified by the Protocol of 1978, 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 CLC Convention;
- b* the London Dumping Convention;
- c* the Convention for the Protection of the Mediterranean Sea Against Pollution;
- d* the OPRC Convention; and
- e* the Bunker Convention.

According to data published by the Hellenic Coast Guard, in 2018 there were 27 pollution incidents arising from ships, 44 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 and the Salvage Convention. Issues relating to wreck removal are governed by Greek law, the Greek State not having yet ratified the Nairobi Convention. 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 a danger of loss or of sustaining damage. This danger must be real, even if not imminent, but predictable, possible and existing at the time of the offering of salvage services. The existence and extent of the danger are examined by reference to all the facts and circumstances surrounding the particular incident; and
- c* the salvors' actions must have a beneficial result.

vi Passengers' rights

Greece has ratified the Athens Convention and the subsequent 2002 Protocol. The Athens Convention applies to international carriages when the place of departure and the place of destination are located in two different states, or in a single state if, according to the contract of carriage or the scheduled itinerary, there is an intermediate port of call in another state. Following the introduction of the EU Passenger Liability Regulation 2009 (PLR), the Athens Convention also applies to domestic carriages in Greece for class A vessels from 31 December 2016 and for class B vessels, it applies from 31 December 2018.

On domestic journeys, the liability of the carrier is regulated by Greek law. In respect of the carriage of passenger vehicles, the Hague-Visby Rules apply instead of the Greek CPML. If a passenger has suffered injury during the carriage that is attributable to the carrier's negligence, he or she is entitled to receive damages (including damages for loss of income and emotional distress). The passenger is also entitled to recover all directly resulting losses in cases where the accident occurred as a result of a fault in the ship's command or navigation by the vessel's master.

vii Seafarers' rights

Greece has ratified the Maritime Labour Convention 2006 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 a period of 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

During the past couple of years, the majority of the Piraeus Court judgments (both in the first and second instance), in a number of OWB related cases brought before them, dismissed the claims of physical suppliers against owners or charterers of vessels, by ruling that the chief engineers of the vessels who signed the physical suppliers' BDRs did not have the authority to accept on behalf of the vessels' owners or charterers the application of the physical suppliers' general terms and conditions that were printed on the BDRs. In particular, such rulings were

based on the view that the vessels' chief engineers, when signing the BDRs of the physical suppliers, were only authorised to measure the quantities of the bunkers delivered onboard the vessel and verify such quantities in the BDRs and not to undertake any contractual obligations on behalf of the owners or charterers towards the physical suppliers. Therefore, according to the prevailing view, the owners or charterers do not have any contractual obligation to pay the physical suppliers' invoices (whether on the basis of the signing of the BDRs or otherwise), since this obligation rests only with the party that purchased the bunkers from the physical suppliers (i.e., OWB). However, there is one appeal judgment that has followed the opposite view and this legal matter will be ultimately resolved by the Greek Supreme Court, given that both sides (i.e., the physical suppliers and the owners or charterers) have already lodged further appeals respectively against the above decisions of the Piraeus Court of Appeal.

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, save that Greek tax residents are taxed at 10 per cent on any such dividends that they import in Greece, those kept abroad not being 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 on the basis of 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, while these offices are taxed with a low, escalating downwards, minor percentage on the funds that they import to meet their expenses locally.

Other than the above, there is no corporate income tax imposed on such shipowning, ship management or other such special regime shipping companies.

HONG KONG

Nicola Hui and Winnie Chung¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Hong Kong is currently the sixth-busiest container port in the world behind Shanghai, Singapore, the fellow Pearl River Delta ports of Shenzhen, Ningbo-Zhoushan and Busan.² In 2018, the port of Hong Kong handled an estimate of 19.6 million TEUs of containers (compared with 20.8 million in 2017)³ and provided about 330 container liner services per week connecting to about 470 destinations worldwide.⁴ As at January 2019, there were more than 2,623 vessels on the Hong Kong Shipping Register (set up in 1990),⁵ totalling more than 125.4 million gross tonnage⁶ and 9 per cent of the world's merchant fleet, making it the fourth-largest register after Panama, Liberia and the Marshall Islands. 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.⁷ Pursuant to the Mainland and Hong Kong Closer Economic Partnership Arrangement, Hong Kong-registered ships receive preferential rates for port charges when calling at Chinese ports.⁸ Further, Hong Kong's profit tax rate is modest (16.5 per cent)⁹ and the tax regime is territorial, which means that income derived from the international operation of Hong Kong-registered ships is exempted from profits tax. Another consideration is that in recent years Hong Kong has significantly increased the number of its double taxation relief agreements from just four to 47,¹⁰ with more under

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

2 www.worldshipping.org/about-the-industry/global-trade/top-50-world-container-ports.

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

4 www.investhk.gov.hk/sites/default/files/2017-maritime-leaflet-en.pdf.

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

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

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

8 hong-kong-economy-research.hktdc.com/business-news/article/Hong-Kong-Industry-Profiles/Maritime-Services-Industry-in-Hong-Kong/hkip/en/1/1X000000/1X09WBHM.htm.

9 www.gov.hk/en/residents/taxes/taxfiling/taxrates/profitsrates.htm.

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

negotiation.¹¹ One focus of these agreements has been shipping income.¹² With its many advantages, Hong Kong is well-positioned to serve as the maritime service hub for the Belt and Road Initiatives¹³ and the development of the Greater Bay Area.¹⁴

In terms of direct economic contribution, the shipping industry plays an important part in Hong Kong's role as a regional logistics hub, with trading and logistics directly contributing more than 21 per cent of Hong Kong's gross domestic product¹⁵ and 19 per cent of the total employment.¹⁶ In the past, there was a considerable shipbuilding industry in Hong Kong; however, cheaper labour costs, as well as the high prices of Hong Kong real estate, have led to Hong Kong's shipbuilders moving across the border into mainland China.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

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

Further, pursuant to Article 153 of the Basic Law:

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

As a result, most key international shipping conventions are applicable in Hong Kong.¹⁷

11 www.ird.gov.hk/eng/tax/dta3.htm.

12 www.ird.gov.hk/eng/pol/dta.htm.

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

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 www.censtatd.gov.hk/hkstat/sub/sp80.jsp?tableID=188&ID=0&productType=8.

16 www.censtatd.gov.hk/hkstat/sub/sp80.jsp?tableID=191&ID=0&productType=8.

17 See, for example, www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx for a list.

III FORUM AND JURISDICTION

i Courts

Hong Kong has an Admiralty Court (part of the Court of First Instance). Admiralty actions are entered in the Admiralty List and prefixed HCAJ, and proceedings are governed by Order 75 of the Rules of the High Court (Cap 4A). Every action to enforce a claim for damage, loss of life or personal injury arising out of a collision or any breach of the collision regulations is assigned to the Court of First Instance admiralty jurisdiction, and the District Court has no jurisdiction to hear such matters even if the claim value (less than HK\$3 million) would otherwise fall within the jurisdiction of the District Court rather than the High Court.¹⁸ The admiralty jurisdiction also includes claims in respect of liability falling on the International Oil Compensation Fund, limitation actions, salvage claims and claims *in rem* for damage done by a ship.

The Limitation Ordinance (Cap 347) applies to most maritime claims except collisions, where two years apply (see Section VI.v). For claims in contract¹⁹ and tort, the time limit is six years from the date on which the cause of action accrued or from the date the damage was suffered, respectively. For personal injury or death claims, the limitation period is three years from the date on which the cause of action occurred.

In shipping disputes, there are often conflicts of law and disputes as to the forum in which the claims should be heard. In Hong Kong, where an action is brought *in personam*, the position is generally the same as in non-admiralty proceedings and will depend on whether the plaintiff should be granted leave to effect service on a foreign defendant outside Hong Kong under Order 11 of the Rules of the High Court.²⁰ In *in rem* proceedings, no such procedure exists as, generally, it will involve service of a writ on the vessel when it is in Hong Kong territorial waters (i.e., service outside the jurisdiction is not required).²¹ Provided that the claim is one that by its nature gives rise to an action *in rem*, service of a writ on the ship is sufficient to found jurisdiction, even in the absence of any other factor connecting the case with Hong Kong.²² However, even where jurisdiction has been established, through arresting in Hong Kong or service out of the jurisdiction, the court has inherent power to order a stay of proceedings in favour of another jurisdiction if it is a more appropriate forum (see, for example, *Shijiazhuang Iron & Steel Co Ltd*), or where the claim is governed by an exclusive jurisdiction clause,²³ or in favour of arbitration where the relevant contract contains an arbitration clause.²⁴ Anti-suit injunctions will also be granted by the Hong Kong courts, for example, where cargo claimants have commenced proceedings in the country of discharge

18 www.doj.gov.hk/eng/legal/. Note that in June 2018, LegCo approved the Judiciary's proposed increase in the general financial limit of the District Court from HK\$1 million to HK\$3 million. The revised limit was implemented from 3 December 2018: <https://www.info.gov.hk/gia/general/201807/06/P2018070500771.htm>.

19 Hong Kong has ratified the Hague-Visby Rules; thus, for cargo claims, a one-year contractual time bar modifies the statutory limitation period.

20 *Halsbury's Laws of Hong Kong* – Vol. 38: *Maritime Law* (2nd edition, 2017), page 119.

21 *ibid.*

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

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

24 Section 20 of the Arbitration Ordinance (Cap 609).

(e.g., China) in breach of a jurisdiction clause in the relevant contract (e.g., a bill of lading). In such situations, the party seeking an anti-suit injunction should apply for the injunction as soon as possible and in any event avoid ‘culpable and inordinate’ delay, otherwise the injunction might not be granted.²⁵

ii Arbitration and ADR

The Arbitration Ordinance (Cap 609) came into force in Hong Kong on 1 June 2011; this incorporated the majority of the UNCITRAL Model Law on International Commercial Arbitration and replaced the previous Arbitration Ordinance (Cap 341), thereby providing a clearer framework. Under Section 14 of the Arbitration Ordinance, the Limitation Ordinance and any other ordinance relating to the limitation of actions apply to arbitrations as they apply to actions in the Hong Kong courts. The Arbitration Ordinance is updated from time to time to reflect the latest developments in international arbitration.²⁶ Sections 22A and 22B of the Arbitration Ordinance give the Hong Kong courts power to enforce emergency orders or relief granted by an emergency arbitrator, whether the relief was initially granted by an arbitral tribunal within Hong Kong or elsewhere.²⁷ On 17 July 2015, the Arbitration (Amendment) Ordinance 2015 was enacted; its main purpose was to remove some legal uncertainties about the opt-in mechanism for domestic arbitrations under Part II of the Arbitration Ordinance.²⁸ On 23 June 2017, the Arbitration Ordinance was further amended to allow third-party funding of arbitration.²⁹

Hong Kong’s main arbitration body is the Hong Kong International Arbitration Centre (HKIAC), which has been designated the appointing body under the Arbitration Ordinance to appoint arbitrators and to determine the number of arbitrators where the parties to a dispute are unable to agree. A new version of the HKIAC Administered Arbitration Rules, accompanied by a Practice Note on the Appointment of Arbitrators, took effect from 1 November 2018. The amendments to the 2013 Rules further reflect developments in arbitration practice in Hong Kong and globally, such as in the areas of use of technology, third-party funding, multi-party and multi-contract arbitrations, early determination of disputes and emergency arbitrator proceedings.³⁰

The International Court of Arbitration of the International Chamber of Commerce (ICC) opened a branch of its Secretariat in Hong Kong in November 2008 to serve ICC arbitration in the Asia-Pacific region. Further, in September 2012, the China International Economic and Trade Arbitration Commission (CIETAC), which handles a large number of international arbitration cases, established its office in Hong Kong, the first outside the mainland;³¹ the China Maritime Arbitration Commission (CMAC) has also set up a branch office in Hong Kong.³² On 4 January 2015, the Permanent Court of Arbitration (PCA) based in The Hague signed a Host Country Agreement with the government of the People’s

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

26 www.news.gov.hk/en/record/html/2014/02/20140220_151614.shtml.

27 Similar provisions are contained in the HKIAC’s administered arbitration rules.

28 www.legco.gov.hk/yr14-15/english/ord/ord011-2015-e.pdf.

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

30 www.hkiac.org/news/2018-administered-arbitration-rules-1-november.

31 www.doj.gov.hk/eng/public/arbitration.html.

32 www.info.gov.hk/gia/general/201411/19/P201411190765.htm.

Republic of China and a related Memorandum of Administrative Arrangements with the Hong Kong government, such that PCA-administered proceedings can be conducted in Hong Kong on an *ad hoc* basis, without the need for a physical presence of the PCA.³³ The PCA is an inter-governmental organisation to facilitate arbitration and other forms of dispute resolution between states. Its dispute resolution services also involve inter-governmental organisations and private parties.

As regards the standard of arbitration in Hong Kong, Mr Justice Hamblen of the English Commercial Court praised Hong Kong as ‘a well-known and respected arbitration forum with a reputation for neutrality, not least because of its supervising courts’.³⁴ According to the 2018 International Arbitration Survey by Queen Mary University of London, the HKIAC was ranked among the top five seats of arbitration worldwide.³⁵ About 297 new arbitration cases were filed at the HKIAC in 2017.³⁶

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 the standards in the conduct of mediation. Following the amendment of the Mediation Ordinance in June 2017, third-party funding of mediation is allowed as well.³⁷

In February 2000, the Maritime Arbitration Group (MAG) was formed as a division of the HKIAC, with the specific aim of promoting the use of maritime arbitration and mediation in Hong Kong. The MAG works in close cooperation with the Hong Kong Shipowners Association, and publishes a list of Hong Kong maritime arbitrators and a list of HKIAC-accredited mediators with maritime experience.³⁸ At present, Hong Kong does not have a specialist maritime arbitration procedure; however, we understand that the MAG hopes, with the support of the London Maritime Arbitrators Association (LMAA), to be able to adopt and slightly adapt the LMAA Rules for use in Hong Kong in future.

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 currently governed by the Arrangement on Reciprocal Enforcement of Judgments in Civil and Commercial Matters 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 2008.³⁹ The Mainland Judgments Ordinance applies to judgments requiring the payment of a sum of money in commercial and civil cases. The judgment creditor must register the judgment that it wishes to enforce

33 www.info.gov.hk/gia/general/201501/04/P201501040801.htm.

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

35 www.hkiac.org/arbitration/why-choose-hkiac.

36 www.hkiac.org/about-us/statistics.

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

38 www.hksoa.org/maritime_arbitration_group.html.

39 www.doj.gov.hk/eng/public/enforcement.html. Note that a second arrangement – the Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases – was signed between the Supreme People's Court and the HKSAR government on 20 June 2017.

in Hong Kong within two years of the date of the judgment taking effect. The first reported Hong Kong decision on the Mainland Judgments Ordinance was in February 2016.⁴⁰ In that case, the Court of First Instance dismissed the defendant's application to set aside an order for registration of a mainland judgment in Hong Kong. The Court also refused to hold a mini-trial on the merits and reminded that partial registration of a mainland judgment is possible when that judgment is for performance in stages.

On 18 January 2019, the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the HKSAR was signed by the Supreme People's Court and the HKSAR government. The Arrangement widens the existing scope for reciprocal recognition and enforcement of civil judgments in Hong Kong and the Mainland. It is expected to come into force this year after both places have completed the necessary procedures to enable implementation. Upon its commencement, the Arrangement will supersede the Choice of Court Arrangement (currently in force through the Mainland Judgments Ordinance).⁴¹

Foreign judgments in civil and commercial matters may be enforced in Hong Kong under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319). The underlying aim of the Reciprocal Enforcement Ordinance is to facilitate the recognition and enforcement of foreign judgments on the basis of reciprocity. The countries that have reciprocal arrangements with Hong Kong are listed in the Foreign Judgments (Reciprocal Enforcement) Order (Cap 319A); they include Australia, Austria, France, Belgium and Italy.⁴² A judgment creditor with a foreign judgment for the payment of a sum of money from a country listed under the Order can make an *ex parte* application to the Court of First Instance to register that foreign judgment. To do this, certain requirements as set out in the Reciprocal Enforcement Ordinance must be met. Most notably, the application must be made within six years of the date of the judgment, or, where there has been an appeal against the judgment, of the date of the last judgment given in those proceedings.⁴³ Once the foreign judgment is registered, it can be enforced in Hong Kong as a Hong Kong judgment.

If a foreign judgment cannot be enforced under one of the aforementioned Ordinances, it may be enforced at common law. To enforce at common law, fresh proceedings must be brought by the judgment creditor in the Hong Kong court. The judgment creditor must issue a fresh writ in Hong Kong and serve it on the defendant. The court will not go into the underlying merits of the claim founding the foreign judgment if certain conditions are met. The judgment creditor must prove that the foreign judgment:

- a* is a final and conclusive judgment;
- b* is for a fixed sum of money;
- c* was not obtained by fraud;
- d* was obtained in a foreign court that had jurisdiction over the defendant according to the Hong Kong rules; and
- e* is not contrary to Hong Kong rules of public policy or natural justice.

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

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

42 Schedules 1 and 2 of the Foreign Judgments (Reciprocal Enforcement) Order.

43 Section 4(1) of the Foreign Judgments (Reciprocal Enforcement) Ordinance.

After commencing proceedings, the plaintiff can apply for summary judgment on the basis that the defendant has no defence. If summary judgment is not given, the action will go to trial.

Arbitration awards

Enforcement between Hong Kong and the mainland is governed by the Arrangement Concerning Mutual Enforcement of Arbitration Awards between the Mainland and the Hong Kong SAR, signed in June 1999.

Hong Kong, as part of the PRC, is a party to the New York Convention, which provides for the mutual enforcement of arbitration awards between contracting states. The Hong Kong courts also have discretionary power to enforce arbitration awards from countries that are not party to the New York Convention.

Further, the Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards between the Hong Kong SAR and the Macao SAR was signed in January 2013. Under this arrangement, Macao arbitration awards are enforceable in Hong Kong in the same way as other non-New York Convention awards; the grounds for refusal to enforce a Macao award are in line with the grounds set out in the New York Convention. This legislation deals with the problem brought about by both Hong Kong and Macao having their own judicial systems but not being separate countries for the purpose of the New York Convention, and is similar to legislation already in place between Hong Kong and mainland China.

IV SHIPPING CONTRACTS

i Contracts of carriage

Contracts of carriage in Hong Kong are governed by the Carriage of Goods by Sea Ordinance (Cap 462), which gives the full force of law to the Hague-Visby Rules (the Rules), which have been ratified by Hong Kong.⁴⁴ Provided that one of the criteria set out in the 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.⁴⁵ The Bills of Lading and Analogous Shipping Documents Ordinance (Cap 440) defines what constitutes a bill of lading under Hong Kong law.⁴⁶ Although the Rules do not apply to charter parties *per se*, they are frequently incorporated in charter parties by agreement by way of a clause paramount.⁴⁷

The Rules govern the rights and liabilities of both the carrier and the shipper. Hong Kong is a party to the International Convention for the Safety of Life at Sea (the SOLAS Convention), which makes the International Maritime Solid Bulk Cargoes Code (requiring

44 The Rotterdam Rules and the Hamburg Rules have not been ratified by Hong Kong and are not expected to be in the near future.

45 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.

46 See Section 3 of the Ordinance. See also *Carewins Development* (footnote 35) for the court's ruling that a sea waybill is different from a non-negotiable bill.

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

a declaration to be made by the shipper on the nature of cargo) mandatory for the carriage of bulk cargoes.⁴⁸ This is relevant where allegations are made that a shipper has shipped dangerous goods in breach of the Rules. As regards the application of the Rules, see Section II.

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

Cabotage does not apply in Hong Kong. As Hong Kong is deemed a foreign port under Chinese legislation, it is not subject to Chinese cabotage rules. As a result, Hong Kong remains an attractive transshipment hub for relaying cargoes to Chinese ports. That said, the Chinese cabotage restrictions have been gradually relaxed in certain parts of the mainland since 2013. It was estimated in 2016 that if the mainland's cabotage restrictions were fully relaxed, Hong Kong could lose up to 2.4 million TEUs in transshipment cargo, that is about 14 per cent of Hong Kong's annual total container throughput.⁴⁹ However, China's central government indicated in 2017 that a full relaxation of the laws was not planned thus far.⁵⁰ Currently, China's coastal ports, such as Qingdao, Ningbo and Guangzhou, have been lobbying for a relaxation of their own cabotage rules on foreign vessels. The Nansha Free Trade Zone in Guangdong province is progressively introducing measures to promote transshipment trade, which can increase competition for Hong Kong.⁵¹

ii Cargo claims

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

Contracts (bills of lading)

Who is able to sue?

Under Section 2(2) of the Bills of Lading and Analogous Shipping Documents Ordinance, anybody who is the 'lawful holder' of a bill of lading has title to sue.⁵² This includes (1) a person in possession of the bill who is identified on the bill as the consignee of the goods, (2) a person in possession of the bill as a result of completion, by delivery of the bill, by endorsement of the bill or by transfer of the bill, and (3) a person in possession of the bill as a result of any transaction where he or she would have become a holder under point (1) or (2) when the transaction took place at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates. The holder must be a holder in good faith.

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

49 www.scmp.com/business/companies/article/2045568/relaxed-mainland-port-rules-could-slice-14pc-hong-kongs-container.

50 https://www.joc.com/regulation-policy/transportation-regulations/international-transportation-regulations/no-plans-relax-chinese-cabotage-laws_20170216.html.

51 <https://www.scmp.com/business/global-economy/article/2049041/chinas-easing-cabotage-rules-deals-serious-blow-hong-kong>.

52 The Hong Kong equivalent to the UK's Carriage of Goods by Sea Act 1992.

Who can be sued?

It is important for cargo interests to determine who is the contractual carrier to be sued. If a demise clause is incorporated into the bill, even if the bill is not provided by the shipowner or demise charterer of a vessel (e.g., a charterer's bill), a contract may exist between the shipowner or demise charterer and the shipper. The demise clause will have to show a clear intention to act in such a manner. This has been the subject of previous (English) case law,⁵³ as has the way in which the bill of lading is signed, which can also have legal consequences. In *The 'Starsin'*,⁵⁴ 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.

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

Often, particularly when there is a voyage charter (e.g., GENCON), charter party terms are incorporated into the bill of lading (e.g., CONGENBILL). Whether the charter party terms are incorporated into the bill of lading will depend on the construction of the incorporation clause in the bill. It is thought that when there is a question of which charter party (when a chain exists) applies, the one with the most appropriate legal relationship to the parties will apply.⁵⁵ The position in Hong Kong on the incorporation of a jurisdiction clause mirrors that under English law – the mere incorporation of a charter party in a bill of lading does not bring an arbitration clause with it, unless sufficiently clear words exist to show that intention.⁵⁶ The legal analysis applied to determine whether other charter party terms are incorporated (e.g., terms that relate to 'charterers') also follows English law.

Suing under a letter of indemnity

Bills of lading are documents of title. As a result, disputes can arise if cargo is released without presentation of the original bills. In the *River Globe* case,⁵⁷ the shipowners accepted a letter of indemnity (LOI) issued by head charterers who had, in turn, received an LOI from sub-charterers. Subsequently, the true holder of the bills brought a claim against the shipowners for the wrongful release of the cargo and threatened the arrest of the vessel. The shipowners relied upon the LOI and demanded that the head charterers either put up bail or security, or pay the claim. Head charterers made a similar demand on the sub-charterers under the second LOI; the sub-charterers refused. The head charterers successfully applied for a mandatory injunction compelling the sub-charterers to provide bail or security under the LOI. In *Cargill International Trading Ltd v. Loyal Base Development Ltd*,⁵⁸ the Hong Kong court again enforced an LOI for delivery of cargo without presentation of original bills of lading by granting a mandatory injunction compelling the LOI provider to perform the undertakings given in the LOI.

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

54 [2003] 1 Lloyd's Rep 571.

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

56 The ruling in *Astel-Peinger Joint Venture v. Argos Engineering & Heavy Industries Co Ltd* [1995] 1 HKLR 300 examined and agreed with the position under English law.

57 [2014] HKCFI 1876.

58 HCCL 12/2015, judgment dated 24 December 2015.

Time limits and bars

Time limits apply to any cargo claim made under the Hague-Visby Rules. Notice of loss or damage must be given by the party claiming the damage within three days of the cargo being delivered (failure to do so has evidential consequences), while any proceedings, unless an extension of time is agreed between the parties, will be substantively time-barred if they are not brought within one year of the date of delivery or the date when the cargo should have been delivered.⁵⁹

If the Hague-Visby Rules do not apply, then the normal six-year time bar for contract and tort applies; however, for cargo claims, the Hague-Visby Rules generally will apply (e.g., by virtue of a clause paramount, sub-bailment on terms or a *Himalaya* clause) and cautious claimants will respect the one-year time bar even if in doubt as to whether it applies. To protect time, proceedings must be commenced in the correct jurisdiction.⁶⁰ If that is in Hong Kong, a writ must be issued and served within its validity (one year counting from the date of issuance of the writ).⁶¹

iii Limitation of liability

On 3 May 2015, the Merchant Shipping (Limitation of Shipowners Liability) (Amendment) Ordinance 2005 came into effect in Hong Kong and increased the limits for personal injury and other claims from the traditional 1976 limits⁶² to the limits provided for by the original 1996 Protocol.⁶³ Only the provisions of the Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC Convention) ‘as set out in Schedule 2’ of the Merchant Shipping (Limitation of Shipowners Liability) Ordinance (Cap 434) (LSL Ordinance) have force of law in Hong Kong (see Sections 12 to 23 of the Ordinance). The 1996 Protocol limits under the LLMC Convention were increased on 8 June 2015.⁶⁴ On 4 December 2017, Hong Kong applied the IMO’s latest amendments to the limits under the 1996 Protocol.⁶⁵ These amendments significantly increased the limits of liability that were in force from 2015. In respect of loss of life and personal injury claims for ships not exceeding 2,000 tons, the new limit is 3.02 million special drawing rights (SDRs) (up from 2 million SDRs) plus additional amounts for larger vessels. In respect of any other claims for ships not exceeding 2,000 tons, the new limit is 1.51 million SDRs (up from 1 million SDRs) plus additional amounts for larger vessels. These increased figures can be found in Schedule 2 to the LSL Ordinance.⁶⁶

Under Hong Kong law, a person may limit his or her liability for claims in respect of loss of life or personal injury, or loss of or damage to property (such as other ships, harbour works, basins or waterways and aids to navigation). To limit liability, a person merely has to establish that the claims in respect of which he or she is alleged to be liable fall within Article 2 of the

59 Article III(6) of the Hague-Visby Rules.

60 *The ‘Pioneer Container’* [1994] 2 AC 32.

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

62 treaties.un.org/doc/Publication/UNTS/Volume%201456/volume-1456-I-24635-English.pdf. Under the Convention on Limitation of Liability for Maritime Claims 1976 (the LLMC Convention).

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

64 *ibid*.

65 www.elegislation.gov.hk/hk/2017/ln155/en.

66 Article 6 of Schedule 2 to the LSL Ordinance.

Convention 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 a 'personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result'. This is a high burden to overcome. The English Admiralty Court commented *obiter* in *Saint Jacques II* that 'it is likely that only truly exceptional cases will give rise to any real prospect of defeating an owner's right to limit'.⁶⁷ The UK limits were in fact successfully broken in *Atlantik Confidence*, but that decision turned on a set of unique facts.⁶⁸ Therefore, the position in *Saint Jacques II* is likely to be followed by the Hong Kong courts.

Under Section 22(4) of the LSL Ordinance, 'owner' includes any part owner, charterer, manager or operator of a ship, and in *Metvale Ltd v. Monsanto International Sarl (The 'MSC Napoli')*, the English Admiralty Court held that the word 'charterer' in the equivalent UK legislation includes a slot charterer.⁶⁹ This case is likely to be followed by the Hong Kong courts.

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

V REMEDIES

i Ship arrest

Arrest in Hong Kong

The Brussels Convention applies in Hong Kong. The maritime claims for which a ship may be arrested are set out in Section 12A(2) of the High Court Ordinance (Cap 4) and include claims in relation to possession or ownership of, or mortgage on, a ship, loss of life or personal injury because of a defect in a ship, damage done by or to a ship (including pollution) and loss of or damage to goods carried by ship and other claims relating to carriage of goods by ship. Claims for insurance premiums⁷⁰ and contracts for the sale of a ship are not included.⁷¹ One can arrest a vessel in Hong Kong for the purpose of obtaining security in aid of foreign proceedings.

A ship under any flag may be arrested in Hong Kong and security arrests are permitted. Generally, the only precondition to an arrest in Hong Kong is that the claim falls within Section 12A(2) of the High Court Ordinance. Cases have arisen concerning a ship manager's right to arrest: namely, *Ruby Star*, *Oriental Dragon* and *King Coal*.⁷² The first two cases suggest that even when ship managers keep a running account, as long as the underlying items in that

⁶⁷ [2002] EWHC 2452 [18].

⁶⁸ [2016] EWHC 2412; [2017] 2 CLC 268.

⁶⁹ [2008] 2 CLC 944; see also *Decurion* [2013] 2 HKLRD 930.

⁷⁰ *Oriental Dragon* [2014] 1 HKLRD 649.

⁷¹ *Hong Ming* [2011] 5 HKLRD 139.

⁷² *Ruby Star* [2014] HKCU 205 and [2015] 1 HKLRD 543; *Oriental Dragon* [2014] 1 HKLRD 649; and *King Coal* [2013] 2 HKLRD 620.

running account would give rise to an *in rem* claim, managers have a right to arrest a vessel (although only for *in rem* claims – and the security put up was reduced to the extent that the claims were not *in rem* claims). The *Ruby Star* appeal decision⁷³ clarifies that the admiralty jurisdiction has to exist at the time of commencement of the action (i.e., the issuance of the writ) – in *Ruby Star* it did not, since the appropriation of the sums to the bunker claims was not exercised at the commencement of the action but afterwards. This was fatal to the arrest as the *in rem* right of action had to exist at the time the action was commenced.

Oriental Dragon suggests that managers are entitled to arrest in respect of unpaid management fees (not previously thought to be the case). *King Coal* is authority that where a statutory *in rem* crew wages claim is assigned, the right to arrest is lost. This is because of the express wording of Section 12A(2)(n) of the High Court Ordinance: ‘Any claim by a Master or member of the crew’ does not provide for a party with assigned rights to make an *in rem* arrest. *Fearless I*⁷⁴ follows the *King Coal* decision. It is the authority that if a party that does not have a valid *in rem* claim against a vessel (in this case, the assignees of the master’s and the crew’s rights to wages) nonetheless arrests the vessel, that party should not be reimbursed from the proceeds of sale.

In *Alas*,⁷⁵ the Hong Kong High Court was asked whether a party could arrest, notwithstanding that the party had already obtained an LMAA arbitration award. The Court held that as long as the claim was based on the original underlying *in rem* cause of action (under Section 12A(2) of the High Court Ordinance), and was not simply a claim to enforce an award issued by a tribunal, it could be brought. Following the *Rena K*⁷⁶ decision, the Court held that an action *in rem* does not merge in a judgment *in personam* but remains available as long as the award remains unsatisfied. Both the High Court and the Court of Appeal⁷⁷ refused the right to appeal the decision in *Alas*, confirming that a security arrest is possible in Hong Kong even after an arbitration award has been obtained in a foreign jurisdiction. However, this is not possible in respect of judgments in view of Section 5 of the Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance (Cap 46).

Ownership

When exercising its admiralty jurisdiction, the court must be satisfied that the person who would be liable for the claim *in personam* was either the sole beneficial owner of the vessel or the demise charterer at the time the *in rem* action is commenced. In the *Almojil 61* case,⁷⁸ the Hong Kong High Court exercised its admiralty jurisdiction against the beneficial owner as stated on the (Dominican) shipping register, and the vessel was arrested and, in turn, sold. A second company (not on the register) alleged that it was the co-owner of the vessel and sought to claim proceeds of the sale. The Court held that the shipping register was of formal importance and it would not go behind the register except in exceptional or special circumstances – such as where the registration of a vessel is procured by fraud. A similar conclusion was subsequently reached in *Bo Shi Ji 393*, in which *Almojil 61* was followed and the Court refused to overlook the ownership details set out in a Vessel Ownership Registration

73 [2015] 1 HKLRD 543.

74 [2013] 5 HKLRD 48.

75 *Alas* [2014] 4 HKLRD 160.

76 *Rena K* [1979] QB 377.

77 HCMP2315/2014, judgment dated 9 July 2015.

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

(and was not in any event satisfied, on the evidence presented, that another individual (not the owner of the arrested sister ship) was the owner of the vessel that had sunk at the time the writ was issued).⁷⁹

Sister ship arrests

By virtue of Section 12B(4) of the High Court Ordinance, sister ship arrests are permitted under Hong Kong law. Under Section 12B(4), a sister ship may be arrested if, when the cause of action arose, the defendant was the ‘owner or charterer of, or in possession or in control’ of the offending ship, and at the time when the action is brought, the defendant is ‘the beneficial owner as respects all the shares’ of the ship to be arrested. In the *Decurion* case,⁸⁰ the Hong Kong High Court limited the scope for sister ship arrest, deciding that ‘control’ for the purposes of Section 12B(4) must mean something more than the control that would normally come with the possession of a ship. It was decided that ‘control’ of the ship rests with the person who is able to tell the person in possession of the ship what to do with the ship. By limiting the definition of control, the High Court has kept the test for whether or not an arrest can be made simple. A key passage of the judgment is:

*[T]he court is not looking to see if a party is exercising control over a company which is the charterer but to see if it is exercising control over the ship itself. Unless the corporate veil is lifted, the separate corporate identity of the contracting party in the charter party relationship cannot simply be ignored.*⁸¹

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

Procedure

A ship may be arrested if the arresting party has a cause of action that carries with it a right of arrest. A party wishing to arrest in Hong Kong must first issue an *in rem* writ against the ship in the Hong Kong admiralty jurisdiction of the Court of First Instance. No counter-security is required although the arresting party has to provide an undertaking (usually in form of a solicitor’s undertaking) to pay the bailiff’s expenses of the arrest and the costs of maintaining the ship under arrest.

Before an arrest can be made, the person who intends to arrest the vessel should check that no caveats against arrest have been entered into the caveat book,⁸² and, if not, prepare to file in court a writ of summons (and blank acknowledgment of service), warrant of arrest, praecipe for service of writ *in rem*, praecipe for warrant of arrest, undertaking and affidavit to lead to arrest (arrest papers).⁸³ 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

79 [2015] 3 HKLRD 424, [28].

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

81 *ibid.*, [67].

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

83 Order 75, Rules 3, 5, 8 and 23A of Cap 4A.

material facts stated in it.⁸⁴ The affidavit is the only evidential requirement for arrest and the arresting party need only establish a *prima facie* right to arrest, in good faith, as reaffirmed in *Bo Shi Ji* 393. Once completed, the relevant arrest papers (and cheques for the applicable fees) should be taken to the bailiff. The bailiff will check to see whether a caveat is entered against the named vessel. After checking that there is no caveat against arrest entered for the vessel, the bailiff will endorse the arrest papers. The bailiff will then take the papers to the Registrar of the High Court, who will review the arrest papers and issue the warrant.⁸⁵ The bailiff will then notify the Hong Kong Marine Department that a warrant for arrest has been issued, which means that the ship will not be allowed to sail. The bailiff then travels to the ship to serve the warrant on the ship. As Hong Kong is relatively small, and most vessels are arrested while calling or anchoring at Hong Kong, we are unaware of any arrests by helicopter.

The party applying to arrest the vessel bears the cost of maintaining the vessel while it is under arrest. Further security will be charged daily. The party applying to arrest the vessel will also be liable for the bailiff's expenses and any overtime. Further, it may be necessary to pay to bunker and provision the vessel and its crew.

Wrongful arrest

Depending on the facts and conduct of the parties, the warrant of arrest may be set aside and the owner of the arrested ship can make a claim for damages for wrongful arrest; however, the Hong Kong courts are reluctant to award damages for wrongful arrest and a claim will only succeed where the arresting party acted in bad faith or in a grossly negligent manner.⁸⁶ The onus is on the owner of the arrested ship to prove bad faith or gross negligence on the part of the arresting party and this requires a very high level of proof. In *The 'Hong Ming'*,⁸⁷ Mr Justice Reyes set aside the arrest and unusually ordered an inquiry for damages for wrongful arrest. However, this decision does not seem to have lowered the threshold, as in the subsequent judgment in *Cosmotrade Exports SA v. Owners and/or Demise Charterers of Ship or Vessel 'Jimrise'*, the same judge set aside the arrest on the basis that the demise charterers were not the demise charterers at the time of arrest but refused to order an inquiry into damages on the basis that he was 'not persuaded that Cosmotrade has shown any degree of malicious negligence to justify an inquiry into damages'.⁸⁸

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 is more common. The latter method relates to enforcement (e.g., by way of a writ of *feri facias*), regarding which see Section III.iii.

When *in rem* claims are defended, ordinarily the vessel's owners (or their P&I club) will put up security to allow the vessel to depart with the claim to be litigated in an appropriate forum. Thus, when a claim is defended, ordinarily the vessel will not be sold.

The situation is different when the vessel's owners are in financial difficulty. A sale *pendente lite* is possible, and an order can be made within six to eight weeks in limited

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

85 Order 75, Rule 10 of Cap 4A.

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

87 [2011] 5 HKLRD 139.

88 [2012] HKEC 79 [38].

circumstances when a vessel has been arrested in Hong Kong but before an award or judgment has been obtained, essentially to stop asset wastage pending a judgment. The court will require a good reason to make such an order (e.g., where the costs of maintaining the arrest may exceed the value of the claim, thereby diminishing the value of the plaintiff's security).

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

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

Broadly, the order of priorities is as in England.⁸⁹ For buyers, the attraction of purchasing a vessel sold by the court is that it will be free of encumbrances.⁹⁰

VI REGULATION

i Safety and port state control

The Marine Department (MD) of Hong Kong Special Administrative Region is the main body responsible for administering the port of Hong Kong, the responsibility vesting in the Director of Marine. The Director of Marine is supported by various advisory, statutory and consultative or governmental bodies, such as the Port Operations Committee, the Pilotage Advisory Committee, the Local Vessels Advisory Committee and the Hong Kong Maritime and Port Board (the latter having been formed by the merger of the Hong Kong Port Development Council and Hong Kong Maritime Industry Council in April 2016). The MD ensures that ships are able to enter a port, load or discharge cargo and then leave the port as quickly and as safely as possible. It also regulates aspects of safety and pollution.⁹¹ As a key flag state, Hong Kong is mindful of the need to uphold standards and maintain an excellent safety record, and to this end most key maritime conventions are applicable.

Hong Kong signed the Tokyo MOU in December 1993 and became a member of the Port State Control Committee in the Asia-Pacific Region.⁹² The MD carries out port state control inspections on ships visiting Hong Kong in accordance with IMO Resolution A.1052(27) and the Tokyo MOU Port State Control Manual. If any serious deficiencies are noticed, the ship will be detained and the ship's agent or owner, classification society and flag state will be notified of the detention and told how to rectify the situation. Serious deficiencies affecting the seaworthiness of a ship or the safety of the crew, or causing damage

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

90 Meeson, *Admiralty Jurisdiction and Practice* (3rd Edition, 2003), page 157.

91 www.mardep.gov.hk/en/aboutus/functions.html.

92 www.mardep.gov.hk/en/aboutus/pdf/psc.pdf.

to the marine environment, have to be rectified prior to the ship's departure.⁹³ There is an appeal mechanism against any detention under Section 66 of the Shipping and Port Control Ordinance (Cap 313). Monthly detention lists, starting from 1998, can be found on the MD website.⁹⁴

On 1 July 2016, the amendments to Chapter VI Regulation 2 of SOLAS on the weighing of containers became effective globally. This means that in Hong Kong, as in other SOLAS Member States, a packed container can only be loaded onto a vessel if its weight has been verified and communicated to the ship. The amendments were brought into effect by Section 3A of the Merchant Shipping (Safety) (Carriage of Cargoes and Oil Fuel) Regulation (Cap 369AV). Shippers in Hong Kong must submit the procedure for 'Method 2' weighing to the MD for approval whether the container has been packed in Hong Kong or not.⁹⁵ The penalties for a 'specified' person who breaches the regulation could be a fine of up to HK\$20,000 or imprisonment for up to two years, or both.⁹⁶ This could also include a master or terminal operator who loads a container without a verified gross mass figure. Hong Kong appears to be implementing the amendments to SOLAS more actively than other jurisdictions. However, there are yet to be any cases involving breaches and it is not clear how strictly the MD, as the competent authority, will enforce its powers.

ii Registration and classification

Registry

The Hong Kong Shipping Register was set up on 3 December 1990 pursuant to the Merchant Shipping (Registration) Ordinance (Cap 415).⁹⁷ Under Section 11(1) of the Ordinance, a ship can be registered in Hong Kong if a representative person is appointed in relation to the ship and the majority interest in the ship is owned by one or more qualified persons or the ship is operated under a demise charter by a corporation that is a qualified person (i.e., an operator register). The ship must also not be registered elsewhere. Section 11(4) provides that a qualified person is (1) an individual who holds a valid identity card and who is ordinarily resident in Hong Kong, (2) a body corporate incorporated in Hong Kong, or (3) a registered non-Hong Kong company as defined by Section 2(1) of the Companies Ordinance. There are three types of registration: provisional, full and demise charter (bareboat charter). This means that a demise charterer can register a vessel in Hong Kong.

Procedure

An application must be made to the MD Shipping Registry. The application consists of, inter alia, an application form and a declaration of entitlement. The Shipping Registry will approve the ship name, allot a call sign and official number, and issue the ship's marking note for the ship's master to complete. A certificate or declaration of marking is then signed by the ship's master or classification society surveyor. The applicant then submits the title certificate of ownership or encumbrance, the builder certificate or bill of sale and other documents

93 www.mardep.gov.hk/en/others/home.html.

94 www.mardep.gov.hk/en/others/dlist.html.

95 www.mardep.gov.hk/en/pub_services/ocean/pdf/miss_vgm_guidelines.pdf.

96 *ibid.* A maximum tolerance in weight of +/5 per cent and +/0.5 tons is allowed between the verified gross mass declared by shippers and the verified gross mass obtained by Marine Department, carrier or terminal for container's gross mass above 10 tons and 10 tons or below respectively.

97 https://www.mardep.gov.hk/en/pub_services/home.html.

as required by the Registry. The Registry will issue a certificate of registry (or a provisional certificate of registry) and the application is complete.⁹⁸ The evidence to be produced for ship registration is set out in Section 21 of the Merchant Shipping (Registration) Ordinance. The Hong Kong Shipping Register registers mortgages on full and provisional registration.⁹⁹

Pre-registration quality control system

The pre-registration quality control system (PRQC) was introduced in 2004 to ensure ships joining the Register comply with applicable safety and pollution prevention standards of the relevant international conventions. Upon receiving an application to join the Register, the MD will assess the conditions of the ship and determine whether a PRQC inspection is required. If the condition of a ship is found unacceptable, registration will be refused.¹⁰⁰

Classification societies

There are nine well-known classification societies that are authorised to act on the MD's behalf to perform survey and certification functions for Hong Kong-registered ships:¹⁰¹

- a* the American Bureau of Shipping;
- b* Bureau Veritas;
- c* the China Classification Society;
- d* DNV GL;
- e* Lloyd's Register;
- f* Class NK (Nippon Kaiji Kyokai);
- g* Korean Register of Shipping;
- h* Registro Italiano Navale (RINA); and
- i* Russian Maritime Register of Shipping.

iii Flag state control

A ship quality control system known as the Flag State Quality Control (FSQC) System was developed in 1999 for monitoring and maintaining the quality of ships under the Hong Kong Shipping Register. The system ensures that ship management companies perform inspection and survey on their ships in line with international conventions. Any Hong Kong-registered ships whose quality standards appear to be doubtful will be subjected to FSQC inspections and recommendations for improvement.¹⁰² For instance, if a Hong Kong-registered ship is detained abroad with serious deficiencies under port state control inspection or subjected to a serious accident, the MD may require a FSQC inspection to be conducted on the ship by a MD's surveyor; if deemed necessary, the company may also be audited to verify whether its safety management system complies with the ISM Code.¹⁰³

98 https://www.mardep.gov.hk/en/pub_services/pdf/sr_handbook.pdf.

99 www.mardep.gov.hk/en/pub_services/reg_gen.html; see Sections 44 and 50 of the Merchant Shipping (Registration) Ordinance.

100 www.mardep.gov.hk/en/pub_services/qas.html.

101 https://www.mardep.gov.hk/en/pub_services/surveycs.html.

102 www.mardep.gov.hk/en/aboutus/hkfactsheet.html.

103 www.mardep.gov.hk/en/pub_services/qas.html.

iv Environmental regulation

Hong Kong is committed to implementing MARPOL 73/78, which is the principal international convention aimed at preventing or minimising pollution of the environment resulting from ship operations. The convention has six annexes:

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

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

Under Annex VI, the global sulphur content of marine fuel on the high seas was capped at 3.5 per cent starting from January 2012.¹⁰⁴ In 2011, 17 major ship liners in Hong Kong launched the Fair Winds Charter, an initiative committed to switching to fuel with no more than 0.5 per cent sulphur content as far as possible when berthing in Hong Kong waters.¹⁰⁵ To encourage ocean-going vessels (OGVs) to switch to cleaner fuel while at berth, incentive schemes to halve the port facilities and light dues charged on OGVs using fuel with sulphur content not exceeding 0.5 per cent while at berth were also launched by the government from September 2012 to March 2018.

The Hong Kong Air Pollution Control (Marine Light Diesel) Regulation (Cap 311Y) came into effect on 1 April 2014. This Regulation provides for the specifications that must be met by marine light diesel suppliers in Hong Kong.¹⁰⁶ It also provides for the requirement on importers and suppliers of light diesel to keep records. In particular, the Regulation states that sulphur content of marine light diesel must not exceed 0.05 per cent by weight.

The Air Pollution Control (Ocean Going Vessels) (Fuel at Berth) Regulation (Cap 311AA) (repealed), which mandates OGVs to use clean fuels while berthing in Hong Kong, took effect on 1 July 2015. This has since been replicated by the mainland's emissions control areas (ECA) programme in neighbouring Pearl River Delta ports. Under the programme, from 1 January 2019 all vessels will have to change to low sulphur fuel (not exceeding 0.5 per cent sulphur) prior to entering the Pearl River Delta ECA (including Hong Kong). On 1 January 2019, the Air Pollution Control (Fuel for Vessels) Regulation (Cap 311AB) came into force in Hong Kong, requiring vessels plying Hong Kong waters to use cleaner fuel to complement the efforts under the programme. The masters and owners of any OGVs using non-compliant fuel in Hong Kong waters, irrespective of whether sailing or berthing, and ship masters and owners who fail to keep records (for three years), will be liable to fines and imprisonment.¹⁰⁷

104 www.epd.gov.hk/epd/english/boards/advisory_council/files/ACE_Paper_10_2013.pdf.

105 *ibid*.

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

107 Sections 5, 13 and 14 of Cap 311AB.

As confirmed at the 70th session of the Marine Environment Protection Committee in October 2016, from 1 January 2020 the limit for sulphur in fuel oil used on board ships operating outside designated emission control areas will be reduced to 0.50 per cent mass by mass under Regulation 14.1.3 of MARPOL Annex VI.¹⁰⁸

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

v Collisions, salvage and wrecks

Collisions

The Merchant Shipping (Safety) (Signals of Distress and Prevention of Collisions) Regulations (Cap 369N) gives the International Regulations for Preventing Collisions at Sea 1972 (COLREGs) force of law in Hong Kong. It is an offence under the Shipping and Port Control Ordinance (Cap 313) to contravene any of the COLREGs, although it is a defence for the person charged to prove that he or she has taken all reasonable precautions.¹⁰⁹ The decision of the Court of Final Appeal in *Kulemesin Yuriy and Tang Dock-Wah v. HKSAR*¹¹⁰ 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*,¹¹¹ 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.¹¹²

The Admiralty Jurisdiction of the Court of First Instance includes the jurisdiction to hear and determine claims for damage done by a ship and claims for loss of life or personal injury.¹¹³ The Merchant Shipping (Collision Damage Liability and Salvage) Ordinance (Cap 508) (the CDLS Ordinance) enacts the provisions of the (now repealed) Maritime Conventions Act 1911 (UK). Accordingly, the doctrine of proportionate fault applies with respect to claims for property damage;¹¹⁴ 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.¹¹⁵ 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.¹¹⁶ If it is not possible to establish degrees of fault, the liability is apportioned equally.

108 <https://www.lr.org/en/sulphur-2020-options-evaluator/>; www.imo.org/en/mediacentre/hottopics/pages/sulphur-2020.aspx.

109 Section 10 of Cap 313.

110 [2013] 16 HKCFAR 195.

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

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

113 Sections 12A(2)(f), (3)(b) and 12C of Cap 4.

114 Section 3 of Cap 508.

115 Section 4 of Cap 508.

116 Section 5 of Cap 508.

Collision claims will invariably be in tort, not contract. Hong Kong follows English law in that pure economic loss can only be recovered as a consequence of physical damage to, or interference with, property of the claimant.¹¹⁷

There is a two-year limitation period for civil claims arising out of a collision.¹¹⁸

Salvage

The provisions of the International Convention on Salvage 1989 (Salvage Convention) applies in Hong Kong by way of Section 9 of the CDLS Ordinance. There is no standard form of salvage agreement under Hong Kong law. Any salvage contracts governed by Hong Kong law would be treated in the same manner as any other contract made under Hong Kong law. Pursuant to Section 12A(2)(i) of the High Court Ordinance, the Admiralty Jurisdiction of the Court of First Instance consists of jurisdiction to hear and determine any claim under the Salvage Convention, any claim under any contract for or in relation to salvage services, or any claim in the nature of salvage; however, the provisions of the Salvage Convention do not apply when the property involved is maritime cultural property of prehistoric, archaeological or historical interest and is situated on the seabed.¹¹⁹

There is a two-year limitation period for salvage claims, commencing from the day on which the salvage operations are terminated.¹²⁰

Wreck removal

Section 21 of the Shipping and Port Control Ordinance empowers the Director of Marine to give the owner or the master of a vessel that is stranded, abandoned or sunk in the waters of Hong Kong directions as he or she sees fit in respect of the removal, raising or destruction of the vessel, and it is an offence not to comply with those directions. The Director has wide powers to contract with tugs and salvors for this purpose. Pursuant to Section 12 of the Merchant Shipping (Limitation of Shipowners Liability) Ordinance, most of the provisions of the LLMC Convention have force of law in Hong Kong; however, claims in respect of the raising, removal, destruction or the rendering harmless of a ship that has been sunk, wrecked, stranded or abandoned are not subject to limitation of liability under Hong Kong law.¹²¹ The Nairobi WRC 2007 came into force in China on 11 February 2017, but China's ratification does not apply to Hong Kong or Macao.

Recycling

There is no specific legislation governing the dismantling and recycling of ships under Hong Kong law. The Hong Kong Convention has not yet been ratified by China on behalf of Hong Kong.¹²²

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

118 Section 7 of the Merchant Shipping (Collision Damage Liability and Salvage) Ordinance.

119 Section 2(1)(c) of Part II of Schedule 1 of Cap 508.

120 Article 23 of the International Convention on Salvage 1989.

121 Section 15 of the Merchant Shipping (Limitation of Shipowners Liability) Ordinance, unless an order has been made under that subsection 15(1).

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

vi Passengers' rights

The Merchant Shipping (Limitation of Shipowners Liability) Ordinance gives effect to both the LLMC Convention and the Athens Convention. These two Conventions are set out in Schedules 1 and 2 to the Ordinance, respectively. Under the Ordinance, claims made under the Athens Convention would not affect the right of a passenger to bring a claim under the LLMC Convention.¹²³

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

The limitation period for a passenger to bring a personal injury claim under the Athens Convention is two years.¹²⁴

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

vii Seafarers' rights

The Maritime Labour Convention 2006 (MLC) was adopted by the ILO to protect seafarers' rights to decent employment. It contains a comprehensive set of global standards governing the working and living conditions of seafarers on board ocean-going ships in 14 areas, including minimum age, medical certification, qualifications, hours of work and rest, accommodation and food. The MLC came into force on 20 August 2013, in jurisdictions of those ILO Member States that have ratified it. Hong Kong is not a member of the ILO but the MLC has been ratified by the PRC on behalf of Hong Kong. In December 2018, the MLC came into force, together with the relevant provisions in the Merchant Shipping (Seafarers) Ordinance (Cap 478) and its subsidiary legislation to implement the requirements under the MLC.¹²⁵ All Hong Kong registered ships of 500 gross tonnage and above engaged on international voyages must obtain a Declaration of Maritime Labour Compliance (DMLC Part I & II) and a Maritime Labour Certificate. The Amendments of 2014 to the MLC became effective on 18 January 2017.¹²⁶ The Amendment provides for requirements to ensure the provision of an expeditious and effective financial security system to assist seafarers in the event of their abandonment.¹²⁷

Working standards and employment conditions for seafarers are specified in the Merchant Shipping (Seafarers) Ordinance (Cap 478) (MSSO) and its subsidiary legislation.

The Merchant Shipping (Seafarers) (Amendment) Bill 2013 was passed on 6 November 2013¹²⁸ and became the Merchant Shipping (Seafarers) (Amendment) Ordinance 2013.¹²⁹ The Ordinance sought to align existing definitions and provisions under

123 Section 3(1) of Cap 434.

124 Article 16 of Schedule 1 of Cap 434.

125 www.mardep.gov.hk/en/pub_services/pdf/mlc181016.pdf.

126 www.ilo.org/dyn/normlex/en/?p=1000:11200:0::NO:11200:COUNTRY_ID:103578;
www.mardep.gov.hk/en/pub_services/pdf/mlc161111.pdf.

127 www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_248905.pdf.

128 www.legco.gov.hk/yr12-13/english/bc/bc06/general/bc06.htm.

129 www.legco.gov.hk/yr13-14/english/ord/ord016-13-e.pdf.

the MSSO with the MLC. The major amendments included amending the definition of 'seafarer', allowing seafarers' organisations to provide recruitment and placement services, and to adopt the 'direct reference approach' in making subsidiary legislation under the MSSO for implementing the requirements of international agreements applicable to Hong Kong. There were also some miscellaneous amendments, including the removal of a provision that allows a company engaged in the supply of seafarers to recover from seafarers part of the prescribed fee paid to the government for their employment, as well as the removal of a restriction that persons aged 35 years or above cannot be registered with the MD for employment as seafarers. Sections 1, 2(1), 3(11)(c), 4 7(11), 10 and 66 of the Merchant Shipping (Seafarers) (Amendment) Ordinance 2013 became effective on 1 December 2016.¹³⁰

VII OUTLOOK

i Current developments

The Competition Ordinance

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

The Competition Ordinance does not currently treat the shipping sector differently from any other sector. This is largely because the Ordinance is new and has not evolved over time. It is, however, a major concern for those in the liner shipping industry, where market organisation has traditionally favoured a variety of cooperative elements, such as (1) consortia and vessel-sharing agreements (VSAs), which are agreements that focus on a particular route, and (2) 'looser' voluntary discussion agreements (VDAs), which have no common tariff but provide a forum for members to discuss the trade and may provide recommendations for general rate increases.

On 17 December 2015, an application for a block exemption order (BEO) was made by the Hong Kong Liner Shipping Association, which made it clear that block exemptions for VDAs and VSAs were being sought. On 14 September 2016, the Hong Kong Competition Commission published a proposed BEO (and preliminary views) that exempts VSAs.¹³¹ However, the proposed BEO does not propose the exemption for VDAs, citing that the rate stability and surcharge transparency as claimed did not justify an exemption. The proposed BEO is in line with the EU approach but not with the approach in the United States and Singapore, where both VSAs and VDAs are exempt.

The tramp shipping sector may also be affected by the Ordinance as it is not unusual in this sector for pools to be formed. In the European Union, the operators of pools tend to

¹³⁰ www.mardep.gov.hk/en/msnote/pdf/msin1646anx14.pdf.

¹³¹ www.compcomm.hk/en/enforcement/registers/block_exemption/files/Notice_issued_under_section_16_of_the_Competition_Ordinance_of_a_proposed_block_e.pdf. The BEO is subject to (1) the combined market share of the parties to the VSA not exceeding 40 per cent, (2) the VSA does not authorise anticompetitive behaviour (e.g., price fixing), and (3) parties being able to withdraw from the VSA without penalty.

self-assess their arrangements to be able to prove, if challenged, that they were entitled to rely on the efficiency exemption (to the First Conduct Rule). As the Hong Kong Competition Commission is a new regulator, we must wait to see how it will approach the shipping industry.

ii What next?

Hong Kong's geographical location and proximity to the mainland has always cemented its position as a major maritime hub in the region. It is now facing challenges on its doorstep from the rise of container ports such as Shenzhen, Nansha and Shanghai. Hong Kong is no longer a major direct shipment port (given the move of manufacturers to other countries) and relies principally on its role as a transshipment port. Yet, free trade zones and the threat of liberalising cabotage regulation (see Section IV.i) may mean a further decrease in throughput.

On 14 December 2017, Hong Kong's Chief Executive, Carrie Lam, signed an agreement with the Chinese government strengthening Hong Kong's position in China's Belt and Road Initiatives. The agreement focuses on finance and investment, infrastructure and maritime transport, economic and trade facilitation as well as developing Hong Kong's place in the Greater Bay Area initiative in the Pearl River Delta. In April 2016, the government set up the Hong Kong Maritime and Port Board to devise maritime and port-related strategies and initiatives.¹³² These include the deepening of the Kwai Tsing container basin and approach, better efficiency of land use and additional barge berths.

In the recent 2018 Policy Address, the Chief Executive highlighted that Hong Kong should capitalise on the opportunities brought by the Belt and Road Initiatives and the Greater Bay Area development to develop high value-added maritime services. The government will implement measures to support and enhance the development such as exploring streamlining regulation, offering facilitation and measures in support of Hong Kong's provision of reliable and quality dispute resolution services, providing tax reliefs to promote the development of marine insurance and injecting HK\$200 million into the Maritime and Aviation Training Fund to enhance the training and nurturing of talent for the sectors.¹³³

With the impending implementation of the new Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the HKSAR in 2019, along with the new HKIAC Rules 2018, Hong Kong's role in the Belt and Road Initiatives as a prime location for dispute resolution will be further reinforced and advanced.

Hong Kong also has myriad established maritime services from ship managers, brokers, P&I clubs, consultant experts and lawyers, which will help preserve Hong Kong's position as a maritime hub in Asia.

¹³² www.hkmpb.gov.hk/en/vision-statement.html.

¹³³ www.policyaddress.gov.hk/2018/eng/policy_ch04.html.

INDIA

Amitava Majumdar, Aditya Krishnamurthy, Jyotika Jain and Damayanti Sen¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

India has an untapped potential to leverage its 7,500 kilometres of coastline spanning nine states and four union territories albeit India's merchandise trade has grown at more than twice the growth rate of the world merchandise exports over the past decade. Over the past five years Indian policymakers have sought to emulate the Chinese export-led development miracle and the same has been satisfactory. Despite a near doubling in India's share in world exports from 0.9 per cent in 2005 to 1.7 per cent in 2016, the same is dwarfed by China, which in 2005 was 7.3 per cent and rose to 13 per cent in 2016. More than 90 per cent of India's merchandise trade by volume and around 70 per cent by value is moved through maritime transport. At present there is 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.

Recently the Indian government has made a concerted effort to switch to clean fuel and citizens below a certain income range have been granted a greater subsidy to encourage the consumption of liquefied natural gas. This has led 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. India is dependent on importing coal from countries such as Indonesia, Australia and South Africa for its thermal power plants, which account for the bulk 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 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.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Shipping in India is centrally regulated and exclusively controlled by the government of India. The government regulates shipping 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

¹ Amitava Majumdar (Raja) is the managing partner, Aditya Krishnamurthy is a partner, and Jyotika Jain and Damayanti Sen are senior associates at Bose & Mitra & Co.

Maritime Organization. The MSA is a general umbrella legislation to deal with merchant shipping. The MSA empowers the DG Shipping to promulgate delegated legislation such as circulars and notifications to deal with 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 Load Line Conventions.

The MoS has a chartering wing (Transchart) to broker transportation of government-owned and government-controlled cargoes. 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. Transchart regularly finalises long-term time charter parties, 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.

With the exception of 12 designated 'major ports', all ports 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. Recently in a number of 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 Tariff Authority for the Major Ports (TAMP) is a regulatory body, or quasi-judicial authority, that deals with the levy of port tariffs such as berthing charges and anchorage charges on ships calling at the 12 major ports. Unfortunately there is no regulatory authority along these lines for ports other than the 12 major ports and this has resulted in a number of litigations relating to the arbitrary and capricious conduct of private terminal operators levying tariffs on ships calling at these ports.

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 an Indian flagged vessel only to take advantage of the cabotage policy in India.

Generally, an Indian shipping company would have to pay corporate tax at the rate of 33.3 per cent, unless it opted for the tonnage tax system, which is between 1 per cent 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 latest notifications² stating that the export

2 Notification No. 9/2017 – IGST (Rate) (as amended from time to time); 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. While the amended IGST Act 2017 has received presidential assent, the amendment will be applicable from a date, to be notified later.

of ocean freight will be exempted from goods and services tax, effective from 25 January 2018 with a 'sunset clause' up to 30 September 2019 (i.e., the exemption will automatically be terminated after this fixed period, unless further extended).

i Satellite devices and ammunition 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.³ 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 where 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. There have been instances where vessels have been detained for their failure to provide proper declarations. The carriage of arms and ammunition has posed added complications for vessels calling into an Indian port following the incident with the MV *Seaman Guard Ohio*. The Madurai Bench of the Madras High Court⁴ exonerated 35 foreign seafarers on the MV *Seaman Guard Ohio*, a foreign-flagged floating armoury, which had been arrested in India for entering Indian waters.

ii Cabotage

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. On the contrary, India 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 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 having 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). There are proposals to develop a system wherein the DG Shipping would set up an online platform bypassing INSA and ICC whereby Indian shipowners would be given an opportunity to match the rates quoted by foreign shipowners for Indian charterers seeking to charter foreign-flagged vessels.

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 EXIM containers intended for transshipment are loaded onboard a vessel, no licence will be required under Section 407 of the MSA for such vessel to undertake the coastal voyage from one

³ Vide Order No. 2 of 2012 (48-NT(1)/2012).

⁴ *Dudnik Valentyn and Ors. v. The Inspector of Police*, 'Q' Branch CID, CrI. A. (MD) Nos. 41, 43, 44 of 2016.

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.

In an attempt to bolster the 'Make in India' policy of the government of India and add stimulus to the shipbuilding industry in India, the government recently issued a notification dated 13 February 2019 and a consequent circular dated 22 March 2019 (the Proposed RoFR Regime) wherein, for the first time, an Indian-built foreign-flagged vessel would have preference over a foreign-built Indian-flagged vessel. Prior to the promulgation of the Proposed RoFR Regime, the order of priority among various categories of shipowners was as follows:

- a* First priority: Indian-flagged vessel.
- b* Second priority: Indian-owned foreign-flagged vessel (Indian-controlled tonnage).
- c* Third priority: foreign-flagged vessel.

Under the Proposed RoFR Regime the order of priority would be as follows:

- a* First priority: Indian-built vessel irrespective of whether she flies the Indian flag or a foreign flag.
- b* Second priority:
 - Foreign built, Indian owned, Indian flag.
 - Foreign built, foreign flag but Indian chartered.

At the time of writing, the Delhi High Court, vide an interim order dated 28 March 2019 in the case of *The Great Eastern Shipping Company Limited v. Union of India*, has passed an *ad interim* order staying the operation of the Proposed RoFR Regime. Subject to the outcome of these proceedings and any further appellate proceedings, there is likely to be a cataclysmic shift in the Indian cabotage regime, which is bound to have far-reaching ramifications for all stakeholders.

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 before the high court of a coastal state, which are the only courts vested with admiralty jurisdiction. Under the newly enacted admiralty regime, each high court of a given state can only exercise admiralty jurisdiction over vessels calling at its own coastal state.

The enactment of the Commercial Courts, Commercial Appellate Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (now renamed

the Commercial Courts Act 2015⁵) radically upgraded the existing judicial procedural framework. The government has established special commercial courts modelled on the lines of the English High Court to deal exclusively with 'commercial disputes' involving specialised subject matters (i.e., relating to export or admiralty and maritime law, carriage of goods, import of merchandise, sale of goods, insurance, etc.) and for claims of a specified value.⁶ The Act makes pre-institution mediation compulsory, unless an urgent interim relief is sought, in which case the Commercial Court can be approached directly without having to go through the mediation process.⁷ The Commercial Courts Act imposes fixed and strict deadlines to complete procedural formalities. Notably, the Commercial Courts Act provides for a strict timeline of presenting the statement of defence within a 120 days of the date of service of the writ of summons, failing which the right to file the statement of defence is forfeited.⁸ This position has been recently confirmed by the Apex Court,⁹ 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. 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. In keeping with the latest developments in technology, the Commercial Courts Act has introduced the system of e-discovery of electronic records, such as metadata and logs relating to the creation and modification of documents.

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. Even though the regime now allows recovery of costs, the courts have, to date, largely not been inclined to issue orders awarding costs, if at all, at figures that equate to the total costs actually incurred by a party.

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.¹⁰ 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.¹¹

5 Vide the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act 2018.

6 The specified value is currently fixed at 10 million rupees but can start from 300,000 rupees – to be notified by the state governments.

7 Section 12A of the Commercial Courts Act.

8 Section 16 read with Clause 4(A) of the Schedule to the Commercial Courts Act.

9 *M/s SCG Contracts India Pvt. Ltd v. K.S. Chamankar Infrastructure Pvt. Ltd. & Ors.*, C.A. No. 1638 of 2019.

10 *Swastik Gases P Ltd. v. Indian Oil Corporation Ltd.* (2013) 9 SCC 32.

11 Section 20 of the Code of Civil Procedure 1908 (CPC).

- 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.¹²
- 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.¹³
- 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.¹⁴
- f Indian courts can apply foreign law in deciding disputes. The question of what constitutes foreign law is a question of fact.¹⁵ 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.¹⁶
- 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.¹⁷
- i The Indian courts have recently re-affirmed the grounds for appeal under the Commercial Courts Act,¹⁸ which leaves some ambiguity as to the jurisdiction of the Commercial Courts to hear appeals arising under the Admiralty Act.

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 last 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 taking place in India or not) would be a High Court. Indian High Courts are better equipped to deal with complex commercial disputes relating to international transactions, and the official language of High Courts in India is English. This brings an end to a rather notorious dilatory tactic adopted by certain litigants to initiate proceedings in courts in interior parts of India where the proceedings may be in a language other than English and the judge is ill-equipped to handle complex issues generally raised in international commercial disputes.

12 *ABC Laminart Pvt Ltd v. AP Agencies Salem* (1989) 2 SCC 163.

13 *Modi Entertainment Network and Anr v. WSG Cricket Pte Ltd*, AIR 2003 SC 1177.

14 Section 23 of the Indian Contract Act, 1862.

15 *Hari Shanker Jain v. Sonia Gandhi*, AIR 2001 SC 3689.

16 *Malaysian International Trading Corpn v. Mega Safe Deposit Vaults (P) Ltd.*, 2006 (3) Bom C R 109.

17 Section 28 of the Indian Contract Act, 1872.

18 *Shailendra Bhadauria v. Matrix Partners India Investment Holdings LLC*, Commercial Appeal No. 327 of 2018 (Bom).

The Arbitration Act also empowers Indian courts to pass interim orders for security and other ancillary relief in support of arbitration taking place outside India. Another notable feature is allowing ‘any person claiming through or under’ a party who was a signatory of the original arbitration agreement to be party to the arbitration agreement. This has the effect of binding even an assignee or subrogee 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.¹⁹ 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, SUPPLYTIME in the shipping industry) is sufficient to incorporate the arbitration agreement contained in those forms into the underlying contract.²⁰ Recently, the Supreme Court has taken 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).²¹

The Arbitration Act requires an arbitrator to disclose in writing any circumstances relating to his or her impartiality and independence, and contains an exhaustive list²² of grounds, including direct, indirect, past and present relationship with the subject matter or parties or counsel to the dispute, be it financial, business, professional, personal, and so on. Furthermore, there is a mandate imposed upon an arbitrator to dispose the reference within one year and in certain limited circumstances extend the reference by a further period of six months.

The Arbitration Act, following the amendment, 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.

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.²³ In the event the arbitration proceeding seated in India 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 context 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’.

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 to any pending application challenging the award under Section 34 of the

19 *MV Nicolaas A v. Indian Farmers Fertilizers Cooperative*, 2017 SCCOnLine Guj 2149.

20 *M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd.* (2009) 7 SCC 696.

21 *Inox Wind Ltd. v. Thermocables Ltd.*, (2018) 2 SCC 519.

22 The Fifth and Seventh Schedules of the Arbitration Act.

23 Section 36(2) of the Arbitration Act.

Arbitration Act.²⁴ 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.

Indian courts would be bound to decline to exercise jurisdiction and to refer the parties to arbitration unless the Indian courts 'find that the said agreement is null and void, inoperative or incapable of being performed'.²⁵ The Supreme Court, in the case of *Chloro Controls India Private Ltd. v. Severn Trent Water Purification Inc.*,²⁶ held that the court could have a fully fledged trial (which includes leading oral or documentary evidence) to make a determination on whether an arbitration agreement exists before referring the parties to arbitration. The finding of the Indian courts on whether an arbitration agreement exists or not is final and cannot be revisited by the arbitral tribunal. 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.²⁷

In an interesting judgment in 2017,²⁸ the Delhi High Court, in its interpretation of the *Chloro* judgment, followed the proposition of law laid down by the Singapore High Court in the case of *Aloe Vera of America, Inc. v. Asianic Food (S) Pte. Ltd.*²⁹ and 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. The Division Bench of the Delhi High Court, in its judgment of *Shakti Nath v. Alpha Tiger Cyprus Investment No. 3 Ltd.*,³⁰ 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.

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 etc., 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, agreements creating a hypothecation or pledge over the goods, etc. In the case of an arbitration seated in India between two Indian parties a very recent judgment of the Supreme Court of India in *Garware Wall Ropes v. Coastal Marine Constructions & Engineering Ltd.*³¹ has created uncertainty over whether an Indian court can entertain an application for interim measures or security in aid of arbitration seated in India, between two Indian parties when the underlying contract had not been affixed with appropriate revenue stamps.

In an effort to promote institutional arbitration in India, the Indian government has, on 2 March 2019, promulgated the New Delhi International Arbitration Centre Ordinance, under which the New Delhi International Arbitration Centre (NDIAC) was established. The Ordinance seeks to establish an independent and autonomous regime for institutionalised arbitration in India through the NDIAC. The NDIAC has been declared to be an institute

24 *Board of Control for Cricket in India v. Kochi Cricket Private Limited & Ors.*, (2018) 6 SCC 287.

25 Section 45 of the Arbitration and Conciliation Act 1996.

26 (2013) 1 SCC 641.

27 *MSM Satellite v. World Sport Group*, (2014) 1 SCC 58.

28 *GMR Energy Limited v. Doosan Power Systems India Pvt. Ltd.*, 2017 SCC OnLine Del 11625.

29 2006 SGHC 78.

30 2017 (5) ArbLR 112 (Delhi).

31 Civil Appeal No. 3631 of 2019 (Arising out of Special Leave Petition (Civil) No. 9213 of 2018).

of national importance. India is rapidly moving towards a pro-alternative dispute resolution regime, and courts are not shying away from looking to institutions for assistance, including for appointment of arbitrators. In the first case of its kind, the Supreme Court of India has sought the assistance of the Mumbai Centre for International Arbitration to appoint an arbitrator for an arbitration between an Indian and a foreign company.³²

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 Sections 44 or 53 of the Arbitration Act. A foreign award holder seeking to enforce an award in India would have to apply to the court, within whose jurisdiction the award debtor has its assets, to enforce the foreign award.³³ 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 execution proceedings to liquidate the assets of the award debtor.³⁴ Enforcement and execution proceedings can be initiated in India by placing on record the following documents before the Indian court:

- a* the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;
- b* the original agreement for arbitration or a duly certified thereof; and
- c* such evidence as may be necessary to prove that the award is a foreign award. In this regard, 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 suffices.

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. One such commonly used ground was on the issue of public policy, where the award debtor would seek to reargue the underlying issues of the arbitration proceedings on merits, and there were a plethora of cases in which the courts considered the merits. However, there were two landmark judgments of the Supreme Court in 2015,³⁵ in which the scope of public policy was clarified. Subsequently, this was included as an amendment to Section 48 of the Arbitration Act to include 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'. Hence, the courts have been more restrictive in allowing the reopening of any issues on merits.

32 *Sun Pharmaceutical Industries Ltd. v. M/s Falma Organics Limited, Nigeria*, Arbitration Case No. 33 of 2014 (SC).

33 *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services* (2012) 9 SCC 552.

34 *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.* (2001) 6 SCC 356.

35 *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.

Indian courts are now 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 circumstances such as issuing guarantees for overseas companies that do not comply with Indian foreign exchange regulations.³⁶ The Bombay and Calcutta High Courts, in their judgments involving shipping disputes, 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 they have chosen not to appeal against the award before the appropriate court in the country where the arbitration had been seated.³⁷

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. 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.³⁸ In these circumstances, it would appear that interim or interlocutory orders of freezing or *Mareva* injunctions passed by foreign courts are not enforceable in India.

While the Gujarat High Court in the case of *MV Cape Climber v. Glory Wealth Shipping Pvt Ltd.*³⁹ has allowed the enforcement of a London arbitral award that has subsequently been converted into a judgment of an English High Court (as a decree of the English High Court), the Delhi High Court, in the case of *Marina World Shipping Corporation Ltd. v. Jindal Exports & Imports Private Ltd.*,⁴⁰ 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 Code of Civil Procedure, 1908 (CPC), even though the London arbitral award had been converted into a judgment of the English High Court. The Bombay High Court in the case of *Marine Geotechnic LLC v. Coastal Marine Construction & Engineering Ltd.*⁴¹ 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.

36 *Intesa Sanpaolo SPA v. Videocon Industries Ltd.*, 2014 SCC Online Bom. 1276.

37 *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.

38 *International Woollen Mills v. Standard Wool, (UK) Ltd*, AIR 2001 SC 2134.

39 Civil Application (OJ) No. 250 of 2015.

40 2007 (3) ARBLR 46 Delhi.

41 Company Petition No. 67 of 2013.

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.⁴² 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.⁴³

i Shipbuilding

India allows 100 per cent foreign direct investment into shipbuilding in India. A shipbuilding contract providing for Indian law would be governed by the Indian Sale of Goods Act, 1930. This Act 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 the same.⁴⁴

The shipbuilding industry is subject to goods and service tax (GST), which subsumes the earlier levy of VAT, central sales tax (CST), excise duty, octroi, service tax, etc. 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 to be 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 recently 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. Under the old regime, courts had discretion in granting the remedy of specific relief and could refuse to order such relief even if the party seeking specific relief satisfied all the criteria for it. This discretionary power of the court has now been done away with. Under the old regime, it was impossible to obtain an order directing specific performance of a contract, for the non-performance of which, compensation was an adequate relief. This is no longer the case under the present regime. Indian courts would not be able to pass an order of injunction if such an injunction would be likely to 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 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), etc. Under the new regime, a court, even after granting specific performance, can additionally grant a certain amount of compensation.

iii Contracts of carriage

The following are the legislation and principles of law applicable to contracts of carriage.

⁴² *Tiruvembai v. Lilabai*, AIR 1959 S.C. 620.

⁴³ *Base International Holdings NV Hockenrode 6 v. Pallava Hotels Corporation Ltd.*, 1999 PTC (19) 252.

⁴⁴ *Consolidated Coffee Ltd. v. Coffee Board, Bangalore* (1980) 3 SCC 358.

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 the case of *Shipping Corporation of India Ltd v. Bharat Earth Movers Ltd.*,⁴⁵ 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. Indian courts have allowed carriers to take defences enumerated under Article IV of the Hague Rules (e.g., fire).⁴⁶ 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, 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.⁴⁷

Liens

Liens can be exercised under Indian law in the following circumstances.

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.⁴⁸ 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.⁴⁹ Notice of such a lien must be served upon the consignee and the concerned port authority prior to the discharge of the cargo from the vessel.

⁴⁵ (2008) 2 SCC 79.

⁴⁶ *Collis Line Private Ltd. v. New India Assurance Co. Ltd.*, AIR 1982 Ker 127.

⁴⁷ *Fateh Chand v. Balkishan Dass*, AIR 1963 S.C. 1405; *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*, 2003(5) SCC 705.

⁴⁸ Section 60 of the Major Port Trust Act, 1963.

⁴⁹ Section 48 of the Gujarat Maritime Board Act, 1981.

Other than the right of lien under the Major Port Trust Act, 1963, 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, 1924, but rather follows a colonial legislation – the Indian Bills of Lading Act, 1856. The Madras High Court in the case of *MT Titan Vision v. 3F Industries Ltd.*⁵⁰ and the Gujarat High Court in the case of *MG Forest Pte Ltd. v. MV Project Workshop*,⁵¹ 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.⁵²

In the case of *British India Steam Navigation Co. Ltd. v. Shanmughavilas Cashew Industries*,⁵³ 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 in circumstances when the consignee or endorsee is unaware of those terms. The Bombay High Court, in its recent judgment in the case of *M/s. Assobhai Bhanji and Sons v. Great Circle Shipping Pvt. Ltd.*,⁵⁴ allowed a shipper's claim against a carrier for delivering cargo without production of the bill of lading even in circumstances when the bill of lading has been made out 'to the order of a named consignee'.

v Interest

Indian courts have the power to pass judgments in foreign currency.⁵⁵ As a general rule, for commercial transactions, courts award interest at the rate at which monies are lent or advanced by nationalised banks.⁵⁶ Indian arbitrators generally award interest at the rate of 18 per cent per annum.⁵⁷ 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

50 (2014) 2 MLJ 154.

51 Misc. Civil Application No. 187 of 2003 in Admiralty Suit No. 14 of 2003.

52 *MV 'Baltic Confidence' v. The State Trading Corporation of India Ltd.* (2001) 7 SCC 473.

53 (1990) 3 SCC 48.

54 (2018) 2 AIR Bom R 252. However, this judgment is pending appeal.

55 *Forasol v. Oil & Natural Gas Commission*, 1984 SCR (1) 526; and *Forysthe Trading Services Ltd. v. MV 'Niizuru'*, 2004 (5) Bom CR 806.

56 Section 34 of the Code of Civil Procedure, 1908.

57 Section 31(7)(b) of the Indian Arbitration and Conciliation Act, 1996.

US dollars.⁵⁸ However, a recent decision of the Supreme Court in *Vedanta Ltd. v. Shenzhen Shandong Nuclear Power Construction Co. Ltd.*⁵⁹ has 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.

In the case of *Forysthe Trading Services Ltd. v. MV Niizuru*,⁶⁰ 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 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.⁶¹

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, 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 India' than to foreign-going vessels. The Merchant Shipping (Limitation of Liability for Maritime Claims) Amendment Rules, 2017, 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.⁶² This decision is therefore likely to make India a favourable jurisdiction for constituting a single worldwide limitation fund, without any prior claim being initiated. 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.⁶³ Security in the form of cash or bank guarantee is permissible.

⁵⁸ *Steel Authority of India Ltd. v. Pacific Gulf Shipping Co. Ltd.*, Appeal No. 391 of 2013.

⁵⁹ (2018) SCCOnLine 1922.

⁶⁰ 2004 (5) Bom CR 806. See footnote 55.

⁶¹ *Hyder Consulting Ltd. v. State of Orissa* (2015) 2 SCC 189.

⁶² *Murmansk Shipping Company v. Adanin Power Rajasthan Ltd. & Ors.*, Admiralty Suit No. 43 of 2012 (decided on 8 January 2016).

⁶³ 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.

V REMEDIES

i Arrest and sale of ships

Admiralty law in Indian has finally 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:

- a* the Bombay and Calcutta High Courts would no longer exercise pan-India jurisdiction and each high court of a coastal state in India would only have 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;
- c* a claimant can arrest a vessel to enforce a judgment or order;
- d* 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 would give rise to a maritime lien;
- e* express stipulations on the priority of claims or the hierarchy of various cluster 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;
- f* an expansive definition of a 'vessel' that can be subject to an order of arrest;
- g* a plaintiff may arrest a vessel for any defined 'maritime claim' as listed in the 1999 Arrest Convention;
- h* 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;
- i* 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*;
- j* the appointment of nautical assessors to assist the admiralty court to deal with technical or nautical matters;
- k* 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;
- l* a defined time period of one year after which maritime liens would expire, except for seafarers' wages, which expire after two years.
- m* 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;
- n* express power to the Indian Central Government to publish rules under the Admiralty Act;
- o* all pending applications in any admiralty court will be decided in accordance with the Admiralty Act; and
- p* the Admiralty Act is silent on whether property other than ships, such as bunkers, cargo, freight, is amenable to an order of arrest without an underlying cause of action being made out against a vessel.

The Bombay High Court in the case of *Flag Mersinidi*⁶⁴ rejected the notion that a bunker supply contract could be given the recognition of a maritime lien, if the governing law of

64 Notice of Motion No. 763 of 2013 in Admiralty Suit No. 8 of 2013.

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 necessities supplied to a vessel would constitute a maritime claim against a vessel and not a maritime lien.⁶⁵ 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 Moschanty*,⁶⁶ on the basis of which a claimant can sustain an order of arrest over a vessel merely by making out a reasonably 'best arguable' case.⁶⁷ 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.⁶⁸

A party seeking release of the vessel is required to furnish security either by way of a cash deposit or a bank guarantee.⁶⁹ Indian courts do not accept club letters of undertaking (LOUs) as security as a right, unless consented to by the plaintiff.⁷⁰

In India, every company is a separate and independent legal entity; ownership of the assets vests with the company and not in its shareholders.⁷¹ *Prima facie*, the registered owner of the vessel is deemed the beneficial owner, save in very exceptional cases.⁷² Only in exceptional circumstances where questions of public policy, fraud or malice are involved, will the courts consider piercing the corporate veil. It must be noted that the party seeking to lift the corporate veil will be required to plead and particularise fraud or malice or public policy.⁷³

The Admiralty Act does not expressly contain any provision allowing a party to arrest a vessel for simpliciter security in aid of judicial and arbitral proceedings taking place outside India. That said, a single judge of the Bombay High Court has recently held that it was permissible for a party to obtain 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. According to the Court, a party has a statutory right to initiate *in rem* proceedings under the Admiralty Act, which could not be denied if a party otherwise had a valid maritime claim.⁷⁴

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

65 *Chrisomar Corporation v. MJR Steels Private Ltd.*, 2017 SCC OnLine SC 1104.

66 [1971] 1 Lloyd's Rep 37.

67 *Videsh Sanchar Nigam Limited v. MV 'Kapitan Kud'* (1996) 7 SCC 127.

68 *Sangita Das & Ors. v. MV Amber L and Ors.* (2018) 1 KLT 836.

69 Security can be deposited in US dollars in the Bombay High Court and Gujarat High Court.

70 *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.

71 *Lufeng Shipping Company Ltd. v. MV 'Rainbow Ace'*, 2013 (4) ABR1412.

72 *Universal Marine & Anr. v. MT 'Hartati'*, MANU/MH/0131/2014.

73 Order VI Rule 4, Civil Procedure Code 1906.

74 *Siem Offshore Redri AS v. MV Altus Uber*, 2018 (6) ABR 361. This judgment is under appeal to a higher bench of the Bombay High Court.

relating to another vessel.⁷⁵ 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.⁷⁶ Recent 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 at the *prima facie* evaluation stage.⁷⁷ By a recent judgment, the Appeal Court of the Bombay High Court has held⁷⁸ 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. At the time of writing, a special leave petition (application for leave to appeal) against the *Amoy Fortune* judgment is pending before the Supreme Court of India.
- b While the earlier position was that a vessel could not be arrested for security pending arbitration in the admiralty jurisdiction of the court,⁷⁹ per the judgment of the single judge of the Bombay High Court this is now permissible if the suit is filed praying for a decree and determination on the merits of the underlying maritime claim.⁸⁰
- 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.⁸¹
- d The arrest of bunkers onboard a vessel is not subject to the admiralty jurisdiction of the courts in India.⁸²
- e Freight alone cannot be arrested.⁸³
- 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,⁸⁴ albeit certain other High Courts have allowed the same on occasions.

75 *Sunil B. Naik v. Geowave Commander*, 2018 SCC OnLine SC 203 (*Geowave Commander*).

76 *Siem Offshore Redri AS v. MV Altus Uber*, 2018 (6) ABR 361. This judgment is under appeal to a higher bench of the Bombay High Court on, *inter alia*, the ground that it is contrary to the findings of the Supreme Court in *Geowave Commander*.

77 *Gulf Petrochem Energy Pvt. Ltd. v. MT 'Valor'* in Notice of Motion (L) No. 581 of 2015 in Admiralty Suit (L) No. 94 of 2015 and *Drop Energy Services Ltd. v. MT 'Tradewind'* in Notice of Motion No. 805 of 2015 in Admiralty Suit No. 240 of 2015. The former judgment is under appeal to a higher bench of the Bombay High Court.

78 *Socar Turkey Petrol Enerji v. M.V. Amoy Fortune*, 2018 SCC Online Bom 1999. A petition for leave to appeal against this judgment has been filed before the Supreme Court of India and is currently pending.

79 *Rushab Ship International LLC v. The Bunkers on board MV African Eagle*, 2014(4) Bom CR 269.

80 *Siem Offshore Redri AS v. Altus Uber*, 2018 (6) ABR 361. This judgment is under appeal to a higher bench of the Bombay High Court. See footnote 74.

81 *Lufeng Shipping Co Ltd v. MV 'Rainbow Ace' and Ors.*, Notice of Motion No. 1646 of 2013 in Admiralty Suit No. 29 of 2013.

82 *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.

83 *Bulk Shipping Management SEA & Anr. v. The Bunkers on board MV 'African Eagle'*, 2013 (3) BomCR 380.

84 *Global Integrated Bulklers 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).

- 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 1996.⁸⁵
- 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.⁸⁶
- 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 on the basis of fraud must plead and *prima facie* establish that fraud is committed.⁸⁷
- 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 negligentia* does not apply.⁸⁸
- 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.⁸⁹
- 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 is not permissible for a single claim even in circumstances wherein the sale proceeds of the vessel are sufficient to meet the claim of the plaintiff though these sale proceeds of the vessel may be insufficient to meet the claims of all creditors asserting a claim against the vessel (i.e., that even if the *pari passu* distribution of the sale proceeds of the vessel would be insufficient to fully satisfy the claim of the plaintiff, arrest of multiple vessels to satisfy the plaintiff's claim is impermissible).⁹⁰
- m* The Bombay High Court has clarified that only a claimant who has executed a warrant of arrest prior to the date of admission of winding-up petition (liquidation application) would have a charge over the vessel and once the winding-up petition has been admitted, the claimant, in any case, would not be able to obtain decree against sister vessels or other assets of the company in liquidation.⁹¹
- n* 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.⁹²
- o* 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'.⁹³

85 See footnote 62.

86 *Coromandel International Limited v. MV 'Glory I' and Andromeda Ship Holdings Ltd.*, 2014 (3) ABR 365.

87 See footnote 71.

88 *Navbharat International Ltd v. Cargo on board MV 'Amtees'*, MANU/MH/0192/2014.

89 *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.*

90 *Praxis Energy Agents SA v. M.T. Prathibha Neera*, 2018 (4) ABR 148.

91 *Praxis Energy Agents SA v. M.T. Prathibha Neera*, 2018 (4) ABR 148. See footnote 90.

92 *State of Goa v. Sale Proceeds of vessel M.T. Pratibha Bheema and Ors.*, A.S. No. 72 of 2014 (decided on 7 June 2018).

93 *M.V. Kiveli v. Monjasa DMCC and Ors.*, 2018 (5) ALT 73.

- p* 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.⁹⁴
- q* 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.⁹⁵

VI REGULATION

India is a party to the Indian Ocean MOU, 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

Indian-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 Indian-flagged vessels can be granted only to a constructed vessel and not to an 'under construction' vessel and such 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.⁹⁶

The Customs Act, 1962 imposes various obligations upon owners of vessels calling at ports in India, such as the Import General Manifest. A central register is maintained by the DG Shipping, which contains all the entries recorded in the 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.

ii 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

94 *M.V. 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 & NoM No. 1770 of 2015 in AS. No. 66 of 2015 (decided on 17.09.2018). This judgment is under appeal to a higher bench of the Bombay High Court.

95 *Joao Martin Fernandes v. The Union of India and Ors.*, Appeal No. 65 of 2017 (decided on 24 October 2018).

96 *Halliburton Offshore Services Inc. v. Principal Officer of Mercantile Marine Department*, Civil Appeal No. 5428 of 2017.

the requirements of the International Oil Pollution Compensation Fund (the IOPC Fund). Where 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.⁹⁷

India is the second-highest contributor to the IOPC Fund in the world, with 13.12 per cent of the total composition of the fund. The IOPC Fund is under an obligation to pay compensation to states and persons who suffer pollution damage, if 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.

iii Collisions, salvage and wrecks

The COLREGs have been incorporated into Indian law under the Merchant Shipping (Prevention of Collisions at Sea) Regulations 1975. While, 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 abstract notions of justice and equity.⁹⁸ 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 WRC 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 the case of *Oil & Natural Gas Corporation Ltd v. Osprey Underwriting Agencies Ltd.*,⁹⁹ 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 the case of *Commander KP Shashidharan v. Union of India*,¹⁰⁰ allowed an officer of the Indian Coast Guard to claim salvage services even though he had a pre-existing duty to protect life and property at sea.

iv 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.

⁹⁷ Section 352I(4) of the MSA.

⁹⁸ *Municipal Corporation of Greater Bombay v. Laxman Iyer*, 2003(8) SCC 731.

⁹⁹ 1998 (2) BOMLR 179.

¹⁰⁰ AIR 2002 Ker 388.

The Merchant Shipping (Recruitment and Placement of Seafarers) Rules 2016¹⁰¹ has overhauled the earlier regime set up under the 2005 Rules, and has 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 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.¹⁰² 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 workmen or employees to claim compensation for death and personal injury of seafarers. However, the ECA would not apply to Indian seafarers working aboard foreign-flagged vessels. Under Indian law, foreign seafarers cannot be employed on Indian-flagged vessels unless they obtain prior permission from the DG Shipping.

v New 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), which repeals the Sick Industrial Companies (Special Provisions) Act, 1985 and various provisions of the Companies Act, 2013. 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 180 days (extendable by up to 270 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.¹⁰³ In order 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 dispute should not be merely illusory in nature.¹⁰⁴ 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 only envisages two situations

101 G.S.R. 169(E) dated 15 February 2016.

102 *O Konavalov v. Commander, Coast Guard Region* (2006) 4 SCC 620.

103 Section 14 of the Insolvency Code.

104 *Mobilox Innovations (P) Ltd v. Kirusa Software (P) Ltd.*, (2018) 1 SCC 353.

after the commencement of the corporate insolvency resolution process; first formulation of a plan in order to continue the existence of the corporate debtor as a going concern and second, to commence the liquidation proceedings. There was no third alternative available for parties who were willing to settle the claims. In order to fill this lacuna, the Insolvency Code was amended.¹⁰⁵ Pursuant to the amendment parties can now withdraw the application, provided that 90 per cent of the committee of creditors approves such a withdrawal. However, the decision of the committee of creditors in rejecting a proposal for withdrawal should not be arbitrary in nature, and as such the adjudicating authority and appellate adjudicating authority under the Insolvency Code have the power to set aside such a decision.¹⁰⁶

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, the Merchant Shipping Bill, 2016 is currently pending before Parliament, which would also update the regime under the MSA. This legislation comes as a welcome development in bringing the Indian legal and regulatory environment up to speed with legislative developments in other countries. It is also heartening to note that India jumped 30 places from its ranking last year in the 'ease of doing business' rankings published by the World Bank in *Doing Business 2018*, to 100. Notwithstanding the foregoing, it remains to be seen how stakeholders react to the entire gamut of legislation affecting the shipping industry.

105 Section 12A, Insolvency and Bankruptcy Code, 2016.

106 *Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India*, 2019 SCCOnLine SC 73.

IRELAND

Catherine Duffy, Vincent Power and Eileen Roberts¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

With Ireland having the European Union's third-largest ocean area, the Irish government plans to double the state's ocean wealth by 2030 and, in the interim, make Ireland an attractive location for international shipping activities. The changes brought about by Brexit may help to enhance Ireland's position further in the maritime sphere. As an island nation, Ireland has always placed great emphasis on its maritime sector and, in particular, the ports and shipping services that connect traders on the island with international markets.

Irish ports and shipping services are making a valuable contribution to the national economy by facilitating growth in trade. The Irish Maritime Development Office (IMDO)² has reported that 90 per cent of Irish exports in merchandise trade is moving by sea.

Equally, Ireland's tourist industry relies significantly on the efficiency, reliability and effectiveness of the shipping sector. Up-to-date statistics on ship registration are not available publicly, but as at April 2019, there were over 3,000 vessels listed on the Irish Ship Register, of which approximately 133 are categorised as commercial vessels.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Ireland, like England and Wales, is a common law jurisdiction whose legal framework is comprised of legislative enactments and case law.³ The Irish government, in furtherance of its commitment to attract international shipping to Ireland, plans to consolidate shipping legislation into a single statute and, to that end, the Merchant Shipping (Consolidation) Bill is making its way through the drafting process. Until it is enacted, the principal legislation applicable to shipping is the series of statutes cited collectively as the Merchant Shipping Acts dating back to 1894. These Acts are supplemented by a plethora of statutory instruments (or Ministerial orders) that legislate for specific issues (e.g., the commencement of statutes as well as the detail of maritime operations).

As a member of the EU, all the EU maritime laws, including treaty provisions, regulations, directives and decisions, apply in Ireland. If the United Kingdom leaves the EU then Ireland would be the only common law jurisdiction in the EU and shipping businesses located there would continue to have the benefits of EU membership, including, for example, free movement of persons, goods, services, capital, payments and establishment.

1 Catherine Duffy, Vincent Power and Eileen Roberts are senior partners at A&L Goodbody.

2 IMDO, *The Irish Maritime Transport Economist* (Volume 15, 2017).

3 Where Irish case law does not provide a precedent, English case law is of persuasive authority in the Irish courts.

Ireland has ratified most of the major international maritime conventions, including the Collision Convention 1910, the 1952 Arrest Convention, the Oil Pollution Fund Convention, the LLMC Convention 1976, the Athens Convention (including the 1976 and 2002 Protocols), the 1989 Salvage Convention, the OPRC Convention, the Bunker Convention and the United Nations Convention on the International Multimodal Transport of Goods.

Irish maritime legislation is primarily formulated and administered by the Department of Transport, Tourism and Sport. Within the Department, the Irish Maritime Administration (IMA) was established in 2013 to integrate the Department's maritime services. The IMA consists of the Maritime Safety Policy Division, the Marine Survey Office, the Irish Coast Guard, the Maritime Transport Division and a Maritime Services Division.

III FORUM AND JURISDICTION

i Courts

The Irish courts are in the common law tradition, with the High Court being a court of universal jurisdiction and usually the most relevant court in maritime matters.

The Jurisdiction of Courts (Maritime Conventions) Act 1989 incorporates the 1952 Arrest Convention into Irish law. The Act confirms that the High Court has jurisdiction to hear and determine proceedings in Ireland in relation to maritime claims. These proceedings are dealt with by a specialist division of the High Court known as the Admiralty Court. Order 64 of the Rules of the Superior Courts (RSC) deals specifically with the rules and procedures that apply to admiralty claims. Claims arising from the carriage of goods by sea (or other claims) with a value in excess of €1 million are generally heard by another specialist division of the High Court, the Commercial Court, under the provisions of Order 63A of the RSC.

Regulation (EU) No. 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast) (Brussels I *bis*) came into effect in Ireland on 10 January 2015 (with the exception of Articles 75 and 76, which applied from 10 January 2014). Brussels I *bis* was implemented to update Council Regulation (EC) No. 44/2001 (Brussels I), which covered jurisdiction as between courts of different EU Member States. Brussels I still applies for proceedings or judgments issued before 10 January 2015. Brussels I established a set of EU rules to determine which court has jurisdiction in cross-border disputes (including maritime disputes) and how court judgments issued in one EU Member State are recognised and enforced in another Member State. Some of the key changes introduced by Brussels I *bis* include the following.

Abolition of the exequatur procedure

Under Brussels I, a judgment given in one Member State does not automatically take effect in another Member State. Instead, it first has to be validated and declared enforceable in a special intermediate court procedure, known as the *exequatur* procedure, which is costly and time-consuming.

Articles 36 and 39 of Brussels I *bis* abolish the *exequatur* procedure, so that any judgment obtained in one EU Member State will be automatically recognised and enforceable in Ireland as if it were delivered in Ireland itself. It is not yet clear how this would operate with regard to the United Kingdom if it leaves the EU.

Abolition of the Italian Torpedo

Under the Brussels I Regulation, where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised must stay its proceedings until the courts have determined whether or not it has jurisdiction. This rule applies even where a party brings proceedings in breach of a jurisdiction agreement for tactical reasons (known as ‘Italian Torpedo’ actions).⁴

Under Article 31(2) of Brussels I *bis*, a court that is named in an exclusive jurisdiction agreement will now have priority of jurisdiction. This enhances the effectiveness of exclusive jurisdiction agreements over a court in which the proceedings may have been first brought. Brussels I *bis* seeks to avoid abusive litigation tactics by providing for an exception to the general *lis pendens* rule. This exception does not apply, however, where (1) the parties have entered into conflicting exclusive jurisdiction agreements, (2) the dispute involves insurance, consumer or employee matters, (3) the parties have chosen a non-Member State as having jurisdiction, or (4) non-exclusive jurisdiction has been conferred only on a Member State court.

Application to non-EU domiciled parties

Brussels I does not apply to defendants domiciled outside the EU and, in such cases, the courts of the Member States apply their own national rules to determine whether they have jurisdiction. Article 24 of Brussels I *bis* extends the scope of the rules in relation to jurisdiction agreements by removing the current requirement that at least one party must be domiciled in a Member State. Therefore, where two non-EU parties agree that any dispute will be subject to the exclusive jurisdiction of the Irish courts, the Irish courts will be required to accept jurisdiction.

Article 25 of Brussels I *bis* also introduces a harmonised conflict of law rule on the substantive validity of jurisdiction agreements. The laws of the Member State court designated in the jurisdiction agreement shall govern questions of substantive validity of the jurisdiction agreement, even if that is different from the governing law of the contract.

Introduction of a limited international lis pendens rule

Brussels I *bis* introduces a new international *lis pendens* rule that aims to avoid proceedings taking place inside and outside the EU. It provides the court of a Member State with discretion to stay proceedings where a court of a non-EU state has already been seised with a related action at the time the EU Member State court is seised.

Clarification on the exclusion of arbitration from the scope of the Regulation

Arbitration matters are excluded from the scope of the Brussels I Regulation. Brussels I *bis* confirms that it does not apply to arbitration; it clarifies the ambit of the arbitration exception and provides that it shall not affect application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It further clarifies that nothing in Brussels I *bis* will prevent the courts of Member States from referring parties to arbitration, staying or dismissing proceedings, and ruling on the validity of an arbitration agreement in accordance with their national law. The New York Convention takes precedence over Brussels I *bis*, and therefore Member State courts are permitted to recognise and enforce an

⁴ See *Websense v. ITWAY* [2014] IESC 5.

arbitral award even if it is inconsistent with another Member State's judgment. The scope of the arbitration exclusion has also been clarified. Brussels I *bis* does not apply to any action or ancillary proceedings relating to the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration or to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.

Service

Rules governing the service of proceedings within EU Member States are set out in Council Regulation (EC) No. 1348/2000 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil and Commercial Matters. This Regulation is directly effective and came into force on 31 May 2001. In Ireland, the relevant entity responsible for transmitting documents to be served outside the state and for receiving documents from another state for service in Ireland is the County Registrar (an official operating at a local level in Ireland). Order 11D of the RSC provides for service of judicial documents within the EU in accordance with this Regulation. Ireland is also a party to the Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil and Commercial Matters 1965, which governs service of judicial documents within signatory countries. The relevant central authority in Ireland entitled to receive requests for service of documents is designated under court rules as the Master of the High Court.

Limitation periods

Pursuant to the Statute of Limitations Act 1957, any proceedings brought in Ireland on foot of a breach of contract claim will be statute barred six years after the cause of action accrues.⁵ Tortious claims must also be brought within six years of the accrual of the cause of action⁶ (except personal injuries based on negligence, nuisance or breach of duty). Specific (shorter) limitation periods may be prescribed by agreed contractual arrangements.

Maritime cases are afforded unique conditions under the Civil Liability Act 1961. Pursuant to Section 46(2), any claim against the owners or operators of a vessel for personal injury or fatal injury or property damage suffered by a passenger on that vessel or for damage to another vessel or cargo must be initiated within two years of the accrual of the action. This period of two years may be extended at the discretion of the court under Section 46(3) subject to certain conditions as it deems fit.⁷

A longer limitation period of 12 years applies to actions based upon deeds executed under seal.

Cargo actions under the Hague Rules or Hague-Visby Rules have a limitation period of one year. These rules were made part of Irish law by Section 31 of the Merchant Shipping (Liability of Ship Owners and Others) Act 1996 (1996 Act).

Another provision potentially relevant to limitation periods for maritime claims involving defective products is Section 7(1) of the Defective Products Act 1991, which provides for a three-year limitation for initiating proceedings under the Act. The producer will not be liable once 10 years have passed since the product was put into circulation.

5 Section 11(1)(a) of the Statute of Limitations Act 1957.

6 Section 11(2) of the Statute of Limitations Act 1957.

7 *Lawless v. Dublin Port and Docks Board* [1998] 1 ILRM 514 – the plaintiff must show special circumstances before an extension of time would be granted. The court will consider the degree of blameworthiness of the second defendant and the length of the delay.

ii Arbitration and ADR

For a dispute in Ireland to be subject to arbitration, there must be a valid arbitration agreement applicable to the dispute (either by a clause written in the contract under which the dispute arises or where the parties after the dispute has arisen have agreed to arbitrate the dispute). The Arbitration Act 2010 (2010 Act), which repealed the Arbitration Acts 1954–1998, applies to all arbitration in Ireland (both domestic and international) commencing after 8 June 2010.

The 2010 Act includes the entire text of the UNCITRAL Model Law on International Commercial Arbitration (Model Law). It adopts the Model Law in its entirety and incorporates only minimal amendments to the Model Law in the text of the Act itself. For example, the default number of arbitrators (if not specified in the arbitration agreement) will be one and not three as is provided in the Model Law. Under the 2010 Act, the Irish courts may make orders in support of all arbitrations in the same manner irrespective of whether the arbitrations are domestic or international.

The court will give full judicial consideration to the issue as to whether there is an arbitration agreement between the parties. A recent decision in *Vertom Shipping and Trading BV*⁸ highlighted the tension between courts and arbitrators regarding responsibility for deciding challenges to arbitrators' jurisdiction. The High Court refused an application to stay proceedings and refer the dispute to arbitration. It held that it was appropriate for the court, rather than an arbitral tribunal, to decide whether an arbitration agreement existed and gave full judicial consideration to the issue.

Several forms of ADR are commonly used in Ireland, including expert determination, early neutral evaluation and mediation. In relation to mediation in particular, the Irish courts often encourage mediation in appropriate cases. If a party refuses to mediate without reasonable grounds for doing so, the Irish courts have jurisdiction to make an adverse costs order against the refusing party. Contracts under Irish law increasingly include mediation and other ADR clauses, including 'stepped' clauses, which require different forms of dispute resolution to be used in a particular order, with ADR often being the first method of resolution followed by arbitration or court proceedings. The introduction of the Mediation Act 2017 (effective from 1 January 2018) requires lawyers to explain mediation and to advise their clients to consider mediation as an option in advance of issuing legal proceedings (which would include proceedings for a maritime claim) and the solicitor with carriage of the proceedings must issue a statutory declaration to that effect.

iii Enforcement of foreign judgments and arbitral awards

Foreign judgments

Since the introduction of Brussels I *bis* in Ireland, it is no longer necessary for parties to apply for and obtain a declaration of enforceability from another Member State. Under Brussels I *bis*, the applicant need only present a copy of the original judgment and a standard form certificate to implement the judgment in another Member State.

Article 54 of Brussels I *bis* provides that where a judgment from one Member State is sought to be enforced in another Member State but 'contains a measure or an order which is not known in the law of that Member State' then the court may adapt the judgment and enforce a 'measure or an order known in the law of that Member State which has equivalent

⁸ *The Lisheen Mine (Being A Partnership Between Vedanta Lisheen Mining Limited and Killoran Lisheen Mining Limited) v. Mullock and Sons (Shipbrokers) Limited and Vertom Shipping and Trading BV* [2015] IEHC 50.

effects'. However, it is still possible for a court to refuse recognition of a judgment on certain grounds. Article 45 specifies the circumstances in which a judgment will not be recognised, including:

- a* any judgment that was contrary to public policy;
- b* if it was granted in default of appearance or if the defendant was not served with notice of the proceedings to allow him or her to prepare a defence, or if he or she was not served with sufficient notice;
- c* if it is irreconcilable with a judgment given in Ireland in connection with the dispute; or
- d* if it is irreconcilable with a judgment given in another Member State or in a third state involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

While the Irish courts have previously refused to enforce a foreign judgment because it was manifestly contrary to public policy grounds, as in *Eurofood IFSC Limited*,⁹ the Irish courts generally construe the public policy defence narrowly, as was the case in *Bostrom Tankers*.¹⁰

Enforcement of judgments from countries that are not party to the Brussels or Lugano Conventions are governed by Irish common law and require the commencement of a new action based on the judgment itself. The Irish courts will not examine the merits of the judgment. However, it will be necessary to show that the court that made the judgment had jurisdiction to do so under Irish conflict of laws rules, that the judgment is for a debt or liquidated sum, and that it is final, conclusive and not contrary to public policy.

Foreign arbitral awards

Irish law incorporates the UNCITRAL Model Law on International Commercial Arbitration (Model Law), which was initially given force of law by the Arbitration (International Commercial) Act 1998 and more recently by the Arbitration Act 2010, which repealed and replaced the earlier legislation for all arbitrations after 8 June 2010. A party may now seek recognition and enforcement of an arbitration award as envisaged by Articles 35 and 36 of the Model Law irrespective of where the award was made or whether it was made in a state that is a party to any particular convention.

IV SHIPPING CONTRACTS

i Shipbuilding

Although Ireland was once host to a vibrant shipbuilding industry, by the end of the 20th century shipbuilding had diminished to almost nothing in terms of commercial vessels.

⁹ *In the matter of Eurofood IFSC Limited*, Case C-341/04 and *In the matter of the Companies Acts 1963 to 2003* [2004] IEHC 54.

¹⁰ *Bostrom Tankers AB v. Factorias Vulcano SA* [2004] 2 IR 191.

ii Contracts of carriage

The 1996 Act gives effect to the Convention relating to the Athens Convention 1974 and the Protocol thereto and to the Hague-Visby Rules. In this chapter, we focus on the Hague-Visby Rules (the Rules) as they apply in Ireland.

The Rules have the force of law in relation to, and in connection with, the carriage of goods by sea where the port of shipment is an Irish port whether or not the carriage is between ports in two different states. The Rules apply in relation to any bill of lading and any receipt marked as a non-negotiable document if the contract contained in or evidenced by the bill of lading expressly provides that the Rules govern the contract.

Bills of lading are otherwise governed by the Bills of Lading Act 1855 (the 1855 Act). Other than through the adoption of the Rules, there has been no change in Irish law dealing with bills of lading. The 1855 Act is restrictive¹¹ and, accordingly, does not capture multimodal contracts of carriage. As at May 2018, Ireland is not a signatory to the Hamburg Rules or the Rotterdam Rules.

The 1996 Act provides that an absolute warranty of seaworthiness is not to be implied in contracts to which the Rules apply.¹²

Liens

The following classes of liens apply in Ireland:

- a* maritime liens:
 - bottomry and respondentia;
 - damage done by a ship;
 - salvage;
 - crew's wages; and
 - master's wages and disbursements;
- b* possessory liens;
- c* statutory liens; and
- d* equitable liens.

As a matter of Irish law, liens do not have to be registered to be effective against the ship or third parties. Under the RSC, maritime liens may be pleaded as statutory liens.¹³

Irish common law recognises possessory liens whereby a claimant in possession of an asset may enforce its claim by retaining the relevant asset. This includes a repairer's lien and a shipowner's lien on cargo for outstanding freight or general average contributions.

An equitable lien exists independently of possession and, as in England, is only binding on third parties who have acquired a legal interest in the liened asset with notice of the lien.

While liens enjoy priority over other rights regardless of registration, with regard to limitation funds constituted under the LLMC Convention, the 1996 Act provides that a lien shall not prejudice or affect the proportions in which a fund is distributed among the claimants.

11 See Section IV.iii.

12 Section 35.

13 Order 64 of the RSC.

iii Cargo claims

A bill of lading evidences a contract for carriage, obliging a carrier to deliver a cargo against that document. Under the 1855 Act, every consignee of goods named in a bill of lading and every endorsee of it to whom the ownership of the goods described in the bill of lading has passed has, or will have, all rights of action and will be subject to the same liabilities in respect of the relevant goods. This is rather restrictive as it is confined to consignees and endorsees and therefore does not include a pledgee of goods and does not apply to waybills, multimodal contracts of carriage or delivery orders. Ireland does not have an equivalent of the English law comprised in the Contracts (Rights of Third Parties) Act 1999 to assist it to overcome issues arising from lack of privity of contract. However, in some circumstances, Irish law looks to the principle applicable in the United Kingdom and Ireland implying a contract between a consignee and a carrier in circumstances where a consignee takes delivery of goods from the carrier by presenting the bill of lading and paying outstanding charges. It is generally thought that the Irish courts would follow the decision of the English courts in *Brandt v. Liverpool, Brazil and River Steam Navigation Co Ltd*,¹⁴ which determined the conditions for implying a contract as being (1) the holder of the bill of lading must have some interest in the property, (2) the actions of the parties must be construed as offer and acceptance, and (3) sufficient consideration must be provided.

As a general principle, the Irish courts will not interfere in contractual terms agreed as arms' length between commercial parties. Accordingly, demise and 'identity of carrier' clauses incorporated in a bill of lading are likely to be recognised and upheld by an Irish court.

There is no case law in Ireland to give guidance on whether a bill of lading relating to carriage on a chartered vessel that expressly incorporates the terms of the charter party would be upheld in the Irish court. However, on general principles, it is possible to incorporate terms into a contract by reference to another contract. In the absence of specific legislation or case law, it is likely that the Irish courts would look to English law and decisions in the English courts for guidance on the extent to which the terms of a charter party may be incorporated into a bill of lading.

Under Irish law, a shipowner may be liable for damage caused whether or not it is the contractual carrier.

The 1996 Act expressly excludes shipowners' liability where any property on board the ship is lost or damaged by reason of fire on board the ship, or precious materials are lost or damaged through theft or otherwise and the nature and value of the relevant items has not been disclosed to the owner or master of the ship in the bill of lading or otherwise in writing.

iv Limitation of liability

By the enactment of the 1996 Act, Ireland gave effect to the LLMC Convention in Irish domestic law. The 1996 Protocol to the LLMC Convention was given effect in Irish law by the Sea Pollution (Hazardous Substances) Compensation Act 2005 but the operative provisions have not yet been brought into force. Under Irish law, the LLMC Convention applies to

¹⁴ [1924]1 KB 575.

seagoing ships and to non-seagoing ships¹⁵ and to any structure (whether completed or in the course of completion) launched and intended for use in navigation as a ship or a part of a ship.¹⁶

As regards who can limit liability and which claims are subject to limitation, the shipowner (defined for Irish law purposes as being a shipowner as owner, charterer, manager and operator of a ship, whether seagoing or not)¹⁷ is the party entitled to limit liability under the LLMC. There is no case law in Ireland to determine what is meant by 'charterer', 'manager' or 'operator' of a ship. However, the decision of the English courts in the case of *CMA CGM SA v. Classica Shipping Co Ltd*,¹⁸ in which the Court of Appeal determined that charterers are entitled to limit their liability would be of persuasive authority in Ireland.

A salvor may avail of the limitation of liability in respect of claims in connection with salvage operations.

An insurer of liability for claims subject to limitation under the LLMC Convention is entitled to the same benefits of the LLMC Convention as the assured.

Article 2 of the LLMC Convention specifies claims subject to limitation. Section 11 of the 1996 Act qualifies Article 2 and provides that the right to limit liability under the LLMC shall not apply to claims in respect of the raising, removal, destruction or rendering harmless of a ship that has sunk or been wrecked, stranded or abandoned, including anything that is or has been on board such a ship and that Article 3 of the LLMC providing for claims excepted from limitation is to be construed accordingly.

Irish procedure for establishing limitation

Under Irish law, it is not necessary to admit liability to avail of a limitation defence, nor does raising a limitation defence constitute an admission of liability. If successfully pleaded as a defence, liability is limited to the amount per claim provided for in the LLMC Convention.

Limitation can be pleaded by a party as a defence to a claim made against it. It is also open to a party anticipating a claim being made against it to open limitation proceedings to have the court determine its right to limit its liability under the LLMC Convention.

Article 6 of the LLMC Convention provides for calculation of the general limits that may be claimed. Article 11 permits any person alleged to be liable for a claim to constitute a fund with the court or other competent authority in any state party in which legal proceedings are instituted in respect of claims subject to the limitation. Under Article 11(2), a fund may be constituted by producing a guarantee or by depositing a sum of money. However, the constitution of a fund is not a requirement to avail of the benefit of limitation.

Under Irish law, the distribution of the fund among claimants is not affected by the rights of lien holders.¹⁹

15 Part II, Section 10 of the 1996 Act.

16 Part II, Section 9 of the 1996 Act.

17 Section 10 of the 1996 Act.

18 [2004] 1 Lloyd's Rep. 460, at page 465.

19 Section 16 of the 1996 Act.

Breaking limits

Article 4 of the LLMC Convention provides that a person shall not be entitled to limit his or her liability if it is proven that the 'loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result'. With such a high level of proof required, breaking the limits is difficult.

V REMEDIES**i Ship arrest**

Two pieces of legislation govern shipping arrests in Ireland. The Brussels Convention was implemented into Irish law by the Jurisdiction of Courts (Maritime Conventions) Act (1989 Act), which is the basis of modern shipping law in Ireland. However, the older Courts of Admiralty (Ireland) Acts 1867 and 1876 are applicable to ships registered in non-Convention countries. Ships to which the Convention applies may be arrested under the 1989 Act. Otherwise, as Ireland is a common law jurisdiction, the law of arrest in Ireland is similar to the law of arrest in England. Ireland has not ratified the International Convention on the Arrest of Ships 1999. It is possible to arrest a sister ship of Convention countries²⁰ although it is not possible to arrest associated ships.

Procedure to arrest

Proceedings must be brought *in rem* before the admiralty judge of the High Court. Often a warning letter is sent to the owner or agent in advance of the application to arrest but this is not a legislative requirement or legal proof. A summons setting out the claim is issued in the Central Office of the High Court and must be accompanied by an affidavit exhibiting the bill of lading, charter party and other documents relevant to the application for the arrest and must include the information set out in Order 64 of the RSC. The affidavit can be sworn by either the arresting party or their solicitor. The applicant must undertake to be responsible for the Admiralty Marshal's expenses of arrest.

The application is made *ex parte* to the Master of the High Court or the admiralty judge. No arrest order will be granted by the court unless it is satisfied that the vessel is within Irish waters and is flying the flag of one of the contracting states to the Brussels Convention. The arrest is effected by service of the warrant of arrest by the Admiralty Marshal or his or her substitutes and the warrant is then filed in the Central Office. Service of a summons or warrant against the ship, freight or cargo on board is effected by nailing or affixing the original summons or warrant for a short time on the main mast or on the single mast of the vessel and, on taking off the summons or warrant, leaving a true copy nailed or affixed in its place.

In a recent decision of the Admiralty Court,²¹ a third party sought to intervene in the proceedings by virtue of the fact that its subsidiary companies had paid a sum of money to the plaintiff on foot of an order for arrest. The Court held that a shareholder has no property,

20 *The 'Marshal Gelovani'* [1995] IR 159 and *The 'Kapitan Labunets'* [1995] 1 IR 164.

21 *Amsterdam Trade Bank NV v. The owners and all persons claiming an interest in the MV 'Clipper Faith'* [2014] IEHC 329.

legal or equitable, in the assets of a company and thus the third party never had any interest in the vessel or, by extension, in any of the funds in court and thus had no *locus standi* to defend the proceedings and otherwise intervene in them.

Types of claims

The claims for which a vessel can be arrested, as set out in Sections 27 to 37 of the Court of Admiralty (Ireland) Act 1867, are:

- a* all claims whatsoever relating to salvage and to enforce the payment thereof;
- b* all claims in the nature of towage and to enforce payment thereof;
- c* any claims for damage received or done by any ship;
- d* any claim for the building, equipping or repairing of any ships;
- e* any claim by a seaman of any ship for wages earned by him on board the ship;
- f* any claim in respect of a registered mortgage; and
- g* any claim by the owner of any bill of lading of any goods carried into any port in Ireland in any ship for damage done to the goods by the negligence or misconduct of or breach of duty or breach of contract on the part of the owner, master or crew of the ship.

The claims for which a vessel can be arrested were extended by Article 1 of the Brussels Convention and include the following:

- a* damage caused by any ship either in collision or otherwise;
- b* loss of life or personal injury caused by any ship or occurring in connection with the operation of any ship;
- c* salvage;
- d* agreement relating to the use or hire of any ship whether by charter party or otherwise;
- e* agreement relating to the carriage of goods in any ship whether by charter party or otherwise;
- f* loss of or damage to goods, including baggage, carried in any ship;
- g* general average;
- h* bottomry;
- i* towage;
- j* pilotage;
- k* goods or materials wherever supplied to a ship for her operation or maintenance;
- l* construction, repair or equipment of any ship or dock charges and dues;
- m* wages of masters, officers or crew;
- n* master's disbursements, including disbursements made by shippers, charterers or agents on behalf of a ship or her owner;
- o* disputes as to the title to or ownership of any ship (including disputes as to possession of a ship);
- p* disputes between co-owners of any ship as to the ownership, possession, employment or earnings of that ship; and
- q* the mortgage or hypothecation of any ship (including the mortgage or hypothecation of any share in a ship).

Sister and associated ship arrests

Sister ship arrest in Ireland is permissible. However, this power of arrest of a sister ship in Ireland is confined to ships of Convention countries only.²² It is not possible to arrest associated ships.

Security and counter-security

A claimant is not required to provide security for an arrest, although the claimant must provide an undertaking for the arrest expenses of the Admiralty Marshal and undertake to indemnify the Admiralty Marshal for all losses incurred in arresting the vessel. The Admiralty Marshal is responsible for the maintenance of an arrested vessel until such time as it is released.

The defendant can provide security to procure the release of the vessel in the form of a payment into court or a payment to the plaintiff, either in money or in the form of an appropriate letter of guarantee from a recognised bank or a letter of undertaking from a recognised P&I club. On payment of appropriate security, the vessel will be released.

In Ireland, it is possible for a third party who also has a claim against the same vessel to enter what is known as a caveat against release. This means that should the owner seek to release the vessel, the caveat would prevent the application being successful on the basis that there is another claim seeking to maintain the arrest of the vessel.

Wrongful arrest claims

The test for wrongful arrest is usually bad faith or gross negligence and is a difficult burden of proof to satisfy. There is very little Irish case law relating to wrongful arrest and what amounts to a good and sufficient reason. In the limited case law to date,²³ reference was made to the need to establish a 'fair and statable' case and 'sufficient grounds for the arrest of the vessel'. If a vessel has been wrongfully arrested, the arresting party may be held liable for the costs of the proceedings and for damages for wrongful arrest.

ii Court orders for sale of a vessel

If no security is forthcoming or indeed no settlement agreement has been reached whereby the arresting party and the shipowners can progress matters, it is possible for an application to be made by the arresting party to the courts to have the vessel sold. The vessel will be sold 'as is', free from encumbrances, liens and with good title. Any claims against the vessel that existed before the sale are transferred to a claim against the sale proceeds.

The Admiralty Marshal appoints an auctioneer and an expert to appraise the vessel and fix a reserve price that is not disclosed to the auctioneer or any other party until the auction gets under way. Auctions of vessels in Ireland are advertised internationally and attract buyers from around the world. If the reserve price is reached at the auction, the vessel is sold to the highest bidder. All parties, including those who have obtained judgment or registered cautions, must be served with the application for sale. The Admiralty Marshal can also order the vessel to be sold under Rule 35 of Order 64 of the RSC if no appearance is entered by the shipowner to the arrest proceedings. If the vessel is sold before the conclusion of the case, the funds from the sale will be lodged in court and subsequently, once the case is determined, the

22 *The 'Marshal Gelovani'* [1995] IR 159 and subsequently in the case of *The 'Kapitan Labunets'* (see footnote 20).

23 *MV 'Blue Ice'* [1997] IEHC 56.

monies will be distributed according to the court order. Court costs are usually 5 per cent of the sale price and are the responsibility of the purchaser. In addition, 10 per cent of the sale price is payable to the court by way of duty and is deducted from the sale proceeds.

The determination of priorities against the proceeds of sale is decided by the admiralty judge in the absence of agreement between the parties. Generally wages and Admiralty Marshal's expenses take priority over the mortgage and then other creditors follow if there are sufficient funds available.

VI REGULATION

i Safety

Ireland has a well-established legislative code relating to maritime safety, which comprises both domestic legislation (principally the Maritime Safety Act 2005) and international conventions on safety.

Maritime safety is administered by the Department of Transport's Maritime Safety Directorate (MSD). The MSD comprises two main sections: the Maritime Safety Policy Division and the Marine Survey Office (MSO) (which includes the Marine Radio Affairs Unit).

Maritime safety policy is formulated by the Department of Transport's Maritime Safety Policy Division. This division is responsible for maritime safety policy, security policy and legislation (including leisure safety), aids to navigation and the corporate governance of the Commissioners of Irish Lights.

ii Port state control

Port state control (PSC) is administered in Ireland by the MSO, which is the designated competent authority. The PSC regime in Ireland is primarily embodied in the European Communities (Port State Control) Regulations 2010 (as amended) (SI No. 656 of 2010), which give effect in Irish law to the EU regime on PSC (principally, Directive 2009/16).

iii Registration and classification

Registration

Ship registration is in a transitional phase following the enactment of the Merchant Shipping (Registration of Ships) Act 2014 (2014 Act) at the end of 2014, which, when it becomes effective,²⁴ will provide a modernised, centralised and flexible ship registration system in Ireland akin to that in the United Kingdom. Pending the 2014 Act coming into effect, Irish ship registration is governed by the Mercantile Marine Act of 1955 (1955 Act) and the Fisheries (Consolidation) Act 1959 as amended by the Fisheries (Amendment) Act 1962 and the Fisheries (Amendment) Act 1983.

The following persons are qualified to be registered in Ireland as an owner or part owner of a ship:

- a* the Irish government;
- b* a minister of the Irish government;
- c* a national of an EU Member State;

24 Expected shortly: www.irishstatutebook.ie/eli/isbc/2014_43.html.

- d* a body corporate established under and subject to the law of and having its principal place of business in an EU Member State; and
- e* nationals of and body corporates having their principal place of business in a reciprocating state and entitled under the laws of that state to own a ship having the nationality of that state.²⁵

The following categories of vessel must be registered under the Irish flag:

- a* ships fully owned by persons being citizens of Ireland or Irish bodies corporate and that are not registered under the law of another country; and
- b* fishing vessels 35 feet and over in length, wholly owned by qualified persons or bodies.

The following categories of vessel are exempt from the obligation to register:

- a* ships not exceeding 15 net registered tonnage (other than fishing vessels more than 35 feet in length) provided they are used only in navigation on the rivers, canals, lakes or coasts of Ireland, Great Britain, the Channel Islands or the Isle of Man, or within the territorial waters off their coasts;
- b* ships acquired before the passing of the 1955 Act;
- c* ships in respect of which the Minister for Transport, Tourism and Sport (the Minister) has, under Section 21 of the 1955 Act, consented to registry under the law of another country; and
- d* ships owned by Irish citizens not ordinarily resident in the state.

There is no provision to register vessels under construction under the flag of Ireland and dual flagging is not permitted.

Other than the ownership of a vessel, only mortgages and discharges of registered mortgages may be registered on the register of an Irish ship. The mortgage register is a prioritised register with priority being afforded according to the date and time at which the mortgage is recorded by the registrar on the ships register and not by reference to the date of creation of the mortgage. The registrar will record mortgages in the order in which they are presented to him or her for registration.

The register is maintained at the particular port of registration. There are currently several ports at which a vessel may be registered in Ireland. The 2014 Act will centralise registration on to one computerised register.

Classification

The following classification societies are recognised and approved by the Irish government for the purposes of performing surveys and inspections on Irish registered vessels:²⁶

- a* the American Bureau of Shipping;
- b* Bureau Veritas;
- c* Class NK (Nippon Kaiji Kyokai);
- d* Germanischer Lloyd AG;
- e* Lloyd's Register;

25 The current reciprocating states are the United Kingdom and the Commonwealth states of Canada, New Zealand and Pakistan.

26 www.dttas.ie.

- f Registro Italiano Navale (RINA); and
- g the Russian Maritime Register of Shipping.

Generally, classification societies exclude their liability in contract. Any claim in tort for breach of duty of care would require the person claiming the breach to establish that a duty of care was owed by the classification society; that the classification society breached the duty of care; and that the breach resulted in loss or damage to the claimant.²⁷ There has been no Irish case law specifically with regard to classification societies and their duty of care to third parties. However, English case law is of persuasive authority in the Irish courts and accordingly the House of Lords decision in *Marc Rich & Co v. Bishop Rock Maritime (the 'Nicholas H')*,²⁸ in which it was held that classifications societies do not owe a duty of care to third parties in respect of their classification and certification duties, would be likely to be followed.

The European Communities (Ship Inspection and Survey Organisations) Regulations 2011 gave effect in Irish law to Directive 2009/15/EC on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations. It contains articles relating to the financial liability of recognised organisations for any marine casualty caused by wilful act, omission or gross negligence.

iv Environmental regulation

There are three sources of environmental regulation in the Irish context: international, EU and national.

First, Ireland is a party to conventions such as the CLC Convention and its 1976 and 1992 Protocols (see Ireland's Oil Pollution of the Sea (Civil Liability and Compensation) Acts 1988–2005). Ireland is also a party to the HNS Convention (see the Sea Pollution (Hazardous Substances) (Compensation) Act 2005). Second, as an EU Member State, Ireland is subject to the entire body of EU environmental law, including the maritime environmental directives. Third, there are also Irish statutes and statutory instruments that are relevant, including the Air Pollution Act 1987 and the Harbours Acts. In terms of policy, Ireland is intent on vigorously enforcing its environmental regime.

v Collisions, salvage and wrecks

Ireland is a party to the Collision Convention 1952 (see the Jurisdiction of Courts (Maritime Conventions) Act 1989).

Ireland is also a party to the 1989 Salvage Convention (see the Merchant Shipping (Salvage and Wreck) Act 1993). The Minister for Transport has general superintendence of all matters relating to every wrecked or stranded vessel. There is no mandatory form of salvage agreement, but the Lloyd's Open Form is normally used.

Ireland is a party to Nairobi WRC 2007 but no enabling Irish legislation has been adopted to date.

Pursuant to the European Communities (Vessel Traffic Monitoring and Information System) Regulations 2010 (as amended), it is an offence under Irish law to fail to report

²⁷ *Ward v. McMaster* [1989] ILRM 400.

²⁸ [1995] 2 Lloyd's Rep 299.

immediately to the Irish Coast Guard any incident or accident affecting the safety of the ship, such as a collision within the exclusive economic zone of the state. Failure to notify is likely to result in prosecution.

The Merchant Shipping (Investigation of Marine Casualties) Act 2000 provides that certain responsible persons involved in a marine casualty must immediately, and by the quickest means feasible, notify the casualty to the Chief Surveyor of the Marine Survey Office. The Act also provides for a no-fault review of casualties by the Marine Casualty Investigation Board to determine the cause, so as to ensure that the occurrence is not repeated.

vi Passengers' rights

First, Ireland acceded to the Athens Convention and to the 1976 Protocol in 1998, and to the 2002 Protocol in 2014. However, since 31 December 2012, Regulation (EC) No. 392/2009 applies in Ireland by virtue of SI No. 552 of 2012. This raises the limits of liability on and introduces compulsory insurance to cover passengers on ships covered by the Regulation. Application of the Regulation in relation to Class B ships travelling in the state has been deferred until the end of 2018. SI No. 552 of 2012 also gives effect to EU Council decisions 2012/22/EU and 2012/23/EU to give the force of law to the Athens Convention Protocol 2002. Secondly, passengers also have some rights by virtue of 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, which is administered in Ireland by the National Transport Authority.

vii Seafarers' rights

Seafarers have extensive rights not only under international and EU law but also under domestic Irish law. In 2014, it was announced that Ireland had ratified the Maritime Labour Convention. With effect from 21 July 2015, Ireland is a party to the Convention and implements the requirements contained in it both for Irish-flagged ships and for international ships calling at Irish ports. Seafarers also benefit from a favourable tax regime. The Mercantile Marine Office maintains the Register of Seafarers.

VII OUTLOOK

The outlook for the Irish shipping sector is positive, and the state is committed to fostering and developing it further. This has been supported by the establishment of the IMDO, the streamlining of administration in the sector and the enactment of new legislation (e.g., Merchant Shipping (Registration of Ships) Act 2014 and the proposed consolidation of existing statutes). The state is also working on developing a new national ports policy, and the Competition and Consumer Protection Commission has published a study of competition in the Irish ports sector. There are also plans to establish an international shipping services centre in Dublin along the lines of Dublin's very successful International Financial Services Centre. The Irish government hopes the Irish shipping sector will continue to grow by way of some indigenous activity but also overseas companies relocating some or all of their operations to Ireland, and the fact that the United Kingdom is planning to leave the EU could mean that some would be more inclined to become established in Ireland so as to be part of the EU.

ITALY

*Pietro Palandri and Marco Lopez de Gonzalo*¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Italy's fleet comprises more than 1,450 units totalling more than 16.5 million gross tonnage (GT). About 92 per cent of the fleet is listed in the International Registry (see Section VI.iii), and 6.6 per cent is listed in the ordinary Registry. Less than 1 per cent of the fleet flies the flag of a foreign country under bareboat charter registration. Italy has the world-leading roll-on, roll-off fleet, with 261 vessels with a total GT of 5.1 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 in some cases 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.

The Italian shipbuilding industry has a long tradition and an established reputation; however, fierce competition, especially from Asian shipyards, has caused a significant restriction of the activity of Italian shipyards. The main focused is currently on high-quality niche markets, such as cruise vessels and mega-yachts.

With 30 orders for new ships (totalling about 2.1 GT) in the year 2016, Italy is ranked sixth in the world shipbuilding ranking and second in Europe (after Germany).

Fincantieri, the largest shipbuilding company, controlled by the Italian state, presently accounts for 80 per cent of Italian shipbuilding production and is a leading shipyard for cruise vessels (for example, 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 navigation section regulates the administrative organisation of the navigation, ownership and operation of a vessel, charter parties, bills of lading, salvage, collision, maritime insurance and procedural rules for maritime claims.

¹ Pietro Palandri and Marco Lopez de Gonzalo are partners at Studio Legale Mordiglia.

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 provide 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.

Law applicable to contractual and non-contractual obligations is regulated, respectively, by Regulation (EU) 593/2008 (Rome I) and Regulation (EC) 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 Hague Rules, the Brussels Convention, the 1989 Salvage Convention and the Maritime Labour Convention 2006 (MLC).

The most prominent convention not yet ratified by Italy is the LLMC Convention 1976, the provisions of which have, however, been partially included in domestic legislation (see Section IV.iv).

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. The Court of Cassation also affirmed the validity of a jurisdiction clause included in a multimodal transport document.

Furthermore, the parties can agree the jurisdiction of an EU Member State even if none of them is domiciled in a Member State, and 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 Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I). According to Rome I, the choice of law made by the parties requires no formalities and can be inferred by the judge taking into consideration 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.² 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 in Italy can be instituted according to Article 840 *et seq.* of the Italian Code of Civil Procedure and it can be formal or informal. The main difference between the two procedures is that in formal arbitration, the arbitrators serve as substitutes for the ordinary courts and their award is enforceable as a judgment, while 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 cannot therefore be directly enforced but must be ‘sued on’ like a contract and is carried into effect through enforcement of the judgment rendered upon it.

As far as arbitration clauses are concerned, courts in Italy are very strict on ascertaining 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.

From September 2013, compulsory mediation was introduced in Italy for certain types of claims. As far as shipping is concerned, mediation is compulsory for insurance claims and therefore must be carried out before any proceedings against insurers are brought to court.

iii Enforcement of foreign judgments and arbitral awards

The rules on the recognition and enforcement of judgments rendered in other EU Member States are set out by Brussels I *bis*. Under the 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.

² Article 438, Paragraphs 1 and 2 of the Code of Navigation.

As far as international conventions are concerned, judgments rendered in, for example, Switzerland, Norway, Denmark and Iceland will be recognised and enforced in accordance with the Lugano Convention 2007 (succeeding the Lugano Convention 1988), which is, in fact, very similar to EU legislation.

If Brussels I *bis* or international conventions do not apply, specific bilateral conventions exist between Italy and certain countries (such as Tunisia since 1967) or, as a residual criterion, the Italian courts will apply Articles 64 to 71 of Italian Law No. 218/1995, which provides a test regarding only the regulatory proceedings followed in rendering the judgment without any reconsideration of the merits.

Regarding the enforcement of foreign arbitral awards, Italy is a signatory party to the New York Convention. Pursuant to that Convention, the Italian courts will consider arbitral awards rendered in another contracting state as directly binding in Italy. Enforcement will be provided by means of an *exequatur* procedure that involves a petition to be filed with the competent court of appeal, the decision whether to grant or reject the enforcement of the award 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 test for the 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 '*appalto*' (which corresponds to 'supply of workmanship and materials'). In any case, parties are free to select the law to govern their contract³ and usually each contract includes an express clause to that effect.

With reference to transfer of title to the vessel, this is another aspect that is usually dealt with from contract to contract. Parties can agree that ownership will be transferred upon delivery; in this case pre-delivery instalments are secured by refund guarantees or by a mortgage on the ship under construction. However, it is also possible to agree that ownership will be transferred 'step by step', concurrently with payment of pre-delivery instalments.

Another aspect that must be underlined is that under Italian law there is a separate Registry of Ships under Construction.⁴ The shipbuilding contract and a declaration that construction has started must be registered. The registration is made in the name of the builder or the buyer, depending on who holds title in construction.

As to the remedies for defects, the parties can incorporate into the contract clauses providing for liquidated damages in the event of breaches of guaranteed standards of performance, for example, regarding speed or consumption⁵ and for the right of termination in the event of particularly serious breaches.⁶

3 Article 3 of EU Regulation No. 593/2008.

4 Article 234 of the Code of Navigation.

5 Article 1383 of the Civil Code.

6 Article 1456 of the Civil Code.

The signature of the protocol of delivery and acceptance will be final and binding except for continuing performance warranties, defects that were fraudulently concealed and latent defects (i.e., defects that could not be detected by reasonable diligence).⁷

ii Contracts of carriage

After entering into force in 7 April 1939, the Hague Rules were renounced in 1984 and, in August 1985, Italy ratified the Hague-Visby Rules, which entered into force in November 1985, as amended by the Protocols of 1968 and 1979. The Hague-Visby Rules are to be considered 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.

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.

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,⁸ 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.

⁷ Article 1667 of the Civil Code.

⁸ Article 288 of the Code of Navigation.

A jurisdiction clause contained in a bill of lading will be recognised by the Italian courts provided it complies with the provisions of Brussels I *bis* (Article 25) or of the Italian International Private Law, Law No. 218/1995 (Article 4).

An arbitration clause contained in a 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 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.

As previously mentioned, Italy has not ratified the LLMC Convention but, by means of Legislative Decree No. 111/2012, the Italian government has enacted in Italy the provisions of the EU Directive 2009/20/EC on the insurance of shipowners for maritime claims. This Decree also introduces into Italian law a new regime of limitation of liability for shipowners. Articles 7 and 8 of the Decree have, in fact, introduced the same limits of liability as those provided under Chapter II of the LLMC Convention as amended by the LLMC Protocol 1996 for vessels of 300 GT or more.

The Decree gives rise to a number of problems, including:

- a* the absence of a list of credits that are subject to limitation and those excepted from limitation; and
- b* the absence of any provisions regarding the cases where a shipowner may lose title to limit.

In addition to the above, 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.

As mentioned above, for vessels of 300 GT or less, the regime of the Code of Navigation remains applicable.⁹

V REMEDIES

i Ship arrest

Italy has ratified the Brussels Convention under which a vessel registered in a contracting state can be arrested only for maritime claims as defined and listed in Article 1 of the Convention. Ships flying the flag of non-contracting states can be arrested in Italy for any claim.

Procedural rules for arrest are set out in domestic legislation by Articles 682 to 686 of the Code of Navigation and Article 669 *bis* et seq. of the Code of Civil Procedure.

⁹ 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 in order to decide whether to grant the arrest. If the arrest is urgently needed and waiting to summon the defendant would jeopardise the claimant's rights, the court can order the immediate arrest of the ship and then set the hearing 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 only be arrested in Italy 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 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. The trend of the Italian courts is more favourable to claimants and arrests are usually granted even in the absence of a lien on the vessel.

However, according to some recent 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) has control over the vessel, like the charterer, but in no other cases.

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. In order to do so, the creditor must be in possession of an enforceable title, usually a judgment.

If the debtor fails to pay within the deadline, the creditor will be entitled to serve upon the debtor and the master of the vessel, through the bailiff, a writ of attachment, along with the order to pay and the enforceable title. The same writ of attachment must be sent to the

harbour master of the port at which the ship is registered so that it can be recorded in the register. The procedure can be joined by other creditors, according to Articles 499 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, upon the debtor and to all other creditors who joined the procedure, who are allowed to make observations on the method of the sale.

The application must be filed within 30 days of its service at the competent court so that an expert can perform a survey to render an estimate of the value of the vessel. After hearing all interested parties, the judge will then order the sale of the vessel. The sale is carried out by means of a public auction. 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

SOLAS was enacted in Italy by Law No. 313/1980. Following its enactment, and taking into consideration its subsequent amendments, the national Regulation on the Safety of Life at Sea was reformed in 1991 by Presidential Decree No. 435/1991.

As far as the safety of work on board ships is concerned, the relevant rules are set out in Legislative Decree No. 271/1999.

Finally, the European Commission, in connection with the MV *Erika* and MV *Prestige* disasters in 1999 and 2002, respectively, introduced various measures on maritime safety. These measures pertain, *inter alia*, to the setting up of a European Maritime Safety Agency, the setting up of a Compensation Fund for Oil Pollution in European Waters, the introduction of a Community monitoring, control and information system for maritime traffic, the speeding up of the replacement of single-hull oil tankers with double-hull oil tankers, 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 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 No. 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 ISM manager to the harbour master's headquarters.

iii Registration and classification

Under Article 143 of the Code of Navigation, registration of a ship in the Italian Registry is subject to the following requirements:

- a* at least half of the shares in the ship are owned by an Italian or a European person or entity; or
- b* in the case of a 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 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.¹⁰

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 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 related to the merits of the cause and not to the legal principle mentioned above), which was confirmed by the Italian Supreme Court of Cassation in March 2018.

iv Environmental regulation

Italy has ratified:

- a* the CLC Convention;
- b* the Oil Pollution Fund Convention; and
- c* the Bunker Convention.

In terms of domestic legislation, environmental regulation is contained in the Environmental Code.¹¹

Part 6 of the Environmental Code contains the procedure for the establishment of liability and compensation for damage to the environment. Article 303 provides that Part 6

¹⁰ Article 235 of the Code of Navigation.

¹¹ Legislative Decree No. 152/2006.

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, a recent decision of the European Court of Justice in *The 'Erika'*¹² deemed the European Directive on waste (which was enacted in Italy with the Code of Environment) applicable to a spill of hydrocarbons after the sinking of a ship, and therefore invited the national judge to apply the principles of the Directive.

Finally, through Legislative Decree No. 112/2014, Italy has adapted its legislation to comply with European Directive No. 33/2012 on sulphur content of marine fuels, which introduced standards aimed at drastically reducing sulphur emissions from vessels.

v Collisions, salvage and wrecks

The Collision Convention 1910 is in force. Jurisdiction is founded on 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 was effected or of any other ship belonging to the defendant that can be lawfully arrested, or where arrest could have been effected and bail or other security has been furnished; or
- c* the collision occurred.

The Court of Cassation (Judgment No. 4686 of 9 March 2015) held that the special criteria of jurisdiction of the Collision Convention 1952 prevail over the general discipline of Brussels I. Neither Brussels I nor the new Brussels I *bis* affects any conventions to which the Member States are parties and that govern jurisdiction in relation to particular matters.

A party can claim all damages that are immediate and direct consequences of the collision, including material damages and loss of earnings. Italy has ratified the 1989 Salvage Convention, which therefore applies as a general rule.

The limitation period for enforcing salvage claims in Italy is two years from the day on which the salvage operations are completed.¹³

The salvor can arrest the salvaged ship (or a sister ship) under the Brussels Convention. It can also arrest the cargo within 15 days of discharge and before it has been lawfully delivered to a third party.

According to Article 73 of the Code of Navigation, the owner of the vessel has the duty to remove a wreck. Further, a general obligation of remediation or depollution is imposed by the Environmental Code¹⁴ on the party responsible for the pollution of an area. In a case of omission, the remediation or depollution is carried out by the public administration, which can claim the costs from the responsible party.¹⁵

Italy has not ratified the Nairobi WRC 2007, which entered in 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 (not yet in force) and establishes a list of recycling facilities authorised to conduct ship-recycling operations. The Regulation entered into force in 2013 but is not yet applicable.

¹² C-188/07.

¹³ Article 500 of the Code of Navigation.

¹⁴ Legislative Decree No. 152/2006.

¹⁵ Article 250 of the Environmental Code.

vi Passengers' rights

The European Union implemented two important pieces of legislation on passenger's rights: Regulation (EU) No. 1177/2010 concerning the rights of passengers when travelling by sea and inland waterways, and Regulation (EC) No. 392/2009 on the liability of carriers of passengers by sea in the event of accidents, implementing the Athens Convention as amended by the 2002 Protocol (according to the 2006 IMO guidelines for implementation of the Athens Convention). The Italian Code of Navigation also regulates the carriage of people by sea in Articles 396 to 418.

For example, Article 400 of the Code of 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 Directive 90/314/EEC, Articles 32 to 51 of the Tourism Code¹⁶ provide 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, which were due to be implemented by the Member States in their national legislation by 1 January 2018, increase the existing protection for travellers and, for the first time, set out a regulation on linked travel arrangements.

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(2) and (10) of the MLC, the Italian government has specified that it will progressively extend the following branches of social security to seafarers:

- a* sickness benefit;
- b* unemployment benefit;
- c* old-age benefit;
- d* employment injury benefit;
- e* family benefit;
- f* maternity benefit;
- g* invalidity benefit; and
- h* survivors' benefit.

In domestic legislation, seafarers' rights are granted by National Labour Collective 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.

16 Legislative Decree No. 79/2011.

As far as stability of employment is concerned, Article 18 of Law 18/1970 has always protected employees, providing strict rules on the termination of employment agreements by the employer. This law became directly applicable to seafarers after Judgment No. 364/1991 of the Italian Constitutional Court. Nonetheless, the government is reviewing labour law legislation and the application of Article 18 of Law 18/1970 may be modified.

VII OUTLOOK

In January 2019, the Tribunal of Genoa rendered a decision on the recovery action brought by a cargo insurer against a shipowner for the reimbursement of the salvage compensation paid by the insurer in favour of the salvor of the vessel and the cargo.

The vessel was under a time-charter and the charterers were using the vessel to perform a general contract with the Italian Army for the carriage of military equipment. At the time of the occurrence a cargo of military equipment was loaded, and charterers bills of lading were issued.

During the voyage a fire broke out in the engine room, which escalated quickly and any action from the crew proved either impossible or ineffective. Salvage assistance was required. The salvage claim was settled by the shipowners and, after negotiations the cargo share of salvage was agreed at €6 million (also taking into account that the cargo did not suffer any damage as a consequence of the fire) and was paid by cargo insurers who accordingly became subrogated in shippers' rights.

The inspection on board and investigations of the casualty revealed that the fire was attributable to the negligence of the crew.

Cargo insurers filed a suit against the shipowner, and not against the carrier, who they considered liable for the conduct of the crew. The claim was framed as a claim in tort with the intent to circumvent the application of the Hague-Visby Rules.

The shipowner claimed instead that the claim was subject to the Hague-Visby Rules as the Hague-Visby Rules refer to either the 'carrier' or the 'ship' and the reference to 'the ship' should be read as reference to the 'the actual carrier', and the bills of lading included a *Himalaya* clause having the effect of giving the shipowner the benefit of all the provisions applicable to the carrier.

The shipowner accordingly raised the following exceptions: the time-bar pursuant to Article 3.6, the excepted perils pursuant to Article 4.2 (fire or crew negligence), and the limitation pursuant to Article 4.5.

The Tribunal of Genoa as at their judgment dated 22 January 2019 rejected the claim of the cargo insurers accepting that the claim was subject to the Hague-Visby Rules and declaring it time-barred for the expiry of the one-year time bar period under Article 3.6 of the Hague-Visby Rules.

JAPAN

Junpei Osada, Masaaki Sasaki and Takuto Kobayashi¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Japan is the world's second-largest ship-owning country (it owns and controls more than 2,400 ocean-going vessels) and the third-largest shipbuilding country 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 quite active in investing not only in domestic companies but also overseas companies through schemes such as operating and finance leases. Of approximately 46,000 ocean-going commercial vessels in the world, roughly 2,450 vessels with more than 170 million deadweight tonnage are owned or operated by Japanese companies or special-purpose companies established in Japan or elsewhere, such as Panama, Liberia, Singapore or the Marshall Islands.²

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Japan has ratified most of the basic maritime conventions, such as the Hague-Visby Rules, the latest version of the LLMC Convention 1976 with its 1996 Protocol, the 1992 CLC Convention and Fund Convention, MARPOL 73/78 with its Annexes, SOLAS, and relevant rules and regulations that are incorporated or codified by local laws and regulations. According to an announcement from the Ministry of Land, Infrastructure, Transport and Tourism (MITI), the Nairobi Convention and the Bunker Pollution Convention 2001 are scheduled to be ratified before long,³ resulting in amendments to the Act on Liability for Oil Pollution Damage⁴ and other related domestic laws.⁵ Amendments to the Act on Liability for Oil Pollution Damage mainly purport to aim to bring it in line with the conventions, such as (1) expanding the scope of the vessels that are required to have compulsory insurance;⁶ (2) admitting a direct claim against the insurer for compensation for losses or damages

1 Junpei Osada is a partner and Masaaki Sasaki and Takuto Kobayashi are associates at TMI Associates.

2 The relevant data is taken from *Shipping Now 2018–2019*, issued by the Japanese Shipowners' Association.

3 These conventions are undergoing the approval procedure of the parliament (as at 22 February 2019).

4 Law No. 95 of 1975.

5 The reform of the Act on Liability for Oil Pollution Damage and other related reform bills are approved by cabinet and will be proposed to the parliament (as of 8 March 2019).

6 Article 41, 49 of the reform of the Act on Liability for Oil Pollution Damage.

arising from bunker oil or a wreck;⁷ (3) limiting defence arguments of the insurer other than the defence that the owner might have been entitled to invoke against the claimant;⁸ and (4) recognition and enforcement of the judgments of the state parties under the Bunker Pollution Convention 2001.⁹

With respect to domestic law, there are provisions in relation to maritime issues set out in Article 684 et seq. of the Commercial Code,¹⁰ which has been amended for the first time since its enactment in 1899. The reform of the Commercial Code came into effect on 1 April 2019, and has changed the legislative framework in Japan in line with the current global maritime standard, with the result that a part of JCOGSA¹¹ and other related Acts have also been amended to make them consistent. It is unlikely that there will be any significant effect on shipping practice in the near future, however, and many of the outstanding issues will be left to future court decisions.

The reform of the Civil Code,¹² which will come into effect on 1 April 2020, will also have some effect on maritime law. *Inter alia*, the reform includes rules regarding standard form contracts to the effect that general terms and conditions should be incorporated into contracts. It will have a commercial impact on maritime-related contracts, particularly contracts of carriage and bills of lading.

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 Procedure¹³ and the Act on General Rules for Application of Laws.¹⁴ In the event that two vessels collided within Japanese territorial water or that a vessel damaged in a collision reached a Japanese port as the first port after the collision, the resulting tort claims can be brought to Japanese courts, regardless of the vessels' flag.¹⁵ Exclusive jurisdiction clauses in contracts, which are normally considered to be valid, would make it clear that the designated courts have the competent jurisdiction.¹⁶

7 Article 43(1), 51(1) of the reform of the Act on Liability for Oil Pollution Damage.

8 Article 43(2), 51(2) of the reform of the Act on Liability for Oil Pollution Damage.

9 Article 39(2) of the reform of the Act on Liability for Oil Pollution Damage.

10 Law No. 48 of 1899.

11 Act on International Carriage of Goods by Sea: Law No. 172 of 1957.

12 Law No. 89 of 1896.

13 Law No. 109 of 1996.

14 Law No. 78 of 2006.

15 Article 3.3(viii), (ix) of the Code of Civil Procedure.

16 Article 3.7 of the Code of Civil Procedure.

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 commercial contracts are subject to a five-year prescription period¹⁷ and tort claims are subject to a three-year period,¹⁸ counting from when the victim is first aware of the damage and the identity of the wrongdoers. Importantly, as mentioned below, shorter time limits apply to specific claims, such as claims for carrier's liability for breach of carriage of goods contract,¹⁹ shipowners' claims against charterers, shippers or consignees,²⁰ claims arising from collision,²¹ salvage²² and general average.²³

ii Arbitration and ADR

The Tokyo Maritime Arbitration Commission (TOMAC), which is located in the Japan Shipping Exchange (JSE), 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 (ICCJ), which tends to deal with more general commercial disputes.

The TOMAC has drawn up three types of arbitration rules:²⁴ (1) Ordinary Rules, (2) Simplified Rules (claims up to ¥20 million), and (3) Small Claims Arbitration Procedure (SCAP) Rules (claims up to ¥5 million). 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).²⁵ One of the advantages of arbitration by the

17 Article 522 of the Commercial Code.

18 Article 724 of the Civil Code. Tort claims for damages caused by death or personal injuries will be subject to a five-year prescription period, following enforcement of the above-mentioned reform of the Civil Code.

19 Article 14(1) of JCOGSA (Article 15 of the reform of JCOGSA, Article 585(1) of the reform of the Commercial Code).

20 Article 20(1) of JCOGSA, Article 765 of the Commercial Code (Article 15 of the reform of JCOGSA, Article 586 of the reform of the Commercial Code).

21 Article 798(1) of the Commercial Code. The reform of the Commercial Code extends the prescription period from one year to two years, in line with the 1910 Collision Convention (Article 789 of the reform of the Commercial Code).

22 Article 814 of the Commercial Code. The reform of the Commercial Code extends the prescription period from one year to two years, in line with the 1910 Salvage Convention (Article 806 of the reform of the Commercial Code).

23 Article 798(1) of the Commercial Code (Article 812 of the reform of the Commercial Code).

24 www.jseinc.org/en/tomac/arbitration/rules_index.html.

25 Article 44, 45 of the Arbitration Act: Law No. 138 of 2003.

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 such costs.

iii Enforcement of foreign judgments and arbitral awards

The following requirements must be met for foreign judgments to be enforced in Japan:²⁶

- 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.

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.

As Japan is a contracting state of the New York Convention, arbitral awards rendered in signatory countries of the Convention would be enforceable in Japan, as long as the requirements of the Convention have been fulfilled. On the other hand, enforceability of arbitral awards in non-party states would be subject to the conditions set out in the Arbitration Act.²⁷

IV SHIPPING CONTRACTS

i Shipbuilding

Japanese shipyards have been constructing high-quality and high-tech commercial vessels for a long time. Owing to the recent global depression in the shipbuilding market, however, some Japanese shipyards have decided to consider consolidating their business or form alliances to withstand this global recession.

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 same 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 JCOGSA, which incorporates the essence of the Hague-Visby Rules, though with some variations. JCOGSA has force of law for

²⁶ Article 118 of the Code of Civil Procedure.

²⁷ Article 46 of the Arbitration Act.

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.²⁸ In contrast, contracts of domestic carriage of goods by sea are subject to the Commercial Code.

Under JCOGSA, the carrier is obligated 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.²⁹ In the event of damage to cargo during a voyage due to unseaworthiness, the carrier is liable for damages unless it can successfully prove 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.³⁰

Remarkably, the reform of the Commercial Code stipulates that if the good has a flammable, explosive or other dangerous nature, the shipper is obliged to notify the carrier of such nature of the good together with other information necessary to carry it safely.³¹

The Supreme Court³² has affirmed a judgment by the Tokyo High Court,³³ 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.³⁴ Unlike under English law, however, a contractual lien on cargo owned by a third party is not recognised.

The reform of the Commercial Code sets out new 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 air transportation, land transportation or sea transportation, depending on the period in which the cause of the loss or damage occurs.³⁵

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 such 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.³⁶ If there is an issue regarding the identity of the carrier, the

28 Article 1 of JCOGSA.

29 Article 5 of JCOGSA.

30 Judgment of the Tokyo District Court dated 30 November 2012, *The 'Cougar Ace'*.

31 Article 572 of the reform of the Commercial Code. This provision is applied *mutatis mutandis* to an international carriage of goods by the Article 15 of the reform of JCOGSA.

32 Judgment of the Supreme Court dated 12 December 2015, *The 'NYK Argus'*.

33 Judgments of Tokyo High Court dated 28 February 2013 (claim against the shipper) and 29 October 2014 (claim against the cargo manufacturer).

34 Article 753 of the Commercial Code (Article 741(2) of the reform of the Commercial Code).

35 Article 15 of the reform of JCOGSA, Article 578(1) of the reform of the Commercial Code.

36 Article 20 (2) of JCOGSA, Article 583 of the Commercial Code (Article 15 of the reform of JCOGSA, Article 581 of the reform of the Commercial Code).

Supreme Court³⁷ has established basic rules that the carrier shall be identified on the basis of 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,³⁸ although the requirements for the incorporation is as yet unclear. 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 the courts will dismiss a claim brought under a contract of carriage covered by such a bill of lading.³⁹

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.⁴⁰ The prevailing view is that determination of the value should be consistent with the cost, insurance and freight value.⁴¹ JCOGSA also includes a package limitation that is identical to that set out in the Hague-Visby Rules.⁴²

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.⁴³ One significant example is the limitation proceedings for the *MOL COMFORT* incident,⁴⁴ which started at Tokyo District Court in July 2013.

Under the Act, an applicant for limitation of liability must be a 'Shipowner, etc.',⁴⁵ 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 also have to 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 P&I club.⁴⁶

Once decisions have been reached about the filed claims and the limitation fund has been distributed accordingly, the proceedings are deemed to be completed.

37 Judgment of the Supreme Court dated 27 March 1998, *The 'Jasmine'*.

38 Judgment of the Osaka District Court dated 11 May 1959, *The 'Tribem'*.

39 Judgment of the Supreme Court dated 28 November 1975, *The 'Tjisadane'*.

40 Article 12-1 of JCOGSA (Article 8 of the reform of JCOGSA).

41 Judgment of the Tokyo District Court dated 27 October 2008, *The 'Keiyo'*.

42 Article 13 of JCOGSA (Article 9 of the reform of JCOGSA).

43 Act on Limitation of Shipowner Liability: Law: No. 94 of 1975.

44 In June 2013, the container ship *MOL COMFORT* was broken in half in the middle of the Indian Ocean, resulting in it sinking with a number of carrying containers.

45 Article 2(1)(ii) of the Limitation of Liability Act.

46 Articles 19 and 20 of the Limitation of Liability Act.

V REMEDIES

i Ship arrest

The arrest of a vessel may be based upon a maritime 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 maritime lien, the following have a statutory lien over the vessel:⁴⁷

- a* a claim stipulated in Article 842 of the reform of the Commercial Code (as from 1 April 2019, e.g., claims for death or personal injury, salvage and general average, taxes, pilotage, towage, those arising from the necessity to continue a voyage, and mariners' claims arising from their employment contracts);
- b* a claim subject to a limitation held in accordance with the Limitation of Liability Act;⁴⁸ and
- c* a claim pertaining to the damage caused by oil pollution resulting from the spill or discharge of oil from a tanker.⁴⁹ Maritime liens are superior to the ship mortgage and other creditors.

The provisional attachment order and general civil enforcement make it possible to arrest sister ships; however, associated ships may not be arrested unless the arresting party succeeds in piercing the corporate veil, which is not normally easily granted.

Only when arresting a vessel by way of a provisional attachment order, the arresting party must provide security, such as cash, a bank guarantee or club LOU. In this event, the court will determine the security amount at its discretion, which may be, say, one-third of the vessel's value.

If a creditor arrests a vessel by provisional attachment order, the arresting party is normally expected to file an action on the merits in Japan. In contrast, when arresting a vessel by execution of a lien, mortgage or settled claim, examination of the merits commences only if the debtor files an objection against the execution.

ii Court orders for sale of a vessel

The arrest of a vessel based on a maritime lien, ship mortgage or general civil enforcement with a title of obligation is commenced by a court order for compulsory judicial auction.⁵⁰ Under these circumstances, the arrest of a vessel is automatically a part of the judicial auction procedures. On the other hand, the arrest of a vessel by provisional attachment order does not proceed to a judicial auction until the creditors' substantive claim is adopted and settled by the courts.

The private sale of a vessel is prohibited during the judicial auction procedure. Therefore, if the arresting party wishes to hold a private sale, that is only possible if the vessel is sold immediately after the arresting party withdraws its petition.

47 A shipper's claim for damage to the cargo arising from the ocean carriage contract under the Article 19 of JCOGSA has been deleted by its reform.

48 Article 95(1) of the Limitation of Liability Act.

49 Article 40(1) of the Act on Liability for Oil Pollution Damage.

50 Articles 114(1), 189 of the Civil Execution Act: Law No. 4 of 1979.

VI REGULATION

i Safety

Japan has ratified, accepted or acceded to major conventions for ship safety, such as SOLAS and relevant codes, including the IMDG Code, the IMSBC Code, the IBC Code, the ISM Code and the STCW Convention. Japan has also introduced the COLREGs and the International Convention for Safe Containers, 1972 into domestic legislation.⁵¹

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 20 countries.⁵² So far, the Tokyo MOU has launched concentrated inspection campaigns with other PSC MOUs each year, which generally last for three months. On its website, the Ministry of Land, Infrastructure, Transport and Tourism (MLIT) publishes a monthly list of the vessels detained in Japan.⁵³

iii Registration and classification

For a vessel to be eligible to fly the Japan flag, its owner must be (1) a Japanese authority, (2) a Japanese citizen, (3) 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 (4) an entity other than a company as described in point (3) all of whose representatives are Japanese nationals.⁵⁴ Only Japan-flagged vessels are able to call at closed ports or conduct coastal transportation of cargoes and passengers.⁵⁵

iv Environmental regulation

Japan has ratified the 1972 London Dumping Convention, MARPOL (73/78) and the OPRC Convention, including 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 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 ratified the 1992 CLC and 1992 Fund conventions, which have been incorporated in the Act on Liability for Oil Pollution Damage. This Act imposes on owners and charterers of tankers and other types of vessels, including bulk carriers, the obligation and liability relating to the discharging of bunker oil in Japanese territorial waters and its exclusive economic zone. Japan has not ratified the Bunker Pollution Convention 2001 so far; however, it is currently under the ratification procedures as stated in Section II above.

51 Act on Preventing Collision at Sea: Law No. 62 of 1977.

52 www.tokyo-mou.org/doc/Memorandum%20rev17.pdf.

53 www.mlit.go.jp/maritime/maritime_tk1_000028.html.

54 Article 1 of the Ships Act: Law No.46 of 1899.

55 Article 3 of the Ships Act.

v Collisions, salvage and wrecks

Japan has ratified the 1910 Collision Convention, which was promulgated and enforced as a domestic law. The major differences between the Convention and domestic law have been in the rules of time bar and joint-and-several liability; however, some differences have been resolved by the reform of the Commercial Code. As regards the time bar, the Convention stipulates a two-year time bar starting from the date of the collision. Domestic law stipulates that a claim based on death or personal injury is time-barred for three years from when the victim is first aware of the damage and the perpetrator,⁵⁶ which will be amended to five years by the reform of the Civil Code,⁵⁷ and a claim based on property damage is time-barred for one year from when the victim is first aware of the damage and the perpetrator,⁵⁸ which has been amended to two years by the reform of the Commercial Code.⁵⁹ As regards joint and several liability, the 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. On the other hand, liability for all damages imposed by domestic law could be held jointly and severally.⁶⁰

Japan has ratified the 1910 Salvage Convention, but not the 1989 Salvage Convention. The Lloyd's Standard Form of Salvage Agreement (LOF) and the JSE Form of Salvage Agreement, which has similar terms to the LOF, 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 and the claim is time-barred for one year.⁶¹ In the reform of the Commercial Code, 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 salvage.⁶²

With regard to wreck removal, under the current Japanese law system, various domestic laws and ordinances prohibit owners or other interests from leaving the wrecks in the sea, in ports or harbours and, where necessary, grant authority to remove them at the cost of the owner or others who are responsible for them. However, as stated in Section II above, such domestic laws and ordinances will be replaced with the Act on Liability for Oil Pollution Damage amended in line with the Nairobi Convention 2017 to be ratified shortly.

vi Passengers' rights

Japan has not ratified the Athens Convention on passengers' liability. 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 in favour of the carrier. A carrier may not be released from the liability to compensate for damages arising from its own negligence, intentional acts or gross negligence of mariners or other employees, or from the vessel failing to be seaworthy. Any provisions of an agreement that contradict the aforementioned rules are considered null

56 Article 724 of the Civil Code and Judgment of the Supreme Court dated 20 April 1915.

57 Article 724 *bis* of the reform of the Civil Code.

58 Article 798(1) of the Commercial Code and Judgment of the Supreme Court dated 21 November 2005.

59 Article 789 of the reform of the Commercial Code.

60 Article 719(1) of the Civil Code.

61 Article 814 of the Commercial Code.

62 Article 15 of the reform of JCOGSA, Article 805 and 806 of the reform of the Commercial Code.

and void,⁶³ save that the reform of the Commercial Code allows the parties to agree only the liability for the delay of the carrier to lighten the carrier's liability.⁶⁴ Further, the burden of proof on the exercising of due care by the carrier or its employees lies with the carrier.

vii Seafarers' rights

Japan has ratified the Maritime Labour Convention 2006 with its amendment of 2014 and has introduced it into the Mariner's Act.⁶⁵ For instance, the Mariner's 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 the vessels. The Mariner's 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.⁶⁶

VII OUTLOOK

As has already been mentioned, there are to be substantial reforms of the Commercial Code and the Civil Code, which will affect, in some aspects, the legislative framework of Japanese maritime law. A close watch should be kept on how the changes are likely to affect shipping practice. Nevertheless, the shipping and shipbuilding industries in Japan will continue to have a significant presence worldwide, especially in Asia, in its competition with China, Hong Kong, Taiwan and South Korea.

63 Article 786(1), 739 of the Commercial Code.

64 Article 591(1) of the reform of the Commercial Code.

65 Law No. 100 of 1947.

66 Article 1(1) of the Mariner's Act.

KOREA

Jong Ku Kang and Joon Sung (Justin) Kim¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Although the downturn in the maritime and shipping industry has been continuing for a while, Korea maintained its position as the fifth largest state in the industry. As of 2018, 1,614 ocean-going commercial vessels up to 80 million gross tonnage were owned or operated under bareboat charter hire purchase (BBCHP) by Korean shipping companies. Among them, 706 vessels of 12.8 million tonnes were directly owned by the Korean shipping companies.²

The total volume of cargoes handled in Korean ports in 2018 increased by 4.3 per cent compared with the volume in 2017, amounting to 1.574 million revenue tonnes.³ Not only the major ports such as Busan have shown an increase in the volume, but bulk cargoes through Daesan and Mokpo port also saw a twofold increase in 2018.

With regard to the shipbuilding industry, Korean shipyards were able to reclaim the first rank in shipbuilding contracts amounting to 10.9 million compensated gross tonnage (CGT) due to the recovery of the industry, part of the recovery being based on the support from the Korea Ocean Business Corporation established in 2018. 10.6 million CGT was built in 2018 and the backlog amounts to 20.7 million CGT.⁴

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The fundamental domestic legislation providing for the carriage of goods by sea and admiralty issues is the Commercial Code. Chapter 5 of the Commercial Code covers maritime matters such as captain's rights and responsibility, global limitation of liabilities, maritime lien, contracts to carriage of goods and charter parties, collision, salvage and general average.

There are several other statutes regulating specific subjects; for example, the Marine Transportation Act to regulate shipping-related business from an administrative perspective, and pilotage, crew, procedures for limitation of liabilities and investigation of marine accidents, which are governed by applicable regulations.

Upon ratification by the Korean government, international conventions are granted the authority equivalent to national statutes under Article 6 of the Constitution. Korea has ratified the Convention on the International Maritime Organization 48, the SOLAS Convention 74 and its Protocols 78 and 88, the Load Lines Convention 66 and its Protocol 88, the Tonnage

1 Jong Ku Kang is a partner and Joon Sung (Justin) Kim is an associate at Bae, Kim & Lee LLC.

2 Index on status of owned vessels by major leading states in shipping industry, Statistics Korea.

3 Index on traffic of goods in national ports, Statistics Korea.

4 World Shipyard Monitor, Clarkson Research.

Convention 69, the COLREG Convention 72, the International Convention for Safe Containers 72, the STCW Convention 78, the Search and Rescue Convention 79, the IMSO Convention 76, the INMARSAT OA 76, the Facilitation Convention 65, the MARPOL (73/78) and its Protocol 97, the London Dumping Convention 72 and its Protocol 96, the CLC Protocols 76 and 92, the Fund Protocol 92 and 2003, the SUA Convention 88 and its Protocol 88, the OPRC Convention 90, the OPRC-HNS Protocol 2000, the Bunkers Convention 01, the Anti-Fouling Convention 2001 and the Ballast Water Management Convention 2004.

III FORUM AND JURISDICTION

i Courts

There is no independently established court dedicated to handling maritime and admiralty matters, yet there are number of departments in the district and the appellate courts specialised in maritime matters. The maritime department of the district court shall hear the case at the first instance. The unsuccessful party may appeal against the first instance judgment to the Appellate Court, and then finally to the Supreme Court.

In principle, the successful party would be entitled to recover legal costs from the opposing party, but the amount of recoverable costs is substantially restricted depending on the claim amount under the regulation.

The hearings will take place consecutively at approximately four-week intervals, and written briefs and documentary evidence shall be submitted in preparation for the hearings. Each hearing will be conducted for a short period (under an hour), mainly for the judges to confirm the arguments and evidence from each party.

With regard to the evidence, the full disclosure procedure is not available under Korean law, although a party may apply to the court to order the other party to disclose 'specific' documents. Witness evidence and expert evidence are usually available at the court's discretion.

Procedural issues of jurisdiction and governing law will be determined pursuant to the Civil Procedure Act (CPA) and the Private International Law Act (PILA). An agreement between the parties on the exclusive jurisdiction is recognised as valid unless such jurisdiction lacks a reasonable link to the case or the agreement is contrary to public order.⁵ With respect to the conflict of laws, PILA provides general governing law for contracts and torts, as well as for certain maritime issues of the ownership to a vessel, maritime lien, as well as the governing law for certain maritime issues, such as the ownership to a vessel and, importantly, maritime lien. According to the PILA, the ownership to and maritime lien upon a vessel are to be determined based on the law of the vessel's flag state.⁶

The limitation period or extinctive prescription, which is regarded as an issue of substantive law under Korean law, differs depending on the nature of the claim. The limitation period would be 10 years for a general civil claim, but for a commercial contractual claim it would be five years from the occurrence of the claim.⁷ The limitation period for a tort claim is either three years from the date on which the injured party became aware of damages

5 Supreme Court Judgment, 26 August 2010, 2010Da28185.

6 Article 60 of the PILA.

7 Article 162(1) of the Civil Code, and Article 64 of the Commercial Code.

or 10 years from the date of the occurrence of the tort, whichever occurs earlier.⁸ However, certain claims are subject to a one-year limitation period, including (1) claims among the parties and the consignee to the contract of carriage of goods by sea counting from the date of delivery of goods; and (2) contribution claims under a general average counting from the completion of calculation.⁹ A two-year limitation period is applicable to (1) claims among the parties and the consignee under a voyage charter counting from the delivery date of the goods; (2) claims between the parties to a time charter party or a bareboat charter party counting from the redelivery date of the vessel; (3) damages claims arising from a collision counting from the date of the collision; and (4) salvage remuneration counting from the completion of salvage.¹⁰

With regard to maritime accidents, the Marine Safety Tribunal (MST), an administrative tribunal established under Act on the Investigation of and Inquiry into Marine Accidents, will decide on the penalty against the liable seafarers and the contributory negligence between the parties involved, provided that the parties had requested so. The decision of the MST is not legally binding upon the relevant parties regarding the liability issues, but is respected in other proceedings in practice.

ii Arbitration and ADR

The Korean Commercial Arbitration Board (KCAB) serves as a general arbitration board. Further, Seoul Maritime Arbitrators Association (SMAA) supports *ad hoc* arbitration proceedings for maritime disputes exclusively.

Limitation period or extinctive prescription in arbitration is identical to those in litigation before the courts, as long as the governing law is Korean law.

Aside from the arbitration, other means of ADR is not widely utilised in Korea.

iii Enforcement of foreign judgments and arbitral awards

To enforce a foreign judgment, an enforcement judgment is required from a Korean court, which will not judge the merits of the foreign judgment, but only determine whether the statutory requirements under Article 217 of the CPA are met for the foreign judgment, which should be final and conclusive.

The requirements are that (1) the jurisdiction that rendered the judgment should be competent under Korean law or international conventions ratified by Korea; (2) the parties were properly served with relevant documents for the proceedings of the foreign judgment; (3) no violation of public order of Korea is present; and (4) the reciprocity exists between Korea and the state of the jurisdiction that rendered the judgment.

In practice, the reciprocity requirement tends to be an issue, as there are not many precedents to refer to. Korean courts have recognised reciprocity between Korea and the United States (usually for the states that adopted Uniform Foreign Country Money-Judgments

8 Article 766 of the Civil Code.

9 Articles 814 and 875 of the Commercial Code.

10 Articles 840, 846, 851, 881 and 895 of the Commercial Code.

Recognition Act¹¹), Japan¹² and Ontario, Canada,¹³ but denied reciprocity between Korea and Australia.¹⁴ In cases of lower court judgments, reciprocity has been recognised for English judgments and Chinese judgments.

Korea ratified the New York Convention 1969, thus arbitral awards rendered in the signatory state of the Convention would be enforceable. To enforce arbitral awards, the successful party will have to obtain an enforcement judgment from the court, which will not judge the merits of the case unless matters of public order arise.

Limitation periods applicable to the enforcement of foreign judgments and arbitral awards are regarded as substantive issues, and thus will be decided by the governing law of such judgments or arbitral awards.

IV SHIPPING CONTRACTS

i Shipbuilding

Most shipbuilding contracts with Korean shipyards are concluded based on the SAJ Form, with some variations. They are usually subject to English law, with disputes arising therefrom usually being referred to LMAA arbitration.

Korean law will inevitably apply to the title to and ownership of the vessels under construction at the shipyards in Korea, particularly before delivery under the shipbuilding contracts. While the parties are at liberty to agree on the issue, the builder, based upon the SAJ Form, would likely acquire the title to a vessel under construction and then, at delivery, transfer to the buyer.

However, it appears that a vessel under construction is usually provided as security to a bank issuing a refund guarantee (RG) for the shipbuilding contract, and the title to the vessel under construction is transferred for security purposes to the RG-issuing bank. Thus, should the buyer apply to the court for an injunction for delivery of the vessel or an arrest of the vessel, the verification of the title to the vessel between the builder and the bank could become an issue.

ii Contracts of carriage

Contracts of carriage are regulated by the Commercial Code in Korea. Korea has not ratified any of the Hague or Hague-Visby Rules, the Hamburg Rules or the Rotterdam Rules, but incorporated some provisions of the Hague-Visby Rules into the Commercial Code in 2007. The Commercial Code provides for rights and obligations of the parties in bareboat charter party, time charter party, voyage charter party and other contracts for carriage of goods by sea.

Pursuant to the Commercial Code, the carrier owes the duty of care regarding seaworthiness of the vessel and the goods, and will be liable for damages unless it is proven

11 Supreme Court Judgment, 28 October 2004, 2002Da74213. There are also cases of Korean courts acknowledging reciprocity between Korea and Kentucky where the Uniform Act is not adopted (Supreme Court Judgment, 28 January 2016, 2015Da207747) but it is not clear whether such could be extended to other states of United States.

12 Supreme Court Judgment, 11 June 2015, 2013Da208388.

13 Supreme Court Judgment, 25 June 2009, 2009Da22952.

14 Supreme Court Judgment, 28 April 1987, 85Daka1767.

that those duties of care are fully met. In the case of general carriage of goods by sea contracts, carriers' liability should not be reduced from the provisions of the Commercial Code;¹⁵ this prohibition is also applicable to bills of lading even when they are issued under charter parties.

The shipper is obligated to present the goods to the carrier at the time and place designated in the agreement or pursuant to practice in the loading port, and to submit the documents required for the carriage of goods to the captain within the loading period.

The carrier or shipowner, including beneficial owners, are obliged to issue bills of lading at the request of the shipper or charterer after the carrier or shipowner has received the goods.

The carrier and the captain may exercise maritime lien in relation to the cargoes. They are entitled to refuse to deliver the goods until freight or hire is paid in full and to sell the goods by auction after obtaining the court's approval to recover the unpaid freight or hire from the auction proceeds.¹⁶ These articles are also applicable to voyage charter parties and time charter parties.

With respect to multimodal transport, Commercial Code¹⁷ has adopted a network liability system to provide that the carrier's liability will be subject to the applicable law of each specific mode of transport where loss has occurred. If the leg where loss occurred is unclear or the loss was extended to multiple modes of transport, the carrier's liability will be subject to the applicable law of the leg covering the longest distance. If it is impossible to confirm which leg is the longest, then the applicable law of the leg with the highest freight prevails.

Cabotage between Korean ports is exclusively allowed to domestic shipping companies.¹⁸

iii Cargo claims

Cargo claims under Korean law are not too different from general civil or commercial claims. The lawful holder of bills of lading, who has the rights to the cargoes, usually holds the title to sue, and also its insurers, if they are subrogated to the rights of the holder through payment of the insurance proceeds. In some cases, the shipper or the consignee named in the bills of lading may have the title to sue under particular circumstances.

It would be the carrier who is liable for cargo claims in general, but in practice it would often be difficult to point out who the carrier is in a particular case, which will often be an issue of fact-finding. Along with the carrier, employees and agents of the carrier or shipowner and the demise charterer could be the target of the suit, and are entitled to the defences and limitation of liability applicable to the carrier, shipowner and demise charterer. Independent contractors of carriers are not entitled to carriers' defences and limitation of liability, unless the *Himalaya* clause is applicable.¹⁹

With respect to the damages, loss and damages directly arising from the carriage shall be recoverable in principle. However, in the case of the contract of carriage, recoverable damages are limited under the Commercial Code and will be calculated by the price of the cargo at the destination as at the date (1) when the cargo would have been delivered in the case of total loss or delay, or (2) when the cargo was actually delivered in the case of partial

¹⁵ Article 799 of the Commercial Code.

¹⁶ Articles 807 and 808 of the Commercial Code.

¹⁷ Article 816 of the Commercial Code.

¹⁸ Article 6 of the Ship Act.

¹⁹ Supreme Court Judgment, 13 February 2004, 2001DA75318; Supreme Court Judgment, 27 April 2007, 2007DA4943.

loss. Nevertheless, should the loss, damage or delay result from the carrier's wilful misconduct or gross negligence, the carrier is liable for the full loss and damages directly attributable to such misconduct or negligence, less any freight or expenses saved because of the loss, damage or delay.²⁰

Whether charter party terms are validly incorporated into a bill of lading is an issue to be determined pursuant to the law applicable to the bill of lading, which will be the law of the place where the bill of lading was issued unless there is agreement thereon between the parties to the bill of lading. In particular, regarding incorporation of arbitration clauses in charter parties between the carrier and the holder of the bill of lading, the Supreme Court²¹ held that an arbitration clause in a charter party would be considered to be validly incorporated into a bill of lading only if:

- a* the bill of lading provides that the arbitration clause is incorporated with a reference to the charter party or the holder of the bill of lading is aware of the charter party with the arbitration clause therein; or
- b* the bill of lading provides that every term of the charter party is incorporated and the holder of the bill of lading is aware of the existence and contents of the arbitration clause, which is not inconsistent with other terms of the bill of lading and its wording sufficiently applies to a third-party holder of the bill of lading.

A demise clause is not valid as it is regarded to be reducing the liability of the carrier.²² However, in an Appellate Court case, in which a foreign law was the governing law to a contract of carriage, and the foreign law recognised the validity of demise clauses, it was held that a demise clause was valid.²³

iv Limitation of liability

With regard to global limitation of liability, Korea has incorporated a substantial part of the LLMC Convention 76 (and part of the LLMC Protocol 96 for limitation amounts in respect of a passenger's death or injury) into the Commercial Code,²⁴ but has not ratified any of the above Conventions. However, as Korea is not a signatory to the Convention, the constitution of funds in Korea would not bar claimants from exercising their rights in another jurisdiction or vice versa. A person entitled to global limitation must apply to the court for commencement of limitation proceedings within one year of receiving a claim letter.²⁵

Package limitation under the Commercial Code²⁶ is the same as that under the Hague-Visby Rules, namely the higher of 666.67 special drawing rights (SDRs) per package or unit and 2 SDRs per kilogram, although Korea has not ratified the Hague-Visby Rules.

The procedure for the limitation of liability is set out in the Act on the Procedure for Limiting the Liability of Shipowners et al.

²⁰ Articles 815 and 137 of the Commercial Code.

²¹ Supreme Court Judgment, 10 January 2003, 2000Da70064.

²² Seoul Appellate Court Judgment, 13 June 2008, 2006Na28074.

²³ Seoul Appellate Court Judgment, 15 May 1989, 88Na44126.

²⁴ Articles 769 to 776 of the Commercial Code.

²⁵ Article 776 of the Commercial Code.

²⁶ Article 797 of the Commercial Code.

V REMEDIES

i Ship arrest

Korea has not ratified any conventions in this respect.

Under Korean law, there are two distinct types of arrest. One is to enforce claims for final satisfaction (based upon an enforceable judgment, a mortgage or a maritime lien), and the other is by way of prejudgment attachment for the purpose of obtaining security for either domestic or foreign judgment or arbitral award to be rendered in the future. The distinction is stringent and thus it is crucial to determine at the outset which process is to be followed; for example, an arrest by way of prejudgment attachment where the claim attracts a maritime lien could be revoked.

In any case, the arrest is available only if the target vessel is legally owned by the person who is liable for the claims. The only exception would be an arrest based on a maritime lien, when the target vessel may be arrested irrespective of the owner's identity once the maritime lien is imposed on the target vessel. Thus, it is very difficult to arrest a sister vessel or an associated vessel in Korea.

The court having jurisdiction over the location of the vessel shall be able to render the arrest order. The application for the arrest is made *ex parte*, and an application for a maintenance and preservation order for physical custody of the target vessel usually follows the application for the arrest. Once an arrest order is rendered, the court officer will serve the order on board the vessel by which the enforcement of the arrest will be completed.

In the case of a prejudgment attachment arrest, the applicant is required to provide counter-security to the court in an amount equivalent to 10 per cent of the claim amount either in cash or by a guarantee insurance policy at the court's discretion. On the contrary, regarding an arrest for enforcement of claims, counter-security is not required but expenses for a court sale are required to be paid to the court, as upon the court's arrest order the court sale automatically commences. For maintenance and preservation for the custody of the vessel, it is usual practice for the applicant to pay the fees for the first month as the application is made.

The prejudgment attachment arrest must be followed by legal proceedings on the merits of the claim before the agreed jurisdiction or arbitration, where the arrest to enforce the claim may be based upon an enforceable judgment already rendered on merits, or if it is based upon a maritime lien or a mortgage, the vessel interests will have to challenge the arrest order before a Korean court. Meanwhile, the vessel interests, usually in the name of the registered owner, may apply to the court for the release of the vessel by providing security of the total amount claimed in cash, unless otherwise agreed with the applicant. The security for the release of the vessel will be regarded as a substitute for the vessel or the sale proceeds.

If the claimant's claim turns out to have been groundless, the claimant would be liable for the wrongful arrest in tort. The claimant would then need to prove that it was not negligent to deny such liability, and may have to compensate the shipowner for the loss of trading during the arrest period and, if the ship was released on security, the interest accrued on the security amount.

The jurisdiction of the court reaches beyond the port limit, and thus a vessel at anchor in territorial waters but not within the port limit can be arrested. However, it is unprecedented to use a helicopter in a vessel arrest.

ii Court orders for sale of a vessel

An arrest based either upon an enforceable judgment or security rights such as a mortgage or a maritime lien shall commence court sale proceedings of the vessel. In the case of a prejudgment attachment arrest, court sale proceedings may be commenced once an enforceable judgment (in the case of an arbitral award, the enforcement judgment in Korea to enforce the award) is obtained from the court.

The court will have the vessel valued and its condition appraised. Meanwhile, other claimants against the shipowner or entitled to a maritime lien can file their claims with the court. Within one month of the expiry of other claimants' filing period, the court will have a notification of the court sale published in newspapers. The court will determine the highest bidder and decide whether to approve the sale. The sale proceeds will be distributed to the claimants and the shipowner according to the priority listings determined after the hearing for the distribution of the proceeds.

VI REGULATION

i Safety

Korea has ratified the following international conventions in respect of safety: the Load Lines Convention 66 and its Protocol 88, the Tonnage Convention 69, the COLREG Convention 72, the International Convention for Safe Containers 72, the STCW Convention 78, the Search and Rescue Convention 79, the INMARSAT OA 76, the Facilitation Convention 65, SUA and Protocol 88. The legislation in this respect includes the Ship Safety Act and the Maritime Safety Act.

Korea is one of the White List countries of the IMO.

ii Port state control

Korea is a member of the Tokyo MOU. The authority in charge is the Ministry of Oceans and Fisheries. The legislation in this respect includes the Ship Safety Act, the Ship Act, the Seafarers Act, the Ship Employees Act, the Maritime Safety Act and the Marine Environment Management Act.

Under the above regulations, the port authority under the MOF, in 2017, inspected 2,931 vessels (inspection rate of 29 per cent) and detained 66 vessels (detention rate of 2.3 per cent).²⁷

iii Registration and classification

There are two registries applicable to ships in Korea. One ship register is managed by the courts, which provides ownership, bareboat charter, securities such as a mortgage, court arrest orders and injunction orders, etc. The other ship register is operated by regional port authorities, which deals mainly with administrative issues when obtaining licences.

Both registers are only available for vessels owned by Korean legal entities (including companies).

27 PSC Inspection Rate, Statistics Korea.

Many members of the International Association of Classification Societies operate in Korea, as Korea is renowned for its shipping and shipbuilding businesses. Among them, the Korean Register is authorised by the Korean government to conduct ship surveys and issue certificates on behalf of the government.

It seems to be generally accepted that a classification society will be held liable for the damages caused to others due to its neglect of duty of care to monitor and supervise the building of a defect-free ship, although there is not yet any published case directly addressing this issue. In a recent case involving dual classification for the same ship, the issue of whether a classification society shall be liable for the damages to others due to the neglect of duty of care by another society in approving defective designs wherein the former is supposed to accept the other's designs as approved and only monitor and supervise the shipbuilding as per such designs had to be determined; the first instance court held that the former classification society shall not be liable. This case is now pending at the appellate court.

iv Environmental regulation

Korea has ratified MARPOL (73/78) (Annexes I to V) and its Protocol 97 (Annex VI), the OPRC Convention 90 (and OPRC-HNS Protocol 2000), the CLC Convention Protocols 76 and 92, the Oil Pollution Fund Convention Protocols 92 and 2003, the Bunker Convention 2001, the Anti-Fouling Convention 2001 and the Ballast Water Management Convention 2004. The legislation in this area includes the Marine Environment Management Act and the Clean Air Conservation Act.

v Collisions, salvage and wrecks

Collision

Korea has not ratified any collision convention. The Commercial Code deals with collisions in Articles 876 to 881.

If a collision case is brought before a Korean court, it will decide whether the applicable law is (1) the law of the country of the territorial water where the collision took place, or (2) the law of the flag of the vessel at fault in the case of a collision on the high seas.

If Korean law applies, the victim shall bear the loss or damage and will not be entitled to claim damages if the collision was caused by a force majeure or the cause of the collision is in doubt. If the collision was caused by the fault of the crew or pilot of one vessel, the owner of that vessel is liable for damages. If the collision was caused by the fault of the crew or pilot of both vessels, the owner of each vessel is liable in proportion to the degree of the respective faults; however, the owners of the vessels are jointly and severally liable for any death or injury. Damages claims arising from a collision will expire if a lawsuit is not brought within two years of the date of the collision, unless the parties agree to extend the limitation period.

As mentioned above, investigation of collision is mainly performed by the MST, overseeing an administrative trial on the cause of the accident to decide on the penalty against the liable parties and the contributory negligence between the parties involved. Such ratio of contributory negligence is likely to be referred to by the Korean court in relevant proceedings.

Salvage

Korea has not ratified the Salvage Convention 89. Salvage is dealt with in Articles 882 to 895 of the Commercial Code.

If a salvage remuneration claim is brought before a Korean court, it will decide the applicable law as follows: (1) the law of the country of the territorial water where the salvage operation took place; or (2) the law of the flag of the salvor vessel if the salvage operation took place on the high seas.²⁸

If Korean law applies, a person who salvaged a vessel or cargo without obligation is entitled to appropriate remuneration not exceeding the price of the salvaged vessel or cargo, and if the amount of remuneration is not agreed between the parties, the court will make adjustments to the amount. If the salvage operation was such that prevented or minimised damage to the environment, the salvor is entitled to special compensation irrespective of the outcome. The remuneration claims for salvage will expire if a lawsuit is brought within two years of the completion of salvage, unless the parties agree to extend the period.

Wreck removal

Korea has not ratified the Nairobi WRC 2007. The legislation dealing with wreck removal includes the Act on Vessels Entering and Departing Port, the Marine Environment Management Act and the Maritime Safety Act.

The owner or the occupant of any object that causes or may cause a hindrance to a vessel's navigation, or the master, owner or operator of a vessel that causes obstruction in navigation, is obliged to remove the object or obstruction or bear the costs and expenses for its removal.²⁹ The master of a vessel that causes certain pollutants to be emitted into the sea is obliged to report to the relevant authority and to take measures to prevent the spread and further emission and to remove the emitted pollutants, and to bear the costs and expenses of the operation.³⁰

vi Passengers' rights

Korea has not ratified the Athens Convention or any protocols. Passenger carriage is dealt with in Articles 817 to 826 of the Commercial Code.

The carrier is liable for the death or personal injury of passengers unless the carrier proves that it or its employees were not negligent. The global limitation amount for a passenger's death or personal injury is in line with that of the LLMC Protocol 96, which Korea has not ratified.

vii Seafarers' rights

Korea has ratified the Maritime Labour Convention 2006, which came into force in Korea in January 2015. The major legislation in this area includes the Seafarers' Act, the Ship Employees Act and the Act on the Investigation of and Inquiry into Marine Accidents.

VII OUTLOOK

The shipping and shipbuilding industries in Korea have maintained a remarkable presence in the international market. Although the global recess in the shipping industry had a harsh

28 Article 62 of the PILA.

29 Article 40 of the Act on Vessels Entering and Departing Port, Articles 25 to 29 of the Maritime Safety Act.

30 Articles 63 and 65 of the Marine Environment Management Act.

impact on the Korean shipping industry, restructuring with support from public and private sectors has significantly improved the financial status of the shipping business in Korea, which is gradually making a recovery from the difficulties of the past years.

The shipbuilding industry, above all, has recovered significantly, securing 42 per cent of the total global shipbuilding contracts in 2018, which is attributable to the knowledge, expertise and experience accumulated over several decades along with financial support from the government-established Korea Ocean Business Corporation.

As indicated in previous editions of this chapter, the Korean government planned to authorise a foreign classification society in addition to the Korean Register to carry out safety surveys on vessels on behalf of the government. In late 2016, Bureau Veritas was designated as such.

Although there are no significant changes anticipated in the legal regime in the near future and it seems that Korea will continue to maintain the current legal framework on maritime law, establishment of maritime courts, dedicated to maritime issues exclusively, in Seoul and in major ports such as Busan and Incheon has been discussed in the National Congress. Further, setting up an international tribunal is being considered, allowing hearings and submission of evidence in foreign languages, in current court departments handling maritime matters. In any case, the Korean judicial system is expected to function as a competent jurisdiction for domestic maritime cases as well as foreign maritime cases under foreign governing law.

LEBANON

Josiane Lahoud and Lea Ferzli¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The shipping industry is a major contributor to the Lebanese economy. This industry experienced significant expansion in the mid 20th century. The main sea port in Lebanon is the Port of Beirut (POB) located in the capital city, Beirut, and is one of the largest sea ports in the Eastern Mediterranean and an important doorway for the transportation of cargo to Syria, Jordan, Iraq and the Gulf states.

Nowadays, the total area of POB is around 1.2 million square metres with four basins (with a total water area of 1.202 million square metres) and 16 quays with a total length of 5,655 meters. A further expansion of POB is currently being considered. There is a project to build a new multi-use station (for containers and general cargo) with new storage areas and to construct a new and advanced platform enabling POB to receive giant vessels that require a depth of between 15 and 16 metres to berth. The development of POB should increase its productivity and hence its imports, which will help improve POB's regional positioning.

POB's activity decreased during 2018. According to recent statistics, the number of vessels that called at POB decreased by 1 per cent compared with the same period in 2017. The total tonnage handled and the total imports for Lebanese markets decreased by 8 per cent compared with the same period in 2017, while the total exports decreased by 13 per cent and reached 50,360 tonnes only in 2018, of which 85 per cent represents agricultural exports (fruits and vegetables); 8 per cent represents agrofood exports and 7 per cent represents industrial exports. The decrease in the activity of POB is due to a struggling economy resulting from various local and regional factors.

The Port of Tripoli (POT) is the second largest port in Lebanon, after POB. At present, POT has one dock and eight berths with depths varying from 8 to 10 metres and a free zone with an area of 150,000 square metres and is currently undergoing expansion. POT is independent both administratively and financially. In 2018, a private company was awarded the concession to develop and operate a new container terminal. The concession started with a major investment in new equipment and machinery, including dedicated gantry cranes, supporting yard cranes, container handlers and yard management systems. Upon completion, the new terminal will be able to accommodate large container vessels.

Vessels calling at Lebanese ports are largely foreign. Lebanon does not have a significant merchant fleet; most vessels flying the Lebanese flag are private pleasure boats or yachts.

¹ Josiane Lahoud is a partner and Lea Ferzli is a senior associate at Baroudi & Associates.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Maritime commerce is governed by the relevant international conventions and a number of local laws, including the Merchant Shipping Law (MSL); Ports' and Harbours' Regulations; Decision No. 156/N dated 18 November 2000 governing the business of freight forwarding; etc.

The provisions of international conventions prevail over internal laws as per Article 2 of the Code of Civil Procedure (CCP) (principle of hierarchy of rules).

The main maritime international conventions ratified by Lebanon are: the Hamburg Rules 1978; the IMO Convention 1948; the SOLAS Convention 1974; the SOLAS Protocol 1978; the Load Lines Convention 1966; the Load Lines Protocol 1988; the Tonnage Convention 1969; the COLREG Convention 1972; the CSC Convention 1972; the STCW Convention 1978; the SAR Convention 1979; the IMSO Convention 1976; the INMARSAT OA Convention 1976; the Facilitation Convention 1965; MARPOL 73/78 (Annex I/II); MARPOL 73/78 (Annex III); MARPOL 73/78 (Annex IV); MARPOL 73/78 (Annex V);² the Intervention Convention 1969; the CLC Convention 1969; the CLC Protocol 1992; the SUA Convention 1988; the SUA Protocol 1988; the OPRC Convention 1990; the Bunkers Convention 2001; the Anti-fouling Convention 2001; the Ballast Water Convention 2004; the Maritime Labour Convention 2006; the Merchant Shipping (Maritime Standards) Convention 1976; and the Seafarers' Pensions Convention 1946.

III FORUM AND JURISDICTION

i Courts

Lebanon does not have specialised maritime courts. Maritime disputes are heard by the civil courts. There are dedicated civil courts in each regional district of Lebanon. Civil courts are usually divided into sections. Substantive maritime actions are determined by the commercial section of these courts. Maritime disputes that are considered urgent are heard by the 'urgent matters' section of civil courts; whereas the procedure for the arrest of or enforcement against a vessel is dealt with by the Execution Bureau.

ii Arbitration and ADR

Lebanon does not have specialised arbitration or ADR centres that can hear or mediate maritime disputes. Maritime disputes are often referred to local courts. Arbitration clauses inserted in contracts of carriage of goods referring disputes between the parties to arbitration are normally enforceable and valid, if the arbitration clause is acknowledged and approved, whether directly or indirectly, by the contracting parties.

iii Enforcement of foreign judgments and arbitral awards

Enforcement of foreign judgments and arbitral awards is governed by the provisions of the CCP.³

2 The Lebanese parliament voted in its audience of 6 March 2019 in favour of the ratification by Lebanon of the MARPOL Protocol 1997 (Annex VI).

3 Articles 1013, 1014, 1015 and 1016 CCP.

A judgment issued by a foreign court would be recognised and enforced by the courts in Lebanon without reconsideration of its merits provided that the foreign judgment satisfies a number of conditions set by the CCP.

According to the CCP, 'an arbitration award (issued abroad or in the context of an international arbitration) shall be recognised and granted the *exequatur* if the party seeking recognition proves the existence of the award which must not clearly conflict with international public order'.⁴ Under the same provision, 'the existence of the arbitration award shall be established through submission of each of the original award and the arbitration agreement or true copies thereof duly certified by the arbitrators or any competent authority'.⁵

The enforcement of a foreign judgments and foreign arbitration awards is not subject to a specific time bar under the CCP. The statute of limitations is in principle 10 years from the date of issuance of the foreign judgment or award.

The order that recognises the foreign judgment or arbitration award (issued abroad or in the context of an international arbitration) or confers upon them the *exequatur* can be challenged subject to certain conditions set out in the CCP.

IV SHIPPING CONTRACTS

i Shipbuilding

Lebanon does not have a significant shipbuilding industry. There are small shipyards and workshops scattered throughout the coastline that are involved in the construction of small fishing and pleasure boats and that are capable of providing minor maintenance services for merchant vessels.

According to Article 16 of the MSL, the title of a vessel passes from the builder to the owner following registration at any Lebanese port within 15 days of its building or acquisition and, should it be built or bought abroad, within 15 days of its entry into Lebanese waters.

ii Contracts of carriage

Contracts of carriage are regulated in Lebanon by the MSL as well as by the Hamburg Rules ratified by Lebanon on 5 January 1983 by act of Parliament and having come into effect on 1 November 1992.

The contract of carriage by sea is evidenced by the bill of lading, which constitutes a proof thereof as well as of the general terms and conditions of carriage. The provisions of the Hamburg Rules are mandatory and would override any provisions of the bill of lading that 'derogate, directly or indirectly, from the provisions of this Convention'.⁶

The most common types of bills of lading giving rise to maritime legal disputes brought before Lebanese courts are (1) the 'Port to Port' bill of lading; (2) the 'Congenbill' used for shipments of general cargo under the gencon charter party; and (3) the 'multimodal' or 'combined transport' bill of lading. A contract of carriage that involves carriage by sea and by some other means of transportation is deemed to be a contract of carriage by sea for the purposes of the Hamburg Rules only insofar as it relates to sea carriage.

4 Article 814 CCP.

5 *ibid.*

6 Article 23.1 of the Hamburg Rules.

Maritime claims heard by Lebanese courts arise from the international transport of goods. The transport of goods by sea between two domestic ports is very rare.

Aside from evidencing the terms of the contract of carriage, the bill of lading serves as a document of title to the goods. Lebanese courts have on several occasions dismissed claims brought by claimants who are not holders of the original bill of lading on the ground of lack of title to claim.

iii Cargo claims

The responsibility of the carrier for the cargo extends from the period while he is in charge of the cargo at the port of loading until the cargo is delivered at the port of destination.⁷ In order to repudiate liability for loss of or damage to the cargo that occurs while the cargo is in his charge as defined in Article 4 of the Hamburg Rules, the carrier must demonstrate that 'he, his agents or servants took all measures that could reasonably be required to avoid the occurrence; which led to the cargo loss or damage; and its consequences'.⁸ It is considered that the carrier must, to evade liability, first demonstrate the cause that resulted in the cargo loss or damage and then prove that he took appropriate steps to avoid the occurrence that led to that cargo loss or damage.

The time-bar applicable to cargo claims is two years starting from the date of delivery of the goods or from the final day on which the goods must have been delivered in the case of a claim for non-delivery.⁹

Title to sue lies in principle with the holder of the original bill of lading. Cargo claims are usually directed against the vessel's owner, operator or charterer. Cargo claims can also target both the 'actual' and 'contractual' carrier. The ship agent has, by law, the capacity to represent the vessel's owner, operator or charterer before the authorities as well as before the courts.¹⁰ The ship agent can bear personal liability for the cargo loss or damage if evidence that the loss or damage results from a personal direct or indirect act. The ship agent can also bring claims against third parties on behalf of his principal.

iv Limitation of liability

Owners' right to limit liability

Lebanon acceded to the International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships, concluded in Brussels on 10 October 1957 (the Convention), on 23 February 1994.

The Convention came into force in Lebanon on 23 June 1995. Hence, from a Lebanese law perspective, the limitation of liability of the shipowner (charterer, manager, operator, master and members of the crew in the course and scope of their employment) are governed by the rules set forth in the Convention. Article 1 of the Convention sets out the claims for which the owner may limit liability pursuant to Article 3, including claims arising from any of the following occurrences:

- a* Loss of life of, or personal injury to, any person being carried in the ship, and loss of, or damage to, any property onboard the ship.

7 Article 4.1 of the Hamburg Rules.

8 Article 5.1 of the Hamburg Rules.

9 Paragraphs 1 and 2 of article 20 of the Hamburg Rules.

10 Article 80 of the Lebanese Ports and Harbours Regulations.

- b Loss of life of, or personal injury to, any other person, whether on land or on water, loss of or damage to any other property or infringement of any rights caused by the act, neglect or default of any person onboard the ship for whose act, neglect or default the owner is responsible or any person not onboard the ship for whose act, neglect or default the owner is responsible: provided, however, that in regard to the act, neglect or default of this last class of person, the owner shall only be entitled to limit his liability when the act, neglect or default is one that occurs in the navigation or the management of the ship or in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers.

The owner is not entitled to limit liability if the ‘occurrence giving rise to the claim resulted from the actual fault or privity of the owner’.

Under Article 3 of the Convention, ‘the amounts to which the owner may limit his liability shall be: (a) where the occurrence has only given rise to property claims an aggregate amount of 1,000 francs for each ton of the ship’s tonnage’.

The Convention utilises the *Franc Poincaré* as the measure of liability; the franc being ‘a unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred’ (Article 3(6) of the Convention).

Article 2(2) of the Convention entitles the owner ‘when the aggregate of the claims which arise on any distinct occasion exceeds the limits of liability provided for by Article 3’ to set up a limitation fund consisting of the total sum representing the limits of liability.

Article 5 of the Convention foresees a system that is aimed at protecting the owner against ship arrest once the limitation fund is constituted. This article stipulates that:

whenever a shipowner is entitled to limit his liability under this Convention, and the ship or another ship or other property in the same ownership has been arrested within the jurisdiction of a Contracting State or bail or other security has been given to avoid arrest, the Court or other competent authority of such State may order the release of the ship or other property or of the security given if it is established that the shipowner has already given satisfactory bail or security in a sum equal to the full limit of his liability under this Convention and that the bail or other security so given is actually available for the benefit of the claimant in accordance with his rights.

Moreover, Article 2(4) of the Convention prevents the claimant against the fund, once the fund has been constituted, from exercising ‘any right against any other assets of the shipowner in respect of his claim against the fund, if the limitation fund is actually available for the benefit of the claimant’.

The assessment of the *Franc Poincaré* value could be problematic. Lebanese courts have in a limited number of old claims calculated the value of the gold franc as a unit of limitation of liability of the carrier under the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading as amended by the Brussels Protocol of 1968 (the Hague-Visby Rules). The precedents in this respect were rendered prior to entry into force of the Hamburg Rules in 1992 (which adopts the SDR as the unit of limitation of the carrier’s liability). These precedents, however, are not reliable.

Article 4 of the Convention subjects ‘the rules relating to the constitution and distribution of the limitation fund’ to the laws of the state in which the fund is constituted;

the rules for the constitution of the limitation fund under the Convention are not specifically regulated in Lebanese law but certain provisions of the MSL (in particular Article 94 et seq. thereof) could serve as guidance for the process.

Limitation of the carrier's liability under the contract of carriage

Claims for loss of or damage to cargo brought before Lebanese courts would normally be governed by the Hamburg Rules. Article 6.1(a) of the Rules sets out the limits of liability of the carrier for loss or damage to the cargo. The limit of liability for delay is dealt with at Article 6.1(b). The limit for loss or damage to cargo is set at 835 SDR per 'package or other shipping unit' or 2.5 SDR 'per kilogram of gross weight of the goods lost or damaged, whichever is the higher'. The limit for delay in delivery is set at an amount equivalent to two-and-a-half times the freight payable for the goods delayed 'but not exceeding the total freight payable under the contract of carriage of goods by sea'.

Under Paragraph 4 of Article 6 of the Rules, the carrier and the shipper may enter into an agreement to increase of the limits of liability set forth above. Such an agreement, however, would not be binding on the actual carrier unless the latter has agreed to it 'expressly and in writing' pursuant to the general rule stipulated in Article 10.3 of the Rules.

Under Article 8.1, the carrier loses the right to limit liability if 'it is proved that the loss, damage or delay in delivery resulted from an act or omission of the carrier done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result'.

V REMEDIES

i Vessel arrest

A vessel can be detained by the authorities in the case of breach of navigational regulations, pollution incidents, breach of the customs' regulations, breach of the port's safety regulations, breach of the requirements of international conventions (such as SOLAS, MARPOL, STCW, etc.). Sanctions may also be decreed and lead to the vessel's arrest for breach of the Israeli boycott regulations.

Vessel arrest in Lebanese waters is regulated by the CCP, which grants any creditor the right to apply to the judge of the Execution Bureau for a conservatory seizure of his debtor's assets to obtain security for his claim.¹¹ The judge normally considers the application for the conservatory arrest of the vessel on a *prima facie* basis and the arrest order is usually rendered *ex parte* on the date of the filing of the application for arrest (or the earliest thereafter) provided that the claim is proven based on the face of things.

Under Lebanese law, the application for a conservatory arrest should be directed against the person or party responsible for the debt. There is no legal provision that would permit enforcement against a vessel unless the claim is directed against her owner. The arrest of a sister vessel is generally possible provided that both vessels are owned by the defendant to the claim. The arrest of a vessel for a debt due by the charterer is not possible unless the claimant has a maritime lien over the vessel.

¹¹ Article 866 CCP.

The conservatory arrest order may be challenged within five days of date of its service at the latest. The conservatory arrest is usually lifted against a cash deposit or bank guarantee provided by a local bank while the court determines the legal challenge. Club LOUs are not accepted by local courts as security to lift the vessel's conservatory arrest.

The law requires the claimant to file a substantive action before a competent court no later than within five days of the date of the arrest order. Failure to file this action within this deadline would result in the cancellation of the arrest order, following application of the defendant.

Claims for wrongful arrest would succeed if the party claiming the loss can prove the bad faith of the arresting party. Damages for wrongful arrest could cover all direct losses (e.g., port dues and associated costs, crew wages, etc.) and possible indirect losses (including loss of profit).

ii Court orders for sale of a vessel

Judicial sale of vessels is regulated by Article 73 et seq. of the MSL. A vessel can only be seized 24 hours after service of a 'notice for payment' upon her owner. In the case of absence of the owner or if the owner is not domiciled in the court's district, service of the notice shall be effected on the master.

The execution clerk should set out in the 'seizure report' the name of the applicant, profession and domicile, the deed asserting the debt, the amount of the debt, the details of the owner and master, the name of the vessel and her specifications and flag, etc.

The applicant for arrest must serve the 'seizure report' upon the owner or master of the vessel and summon him to appear before the court of the place where the arrest was made, to decide, in his presence, the initiation of the sale of the seized assets. The seizure report is also recorded on the ship's register.

The court of the place where the arrest was made shall set the sale and its conditions and fix a date for the auction as well as the starting price. If no purchaser comes forward on the date of the auction, the court will adjourn the auction and reduce the starting price. The sale shall take place at an auction before the civil court 15 days after its public announcement (by publication on each of the court's board, the vessel, harbour master's office, etc.).

The purchaser of the vessel must settle the price in one of the agreed banks within 24 hours of the date of confirmation of the award, failing which the auction will be repeated at his expense.

VI REGULATION

i Safety

Lebanon is party to the main international shipping conventions dealing with safety and pollution prevention, including the 1974 SOLAS Convention, the 1978 SOLAS Protocol, MARPOL (Annex I to V),¹² the 1972 COLREGs, the 1966 Load Lines Convention, and MLC 2006.

Compliance of vessels with the requirements of the above conventions is enforced at Lebanese ports by port state control officers.

12 Ratification by Lebanon of Annex VI is set take place soon.

The harbour master also has a duty to regulate the entry of vessels into the port and their departure from the port and to oversee their movements within the port and in the event of emergencies take whatever steps are needed to safeguard public safety. The harbour master may also require crew members to take all measures necessary for the sake of preserving public safety.

The Ministry of Public Works and Transport (MPWT) and the Ministry of Environment oversee the application of the regulations governing the safety and prevention of maritime pollution. The MPWT has the authority to impose fines on vessels that breach these regulations. Vessels involved in incidents resulting in maritime pollution are usually detained by the MPWT until provision of suitable security. Criminal charges are sometimes issued against offending vessels and their master and crew depending on the circumstances of the case.

ii Port state control

Lebanon is a party to the Memorandum of Understanding on Port State Control in the Mediterranean Region (Mediterranean MoU), signed in Valletta (Malta) on 11 July 1997.

According to the terms of the Mediterranean MoU, when a vessel is detained in any port of a Member State, the latter shall immediately report the action taken to the concerned administration of the state of the ship's flag and the diplomatic representatives of that state or, in their absence, its nearest diplomatic representative. Where relevant, the organisation responsible for the issue of the classification certificates must also be informed.

Vessels are detained or stopped from operation under the provisions of the Mediterranean MoU in the case of deficiencies that are clearly hazardous to safety, health or the environment. The detention order or the stoppage of the operation shall not be lifted until the hazard is removed. In some cases, the concerned authorities of the Member State in which detention occurred may exceptionally allow the vessel to proceed to another port, or to the nearest repair yard (in the event that the vessel can proceed without danger to safety, health or the environment). In such circumstances the Member State where the next port of call or the repair yard is located must be notified of the same to take necessary actions. In the case of force majeure, access to a specific port may be permitted to minimise the risk to life or of pollution.

Of the 690 vessels inspected by port state control officers at Lebanese ports from 1 January 2018 to 10 April 2019, 598 vessels were found with deficiencies (eight of which were detained).

iii Registration and classification

The ports of Beirut, Tripoli, Sidon and Tyre hold ship registers. Each register covers a specific area of the Lebanese coastline. These areas are set in Article 8 of the MSL. The ship register's sheets are numbered and initialled. The ship register includes information about the vessel, including her name and previous names, registration number, place and date of construction, type, size, tonnage, type and power of engines, the name, nationality and domicile of her owner (in cases of multiple owners, the share belonging to each), the name and domicile of the manager or operator of the vessel, encumbrances, etc.¹³

13 Article 11 MSL.

A vessel is registered in a Lebanese port by 'declaration of ownership' supported by documents, vouchers, deed of transfer, invoices, etc. The owner may be asked to issue an undertaking to furnish to the harbour master any witnesses, documents or evidence whose production or hearing is necessary to ascertain the ship's ownership.¹⁴

iv Collisions, salvage and wrecks

Collisions are regulated in the MSL. Under Article 234 of the MSL, 'If the collision is accidental, or caused by force majeure or if the cause of the collision is left in doubt, the damages are borne by those who have suffered them and this provision shall continue to apply in case the vessels or one of them were at anchor at the time of the collision.' In the event that the collision is caused by the fault of one of the vessels, liability to make good the damages shall fall on the party responsible for said collision.¹⁵

Under Article 236.1 of the MSL, 'if the fault is joint, the liability of each vessel is in proportion to the degree of the fault respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability is apportioned equally'.

Article 245 et seq. of the MSL govern salvage. Every assistance or salvage operation rendered by a vessel to another vessel in danger, as well as to the goods loaded onboard the vessel, even if deserted by her crew, shall be subject to the provisions of salvage.¹⁶ Any fruitful assistance or salvage shall be fairly rewarded. No reward shall be due if the service rendered has yielded no useful results. The sum payable shall not exceed in any case the value of the salvaged goods.¹⁷

Wrecks are regulated by Decision No. 98 dated 30 April 1941 ('*Maritime Wreck*'), the MSL, Ports' and Harbours Regulations and Decision No. 1372 dated 13 April 1922 ('*The Search of Fallen Goods in the Waters of the Ports*'). Under the principles set out in these regulations:

- a Anyone who discovers or removes a wreck has to preserve it in a secured place and file a declaration within 24 hours at the nearest port office. The harbour master must attend immediately upon receipt of said declaration to the location where the wreck is stored and issue a minute stating the place of discovery, nature of the wreck and all its details and characteristics. A copy of the minute must be sent to the General Director of the Ministry of Transport.¹⁸ It is the harbour master's obligation to guarantee the protection and safeguard of the wreck.
- b The owner of the vessel has the obligation to remove the wreck of a sunken vessel.¹⁹
- c If the vessel sinks while in port, her owner or master must immediately notify the harbour master and port authorities, and arrange for her refloating or towage as soon as possible. If this is not possible, her owner or master should arrange for her dismantling. These operations should be carried without delay. In the case of neglect of the owner

14 Article 12 MSL.

15 Article 235 MSL.

16 Article 245 MSL.

17 Article 246 MSL.

18 Article 2 of Decision No. 98 dated 30 April 1941 ('*Maritime Wreck*').

19 Article 94 (5) MSL.

or master, the General Director of Maritime Transport can take all necessary measures to clear hazards to navigation caused by the wreck, at the expense and liability of the interested parties.²⁰

- d According to Decision No. 1372 dated 13 April 1922 (*The Search of Fallen Goods in the Waters of the Ports*), it is prohibited to search for fallen goods or materials within the ports' waters without the consent of the harbour master.

v Passengers' rights

Lebanon is not a signatory of the 1974 Athens Convention on the carriage of passengers and their luggage by sea.

The carriage of passengers is dealt with in Article 219 et seq. of the MSL as well as in Article 679 et seq. of the Code of Obligations and Contracts. These provisions regulate the issues relating to passengers' rights under the contract of carriage, including their right to compensation in the case of non-performance or cancellation of the voyage or in the case of death or injury while onboard or due to hazards of the sea and damage to their luggage as well as issues relating to the carrier's rights and liability under the contract of carriage, including the carrier's exemption for loss in the event of force majeure or passenger's fault.

vi Seafarers' rights

Seafarers' rights are governed by Article 128 et seq. of the MSL as well as by the 2006 Maritime Labour Convention (MLC). These provisions of the MSL and 2006 MLC guarantee the rights to seafarers to fair treatment regardless of religion, race, nationality, gender, sexual orientation and political views, the right to join trade unions, the right to work of their own will and be paid for their work, and the right to work in a safe and secure workplace with access to medical care and health protection whenever needed.

In a recent case, the court intervened to safeguard the rights of seafarers on a vessel abandoned by her owners at Beirut Port. The vessel was loaded with a chemical cargo and was quickly deteriorating. The port authorities refused to allow her crew to disembark under the excuse that the vessel could not be left unattended. After several weeks of restraint onboard the vessel, the crew sought the intervention of local courts on the ground of infringement of their right to liberty and freedom of movement, which is protected under the constitution and international human rights' conventions. The court made an order granting permission to the crew members to leave the vessel and travel on the basis that their restraint onboard the vessel, regardless of its cause, constituted a breach of their right to liberty and freedom of movement, which is considered one of the fundamental human rights under internal and international laws.

VII OUTLOOK

Lebanese merchant shipping legislation needs to be reformed. The MSL dates back to 1947 and very few steps have been taken to update it since its enactment. Moreover, Lebanon is party to the main international conventions, although it has not yet joined some key protocols associated with these conventions. The country is one of the very few states that have joined the Convention on the Carriage of Goods by Sea, which was adopted in Hamburg on

20 Article 24 of the Lebanese Ports' and Harbours Regulations.

31 March 1978. The maritime authorities and some industry players had expressed interest in joining the Convention of Contracts for the International Carriage of Goods Wholly or Partly by Sea, adopted in Rotterdam on 11 December 2008. However, since major countries have been slow in ratifying the Rotterdam Rules, disputes arising under contracts for carriage of goods by sea will continue for some time to be governed by the Hamburg Rules. In the past decade, the focus of the Lebanese authorities has been directed towards joining international treaties and regional agreements and enacting regulations aimed at reinforcing safety and security in Lebanese waters and combating and reducing sea pollution and safeguarding the environment as a whole.

MALTA

Jean-Pie Gauci-Maistre, Despoina Xynou and Yvanka Vella¹

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 and, as at 2014, the sixth largest in the world, since when registered numbers have continued to increase every year. Besides 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 2018, Malta retained its position as the sixth largest flag worldwide and increased the registered dead-weight tonnage to 108,759 constituting a share of world total deadweight tonnage of 5.65 per cent. The successful enactment of the Commercial Yacht Code makes Malta a leading commercial yacht registry, and has led to the country becoming the flag choice for the global luxury superyacht industry.

The island's strategic location, midway between Europe, the Middle East and North Africa, has established Malta 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 but influenced to a great extent by British law, as a result of Malta having been a British colony. The European Union Treaty was transposed into Maltese law following Malta's accession to the European Union in 2004 and is now the law of the country. The principal legislation for shipping in the Republic of Malta is the Merchant Shipping Act of 1973, a law based on English shipping laws, as amended today, 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.

¹ Jean-Pie Gauci-Maistre is a managing partner, Despoina Xynou is a partner and Yvanka Vella is a senior associate at Gauci-Maistre Xynou.

III FORUM AND JURISDICTION

i Courts

It is the Civil Court that hears maritime cases in Malta. Disputes with a value of more than €11,646.86 are heard by the First Hall of the Civil Court and 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 (ADR), 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 are delivered, 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 Act⁴ 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 (New York 1958). 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.i).

² Chapter 382 of the Laws of Malta.

³ Chapter 474 of the Laws of Malta.

⁴ Chapter 387 of the Laws of Malta.

IV SHIPPING CONTRACTS

i Shipbuilding

Valletta's Grand Harbour 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.

More recently, a process of privatisation of Malta Shipyard Ltd took place after Malta became an EU Member State, 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 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, although Malta is not a signatory to the Hague-Visby Rules, the Hamburg Rules or the Rotterdam Rules, it is a party to the Hague Convention, and the Hague Rules are 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 Code⁶ 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 Act⁸ 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 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.

5 Chapter 140 of the Laws of Malta.

6 Chapter 13 of the Laws of Malta.

7 Chapter 12 of the Laws of Malta.

8 Chapter 234 of the Laws of Malta.

9 Article IV, Schedule 1, Carriage of Goods by Sea Act 1954 (Chapter 140 of the Laws of Malta).

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

The Maltese courts have, only on one occasion,¹¹ stated that the case of *The Starsin*¹² is substantially compatible with the system of Maltese mercantile law.

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 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 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).¹³ For the purposes of Article 11 of the LLMC Convention, the fund referred to therein is governed by the Limitation of Liability for Maritime Claims Regulations¹⁴ and shall be constituted with the First Hall of the Civil Court and 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 (COCP) provides for the arrest of vessels in Malta both as security of maritime *in rem*¹⁵ claims (where the ship concerned is within the territorial jurisdiction of the Maltese courts) and as security of *in personam*¹⁶ claims in cases where 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 only be arrested in Malta in 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 Chapter 234 of the Laws of Malta.

¹¹ *Advocate Dr Philip Manduca (as special mandatory) v. Sun Maritime Limited* decided on 26 June 2009 [Appeal Civil Number 212/1999/1].

¹² *Homburg Houtimport BV v. Argosin Pvt Ltd & Ors (The Starsin)* [2003] 1 Lloyd's Rep 571 (HL).

¹³ www.imo.org/en/MediaCentre/PressBriefings/Pages/24-llmc-limits.aspx.

¹⁴ Laws of Malta, Subsidiary Legislation 234.16.

¹⁵ Article 742B of COCP.

¹⁶ Article 742 of COCP.

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 indicating the place where the vessel is to be found: note that it is not permissible to apply for a warrant of arrest unless the vessel is inside 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.

Once a vessel is 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, *inter alia*. Cash deposits, Maltese bank guarantees or upon 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 in the event where 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, upon 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 where 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

The 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 piece of legislation being enacted in 2006, the Courts of Malta were only asked to rule upon it for the first time in December 2011. The sale of the *MV Thor Spirit*¹⁷ in December 2011 paved the way for many similar cases in which also other subtleties of this judicial mechanism have been explored.¹⁸ The procedure has been extensively used in the past few years and the more contentious private sales are being more uniformly handled by the Courts of Malta.

VI REGULATION

i Safety

The Merchant Shipping Directorate (MSD) and Armed Forces of Malta (AFM) are the responsible institutions 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 SAR Convention in addition to the Global Maritime Distress and Safety System (GMDSS) 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: SOLAS (as amended), the COLREGs (as amended), the FAL Convention, the Load Lines Convention, the Search and Rescue Convention, the SUA, Safety of Fishing Vessels and the STCW

17 *Danske Bank A/S v. MV Thor Spirit* (1 December 2011).

18 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).

Convention (as amended). These maritime safety regulations are transposed into domestic law through the Merchant Shipping (Safety Convention) Rules (SL 234.30), the Merchant Shipping (Safe Manning and Watchkeeping) (SL 234.31), the Merchant Shipping (Safety Convention Rules) (SL 234.33), the Merchant Shipping (Safe Operation of Regular Ro-Ro Ferry and High-Speed Passenger Craft Services) Regulations (SL 234.35), the Merchant Shipping (Ship Inspection and Survey Organisations) Regulations (SL 234.37), the Merchant Shipping (Accident and Incident Safety Investigation) Regulations (SL 234.49), the Merchant Shipping (Fishing Vessels) (Minimum Health and Safety Requirements) Regulations (SL 234.34), the Merchant Shipping (Fishing Vessel Safety) Rules (SL 234.36) and the Merchant Shipping (Certification of Commercial Yachts and Commercial Cruising Vessels) Regulation.

The Merchant Shipping (Accident and Incident Safety Investigation) Regulations (SL 234.49) established the Marine Safety Investigation Unit (MSIU) as an independent government investigation unit to carry out safety investigations into accidents and incidents and participate in safety studies and academic research.¹⁹

ii Port state control

Through the Merchant Shipping Directorate, 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 (Mediterranean MOU) on 11 July 1997 (which entered into force on 24 February 1998), with other maritime authorities and the assistance of, *inter alia*, the IMO, the International Labour Organization and the European Commission. Moreover, Malta has an active participation in the Paris MOU and 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), which apply to any ship and her crew calling at a port in Malta or anchored off such a port to engage in a ship-port operation. Furthermore, the Merchant Shipping (Flag State Requirements) Regulations 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.²⁰ Ship registration and the provision of all ancillary services is the responsibility of the Merchant Shipping Directorate, which is also responsible for the regulation, control and administration

19 <http://mtip.gov.mt/en/Pages/MSIU/Marine-Safety-Investigation-Unit.aspx>.

20 Published on the flag performance list of the Paris MOU.

of all matters related to merchant shipping, the certification of seafarers and the administration and implementation of international maritime conventions and agreements.²¹ 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, yachts in commercial use and that do not carry more than 12 passengers, can be registered in Malta subject to the conditions of the Commercial Yacht Code. 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 European citizens 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 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.

21 www.transport.gov.mt/ship-registration/merchant-shipping.

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* the American Bureau of Shipping (ABS);
- b* Bureau Veritas (BV);
- c* the China Classification Society (CCS);
- d* the Croatian Register of Shipping (CRS);
- e* Class NK (Nippon Kaiji Kyokai);
- f* DNV GL;
- g* the Indian Register of Shipping (IRS);
- h* the Korean Register of Shipping (KR);
- i* Lloyd's Register (LR);
- j* the Polish Register of Shipping (PRS);
- k* Registro Italiano Navale (RINA); and
- l* the Russian Maritime Register of Shipping (RS).

iv Environmental regulation

Malta is a Member State of the European Maritime Safety Agency (EMSA), the European Seaports Organisation (ESPO) and the Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea (REMPEC). In assistance with these regional authorities and, *inter alia*, the IMO, Malta enforces international, regional and EU instruments, which have been either ratified or directly form part of domestic legislation. Malta is party to the major conventions regulating sea and air pollution.

As a signatory of MARPOL (as amended), its Annexes have been transposed into domestic legislation through the Merchant Shipping (Prevention of Pollution of Ships) Regulations (SL34.32), the Merchant Shipping (Prevention of Pollution by Garbage) Regulations (SL234.33), the Merchant Shipping (Prevention of Pollution Sewage) Regulations (SL234.47) and the Merchant Shipping (Wreck Removal Convention) Regulations (SL234.53). The Bunkers' Convention has been transposed into domestic law through the Merchant Shipping (Liability for Bunker Oil Pollution Damage) Regulations (SL234.46).

Additionally, in response to grave concern about the spread of invasive species due to carriage of ballast waters from ships, Malta acceded, on 7 September 2017, to the International Convention for the Control and Management of Ships' Ballast Water and Sediments, which entered into force on 8 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 (SL234.55).

Moreover, to further establish a system of penalties for failure to comply with the 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

²² Subsidiary legislation 234.37.

transposed into domestic legislation through the Merchant Shipping (Monitoring, Reporting and Verification of Carbon Dioxide Emissions from Maritime Transport) Regulations (SL234.54).

Furthermore, Malta is a signatory to the UNEP Convention on Biological Diversity, the Convention for Protection of the Mediterranean Sea against Pollution (Barcelona Convention) and its 2002 and 2004 Protocols, the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (LC), the International Convention on the Control of Harmful Anti-Fouling Systems on Ships, the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC) and the OPRC-HNS Protocol.

v Collisions, salvage and wrecks

Collisions

Malta has adopted the COLREGs 1972, which are regulated in the Commercial Code (Chapter 13), the Merchant Shipping Act (Chapter 234) and in 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 damages 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.²³

The Prevention of Collisions Regulations are regulated under the Merchant Shipping Act.²⁴ 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 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.²⁵

Under the Merchant Shipping Act, salvage includes all expenses properly incurred by the salvor in the performance of salvage services.²⁶ 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.²⁷ Where 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.²⁸

23 Article 545, Commercial Code (Chapter 13 of the Laws of Malta).

24 Part V, Section 5, Merchant Shipping Act (Chapter 234 Laws of Malta).

25 Article 444(h), Commercial Code (Chapter 13 Laws of Malta).

26 Article 330, Merchant Shipping Act (Chapter 234 Laws of Malta).

27 Article 342, Merchant Shipping Act (Chapter 234 Laws of Malta).

28 *ibid.*,

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.²⁹

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.³⁰

Wrecks

Malta ratified the Nairobi International Convention on the Removal of Wrecks 2007 (Nairobi Convention) on 18 January 2015. The Nairobi Convention is transposed into Maltese legislation through the Merchant Shipping (Wreck Removal Convention) Regulations (SL234.53), which is applied to all Maltese ships wherever they may be and to all other ships while in Maltese waters regardless of flag.³¹ A section on wrecks is also found in the Commercial Code and the Merchant Shipping Act.

The applicability of the Nairobi Convention 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.³² With respect to certification, Transport Malta (TM) is the authority that issues the wreck removal certificates in terms of the Nairobi Convention, 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 shipping³³ is granted the power not only to remove the vessel but also to destroy it, whether in whole or in part.³⁴

Ship recycling

Malta has not yet ratified the Hong Kong Convention; however, 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) are enforceable in Malta in terms of the Merchant Shipping (Ship Recycling) Regulations adopted on 31 December 2018.³⁵ Moreover, in order 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 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.

vi Passengers' rights

Malta has ratified the Athens Convention on the Carriage of Passengers and their Luggage by Sea (PAL 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

29 Article 344, Merchant Shipping Act (Chapter 234 Laws of Malta).

30 Article 345(3), Merchant Shipping Act (Chapter 234 Laws of Malta).

31 Regulation 1, Legal Notice 83 of 2015.

32 Regulation 2, Legal Notice 83 of 2015. See Chapter 226 from the Laws of Malta.

33 Article 339, Merchant Shipping Act (Chapter 234 Laws of Malta).

34 *ibid.*,

35 Subsidiary legislation 234.56.

Shipping (Carriage of Passengers by Sea) Regulations³⁶ and give effect to the Athens Convention. In accordance with the Regulations, the Registrar General of Shipping 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,³⁷ which came into force on 18 December 2012, is also enforceable in Malta.

vii Seafarers' rights

Malta ratified the Maritime Labour Convention (MLC) 2006 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 (SL234.51). Part IV of the MSA 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 (SL234.17). 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.³⁸

With regard to detention measures in respect of ships, if the ship is not in compliance with the provisions of the Merchant Shipping Act, 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'.³⁹

VII OUTLOOK

Under the Maltese system, a shipping company is subject to tonnage tax calculated on the basis of 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 from shipping activities, such

36 SL 234.52.

37 https://ec.europa.eu/transport/themes/passengers/maritime_en.

38 www.transport.gov.mt/ship-registration/mlc-2006-stcw/stcw.

39 Article 129(1) Merchant Shipping (Maritime Labour Convention) Rules.

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.

Malta has also enacted the legal framework to regulate activities based in the blockchain and fintech industry and it has established itself as a centre for distributed ledger technology (DLT) 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.

Additionally securitisation is one of the financing tools within the shipping industry, being used as a primary source of raising finance. 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. Malta also offers a network of double tax treaties with approximately 75 jurisdictions.

Malta has also 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 immediately dissolved 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 this without the need of any authorisation or confirmation by any court that an event of default has taken place. In such 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.⁴⁰

It is also worth mentioning that any 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.

40 See Article 1526, Civil Code (Chapter 16 Laws of Malta).

MARSHALL ISLANDS

*Lawrence Rutkowski*¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The Republic of the Marshall Islands is home to one of the world's largest registries of ocean-going vessels, mobile drilling units, floating production platforms and other vessels. More than 3,000 such vessels are registered under the Marshall Islands flag, making up more than 102 million gross registered tonnage (GRT), having recently become the world's second-largest ship registry. The Marshall Islands is considered an 'open' or 'international' registry, meaning that it is possible for entities not resident in the Marshall Islands to own Marshall Islands-registered vessels.

The Marshall Islands fleet has grown rapidly since its inception in 1990. Pursuant to a joint venture agreement between the government of the Marshall Islands and International Registries Inc (IRI), IRI – acting as maritime administrator – administers both the maritime and corporate programmes of the Marshall Islands. IRI's headquarters is in the United States (in Reston, Virginia, near Washington, DC) although it has offices to assist in corporate formation, vessel registration, port state control and mortgage recording throughout the world.²

The Republic of the Marshall Islands is an independent nation comprising atolls and islands in the middle of the Pacific Ocean with fewer than 70,000 inhabitants, but is party to a Compact of Free Association with the United States, pursuant to which the United States provides defence, funding grants and certain social services. As such, although the Marshall Islands has no significant domestic shipping industry of its own, the location of the management of its corporate and shipping programmes in the United States and the political stability derived from its relationship with the United States has allowed its registry to continue to grow without the setbacks that have beset nations supporting other popular open registries.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The principal legislation for shipping is the Maritime Act 1990, as amended (Maritime Act). The Maritime Act comprises legislation covering, *inter alia*, vessel registration, mortgages,

1 Lawrence Rutkowski is a partner at Seward & Kissel LLP.

2 IRI currently maintains offices in Baltimore, Fort Lauderdale, Houston, Long Beach, New York and Reston in the United States, and in Dalian, Dubai, Geneva, Hamburg, Hong Kong, Istanbul, London, Mumbai, Piraeus, Rio de Janeiro, Roosendaal, Seoul, Shanghai, Singapore, Tokyo, Taipei and Zurich.

financing leases, maritime liens, rules of navigation, the carriage of goods and passengers, liability rules for oil pollution, duties of a master and rights of seafarers, though most practitioners are concerned principally with vessel registration and mortgages.

As noted above, the Marshall Islands flag fleet comprises principally ocean-going tonnage owned by parties not resident in the Marshall Islands. While it is valuable to know that Chapter 6 of the Maritime Act adopts the CLC Convention and that the Marshall Islands is a party to SOLAS and has ratified the Maritime Labour Convention 2006 (MLC), it is equally important to understand that much of Marshall Islands law has its roots in US law.

Indeed, much of the Maritime Act, at least as adopted in its original form in 1990, was based on similar legislation in the Republic of Liberia, which was in turn modelled on US law. In particular, Chapter 3 of the Maritime Act on ship mortgages can be traced back to the US Ship Mortgage Act, 1920 (subsequently amended and recodified). Moreover, Section 113 of the Maritime Act provides that insofar as it does not conflict with any other law of the Marshall Islands, the non-statutory general maritime law of the United States is adopted as the general maritime law of the Marshall Islands. This has the benefit of affording practitioners a deep body of American jurisprudence from which they can draw in analysing legal questions arising under Marshall Islands maritime law.

III FORUM AND JURISDICTION

i Courts

All causes of action arising under the Maritime Act fall within the jurisdiction of the High Court of the Marshall Islands, sitting in Admiralty, but Section 116 of the Maritime Act specifically provides that nothing in the Maritime Act will be deemed to deprive other courts of jurisdiction to enforce causes of action. Hence, mortgage foreclosures, as is customary in marine practice, continue to be conducted in the courts of the jurisdiction in which the relevant vessel is found at the time of foreclosure and other commercial arbitration, and litigation in commercial matters continues to be pursued in the jurisdictions and before the tribunals to which the parties have submitted. Marshall Islands law generally respects the parties' choice of law and forum. Indeed, the most recent notable cases somewhat related to international shipping that have been litigated in the Marshall Islands involve shareholder-derivative suits brought by dissident shareholders of Marshall Islands companies that are publicly traded in the United States. Decisions are appealed from the High Court to the Supreme Court of the Marshall Islands. The Supreme Court consists of a chief justice and two associate justices. Historically, the associate justices are *pro tempore* judges from other jurisdictions (e.g., the United States Ninth Circuit Court, the Republic of Palau, the Commonwealth of the Northern Mariana Islands and Canada).

That said, the Marshall Islands did adopt the Admiralty Jurisdiction Act 1986. That Act separately vested the High Court with jurisdiction in respect of suits involving a claim:

- a* to the possession or ownership of a ship or the ownership of any share therein;
- b* arising between co-owners of a ship as to possession, employment or earnings of that ship;
- c* with respect to a mortgage of or charge on a ship or any share therein;
- d* for damage received by a ship;
- e* for damage done by a ship;
- f* for loss of life or personal injury sustained in consequence of:

- any defect in a ship or in its apparel or equipment; or
- the wrongful act, neglect or default of the owners, charterers or persons in possession or control of a ship or of the master or crew thereof or of any other person for whose wrongful act, neglect or default the owners, charterers or persons in possession or control of a ship are responsible, being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from the ship or in the embarkation, carrying or disembarkation of persons in or from the ship;

g for loss of or damage to goods carried in a ship;

h arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;

i in the nature of salvage;

j in the nature of towage or pilotage with respect to a ship;

k with respect to goods or materials supplied, or services rendered, to a ship for its operation or maintenance;

l with respect to the construction, repair or equipment of a ship, or dock charges or dues;

m by a master or member of the crew of a ship for wages and any claim by or with respect to a master or member of the crew of the ship for any money or property which under any law in force for the time being is recoverable as wages;

n by a master, shipper, charterer or agent with respect to disbursements made on account of a ship;

o arising out of bottomry; or

p for the forfeiture or condemnation of a ship or of goods that are being or have been carried or have been attempted to be carried in a ship, or for the restoration of a ship or any such goods after seizure, or for jetsam, flotsam, lagan and derelict found in or on the sea, the shores of the sea or any tidal water, or for property found in the possession of convicted pirates.

ii Arbitration and ADR

Neither arbitration nor alternative dispute resolution customarily occurs in the Marshall Islands for commercial disputes between non-residents, which includes 'non-resident domestic' entities, which are entities formed under the laws of the Marshall Islands, be they corporations, limited liability companies, partnerships or other entities, but that do not do business in the Marshall Islands. Such entities are not deemed resident in the Marshall Islands merely because they register vessels under the Marshall Islands flag or maintain a resident agent there as required by the Marshall Islands Associations Law.

The Marshall Islands is a party to the New York Convention.

iii Enforcement of foreign judgments and arbitral awards

Generally, to the extent that enforcement would be sought in the Marshall Islands (an unlikely occurrence given that non-resident domestic entities are unlikely to have assets in the territory of the Marshall Islands), a foreign judgment may be enforced in the Marshall Islands without a retrial on the merits of the matter provided that (1) the judgment was for a sum of money and was final in the jurisdiction granting the judgment, (2) the court granting the judgment had jurisdiction under the laws of the place where it sat and the judgment did

not offend the principles of the Republic of the Marshall Islands as to due process, propriety or public policy, and (3) the defendant was actually present in person or by duly appointed representative and the judgment did not constitute in effect a default judgment.

IV SHIPPING CONTRACTS

i Shipbuilding

The Marshall Islands does not have an active shipbuilding industry for commercial vessels.

ii Contracts of carriage

Chapter 4, Part 1 of the Maritime Act (also cited as the Carriage by Sea Act) governs the carriage of goods. However, consistent with the approach taken generally by the Marshall Islands as an open or international registry, the Carriage by Sea Act, insofar as it relates to the carriage of goods by sea, is only applicable if the goods are carried on Marshall Islands vessels in foreign trade or on other vessels to or from ports of the Marshall Islands in foreign trade. Section 402(f) of the Maritime Act defines 'foreign trade' as the transportation of goods between the Marshall Islands and foreign countries or between foreign countries. Therefore, as a practical matter it is principally relevant with respect to Marshall Islands-flagged vessels in international commerce. No similar rules are adopted purely for cabotage trades and there are no rules limiting cabotage trades to Marshall Islands-flagged vessels.

The Marshall Islands has not adopted either the Hamburg Rules or Rotterdam Rules.

iii Cargo claims

A carrier is obliged to make the ship on which the goods are to be carried seaworthy, to properly man, equip and supply the same and to make the holds fit and safe for the reception, carriage and preservation of cargo. While disputes can be submitted to the courts of the Marshall Islands, little, if any, litigation or arbitration occurs within the Marshall Islands over these claims. As noted above, the Marshall Islands generally respects the choice of law and forum by the parties to a contract.

iv Limitation of liability

Similar to the US Carriage of Goods by Sea Act (COGSA), the Carriage by Sea Act contains a 'package limitation', although the package limitation under the Carriage by Sea Act provides that unless the shipper has declared the value of the goods prior to shipment, the carrier's and the vessel's limit of liability is 666.67 special drawing rights (SDRs) per package or 2 SDRs per kilogram of gross weight of the goods lost or damaged.

Marshall Islands law also provides for the customary exemptions from liability not caused by the carrier's want of due diligence or for those matters customarily covered by a shipper's insurance.

The Marshall Islands has adopted the LLMC Convention 1976 as Chapter 5 of the Maritime Act. Pursuant to Chapter 5, various parties are entitled to limit their liability in respect of certain claims but unable to claim the same limitations to others. For example, many claims are limited to an amount equivalent to a variable number of units (as described above in respect of certain cargo claims) following the formula for (1) 1 million SDRs, plus (2) 400 SDRs for each tonne between 2,001 and 30,000, plus (3) 300 SDRs for each tonne between 30,001 and 70,000, plus (4) 200 SDRs for each tonne in excess of 70,000.

V REMEDIES

i Ship arrest

Marshall Islands ship mortgage law (Chapter 3 of the Maritime Act) is extremely important in the world of vessel finance as so much of the world's merchant fleet is registered there. Nonetheless, as a small nation comprising thousands of small islands, very few significant carriers trade there. As a consequence, there is no history of vessel arrests on which to draw. More relevant is a brief synopsis of Marshall Islands mortgage law as it relates to enforceability elsewhere and what lien priorities exist by statute to the extent that other jurisdictions follow the laws of the flag state.

As alluded to above, the Maritime Act permits any 'citizen', 'national' or 'foreign maritime entity' to register any seagoing vessel engaged in foreign trade (subject to certain age restrictions and matters of technical compliance described below). For these purposes, this includes any entity formed within the Marshall Islands, regardless of whether legally or beneficially owned by residents of the Marshall Islands, and entities formed elsewhere as long as they register and meet the limited qualifications of a foreign maritime entity.

Once a vessel is registered, a mortgage may be recorded against the vessel. Any such mortgage (which, like Liberia, Panama, Vanuatu and others, follows the American form and not the English-style mortgage form accompanied by a deed of covenants) must identify the owner, the vessel, the amount of the direct or contingent obligations secured by the mortgage and must cover the 'whole of the vessel': one cannot grant a mortgage covering a limited interest in the vessel. There are certain formalities required with respect to number of copies, notarisation or legalisation and related items but these are not unduly complicated – more complicated is the nature of the obligations that can be secured.

Unlike English-law-type 'account current' mortgages or security interest filings under the Uniform Commercial Code in the various states of the United States, Marshall Islands mortgages are intended to secure specific, identified debts to provide, *inter alia*, notice to third-party vendors who might be supplying credit to the vessel. This requirement sometimes leads to complications when the parties desire the mortgage to secure obligations that may not be extant or where the amount to be secured is unliquidated (e.g., obligations under a derivatives contract). Traditionally, Marshall Islands mortgages secured debt obligations (loans and other extensions of credit), but changes in the law have made it possible to secure contingent obligations, including revolving credits, letters of credit reimbursement obligations and certain other obligations that are the subject of commitments or agreements subject to certain additional formalities in the language of the mortgage instrument.

Assuming the mortgage instrument has been properly drafted and meets the formal requirements for recording, it has a high priority. Specifically, the lien of the mortgage up to the amount of the outstanding indebtedness secured thereby will have priority over all claims against the vessel *in rem* except for liens arising before the recordation of the mortgage and:

- a* maritime liens arising out of tort;
- b* tonnage taxes and other fees owing to the Marshall Islands;
- c* maritime liens for the crew's wages;
- d* maritime liens for general average;
- e* maritime liens for salvage; and
- f* expenses and fees allowed and taxed by the court sitting in foreclosure.

In addition to the preferred maritime liens referenced above, whoever furnishes repairs, supplies, towage, use of dry dock or marine railway, or other necessities, may have a maritime

lien on the relevant vessel. Based on US case law, 'other necessities' can comprise a large variety of other claims but the case law is too extensive to discuss in this context. Again, as noted above, US case law is relevant because of its incorporation into Marshall Islands law.

Notwithstanding that the Marshall Islands is not a prominent jurisdiction for vessel arrests, the Admiralty Jurisdiction Act 1986 does contain rules governing the arrest of vessels. Where an action *in rem* has been commenced, and the court is satisfied that the vessel to which the action relates will be removed from the jurisdiction of the court before the plaintiff's claim is satisfied, the court may issue a warrant for the arrest and detention of that vessel, provided, however, that no warrant will be issued if the defendant, or any person who has entered an appearance, in the action:

- a* pays into court the amount claimed in the action or an amount equal to the appraised value of the vessel or the property to which the action relates; or
- b* gives bail, guarantee or other security, to the satisfaction of the plaintiff to the action, for the payment of such amount.

Where any vessel or property has been arrested and detained in pursuance of a warrant, the court may, on an application by the defendant or any other person who has entered an appearance in the action relating to the vessel or property, make an order releasing the vessel or property if the defendant or other person subsequently:

- a* pays into court the amount claimed in the action or an amount equal to the appraised value of the vessel or property that has been arrested or detained; or
- b* gives bail, guarantee or other security, to the satisfaction of the plaintiff to the action, for the payment of such amount.

ii Court orders for sale of a vessel

As noted above, very few (if any) foreclosures of commercial vessels have taken place in the Marshall Islands. The Maritime Act confers jurisdiction with respect to foreclosures of mortgages on the High Court of the Marshall Islands. And, in accordance with the Admiralty Jurisdiction Act, when the Court determines an arrested vessel is subject to 'speedy decay', the Court may, on an application made by the Chief of Revenue of the Marshall Islands, direct that the vessel be sold and the proceeds deposited in court, pending the determination of the action. Hence, Marshall Islands procedure is much like the Anglo-American procedure permitting the interlocutory sale of a vessel.

VI REGULATION

i Safety

The Office of the Maritime Administrator discusses the safety regime in the Marshall Islands as follows:

The Marshall Islands is a sovereign nation that has been a full member of the United Nations (UN) since 1991 and its maritime agency, the IMO, since 1998. . . . [It] is an active participant in the deliberations of the IMO and is one of the original sponsors of the concept of the Member State Audit Scheme. . . .

Pursuant to Section 155 of the Maritime Act, the international conventions and agreements to which the Marshall Islands is or may become a state party, shall be complied with by all vessels documented under the laws of the [Marshall Islands] that are engaged in foreign trade. . . .

The Maritime Administrator is committed to providing the highest quality ship registry and flag state administration found anywhere in the world. The premise of this commitment is the Maritime Administrator's understanding of the need to balance timely and effective compliance with the provisions of UNCLOS, all international conventions, regulations, procedures and practices contained in IMO instruments (such as SOLAS, MARPOL, the STCW Convention, Load Lines Convention, the Tonnage Convention, the COLREGs and the MLC), and other mandatory instruments to which the [Marshall Islands] is a party, with the professional knowledge of, and pragmatic appreciation for, the complexities of conducting international trade in today's world without unnecessary interference.³

ii Port state control

The Marshall Islands is not a major hub of commercial shipping activity and as such there is little to say about port state control. The Marshall Islands is better known for the responsible exercise of its authority as a flag state. The Marshall Islands' record as a flag state under white lists for both the Paris MOU and the Tokyo MOU, and its holding Qualship 21 status with the United States Coast Guard for 14 consecutive years, has been exemplary for an open registry with comparatively few detentions or bannings by port states of Marshall Islands-flagged vessels.

iii Registration and classification

Any seagoing vessel engaged in foreign trade, wherever built, owned by a citizen or national of the Marshall Islands, or a foreign maritime entity qualified in the Marshall Islands, may be registered under the Marshall Islands flag. In addition, the following vessels may be registered if owned by such a party:

- a* any decked commercial fishing vessel of 24 metres or more in length, engaged in foreign trade, wherever built;
- b* any commercial yacht of 24 metres or more in length;
- c* any private yacht of 12 metres or more in length; and
- d* any vessel under construction, provided that a vessel under construction may only be registered in the name of the party making the application for registration.

Generally, vessels may not be registered under the Marshall Islands flag if they are more than 20 years old; however, both the minimum length restrictions referred to and the 20-year maximum age limitation may be waived at the discretion of the Maritime Administrator.

In addition, almost as an historical footnote to political crises that have plagued other jurisdictions, for vessels newly entering the flag, the Maritime Administrator may, for good cause shown, including but not limited to cases of international, civil, political or military crisis, temporarily suspend or modify certain requirements of registration, and allow such vessels to be registered.

iv Environmental regulation

The Marshall Islands is a contracting state to SOLAS, including the Protocols of 1978 and 1988. It is also a party to the COLREGs, as amended, as well as the INMARSAT Convention and other significant conventions related to the safe operation of vessels. The Marshall Islands is a

³ Office of the Maritime Administrator, Marine Notice No. 1-000-4 Rev. 11/13.

participating member of the IMO and has implemented the International Safety Management Code, the International Life-Saving Appliance Code (LSA Code), the International Code for Fire Safety Systems and all other SOLAS, MARPOL and STCW-mandated international codes and IMO maritime safety Resolutions and Conventions. Pursuant to Section 155 of the Maritime Act, all vessels registered under the Marshall Islands flag are required to comply with the terms of all the aforementioned conventions and codes.

v Collisions, salvage and wrecks

As in the case of the safety regulations discussed above, the Marshall Islands is a party to, or has implemented, all the major conventions and codes relevant to environmental regulation, including MARPOL (73/78), the OPRC Convention, as well as regional agreements such as the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region.

vi Passengers' rights

Part II of the Carriage by Sea Act provides for certain protections and rights of passengers that apply to the international carriage of passengers (and luggage) but only if the contract for carriage has been made in a state that is party to the Athens Convention, as amended, and the place of departure or destination is in such a state. Moreover, the statute is inapplicable in the event that the applicable carriage is mandatorily the subject of a civil liability regime under another convention. This statute also contains a limitation of liability regime not unlike that contained in the law relating to the carriage of cargo.

vii Seafarers' rights

The Marshall Islands has adopted a Merchant Seaman Act, which codifies and expands on the older Seamen's Protection Act. These Acts provide for, *inter alia*, prohibitions against unjustifiable discharge, overtime pay, repatriation rights and similar provisions. In addition, the Marshall Islands has acceded to the MLC.

VII OUTLOOK

The Marshall Islands has recently amended the Maritime Act in two areas pertinent to ship financing.

First, it has introduced the concept of the recording of a 'financing charter' in respect of a vessel. In light of the recent spate of bankruptcies in shipping that have resulted in serious questions as to the nature of the interest that a vessel owner had under a lease, when that lease was intended (or could be construed) as an alternative financing structure, the Marshall Islands permits the recording of a financing charter on a vessel. Previously, in a US bankruptcy court, such a lease was re-characterised as a financing contract; since the lease was not recorded anywhere, the vessel could be considered an asset of the lessee (charterer) and the owner as nothing more than an unsecured creditor of the lessee. The intent of this new legislation is to provide a basis for the owner to assert its status as a secured creditor in such a bankruptcy, a secured creditor having a considerably more favourable position in such a proceeding.

Second, the Marshall Islands has amended the Maritime Act to permit the registration of a vessel under construction and the recording of a mortgage against such a vessel. The value of the latter amendment is likely to be limited to those circumstances wherein certain export

subsidy programmes assist in the provision of construction finance but which, by their terms, require a mortgage as security. Previously, it was not possible to convey a security interest in a vessel under construction by way of a mortgage.

In addition, as part of the global effort to combat money laundering, the Marshall Islands has recently amended its corporation law to require that all corporations issuing bearer shares must record the number, class and dates of issuance of bearer shares and the names, addresses, nationalities, and, in the case of natural persons, dates of birth of all holders and beneficial owners of bearer shares.

MOZAMBIQUE

João Afonso Fialho, José Miguel Oliveira and Catarina Coimbra¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Over the years Mozambique's economy has been consistently fuelled by the exploration of the country's massive minerals reserves, notably coal and ores. In addition to minerals, the country has gigantic reserves of natural gas, with the OECD expecting Mozambique to become in the medium term one of the top five exporters of LNG globally, second in the African continent.

To take advantage of the country's geographic location, ongoing consolidation of the SADC free trade tariffs and expected increase in the local production and extraction of minerals and LNG, which in the coming years will necessarily lead to growing transport volumes and exports, the government has in the pipeline transport projects totalling US\$117 billion, which include expanding ports and logistics capacities.

The above notwithstanding, it is worth mentioning that Mozambique has seen both imports and exports increasing during recent years, with port demand greatly increasing since 2013. Most of the goods are channelled by sea through the ports of Maputo/Matola, Beira, Nacala and Pemba (which mostly serves the oil and gas industry), where investments in existing and new infrastructure are also planned: in addition to the plan of increasing the handling capacity of the port of Maputo to an annual 48 million tonnes by 2033, the government intends to reactivate the construction of a deep-water port at Techobanine, close to the South African border, and build a new port for Palma, north of Pemba, to support the LNG activities.

Further, the government's plan to set up a logistics corridor in Nacala, comprising several industry projects in the range of billions of US dollars (the largest infrastructure project financing in Africa to date), is also expected to enhance cabotage and bunkering services, as it will serve to promote the shipment of goods and passengers along the coast of Mozambique. In this respect, the revitalisation of the Mozambican maritime cabotage is one of the main goals of the government for the transport sector. For that, the government has set up several protocols with public and private entities (including with the concessionaires of the Nacala and Maputo ports) aimed at enhancing the national maritime cabotage to enable the increase of flow of load and people between the Mozambican ports.

¹ João Afonso Fialho is a partner, José Miguel Oliveira is a managing associate and Catarina Coimbra is an associate at Vieira de Almeida.

As regards trading partners, Mozambique has solid ties with South Africa and Portugal for geographical and historical reasons, respectively. However, the past couple of years have seen the rise of new players, such as the Netherlands, China, India, Belgium-Luxembourg and Italy, with all that means in terms of port-calls and shipping-related activities.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The legal framework applicable to the industry is a combination of both domestic laws and international treaties and conventions. Nevertheless, most of the applicable international conventions governing shipping-related matters were initially ratified by Portugal when Mozambique was still a Portuguese overseas territory. Although Mozambique has not specifically adhered to the same conventions since gaining independence, as required under the Vienna Convention on Succession of Treaties, it is commonly accepted that those conventions apply in light of Article 71 of the Mozambican Constitution (the version approved immediately after the country gained independence), which provided for the survival of any Portuguese laws and regulations in force at that time as long as they do not conflict with the word and spirit of the constitutional provisions.

In terms of domestic law, several statutes have been approved during the past decade, the most relevant being Law 4/96 of 4 January 1996 (the Law of the Sea) and Law 5/96 of 4 January 1996, which established specialised maritime courts. In 2016 and 2017, important legislation was also enacted, including: (1) a Special Registry for Foreign Vessels, providing maritime cabotage (Decree 35/2016, of 31 August 2016); and (2) new regulations on Port Work (Decree 46/2016, of 31 October 2016); (3) the Regulations on Private Use of the National Maritime Space (Decree 21/2017, of 24 May 2017); and (4) the Regulations on the International Code of Protection of Vessels and Port Facilities (Decree 71/2017, of 31 December 2017), through which Mozambique has (finally) ratified the International Ship and Port Facility Security Code (ISPS Code).

Having in mind its goal to set up a consistent legal regime for maritime and shipping activities, more recently the government has enacted a set of important new statutes, including Resolution 5/2018, of 18 September 2018, which transposes into domestic law the Maritime Labour Convention, the new Regulations for Pilots and Ports Certification (Decree 24/2018, of 7 May 2018), and Regulations on the mandatory verification and declaration of containers' gross weight (Decree 58/2018, of 4 September 2018). In addition, regulations on international maritime safety have also been approved, as further detailed below.

III FORUM AND JURISDICTION

i Courts

With the enactment of Law 5/96, specialised courts in maritime and shipping matters were established in Mozambique's most important cities, such as Maputo, Inhambane, Beira, Quelimane, Nacala and Pemba. These are independent courts exercising jurisdiction over all types of maritime contracts (from engineering, procurement and construction contracts for vessels to bareboat charters) and disputes.

In general, Mozambican courts will find themselves competent to rule on claims where parties in dispute and the claim itself have a close connection or link to Mozambique.

The general time bar for commercial matters is 20 years, although there are certain cases in which this statutory limitation period is shorter (e.g., general average-related claims

are time-barred after one year and salvage claims are time-barred if legal proceedings do not commence within two years of the day on which the salvage operations are concluded or terminated).

ii Arbitration and ADR

Mozambique adopted the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and has ratified the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States.

The primary source of domestic law relating to arbitration is the Law on Arbitration, Conciliation and Mediation, commonly referred to as LACM (Law 11/99 of 8 July 1999). The LACM governs both international and domestic commercial arbitration, recognises the New York and Washington conventions but applies the rules set out in the Mozambican Code of Civil Procedure for arbitration proceedings. The LACM does not diverge itself from the UNCITRAL Model Law on International Commercial Arbitration and it follows the general standards and terms of the UNCITRAL Model Law for the conduct of proceedings, tribunal composition and recognition of the awards given.

In order to submit a dispute to arbitration, there must be an arbitration agreement (often a clause that is express, valid and enforceable). This agreement is required to be in written format (in the contract under which the dispute arises or in any correspondence exchanged between the parties).

As a final note, the government of Mozambique created the Centre for Arbitration, Conciliation and Mediation (CAMC) to oversee and promote arbitration, and other alternative dispute resolution mechanisms. The CAMC is headquartered in Maputo but also has branches in the cities of Beira and Nampula.

iii Enforcement of foreign judgments and arbitral awards

Mozambican law allows the parties to a contract to agree on a foreign jurisdiction and arbitral tribunal to resolve any conflicts arising under the relevant agreement, unless those conflicts are covered by provisions that, for any reason, are subject to mandatory Mozambican law or jurisdiction.

Article 1094 of the Mozambican Civil Code of Procedure sets out that any judgment or arbitration awarded by a foreign court or arbitration is, as a rule, subject to review and confirmation by the Supreme Court in order to be valid and enforceable locally (i.e., to obtain the *exequatur*). That is to say, unless a special regime applies, the enforcement of any foreign judgments or arbitral awards in the country is subject to the consideration of Mozambique's highest court.

Given that Mozambique has ratified the New York Convention, courts are *prima facie* to give effect to an arbitration agreement and award rendered in any other signatory to the New York Convention. Where the arbitral award was not granted by another contracting state, to be enforceable the award must have previously been reviewed and confirmed by Mozambique's Supreme Court.

IV SHIPPING CONTRACTS

i Shipbuilding

Mozambique does not have specific legislation dealing with shipbuilding contracts. These contracts are often treated as sale and purchase agreements and therefore are subject to the

principle of private autonomy of the contracting parties. This means the parties can negotiate the terms and conditions of the contract in accordance with Article 405 of the Mozambican Civil Code. Under the Civil Code, contractual risk and ownership is transferred upon delivery and full payment of the price, unless otherwise agreed.

ii Contracts of carriage

The Hague Rules are applicable in Mozambique. Under the Hague Rules, the carrier is liable with regard to the consignee in relation to the loading, handling, stowage, carriage, custody, care and discharge of goods. Contracts of carriage are therefore governed by the terms of the Hague Rules and the Mozambican Commercial Code, in the absence of detailed provisions set out in the relevant contract.

If the shipment takes place between two countries that are party to the Hague Rules (i.e., loading and place of destination), these rules shall apply. However, if the country of destination of the goods is not a signatory to the Hague Rules, then the applicable law would be determined by Mozambican courts in accordance with the principle *lex rei sitae*.

iii Cargo claims

As a general principle, any party to a contract of carriage that holds an interest over the cargo and can demonstrate that it has suffered loss or damage arising from the carrier's actions or omissions is entitled to sue for loss or damage. Taking this into consideration, the rights to sue under a contract of carriage rest with (1) the shipper and (2) the rightful holder of the bill of lading. When in the presence of a straight bill of lading, the right to bring a claim remains with the named consignee; with an order bill of lading, only the latest endorsee is eligible to sue; and with a bill of lading to bearer, it is up to the rightful holder at a given moment to sue.

Pursuant to the relevant provisions of the 2005 Commercial Code (Article 697 et seq.), the consignee is entitled to sue the carrier for loss or damage to the relevant cargo as long as the event took place during the period between the date on which the carrier received the goods and the date on which they are delivered to the consignee at the agreed place. The carrier will be held liable unless it can prove, *inter alia*, that the loss or damage being claimed is the result of:

- a* an action or omission attributable to the shipper or the consignee;
- b* the goods being defective or faulty;
- c* the goods not being duly assembled or packaged; or
- d* by reason of change (*caso fortuito*) or force majeure.

Note also that if carrier accepted the goods without any reservations, there is a legal presumption that no apparent faults or defects existed at the time.

The above notwithstanding, in general the consignee will not be able to file a claim against the carrier in the terms described above if it receives the cargo and settles payment without making any reservation as to its status. This principle will not apply in the event that the carrier acted with wilful misconduct (*dolo*), serious fault (*culpa grave*) or where the faults, defects or losses were not easily visible or detectable at the time of delivery.

Moreover, the carrier can be held liable before the shipper if, at the time it delivers the cargo to the consignee, it fails to seek reimbursement of the transportation expenses and any debts that the shipper instructed the carrier to recover from the consignee. In this case, the carrier will be held liable for the payment of the unrecovered credits and cannot seek to recover any transportation costs from the consignee.

In addition to the above, rights under a contract of carriage may also be validly transferred to third parties either by way of assignment of contractual position or subrogation in rights (which is typically the case when insurers indemnify cargo interests and then seek reimbursement from the carrier), as long as the relevant rules provided in the Civil Code are met.

iv Limitation of liability

The LLMC Convention 1976 is not applicable in Mozambique. Conversely, both the 1924 International Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Owners of Seagoing Vessels and the 1957 International Convention relating to the Limitation of the Liability of Owners of Seagoing Vessels are applicable.

In addition to the above conventions, it is also important to consider the limitations arising from the Hague Rules, to the extent that they are applicable.

V REMEDIES

i Ship arrest

The Brussels Convention is applicable in Mozambique. Under the Brussels Convention, any person alleging to have a maritime claim (*fumus bonis iuris*) is entitled to seek the arrest of a ship. A 'maritime claim' is one that arises out of one or more of the situations named under Article 1.1 of the Brussels Convention.

Outside the scope of the Brussels Convention, that is, for purposes of obtaining security for an unlisted maritime claim (e.g., arrest for a ship sale claim, unpaid insurance premiums, P&I dues) or to seek the arrest of a vessel sailing under the flag of a non-contracting state, the claimant must make use of the provisions of the Civil Procedure Code. In this case, and aside from the jurisdiction issue that needs to be properly assessed, in addition to providing evidence of the likelihood of its right or credit (*fumus bonis iuris*), the claimant shall also produce evidence that there is a risk that the debtor or arrestor may remove or conceal the ship (security for the claim) or that the ship may depreciate in such a way that at the time the final judgment is handed down in the main proceedings, the ship is no longer available or has substantially decreased in value (*periculum in mora*).

With the arrest in place, the claimant is required to file the initial claim for the main proceedings of which the injunction will form an integral part within 30 days of the arrest order. During the proceedings, the parties are free to settle by agreement and withdraw the claim. If the main claim should be filed with a foreign court, then the Mozambican judge dealing with the arrest application must set out the period within which the claimant must commence proceedings on the merits in the appropriate jurisdiction. The defendant is entitled to post a security before the relevant court in the amount of the claim brought by the claimant and seek the release of the vessel pending foreclosure and auction.

ii Court orders for sale of a vessel

The arrestor or any interested party can seek the judicial sale of the arrested vessel. In principle, the sale cannot take place during the arrest proceedings, requiring the bringing of new enforcement proceedings.

In a nutshell, with the enforcement application lodged, the court will notify the debtor (owner or charterer and other interested parties) to settle the claim or oppose the sale. If the debtor fails to pay or if no opposition is lodged within an appropriate period of time, the

court will order the sale. To that extent, the judge will then decide on how the sale will take place (public auction, private negotiation, sealed bids) and will appoint an auctioneer who will be responsible for the relevant proceedings and arrangements (such as organising the tender and visits to the vessel, collecting the bids, getting the proceeds of the sale and liaising with court). The vessel is sold 'as is and where is' and free from any charges or encumbrances. The proceeds arising from the sale of the vessel will be used to pay the claimant or creditors, the court fees (including auctioneer's fees) and other credits and expenses, such as salvage rewards, master and crew wages, insurance premiums, pilotage and towing expenses.

Lastly, the debtor will have the power to recover the vessel until completion of the judicial sale, provided it deposits with the court the amount being due plus court fees and expenses.

VI REGULATION

i Safety

The National Maritime Institute (INAMAR), a public body that is under the supervision of the Ministry of Transport and Telecommunications, is the key entity responsible for maritime safety. The National Institute of Hydrography and Navigation also has an ancillary role in maritime safety. The INAMAR fulfils a number of safety functions, including the coordination of protective measures of vessels and sea ports and the supervision (licensing) of compliance with safety regulations for vessels operating within Mozambican waters. The INAMAR is also responsible for ensuring that carriers and shipowners operating in the country adopt, adhere to and comply with the international conventions applicable or ratified by Mozambique, such as SOLAS and the ISPS Code, ratified by means of Decree 71/2017 of 31 December 2017. The implementation of the ISPS Code was monitored, during 2018, by experts from the US Coast Guard, together with INAMAR. In the context of a visit to the Port of Maputo at the end of 2018, the experts team congratulated the government on, among others, the creation of an efficient system of security checks of persons and vehicles, access control to the ports and improvement of the work conditions of the supervisory agents.

Regarding the international regulations on maritime safety, the government has recently adhered to the 2005 Protocol for the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) and the 2005 Protocol on the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (SUA PROT), by means of Resolutions 28/2018 and 29/2018, of 31 July 2018.

ii Port state control

The INAMAR is also responsible for exercising port state control over any foreign vessels. Pursuant to Resolution 9/2012 of 15 March 2012, the INAMAR controls all maritime activities in the country and is responsible for:

- a* the coordination, implementation and supervision of compliance with the ISPS Code;
- b* the designation of security plans for port facilities;
- c* the assessment of security of Mozambican ships and port facilities;
- d* the licensing of shipping agents;
- e* the certification of seafarers;
- f* the issuance of pilotage certificates;
- g* the certification of vessels; and
- h* the development of regulations to implement the ISPS Code.

Despite being a relatively new institute, and arguably lacking staff with the required security expertise and resources to undertake its regulatory functions, the INAMAR has been actively engaging with different stakeholders to improve its supervision duties and control over Mozambican ports and shipping-related activities.

iii Registration and classification

As a rule, the flying of the Mozambican flag is restricted to vessels owned by nationals (individuals or legal entities majority-owned by Mozambicans). This notwithstanding, by means of Decree 35/2016 of 31 August 2016, foreign vessels are also allowed to fly Mozambique's flag (second flag) and perform cabotage activities provided that:

- a* the relevant owner associates itself with a Mozambican national or company and sets up a joint venture company in Mozambique (the Mozambican partner must hold a minimum of 35 per cent of the joint venture company's share capital);
- b* the vessel that is to operate in Mozambique is not more than 10 years old; and
- c* the vessel's main registry is suspended.

Pursuant to Article 3 of Decree 35/2016, this special registry regime is also applicable to vessels under a bareboat charter.

The registration process is relatively time-consuming and bureaucratic, despite the best efforts of the government in bringing transparency and revamping procedures. In addition, registration is always conditional upon a positive survey by a classification society, which must be carried out in strict liaison with the INAMAR and the relevant flag administrations and insurers. At the time of writing, the number of class societies operating in the country is very limited (Bureau Veritas has a presence), but in view of the growing prospects of the country, there are rumours that other main classification societies – such as DNV GL and the American Bureau of Shipping – are looking for opportunities, notably with respect to the offshore LNG project.

iv Environmental regulation

The Ministry for Coordination of Environment Affairs is responsible for directing and planning the implementation of the country's environmental policy.

The Environmental Law (Law 20/97 of 1 October 1997), as amended, sets out the general provisions pertaining to the protection of the environment and imposes an environmental impact assessment process on companies carrying out activities that may have a direct or indirect impact on the environment. In a nutshell, the Environmental Law sets forth the legal basis for proper management of the environment, cumulatively with the development of the country. It applies to both private and public entities pursuing activities that have the potential to affect the environment. Core principles such as the polluter pays principle, rational management and use of the environment and the importance of international cooperation are referred to and integrated in the Environmental Law.

To specifically protect marine life and limit pollution resulting from illegal discharges by vessels or from land-based sources along the Mozambican coast, the government enacted Decree 45/2006 of 30 November 2006. This Decree prevents pollution arising from maritime activity, particularly from oil tankers and VLCCs. Considering the prospective gas reserves found offshore, Decree 45/2006 also details the activities that, because of their potential harm to the environment, fall within the oversight of the maritime authority, such as the loading,

offloading and transfer of cargo, tank cleaning and discharge of water waste into the sea. Both statutes are complemented by the conventions and protocols signed by Mozambique, such as the CLC Convention and MARPOL.

v Collisions, salvage and wrecks

The following international conventions and regulations on collisions are all applicable in Mozambique:

- a* the Collision Convention 1910;
- b* the Collision Convention 1952;
- c* the Criminal Collision Convention 1952; and
- d* the COLREGs.

These are supplemented, as the case may be, by domestic statutes, notably on rules of traffic within the port area, inland navigation, among others. Under the above-mentioned 1952 conventions, a claim for collision can be brought before a Mozambican court in any of the following situations: (1) Mozambique is the only country where the defendant has his or her habitual residence or place of business; (2) Mozambique is the country where arrest of the defendant's vessel has been effected or of any vessel belonging to the defendant that can be lawfully arrested or where arrest could have been effected, and bail or other security has been furnished; or (3) collision occurred within the limits of a Mozambican port or within its inland waters.

When there is a collision between a vessel registered under the Mozambican flag and another vessel registered under the flag of a non-contracting state to any of the above-mentioned conventions and regulations, one must resort to the rules set forth in the Code of Civil Procedure, which provide that the claimant must commence an action before the court of the place where (1) the collision occurred (provided it was in Mozambican territorial waters), (2) the defendant is domiciled, (3) the vessel took refuge, or (4) the vessel first called after the collision.

As a general rule, Mozambican courts will rule in favour of compensating any sort of damage resulting from collisions. The claimant must demonstrate the causal link between the damage and the collision. From our experience, demonstration of the causal link can be problematic as Mozambican law requires an adequate causal nexus between the action and damage for liability to occur (pursuant to Article 563 of the Civil Code). It should be noted that the concepts of indirect and consequential damage are not clearly distinguished for indemnity purposes. Compensation is only due for those damages that the party would probably not have suffered if the collision had not taken place. This excludes consequential and indirect damages. In a nutshell, compensation should cover not only the damages directly caused by the collision but also the advantages from which the non-defaulting party would have benefited if the collision had not occurred.

Salvage is governed by the 1910 Salvage Convention and, where applicable, the provisions set out in the Commercial Code. There is not a mandatory local form of salvage agreement. There are situations in which non-contractual salvage can and must be secured. This is typically the case in imposed relief vessel operations as a result of oil spills or other dangerous substances causing damage to the environment. Although terms and conditions may be agreed under the specific salvage agreement, Lloyd's standard form of salvage agreement is acceptable.

Mozambique is not a signatory of the Nairobi WRC 2007. The removal of wrecks must therefore be dealt with in light of domestic law, namely the Environmental Law and ancillary statutes and regulations.

vi Passengers' rights

Mozambique is not a party to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea. Generally, carriage of passengers is governed by the Mozambican Commercial and Civil Codes and the Consumer Law, in addition to the individual terms of the contract of carriage. Carrier's liability is mostly fault-based. In the event of delays, unexpected changes of route, damage or loss of carriage, passengers are entitled to claim compensation for loss and damage caused by an action attributed to the carrier, regardless of its wilful misconduct.

vii Seafarers' rights

By means of Resolution No. 22/2018, of 12 July 2018, Mozambique has ratified and adheres to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers. This convention prescribes minimum standards relating to training, certification and watchkeeping for seafarers, which countries are obliged to meet or exceed.

Following the adherence to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, and in order to align the domestic law to the standards of the referred to convention, the government has recently approved the Regulations on the Training and Certification of Watchkeeping Seafarers, which contains several requirements regarding the health, training and safety of the seafarers. In addition, labour matters are now governed by the provisions of the Maritime Labour Convention, adopted by the International Labour Organization on 23 February 2006 and on 9 June 2006, which has been ratified by Mozambique by means of Resolution 5/2018, of 18 September 2018 (which approves the transposition of the referred convention into domestic law).

VII OUTLOOK

The shipping industry is intrinsically linked with the country's economic development and the needs of local industry, and the government's capacity on public spending (infrastructure projects). In this context, the fact that (1) new projects on infrastructure, energy and transportation are expected in the near future and (2) Mozambique has finally availed itself of its favourable central geographical location (the fact that it is well positioned to meet demands from customers in the Atlantic and the Asia-Pacific markets) are indicators of the country's potential for shipping and its openness to receive foreign investments. The enhancement of the LNG project in Offshore Areas 1 and 4 (the final investment decision regarding Areas 1 and 4 is expected to be made soon and the extraction of natural gas expected to begin in 2022 or 2023) and, consequently, the need to transport the LNG and provide maritime equipment and services, will naturally lead to a development of the domestic shipping industry. Evidence of this is the refurbishment and expansion of the existing marine ports and the building of new ones, which may give rise to investment opportunities by the private sector (both foreign and domestic). Other opportunities may arise from the recent focus on investment in national cabotage services and equipment, for which the Ministry of Transport and Communications has called on the private sector to invest.

In line with the above, the setting up of maritime courts, the creation of an institute exclusively dedicated to regulate and oversee the shipping industry (the INAMAR), the opening of cabotage activities to foreign vessels and owners, the ratification and adherence to the ISPS Code and, more recently, the ratification of the Maritime Labour Convention, and the enactment of new regulations on maritime safety and on maritime transport operations, are clear indicators of the government's drive in setting up a consistent legal regime for maritime and shipping activities. In addition, the ratification by Mozambique of important international regulations on maritime matters is also an indicator of the government's goal to enhance foreign investment in this sector.

Without prejudice to the above, Mozambican future growth may, ultimately, trigger local content concerns, aiming at empowering the Mozambican private sector and developing the country's economy.

At a broader level, the Mozambican government has been actively working on strengthening the economic relations with its historic and strategic partners. The latest evidence of this is the conclusion, on July 2018, of a protocol of cooperation between Mozambique and Portugal regarding maritime transports and ports, aimed at simplifying the procedures, staff training and enactment of maritime and ports legislation in those sectors. Moreover, this protocol also aims at enhancing cooperation between the two countries on the utilisation of liquified natural gas in maritime transport.

NEW ZEALAND

Simon Cartwright, Rob McStay, Charlotte Lewis and Zoe Pajot¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

As the previous authors of this chapter have noted, New Zealand is essentially an importer and exporter. Other than recreational craft, it is not a ship-owning nation.²

Commercially, New Zealand is serviced by international shipping lines for container, bulk and car carriers. In recent years, there has also been a significant growth in cruise liners visiting our ports: 270,000 cruise passengers were expected during the 2017–2018 season.³

Domestic shipping largely comprises the local fishing fleet, several coastal tankers and bulk carriers (primarily for cement cargoes) and ferries (including the inter-island ferries operating between the North and South Islands).

Although the present government is considered to be ‘pro’ rail and coastal shipping, at present there has been little sign of support for the latter.

A national debate about clean seas and inland waters has brought our maritime environment into focus. The maritime regulator, Maritime New Zealand, has for several years had a ‘clean seas’ policy. Together with other government departments, a number of initiatives have been taken in this respect, including the introduction in May 2018 of a Craft Risk Management Standard to prevent bio-fouling from ship’s hulls and the adoption of international regulations for ballast water. This has led to the detention in or rejection from New Zealand waters of a number of vessels.

New Zealand is not currently a signatory to Marpol Annex VI. The government recently called for submissions as to whether New Zealand should accede. We expect New Zealand will do so.

Looking ahead, New Zealand hosts the America’s Cup regatta in Auckland in 2021. This is expected to give a substantial boost to the country’s pleasure craft and superyacht industries, as well as the wider marine industry in New Zealand.

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.

1 Simon Cartwright is a partner, Rob McStay and Charlotte Lewis are solicitors, and Zoe Pajot is a maritime legal adviser at Hesketh Henry.

2 According to the Maritime New Zealand Annual Report 2016/2017, 1.45 million New Zealanders are involved in recreational boating in some way.

3 Tourism New Zealand: Cruise Sector 25 October 2017.

The principal legislation is the Maritime Transport Act 1994 (MTA). The MTA regulates maritime activity (safety), the marine environment (prevention of pollution etc), 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 LLMC Convention 1976 (as amended by the 1996 Protocol) and the Hague-Visby Rules. Other conventions are given effect by subordinate regulations; for example, the Maritime Rules (discussed below) give force to the COLREGs and SOLAS.

Other legislation focuses on specific matters, such as admiralty jurisdiction,⁴ domestic carriage of goods,⁵ biosecurity,⁶ non-sector-specific employee safety,⁷ security measures around ships and ports,⁸ criminal provisions relating to maritime matters,⁹ rights and liability under shipping documents and the delivery of goods, liens for freight and warehousing of cargo,¹⁰ formation of port companies and management and operation of the commercial aspects of ports,¹¹ discharge from ships and offshore installation within 12 nautical miles,¹² ship registration, transfer of ownership and mortgages,¹³ and outward shipping policy.¹⁴

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 Resources Management Act 1991.¹⁵

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 Rules¹⁶ and the Marine Protection Rules.¹⁷

4 Admiralty Act 1973 (and Part 25 of the High Court Rules 2008).

5 Contract and Commercial Law Act 2017, Part 5, Subpart 1.

6 Biosecurity Act 1993.

7 Health and Safety at Work Act 2015.

8 Maritime Security Act 2004 and Maritime Security Regulations 2004, giving effect to aspects to the ISPS Code.

9 Maritime Crimes Act 1999.

10 Contract and Commercial Law Act 2017, Part 5, Subpart 2.

11 Port Companies Act 1988.

12 Resource Management Act 1991 (and Resource Management (Marine Pollution) Regulations 1998).

13 Ship Registration Act 1992.

14 Shipping Act 1987.

15 There is a further division in the safety context between local regulations of recreational boating and shipping under navigation safety bylaws, and national regulations under the MTA⁹⁴ and Maritime Rules.

16 The Maritime Rules give effect to a number of conventions, including the STCW, the COLREGs and SOLAS.

17 The Marine Protection Rules give effect to a number of conventions, including MARPOL, the London Dumping Convention, OPRC and CLC.

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 will typically last between six months and a year for a substantial arbitration.

There are two main domestic arbitral institutions, being the Arbitrators' and Mediators Institute of New Zealand and the Resolution Institute. Neither has specialist maritime expertise. The Maritime Law Association of Australia and New Zealand has issued arbitration rules that 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, however, 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 if (1) it is a money judgment and is not for a sum in respect of taxes or penalty; (2) the judgment is final and conclusive; and (3) 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 (HVR) for claims in respect of loss or damage to goods under a contract of carriage governed by the HVR;
- c* under the Contract and Commercial Law Act 2017, there is a one-year time limit for claims relating to domestic carriage of goods and the contracting carrier must be notified of any partial loss or damage within 30 days;
- d* under Section 361 of the Maritime Transport Act 1994 (MTA), no action may be brought in respect of discharge or escape of oil from a CLC Convention vessel, or in respect of discharge or escape of bunker oil from a Bunker Convention vessel, 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; however, the plaintiff can apply for an extension;
- g* salvage claims are subject to a two-year time limit under Article 23 of the International Convention on Salvage 1989; and
- h* 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.

IV SHIPPING CONTRACTS

i Shipbuilding

There is no specific statutory regime for shipbuilding contracts. General contract law principles apply (and 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 Contract and Commercial Law Act 2017 (CCLA).¹⁸

Typically, title will pass on delivery.

ii Contracts of carriage

New Zealand is not a signatory to the Hamburg Rules or the Rotterdam Rules. Instead, the carriage of goods under New Zealand law is subject to:

- a* the MTA (which incorporates the Hague-Visby Rules for international carriage of goods by sea);¹⁹ and

¹⁸ Contract and Commercial Law Act 2017, Part 2, Subpart 2. The CCLA repealed (and consolidated under one statute) various New Zealand statutes which 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.

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 (Hague Rules) as amended by the First (Visby Rules) Protocol of 23 February 1968 and the Second (SDR) Protocol of 21 December 1979.

- 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 unless:²¹

- 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 HVR apply to every bill of lading (BOL) relating to the international carriage of goods if:²²

- 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 HVR or the MTA are to govern the contract.

Under the MTA, parties may not limit the New Zealand courts' jurisdiction in respect of a:²⁴

- a* BOL (or similar) relating to the international carriage of goods; or
- b* non-negotiable document (other than a BOL or similar document of title) that contains express provision to the effect that the HVR 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 effect the enforceability of arbitration agreements and foreign choice-of-law clauses.²⁵

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 who 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 As to '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 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).

²⁵ MTA, Section 210(2); *Mobil Oil New Zealand Ltd v. The Ship 'Stolt Sincerity'* HC Auckland AD628/93, 14 March 1995.

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. Loss caused by delay in delivery is not covered by the Act (common law principles apply).

The CCLA recognises four types of contracts of carriage:²⁹

- a* 'at owner's risk': the carrier will be liable only where 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.
- 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

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, whereas 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

26 It applies to the carriage of goods performed or to be performed by as 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 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].

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(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.

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, the majority of 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 or a person entitled to delivery of the goods.³⁸ However, where the consignee is not a party to the contract, it may still bring a claim against the contracting carrier once the goods are in the possession of the consignee.³⁹ In some circumstances, claims may also be brought in tort.

If a claim is commenced, it is likely to be against both the shipowner (or contracting carrier) and the vessel (*in rem*).

Jurisdiction

A defendant issued with proceedings from New Zealand may bring an action in *forum non conveniens* to protest jurisdiction and apply to the New Zealand court to dismiss (or, in the alternative, stay) the proceeding. A plaintiff opposing a stay or dismissal will carry the burden of convincing the New Zealand court that there is a strong case for maintaining the action under the New Zealand jurisdiction.

Commencing proceedings against overseas parties

Generally, the rules governing service of proceedings are set out in Part 6 of the High Court Rules 2016 (HCR). There are various exceptions to the standard rules for overseas service, which parties must take into account when serving proceedings on an overseas party.⁴⁰

Damages

The measure of damages to be awarded differs depending on whether the HVR or the CCLA apply to the claim.

Under the HVR, the measure of damages is calculated by the reduction in value of the cargo at delivery,⁴¹ whereas under the CCLA, the contractual measure of damages are recoverable (including consequential losses).⁴²

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.

40 Overseas service is generally governed by Rules 6.32 of the High Court Rules 2016. There are various exceptions to Rule 6.32, including service in Australia (Rule 6.36) and service in convention countries (Rule 6.34).

41 MTA, Schedule 5, Article 5(b).

42 *Transtext Network New Zealand Ltd (In Liquidation) v. Greaney* [2001] 3 NZLR 378.

In addition to the damages available under the HVR or the CCLA, New Zealand courts have a discretionary power to award interest or legal costs (including increased or indemnity costs) and disbursements to successful claimants.⁴³

iv Limitation of liability

Both the HVR and the CCLA limit a carrier's liability.⁴⁴ However, the benefit of the limitation of liability does not apply to loss or damage caused by the carrier, either intentionally or recklessly.⁴⁵

Under the HVR, liability is limited in accordance with Article 4. Under the CCLA, liability is capped at NZ\$2,000 for each unit of goods lost or damaged.⁴⁶

In addition, a shipowner has to limit civil liability, save in 'exceptional cases'.⁴⁷

Limitation of liability for ships under the MTA was reformed following the grounding of the MV *Rena*.⁴⁸ Part 7 of the MTA now gives direct force of law to the LLMC Convention (incorporated in Schedule 8) as amended by the LLMC Protocol (incorporated in Schedule 9).⁴⁹ By Order in Council, in May 2015, New Zealand adopted the increased 1996 Protocol limits, effective from 8 June 2015.

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 HCR.

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 (1) damage done by a ship, (2) salvage, (3) seafarers' wages, (4) master's wages and disbursements, and (5) bottomry and respondentia. As regards the claims listed in Section 4(1) of the Admiralty Act 1973, these include claims:

- a* for the possession or ownership of a ship;
- b* for any damage done or received by a ship;
- c* arising out of any agreement relating to the carriage of goods in a ship, or its use or hire;
- d* for loss of or damage to goods carried by a ship;
- e* in respect of the construction, repair or equipment of a ship; and
- f* for dock or port or harbour charges.

⁴³ HCRs, Part 14.

⁴⁴ HVR IV and CCLA, Section 259.

⁴⁵ HVR IV 5(e) and CCLA, Section 259.

⁴⁶ CCLA, Section 259.

⁴⁷ *Daina Shipping Company v. Te Runanga O Ngati Awa* [2013] 2 NZLR 799 at [29].

⁴⁸ MTA, Section 83.

⁴⁹ MTA, Section 84A.

If a maritime lien exists in relation to a ship (or aircraft or other property), a party may initiate an *in rem* action against the ship concerned⁵⁰ and contemporaneously apply for that particular ship's arrest.

If the claim is one found in the list in Section 4(1), there may in limited circumstances be an opportunity to arrest instead a sister ship or associated ship:

- a For claims listed in Sections 4(1)(a), (b), (c) and (s), an action *in rem* and warrant for arrest may only be brought against the particular ship or property that is the subject of the claim.⁵¹ 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.
- b For claims listed in Sections 4(1)(d) to (r) arising in connection with a ship, where 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:⁵²
 - the particular subject ship if, at the time the action is brought, that ship is beneficially owned as regards all the shares therein by, or is on charter by demise to, the person who would have liability *in personam*; or
 - any other ship which, 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)(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.

It is unlikely that bunkers may be arrested separately, as distinct from the ship herself; the High Court has suggested (*in obiter*) that a ship includes permanent structures, components and accessories, but not her bunkers.⁵³ 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 for an arrest warrant, the applicant should search the Admiralty Register to check that there is no current caveat against arrest.⁵⁴ 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.⁵⁵

An applicant must have legitimate grounds for arrest. There are two types of cases of wrongful arrest that may attract liability for damages: bad faith or gross negligence on the

50 Section 5(1) of the Admiralty Act 1973.

51 Section 5(2)(a) of the Admiralty Act 1973.

52 Section 5(2)(b) of the Admiralty Act 1973.

53 *Mobil Oil NZ Ltd v. The Ship 'Rangiora'* HC Auckland AD 877, 10 August 1999.

54 HCR 25.34(3).

55 HCR 25.43(2).

part of the arresting party.⁵⁶ Bad faith may be found where, on a subjective assessment, the arresting party has no honest belief in its entitlement to arrest the ship. Liability may be founded on gross negligence where, on an objective assessment, the basis for arrest is so inadequate that it may be inferred that the arresting party did not believe in its entitlement to arrest – or acted without any serious regard as to whether it had adequate grounds to arrest the ship.⁵⁷

An application for arrest may only be made 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 arrest⁶⁰ and a notice by the Registrar of the arrest⁶¹ (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 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 cases of urgency where the ship is due to leave, a request for urgency may be raised with the Admiralty Registrar at the time.

56 *Centro Latino Americano de Comercio Exterior S.A. v. Owners of the Ship 'Kommunar' (The 'Kommunar')* (No. 3) [1997] 1 Lloyd's Law Reports 22; *Nalder & Biddle (Nelson) Ltd v. C & F Fishing Ltd* [2005] 3 NZLR 698 (HC).

57 *Ibid.*

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).

63 High Court Fees Regulations 2013.

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 ship⁶⁴ 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 may be prevailed upon to serve that document at the same time.

Ships may be arrested via helicopter or boat within New Zealand's territorial waters, by serving the warrant of arrest and by giving notice of the arrest of property.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 released⁶⁸ or the ship is sold by court order.⁶⁹

The Registrar may issue and action an instrument of release on payment into court 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 re-arrested based on the same claim. That said, there may be exceptional circumstances for which the party may be able to re-arrest (for example the Registrar has released the ship for significantly inadequate security).⁷¹

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 P&I club guarantee.⁷³

64 HCR 25.36.

65 HCR 25.10(1)(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).

72 Ibid.

73 Which 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.

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 here. A defendant may seek to stay the proceedings by raising *forum non conveniens* issues; although even if the defendant is successful on that point, the New Zealand court may still maintain security pending resolution of the dispute elsewhere.⁷⁵ There is nothing in theory to stop a foreign-based entity from tracking a vessel to New Zealand, arresting it, staying the New Zealand proceeding, and pursuing its claim in another jurisdiction.

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

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 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 appraisal (though in the case of commercial or large ships, appraisal is usually required so 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

⁷⁴ HCR 25.46.

⁷⁵ See *Raukura Moana Fisheries Ltd v. The Ship Irina Zharkikh* [2001] 2 NZLR 801 (HC); a stay was sought on the basis of an arbitration clause.

⁷⁶ HCR 25.42.

⁷⁷ HCR 25.43(2).

⁷⁸ HCR 25.51.

⁷⁹ Form AD15 and AD16 respectively.

⁸⁰ HCR 25.51(7).

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. That said, the position taken by the New Zealand courts on a court-ordered sale (i.e., free of encumbrances) may not necessarily be the position of foreign courts, which cannot be compelled to take the same approach.

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. But where 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 where appraisal and sale was ordered prior to judgment, despite opposition.

The order of priority to the sale proceeds is not immutable, and depends on the particular circumstances, but generally falls as follows:⁸⁴

- a* costs and expenses of the 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.

The MTA sets out general requirements for participants in the maritime system, which are focused on:

- a* compliance with the conditions attached to relevant maritime documents (licences, permits, certificates);
- b* proper qualification of participants in the maritime industry; and
- c* compliance with prescribed safety standards and practices.

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) and *Fournier v. The Ship 'Margaret Z'* [1999] 3 NZLR 111 (HC).

⁸⁵ HCR 25.52.

While 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 seafarers⁸⁷ 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 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.

ii Port state control

Port state control (PSC) is governed by the MTA and carried out in accordance with the Tokyo MOU (incorporating several international treaties).⁸⁹

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.⁹⁰

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 International Labour Organization.⁹¹

Where vessels fail 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.

86 MTA 94, Part 6.

87 MTA 94, Part 4A.

88 MTA 94, 33J and 33K.

89 MTA, Section 54, 396 and 397.

90 There are three categories: high-risk ship, standard-risk ship and low-risk ship.

91 Conventions that New Zealand applies for port state control are, in particular: International Convention on Load Lines 1966, International Convention for the Safety of Life at Sea (SOLAS) 1974 as amended, International Convention for the Prevention of Pollution from Ships (MARPOL) 1973, as modified by the Protocol of 1978, International Convention on Standards for Training, Certification and Watchkeeping for Seafarers (STCW) 1978, as amended, International Convention on Tonnage Measurement of Ships 1969, Merchant Shipping (Minimum Standards) Convention 1976 (ILO Convention 147), Maritime Labour Convention, 2006 (MLC 2006), International Convention on the Control of Harmful Anti-Fouling Systems on Ships 2001.

In addition to the Tokyo MOU, New Zealand and Australia have 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 divided into two parts:

- a Part A confers nationality, provides evidence of ownership and enables registration of mortgage. Part A 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.⁹² To be registered under this Part, the ship must be surveyed and the owner must give very detailed information and documents, a declaration of ownership and nationality, the builder's certificate, a tonnage certificate and evidence of changes in ownership.⁹³
- b Part B only confers 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.⁹⁴

Lastly, the Fisheries Act 1996 has separately established a Fishing Vessel Register for fishing vessels operating in New Zealand fisheries water.

Classification societies

Maritime New Zealand recognises the following classification societies: American Bureau of Shipping, Bureau Veritas, DNV GL, Class NK and Lloyd's Register International.

It is not likely that either surveyors or classification societies would be held to owe a duty of care capable of sustaining a negligence action. The leading authority on surveyors' liability is *Attorney General v. Carter*.⁹⁵ That case confirmed that no duty of care was owed by surveyors because survey certificates were issued as part of a statutory safety regime, not to protect commercial interests. Similarly, a classification society does not owe a duty of care to ship purchasers in circumstances where loss is purely economic.⁹⁶

⁹² Ship Registration Act 1992 (SRA), Section 6(1).

⁹³ SRA, Sections 14 and 15.

⁹⁴ See ship registration flow chart on Maritime New Zealand website for more details on whether a ship needs to be registered.

⁹⁵ [2003] 2 NZLR 160.

⁹⁶ *Castlelight Maritime SA v. China Corporation Register of Shipping* HC Auckland CIV-2005-404-003423, 14 December 2005.

iv Environmental regulation

The regulation of pollution to New Zealand's marine environment from 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:

- a* the Intervention Convention and the Intervention Protocol;
- b* the CLC Convention;
- c* the Oil Pollution Fund Convention;
- d* MARPOL;
- e* UNCLOS;
- f* the OPRC Convention; and
- g* the London Dumping Convention and 1996 Protocol.

New Zealand is currently considering whether to become a signatory to MARPOL Annex VI on air pollution.

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:

- 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.⁹⁷
- 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.⁹⁸
- c* The cost of cleaning up harmful substances or pollution damage attracts civil liability under the MTA.⁹⁹

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.

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

97 RMA, Sections 15A to 15C.

98 MTA, Sections 226 and 261.

99 MTA, Part 25.

requirements for the discharge of ships' ballast water¹⁰⁰ and biofouling requirements.¹⁰¹ With regard to the latter, from May 2018, vessels arriving in New Zealand must arrive with a 'clean hull', as defined by the Craft Risk Management Standard on Biofouling (CRMS) or risk expulsion. Even prior to the CRMS coming into force, a firm stance by the MPI has resulted in several vessels being ordered to move to international waters to undertake hull cleaning, or take some other action at great expense to the vessel owner.

The importation and management of hazardous waste and products is 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\$300,000.¹⁰² However, offenders on foreign ships (although a few exceptions exist) cannot be imprisoned in New Zealand for offences under the RMA.¹⁰³

In addition to the times noted above, 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.¹⁰⁴ Further, general reparations for clean-up costs may be awarded.¹⁰⁵

Under the MTA, the maximum penalty is imprisonment of no more than two years or a fine 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.¹⁰⁶

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.¹⁰⁷

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:

- 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;¹⁰⁸ and
- b* all pollution damage caused by a harmful substance or waste (or reasonable cost in preventing pollution damage).¹⁰⁹

100 It does so via Import Health Standard for Ballast Water implemented under Section 22 of The Biosecurity Act 1993.

101 It does so via the Craft Risk Management Standard on Biofouling implemented under Section 24G of the Biosecurity Act 1993.

102 The penalties are contained in Section 339(1) and (1A) of the RMA.

103 RMA, Section 339A.

104 RMA, Section 339B.

105 Sentencing Act 2002, Section 12.

106 MTA, Section 244(1).

107 MTA, Sections 244(1)(c) and 409.

108 MTA, Section 344.

109 MTA, Section 345.

CLC convention ships are not liable for civil liability under point (a). 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.¹¹⁰

Limitation of liability for civil claims

Despite the MTA establishing civil liability for the discharge of harmful substances or waste (or cost of preventing the same), ship owners are entitled to limit their liability under the LLMC, or, in the case of CLC convention vessels, in accordance with that convention.¹¹¹

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.¹¹² In line with international practice, liability for collisions is determined in accordance with normal tort law principles. Negligence will generally be established where 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 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 navigational hazards.

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 region that are posing a hazard to navigation.¹¹³ Further, the Director of Maritime New Zealand has the power to order regional councils or the owner to remove wrecked ships that

110 MTA, Section 314.

111 MTA, Sections 344 and 345. These two sections are subject to Part 7 of the MTA, which provides for limitation.

112 Maritime Rules Part 22.

113 MTA, Section 33J.

are navigational hazards.¹¹⁴ 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.¹¹⁵

vi Passengers' rights

New Zealand has no specific statutory regime related to 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. For example: The Accident Compensation Act 2001 (which covers personal injury within (though not outside) New Zealand, and the Contract and Commercial Law Act 2017 (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.

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.¹¹⁶

VII OUTLOOK

As noted in Section I, the maritime community in New Zealand will be monitoring developments in ports and infrastructure, coastal shipping and maritime environment regulation for the next several years. As expected, the implementation of the Craft Risk Management Standard for hull-fouling has already affected foreign-flagged vessels calling to New Zealand. MPI advised in March 2019 that they have taken action against 14 vessels that have fallen foul of new regulations to keep out potentially invasive marine organisms and devastating aquatic diseases. Those included foreign military ships, bulk carriers, container vessels and a tanker.

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

114 MTA, Section 33J.

115 MTA, Section 33K.

116 Admiralty Act 73, Section 4.

have a significant impact on New Zealand's maritime regulation and case law. New Zealand is potentially 'due' another incident. Given the importance of shipping to the economy, there is a significant potential risk in the event of a cyber attack affecting vessel operations, or a natural disaster or vessel incident causing damage to port infrastructure.

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 by the coastline. With an extensive natural maritime endowment base incorporating a coastline of more than 800km, an exclusive economic zone of more than 200 nautical miles,² the Nigerian 'blue economy'³ is being harnessed, considering 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 inland waterways resource estimated at nearly 3,000km and comprising more than 50 rivers, both large and small, that can support a vibrant intra-regional trade.⁵ 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.⁶ Crude oil and natural gas continue to be exported in large quantities. Consequently, demand in shipping services has been on the increase and the maritime industry, which plays an important part in the exploitation and distribution of Nigeria's oil and gas, conveniently takes second place as the principal contributor to the nation's economy after petroleum.

1 Adedoyin Afun is a partner at Bloomfield Law Practice.

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) <<https://www.undp.org/content/undp/en/home/blog/2018/blue-economy-sustainable-ocean-economic-paradigm.html>> [accessed 17 April 2019]; The Commonwealth 'Blue Economy' <<http://thecommonwealth.org/blue-economy>> [accessed 17 April 2019].

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* 21-25; PwC 'Nigeria: Looking beyond oil' (PwC, Lagos Chamber of Commerce and Industry, Lagos, Nigeria, March 2016) 1-32.

5 Eromosele Abiodun (2018), 'Rescuing the Maritime Sector', *THISDAYLIVE* <<https://www.thisdaylive.com/index.php/2018/03/09/rescuing-the-maritime-sector/>> [accessed 17 April 2019].

6 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* 184-187.

Commercial shipping activities largely revolve around six active ports⁷ and six petroleum exportation terminals.⁸ The 2006 port reforms brought about a remarkable increase in their cargo volume.⁹ Consequently, 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.

Within the first six months of 2018, a total of 2,008 vessels berthed at the various Nigerian ports.¹⁰ This represents a consistent but sharp decline compared with the three preceding years, when a total of 5,014 vessels, 4,373 vessels and 4,292 vessels berthed at Nigerian ports in 2015, 2016 and 2017 respectively. The decline in the number of berthed vessels and tonnage registered can be attributed to the increase in the exchange rate of international currencies against the Nigerian naira, the introduction of new importation policies and a reduction in service boat operation because of the decline in international crude oil prices.

The total value of Nigeria's merchandise trade was 6,569.98 billion naira in the second quarter of 2018, which was a -8.89 per cent contraction from the figure recorded in Q1, 2018 (7,211.12 billion naira) and a 14.56 per cent growth from Q2, 2017 (5,734.80 billion naira).¹¹ The total value of exports in 2017¹² stood at 13,598.2 million naira.

Compared to other oil-producing nations, vessel tonnage is low but in the past three years and pursuant to the implementation of several items of indigenous shipping development legislation, Nigerian-flagged vessels (mostly oil tankers, oil rigs and liftboats, offshore support vessels, floating storage and offloading (FSO) vessels, and floating production storage and offloading (FPSO) vessels) have enjoyed significant growth, from 370 vessels with a total of almost 420,000 metric tons in 2016, with a dip in 2017, at 307 registered vessels with a total of 415,638.03 metric tons¹³ and an increased pick up in 2018, due to registration of high capacity index vessels like the EGINA FPSO and a crude oil tanker, with approximately 595 vessels and a total of approximately 711,987.95 metric tons.¹⁴

7 Located in Lagos State are Apapa Port and Tin Can Island Port. Located in Rivers State are Port Harcourt Port and Onne Port. Located in Delta State and Cross River State are Warri Port and Calabar Port, respectively. Three other ports are under construction: Badagry, Lekki and Ibom.

8 Nigeria Business Info 'The Nigerian Crude Oil & Gas Industry' <<https://web.archive.org/web/20060213013744/http://www.nigeriabusinessinfo.com/nigerian-oil.htm>> [accessed 17 April 2019].

9 James Leigland and Gylfi Palsson 'The World Bank 'Port reform in Nigeria' (Grid Lines, World Bank, March 2007) <<http://www.infradev.org/Infradev/assets/10/documents/Gridline%20-%20Port%20Reform%20in%20Nigeria.pdf>> [accessed 17 April 2019].

10 Source: Nigerian Port Authority – Nigerian Port Statistics for 2007 to June 2018.

11 'Merchandise Trade Declines in Q2 2018: -8.89% Contraction from Q1 2018 Trade Figure' <<https://www.proshareng.com/news/NIGERIA%20ECONOMY/Merchandise-Trade-Declines-in-Q2-2018--8.89Percent-Contraction-from-Q1-2018-Trade-Figure/41705>> [Accessed 18 April 2019].

12 'Nigeria's Merchandise Trade Declined Marginally QoQ but Increased YoY for Q4 2017' (2018) <<https://www.proshareng.com/news/Nigeria%20Economy/Nigeria%E2%80%99s-Merchandise-Trade-Declined-M/38717>> [Accessed 18 April 2019].

13 Nigeria's Maritime Industry Forecast: 2018–2019 as presented by the Nigerian Maritime Administration and Safety Agency (NIMASA).

14 Nigeria's Maritime Industry Forecast: 2019–2020 as presented by the NIMASA.

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 (MSA), 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,¹⁵ 2004, the Carriage of Goods by Sea Act,¹⁶ and the United Nations Convention on Carriage of Goods by Sea (Ratification and Enforcement) Act 2005.

Generally, the Constitution of the Federal Republic of Nigeria 1999 (as amended) (the Nigerian Constitution),¹⁷ the Admiralty Jurisdiction Act (AJA),¹⁸ and the Admiralty Jurisdiction Procedure Rules 2011 (AJPR) provide the framework for admiralty jurisdiction and court practice.

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 the traditional unpaid wages, which the AJA defines as a maritime lien.

Notably, Sections 20(a) to (h) of the AJA stipulate that the Federal High Court can exercise jurisdiction over admiralty matters, notwithstanding any exclusive jurisdictional clauses contained in any agreement related to such a matter, where the following circumstances exist:

- a* the place of performance, execution, delivery, act or default is or takes place in Nigeria;
- 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;

¹⁵ Cap. N126, LFN 2004.

¹⁶ Cap. C2, LFN 2004.

¹⁷ Cap. C23, LFN 2004.

¹⁸ Cap. A5 LFN 2004.

- 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 upon 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 null and void. However, only the jurisdictional aspects of the clause are affected, not the entire agreement. Section 10 of the AJA¹⁹ clearly empowers the Federal High Court to recognise and enforce arbitration clauses in admiralty agreements.²⁰

It is worth noting that Section 18 of the AJA mandates that proceedings in a maritime claim or a claim on a maritime lien or other charge to be commenced within any stipulated limitation period provided in the contract in respect of such claim. However, where there is no stipulated limitation period in an agreement or law, such proceedings must be commenced within three years of the cause of action arising.

Meanwhile, the MSA prohibits the commencement of any action for payment by a salvor more than two years after completion of salvage.²¹ 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).²² 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 Arbitration Rules.²³ 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 Lagos Regional Centre for International Arbitration (the formation of which is backed by federal legislation).²⁴

Nigeria does not have any specific maritime arbitration procedure legislation. However, recourse is often made to either the Maritime Arbitrators Association of Nigeria (MAAN), a non-governmental body comprising maritime and commercial law practitioners, master

19 Section 10 of the AJA codifies Nigeria's obligations under Article II(1) of 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.'

20 *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.

21 This time may, however, be extended by a court if the salvor has been unable to arrest the salvaged vessel.

22 Cap. A18, LFN 2004.

23 Section 15 of the ACA.

24 The Regional Centre for International Commercial Arbitration Act, Cap. R5, LFN 2004.

mariners, surveyors, insurance brokers and other maritime practitioners, or to experienced arbitrators, who are committed to providing specialised 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 during the past 15 years to institutionalise the use of 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 Enforcement of foreign judgments and arbitral awards

The enforcement of foreign judgments in Nigeria is regulated by the following two statutes:

- a Reciprocal Enforcement of Foreign Judgments Ordinance;²⁵ and
- b Foreign Judgment (Reciprocal Enforcement) Act (FJA).²⁶

Until recently, there was intense intellectual polemics among text writers, commentators and legal practitioners as to which of these two statutes regulates the enforcement of foreign judgments in Nigeria. While the debate continued, there was one common factor to both pieces of legislation – that is, the registration and enforcement of foreign judgments (including maritime judgments) be based on reciprocity.

The FJA provides for a one-year limitation period for the registration and enforcement of foreign judgments, and the REJ has a six-year limitation period.

The REJ, owing to its English origins, lists a number of Commonwealth countries in favour of which reciprocal status was granted for judgments of their superior courts. The FJA, on the other hand, empowers the Minister of Justice to make orders in respect of countries with which the Minister is assured would grant reciprocal enforcement to Nigerian judgments before the provisions of the FJA would be applicable to the judgment of such countries. However, no such order has been made to date by the Minister. As such, the FJA remains inoperative, even though it was enacted well after the REJ. The fact that the FJA did not repeal the REJ further compounds the legal quagmire.

Although there have been several court decisions suggesting that registration and enforcement of judgment should follow the provisions of the FJA, the Supreme Court has been consistent during the past 10 years that the REJ is the applicable law, for the time being, for the registration and enforcement of judgments from the United Kingdom and other named Commonwealth countries (pursuant to Section 5 FJA) until the relevant orders are made by the Minister of Justice pursuant to the FJA. The foregoing was recently echoed in *Bronwen Energy Trading Ltd v. Crescent Africa (Ghana) Ltd*,²⁷ in which the Supreme Court relied on earlier decisions.²⁸

25 Cap 175, Laws of the Federation of Nigeria and Lagos, 1958 (REJ) (this Ordinance was enacted in 1922 as LN 8, 1922).

26 Originally enacted in 1960. Cited as Chapter C35, Laws of the Federation 2004.

27 (2018) LPELR-43796(CA).

28 See *Macaulay v. RZB Austria* (2003) ALL NLR 393, *Marine & General Assurance Company Plc v. Overseas Union Insurance* (2006) 4 NWLR (Pt. 971) 622 and *Grosvenor Casinos Ltd v. Halaoui* (2009) 10 NWLR (PT 1149) 309.

The number of foreign judgments enforced has not been high, not only as a result of the restricted number of countries that have been recognised by law to reciprocate enforcement of Nigerian judgment, but also because of the conditions contained in the REJ that may prevent a duly obtained judgment in any jurisdiction from being registered and enforced in Nigeria.²⁹

Order 52 Rules 16 and 17 of the Federal High Court (Civil Procedure Rules) 2009 also govern the recognition and enforcement of arbitral awards at the Federal High Court, which has exclusive jurisdiction over admiralty matters.

Nigeria is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention), which was included as a schedule to the ACA. An arbitration award may be enforced pursuant to either Section 51 or Section 54 of the ACA. While Section 51 allows recognition and enforcement of an award from any country, Section 54 applies to recognition and enforcement of awards between Nigeria and any other contracting state to the New York Convention, pursuant to conditions stipulated thereunder.

The ACA does not specify a limitation period for the recognition and enforcement of an award. As such the question as to when time begins to run for the purpose of commencing the enforcement of an arbitral award has always been the subject of much debate. The foregoing stems from the conception of enforcement proceedings as an action instituted for the assertion of a right. If it is considered as such, then the six-year limitation period contained in the Limitation Act 1966 and the limitation laws of the different states (and the Federal Capital Territory, Abuja) for the institution of an action in a Nigerian court is therefore applicable.

In *Murmansk State Steamship Line v. Kano Oil Millers Limited*,³⁰ *City Engineering Nigeria Limited v. Federal Housing Authority*³¹ and *Tulip (Nig.) Ltd v. Noleggioe Transport Maritime SAS*,³² the Supreme Court decided that the period of limitation runs from the date of the accrual of the original cause of action in the arbitral agreement, being the date on which the claimant acquires the right to institute an arbitral proceeding, and not from the date of the arbitral award.

The decision of the Supreme Court in *City Engineering v. Federal Housing Authority* is most unsatisfactory for the law does not command impossibility. Time cannot start to run before the making of an award. Second, an arbitration agreement constitutes two distinct contracts, namely the contract to submit a dispute to arbitration when one does occur, and second, the contract or agreement to comply with the terms of the award when made. It is therefore expected that the English position,³³ which the Supreme Court was urged to adopt in *City Engineering*, would be followed, namely that the making of an arbitral award gives rise to a new cause of action as soon as the unsuccessful party fails to comply with the terms of the award, and not from the date of accrual of the original cause of action giving rise to the submission.

29 Some of the other conditions include that the original court must have jurisdiction that the judgment was not obtained by fraud, that the judgment is not subject to appeal in another country or that the judgment is not contrary to public policy in Nigeria.

30 (1974) All N.L.R 89.

31 (1997) 9 NWLR (Pt 520) 224.

32 (2011) 4 NWLR (Pt 1237) 254.

33 As stated by Otton J in *Agromet Motoimport Ltd v. Maulden Engineering Co. (Beds) Ltd* (1985) 2 All ER 436.

Notwithstanding the preceding paragraph, an applicant wishing to enforce an arbitral award in Nigeria must also ensure that the arbitration proceedings are swiftly concluded so as not to be caught up by the applicable limitation period. As an alternative, as advised by Elias, Chief Justice of Nigeria (as he then was) in the *Murmansk* case, it may be prudent for an aggrieved party to institute an action in court following a breach of the contract containing the arbitration agreement. Upon an application by the other party, the matter may be stayed pending the outcome of arbitration.

IV SHIPPING CONTRACTS

i Shipbuilding

Nigeria does not undertake a significant amount of shipbuilding. Most newbuilds are ordered from abroad but a few Nigerian shipyards build or assemble craft (barges, tugboats and riverboats) below 5,000 tonnes for use in inland waterways, cabotage operations and 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 Ajaokuta steel mill in Kogi State and Aluminium Smelter Company in Ikot-Abasi, Akwa Ibom State, coming on stream.³⁴

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, on the other hand, 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 Hague Rules 1924 and the Hamburg Rules 1978 are concurrently in force in Nigeria. The Hague Rules are 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.

34 Anna Okon 'NIMASA to end 16-year cabotage waivers regime' (*The Punch*, Lagos, Nigeria, 11 April 2019) (online) <<https://punchng.com/nimasa-to-end-16-year-cabotage-waivers-regime/>> [accessed 19 April 2019].

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 Convention, have 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 Hague-Visby Rules, but it signed the Rotterdam Rules and would need to make 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*.³⁵

The essential features of the 1855 Act were imported into the Merchant Shipping Act 2004 (MSA 2004), in Section 375. Regrettably, when the MSA 2004 was repealed by the MSA, Section 375 of the MSA 2004 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 (see footnote 23). 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*³⁶ 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;
- 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 the case of *Pacers Multi-Dynamic Ltd v. MV Dancing Sisters & Anor.*³⁷ However, where the bill of lading is endorsed to the person named as the 'notify party', the

35 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.

36 [1924] 1 KB 575.

37 2012) LPELR-7848(SC).

Supreme Court held in *Basinco Motors Limited v. Woermann-Line and Anor*³⁸ 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.³⁹

iv Limitation of liability

Under Nigerian law, not all claims against a shipowner are susceptible to limitation of liability. Nigeria, as a signatory to the 1976 Convention on Limitation of Liability for Maritime Claims (LLMC) (which replaced the 1957 International Convention Relating to the Limitation of Owners of Seagoing Ships) and the 1996 Protocol (the Protocol) thereto,⁴⁰ domesticated the LLMC and the Protocol in its laws through the provisions of Section 335(1)(f) of the MSA.

The LLMC and its Protocol formed the basis of the Limitation of Liability for Maritime Claims as stated in Sections 351 to 359 of the MSA, 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.

Sections 352(1)(a) to (g) of the MSA states the types of claims that are subject to limitation, while Sections 353(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 MSA creates room for discussion as to whether or not 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 would not be subject to the limits stated in Section 356(1). If so, how would the limit of such claims be calculated?' On the other hand, the above provision of the MSA could mean that the general limits of liability for claims, other than claims for which specific limitations has been provided for in the MSA (such as passenger claims under Section 357), shall be calculated as provided.

The above provision of the MSA 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 cases the limitation of liability provisions is applicable. The author aligns with the first interpretation. Pending judicial interpretation of the above provision of the MSA, a revision of the MSA is being agitated to clear this ambiguity as well as other salient issues highlighted herein.

The entry into force of the amendment to the limit of liability in the Protocol on 8 June 2015⁴¹ (Protocol Amendment 2015) presupposes an increase in liability for the

38 (2009) 13 NWLR (Pt 1157) p. 149.

39 L Chidi Ilogu SAN, *Foundation of Carriage of Goods by Sea – The Nigerian Perspective* (2016) at pp. 199–206.

40 Which came into force on 1 December 1986 and 13 May 2004, respectively.

41 Thirty-six months after it was adopted by the Legal Committee of the IMO, when the Committee met for its 99th session in London.

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, as the Constitution requires every convention to be domesticated via a law of the National Assembly before it can have force of law in Nigeria. The matter is further compounded by the fact that the MSA states expressly, in Sections 356 to 359, the limits provided for in the Protocol.

It is therefore imperative that the MSA be amended to accommodate amendments to the Protocol (such as the Protocol Amendment 2015) and how such amendments would be incorporated into the express thresholds of limitation of liability as set out in the MSA 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 processes: (1) an affidavit setting out the facts relied upon; (2) copies of all the exhibits to be relied upon; and (3) 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 claim⁴² 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, 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. These include, but are not limited to, claims for damage done or received by a ship (whether by collision or otherwise), claims 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, claims 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 as well as arising out of an act or omission of the owners or characters of a ship.

⁴² Section 2(2) of the AJA.

The AJA stipulates that an action *in rem* can only be brought 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 only be brought before the court 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.⁴³

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.⁴⁴

An application for the arrest of a vessel is brought via an *ex parte* application (if the vessel is within Nigerian territorial waters⁴⁵ 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.⁴⁶ The application can only be made if the vessel has been under arrest for six months and the owner has failed to provide security for her release and the vessel is depreciating in value. Where 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 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

The NIMASA, pursuant to the NIMASA Act, the MSA, the Cabotage Act and other related legislation, is empowered, *inter alia*, to regulate maritime safety, security, marine pollution and maritime labour.

⁴³ Section 5(4) of the AJA.

⁴⁴ Section 5(3) of the AJA.

⁴⁵ According to the Territorial Waters Act, Cap. T5, LFN 2004, the territorial waters of Nigeria extend to 12 nautical miles off the coast of Nigeria, measured from the low-water mark, or of the seaward limits of inland waters.

⁴⁶ Order 16, Rule 1 of the AJPR.

Section 20 of the NIMASA Act empowers the Agency to establish the procedure for the implementation of international maritime conventions of the IMO, the ILO and other conventions on maritime safety and security to which the government of Nigeria is a party, especially by making regulations in respect of any such implemented convention.

Some of the maritime safety conventions that have been implemented and their corresponding regulations (where applicable), pursuant to Section 215 of the MSA, are:

- a* the International Convention for the Safety of Life at Sea (SOLAS), 1974;
- b* the 1988 Protocol relating to SOLAS and Annexes I to V thereto;
- c* the Search and Rescue Convention 1979;
- d* the International Labour Organisation Convention concerning the Protection Against Accident of Workers Employed in Loading or Unloading Ships (the Dockers Convention); and
- e* the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation 1988.

ii Port state control

The NIMASA is the authority tasked with undertaking port state control (PSC) duties. Nigeria facilitated the development of 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. The MOU has been active, recently hosting its third Ministerial Conference and ninth Port State Control Committee Meeting with the aim of developing a unified system of PSC inspection procedure for the region.

Although vessel inspection under PSC is relatively low when compared with vessel traffic, Nigeria is one of the leading nations in Africa, having inspected more than 700 ships in 2014 and detained 63. Also, Nigeria is one of the countries with the highest positive performance indicators in the 2016–2017 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.

iii Registration and classification

The Nigerian Ship Registry (NSR) is domiciled with the 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 only fly the flag of one country. Consequently, there is a requirement for vessels already registered under a foreign flag to deregister their current present 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, the NIMASA has set a five-year period for the cessation of the nation's cabotage waiver regime (which was implemented pursuant to the provisions of the Cabotage Act) that has given, *inter alia*, an advantage to foreign-flagged vessels, foreign-owned vessels as well as foreign crew to operate in Nigerian cabotage for over 15 years now. The recent move by the NIMASA, which 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 vessels built, owned and operated by Nigerians. Preliminary findings reveal that the 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 two phases of the termination are expected to end in two and five years respectively. The move by the NIMASA to end the cabotage waivers for foreign-owned vessels is welcome news and a 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.⁴⁷

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, the 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: the American Bureau of Shipping, Bureau Veritas, Det Norske Veritas, Lloyd's Register, the International Naval Survey Bureau and the International Register of Shipping.

iv Environmental regulation

The 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 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 MARPOL 73/78, the London Dumping Convention 1972 and its 1996 Protocol 1996, the Ballast Water Management Convention 2004 and the Intervention Convention 1969.

v Collisions, salvage and wrecks

The MSA contains various provisions in respect of collisions, salvage and wrecks. The MSA mandates the observance of the Merchant Shipping (Collision) Rules 2010 (Collision Regulations), which are significantly modelled after the International Regulations for Preventing Collisions at Sea 1972 (the 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.

⁴⁷ Anna Okon 'NIMASA to end 16-year cabotage waivers regime' (*The Punch*, Lagos, Nigeria, 11 April 2019) (online) <<https://punchng.com/nimasa-to-end-16-year-cabotage-waivers-regime/>> [accessed 19 April 2019].

Pursuant to Section 387 of the MSA, the International Convention on Salvage 1989 forms the basis of Nigeria's salvage regime set out in Part XXVII of the MSA. The MSA 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 to engage in domestic coastal carriage of cargo and passengers within Nigerian waters, Section 8 of the Cabotage 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 water. 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, the responsibility for removal of any ship that becomes a wreck is placed on the shipowner.⁴⁸ However, this is difficult to implement as most shipowners are usually insolvent at that stage. The MSA 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 of Wrecks. Also, in a manner it thinks fit, the Receiver of Wrecks 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 of Wrecks 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 of Wrecks. It is expected that the Receiver of Wrecks and the NIMASA would put in place the framework for a mutually beneficial relationship with recyclers, with whom the Receiver of Wrecks 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.

vi Passengers' rights

The Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974, and its Protocol of 1990, is applicable in Nigeria pursuant to Section 215 of the MSA. To date no regulations have been made pursuant to the Athens Convention and its Protocol.

Sections 340 and 341 of the MSA 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

48 See Sections 360 to 385 and 398 of the MSA.

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 must be brought to court within two years of the date on which the loss or injury was caused.

vii Seafarers' rights

Several conventions on seafarers' rights have been implemented pursuant to Section 215, MSA. These include:

- a* rights with regard to their employment contracts (and obligations of their employers), including wages, leave benefits and discharge from service; and
- b* rights regarding general welfare, health and accommodation.

Some MSA 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 Minister⁴⁹ 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 2001.⁵⁰

Other conventions domesticated by the MSA 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 Federal High Court stated in a recent decision⁵¹ 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.

49 Section 408 of the MSA empowered the Minister to make regulations for the general carrying into effect of the Act.

50 Regulations 3 and 4 place duties on masters of Nigerian ships to ensure, so far 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, so far 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.

51 Suit FHC/L/CS/1807/17: *Assuranceforeningen Skuld v. MT Clover Pride (Unreported)* – Ruling of Idris J delivered on 28 March 2018. The ruling was appealed but same was subsequently withdrawn and the suit discontinued. Pending consideration of this issue by the Court of Appeal, this remains the position of the law in Nigeria.

VII OUTLOOK

Generally, the outlook for the Nigerian economy continues to be positive. Based on available data, the Nigerian economy, after exiting recession in 2017, quickened its pace of growth in 2018, and this upward trajectory is expected to continue in 2019, albeit at a reduced pace due to expected delays following the successful 2019 general elections and the inauguration of the new government.

Further to the Maritime Industry Forecast for 2019–2020 (as recently presented by the NIMASA), the total Nigerian fleet is projected to grow by 10.33 per cent in 2019 and ease to 8.75 per cent in 2020 (that is to say, the size of the oil tanker fleet is projected to decrease by 11.2 per cent in 2019 and recover to a positive growth of 0.11 per cent in 2020; the size of the non-oil tanker fleet size is to estimated to increase by 14.3 per cent in 2019 and 10.2 per cent in 2020; and oil rigs are projected to increase by 6.98 per cent and 6.5 per cent in 2019 and 2020 respectively).

Regrettably, the following bills, most of which were highlighted in last year's chapter and would positively affect the Nigerian maritime industry, are still going through legislative processes at the National Assembly: the Anti-Piracy Bill, the National Transport Commission Bill, the Petroleum Industry Governance Bill, the National Inland Waterways Authority Amendment Bill, the Deep Offshore and Inland Basin Production Sharing Contract Amendment Bill, the Cabotage Act Amendment Bill and the Ports and Harbour Bill. If the foregoing bills are not passed into law before the dissolution of the current National Assembly in June 2019, the bills would lapse and would have to be reintroduced to the next National Assembly for consideration.

The development of new greenfield ports, with a view to reducing congestion at existing ports and meet global shipping trends, continues in Nigeria. Extensive works are ongoing at the Lekki Deep Sea Port, which is now scheduled to be completed in 2021. Other greenfield port projects include: (1) the Ibom Deep Sea Ports, designed as a PPP arrangement between the Federal Ministry of Transportation, Akwa Ibom State and the Nigeria Ports Authority and intended to be a major transshipment port to accommodate Panamax vessels, is due to commence construction in 2019; and (2) the Badagry Deep Sea Port.

In line with the renewed synergy between the NIMASA and the Nigerian Content Development & Monitoring Board (NCDMB), certain categories of vessels have been identified (tugboats, security patrol vessels, crew boats, among others) to be in high demand in the Nigerian offshore industry over the next four years, with a projected spend of approximately US\$1.6 billion on marine contracts for the aforesaid vessels. Equally worth noting is that the NCDMB has set in place a financial scheme to aid Nigerians to acquire these vessels. Similarly, a framework for manpower development for critical skills required in the maritime industry has been put in place. All these developments are part of NIMASA's recent drive to cease the granting of cabotage waivers in five years and further promote indigenous participation in the country's maritime industry.

With the Nigerian LNG Limited (NLNG) Train 7 expansion project,⁵² which will be done locally by most Nigerian companies, a lot of value is expected to be added to the Nigerian offshore industry in 2019 and 2020 (just as the EGINA FPSO was primarily

52 Which aims to increase NLNG's production capacity from 22 metric tons of liquified natural gas per annum to over 30 MTPA by upgrading Trains 1-6 and adding of Train 7 and associated infrastructure.

constructed and integrated in Nigeria), taking into consideration the project estimate of US\$4.3 billion and the above-mentioned synergy between the NIMASA and the NCDMB for the development of local content in the Nigerian offshore industry.

PANAMA

Juan David Morgan Jr¹

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. From 1,000 ship transits in 1914, the Canal now handles about 14,500 transits each year. The Canal is run by the Panama Canal Authority (PCA), a Panamanian government agency, which took over from the Panama Canal Commission, an agency of the US government, in 2000.

Since the PCA took over the administration of the Panama Canal, waiting time for the Canal is down substantially and there are now fewer accidents per year. Revenues from the Panama Canal have risen exponentially. In 2018, 442.1 million tonnes of cargo went through the Canal, which represents an increase of 9.5 per cent with respect to the 403.8 million tonnes of 2017. In 2007, after it was approved by a national referendum, Panama embarked on a US\$5.3 billion expansion project of the Canal. 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 side of the waterway, more than doubling its cargo capacity. The new locks have a 25 per cent increase in length to 1,400 feet, a 51 per cent increase in width to 180 feet, and a 26 per cent increase in draught to 60 feet. Traditional Panamax vessels have a maximum deadweight tonnage (DWT) of 80,000, while the Neopanamax size have up to 170,000 DWT. The biggest container vessels that could transit the Panama Canal before its expansion could carry up to 5,000 twenty-foot equivalent units (TEUs), while 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, besides deepening, widening and straightening the Gaillard Cut. On 19 March 2017, Panama celebrated the transit of 1,000 Neopanamax vessels through the expanded Canal. In that same month, there was a record 160 transits of Neopanamax vessels out of a total of 1,111 transits, which constitutes the 78 per cent of available transit slots for Neopanamax vessels. The expanded Canal will further bolster the growth of the maritime sector of Panama's economy and generate record profits for the country.

The port system at both ends of the Canal, particularly the privately-operated container ports, are efficient and constantly growing. In this regard, Panama ranks first in Latin America and the Caribbean, having handled 7.01 million TEUs in 2018. The vast majority of cargo

¹ Juan David Morgan Jr is a partner at Morgan & Morgan.

that comes to Panama is for transshipment purposes. There are currently five privately operated container ports at both ends of the Canal, with a railway linking four of these ports; in effect, they constitute an integrated logistical port system. Also new oil terminals have just been or are being built at both ends of the Canal. In the western part of the country there is an oil pipeline linking the Atlantic and Pacific oceans, with port terminals capable of handling very large crude carriers. It has been in operation since 1982 and new storage tanks were recently built at both ends of the pipeline.

The maritime sector of Panama has grown substantially, fuelled by the Panama Canal. The Panama Chamber of Shipping now has over 250 members, while 20 years ago it had fewer than 30. These include regional offices of shipping companies, shipping agents, bunkering companies, shipyards, port operators, dredging companies, surveying companies, banks and insurance companies. According to the United Nations Conference on Trade and Development (UNCTAD), there were 7,914 ships registered in Panama, totalling around 220 million GT.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Panama has a unicameral National Assembly with 71 legislators elected every five years. The main pieces of maritime legislation are the Organic Law of the PCA and the Organic Law of the Panama Maritime Authority (PMA). The Panama Canal has a special chapter in Panama's Constitution, the objective of which is to keep it as far away as possible from local politics. Panama has ratified most of the IMO conventions. Their implementation and enforcement is carried out by the PMA, which has directorates dealing with the merchant marine, seafarers, and ports and auxiliary industries. Maritime substantive law is contained in the Law on Maritime Commerce (LMC), passed in 2008 by the National Assembly to replace the old Book II of the Code of Commerce, enacted in 1917, which had hitherto contained Panama's substantive maritime laws. The Code of Maritime Procedure (CMP) regulates the two maritime courts operating in Panama and contains the procedural laws applicable to all maritime cases. The CMP has a section that incorporated the LLMC Convention into domestic law. The contents of the 1996 Protocol to that Convention have not been passed into law.

III FORUM AND JURISDICTION

i Courts

Panama has two maritime courts that have exclusive jurisdiction over all maritime judicial claims filed in Panama. Appeals are heard by the Court of Maritime Appeals, which 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 the same article, 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'. There have been two recent Supreme Court decisions that have interpreted the modified Article 22(3) of the CMP in the context of forum-selection clauses in contracts of carriage evidenced by bills of lading. In a decision dated 30 May 2012 in *Mund & Fester GMBH & Co KG v. 'Nagoya Bay' and Nagoya Bay Inc*, the Supreme Court affirmed a ruling of the Second Maritime Court that denied a motion to stay an action based on the standard arbitration clause contained in the 1994 Congen Bill Form, which incorporated, by reference, the arbitration clause in the charter party. More recently, in a decision dated 6 January 2014 in *Harvest Fresh Growers Inc v. Maersk Line*, the Supreme Court affirmed a ruling of the First Maritime Court that denied a motion to stay an action in favour of the English High Court based on a forum-selection clause in a standard liner bill of lading. The lower court decision was affirmed, even though the parties had negotiated a service contract that incorporated the standard terms of the Maersk bill of lading. In both cases, the Supreme Court found that there was no evidence of a prior negotiation by the parties of the corresponding forum selection clauses. It must be said that the reason behind the legislative amendment to Article 22(3) of the CMP was to prevent stay of actions based on forum selection clauses in bills of lading. If the relevant forum selection clause is contained in a charter party or MoA, which are normally actively negotiated by the parties, the Panamanian courts would tend to enforce it.

Article 566 of the CMP contains conflict-of-laws rules. In general, in contractual claims, the maritime courts apply the substantive laws agreed on by the parties to the contract to resolve the dispute. In tort claims, the substantive law of the flag state of the relevant vessel, or the laws of the place where the tort occurs, are applied to resolve disputes.

ii Arbitration and ADR

The Maritime Law Association of Panama and the Panama Chamber of Shipping joined forces to create a maritime arbitration centre (CECOMAP). Recently, the rules and a table of fees were approved for the CECOMAP and an agreement with one of the established arbitration centres in the Chamber of Commerce or the Construction Chamber is being worked on for the CECOMAP to be able to use their facilities. CECOMAP is intended to be an arbitration centre in which the growing number of companies in the Panama Chamber of Shipping can resolve their disputes efficiently and cost-effectively. Eventually, it is intended that the CECOMAP become an option for dispute resolution for the whole of Latin America.

iii Enforcement of foreign judgments and arbitral awards

Final foreign judgment and arbitration awards can be enforced in Panama. Before enforcement, the party seeking enforcement of its judgment or award must have it recognised and declared

enforceable by the Fourth Chamber of the Supreme Court of Panama through *exequatur* proceedings. These proceedings normally last between six months and one year, depending on the opposition presented by the judgment or award debtor, who must be notified of the *exequatur* proceedings and may file opposition pleadings and evidence. The general rule is that a final judgment or award would be recognised and then enforced in Panama if the action that resulted in the judgment or award was properly and personally served on the defendant, so that it was not rendered by default, and if the obligation for which the judgment and award was sought would be considered a legal obligation in the Republic of Panama.

The only additional requirement is that of reciprocity. As per Article 424 of the CMP, if the judgment or award comes from a country that would not recognise judgments or awards rendered in Panama, Panama would not recognise judgments or awards from such country.

In 1982, Panama ratified the New York Convention. This makes the recognition and enforcement of arbitration awards issued in countries that are also parties to such convention simpler and somewhat faster than a normal *exequatur* for recognition of a foreign judgment.

One important feature of enforcing a maritime foreign judgment or arbitration award is that the maritime courts may attach assets of the judgment or award debtor, and thereby obtain security for the enforcement while the *exequatur* proceedings are pending in the Supreme Court. This is important because much of the time such assets (ships, cargoes, bunkers, etc.) would be passing through the Panama Canal or calling at our ports for only a brief period.

IV SHIPPING CONTRACTS

i Shipbuilding

The shipbuilding industry is not well developed in Panama. Ships built in Panama are basically small craft used in local trade or the local maritime service industries. There is one shipyard in Panama with a current Panamax-size dry dock, which is located at the Pacific entrance to the Panama Canal: MEC Shipyard. The facility is, however, used for maintenance and repair of vessels, rather than shipbuilding. Ship repairers have standard form contracts, which may be amended by the parties to accommodate their needs.

ii Contracts of carriage

Chapter I of Title II of the LMC contains substantive maritime law on contracts of carriage. While Panama has not ratified any of the international conventions dealing with contracts of carriage, the Chapter basically incorporates the Hague-Visby Rules, with some minor additions. Article 58 of the LMC contains the same defences available to a carrier under Article IV, Rule 2 of the Hague-Visby Rules, including the ‘act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation and management of the ship’. Article 63 of the LMC determines how any loss to cargo interests is to be calculated and includes the same limitations of liability to the carrier by package (666.67 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.

While very modern legislation exists on contracts of carriage, the vast majority of contracts of carriage cases in Panama's maritime courts are not resolved in accordance with Panamanian substantive law. Article 566(10) of the CMP provides that the applicable substantive law to determine the effects of contracts of carriage are those agreed on by the parties and, only when there is no governing-law clause, by the laws of the place of shipment. Since most contracts of carriage nowadays contain a governing-law clause, and it is only very seldom that the parties have agreed on Panamanian substantive law, cargo claims almost invariably end up being litigated in accordance to the substantive laws of other countries.

Article 244 of the LMC contains the list of claims that give rise to maritime liens on ships or 'preferred maritime credits'. The list contains 13 types of claims. Contract-of-carriage claims can give rise to a maritime lien against the carrying ship under items 7 and 12. Claims that give rise to liens on cargo are listed in Article 248 of the LMC. *Inter alia*, contract of carriage claims for unpaid freight and contributions to general average give rise to liens on cargo in favour of the carrier that may be exercised by possession.

iii Cargo claims

Among the claims filed in Panama's maritime courts, cargo claims are the most common. Most involve damage to containerised cargo, but there are also bulk cargo claims. Claims for damage to fruit cargoes carried from Panama and Latin America to Europe and the United States are fairly common. Under Panamanian substantive law, whichever party suffered the loss – either the shipper or the consignee – can sue the contractual carrier, the actual carrier or the servant of the carrier that was entrusted with the care and custody of the cargo when the damage occurred. Subrogated cargo underwriters have title to sue. Under Article 202 of the LMC, upon payment by an insurer to its insured, the insurer is vested with title to sue by operation of law; a formal assignment of rights is not required. In Panama, it is normally the cargo underwriter who files suit; however, when the claim is subject, for instance, to English law, a prudent litigator would always include the consignee under the bill of lading as a claimant to avoid title-to-sue issues under such law. The Panamanian courts uphold the incorporation by reference of 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, while 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, *supra*).

iv Limitation of liability

Panama has incorporated the LLMC Convention into domestic law, without its 1996 Protocol, almost verbatim. Procedurally, the limitation action is regulated by Articles 517 to 529 of the CMP. Some of its most important features are: that the action must be commenced within six months of the receipt of a claim in writing by the person seeking to limit; that the

limitation fund may not only be constituted by a cash bond, but also through a guarantee issued by a bank or an insurance company licensed in Panama; and that the party seeking to limit may also petition the court for a finding of no liability.

For oil pollution claims, limitation of liability is regulated by the CLC Convention and its 1992 Protocol.

As previously stated, cargo claims may be limited in accordance with the package and weight limitation of the Hague-Visby Rules, which have been incorporated into the LMC.

V REMEDIES

i Ship arrest

With more than 14,000 canal transits per year and the busiest container ports in Latin America, Panama is an ideal place to arrest not only vessels, but cargoes, bunkers and any other assets that may enter the jurisdiction. The arrest procedure is fairly simple, and the maritime courts are open 365 days per year and 24 hours a day for urgent matters, such as arrests or the lifting of arrests. There are three types of arrests contemplated in the CMP:

- a* arrests merely to secure an *in personam* claim: In this type of arrest, the defendant is a company with operations in Panama and that can be served with process within the court's jurisdiction. For this type of arrest, the claimant or arrestor must post between 20 and 30 per cent of the arrest amount as counter-security with the court;
- b* arrests to confer jurisdiction to Panamanian maritime courts over the defendant: This type of arrest has the effect of serving the complaint on the defendant, besides securing the claim. Defendants are companies that cannot be served with process within Panama – normally foreign companies with no operations in Panama or Panamanian companies that do not have any operations within Panama. For this type of arrest, only US\$1,000 is required as counter-security, irrespective of the claim amount, but *prima facie* evidence of the claim and its quantum must be filed with the complaint and arrest petition; 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 (b) above.

Most arrests in Panama fall under (b) and (c). When the complaint and arrest petition are filed, the corresponding maritime judge would review the *prima facie* evidence and, if he or she considers that it sufficiently supports the claim and its quantum, he or she immediately issues the arrest order. The court marshal then serves the arrest order on the vessel, normally when at anchor when the vessel is waiting to transit the Panama Canal at either Balboa or Cristobal anchorages, or at any of the ports. If feasible, an arrest order may also be served by helicopter on the target vessel, provided the vessel is within Panamanian territorial waters. When the target vessel is the vessel in respect of which the claim has arisen, the claimant may also request an inspection of documents on board the vessel to obtain evidence. Inspection of documents is particularly important in arrests of bunkers or cargoes, in order to confirm that the defendant owns the bunkers or cargoes.

An arrest cannot be effected in Panama to secure proceedings in another jurisdiction. It is a requirement that substantive proceedings be commenced in Panama simultaneously with the arrest petition; however, the case can later be stayed in favour of a foreign forum. The security obtained through the arrest can be replaced with security in the foreign forum, or the security in Panama can be maintained in the maritime courts to the order of the foreign forum.

Amounts to be posted as security may be consigned to the court in the following forms:

- a* a guarantee certificate drawn on cash from the Banco Nacional de Panama (Panama's central bank);
- b* a letter of guarantee from a bank operating locally;
- c* a guarantee issued by a local insurance company; or
- d* any other form of security on which the parties may agree.

P&I LoUs, which fall under (d), are probably the most common form of security for the lifting of arrests in Panama; however, they are not accepted as a matter of law and the claimant must consent to 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 such value. If, however, the parties cannot agree on the value of the ship, the court will have to order an appraisal, which could cause a substantial delay in the lifting of the arrest. Once adequate security is posted, the maritime court will promptly issue the order lifting the arrest, which the marshal of the court will serve on the master of the vessel, returning the documents removed from the vessel and removing the custodians from the vessel. The whole process could last from one to several hours, depending on the location of the vessel (Balboa or Cristobal).

In the event of a wrongful arrest, the CMP provides the aggrieved party with summary proceedings to lift the arrest. This is called *apremio*, which consists of a special motion to lift the arrest upon showing sufficient evidence that the arrest was wrongful, which, under the CMP, means it was effected:

- a* over property (ship, cargo, bunkers, etc.) not belonging to the defendant;
- b* in contravention of a previous express agreement by the parties to refrain from arrests; or
- c* when a maritime lien has been extinguished or is 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 such burden of proof, the maritime judge will order the immediate release of the vessel or other property arrested. The claimant may appeal the decision, but this does not prevent the lifting of the arrest.

ii Court orders for the sale of a vessel

A pre-judgment judicial sale of a vessel can be and is normally ordered when it becomes apparent that the defendant will not, or cannot, lift the arrest. When the judge orders the judicial sale of a vessel, he or she appoints an appraiser to issue a report on the market value of the vessel. The court then sets three dates for the judicial auction of the vessel by the marshal.

On the first date, the lowest bid may be no lower than three-quarters of the appraised value of the vessel. If there are no bidders in the first auction, the lowest bid in the second auction may be half of the appraised value of the vessel. If the vessel is not sold in the second auction, there is no minimum bid in the third auction. The vessel is sold by the marshal to the highest bidder. Usually, vessels sell for less than their appraised value.

VI REGULATION

i Safety

Panama has passed SOLAS into law; this is the most important legislation on safety for Panamanian merchant vessels. It is implemented by the PMA and it relies on its recognised organisations (ROs) for the certification of the merchant vessels registered in Panama. The Colregs have also been passed into law in Panama. They apply to Panamanian merchant vessels and they are also the 'rules of the road' for navigating Panamanian territorial waters. The PCA has, however, adopted its own Colregs (PCA Colregs) with certain variants from the IMO Colregs, which apply to all vessels in Panama Canal waters. These include the designated anchorage areas at both sides of the Panama Canal (Balboa and Cristobal). The PCA Colregs are almost identical to their IMO counterparts, but have slightly different regulations dealing with instances when the master is required to be on bridge, navigation in the Gaillard Cut and through the locks, and lookout duties.

ii Port state control

The port state control entity in Panama is the PMA. The PMA's Directorate of Merchant Marine and its Directorate of Ports and Auxiliary Industries execute random inspections of merchant vessels of any nationality entering Panamanian waters. Panama subscribes to and is part of the *Viña del Mar* MoU, which groups the maritime authorities of South America, Mexico, Panama and the Caribbean.

iii Registration and classification

Panama has the biggest open registry in the world. Shipowners from any nationality – except those from countries to which the UN has applied restrictions (currently North Korea and Iran) – may register their vessels in Panama. The procedure is very quick and simple. The shipowner just needs to complete a form with the ship's particulars and present it to the Directorate of Merchant Marine of the PMA, with a copy of the minimum safe manning certificate from the previous registry – newbuilds are of course exempted from the latter requirement. Upon payment of the registration fees and annual tonnage taxes, which vary according to the ship's type, the vessel is issued a provisional patent of navigation, valid for six months.

The registration procedure can be carried out in Panama through a lawyer or at one of the many Panamanian consulates in key ports and maritime centres throughout the world. A lawyer must always be appointed as the vessel's legal representative before the PMA. After the provisional registration, the shipowner has six months to complete permanent registration of the vessel. In order to do so, title over the vessel must be duly registered in the Registry of Titles & Mortgages of the PMA, the deletion certificate from the previous registry must be filed before the PMA and the corresponding technical certificates evidencing compliance with the various IMO conventions must be issued by the classification society or RO selected

by the shipowner. For fishing and fishing support vessels (reefers that carry fish), a certificate of compliance from the Authority of Aquatic Resources of Panama must be obtained before the permanent registration of the vessel can be accomplished.

The permanent patent of navigation, issued after the foregoing requirements are met, is valid for five years, after which an application for renewal can be filed. Vessels that are continually detained by the PSC of the various MoUs can be deregistered by Panama. Upon receiving the corresponding PSC reports, the Director of Merchant Marine can commence an *ex officio* cancellation process, which may lead to the vessel's cancellation from the registry, unless the vessel is mortgaged and the mortgagee bank, which must be served with notice of such process, appears before the Directorate of Merchant Marine and opposes such cancellation. Technical certificates evidencing compliance with the various IMO conventions are issued by Panama through the classification societies and ROs authorised by Panama to issue certificates on its behalf. All members of the IACS are authorised by Panama. There are also a number of non-IACS ROs authorised by Panama. Most are Panamanian, but there are some foreign ROs authorised by Panama. There have not been any cases filed against classification societies or ROs in Panama's maritime courts, but, in principle, there is nothing in Panamanian law that would exempt them from liability for negligence in the issuance of certificates, if such negligence were to cause damage to shipowners or third parties.

On 17 November 2017 Panama and China entered into a Maritime Transport Agreement in Beijing that grants most-favoured-nation treatment to Panama flag vessels calling Chinese ports. This means that Panama flag 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 ratified 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 Panama Canal. For severe offences, PCA fines can reach US\$1 million. Panama also has a Ministry of the Environment, whose jurisdiction includes Panamanian territorial waters. Normally, its focus is on pollution events on land, but it could also fine any vessels causing pollution. In 2002, the Sydney Star had a collision with the Royal Ocean in Cristobal. As a result, one of its bunker tanks was ruptured and it spilled bunkers at the north entrance of the Panama Canal. Both the PMA and PCA fined the vessel. It was ruled by the Supreme Court that both entities could fine the vessel independently of each other but the PMA did reduce its fine, taking into account that the PCA had already levied a fine of US\$25,000 against the vessel.

v Collisions, salvage and wrecks

Collisions and salvage are regulated in Chapters I and II, respectively, of Title III of the LMC. In general, for a salvor to collect any salvage award, the salvage must be at least partially successful.

vi Passengers' rights

Panama ratified the Athens Convention and its 2002 Protocol on 7 November 2013. There have not yet been any cases litigated in the maritime courts to which the Athens Convention has been applied.

vii Seafarers' rights

Panama ratified the Maritime Labour Convention 2006 (MLC) in January 2009. There have been no detentions in Panama resulting from a breach of the MLC. Besides the MLC, Panama has a Maritime Labour Law passed in 1998 (MLL), which regulates all labour issues not dealt with in the MLC. There is a minimum compensation table for seamen who have suffered accidents on board Panamanian vessels established by virtue of Article 82 of such MLL. The maximum compensation under this table is US\$50,000 in the event of death or permanent disability; however, this compensation is considered of a labour nature and seamen could also sue the shipowner for civil liability, in which case they must prove the negligence of the shipowner in the causation of the accident. Any payment under the compensation table would be deducted from any damages arising from any civil liability. Under Article 92 of the MLL, the shipowner and the seaman may agree on any law and jurisdiction other than Panama in their contracts. In a judgment dated 26 March 2006, in *Edwin Cabungcag et al v. Diamond Camellia SA & Mitsui OSK Lines*, the Supreme Court of Panama upheld a decision from the lower labour courts dismissing for lack of jurisdiction a claim arising on board a Panamanian vessel because the parties had agreed on Philippine law and jurisdiction in the applicable labour contract. Panama's two maritime courts have jurisdiction for any civil claims against a shipowner, while labour claims against shipowners of Panamanian-flagged vessels must be filed in Panama's labour courts.

PARAGUAY

Juan Pablo Palacios Velázquez¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The shipping industry in Paraguay has grown steadily in the past decade, mainly as a consequence of the significance that agribusiness has for the local economy and the need to transport these commodities overseas.

Paraguay's economy is dependent on foreign trade² – it is one of the five largest soya exporters in the world;³ in the past 20 years the major international agri-commodity companies have settled in the heart of South America⁴ and, with them, their shipping arms. Traditional international carriers, such as MSC, P&O Maritime, Imperial Shipping and CMA CGM, and South American shipping companies such as UABL and Hidrovías, have invested heavily and are fully operational in Paraguay. Likewise, local carriers, led by Navemar and Copanu, play their role in meeting the continuous demand for hold space for Paraguayan products.

The registered fleet size currently authorised by the Merchant Shipping Authority of Paraguay⁵ is of approximately 2,012 vessels, of which 1,741 are barges. From that total fleet, 90 per cent of the vessels and 80 per cent of the barges have Paraguayan flags, while the rest of the ships operating in Paraguay are registered under Argentinian, Bolivian, Brazilian and Uruguayan flags.⁶ The Paraguay–Paraná waterway, a system of rivers that starts in Puerto Cáceres (Brazil), 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,⁷ cities strategically located for river connections to the sea through Argentina, Uruguay and Brazil. Virtually all the cargo that leaves Paraguayan ports through the waterway in river carriers is 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 flourished in Paraguay in the past few years. Japanese giant Tsuneishi arrived in the country in 2012 to join local

1 Juan Pablo Palacios Velázquez is a senior associate at Palacios, Prono & Talavera.

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 The data was provided by Centro de Armadores Fluviales y Marítimos (CAFYM), the shipowners' union in Paraguay.

7 www.mre.gov.py/v1/userfiles/file/presentacionpais/Presentacion-Paraguay-octubre2013-ESP.pdf.

companies Astillero Chaco SA, La Barca and Astillero Aguape SA. They remain a valid alternative to Argentinian and Brazilian shipyards, and the most frequently requested by shipowners in recent times.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Book III of the Code of Commerce, ‘Rights and obligations arising from navigation’, was the only one in this old Argentinian statute (1889) not repealed by the current Paraguayan Civil Code.⁸ It was adopted by Paraguay in 1903 and contains the legal framework for private maritime law. Both dry and wet domestic shipping is controlled by this law, which contains provisions related to ships, shipowners, charterers, captains, crew, contracts of affreightment, 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 related to customs matters, navigation and safety, insurance, equal opportunities for increasing competitiveness and dispute resolution.

International carriage of goods by sea is governed by the Hamburg Rules, adopted in Paraguay by Law No. 2614/2005.

In the administrative sphere, the most important statutes are the Code of Fluvial and Maritime Navigation, adopted in Paraguay by Law No. 476/1957, and the Capitancias Rules, adopted by Law No. 928/1927.

Other key international legislation adopted by Paraguay includes the Collision Convention 1910, the CLC Convention, the Criminal Collision Convention 1952, the Brussels Convention, UNCLOS, SOLAS and the 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. Further, 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.

Domestic cargo claims – involving transport between Paraguayan ports – must be filed within a year, counted from the day on which the goods were delivered or from the day they should have been delivered. If the dispute is related to international river carriage, the time bar for initiating the claim is 18 months, 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.

8 Law No. 1183/1985.

ii Arbitration and ADR

Paraguay does not have a specific maritime arbitration court, nor does it have any special procedures. The arbitration and mediation proceedings are normally directed to the Paraguayan Centre of Mediation and Arbitration, a body of the Paraguayan Chamber of Commerce,⁹ 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 related to shipping disputes in Paraguay.

It is worth mentioning that international carriers normally prefer to litigate in foreign jurisdictions with legislation more friendly to shipowners. Hence, it is not unusual to find clauses selecting foreign courts or moving arbitration proceedings abroad. The validity of this type of clause before the Paraguayan courts has not yet been uniformly decided, but some courts have declared them null and void¹⁰ on the basis that referring the dispute to foreign courts, where the shipper or the consignee have not been in a position to negotiate the terms of the contract, is quite similar to denying justice to these claimants, and therefore they are against public policy. Time bars on starting arbitral proceedings are the same as those noted above 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 New York Convention.

Applications for the enforcement of foreign judgments and arbitral awards have to be made before the civil and commercial court of first instance of the domicile of the person against whom the award is meant to be executed, or in the place in which the property of the defendant is located. The party who wants to enforce the judgment or the award has 10 years to do so,¹¹ counting from the day of the ruling.

IV SHIPPING CONTRACTS

i Shipbuilding

Local shipyards have grown significantly in the past five years, with a lot of carriers buying brand-new barges to increase their fleets as a result of the high demand for space on the Paraguay–Paraná waterway.

9 www.camparaguay.com/v3/index.php.

10 *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.

11 Article 659b of the Civil Code; Articles 526b and 534 of the Civil Procedural Law; Article 48 of Law No. 1879/2002.

The contract to build a ship is neither a typical nor a nominate contract in Paraguayan law. In this sense, what the parties have specifically agreed, exercising their freedom of contract, together with the general principles of Book III of the Civil Code (which regulates the law of contracts) will rule shipbuilding contracts.

Law No. 928/1927 obliges carriers to notify and obtain permission from the General Naval Prefecture for the construction of any ship. The General Naval Prefecture is in charge of navigational safety and issues most of the statutory certificates that are needed to navigate, polices the rivers and is responsible for enforcing navigational rules.¹² 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 Hague Rules were 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, friendlier to cargo owners, are currently in force for international carriage of goods by sea. Besides the Hamburg Rules, the carriage of goods by river is governed by Book III of the Code of Commerce, which contains detailed provisions relating to contracts of carriage.

The Code of Commerce establishes a strict liability regime, with few exceptions in favour of the carrier. One could easily conclude that the legal framework of the Code of Commerce is less advantageous to the carrier than international conventions.

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 they were in at the time of loading. The contract of carriage under the Code of Commerce does not envisage ‘best-effort’ obligations – namely, obligations to use diligence and to give one’s best efforts to carry out an obligation – but end results. The carrier promises a specific result and not conduct aimed at producing a result that it is not possible to assure. Hence, when the goods are not returned in the same condition – the result promised – the fault of the carrier is presumed by the courts until the latter can demonstrate cause for exemption.

The carrier is liable for any damage or loss to the cargo during transport, unless it can prove (1) an inherent flaw in the goods, (2) force majeure, or (3) the fault of the shipper. These are the only exceptions established by law in favour of the carrier. Normally, the carrier will try to argue the case through the force majeure defence; under this domestic regime, there are no exceptions covering errors in navigation or in the management of the ship.

The Code of Commerce also recognises the liability of the shipper in Articles 1,068 and 1,069. The carrier might be entitled to claim against the shipper for unpaid freight, for damage to the ship caused by the cargo, for loading dangerous or prohibited goods damaging other cargo, or, for instance, for deposit charges where the consignee fails to collect the goods. This liability is also recognised in general terms in the Civil Code.

With regard to security for the freight, Article 958 of the Code of Commerce provides that the owner is entitled to exercise a lien on freight payable on delivery, general average

12 Law No. 1,158/85 organising the General Naval Prefecture; Law No. 928/1927 on the Capitancias Rules; and Law No. 476/1957, the Code of Fluvial and Maritime Navigation.

contributions and costs of preserving the goods. Moreover, the contract of carriage will normally contain detailed provisions entitling the owner to retain the cargo until it has been paid the sums that the lien covers, and these provisions will normally be respected by courts.

As shown, the Code of Commerce and the Hamburg Rules have significantly different regimes regarding matters, including the liability of the carrier, time bars and limitation of liability. Accordingly, it is essential to establish from the outset which law applies. In this regard, when it is proven that the damage occurred during the river leg of the journey, Paraguayan jurisprudence says that the local rules, established by the old Code of Commerce, will apply rather than the international conventions on sea carriage.¹³

In terms of charter parties, the Code of Commerce regulates the contract of carriage.¹⁴ 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 new Law No. 5,393/2015 on the Law Applicable to International Contracts.

iii Cargo claims

In the landlocked country of Paraguay, all cargo arrives in one of two ways: 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 in the legal parties to the contract and the rules and legislation applicable. This peculiarity raises several questions relating to the identity of the carrier, title to sue and the terms of the contract of carriage.

The contractual parties to any bill of lading are the shipper, the carrier and the consignee. The only party that will normally remain unchanged in both bills of lading (ocean or river) is the consignee. The carrier will probably change, because in an ocean bill of lading, the carrier is the entity with which the shipper is contracted (ocean or sea carrier), while 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 the shipper may be the ocean carrier. This is a normal scenario, which can, however, have another layer of complication if special agreements are made between carriers.

The consignee, as it normally appears in both bills of lading, is entitled to sue any of the carriers. The shipper also has title to sue; this is true under both the Hamburg Rules and the Code of Commerce. Finally, the question of who will be sued will depend on which carrier is liable, which in turn will normally depend on where the damage took place.

If the damage occurred during the river journey, the consignee *prima facie* will be entitled to sue the river carrier under the river bill of lading. The river carrier is only liable for this leg of the journey 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

13 *Garantía SA de Seguros y Reaseguros v. Compañía Marítima Paraguaya SA y otros* (see also footnote 10).

14 Articles 1,018 to 1,102.

(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 scenario, the ocean carrier will normally have recourse against the river carrier.

If the damage took place during the sea leg, the consignee should only sue the ocean carrier, as the river carrier is not liable for the ocean leg of the 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 LLMC Convention 1976 and its 1996 Protocol, the Brussels International Convention on the Limitation of Liability of Owners of Sea-going Ships 1957 and the 1924 Brussels Limitation Convention.

In this scenario, 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 in the Civil Procedural Code. Recent jurisprudence has established that the general rules and requirements of injunctions and interim relief apply to the arrest of ships.¹⁵

To arrest a ship, the party that has a privileged¹⁶ or unprivileged¹⁷ credit against the ship can either file a specific claim for the sole purpose of obtaining the arrest or can initiate the principal claim on its merits.¹⁸ 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.¹⁹

There are other general requirements that must be met to obtain an arrest order: (1) the claimant needs to prove the verisimilitude of its right (a good, arguable and accrued case); (2) the claimant needs to prove the urgency of arresting the ship (there must be a real risk of dissipation); and (3) the claimant needs to offer security to meet the costs and damages that may result if the order is granted without right. In this respect, Article 702 of the Civil

15 *Nautimill SA v. Naviera Chaco SRL s/ Cobro de Guaraníes Ordinario*, AI No. 77, 7 March 2013. Civil and Commercial Appeal Tribunal, Third Chamber.

16 Article 868 of the Code of Commerce. Maritime privileges are governed by Articles 1368 to 1378 of the Code of Commerce.

17 Article 869 of the Code of Commerce.

18 Article 691 of the Civil Procedural Code.

19 Article 700 of the Civil Procedural Code.

Procedural Code establishes a claim for wrongful arrest when the claimant has abused or exceeded its rights in the use of the right to arrest a ship. The order granted by the court needs to be communicated to the General Naval Prefecture, the body that executes the arrest.

The arrest is considered a provisional and ancillary measure²⁰ and the arrested party can always offer equivalent security to free the ship.²¹

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 property²² 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, in its Second Additional Protocol, a regulation related to safety and navigation. The Protocol contains detailed provisions relating to safety standards of vessels and cargo, safety of the crew, safety of navigation on inland waters, safety rules for ports and guidelines for the prevention, reduction and control of pollution of ships and boats. The Capitánías Rules also contain, in Articles 216 to 224, regulation on the safety of vessels.

Furthermore, Paraguay has also approved SOLAS, by Law No. 2367/2004, and SUA.

ii Port state control

The General Naval Prefecture has jurisdiction over all port activities. As the river authority, it has competence to control the entry and exit of all vessels in order to monitor compliance with local laws and regulations. It also inspects docks and piers to monitor loading and discharging operations, and determines the order of entry, departure, berthing, anchoring and the placement of vessels in port.

Among its duties, the General Naval Prefecture provides public services within ports and maintains harbours and channels, keeping them clean, safe and to depth, removing any obstacles that may interrupt navigation. The 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 registration. Currently, the process starts with the Directorate General of the Merchant Marine, which issues a decision on the proposed registration. If favourable, the opinion is then elevated for final

20 Article 697 of the Civil Procedural Code.

21 Article 698 of the Civil Procedural Code; and Article 870 of the Commercial Code.

22 Article 864 of the Commercial Code.

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 Paraguayan flag. Once this resolution is obtained, the owner must go to the General Naval Prefecture to gain a certificate of registration and finally, with the resolution and the certificate, the owner requests the registration of the ship ownership title before the Public Records Office.

The regime for the incorporation, registration and flagging of ships is regulated by Decree No. 1,994/2014, Decree No. 2,115/2014 and by Resolution No. 1,791/2014 of the Ministry of Public Works and Communications. The regulations set forth all the requirements for incorporating newbuilds and second-hand ships, registering bareboat charters and incorporating ships under lease. Under Decree No. 4,787/2016, the government restricted the incorporation of ships under lease to a maximum of six years, limiting the use of that regime of provisory incorporation to the Paraguayan flag.

iv Environmental regulation

The additional Navigation and Safety Protocol of the Paraguay–Paraná River Transport Agreement establishes detailed rules 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 related to transport and dumping and they need to strictly observe the rules relating to the discharge regimes. Likewise, the carriage of hydrocarbons, noxious liquid substances, harmful substances and dangerous goods is regulated.

Paraguay has not approved any of the IMO conventions on environmental regulation.²³ MARPOL and its protocols and annexes are therefore not in force. The same is true in respect of the Intervention Convention, 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 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. They are also regulated by the law of tort. Typically, collisions will give rise to a cause of action in negligence. There are certain points that the claimant needs to prove to obtain a favourable judgment:

- a* any damages suffered by the innocent ship;
- b* the fault of the guilty ship in the collision;
- c* that the fault caused the collision; and
- d* that the collision caused the damage.

Liability will be imposed by the court in proportion to the fault of the ships involved; if the relative degrees of fault cannot be determined, the court will apportion fault equally. To determine the fault of the ships, the COLREGs will apply: these were approved as the

23 www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx.

official navigation rules by Article 46 of Protocol II of the Paraguay–Paraná River Transport Agreement. Disputes arising from collisions need to be filed within two years of the day of the accident.

The law of salvage is entirely contained in the Code of Commerce (Articles 1,303 to 1,311) as Paraguay is not party to the 1989 Salvage Convention. Broadly speaking, under the local regime, the party claiming a judgment for salvage will succeed as long as it proves in court that:

- a* the salvage was in a maritime or river situation;
- b* there was a recognised subject of salvage;
- c* the subject of salvage was in a position of danger necessitating a salvage service to preserve it from loss or damage;
- d* the claimant did not have a pre-existing contractual or legal duty to save the ship; and
- e* the salvage was successful or contributed to the success of preserving the subject from danger.

The quantum of the salvage award is calculated taking into account the promptness and nature of the service, the number of people and facilities involved in the service, and the 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 the responsibility for any obstruction to navigation.

vi Passengers' rights

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 specialised nature of this work.

VII OUTLOOK

Paraguay has started the lengthy process of adapting its legislation to the current needs of the maritime business, which is expected to continue to expand along with the balanced economy that the country has shown in recent years. Today, 90 per cent of foreign trade in or out of Paraguay passes 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.

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. The Philippines is an archipelagic country of more than 7,000 islands, and so shipping provides a vital link throughout the country. The domestic shipping industry, however, is probably best remembered for the ill-fated collision between the passenger ferry *Doña Paz* and the petroleum product tanker *Vector*, which happened on 20 December 1987 and resulted in more than 4,000 deaths – the worst disaster at sea in peacetime. As could be expected, it spawned a considerable amount of litigation in the Philippines and the United States. In 2017, the Philippine domestic fleet consisted of 33,347² registered vessels, which moved people and cargo throughout the archipelago.

The Philippines is one of the largest providers of seafarers to the world's merchant marine fleet. In fact, it provides more than 30 per cent of the world's seafarers.³ In 2017, the Philippines deployed 378,072 seafarers internationally,⁴ and the number is projected to grow each year. In 2018, the nation earned more than US\$28.94 billion⁵ from overseas Filipino workers, and of that total, almost US\$6.1 billion came from Filipino seafarers employed by the world's merchant marine fleet.⁶ In 2018, the personal remittances of overseas Filipino workers constituted 9.7 per cent of the Philippines' gross domestic product.⁷

The largest port in the Philippines is Manila, on the island of Luzon in the northern part of the country. In 2018, the total Philippine cargo throughput was recorded at around 256 million MT, and of that total, 103.16 million MT came from the Manila and Northern Luzon Ports alone. In central Philippines, the Panay Guimaras ports serve as the main hub for the distribution of goods within the central islands with a 12.017 million MT cargo throughput. Surigao and Davao are the major ports in the southern Philippines' island of Mindanao, which is largely the source of agricultural exports. The said ports' cargo

1 Valeriano R Del Rosario, Maria Theresa C Gonzales, and Daphne Ruby B Grasparil are partners, and Jennifer E Cerrada is a managing associate at VeraLaw (Del Rosario Raboca Gonzales Grasparil).

2 Maritime Industry Authority data as of 2017, available at http://marina.gov.ph/sectoral/summary_domfleetinventoryjune2017andprevious.pdf.

3 Lucas, 'Seafarers' Day: PH is world's manning capital', *Philippine Daily Inquirer*, 12 April 2017, available at <http://globalnation.inquirer.net/125167/seafarers-day-ph-is-worlds-manning-capital>.

4 Philippine Overseas Employment Administration, 'Compendium of OFW Statistics', <http://www.poea.gov.ph/ofwstat/compendium/deployment%202006-2018S1.pdf>.

5 Bangko Sentral ng Pilipinas statistics, available at <http://www.bsp.gov.ph/statistics/keystat/ofw2.htm>.

6 Ibid.

7 Lucas, '2018 remittances hit all-time high', *Philippine Daily Inquirer*, 18 February 2019, <https://business.inquirer.net/265151/2018-remittances-hit-all-time-high/>.

throughput was recorded at 27.75 million MT and 18.49 million MT, respectively.⁸ In 2018, the Philippines imported US\$109.92 million (free on board (FOB) value) worth of goods, while at the same time exporting goods worth US\$67.48 million (FOB value).⁹ 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,¹⁰ which was enacted in 1949, was based on the Spanish Civil Code, but it is written in English rather than Spanish. The Philippines is no longer a Spanish-speaking country, so all enacted laws are in English and court proceedings are 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 New Civil Code, while the rules on domestic carriage of goods are set out in both the New Civil Code and the Code of Commerce. The latter also provides for the law on charter parties, collision and general average. Salvage is covered under a special law.

The Philippines also follows the system of judicial precedents and, therefore, the decisions of the Philippine Supreme Court, written in English, interpreting the provisions of the Civil Code, the Code of Commerce and other legislation, have the force of law. For the carriage of goods to and from Philippine ports in foreign trade, the Philippines adopted the United States Carriage of Goods by Sea Act of 1936¹¹ (the Philippine COGSA), which is basically the Hague Rules.

As mentioned above, the Philippines is a major provider of seafarers to the world's merchant marine fleet. More recent shipping-related legislation has tended to be with regard to overseas Filipino workers. As a result, on 13 March 2014, the Philippine Congress enacted Republic Act No. 10635,¹² which established the Maritime Industry Authority (MARINA) as the single maritime administration responsible for the implementation and enforcement of the STCW Convention, as amended, and the international agreements or covenants related thereto.

In August 2012, the Philippines became the 30th member country of the International Labour Organization to adopt the Maritime Labour Convention of 2006. The adoption of the MLC 2006, 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 by Filipino seafarers to the growth of the country's economy.¹³

8 Philippine Ports Authority statistics, available at <http://www.ppa.com.ph/content/statistics-1>.

9 Philippine Statistics Authority, 'National Quickstat – March 2019', available at <https://psa.gov.ph/statistics/quickstat>.

10 An Act to ordain and institute the Civil Code of the Philippines [Civil Code], Republic Act No. 386 (1950).

11 Carriage of Goods by the Sea Act [COGSA], Public Act No. 521 (1936).

12 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 10635 (2014).

13 Press Release, Manila Philippines, International Labour Organization, 21 August 2012, www.ilo.org/manila/public/pr/WCMS_187754/lang-en/index.htm.

III FORUM AND JURISDICTION

i Courts

Jurisdiction of courts

The Philippine courts' jurisdiction over shipping disputes is determined by law. Under the Judiciary Reorganization Act of 1980 (BP 129), as amended by Act No. 7691,¹⁴ the regional trial courts have exclusive original jurisdiction over admiralty and maritime matters.

An interesting jurisdictional issue was dealt with in *Negros Navigation Co., Inc. v. Court of Appeals*¹⁵ and *Tsuneishi Heavy Industries (Cebu) Inc (THI) v. Negros Navigation Co Inc.*¹⁶ THI commenced an action to enforce a maritime lien for ship repairs with the Regional Trial Court of Cebu (the Cebu RTC) against the properties of Negros Navigation Co Inc (NNC). NNC subsequently commenced rehabilitation proceedings with the Regional Trial Court of Manila (the Manila RTC) and filed for suspension of payments. The Manila RTC issued a stay order of all claims against NNC. Meanwhile, the Cebu RTC issued an arrest for NNC's vessels in the *in rem* aspect of the case. NNC sought the suspension of proceedings in Cebu on account of the stay order issued by the Manila RTC. The appellate court restrained the implementation of the Manila RTC stay order. The Supreme Court overruled the argument by THI that the Manila RTC divested the Cebu RTC of jurisdiction acting as an admiralty court when it issued the stay order, but affirmed that the maritime lien must be upheld notwithstanding NNC's rehabilitation proceedings. The Supreme Court ruled that:

[t]he Manila RTC acting as a rehabilitation court merely suspended the proceedings in the admiralty case in the Cebu RTC. It did not divest the Cebu RTC of its jurisdiction over the maritime claims of THI against NNC. The preferred maritime lien of THI can still be enforced upon the termination of the rehabilitation proceedings, or if such be unsuccessful, upon the dissolution of the corporation.

Limitation period

Actions based on written contracts have to be filed within 10 years of the 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*¹⁷ operator is not covered by the Carriage of Goods by Sea Act. The *arrastre* operator cannot invoke as a defence that the suit was instituted beyond the one-year limitation period.¹⁸

¹⁴ An Act expanding the jurisdiction of the metropolitan trial courts, municipal trial courts and municipal circuit trial courts, amending for the purpose Batas Pambansa, Blg 129, otherwise known as the 'Judiciary Reorganisation Act of 1980', Act No. 7691 (1994).

¹⁵ GR No. 163156, 10 December 2008.

¹⁶ GR No. 166845, 10 December 2008.

¹⁷ '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'. Merriam-Webster.com, www.merriam-webster.com/dictionary/arrastre.

¹⁸ *Insurance Company of North America v. Asian Terminals*, GR No. 180784, 15 February 2012.

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 may be granted in any of the following instances: (1) to prevent irreparable loss or injury; (2) to provide security for the performance of any obligation; (3) to produce or preserve any evidence; or (4) to compel any other appropriate act or omission.

A party to an international commercial arbitration may petition the regional trial court for the recognition and enforcement of the international commercial award in accordance with Rule 12 of the Special Rules of Court on Alternative Dispute Resolution.

A party to a foreign arbitration may likewise petition the regional trial court to recognise and enforce the foreign arbitral award, which shall be governed by the 1958 New York Convention.

A foreign corporation not licensed to do business in the Philippines may seek recognition and enforcement of the foreign arbitral award in accordance with the provisions of the Alternative Dispute Resolution Act of 2004.

IV SHIPPING CONTRACTS

i Shipbuilding

Recognising that shipping is a necessary infrastructure and that the shipping industry plays a vital role in the country's economic development, the Philippine Congress has passed a law¹⁹ granting certain incentives to domestic or foreign corporations wishing to engage in shipbuilding within the country. Among the incentives granted²⁰ is the tax-free importation of capital equipment to be used in the construction or repair of any vessel.

As of 2017, the Philippines was ranked as the fourth-largest shipbuilding nation in the world in terms of newbuild completion volume, following South Korea, China and Japan.²¹ This was mainly attributable to the presence of industry heavyweights such as Tsuneishi Heavy Industry of Japan, which owns and operates a shipyard in Balamban, Cebu, and Hanjin Heavy Industries of Korea, which owns and operates a shipyard in Subic Bay, Olongapo. However, with the Hanjin Yard recently facing bankruptcy and imminent closure due to debt, the future of Philippine shipbuilding is now uncertain.

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

19 An Act promoting the development of Philippine domestic shipping, shipbuilding, ship repair and ship breaking, ordaining reforms in government policies towards shipping in the Philippines and for other purposes [Domestic Shipping Development Act of 1994], Act No. 9295 (1994).

20 Ibid., Chapter V, Section 14.

21 Review of Maritime Transport 2018, United Nations Conference on Trade and Development, https://unctad.org/en/PublicationsLibrary/rmt2018_en.pdf.

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,²² while the Philippine COGSA applies to the carriage of goods by sea to and from Philippine ports in foreign trade.

The Philippines has not adopted the Hague-Visby Rules, the Hamburg Rules or the Rotterdam Rules.

The New Civil Code requires extraordinary diligence in the carriage of goods by common carriers,²³ while in the Philippine COGSA,²⁴ 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.²⁵

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,²⁶ 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. 10668²⁷ promulgated on 28 July 2014, foreign vessels are now allowed to transport and co-load foreign cargoes for domestic transshipment. The Carriage of Goods by Sea Act, and not the Civil Code, applies in the determination of the liability of the foreign vessel for the loss of, or damage to, the goods carried on board the vessel. Foreign vessels engaging in carriage conducted in accordance with Republic Act No. 10668 are neither considered common carriers with the duty to observe extraordinary diligence in the transportation of goods nor are they considered 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, meaning the carriage of cargo between the Philippine islands, the rules are stated in the Code of Commerce and the New Civil Code. For international carriage of goods, the applicable rules are set out in the Philippine COGSA.

For domestic carriage, notice of loss or damage to the goods must be provided by the cargo owner to the carrier within 24 hours of delivery of the goods. The 24-hour notice is a condition precedent, and provided such notice is given, the cargo owner has 10 years within which to sue for the loss 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

22 Civil Code, Article 1766.

23 Ibid., Article 1753.

24 COGSA, Section 3(1).

25 Code of Commerce, Article 362.

26 *Ouano v. Court of Appeals*, 211 SCRA 740 (1992).

27 An Act Allowing Foreign Vessels to Transport and Co-Load Foreign Cargoes for Domestic Transshipment.

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 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)*,²⁸ 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.

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.²⁹

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

28 GR No. 101503, 15 September 1993.

29 *Federal Phoenix Assurance Co. Ltd v. Fortune Sea Carriers, Inc*, GR No. 188118, 23 November 2015.

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.*³⁰ 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.

As an update, the Supreme Court's 2016 decision in *Designer Baskets Inc v. Air Sea Transport Inc and Asia Cargo Container Lines*³¹ 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. In collision cases, the shipowner is allowed to limit its liability for collision damage and any cargo claim that may arise. As far as cargo claims are concerned, the owner may exercise the right to abandon the ship and freight at risk to cargo interest in order to limit its liability.

The right to limit liability has been curtailed since the *Doña Paz* tragedy. Before 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*,³² 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.

30 GR No. 182208, 14 October 2015.

31 GR No. 184513, 9 March 2016.

32 GR No. 156978, 2 May 2006.

V REMEDIES

i Ship arrest

The procedure equivalent to a ship arrest in the Philippines is through an application for the issuance of a preliminary attachment under Rule 57 of the 1997 Rules of Civil Procedure. For the effective enforcement of the writ of preliminary attachment, the court sheriff should have, previously or simultaneously with the implementation of the writ of attachment, served a copy of the summons upon the person of the defendant in order for the court to acquire jurisdiction upon him or her.

The party applying for a writ of preliminary attachment must provide a bond in favour of the other party to answer for damages in the event of a wrongful attachment. The party against whom the attachment was issued may lodge a counter-security to obtain the release of the levied property.

The improper or irregular issuance of a writ of preliminary attachment does not automatically warrant the award of damages. Evidence must be submitted to prove the nature and extent of the injury suffered by reason of the wrongful attachment.

Under the Ship Mortgage Decree, the mortgagor may apply *ex parte* for an order for the arrest of the mortgaged vessel. The applicant must submit a sworn statement that a default in the mortgage has occurred and that the applicant files a bond executed to the adverse party in an amount to be fixed by the judge, not exceeding the applicant's claim, conditioned that the latter will pay all the costs that may be adjudged to the adverse party and all damages that he or she may sustain by reason of the arrest, if the court shall finally adjudge that the applicant was not entitled thereto.

ii Court orders for sale of a vessel

During the pendency of the action, the vessel subject to a writ of attachment may be sold at public auction and the proceeds deposited in court to await the judgment in the action upon proof that 'the property attached is perishable, or that the interests of all the parties to the action will be served by the sale thereof'.³³ In *Shuhei Yasuda v. Court of Appeals and Blue Cross Insurance Inc.*,³⁴ 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.

A court may order the sale of a mortgaged vessel in any suit *in rem* in admiralty for the enforcement of a maritime lien other than a preferred maritime lien.

After judgment, the property may be sold at public auction to satisfy the judgment.

VI REGULATION

i Safety

Safety means two things to the Philippines: safety regulations, which are applied to the domestic fleet, and the qualification and certification of Filipino seafarers who work on ships throughout the world's fleet. The safety regulations of both domestic shipping and certificates for seafarers overseas-bound are regulated by two government entities – MARINA and the Philippine Coast Guard (PCG).

33 The Ship Mortgage Decree of 1978, Presidential Decree No. 1521 (1978), Section 11.

34 300 SCRA 385 (2000).

In domestic shipping, MARINA is mandated to set the safety standards of all domestic vessels in accordance with government regulations and conventions,³⁵ 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 board³⁶ and, accordingly, to impose penalties and fines, and suspend or revoke certificates of public convenience or other licences.³⁷ 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.³⁸

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. 10635,³⁹ 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 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.⁴⁰

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.⁴¹

ii Port state control

The Philippines Coast Guard Law of 2009 vested the PCG with the authority, *inter alia*, to enforce regulations pertaining to maritime international convention, treaties, national laws, rules and regulations for the promotion of safety of life and property at sea within the maritime jurisdiction of the Philippines; to implement port state control; to conduct vessel inspections; and to detain ships that do not comply with safety standards.

35 Act No. 9295, Section 10(6). MARINA is also in charge of issuing, *inter alia*, certificates of public convenience for operation of all domestic vessels, special permits for international vessels operating in the Philippine territory and certificate of inspection. With MARINA's power to issue these permits or certificates also comes the power to revoke same.

36 Ibid., Section 10(8).

37 Ibid., Section 10(16).

38 *People v. Go*, G.R. No. 2018816, 10 December 2018.

39 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.

40 STCW Circular No. 2015-11 issued by MARINA on 22 July 2015.

41 An Act establishing the Philippines Coast Guard as an armed and uniformed service attaches to the Department of Transportation and Communications, thereby repealing Republic Act No. 5173, as amended, and for other purposes [Philippines Coast Guard Law of 2009], Act No. 9993, Section 3 (2010).

Memorandum Circular No. 01-00⁴² 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 in order to fly the Philippine flag or trade within Philippine waters.⁴³ 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 only 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 apply for and be granted a certificate of Philippine registration and a certificate of ownership by MARINA as well as a certificate of public convenience. Ships registered with MARINA may also be deleted from the Register by the owner, voluntarily or involuntarily, as in the case when MARINA, after due process, orders deletion of ships for having violated government rules and regulations, or in the case of dual-flagged vessels where approval of the charter or lease contract is revoked for cause.⁴⁴ Currently, the International Association of Classification Society members recognised by MARINA include the American Bureau of Shipping, Bureau Veritas, China Classification Society, Det Norske Veritas, Germanischer Lloyd, Hellenic Register of Shipping, International Register of Shipping, Korean Register of Shipping, Lloyd's Register Asia, Nippon Kaiji Kyokai and Registro Italiano Navale. There are also domestic classification societies, namely Filipino Vessels Classification System Association, Inc, Ocean Register of Shipping, Inc, Orient Register of Shipping, Inc, Philippine Classification Register, Inc, Philippine Register of Shipping, Inc and Shipping Classification Standards of the Philippines, Inc, which are authorised to classify domestic ships for domestic trade.

iv Environmental regulation

The Philippines is a signatory to three major environmental protection conventions relating to shipping:

- a* the CLC Convention;
- b* MARPOL (73/78) (Annexes I to V); and
- c* the 1992 Protocol to the Oil Pollution Fund Convention.

On 2 June 2007, Republic Act No. 9483, known as the Oil Compensation Act of 2007, was signed into law. This new legislation aims to give more teeth to the implementation of the provisions of the CLC Convention and the 1992 Protocol to the Oil Pollution Fund Convention. Under this law, an action for compensation because of 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

42 Port State Control, Philippine Coast Guard Memorandum Circular No.1, Series of 2000 (28 September 2000).

43 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).

44 *Ibid.*, Section VI.

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.⁴⁵

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.⁴⁶ The affected communities and individuals filed damage claims with the International Oil Pollution Compensation Fund (the IOPC Fund) and by October 2012, the IOPC Fund had released 987 million Philippine pesos in compensatory damages to 26,870 claimants.⁴⁷

In efforts to monitor and address environmental violations, the Province of Zambales adopted an ordinance in June 2015, approving the installation of a provincial coast watch surveillance and environment monitoring system for the purposes of keeping its waters safe, clean and secure. Apart from aiding in sea navigation, this sophisticated system also aims to monitor vessel exhaust emissions. This province, strategically situated at the entrance to Manila bay, will collect fees as charges for the use of this coastal watch system from ships approaching from the north of Manila.

Since its promulgation, the validity of the ordinance had been questioned by various sectors. Eventually, this was brought before the Department of Justice (DOJ), which, in turn, issued its Opinion No. 8, stating that the subject ordinance is invalid. It violates the 1987 Constitution, the Local Government Code, the Philippines Coast Guard Law, the laws providing for the creation and reorganisation of the Philippine Ports Authority (PPA), and the Executive Order establishing the National Coast Watch System. Among other reasons, it stated that the ordinance usurps the powers and functions already vested in the PCG, the PPA and National Coast Watch Council. Considering the opinion of the DOJ, the Maritime Industry Authority issued Advisory No. 2017-09⁴⁸ to notify the public of the invalidity of the ordinance.

Despite the ordinance being declared invalid, it is hoped that the Province of Zambales and others continue to bring about worthwhile efforts to protect the environment and waters around their areas.

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, this is not the case in the Philippines: it is all or nothing. If both vessels are to blame, then each vessel suffers its own loss, and both vessels are jointly and severally liable for the damage to cargo and passengers of both vessels. If one vessel is wholly to blame, then 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.

45 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>.

46 NCSB Factsheet, September 2006 published by the National Statistical Coordination Board.

47 'Oil Spill Victims Seek Compensation', *Manila Bulletin*, 15 August 2013, <https://ph.news.yahoo.com/oil-spill-victims-seek-compensation-215341344.html>.

48 Maritime Industry Authority policies, available at: <http://marina.gov.ph/policies/FSAA/MA%202017-09.pdf>.

The Philippine Salvage Law is set out in Act No. 2616.⁴⁹ 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 like that in the United Kingdom, so most commercial salvors use the LOF salvage agreement or, for a less complicated service, the salvage is negotiated for a fixed fee. The Philippines is not a signatory to the 1989 Salvage Convention.

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. 890,⁵⁰ a salvage operation performed without a permit is a criminal offence.

vi Passengers' rights

The Philippine government recently passed the rules and regulations concerning the Air Passengers' Bill of Rights,⁵¹ but it has yet to pass the corresponding rules for sea passengers. Notwithstanding the absence of a comprehensive Sea Passengers' Bill of Rights, MARINA rules require all ships engaged in domestic trade to secure adequate P&I insurance to cover the shipowners' or operators' liability for marine accidents, including liabilities for wreck removal, pollution, loss of life or injury to passengers, third parties or seafarers, collisions, damage to fixed or floating structures, and loss or damage to cargo.⁵²

vii Seafarers' rights

Seafarers' rights is an important topic when discussing Philippine shipping law because of the sheer number of Filipinos employed worldwide, who, to date, account for 30 per cent of the world's seafarers.⁵³ The Philippine government has attempted to export Philippine law to protect its seafarers by imposing a standard seafarers' contract called the Philippine Overseas Employment Administration Standard Employment Contract (POEA SEC).

Included in the POEA SEC is a feature to ensure seafarers' rights to procedural due process. Based on this right, a seafarer who commits a wrongful act must be (1) notified of 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 Code⁵⁴ 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 grounds⁵⁵ 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

49 Enacted 4 February 1916.

50 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).

51 DOTC-DTI Joint Administrative Order No. 1, series of 2012.

52 MARINA Circular No. 2009-01, as amended (4 February 2009).

53 See footnote 3.

54 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).

55 Ibid., Article 285.

authorised grounds⁵⁶ 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,⁵⁷ both monetary and non-monetary, the most important and controversial being the compensation and benefits for injury, illness and death.

Jurisdiction for claims filed by seafarers under the Labour Code and the POEA SEC 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).^{58, 59} Prescription of actions for claims based on the POEA SEC is three years from the date the cause of action accrues.⁶⁰

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.⁶¹

The Philippine Senate ratified the Maritime Labour Convention 2006 on 13 August 2012.

To further protect seafarers, and their employers, Republic Act No. 10706⁶² was enacted into law on 26 November 2015. This law 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. Subsequently, the Department of Labour and Employment issued the Implementing Rules and Regulations for the above-mentioned law.⁶³

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 – this is one of the best-kept secrets in the shipping industry. Apart from the core of potential port captains, port engineers and designated persons ashore who are available now from the officers currently sailing, the Philippines has improved the infrastructure for conducting business. In the next few years, the Philippines will be able to see whether the shipping world will take advantage of its large pool of talent.

56 Ibid., Articles 282 to 284.

57 Includes seafarers' wages, leave pay, shore leave, benefits for illness, injury and death.

58 The NCMB was created under Executive Order No. 126, issued on 31 January 1987.

59 *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.

60 The POEA SEC, Section 30.

61 Rules and Regulations Implementing the Migrant Workers and Overseas Filipinos Act of 1995, Republic Act 10022 (2010), Rule XVI.

62 An Act Protecting Seafarers Against Ambulance Chasing and Imposition of Excessive Fees, and Providing Penalties Therefor [Seafarers Protection Act], approved on 26 November 2015.

63 Department Order No. 153-16 Implementing Rules and Regulations of Republic Act No. 10706, otherwise known as the Seafarers Protection Act, approved on 19 April 2016.

The Philippines has also relaxed its cabotage restrictions to allow foreign ships to carry goods between domestic ports. In 2015, a new 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:⁶⁴

- a* a foreign vessel, arriving from a foreign port, shall be allowed to carry a 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 a 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 a foreign cargo intended for export; and
- d* a foreign vessel, departing from a Philippine port of origin, shall be allowed to carry a 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.

With the passage of this new 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.

64 Section 4, Republic Act No. 10668.

PORTUGAL

João Afonso Fialho, José Miguel Oliveira and Miguel Soares Branco¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

In recent years, the Portuguese government has been working actively on several strategic policies primarily aimed at strengthening traditional ocean activities (e.g., fishing and aquaculture, maritime transport, ports and the naval industry) and empowering emerging economic activities related to the use of the oceans (such as blue biotechnology, ocean renewable energies and deep-sea strategic resources). Most notably, the government approved an ambitious 10-year strategic plan to increase the competitiveness of its ports and shipping sector. The plan, entitled ‘Horizonte 2016–2026’, is expected to create around 12,000 new workstations by 2030 and lead to a total load growth of up to 78 million tonnes (an increase of 88 per cent), all backed by an estimated overall investment of between €2.1 billion and €2.5 billion. The government’s goal is to turn Portugal into a logistic hub of excellence in Europe. In 2017, the Portuguese ports registered record cargo volumes of 95.9 million tonnes and a record high of 3 million TEUs in container handling.

To support the ongoing development of the country’s shipping and maritime industries, the government has recently introduced (1) a tonnage tax scheme – to bring Portugal into line with the fiscal regimes set out in other European countries; (2) a special tax and contribution regime for seafarers; and (3) a simplified registration procedure for ships and vessels. In addition, the government expressed its strong commitment to (1) develop national ports; (2) establish a ‘world-class’ digital port management system; (3) set up an electronic statutory certification on board; and (4) boost sustainable green shipping initiatives. The latter is of utmost importance considering the EU’s call for a global approach to reduce greenhouse gas emission from international shipping (as of 1 January 2020, EU Member States must ensure that ships in EU waters use fuels with a sulphur content of no more than 0.5 per cent).

Finally, Portugal is currently awaiting the approval of its submission for the Extension of the Continental Shelf to the United Nations Commission on the Limits of the Continental Shelf. If this submission is successful, Portugal will have one of the largest economic exclusive zones, with a total maritime area of 3,877,408 square kilometres – an area larger than India and equivalent to the continental European Union (excluding the United Kingdom and Sweden) – with all it entails for the country’s shipping industry.

¹ João Afonso Fialho is a partner, José Miguel Oliveira is a managing associate and Miguel Soares Branco is a senior associate at Vieira de Almeida.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

As mentioned above, Portugal has recently adopted legislative measures to attract investment and improve competitiveness in the sector. The long-awaited tonnage tax regime (approved by Decree-Law 92/2018 of 13 November 2018) establishes a special tax based on ship tonnage. It further grants a 50 per cent and 25 per cent tax reduction for the first and second business year respectively, and a reduction of between 10 and 20 per cent for vessels with a net register tonnage greater than 50,000 (the latter approved by Order 72-B/2019 of 4 March 2019). This regime applies to companies headquartered and with effective management in Portugal that are in the business of transporting goods or passengers or involved in related maritime activities. To be eligible, at least 50 per cent of the ship's crew must be Portuguese, from an EU or EEA Member State, or from other Portuguese-speaking countries. Lastly, this tax regime offers an income tax exemption for seafarers (provided that they work on board for a minimum period of 90 days per tax year) and reduced social contribution rates.

In addition, there are rumours that a number of legislative initiatives are being prepared, including a new Merchant Navy Law and further green shipping incentives. Overall, Portugal is taking advantage of the fact that the country is party to the most relevant international treaties and conventions to adopt sophisticated internal laws capable of addressing the industry's concerns and boosting the economy.

III FORUM AND JURISDICTION

i Courts

Maritime courts were created in 1986 with the enactment of Law No. 35/86 of 4 September 1986. The original proposal was for five. However, there is currently only one, the Maritime Court of Lisbon, with exclusive jurisdiction to deal in the first instance with maritime disputes materially connected with the Portuguese mainland. Maritime disputes occurring in Madeira and the Azores are resolved at the first instance by local civil courts. Appeals are heard by the Court of Appeal and the Supreme Court as applicable.

Portuguese courts will generally find in favour of their own jurisdiction to rule on claims where parties in dispute and the claim itself have a close connection or link to Portugal.

Any proceedings brought before a Portuguese court in disregard of a foreign jurisdiction or arbitration clause may be challenged. It is up to the defendant to seek formal dismissal of the proceedings based on the breach of the arbitration or foreign jurisdiction clause and ensuing lack of jurisdiction of the Portuguese courts. The court will then assess whether it has jurisdiction (if it does, the court will hear the parties on the substantive proceedings) or rule that it has no jurisdiction and dismiss the claim.

ii Arbitration and ADR

The primary domestic source of law for arbitration in Portugal is Law No. 63/2011 of 14 December 2011 (the Voluntary Arbitration Law (VAL)). The VAL is based on the UNCITRAL Model Law, albeit with differences and specificities tailored to the Portuguese legal system and the arbitral culture and practice.

The VAL is applicable to all arbitrations seated in Portugal although it contains some specific rules applicable to international arbitrations to make Portugal an attractive seat. Under the VAL, when international trade interests are at stake, arbitrations are considered international.

The VAL requires arbitration agreements to be made in writing, otherwise they will be deemed null and void. This requirement is met if the agreement is recorded in a written document signed by the parties, in an exchange of communications providing a written record of the agreement, including electronic means of communication, and any other type of support that offers the same guarantees of reliability, comprehensiveness and preservation. References made in a contract to a document containing an arbitration clause constitute an arbitration agreement, provided that they are made in writing and that the reference is such that it makes that clause part of the contract.

The VAL distinguishes between an arbitration agreement concerning an existing dispute, even if already pending before a state court (submission agreement), and an arbitration agreement arising from a given legal contractual or non-contractual relationship (arbitration clause). A submission agreement must specify the subject matter of the dispute and an arbitration clause must specify the legal relationship underlying the dispute. An arbitration agreement, in the form of an arbitration clause, can cover all future disputes arising out of or in connection with such contract.

In international arbitrations seated in Portugal, the validity of the arbitration agreement and the possibility of referring the dispute to arbitration are determined by reference to the requirements set out either by the law chosen by the parties to govern the arbitration agreement, by the law applicable to the subject matter of the dispute or by Portuguese law, according to which arbitration is allowed.

Any dispute involving economic interests may be referred to arbitration, save for those disputes that are exclusively submitted by a special law to the state courts (e.g., criminal and insolvency disputes) or to compulsory arbitration (e.g., certain labour disputes). In addition, disputes that do not involve economic interests may also be subject to arbitration provided that the parties are entitled to settle the disputed right.

Law No. 29/2013 of 19 April 2013 (the Mediation Law), established for the first time the general rules applicable to mediation carried out in Portugal, and the legal framework for civil and commercial mediation. Under the Mediation Law, disputes falling within the scope of civil or commercial matters and relating to interests of a patrimonial nature can always be subject to mediation. 'Non-patrimonial' disputes may nevertheless be subject to mediation if the parties are entitled to settle a disputed right. In any case, a mediation clause should be executed in writing. Agreements reached through mediation conducted by a mediator officially registered by the Ministry of Justice may be granted immediate enforceability without the need for judicial confirmation provided that certain requirements are met. It is still not common practice to resolve shipping and maritime disputes through mediation.

iii Enforcement of foreign judgments and arbitral awards

Enforcement proceedings of both foreign judgments and foreign arbitral awards are subject to previous *exequatur* proceedings in Portugal, the first under Brussels I and the second under the New York Convention, to which Portugal is a party. Although both instruments provide for different procedural steps in order to obtain *exequatur*, in practical terms there will be a great difference in choosing one over the other. The same goes for enforcement, although in addition to the grounds on which the enforcement of a judgment can be challenged, the enforcement of arbitral awards is also subject to the grounds provided for in Article V of the New York Convention and the VAL.

IV SHIPPING CONTRACTS

i Shipbuilding

Shipbuilding contracts are mainly governed by Decree Law 201/98 of 10 July 1998, and secondarily by the provisions of the Civil Code applicable to works contracts. It is mandatory that they are made in writing and parties are free to agree on its contents (the Norwegian Standard Form Shipbuilding Contract 2000 is widely accepted).

Unless otherwise agreed, title remains with the shipbuilder until delivery and payment in full of the agreed price.

The shipbuilder is statutorily responsible for repairing any defects reported by the owner within one year of delivery.

ii Contracts of carriage

Portugal has ratified the Hague Rules, which have been given the force of law in Portugal by means of Decree Law 37,748 of 1 February 1950. It is mandatory for the Hague Rules to be applied if the bill of lading was issued in the territory of a contracting state. Although not having signed or ratified the Hague-Visby Rules, some of the provisions (notably those in regard to package and unit calculation) were transposed into internal law by means of Decree Law 352/86 of 21 October 1986 (as amended). Decree Law 352/86 applies as a subsidiary to the Hague Rules, also covering a number of issues that fall outside the scope of those Rules, as is the case regarding pre-loading and post-discharge responsibilities and liabilities, calculation of package and units limitation. Decree Law 352/86 has also transposed into domestic law the limitation period of two years arising from the Hamburg Rules.

iii Cargo claims

As a general principle, any party to a contract of carriage that holds an interest over the cargo and can demonstrate that it has suffered loss or damage arising from the carrier's actions or omissions is entitled to sue for loss or damages. Taking the above into consideration, the rights to sue under a contract of carriage rest with (1) the shipper and (2) the rightful holder of the bill of lading. In this respect, when in the presence of a straight bill of lading, the right to bring a claim remains with the named consignee; with an order bill of lading, only the latest endorsee is eligible to sue; and with a bill of lading to bearer, then it is up to the rightful holder at a given moment to sue.

In addition to the above, rights under a contract of carriage may also be validly transferred to third parties either by way of assignment of contractual position or subrogation in rights (which is typically the case when insurers indemnify cargo interests and then seek reimbursement from the carrier), as long as the relevant rules provided in the Civil Code are met.

iv Limitation of liability

Portugal is a party to both the 1924 International Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Owners of Seagoing Vessels and the 1957 International Convention relating to the Limitation of the Liability of Owners of Seagoing Vessels and its 1979 Protocol (the 1957 Convention). In addition to the above conventions, it is also important to consider the limitations arising from the Hague Rules and those provided in Decree Law 352/86 of 21 October 1986 (as amended), which end up transposing into

domestic law some of the provisions contained in the Hague-Visby Rules, notably those in regard to package and unit calculation, and Decree Law 202/98 of 10 July 1998 (on vessels limitation of liability).

Taking into consideration the reservations raised by Portugal at the time of its accession to the 1957 Convention, the following claims may be limited, unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner:

- a* loss of life of, or personal injury to, any person being carried in the vessel, and loss of, or damage to, any property on board the vessel; and
- b* loss of life of, or personal injury to, any other person, whether on land or on water, loss of or damage to any other property or infringement of any rights caused by the act, neglect or default of any person on board the vessel for whose act, neglect or default the owner is responsible or any person not on board the vessel for whose act, neglect or default the owner is responsible – provided, however, that with regard to the act, neglect or default of this last class of person the owner shall only be entitled to limit its liability when the act, neglect or default is one that occurs in the navigation or the management of the vessel or in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers.

The owner and the insurer for the owner, the ship merchant, the master, crew members and other servants can request for limitation of their liability in the cases stated above. Liability can be limited under the 1957 Convention, as follows:

- a* if the occurrence has given rise only to property claims of an aggregate amount of 66.67 units of account for each tonne of the vessel's tonnage;
- b* if the occurrence has given rise only to personal claims of an aggregate amount of 206.67 units of account for each tonne of the vessel's tonnage; and
- c* if the occurrence has given rise to both personal claims and property claims of an aggregate amount of 206.67 units of account for each tonne of the vessel's tonnage, of which a first portion amounting to 140 units of account for each tonne of the vessel's tonnage shall be exclusively appropriated to the payment of personal claims and of which a second portion amounting to 66.67 units of account for each tonne of the vessel's tonnage shall be appropriated to the payment of property claims; provided, however, that in cases where the first portion is insufficient to pay the personal claims in full, the unpaid balance of those claims shall rank rateably with the property claims for payment against the second portion of the fund.

The units of account mentioned above re special drawing rights, as defined by the International Monetary Fund. The amounts mentioned in points (a) to (c) above shall be converted into euros on the basis of the value of the euro on the date on which the owner has constituted the limitation fund, made the payment, or given a guarantee that, under the relevant law, is equivalent to that payment.

The 1957 Convention was incorporated into domestic law by virtue of Decree Law 49028 of 26 May 1969. Reference must also be made to Article 12 of Decree Law 202/98, which provides that, in addition to the limitation of liability provisions set forth in any international conventions to which Portugal is a party, and where the claims at stake are other than those contained in said conventions, the owner can limit its liability to the vessel and to the freight at risk by abandoning the vessel to its creditors and in order to establish a limitation of liability fund.

V REMEDIES

i Ship arrest

Portugal has ratified the Brussels Convention, under which any person alleging to have a maritime claim (*fumus bonis iuris*) is entitled to seek the arrest of a ship. A 'maritime claim' is one that arises out of one or more of the situations named under Article 1.1 of the Brussels Convention.

Outside the scope of the Brussels Convention, that is to say for the purposes of obtaining security for an unlisted maritime claim (e.g., arrest for a ship sale claim, unpaid insurance premiums, P&I dues) or to seek the arrest of a vessel sailing under the flag of a non-contracting state, a claimant must make use of the provisions of the Civil Procedure Code. In this case, and aside from the jurisdiction issue that needs to be properly assessed, in addition to providing evidence of the likelihood of its right or credit (*fumus bonis iuris*), the claimant shall also produce evidence of the potential risk that the debtor or arrestor may remove or conceal the ship (security for the claim) or that the ship may depreciate in such a way that at the time the final judgment is handed down in the main proceedings, the ship is no longer available or has substantially decreased in value (*periculum in mora*).

With the arrest in place, the claimant is required to file the initial claim for the main proceedings of which the injunction will form an integral part within 30 days of the arrest order. During the proceedings, the parties are free to settle by agreement and withdraw the claim. If the main claim should be filed with a foreign court, then the judge dealing with the arrest application must set out the period within which the claimant must commence proceedings on the merits in the appropriate jurisdiction. The defendant is entitled to post a security before the relevant court in the amount of the claim brought by the claimant and seek the release of the vessel pending foreclosure and auction.

ii Court orders for sale of a vessel

The arrestor or any interested party can seek the judicial sale of an arrested vessel. In principle, the sale cannot take place during the arrest proceedings, being therefore dependent on the outcome of the main claim and requiring the bringing of new enforcement proceedings. In a nutshell, with the enforcement application lodged, the court will notify the debtor (owner or charterer and other interested parties) to settle the claim or to oppose the sale. If the debtor fails to pay or if no opposition is lodged in time, the court will order the sale.

The above notwithstanding, in very limited situations (e.g., when in view of the lack of maintenance, the value of the arrested vessel is depreciating substantially) the Maritime Court has authorised the anticipated sale of vessels within the arrest proceedings. To that extent, the applicant must request in writing authorisation for the anticipated sale of the vessel, ground such request and propose a minimum amount for the sale. In view of the information and evidence produced, the judge will authorise the sale if the arresting party reaches an agreement with respect thereof with the claimant, or the judge is convinced by the facts presented.

The judge will determine how the sale will take place (public auction, private negotiation, sealed bids) and will appoint an auctioneer who will be responsible for the relevant proceedings and arrangements (such as organising the tender and visits to the vessel, collecting the bids, getting the proceeds of the sale, liaising with court). The vessel is typically sold 'as is and where is' and free of any charges or encumbrances. In addition to

reimbursement of the relevant costs and expenses incurred, the auctioneer will be entitled to remuneration to be determined by the court, which typically corresponds to 5 per cent of the sale price.

VI REGULATION

i Safety

Portugal has ratified SOLAS and its 1978 and 1988 Protocols. In light of Regulation (EC) No. 725/2004 of the European Parliament and of the Council of 31 March 2004 on enhancing ship and port facility security, Portugal has also adopted Part A (mandatory for all ships flying the Portuguese flag) and Part B of the International Ship and Port Facility Security Code (ISPS Code). The COLREGs, MARPOL (73/78), the CLC Convention and other international conventions on pollution and environment, as detailed below, are also in force, with all that implies in terms of safety.

The Portuguese maritime administration (DGRM)² is responsible for supervising, controlling and managing general safety and for implementing the obligations undertaken by Portugal in these respects.

In addition, Portugal has ratified the most relevant international conventions and treaties on safety and security adopted by the International Maritime Organization and the International Labour Organization.

The European Maritime Safety Agency (EMSA) is headquartered in Lisbon. It provides technical assistance and support to the European Commission and Member States in developing and implementing EU legislation on maritime safety, ship pollution and maritime security.

ii Port state control

The DGRM is the entity responsible for exercising port state control over all foreign vessels calling in and sailing within Portuguese waters and, consequently, for ensuring that they meet and comply with international safety, security and environmental standards, and that their crews have adequate living and proper working conditions. When deficiencies are uncovered during inspections, the DGRM holds powers to assess fines and detain the vessel until the reported deficiencies are duly rectified.

Portugal is a member state of the Paris MOU.

iii Registration and classification

All types of merchant vessels can be found under the Portuguese flag: product and chemical carriers, bulk carriers, container vessels, gas tankers, cruise ships, crude oil, and so on. To fly under the Portuguese flag, a merchant vessel must be registered either with the Ships Conventional Registry or the International Shipping Registry of Madeira (MAR). In a nutshell, the Conventional Registry implies registration with both the Harbour Master's Office and the Commercial Registry, while registration with the MAR implies registration with its Technical Commission and the Commercial Registry. Vessels under construction are eligible for registration. Dual registration and flying in is also admissible in both the Ships Conventional Registry and the MAR.

2 Direcção Geral de Recursos Naturais, Segurança e Serviços Marítimos.

The MAR offers a very competitive tax regime, applicable to both vessels and shipping companies, full access to EU cabotage and full application of the relevant international maritime conventions. In addition, when compared with the Ships Convention Registry, the MAR has fewer requirements in terms of the nationality of crew members and offers a very flexible and competitive mortgage system (e.g., the mortgagor and mortgagee can, by means of a written agreement, freely choose the law that governs the mortgage).

In terms of classification, a number of classification societies are approved, such as, to name a few, RINAVE/Bureau Veritas, DNV GL, Lloyd's Register, the American Bureau of Shipping and Class NK.

iv Environmental regulation

The following conventions and relevant protocols regarding pollution and the environment are applicable:

- a* MARPOL (73/78), its optional Annexes III, IV, V and the 1997 Protocol on Annex VI;
- b* the 1992 Protocol to Amend the 1971 International Fund for Compensation for Oil Pollution Damage;
- c* the CLC Convention 1992;
- d* the 2003 Protocol to Amend the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage;
- e* the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC) and its 2000 Protocol (OPRC-HNS Protocol); and
- f* the Bunker Convention.

v Collisions, salvage and wrecks

In regard to collisions, the following international conventions were ratified by Portugal:

- a* the Collision Convention 1910;
- b* the Collision Convention 1952;
- c* the Criminal Collision Convention 1952; and
- d* the COLREGs.

Under the Collision Convention 1952, a claim for collision can be brought before a Portuguese court in any of the following situations: (1) Portugal is the only country where the defendant has his or her habitual residence or place of business; (2) Portugal is the country where arrest of the defendant's vessel has been effected, or of any vessel belonging to the defendant that can be lawfully arrested, or where arrest could have been effected and bail or other security has been furnished; or (3) collision occurred within the limits of a Portuguese port or within its inland waters. When there is a collision between a vessel sailing under the Portuguese flag and another vessel sailing under the flag of a non-contracting state to any of the above conventions and regulations, one must resort to the rules set forth in the Code of Civil Procedure, which provide that the claimant must commence an action before the court of the place where (1) the collision occurred (provided it was in Portuguese territorial waters), (2) the defendant is domiciled, (3) the vessel took refuge, or (4) the vessel first called after the collision.

Salvage is governed by the 1910 Salvage Convention. Note, however, that although Portugal did not ratify the 1989 Salvage Convention, Decree Law No. 203/98 of 10 July 1998 transcribes most of its provisions into domestic law.

Finally, with regard to wrecks, Portugal is not a signatory of the Nairobi WRC 2007. The removal of wrecks must therefore be dealt with pursuant to Decree Law No. 64/2005 of 15 March 2005, which, among other things, lists the entities that hold powers to order the removal of the wreck and the obligations to the owners in respect thereof.

vi Passengers' rights

Portugal has ratified the 2002 Protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, as amended by its 2002 Protocol. The limitation regime set forth therein on passenger and luggage claims is therefore applicable. Also of relevance is 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.

vii Seafarers' rights

Portugal has ratified the STCW Convention, which prescribes the minimum standards relating to training, certification and watchkeeping for seafarers, which countries are obliged to meet or exceed. By means of Decree Law No. 280/2001 of 23 October 2001 (as amended by Decree Law No. 206/2005 of 28 November 2005 and Decree Law No. 226/2007 of 31 May 2007), Portugal has also approved domestic rules governing the profession of seafarer, including those related to training and certification. Notably, the benefits granted to seafarers under the tonnage tax regime maintain the seafarer's full protection in the event of, *inter alia*, parenthood, sickness, disability and unemployment. With the approval of Decree-Law No. 34/2015 of 4 March 2015, Directive 2012/35/EU, of the European Parliament and of the Council of 21 November 2012, was transposed into domestic law, and the Manila Amendments to the STCW Convention were duly incorporated at a national level.

On 12 May 2016, Portugal ratified the Maritime Labour Convention 2006 (MLC), having become the 78th member state of the International Labour Organization that has committed to the decent work standards of the MLC. As the fourth pillar of the international maritime legal regime, and being complementary to key conventions of the International Maritime Organization, the MLC establishes and protects decent working and living conditions for seafarers. The MLC entered into force in Portugal on 12 May 2017.

VII OUTLOOK

From the legislative initiatives in place and strategic goals established by the Portuguese government for the sector, one can expect the Portuguese shipping industry to have a considerable boom in the coming years, namely with respect to liquefied natural gas and specialised high-value vessels. Portugal is eyeing international shipping trade and is committed to expanding its infrastructures, with a focus on efficiency, sustainability and innovation. To boost efficiency and simplify procedures, Portugal has created a central and single database (the National Maritime and Ship System (SNEM)) for registration and certifications of vessels and seafarers. Overall, SNEM aggregates information on maritime activity and shows the country's willingness to improve business in the sector. Lastly, the strategic plan envisaged and approved by the government for ports and the shipping industry goes hand in hand with the country's drive for 'green energy'. Undeniably, Portugal is committed to becoming one of the major players within the Blue Economy, with all that implies for the sector.

RUSSIA

*Igor Nikolaev*¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The register of Russian seaports lists 67 seaports, which are on 12 seas, three oceans and the Caspian Sea. They are distributed around five sea basins that are divided by territory: the Black Sea basin, the Baltic basin, the Caspian basin, the Pacific basin and the Northern (Arctic) basin. Some of these seaports have a particularly important role in seaborne exports and imports. The basin under the most development is the Northern (Arctic) basin.

All Russian ports have been developed significantly during the past 10 years or so and a lot of different types of cargo now pass through them. The cargo-handling capacity of seaports of Russia increased by 3.8 per cent in 2018 as compared with 2017 to 816.5 million tonnes. This was largely as a result of the politics of the Russian government focused on the development and construction of new infrastructure in seaports of in the Arctic basin.

Russia is developing the northern seaway (in the Northern basin) as the shortest route between Europe and Asia. The volume of cargo turnover through ports of the Northern Sea Route was 92.7 million tonnes in 2018 – an increase of 26.4 per cent from 2017.²

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Russia is a signatory to a number of international conventions and it has some influence on legal disputes related to the shipping industry. Generally, Russian courts are governed by national legislation that is the same across the entire territory. The principal rules are set out in the Russian Merchant Shipping Code of 1999, but if any foreign company is involved in a dispute or a court proceeding, then international conventions can be applied and will prevail over domestic law and regulations.

The customs regulations also influence the shipping industry in Russia. They were slightly changed when the Customs Code of the Customs Union came into force in July 2010 and replaced the Russian Customs Code.

The Federal Law on Seaports in the Russian Federation of 2007 regulates the structure, mechanisms and rules of operation of all seaports in Russia.

1 Igor Nikolaev is the founder of IN Law Office.

2 Statistical information from the official site of the Russian Ministry of Transport.

III FORUM AND JURISDICTION

i Courts

The Russian court system does not have any specific courts for shipping cases. Any disputes related to the shipping industry may be heard by one of the following forums:

- a* the Constitutional Court, which deals only with constitutional issues;
- b* the courts of general jurisdiction, which hear criminal, administrative and civil cases;³ and
- c* the state commercial courts, which now operate at four levels: regional commercial courts, regional appeal commercial courts, federal commercial circuit courts and the Supreme Court of the Russian Federation.⁴

Russian law governs all disputes in Russian courts

In February 2014, a law was passed to merge the Supreme Court of the Russian Federation and the Supreme Commercial Court of the Russian Federation. The new Supreme Court of the Russian Federation was duly established and since 6 August 2014 has been the apex court in Russia.

ii Arbitration and ADR

Arbitral tribunals are a popular forum for foreign companies because the proceedings in these courts are relatively quick, the court fees are acceptable and they are independent of the state.

There are two main, well-known forums in Russia that are generally used by foreign companies: the International Commercial Arbitration Court in Moscow, which deals with general commercial disputes, and the Maritime Arbitration Commission in Moscow, which deals mostly with maritime disputes. Both were established at the Chamber of Commerce and Industry of the Russian Federation in Moscow in the early 1930s.

The activity and establishment of international arbitral tribunals in Russia is governed by the Law on International Commercial Arbitration of 7 July 1993. Further, international arbitration is governed by a number of international conventions that relate to arbitration and the enforcement of foreign arbitral awards. Russia is a party to the European Convention on International Commercial Arbitration of 1961 and the New York Convention. Russia has bilateral treaties with some other countries that include provisions relevant to arbitration and the enforcement of arbitral awards (such as the Treaty on Trade and Navigation with Austria of 17 October 1955).

iii Enforcement of foreign judgments and arbitral awards

In practice, foreign companies usually prefer to have disputes with Russian counterparts in their own jurisdictions, or jurisdictions other than Russia. It is nevertheless important to be

³ Before 1 September 2002, the courts of general jurisdiction were dealing with commercial disputes when at least one party to the dispute was a private individual (whether Russian or foreign). The courts of general jurisdiction operate at three levels: local courts, regional courts and the Supreme Court of the Russian Federation at the moment. As of 1 October 2019 the courts of general jurisdiction will operate at four levels: regional courts of general jurisdiction, appeal courts of general jurisdiction, federal courts of general jurisdiction and the Supreme Court of the Russian Federation.

⁴ These courts deal with all commercial disputes between businesses (even when a private individual is a party in the dispute). The jurisdiction of the state commercial courts covers foreign parties.

familiar with the enforcement procedure applicable in Russia. The decisions of any arbitral tribunal in any country in the world presume that the losing party will pay voluntarily and if a Russian company lost a dispute and refused to pay, then the foreign claimant would face the problem of obtaining enforcement in Russia. Before 1 September 2002, this procedure was carried out in the courts of general jurisdiction and was governed by the Decree of the Presidium of the Supreme Soviet on Recognition and Enforcement in the USSR of Decisions of Foreign Courts and Arbitral Tribunals of 21 June 1988 and by the Law on International Commercial Arbitration of 7 July 1993.

In accordance with the Arbitration Procedure Code of the Russian Federation of 14 July 2002, the procedure for enforcement of international arbitral awards and decisions of arbitral tribunals with a location in Russia is through the state commercial courts. Presumably, the recognition and enforcement of awards by foreign courts and foreign arbitration awards will still take place through the courts of general jurisdiction (there is currently no official interpretation on this matter, but the legal procedure is roughly the same).

A petition for the enforcement of arbitral awards must be signed by the claimant or its representative and should be submitted in written form to the regional commercial court at the place of the debtor's business or the location of its property (if the place of the business is unknown). The judge of the regional commercial court should make a decision within a month of the date the petition was submitted. The judge should notify parties of the date and time of the hearing, but the matter will be judged regardless of whether the parties attend.

The list of grounds on which enforcement can be denied is set out in the New Arbitration Code, which corresponds to the New York Convention and the European Convention on International Commercial Arbitration of 1961. The regional commercial court can deny the petition if the defendant proves one of the following:

- a* the arbitration clause (agreement) is invalid on the basis provided for by Russian federal law;
- b* the defendant had not been properly notified about the arbitration or appointment of an arbitrator;
- c* the award was made regarding a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the arbitration;
- d* the composition of the arbitral tribunal or arbitral procedure was not in accordance with the agreement of the parties or Russian federal law; or
- e* the award has not entered into force or was suspended by the commercial court or another Russian or foreign court.

The regional commercial court will reject a petition on the enforcement of an award if it finds that the subject of the dispute is not capable of settlement by arbitration under Russian federal law or the award is in conflict with public policy. The reasons for rejecting the enforcement of awards are very similar to those for setting aside arbitral awards.

The decision of the regional commercial court can be appealed to the federal commercial circuit court by the claimant or the defendant party participating in the arbitral tribunal within one month of the date of the decision.

The writ of execution is made out by the regional commercial court in accordance with its decision. Normally, the decision of the regional commercial court becomes effective within one month of the date the decision was made or the date of the decision of the federal

commercial circuit court. The writ of execution is effective for three years. The next step is to file the writ of execution with a court bailiff at the place of business of the debtor (or its property) and he or she will carry out an enforcement procedure.

IV SHIPPING CONTRACTS

i Shipbuilding

After the collapse of the Soviet Union, the shipbuilding industry declined and has been operating at a very low level until recently. However, steps have been taken to rejuvenate the industry and a programme for continuing development through to 2030 has been adopted by the Russian government. There are about 150 ships under construction in Russia and the government expects them to operate under the Russian flag.

Russian legislation has no particular regulations regarding shipbuilding. All shipbuilding contracts are constructed in accordance with general rules of the Russian Civil Code. The title on a vessel under construction should be registered from the date of keel laying. The harbour master of the nearest port to the shipyard keeps a register of the vessels that are under construction. The construction should be done under the supervision of the approved classification society, which is the Russian Maritime Register of Shipping.

ii Contracts of carriage

The Merchant Shipping Code regulates the carriage of goods by sea. Chapter VIII of the Code regulates all aspects of maritime carriage and it is stipulated therein that any contract of carriage must be in written form. The evidence that the contract of carriage has been concluded may be proved by a bill of lading. Russia is a signatory to the Hague-Visby Rules, one of the few international conventions that have been signed by Russia in the sphere of the carriage of goods by sea. However, many rules from the various international conventions that have not been accepted by Russia are nevertheless reflected in the Merchant Shipping Code of 1999, which states that any transshipment of goods in cabotage can be done only by Russian-flagged vessels. The maritime carrier has rights to exercise a lien over the cargo until it has discharged all freight and received payment for cargo expenses.

iii Cargo claims

There are various situations that can cause problems regarding cargo delivered into Russia. These can be organised into two main types of problem; the first relates to problems created by the Russian authorities, and the second concerns problems that arise all around the world between carriers, shippers, receivers and shipowners.

The first type of problem is characterised by the peculiarities of the quickly changing requirements of Russian legislation. As a rule, the most frequent cargo problems occur in connection with customs and the Federal Service for Veterinary and Phytosanitary Surveillance (SVPS). These types of problems can occur in any country, but in Russia they excite interest from many third parties who are keen to exploit a situation and to earn money from it – for example, when a cargo is partially damaged by seawater, yet the entire cargo is found by the SVPS to be completely unfit for use as a food.

As regards the second type of problem, Chapter VIII of the Russian Merchant Shipping Code of 1999 regulates cargo claims. The carrier can be liable for loss, damage of the cargo or for the later delivery of it from the moment of the acceptance of the goods until the cargo is

delivered to the receivers. There is a one-year time bar for cargo claims in Russia. Situations occasionally arise where cargo damages a vessel or a shore crane damages a vessel by falling on the vessel. In such circumstances, the time bar is usually three years.

iv Limitation of liability

Chapter XXI of the Merchant Shipping Code is based on the LLMC Convention 1976 but does not repeat it and regulates the limitation of liability of shipowners and salvors or persons or companies for whose actions shipowners and salvors are responsible. The insurers can also apply to limit their liability in the same way as insured shipowners and salvors.

Limitation of liability can be applied when claims for the following arise:

- a* in respect of loss of life or personal injury, or loss of or damage to property, including claims in connection with damage to port installations, water basins, navigable routes and navigational aids, which occurred on board the vessel or in direct connection with the operation of the vessel or salvage operations, as well as claims of compensation for any consequential loss resulting therefrom;
- b* claims of compensation for loss resulting from delay in delivery during the carriage by sea of goods, passengers or their luggage;
- c* claims of compensation for other loss resulting from the infringement of any rights other than contractual rights, occurring in direct connection with the operation of the vessel or salvage operations; and
- d* claims of a person other than the person liable for damage caused by the measures he or she has taken to prevent or minimise loss, for which the person liable for the loss may limit his or her liability in accordance with the regulations set out in the Merchant Shipping Code, and the further loss caused by such measures.

Limitation of liability does not apply in the following claims:

- a* reward for carrying out a salvage operation, including the payment of a special compensation or contribution in general average;
- b* compensation for damage from oil pollution from vessels;
- c* compensation for damage in connection with the carriage of hazardous and noxious substances by sea;
- d* compensation for nuclear damage;
- e* in connection with the raising, removal or destruction of a sunken vessel, including everything it has or had on board;
- f* in connection with the raising, removal and destruction or rendering harmless of the cargo of the vessel;
- g* compensation for damage caused to human life, health or property of the servants of the shipowner or salvor, whose obligations are connected with the vessel or salvage operations, as well as the heirs of the said servants, persons dependent on them or having the right to maintenance from them, if the labour contract between the shipowner or salvor and such servants is governed by the laws of the Russian Federation;
- h* compensation for loss of life or personal injury of the vessel's passengers when the shipowner and passenger are entities or citizens of the Russian Federation; and
- i* compensation for damage caused to the life, health or property of a person in direct connection with the operation of the vessel or salvage operations when the shipowner and the person or the salvor and the person are entities or citizens of the Russian Federation.

V REMEDIES

i Ship arrest

The procedure for the arrest of ships in Russia is not very complicated, but there are some details that should be noted by the initiating party. The legal basis for ship arrest is the Merchant Shipping Code, which came into force on 1 May 1999, and the Arbitration Procedure Code. Russia also joined the Brussels Convention 1952 in January 1999, and the chapter of the Merchant Shipping Code on the arrest of ships was constructed in accordance with the Brussels Convention and the Arrest Convention 1999.

A ship can be arrested by a court order not only as security for a maritime lien or a maritime claim but also as a security for an ordinary claim. A non-Russian flagged ship located in Russia may be subject to arrest when the arresting party argues before the court that it is the property of the defendant and the court issues an arrest order. That order should be taken to a court bailiff, who will issue a resolution regarding the arrest of the ship indicated in the court order and that document serves as a basis for the arrest. A sister ship can also be arrested if the arresting party is able to provide evidence that both vessels belong to the same legal entity (shipowner).

The party who initiates the arrest (if it is a maritime lien or claim against the ship) first applies to a harbour master, who has the right to detain the ship for 72 hours (counting only working days) until the claim is brought to court.

The commercial courts provide the possibility of arresting ships in Russia not only as security for a claim that would be tried in the court that issues the arrest order, but also as security for a claim that will be tried in another jurisdiction or court. In such a case, the claimant must present evidence to the judge that the claim was brought before a court in the other jurisdiction within 15 days of the date of the arrest order, otherwise the ship will be released.

The ship can be released from arrest on the provision of whatever type of security is acceptable to the claimant, but if agreement cannot be reached then cash can be paid into a court deposit account. The payment must be made in roubles. The court then issues a release order cancelling the arrest of the ship. The arrested ship can only be released by the court order and that order can be as a result of the provision of security or the result of trying the case in court (including settlement of the case). The release order of the court should be delivered to the court bailiff (as with an arrest order) and the court bailiff must issue a resolution that cancels the arrest resolution. It can take a few days for all these steps to be completed.

The documents that must be presented to the court are the same for both types of arrests; however, the court can require counter-security on the amount of the claim and, if it is not provided, the application for the arrest may be rejected. If the arresting party provides the counter-security at the same time as the application for the security order, the security order will be granted.

A vessel can be arrested only if she called into a Russian port and an arrest order can be delivered to the master of the vessel by a court bailiff.

ii Court orders for sale of a vessel

A vessel may only be sold pursuant to a court decision. The court decision regarding the sale of the vessel should be delivered to a court bailiff, who should issue his or her own order for arranging an auction for the sale.

VI REGULATION

i Safety

Russia is a member of most international safety conventions, including SOLAS and the STCW Convention.

ii Port state control

Russia is a member of the Paris MOU and the administration of any seaport in Russia includes a port state control (PSC) office. The purpose of PSC offices is to carry out inspections of foreign vessels by the port state within the framework of the requirements of the Paris MOU. The activity of the PSC is regulated by:

- a* the Russian Merchant Shipping Code;
- b* the Order of the Russian Ministry of Transport No. 140 of 20 August 2009 'On approval of the general rules for navigation and mooring in the seaports of the Russian Federation and approaches to them';
- c* the Paris MOU;
- d* IMO Resolution A.1052(27) Procedures for Port State Control; and
- e* the bylaws of the port where the inspection takes place.

iii Registration and classification

The register of vessels in Russia is maintained by the harbour master of each seaport. The registration of vessels is regulated by Chapter III of the Merchant Shipping Code. The Russian government has had a special programme to stimulate and attract more vessels under the Russian flag since the fall in numbers following the collapse of the Soviet Union. There are two ship registers in Russia: the Russian Register of ships and the Russian International Register of Ships.

The classification society is the Russian Maritime Register of Shipping, which was established on 31 December 1913. In 1969, it became a member of the International Association of Classification Societies.

iv Environmental regulation

Russia participates in most international environmental and pollution conventions. Chapter XVIII of the Merchant Shipping Code regulates oil pollution from ships. Environmental issues are monitored by a dedicated government authority that has the right to fine the owners of vessels that have polluted in Russian waters. The shipowners will also be obliged to compensate for the cost of cleaning up the pollution.

v Collisions, salvage and wrecks

The legal basis for regulating the consequences of collisions in the waters of the Russian Federation lies in Chapter XVII of the Merchant Shipping Code and regulates the classification, investigation and registration of emergency situations in relation to vessels at sea. Chapter XX of the Merchant Shipping Code sets out rules on the salvage of vessels and other property. Chapter VII of the Merchant Shipping Code regulates wreck removal.

Chapter XVII of the Merchant Shipping Code is based on the 1910 Salvage Convention and can be applied when a collision involves at least one seagoing vessel regardless of where the collision occurred (whether in international waters or the territorial or domestic waters of Russia). It applies only when damage is caused to a third party on a non-contractual basis.

Parties involved in a collision bear their own losses and are not liable for the damage of others if the collision occurs as a result of force majeure or if it is impossible to establish the reasons for the collision. However, the parties in such a collision can still be liable under Russian civil legislation to third parties who were not a party to the collision but who nevertheless suffer damage as a result of it.

If a collision occurs as a result of the fault of only one of the vessels involved, then the owner of that vessel is liable for all damages resulting from the collision. The damages consist of expenses that all other parties have incurred to the extent required to restore them to their position before the collision. If the result of the collision is the total loss of a vessel, then the owner of that vessel has the right to recover the market price of the vessel as determined on the day of the collision.

If the cause of the collision is the fault of two or more vessels, the liability for damage to each vessel is determined in accordance with the proportion of fault of each vessel. The owners of all vessels involved in the collision are liable for damage to third parties resulting from the collision in the same proportions. If the damage caused was personal injury or death, then the victim or his or her representative can claim from any owner involved in the collision (and thereafter, that owner can claim a proportion from the owners of the other vessel or vessels).

The owner of a vessel involved in a collision is liable for damage resulting from the collision even if the collision resulted from the negligence of a pilot and even if the vessel was in a compulsory pilotage area at the time. The reason for this is that the pilot is an adviser to the master and the final decision must be that of the master of the vessel. (In this situation, the pilot may also be liable in accordance with Russian law but his or her liability is limited.)

The Merchant Shipping Code declares that no vessel or owner involved in a collision can be found liable for that collision until liability is proved by the claimant party.

vi Passengers' rights

The Merchant Shipping Code, at Chapter IX, regulates passengers' rights. The rules set out therein mostly correspond to the Athens Convention as the Russian Federation is a participant in that convention.

vii Seafarers' rights

The rights of seafarers on board Russian-flagged vessels are regulated by Chapter IV of the Merchant Shipping Code and by the Labour Code of the Russian Federation.

VII OUTLOOK

The Russian government is continuing to support the national shipping industry. There are a number of state programmes, including those for constructing new vessels and for attracting shipowners under the Russian flag. The Russian government has also created a legal basis for this by issuing Law 460-FZ. As a result of that new law, Article 4 of the Russian Merchant Shipping Code 'Use of vessels flying the State Flag of the Russian Federation for the merchant shipping purposes' was changed at the end of 2017.

Changes to the Russian Merchant Shipping Code entered into force on 1 February 2018, with the exception of the provisions relating to exclusive rights of Russian vessels to transport oil, gas and coal explored in the Russian territory and loaded in the Northern Sea Route, or storage on vessels in the water area of the Northern Sea Route.

The provisions relating to exclusive rights of Russian vessels entered into force one year after official publication of the amendments (29 December 2018). The Law does not apply to transportation by the Northern Sea Route in accordance with international agreements concluded before Law 460-FZ came in force.

The law widens the definition of the term 'cabotage', *inter alia*, to refer not only to voyages between Russian ports but also between oil and gas platforms and the ports of first destination (even if these are not Russian ports). It was issued to protect the interests of Russian shipowners and to attract more vessels under the Russian flag. Since Russia is currently building new fleet of ice-class vessels (oil and gas tankers), the new law will serve to support that project.

Two new ice-class tankers (Arc4) operating on environmentally friendly LNG bunker fuel were built in 2018 as part of a mutual project between Sovcomflot and Shell. A new LNG bunker tanker was also started to be built in 2018.

SINGAPORE

*Kimarie Cheang, Wole Olufunwa, Magdalene Chew, Edwin Cai and Nahin Mustafiz*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 ‘the top bunkering port in the world’.² As well as the business Singapore receives from the traffic passing through its ports, it is also home to more than 140 of the world’s top international shipping groups³ and has more than 4,500 vessels registered with the Singapore Registry of Ships.⁴ The most recent figures for Singapore’s seaborne cargo put the volume at 627.688 million tonnes,⁵ with container throughput at a notable 33.667 million TEUs.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 IMO conventions into its legislative framework:

- a* the 1974 International Convention for the Safety of Life at Sea (SOLAS Convention), the 1978 SOLAS Protocol, the 1988 SOLAS Protocol (HSSC) and the 1996 SOLAS Agreement;
- b* the 1966 Load Lines Convention (the Load Lines Convention) and the 1988 Protocol;
- c* the 1972 Convention on the International Regulations for Preventing Collisions at Sea (the COLREGs);
- d* the 1969 International Convention on Tonnage Measurement of Ships (the Tonnage Convention);
- e* the 1972 International Convention for Safe Containers (the CSC Convention);

1 Kimarie Cheang and Wole Olufunwa are senior associates at HFW. Magdalene Chew is a director, Edwin Cai is an associate director and Nahin Mustafiz is a trainee at AsiaLegal LLC. The chapter incorporates content provided by previous authors of this chapter.

2 <https://www.mpa.gov.sg/web/portal/home/maritime-singapore/introduction-to-maritime-singapore/facts-and-trivia>.

3 <https://www.mpa.gov.sg/web/portal/home/maritime-singapore/introduction-to-maritime-singapore/leading-international-maritime-centre-imc>.

4 *Year Book of Statistics Singapore 2018*, Department of Statistics, Singapore at page 182.

5 Id.

6 Id.

- f* the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (the STCW Convention);
- g* the 1976 Operating Agreement on the International Maritime Satellite Organisation;
- h* the 1976 Convention on the International Maritime Satellite Organisation;
- i* the 1965 Convention on Facilitation of International Maritime Traffic (the FAL Convention);
- j* the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL Convention) (Annex I to Annex V) and the 1997 MARPOL Protocol to the International Convention for the Prevention of Pollution from Ships (Annex VI);
- k* the 1976 and 1992 Protocols to the International Convention on Civil Liability for Oil Pollution Damage;
- l* the 1992 Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage;
- m* the 1976 Convention on the Limitation of Liability for Maritime Claims (the LLMC Convention);
- n* the 1988 Cospas-Sarsat Programme Agreement (COS-SAR);⁷
- o* the 2001 International Convention on the Control of Harmful Anti-Fouling Systems on Ships (the Anti-Fouling Convention);
- p* the 1979 International Convention on Maritime Search and Rescue (the SAR Convention);
- q* the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (the SUA Convention) and the 1988 SUA Protocol;
- r* the 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation (the OPRC Convention) and the 2000 Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances (HNS-OPRC);
- s* the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage (the Bunkers Convention);
- t* the 2006 Maritime Labour Convention (MLC), as amended by Amendments of 2014;⁸
- u* the 2004 Convention for the Control and Management of Ships' Ballast Water and Sediments; and
- v* the 2007 Nairobi Convention on the Removal of Wrecks (the Nairobi Convention).

Singapore's international obligations set out in these IMO conventions are administered by the Maritime and Port Authority of Singapore (MPA) through six key Singapore statutes and regulations made thereunder:

- a* the Maritime and Port Authority of Singapore Act, which regulates the functions, duties, and powers of the MPA, the employment of seafarers, port regulation, licensing, etc.;
- b* the Merchant Shipping Act, which covers the registration of ships, manning and crew matters, and safety issues;
- c* the Prevention of Pollution of the Sea Act, which empowers the MPA to take preventive measures against pollution;

⁷ Note: the 1988 Cospas-Sarsat Programme Agreement is a multinational agreement, rather than an IMO convention.

⁸ Note: MLC is an ILO 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 Production) Act, which considers liability for bunker oil pollution;
- f* the Maritime Offences Act, which incorporates certain conventions, such as the SUA Convention, that deal with criminal offences; and
- g* 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 apex court, which is the Court of Appeal. The legal system has its roots in the English common law system, so English case law is viewed as having persuasive authority in the Singapore courts, although the right of appeal to the Privy Council was abolished in 1994. Likewise, case law from other Commonwealth jurisdictions, in particular Hong Kong, Australia, New Zealand and Canada, are regularly cited and viewed favourably as authorities in the Singapore courts.

The High Court exercises original jurisdiction in respect of criminal matters that are of particular gravity, as defined by statute law, and tries civil matters where the subject matter in question is in excess of S\$250,000 in monetary value. All admiralty matters must be commenced in the High Court, which alone exercises admiralty jurisdiction by statute.

High Court trials and certain interlocutory applications are normally heard before a single judge (whereas other interlocutory applications are heard by an assistant registrar) and experts may be appointed to assist the court in various subject matters. Cases involving specialist areas of law are generally assigned to list or docket judges with experience in commercial matters. Disputes relating to shipbuilding, shipping and insurance, and tort claims are examples of areas that are heard by Supreme Court justices with experience within that commercial field. Proceedings of a maritime nature are assigned to the Admiralty bench.

The Singapore courts take an active role in case management, particularly through regular pretrial conferences, to advance litigation proceedings to resolution, whether by trial or mediated resolutions in as cost-effective a manner as possible. Currently, civil actions that are commenced in the High Court typically take 12 to 15 months from the commencement of the suit to completion of the trial.

As part of the plan to position Singapore as the leading dispute-resolution hub in Asia, 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 16 international judges with a mixed common law and civil law background. The SICC is a division of the High Court and it is primarily designed to hear and try international commercial disputes.

The SICC has jurisdiction to hear claims or actions (1) that are international and commercial,¹⁰ (2) in which the parties have expressly submitted to the jurisdiction of the SICC by a written jurisdiction agreement, and (3) in which the parties to the action do not

⁹ www.mpa.gov.sg/web/portal/home/port-of-singapore/maritime-legislation-of-singapore.

¹⁰ Rules of Court (Amendment No. 6), published on 26 December 2014, Order 110 Rule 1.

seek any relief in the form of a prerogative order. It is possible for the High Court to transfer cases to the SICC, of its own motion, if the claim satisfies the criteria and the parties have submitted to the jurisdiction of the Singapore courts.

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 where the parties in the SICC proceedings or the original arbitration appoint foreign lawyers.¹¹

Civil trials and certain interlocutory applications in Singapore are conducted in open court, although the parties may apply for an order to seal the court documents or case file to keep the proceedings confidential. Decisions by a single judge of the High Court may be appealed to the Singapore Court of Appeal, subject to any written agreement between the parties to limit the right of appeal. SICC judgments are recognised as a national court judgment (Supreme Court of Singapore) and any enforcement is dependent on the recognition of foreign judgments in the relevant jurisdiction. Other key features include the possibility for parties to choose to apply alternative rules of evidence and to be represented by foreign lawyers in offshore cases, as defined in the SICC Practice Directions.¹²

ii Arbitration, mediation and ADR

The Singapore courts have incorporated 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. The state courts of Singapore (which comprise the magistrates' courts and the district courts), in particular, actively encourage and endorse the early use of the ADR process in civil claims. The state courts try civil matters where the subject matter in question does not exceed S\$250,000 in monetary value. 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.

The four ADR options currently available in the state courts for civil claims (including non-*in rem* maritime claims) are (1) mediation at the State Courts Centre for Dispute Resolution (SCCDR), (2) neutral evaluation at the SCCDR, (3) mediation at the Singapore Mediation Centre (SMC), and (4) arbitration through the Singapore Law Society Arbitration Scheme (LSAS). Mediation at the SCCDR is the most commonly used ADR option in the state courts and is generally regarded as the default ADR option, followed by neutral evaluation. Both processes are fully confidential (that is, the matters discussed at ADR will not be disclosed to the trial judge if the matter proceeds to trial) and non-binding (unless parties opt for a binding evaluation or reach a binding settlement following the ADR process). If the ADR process is successful, particularly at an early stage, it can result in substantial savings in time and costs for the parties.

11 Supreme Court of Judicature (Amendment) Bill No. 47/2017, read for the first time on 6 November 2017 and passed on 9 January 2018.

12 www.sicc.gov.sg/documents/docs/SICC_Practice_Directions.pdf.

The Supreme Court of Singapore has also adopted a more pro-ADR approach. The Supreme Court Practice Directions include a process for parties to consider using ADR at the earliest possible stage of the proceedings. As with civil proceedings and ADR in the state courts, potential adverse costs orders can be made against any party that unreasonably refuses to engage in the ADR. A party that wishes to attempt mediation or any other means of ADR (e.g., neutral evaluation, expert determination or conciliation) in proceedings before the High Court or Court of Appeal should file and serve an ADR offer on the other party. If within 14 days thereafter, the other party does not serve a response to the ADR offer, it would be deemed unwilling to attempt the ADR without providing any reasons, and may be subject to adverse costs orders in the proceedings.¹³

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, on the other hand, is a non-sector-specific arbitration organisation that was established in 1991.

The SCMA Rules were amended in October 2015 to extend the SCMA small claims procedure now extends to cover disputes where the aggregate amount in dispute (claim and counterclaim), excluding interest and costs, does not exceed US\$150,000 (up from US\$75,000 previously). Alternatively, parties can either adopt the small claims procedure, regardless of the amount in dispute, or exclude the application of this procedure, by agreement. Under the small claims procedure, a sole arbitrator is appointed to conduct the arbitration and the 2015 amendments have introduced a cap on the arbitrator's fees (US\$5,000 or, where there is a counterclaim, US\$8,000) and recoverable legal costs (US\$7,000 or, where there is a counterclaim, US\$10,000 in total for each party's lawyers). Timelines for the service of case statements were abridged to 14 days. Parties can expect the award to be issued within 21 days of either the date of the tribunal's receipt of all parties' statements of case or, if there is an oral hearing (which is not usually the case), the close of the oral hearing.¹⁴ In 2017, the London Maritime Arbitrators Association (LMAA) amended its rules to emulate the SCMA's expedited process for the appointment of a sole arbitrator and dealing with concurrent arbitrations, as well as controlling costs.¹⁵

Rule 47 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 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.¹⁶ 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,¹⁷ which include directions on early termination and parties' submissions.

13 <https://epd.supremecourt.gov.sg/#> - Supreme Court Practice Direction 35C.

14 Rule 46 of the SCMA Rules, Third Edition (October 2015).

15 LMAA Small Claims Procedure 2017.

16 Rule 47 of the SCMA Rules, Third Edition (October 2015).

17 Schedule B SCMA Rules, Third Edition (October 2015).

The SIAC continues to become an increasingly important global forum for international dispute resolution. The year 2017 saw SIAC set a new record for the highest number of new case filings and administered cases. SIAC's caseload has increased by more than five times in the past decade. The aggregate sum in dispute for all new case filings amounted to US\$4.07 billion.¹⁸ 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. While the UNCITRAL Rules are generally designed for *ad hoc* forms of arbitration, parties can still elect for institutional administration of the arbitration by the SIAC. These are both consensual regimes that respect the principle of party autonomy.

The 2016 SIAC Rules retain, with some amendments, an expedited procedure¹⁹ for which any party to a SIAC arbitration desiring an expeditious arbitral process can apply. Now, disputes may be referred to arbitration under the expedited procedure in any of the following instances: (1) if the amount in dispute does not exceed the equivalent amount of S\$6 million (representing the aggregate of the claim, counterclaim and any defence of set-off), (2) if all parties so agree, or (3) in cases of exceptional urgency. Parties can also agree beforehand to adopt this procedure, regardless of the amount in dispute, by incorporating the SIAC Expedited Procedure Model Clause in their contract. An arbitral award under the expedited procedure must be issued within six months of the date when the tribunal is constituted, although the Registrar of SIAC can extend the time in exceptional circumstances.

The president of SIAC retains the discretion not to apply the expedited procedure if the dispute is not suitable to be resolved in six months or where the procedure is generally not appropriate for the particular dispute. Equally, the tribunal may determine, in consultation with the parties, that an expedited procedure case shall be decided on documentary evidence alone.

Finally, any disparity between the parties' arbitration agreement and the Expedited Procedure will be resolved in favour of the latter.

Under the 2016 SIAC Rules, the parties may still appoint an emergency arbitrator in situations where a party is in need of emergency interim relief before a tribunal is constituted.²⁰ The types of emergency relief typically sought include preservation orders, freezing orders, orders permitting access to inspect property, *Mareva* injunctions and general injunctive relief. Cases in which applications for emergency relief are filed relate to disputes in a broad range of sectors, including shipping, international trade and general commercial agreements.

The emergency arbitrator will now be appointed within one calendar day, rather than one business day, of receipt of the application, fees and deposit. While emergency awards or orders have been passed in as little as two days, it generally takes between eight and 10 days on average (but within a maximum of 14 days) for the emergency arbitrator to render its award after hearing the parties' submissions. To ensure that emergency arbitration proceedings are cost-effective for any quantum, the fees for it are now fixed at S\$25,000, unless otherwise determined by the Registrar.

18 <http://www.siac.org.sg/69-siac-news/560-siac-announces-new-records-for-2017>.

19 Rule 5 of the 2016 SIAC Rules.

20 Rule 30.2 of 2016 SIAC Rules.

Following amendments made to the Singapore International Arbitration Act (IAA) in 2012, awards issued by emergency arbitrators in arbitrations seated within and outside Singapore are enforceable under Singapore law.²¹

Further changes have been brought in under the 2016 SIAC Rules:

- a* Multi-contract disputes can be brought to arbitration in one of two ways: (1) by filing separate notices of arbitration with an application for consolidation, or (2) simply by filing a single notice of arbitration in respect of all contracts. In both cases, the claimant will be deemed to have commenced multiple arbitrations. An application for consolidation can also be filed after the arbitration proceedings have commenced.²²
- b* Parties and non-parties can apply to join a pending arbitration (either before or after the constitution of the tribunal).²³
- c* An early dismissal procedure has been introduced in Rule 29 for claims or defences that are either wholly without legal merit or outside the scope of the tribunal.
- d* In recognising the international nature of the SIAC, there is no longer a predetermined location for the arbitration and this is left to the tribunal, unless otherwise agreed by the parties.
- e* All challenges to arbitrations will be issued with reasoned decisions for a fixed fee of S\$8,000.²⁴

Since 2013, Singapore has been a named arbitral forum to the BIMCO Standard Dispute Resolution Clause, besides London and New York, to reflect the global spread of maritime arbitration venues. Within the new SCMA BIMCO Arbitration Clause,²⁵ 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:²⁶

- a* international arbitration proceedings;
- b* court proceedings arising from or out of or in any way connected with international arbitration proceedings;
- c* mediation proceedings arising out of or in any way connected with international arbitration proceedings;
- d* an application for a stay of proceedings referred to in Section 6 of the IAA and any other application for the enforcement of an arbitration agreement; and
- e* proceedings for or in connection with the enforcement of an award or a foreign award under the IAA.

21 Section 2(a) of the International Arbitration (Amendment) Act 2012 (Singapore).

22 Rules 6 and 8 of 2016 SIAC Rules.

23 Rules 7 of 2016 SIAC Rules.

24 Rules 15 and Schedule of Fees of 2016 SIAC Rules.

25 <https://www.scma.org.sg/Default.aspx?sname=scma&sid=126&pageid=2969&catid=4185&catname=Model-Clauses>.

26 Regulations 3 and 4 of the Civil Law (Third-Party Funding) Regulations 2017.

Mediation is used in tandem with court proceedings in that the court can suggest that parties refer disputes to the 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 (UN) Convention on International Settlement Agreements Resulting from Mediation, and to name it after Singapore. The Convention will be known as the ‘Singapore Convention on Mediation’. It is the first treaty to be named after Singapore among the treaties concluded under the auspices of the United Nations organisation. At the session, UNGA also agreed that the signing ceremony for the Convention will be held in Singapore on 7 August 2019. Singapore is expected to be among the first signatories of the Convention. 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 upon 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 is comprised of experienced maritime lawyers, in-house counsel and other 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). Under the AMA Protocol between the SIAC and the SIMC, settlement agreements may be recorded as consent awards. The SIMC has an international panel of mediators and an international panel of experts from various industry sectors who can assist the mediator in complex commercial disputes involving technical questions. Although the mediation services offered by the SIMC focus largely on international commercial disputes, parties are free to choose whether they prefer to mediate at the SMC or the SIMC. For *ad hoc* mediations not administered by the SIMC in accordance with the SIMC Rules, the SIMC can serve as an appointing authority for mediators or experts, subject to the parties’ agreement and for a prescribed fee.

iii Enforcement of foreign judgments and arbitral awards

Foreign court judgments of a Commonwealth origin readily find enforcement in Singapore, under the statutory regime of the Reciprocal Enforcement of Commonwealth Judgments Act (RECJA). This prescribes a registration method to a judgment from a gazetted Commonwealth jurisdiction whereby the applicant for registration applies *ex parte* to the High Court to obtain, first, leave to register the foreign judgment. The notice of registration of the foreign judgment is then served on the judgment debtor. The judgment debtor is given the opportunity to contest the registration of the foreign judgment, failing which that judgment can be entered as a judgment of the Singapore High Court. Under the RECJA, a time limit of 12 months from the date of the foreign judgment applies, within which that judgment may be registered under the RECJA, or a longer period as may be allowed by the High Court on application.

In a similar vein, the Reciprocal Enforcement of Foreign Judgments Act (REFJA) allows the enforcement of a superior court judgment of any gazetted non-Commonwealth foreign country (which currently only comprises the Hong Kong Special Administrative Region of the People's Republic of China).

The REFJA prescribes a six-year limitation period within which the enforcement application must be brought. Both the RECJA and the REFJA permit challenges to the registration of foreign judgments on narrow, specific grounds that are spelled out by statute.

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 only applies to international civil or commercial disputes and not matters such as family, matrimonial, insolvency, consumer matters, tortious claims not arising from contracts, antitrust and intellectual property.

The CCAA implements the 2005 Hague Convention on Choice of Courts Agreements (HCCCA) to which Singapore is a signatory. The HCCCA establishes an international legal regime that requires contracting states to, *inter alia*, uphold exclusive choice of court agreements designating the courts of contracting states in international civil or commercial cases, and recognise and enforce judgments of the courts of other contracting states designated in exclusive choice of court agreements. 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 likewise 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 are currently 28 countries that are party to the HCCCA, namely Mexico and all European Union states save for Denmark. As Mexico and the EU states are not covered under the current reciprocal enforcement regimes in Singapore under the RECJA and REFJA, the CCAA significantly extends the enforceability of Singapore court judgments.

There may be instances where a foreign judgment falls within the scope of both the CCAA and either RECJA or REFJA (e.g., judgments of the superior UK courts). In instances of overlap, the CCAA overrides RECJA and REFJA. For the avoidance of doubt, the RECJA and 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, RECJA or the REFJA may be enforced under common law. This requires an action upon the foreign judgment (i.e., the foreign judgment creditor commences a suit in a Singapore court, suing upon the original cause of action, and using the foreign judgment as evidence of the defendant's *in personam* liability on the claim). Typically, a summary judgment application is possible on a common law enforcement action.

Where enforcement of foreign arbitral awards is concerned, the centrepiece avenue under Singapore law is that of the New York Convention, to which Singapore is a signatory. The approach of the Singapore courts and, uniformly, the Commonwealth jurisdictions that

are party to the New York Convention, is to be pro-enforcement when asked to enforce foreign arbitral awards under the Convention.²⁷ 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.²⁸ 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 this first stage, the enforcement process does not require judicial investigation by the court in the jurisdiction where enforcement is sought and the party seeking leave to enforce the award must merely comply with the formalistic procedural requirements under Order 69A of the Rules of Court.²⁹ The applicant must nevertheless give full and frank disclosure of the relevant facts, including the existence of any pending applications for setting aside the award or leave to appeal on a question of law, as the application for leave to enforce is made on an *ex parte* basis.³⁰ At the second stage of the two-stage process of enforcement, which is invoked when a party against whom an award is made resists enforcement on the grounds set out in the IAA, that party must prove the grounds it relies upon on a balance of probabilities.

IV SHIPPING CONTRACTS

i Shipbuilding

Singapore has long been a leading centre for ship repair and building. Singapore corporations Keppel Corp and Sembcorp Marine are among the world's top offshore rig builders.

A shipbuilding contract is regarded both as a contract for sale and purchase as well as a contract for the supply of workmanship and materials. There are a number of commonly used standard-form shipbuilding contracts, including SAJ (Shipbuilders' Association of Japan), AWES (Association of West European Shipbuilders) and BIMCO's NEWBUILDCON.

Shipbuilding disputes usually involve issues of whether the ship complies with the description and contractual specifications.³¹ The conditions and implied warranties under the Sale of Goods Act 1979 apply if the shipbuilding contract is governed by Singapore law (e.g., there is an implied condition that the ship will correspond with the description and be reasonably fit for its intended purpose).

The parties may contract for title to pass gradually upon the progress of the construction or at certain stages or milestones. Generally, in the absence of any provisions to the contrary, the risk will pass with the title.

Typically, payment of the purchase price is made in instalments before delivery and, in return, a performance guarantee or refund guarantee will be furnished by the yard under

27 See *Aloe Vera of America v. Asianic Food (S) Pte Ltd* [2006] 3 SLR 174 at [41] to [46].

28 Ibid.

29 Ibid., at [42], and more recently endorsed in *Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) v. Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd)* [2010] 3 SLR 661 and clarified in *Galsworthy Ltd of the Republic of Liberia v. Glory Wealth Shipping Pte Ltd* [2011] 1 SLR 727. Endorsed by the Supreme Court of Victoria in *Altain Khuder LLC v. IMC Mining Inc & Anor* [2011] VSC 1 at [68].

30 *AUF v. AUG* [2016] 1 SLR 859.

31 E.g., *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.

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. In *Master Marine AS v. Labroy Offshore Ltd and others*,³² the yard failed to deliver a rig by the agreed delivery date. The buyer rescinded the contract and called on the refund guarantees furnished by the seller's banks. The yard applied *ex parte* for an injunction preventing the banks from paying out the monies or Master Marine receiving the same. The Singapore Court of Appeal held that on the true construction of the refund guarantees, the guarantees were on-demand guarantees, and having satisfied the conditions for payment under the guarantees, the buyer was entitled to payment under the refund guarantees.

The Singapore courts have not had the opportunity to consider, in any reported decision thus far, the presumption applied by the English Court of Appeal in *Marubeni Hong Kong and South China Ltd v. Mongolian Government*³³ (*Marubeni*) that in construing a guarantee given outside the context of a banking instrument or by a non-financial institution, the absence of language appropriate to a performance bond or something having similar legal effect creates a strong presumption against the parties' intention to create a performance bond or on-demand guarantee (the *Marubeni* presumption). While the Singapore High Court in *China Taiping Insurance (Singapore) Pte Ltd (formerly known as China Insurance Co (Singapore) Pte Ltd) v. Teoh Cheng Leong*³⁴ (*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 – that is, fraud and unconscionability.³⁵ The fraud exception is meant to safeguard the account party from a dishonest call being made upon the guarantee by the beneficiary.³⁶ The unconscionability exception, on the other hand, was developed as it was recognised that in certain circumstances, even where the account party cannot show that the beneficiary had been fraudulent in calling on the bond, it would nevertheless be unfair for the beneficiary to realise its security pending resolution of the substantive dispute.³⁷ Therefore, under Singapore law, where a beneficiary acts fraudulently or unconscionably when calling on an on-demand guarantee or performance bond, the court can grant injunctive relief to restrain a call on or payment out under such a guarantee or performance bond.

It is, however, now possible under Singapore law for parties to incorporate a carefully worded clause in their contract to restrict the grounds on which an obligor may object to a beneficiary's call on a performance bond. The Singapore Court of Appeal recently considered the issue of whether parties could contractually restrict the right of the obligor under a

32 [2012] 3 SLR 125.

33 [2005] 1 WLR 2497.

34 [2012] SGHC 2.

35 *Arab Banking Corp (B.S.C.) v. Boustead Singapore Ltd* [2016] SGCA 26 at [51].

36 *Ibid.*, at [60].

37 *Ibid.*, at [104].

performance bond to apply for an injunction (which is an equitable remedy) to restrain the beneficiary from calling on the bond.³⁸ Under the subject clause in the main contract in *CKR Contract Services*, the obligor was not entitled to restrain the beneficiary from calling on the performance bond on any ground, except in the case of fraud.³⁹ 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*).⁴⁰

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 the yard to construct or complete the ship in accordance with the terms of the contract may entitle the buyer to claim damages from the yard, which is the usual remedy. Specific performance may be ordered whereby the buyer can prove that damages will not be an adequate remedy.

ii Contracts of carriage

Singapore is a state party to the Hague-Visby Rules, which were enacted into domestic legislation by the Singapore Carriage of Goods by Sea Act (1998 edition), without variation.

These Rules apply by force of law to shipments of goods under a bill of lading 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 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

38 *CKR Contract Services Pte Ltd v. Asplenium Land Pte Ltd* [2015] 3 SLR 1041 (*CKR Contract Services*).

39 *Ibid.*, at [5].

40 *Ibid.*, at [20] to [24].

of the goods lost or damaged, whichever is higher. The time bar for cargo claims under the Hague-Visby Rules is one year from the date of delivery or from the date when the goods should have been delivered.

In respect of contracts of carriage of goods by sea, the relevant liens applicable are (1) the shipowner's lien on cargo, which is a possessory lien that can arise at common law in respect of freight, or in a bailee of necessity context,⁴¹ or under contract for amounts payable to the shipowner under the contract of carriage, (2) the shipowner's lien on sub-freight or sub-hire, which is a contractual lien under a contract of carriage validly incorporating a charter party lien clause, and (3) liens on the ship exercisable by an action *in rem* following arrest of the vessel. This is the claimant's statutory right of action against the ship if the claim is listed as falling within the subject matter of Admiralty jurisdiction in the High Court (Admiralty Jurisdiction) Act.

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*⁴² 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 decision⁴³ 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 of the CA. 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. Further, given the large number of charter parties concluded every day, imposing a registration requirement will 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' 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 only be considered registrable 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.

41 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.

42 [2017] SGHC 172.

43 *Diablo Fortune Inc v. Cameron Lindsay Duncan and Anor* [2018] SGCA 26.

The shipper has a duty to properly identify and to pack the goods shipped. Pursuant to Article III(5) of the Hague-Visby Rules, the shipper is deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by it, and the shipper must indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in the particulars. The shipper has a strict liability at common law for shipment of dangerous goods without notice to the carrier. This strict liability regime is extended by the indemnity regime of Article IV(6) of the Hague-Visby Rules, which imposes broad liability upon the shipper for all damages and expenses directly or indirectly arising out of or resulting from the shipment of any cargo that causes or threatens to cause loss of life, damage to the ship or other cargo, delay or expense to the carrier.

The Singapore courts have handed down decisions on principle in relation to the interpretation of the Hague-Visby Rules. Notable examples are the decision in *Sunlight Mercantile Pte Ltd v. Every Lucky Shipping Co Ltd* on the carriage of deck cargo,⁴⁴ in which the Court of Appeal declined to follow the English court decision in *The 'Imvros'*⁴⁵ 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*⁴⁶ 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.'*⁴⁷

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 CP was formed notwithstanding the presence of a 'subject to review' clause.⁴⁸

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* a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;
- b* a person with possession of the bill as a result of the completion, by delivery of the bill, of any endorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill; or

44 [2004] 1 SLR(R) 171.

45 [1999] 1 Lloyd's Rep 848.

46 [2002] 2 SLR(R) 1119.

47 [2002] 1 Lloyd's Rep 113.

48 *Toptip Holding Pte Ltd v. Mercuria Energy Trading Pte Ltd* [2017] SGCA 64.

- c a person with possession of the bill 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 1924. 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.⁴⁹ 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*⁵⁰ 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 recent High Court decision of *The 'Star Quest'*,⁵¹ the plaintiffs sold bunkers to buyers (two subsidiaries of OW Bunkers A/S), which were loaded onto several bunker barges owned or demise-chartered by the defendants. The terminal at which the bunkers were loaded, prepared and furnished various bills of lading naming the plaintiffs as shipper and made out to its order. By the time the plaintiffs invoiced the buyers for the price of the bunkers, the bunkers had already been supplied to other vessels and expended for consumption without production of the original bills of lading, which the plaintiffs still possessed. The buyers subsequently went insolvent and the plaintiffs, having not been paid for the bunkers, demanded delivery of the same from the defendants on the basis that they still held the bills of lading.

The plaintiffs then applied for summary judgment but failed in their application, with the High Court giving the defendants unconditional leave to defend the action. In arriving at this decision, the High Court held, among other things, that it was at least arguable that the bills of lading could not be relied upon as contractual documents, and that their express terms indicated 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. Further, 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.

Apart from bringing a claim in contract, Singapore law, again as exemplified by recent decisions at the High Court, also recognises and applies common law principles of bailment

49 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.

50 [2002] 2 SLR(R) 1119.

51 [2016] 3 SLR 1280.

and tortious duties of conversion 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

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 upon a third-party lawful holder of the bill of lading. A demise clause providing that the parties to the contract evidenced by the bill of lading are the shipper and the shipowner is generally upheld and valid.

iv Limitation of liability

Singapore is party to the LLMC Convention 1976, which came into force on 1 May 2005 pursuant to Part VIII of the Merchant Shipping (Amendment) Act 2004. The Merchant Shipping Act of Singapore, as amended in 2004, contains various provisions that either operate in tandem with or modify the provisions of the 1976 Convention. These provisions are found in Sections 136 to 142 of the Act.

Singapore is, however, not a party to the LLMC Protocol 1996 or the 2012 Amendments to the 1996 Protocol, and the increase in the limits of liability under the 1996 Protocol and the 2012 Amendments are therefore not applicable under Singapore law.

A ship, for the purpose of limitation, is any kind of vessel used in navigation by water and includes barges, hovercraft and 'offshore industry mobile units'. The persons entitled to limit their liability are as per Article 1 of the LLMC Convention wording, which is unamended. These include:

- a* shipowners;
- b* demise, time, voyage and slot-charterers;
- c* managers or operators of a seagoing ship;
- d* salvors;
- e* any person for whose act, neglect or default the parties listed above are responsible; and
- f* an insurer for claims subject to limitation can limit to the same extent as its assured.

The following claims are subject to limitation of liability:

- a* 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;

52 See *The 'Dolphina'* [2012] 1 SLR 992 and *Antariksa Logistics Pte Ltd v. McTrans Cargo (S) Pte Ltd* [2012] 4 SLR 250.

- d* in respect of the removal, destruction or the rendering harmless of the cargo of the ship (but not if under contract with the person liable); and
- e* 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.

The limits of liability for loss of life or personal injury are:

- a* 166,667 special drawing rights (SDRs) for ships below 300 tonnes; and
- b* 333,000 SDRs for ships not exceeding 500 tonnes.

For larger ships, the following amounts are used in addition to 333,000 SDRs:

- a* between 501 and 3,000 tonnes: 500 SDRs per tonne;
- b* between 3,001 and 30,000 tonnes: 333 SDRs per tonne;
- c* between 30,001 and 70,000 tonnes: 250 SDRs per tonne; and
- d* 70,001 tonnes and above: 167 SDRs per tonne.

The limits of liability for any other claims are:

- a* 83,333 SDRs for ships below 300 tonnes; and
- b* 167,000 SDRs for ships not exceeding 500 tonnes.

For larger ships, the following amounts are used in addition to 167,000 SDRs:

- a* between 501 and 30,000 tonnes: 167 SDRs per tonne;
- b* between 30,001 and 70,000 tonnes: 125 SDRs per tonne; and
- c* 70,001 tonnes and above: 83 SDRs per tonne.

Limitation proceedings can be brought by a party seeking to establish 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 1976 Convention, following practical instances where this has been done in Singapore, and the approach in the English Court of Appeal decision in *Kairos Shipping Ltd v. Enka & Co LLC (The 'Atlantik Confidence')*.⁵³

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

53 [2014] EWCA Civ 217.

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.⁵⁴

On the other hand, where the Singapore courts are asked to stay proceedings commenced in Singapore on the grounds of *forum non conveniens* in actions to determine liability on collision claims, the Singapore courts take the view that the fact that the law in the alternative foreign forum may be less favourable to the plaintiff because lower limits of liability apply in that jurisdiction does not *per se* necessarily justify dismissing the stay application, if the claim bears greater jurisdictional connections to that foreign jurisdiction. The existence of different limitation regimes is not considered a personal or juridical advantage under the *Spiliada*⁵⁵ principles that the Singapore courts apply when considering a stay application.⁵⁶

V REMEDIES

i Ship arrest

The Singapore courts have developed their own jurisprudence in relation to the law of ship arrest, which is now clearly divergent from English law. Singapore has not acceded to either the 1952 or 1999 Arrest Conventions, neither is it a signatory to the International Convention on Salvage 1989, under which an expanded jurisdiction for arrest for salvage claims is now available to signatory countries, such as the United Kingdom.

The statutory provisions for ship arrest in Singapore are primarily set out in the High Court (Admiralty Jurisdiction) Act (HCAJA) and the Rules of Court, which flesh out the procedural aspects.

Section 3(1) of the HCAJA, which was modelled on the English Supreme Court Act 1981 equivalent provisions, provides an exhaustive list of claims for which a claimant may invoke admiralty jurisdiction of the High Court.

Section 3(1)(h) of the HCAJA, for example, provides that the High Court has admiralty jurisdiction over 'any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship'. The High Court held in *Lipkin International Ltd v. Swiber Holdings Ltd and another*⁵⁷ that the term 'relating to' should be 'narrowly construed to exclude a collateral or separate agreement independent of the charter party or bill of lading unless it is "intrinsically related to the use or hire of a vessel"'. In this case, it was held that an agreement to procure a charter party does not fall within the ambit of Section 3(1)(h).

In a decision by the High Court in 2016, it was held that Section 3(1)(o) of the HCAJA, which allows for 'any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship' to be brought, did not apply to bookkeeping and administrative fees incurred by a vessel's managers or agents as such fees were incurred on

54 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.

55 *Spiliada Maritime Corporation v. Cansulex Ltd* [1987] AC 460.

56 See *The 'Reecon Wolf'* [2012] 2 SLR 289.

57 [2016] SLR 1079.

behalf of the shipowner and not the ship. Neither did Section 3(1)(o) of the HCAJA apply to management fees, as the provision did not cover any remunerative elements, whether by way of commission or fee.⁵⁸

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.⁵⁹

The doctrine of agency by estoppel was recently examined by the Court of Appeal in *The Bunga Melati 5*,⁶⁰ in which the defendant was alleged to be a party to the contract for the supply of bunkers via the agency of the defendant's purported agent and was, therefore, contractually liable to the plaintiff for the bunkers supplied (i.e., liable *in personam*). There, Chief Justice Menon (delivering the judgment of the court) held that estoppel would operate if the following elements are satisfied: (1) a representation by a person against whom the estoppel was sought to be raised; (2) reliance on that representation by the person seeking to raise the estoppel; and (3) detriment. In particular, representation can only be established by silence or inaction if there was a legal or equitable (and not merely moral) duty owed by the silent party to the party seeking to raise the estoppel to make a disclosure. This duty would only arise if the silent party knew that the party seeking to raise the estoppel and was acting based on the 'mistaken belief which the silent party acquiesced in'. The plaintiff argued that the court ought to infer, from the email exchange between the defendant and the plaintiff, that the defendant knew of the plaintiff's misunderstanding regarding the purported agent's position. However, this argument was promptly rejected by the Court of Appeal on the basis of the well-established rule that an inference may only be drawn if it is the sole inference flowing from the proven facts.

In proving ownership of a vessel for the purposes of an arrest, ship registers serve as records upon 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'*,⁶¹ 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 said 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.

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.⁶² It is not possible to arrest ships in associated ownership in the same way that is permitted under, say, South African

58 *The 'PWM Supply' ex 'Crest Supply 1'* [2016] 4 SLR 407.

59 Section 4(4)(i) HCAJA.

60 [2016] 2 SLR 1114.

61 [2016] 5 SLR 667.

62 Section 4(4)(ii) HCAJA.

law. Maritime liens are recognised for limited categories of priority claims, such as claims for salvage, damage done by a ship (typically in collisions), crew wages, bottomry and master's disbursements. Cargo may exceptionally be arrested for priority claims, such as maritime liens.

Critically, a ship should not be arrested in aid of legal proceedings in a foreign court. Presently, there is no statutory provision in Singapore empowering the courts to arrest property or retain arrested property for the satisfaction of foreign court proceedings.⁶³

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, at its discretion, extend the validity 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 arresting party has a duty to make full and frank disclosure to the court of all material facts in the supporting *affidavit* filed in its application for a warrant of arrest. In any given case, if circumstances are not clear as to, for instance, the *in personam* liability of the shipowner for the claim, or proof of ownership of the vessel to be proceeded against, the arresting party has to be careful to address and explain any such weaknesses in its case.

The Singapore Court of Appeal has clarified that although the Singapore courts will not consider the merits of a plaintiff's claim in deciding whether the plaintiff has properly invoked admiralty jurisdiction, the plaintiff must satisfy the various steps and relevant standards of proof for invoking admiralty jurisdiction in Singapore under Sections 3 and 4 of the HCAJA.⁶⁴ In this respect, a plaintiff need not prove who 'the person who would be liable on the claim in an action *in personam*' is for the purposes of establishing admiralty jurisdiction (until and unless the defendant subsequently challenges the plaintiff's action by applying to strike out the action under Order 18 Rule 19 of the Rules of Court or the inherent jurisdiction of the court), but the plaintiff must identify in its supporting *affidavit* for a warrant of arrest, without having to show in argument, the person who would be liable on the claim in an action *in personam*. In the event that a plaintiff's invocation of admiralty jurisdiction or its arrest of the defendant's vessel is subsequently challenged, the plaintiff would need to show, in addition to the requirements under Sections 3 and 4 of the HCAJA, a good arguable case on the merits of its claim.⁶⁵

The recent case of *The 'Chem Orchid' and another matter*⁶⁶ clarifies that a shipowner who wishes to set aside an *in rem* writ and a warrant of arrest on the ground of a factual

63 *The 'Eurohope'* [2017] 5 SLR 934 at [27] to [30].

64 *The 'Bunga Melati 5'* [2012] 4 SLR 546 at [112].

65 *Ibid.* at [96].

66 [2016] 2 SLR 50.

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, however, be conclusive if the latter approach is taken.

The duty to make full and frank disclosure is to disclose all material facts. The test of materiality for an arrest application is also the same as that required in other *ex parte* civil remedies. The mere disclosure of material facts without more or devoid of the proper context is in itself insufficient to constitute full and frank disclosure. Unless the document is presented to the judge, it has not been disclosed. The test of materiality is whether the fact is relevant to the making of the decision whether to issue the warrant of arrest, that is, a fact that should properly be taken into consideration when weighing all the circumstances of the case, though it need not have the effect of leading to a different decision being made. Examples of material facts that have to be disclosed to the court include:

- a* facts that affect the invocation of admiralty jurisdiction (e.g., the identity of the person liable *in personam*, whether the person liable *in personam* is the owner or charterer of the offending vessel when the cause of action arose or the registered owner of the offending ship at the time the writ is issued, whether the requirement for externality under Section 3(1)(d) of the HCAJA is satisfied);
- b* defences that will result in the arresting party's claim being determined summarily, and regarded as frivolous, vexatious and an abuse of process; and
- c* facts that would assist the court in adequately and accurately understanding the arresting party's claim and surrounding circumstances to make an informed and fair decision.

The arrest warrant is issued by the High Court on the application of the plaintiff. Civil liability will not arise should the arrest turn out to be unjustified and set aside later, unless it can be shown that the plaintiff acted with bad faith or with gross negligence implying malice. A mistake in itself would not make an arrest wrongful, neither would a weak case for the plaintiff: actions for wrongful arrests are rare and seldom succeed. Practically speaking, a plaintiff will only face exposure for liabilities following an arrest if it can be shown that it had no reason to believe it had an arguable claim or that the ship was owned by the defendant, or was intent on abusing the court process. 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.⁶⁷

In Singapore, a ship can only be arrested if it comes within the territorial waters as well as within the port limits of Singapore. The ship is arrested when the warrant of arrest is affixed for a short time on any mast of the ship or on the outside of any suitable part of the ship's superstructure. After a vessel is arrested, it comes under the custody of the Sheriff of the Supreme Court of Singapore.

An undertaking to indemnify the Sheriff of the Supreme Court for costs of maintenance of the vessel under arrest is required, which includes the cost of a guard service. In practice, an initial deposit of between S\$5,000 and S\$10,000 is usually required on account of the costs

⁶⁷ *The 'Xin Chang Shu'* [2016] 1 SLR 1096.

of the Sheriff. In addition, a local law firm employed to prepare and file the arrest papers and carry out the arrest usually requires a cross-undertaking from the arresting client, or funds sufficient to secure the firm's undertaking to the Sheriff. Since it will be responsible to the Sheriff, the practice is for the local law firm to ask for a payment on account of its fees and disbursements, including the Sheriff's costs.

Security

A plaintiff arresting party need not furnish any counter-security to the defendant shipowner when applying to arrest.

The defendant can, at a later stage of the court action, apply to the court to require the plaintiff to furnish security for the defendant's costs, which is the same general rule as for all civil litigants. The court has discretion to require security for costs of the defendant if the plaintiff is ordinarily resident out of the jurisdiction, or is shown to be financially unsound so as to be unable to meet an adverse order of costs if ordered against it. Such security if ordered is for costs only and does not cover damage suffered in other forms, for which the plaintiff will not be required to provide counter-security.

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 will deteriorate.

From the time of arrest, the main steps (in chronological order) following a successful application for judicial sale order, culminating in an actual sale to a buyer, are broadly as follows:

- a* surveying and 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'*,⁶⁸ the mortgagee bank arrested two vessels and commenced *in rem* proceedings against the defendant shipowner, later obtaining default judgment. It filed applications seeking the court's approval of a private direct sale of each vessel on terms of contract entered into with named purchasers for a specified price each. The prices were above, but not significantly higher than, the court valuation. The court emphasised that it has to strike a balance between the two competing concerns in a judicial sale: that of accepting the highest bid price at a fairly conducted Sheriff's sale on the one hand, and weighing that concern against the purpose to be achieved by a judicial sale, which is to benefit all persons interested in the *res*. Where a party seeks to enter into a private direct sale, there is a divergence in its own interest to obtain benefits for itself, and the interest of the Sheriff acting pursuant to a commission for appraisal and sale. As a result, the court has to be circumspect when dealing with such a sale application and has to carefully scrutinise each application. The court will not allow a direct sale unless there exist 'powerful special features' or 'special circumstances', and these were lacking on the facts of the case. In *The 'Sea Urchin'*,⁶⁹ 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 a recent High Court case of *The Swiber Concorde*,⁷⁰ it was 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 together with the proceeds of sale.

In another recent High Court decision of *The Long Bright*,⁷¹ 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;

68 [2013] 4 SLR 615.

69 [2014] SGHC 24.

70 [2018] SGHC 197.

71 [2018] SGHC 216.

- 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 necessities claims).

While 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 where the demands of justice warrant the same. For example, an alteration of the general order of priorities would be justified where 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*⁷² 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. Further, there was no evidence that the mortgagor was liquidated or subjected 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 in order 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.

VI THE HCAJA IN THE CONTEXT OF CROSS-BORDER INSOLVENCIES

The UNCITRAL Model Law on Cross-Border Insolvency has recently come into force in Singapore (the Model Law).⁷³ Broadly speaking, 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. Likewise, 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 new Section 211B of the Companies Act in relation to Schemes of Arrangement might result in some tension with the HCAJA. Section 211B imposes an automatic moratorium period of 30 days from the application date whereas previously it was

⁷² *The 'Posidon' and another matter* [2017] SGHC 138.

⁷³ Tenth Schedule of the Companies Act.

discretionary. How the automatic moratorium provisions can be reconciled with the rights of *in rem* claimants remains to be seen. It appears that *in rem* actions may fall outside the purview of the moratorium under Section 211B(c) of the Companies Act, which refers only to 'the commencement or continuation of any proceedings . . . against the company' and not against the vessel itself.⁷⁴ Likewise, the moratorium under Section 211B(d) of the Companies Act applies only to the 'execution, distress or other legal process against any property of the company'. While 'any property of the company' could presumably cover a vessel owned by the debtor company, an argument can be made that the phrase 'other legal process' refers only to legal processes similar to execution and distress, which does not include an *in rem* action.⁷⁵ It has been held, in the case of *The Daien Maru No. 18*,⁷⁶ that an arrest and sale of a vessel cannot be classified as an execution process. Earlier cases, such as *Lim Bok Lai v. Selco (Singapore) Pte Ltd*,⁷⁷ dealt with a situation in which a company was in liquidation. Although it is arguable that the same principles would extend to a situation in which a company was under a judicial management order, the same is unlikely to apply in the case of a scheme of arrangement.

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', which include 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 ISPS Code was introduced and adopted by amendments to SOLAS; it entered into force on 1 July 2004. The ISPS Code was implemented by using the wide powers of the MPA given under the Maritime and Port Authority Act and the Merchant Shipping Act to give effect to the provisions of any international conventions in relation to shipping to which Singapore is a party.

ii Port state control

The MPA is the government agency responsible for implementing all IMO conventions. The MPA was established by the Maritime and Port Authority of Singapore Act in 1996.

Singapore is a founding member of the Tokyo MOU, which is a regional port state control organisation consisting of 20 members in the Asia-Pacific region.⁷⁸

The MPA performs all regulatory and administrative functions in respect of merchant shipping, marine and port, including port state control inspections. The MPA is responsible for, *inter alia*, port state control to ensure that ships leaving the port meet the international safety, security and pollution prevention standards. Inspections are carried out by port state

74 <https://www.supremecourt.gov.sg/Data/Editor/Documents/Speech%20at%20Maritime%20Law%20Conference%202017%20.pdf>.

75 Ibid.

76 [1983-1984] SLR(R) 787.

77 [1987] SLR(R) 466.

78 <http://www.tokyo-mou.org/>.

control and ships that do not meet the requisite international standards may be detained. Between April 2017 and February 2018, 10 ships were detained by the MPA for various deficiencies and non-conformities.⁷⁹

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.⁸⁰ It is currently ranked in the top 10 registries in the world in terms of registered tonnage, with more than 4,700 registered vessels, totalling in excess of 88 million gross tonnage. It also has one of the youngest fleets.⁸¹

The Singapore Registry of Ships is administered by the MPA. Eight internationally recognised classification societies⁸² 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. The conditions for registration are relatively straightforward:

- a* Vessels that are more than 17 years old will generally not be considered for registration; see Section 8 of the Merchant Shipping (Registration of Ships) Regulations 1996.
- b* The registered owner must be a Singapore citizen or permanent resident or a Singapore incorporated company, which can be either locally or foreign owned.
- c* For any foreign-owned company (defined as a company incorporated in Singapore with more than 50 per cent of the equity owned by foreign interests), the company is required to have a minimum paid-up capital of S\$50,000. The vessel must be self-propelled and have a gross tonnage of at least 1,600. The minimum paid-up capital and tonnage requirements may be waived at the discretion of the Registry.⁸³

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 from the vessels involved. Having the necessary legislation and administrative bodies to deal with any environmental impact is vital.

79 http://www.tokyo-mou.org/inspections_detentions/detention_list.php.

80 <https://www.mpa.gov.sg/web/portal/home/singapore-registry-of-ships/about-srs-and-what-new/benefits-or-srs>.

81 <https://www.mpa.gov.sg/web/portal/home/singapore-registry-of-ships/about-srs-and-what-new>.

82 <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 GL, Korean Register of Shipping, Lloyd's Register of Shipping, Nippon Kaiji Kyokai and Registro Italiano Navale.

83 <https://www.mpa.gov.sg/web/wcm/connect/www/c7290236-12d8-4a2e-b396-552ebca1fc50/english-version.pdf?MOD=AJPERES>.

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 Oil Pollution Fund Convention;
- d* the Bunker Convention;
- e* the OPRC Convention; and
- f* the 2004 Convention for the Control and Management of Ships' Ballast Water and Sediments.

These international conventions are given effect by domestic legislation:

- a* the Prevention of Pollution of the Sea Act, as amended, gives effect to the International Convention for the Prevention of Pollution from Ships 1973, the Protocol of 1978 (MARPOL) and the Ballast Water Convention,⁸⁴ and to other international agreements relating to the prevention, reduction and control of pollution of the sea and pollution from ships;
- b* the Merchant Shipping (Civil Liability and Compensation for Oil Pollution) Act gives effect to the CLC Convention and the Oil Pollution Fund Convention; and
- c* the Merchant Shipping (Civil Liability and Compensation for Bunker Oil Pollution) Act 2008 covers the liability of ships that cause bunker oil pollution in Singapore. This Act gives effect to the Bunker Convention.

The MPA coordinates operations for cleaning up spills, and monitors and enforces measures to prevent oil pollution in Singapore waters. Under the Prevention of Pollution of the Sea Act, the MPA is empowered to take preventive measures to prevent pollution, including denying entry or detaining ships.

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).⁸⁵

In the recent decision of *The 'Dream Star'*,⁸⁶ which is the first written judgment by the Singapore courts involving a collision between two vessels since 1979, the Singapore High

⁸⁴ 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.

⁸⁵ See *The 'Orinoco Star'* [2014] SGHCR 19 at [11] and [24].

⁸⁶ [2017] SGHC 220.

Court had occasion to consider 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 vessels 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*, i.e., 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 reduce speed in breach of Rules 6 and 8 of the COLREGs (which required 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.

In the recent Singapore High Court case of *The 'Tian E Zuo'*,⁸⁷ 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.

In the early hours of 12 June 2014, the area was experiencing strong winds. Resultantly, *Tian E Zuo* started to drag her port anchor and collided with *DL Navig8*. *Tian E Zuo* was unable to move unilaterally as its mooring lines and anchor chains had become entangled (or there was fear of entanglement) with *DL Navig8* and a bunker barge *Marine Liberty*. Despite *Tian E Zuo*'s port anchor and starboard anchor being in the water, the three vessels continued to drift together towards *Arctic Bridge*. Noticing the three vessels drawing closer to *Arctic Bridge*, the master of *Arctic Bridge* was forced to move from her anchored position, dredging three shackles of its port anchor cable in the water. However, *Arctic Bridge* was unable to clear another anchored vessel in her attempt to move away, and instead passed the bow of *Tian E Zuo*, and her anchor chains entangled with that of *Tian E Zuo*. The entanglement resulted in *Tian E Zuo* being towed by *Arctic Bridge* for approximately 20 minutes. Subsequently, *Tian E Zuo* collided with the port quarter of *Stena Provence*, the impact of which caused the *Stena Provence* to turn to port towards *Arctic Bridge*. *Arctic Bridge* maintained her forward movement, towing *Tian E Zuo* along after the contact. After the first contact, *Tian E Zuo* reduced her engine speed before coming to a complete stop while still being dragged along by *Arctic Bridge* at full speed. Subsequently, *Arctic Bridge* towed her into a second collision with *Stena Provence*.

Belinda Ang J 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 in, *inter alia*, 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

87 [2018] SGHC 93.

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 for, *inter alia*, 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* thus resulting in the collision with *Stena Provence*.

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 Nairobi International Convention on the Removal of Wrecks (the Nairobi Convention) came into force in Singapore on 8 September 2017. The Nairobi Convention 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 Convention requires owners of all seagoing vessels over 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 will now be 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.

The MPA has general supervision over all wrecks in Singapore.

Part IX of the Maritime and Port Authority of Singapore Act empowers the MPA to require owners of any vessel or object sunk, stranded or abandoned within the port of Singapore or approaches thereto to remove or destroy the whole or any part of that vessel or object. If the MPA's directions are not complied with, it may take possession of the vessel or object, raise, remove or destroy the vessel or object, and recover its expenses from the proceeds of the sale of the vessel or object. If the proceeds of sale are insufficient to reimburse the MPA, the outstanding amount is a debt that may be recovered from the owners.

Part IX of the Merchant Shipping Act deals with wreck and salvage and provides that the MPA is empowered to appoint any person to be a receiver of a wreck. The appointed receiver has extensive powers to deal with any ship that is wrecked, stranded or in distress at any place on or near the coasts of Singapore or within Singapore territorial waters. The receiver of the wreck may take possession and raise, remove or destroy, and sell in such manner as it thinks fit, any ship so raised or removed and any other property recovered in the exercise of his or her powers.

Further salvage is payable for saving life and for any service rendered to any shipwrecked, stranded or in-distress vessel on or near the coasts of Singapore or in any tidal water within the limits of Singapore. If salvage is due in respect of services rendered in assisting any ship, or in saving life, cargo or apparel, the Merchant Shipping Act empowers the receiver of the wreck to detain the ship, cargo or apparel until payment is made for salvage or process is issued for the arrest or detention of the property by the High Court. The receiver of the wreck

is also empowered to sell the detained property if payment is not made within 20 days of the amount becoming due or within 20 days of a decision being reached by the High Court or the Court of Appeal, as the case may be.

vi Passengers' rights

Singapore is not a signatory to the Athens Convention or any of its protocols.

The LLMC Convention 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 the owners is 46,666 SDRs multiplied by the number of passengers that the ship is authorised to carry according to the ship's certificate, subject to a maximum limit of 25 million SDRs. On 14 January 2019, the Singapore Parliament passed the Merchant Shipping (Miscellaneous Amendments) Bill to implement the 1996 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 GRT and above is also required to carry and maintain a maritime labour certificate and a declaration of maritime labour compliance.

Port state control (PSC) extends to any ship in Singapore (not being a Singapore ship) engaged in commercial activities. Like most international conventions, certificates issued by the flag state administration are accepted as *prima facie* evidence of a ship's compliance with the requirements under the Convention. Similarly, under the MLC Act, port state inspections in Singapore will be limited to verifying that a valid maritime labour certificate and a valid declaration of maritime labour compliance are carried on board the ship.⁸⁸ This limitation, however, is fairly arbitrary as Section 58(4) of the MLC Act provides a significant list of situations in which the PSC surveyor is permitted to inspect beyond the certificates. In particular, detailed port state inspection will be carried out in the following situations, *inter alia*: (1) when the maritime labour certificate and the declaration of maritime labour compliance are not produced or are falsely maintained; or (2) there are clear grounds for believing that the living conditions on board the ship do not conform to the requirements of the MLC Act or the Convention, or the working and living conditions of the ship constitute a clear hazard to the safety, health or security of the seafarers.⁸⁹

The MLC Act implements the Convention requirements for the shipowner to have in place financial security to meet any liabilities that may arise from, *inter alia*, repatriation

88 Section 58(2) of the MLC Act.

89 See Section 58(4) of the MLC Act for further details.

of a seafarer, medical and other expenses incurred in connection with a seafarer's injury or sickness, and burial or cremation of a seafarer.⁹⁰ While neither the Convention 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.⁹¹ 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.

At the time of writing, there have been no known detentions in Singapore for non-conformity with the MLC. With the implementing legislation in place, there is no doubt Singapore will enforce the provisions of the MLC through, *inter alia*, port state control and flag state control.

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. The SIAC arbitrated 343 new cases in 2016 from parties in 56 jurisdictions.⁹² It is the preferred arbitral institution in Asia, and third out of the top five arbitral institutions in the world.⁹³ Similarly, since its re-establishment in 2009, the SCMA has enjoyed considerable success. In 2018, a record 56 references were registered at the SCMA. Compared with 2017's average case quantum of US\$1.46 million, the average in 2018 was US\$1.8 million. The total amount in dispute also rose from US\$53 million in 2017 to US\$88.7 million in 2018.⁹⁴ This trend is likely to continue as Singapore continues to grow in importance and in overall attractiveness to the maritime industry as a venue for arbitral dispute resolution and, indeed, the resolution of broader commercial disputes by litigation, with the establishment of the SICC.

As mentioned in Section III.ii, Singapore has passed legislation allowing for third-party funding in the leading global arbitration centres of London, New York and Geneva. This change to the laws helps Singapore to shore up its place in the top five most-preferred international arbitration centres in the world.

The legal framework has been enhanced to give the Singapore courts the power to grant interim remedies, specifically in support of international arbitrations. The High Court is empowered to order, where a ship or property is arrested in court proceedings in

90 Section 34 of the Merchant Shipping (Maritime Labour Convention) Act.

91 <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>.

92 www.siac.org.sg/.

93 <http://www.siac.org.sg/component/content/article/69-siac-news/568-siac-is-most-preferred-arbitral-institution-in-asia-and-3rd-in-the-world>.

94 <https://www.scma.org.sg/SiteFolders/scma/387/YIR/2017YearInReview.pdf>.

Singapore, that the arrested property be retained as security in answer to an award to be made in arbitration that is to be commenced or that is already under way in Singapore or elsewhere. Court proceedings can be stayed on the basis that provision of equivalent security is given in place of an arrested vessel for the satisfaction of any such award. With effect from January 2010, the High Court's powers to order interim measures in aid of arbitration in Singapore, or foreign arbitration, were enhanced by statutory amendment to the Singapore International Arbitration Act (IAA). The amendments allow the High Court, particularly in cases of urgency, or where an arbitral tribunal has no power or is unable for the time being to act effectively, to make orders or give directions to any party for, *inter alia*, the preservation, interim custody or sale of property that is the subject matter of the dispute, preservation of evidence, and other interim injunctive relief.

The Merchant Shipping (Miscellaneous Amendments) Bill, passed on 14 January 2019 to amend the Convention on the Limitation of Liability for Maritime Claims and the International Convention on Salvage 1989, when in force, will ensure that Singapore's limitation regime reflects the current value of life and property adopted by other countries that have acceded to the 1996 Protocol. This will promote the selection of Singapore law in commercial shipping contracts and attract claimants to Singapore's legal and dispute resolution facilities.

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 in order to continue to grow the maritime cluster and to capture new opportunities. The MPA will enhance and top up the Maritime Cluster Fund (MCF) by S\$100 million in support of its vision for maritime Singapore to be a 'global maritime hub for connectivity, innovation and talent'.⁹⁵

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 to 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 relating to bills of lading, cargo misdelivery claims and the exercise of admiralty jurisdiction.

95 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.

SPAIN

Anna Mestre, Andrés Candomeque and Carlos Górriz¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Spain has the largest coastline of countries in the European Union (8,000km)² and offers a strategic position in the communication between continents and seas, as it is located between the Atlantic Ocean and the Mediterranean Sea.

At 1 January 2018, the Spanish merchant fleet comprised 119 vessels with 2,301,681 GT and 1,860,148 DWT.³ In 2017 Spanish seaborne trade increased by 6.4 per cent. According to the Spanish Minister for Public Works and Transport over the past year more than 150,000 ships dedicated to maritime transportation docked at Spanish ports. Likewise, in recent years the Spanish ports have reached historic records in terms of freight traffic with more than 500 million tonnes (559,989,681 in 2018) and more than 32 million passengers transported. Over 2,500 people are working in the Spanish Maritime Administration.⁴

Most recently, the shipping industry has been assuming the stricter environmental regulations as its own challenge. In 2017, the Ballast Water Management Convention entered into force. In April 2018, the IMO agreed to reduce carbon dioxide emissions from ships to 50 per cent of 2008's levels by 2050.

With regard to the shipbuilding industry, the sector has overcome the crisis suffered over the past few years.⁵ In 2017, 35 new vessels worth a total of €813 million were ordered. This was an increase of 20 per cent in terms of number of new orders and a 30 per cent increase in terms of budget.

The private Spanish shipbuilding sector is mainly devoted to exports. It has an excellent international reputation thanks to its construction quality and tradition, and guarantees high standards in highly technologically sophisticated ships such as those that provide support to offshore oil rigs, oceanographic research vessels, factory ships, etc. Currently, Spain is the second largest shipbuilding country in the European Union, slightly behind Holland. Shipbuilding activity in Spain is concentrated in the industrial areas of Galicia, Asturias and the Basque Country.

1 Anna Mestre is the managing partner and founder of Mestre Abogados and Andrés Candomeque is a partner at the firm. Carlos Górriz is a professor at the UAB (Universitat Autònoma de Barcelona) and a consultant at Mestre Abogados.

2 Data produced by the Directorate-General for Merchant Shipping. See <https://www.fomento.gob.es/maritimo>.

3 https://www.anave.es/images/informes/marina_mercante/2018/MM2018_paraweb_in.pdf.

4 <https://www.fomento.gob.es>.

5 <http://pymar.com/es>.

Nonetheless, 2018 brought bad news for the Spanish shipbuilding sector, as the European Court of Justice held that the European Commission was right when asserting that the Spanish tax lease system represented illegal state aid (C-128/16 P, *European Commission v. Kingdom of Spain and Others*).⁶ The Spanish (corporate and value added) tax laws allowed maritime shipping companies to benefit from a 20 to 30 per cent price reduction when purchasing ships constructed by Spanish shipyards. The European Commission held that this system was contrary to Article 107.1 TFEU (decision of 17 July 2013) and ordered Spain to recover the unpaid taxes. The Spanish Kingdom, a financial enterprise and a shipyard company applied seeking the annulment of this decision. In a judgment of 17 December 2015, the General Court granted the appeal. Essentially it asserted that the Commission had not adequately identified the beneficiaries of the aid. By contrast, the Court of Justice of the European Union held that the Commission had correctly enforced the state aid prohibition. In its judgment of 25 July 2018 the Court considered that the Spanish tax lease system was selective, because it differentiated the operators: only some of them could benefit from a tax reduction when acquiring a ship from Spanish shipyards. The others were excluded.

Yachting also represents an important business sector in Spain. According to ANEN,⁷ in 2017 the yachting market increased by 9.4 per cent with 5,275 new registries, of which 1,570 were charter yachts. In fact, the charter market grew significantly in 2017, at a rate of 24.7 per cent. The recreation boats market continued to increase during 2018 but, according to ANEN, has slightly declined as at January 2019.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Spanish shipping law is mainly regulated by the Act 14/2014 of 24 July on Maritime Navigation (the Maritime Navigation Law or MNL), in force since 25 September 2014.⁸ It aims to uniformity, avoiding the past dual provisions that existed on matters ruled on differently by international conventions and domestic legislation. Hence, it normally refers to the former conventions and applies them to domestic cases too. In addition, the MNL provides content to the room that international treaties leave to the Member States.

The second main legal framework for shipping law in Spain is Royal Legislative Decree 2/2011 of 5 September, which approves the Consolidated Text of the State Ports and Merchant Marine Law (SPMML). It covers core public law issues. Other significant rules are Act 22/1988 of 28 July on Coasts – modified by Law 2/2013 of 29 May – and Royal Decree 1027/1989 of 28 July on Flagging Out and Ship Registration.

As a Member State, regulations and directives issued by the EU are applicable in Spain. Similarly, the case law of the Court of Justice of the European Union and its judgments condition the construction and enforcement of the domestic law.

6 Commission Decision No. 2014/200/EU of 17 July 2013 on the aid scheme SA.21233 C/11 (ex NN/11, ex CP 137/06) implemented by Spain – Tax scheme applicable to certain finance lease agreements also known as the ‘Spanish Tax Lease System’ (OJ 2014, L 114, p.1).

7 <http://www.anen.es>.

8 An English translation can be found at http://www.mjusticia.gob.es/cs/Satellite/Portal/1292427275074?blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadervalue1=attachment%3B+filename%3DAct_14_2014__dated_24th_july__on_Maritime_Navigation_.

III FORUM AND JURISDICTION

i Courts

As a general principle, the commercial courts are competent in (private) maritime issues. Nonetheless, the MNL has given competence to notaries public to deal with some maritime proceedings, such as proof of incidents, liquidation of general average, deposits and sale of cargo and luggage for payment of freight, loss, theft or destruction of the bills of lading, and sale of damaged cargo.⁹

Article 468 establishes that clauses of submission to a foreign jurisdiction or arbitration abroad are not valid if they have not been negotiated. The interpretation and application of this provision raises doubts, because it could be considered that it is contrary to EU law and, in particular, the case law of the European Court of Justice.

Foreign applicable law must be duly proved through an affidavit signed by two lawyers on its content and validity.

The MNL usually establishes a specific time bar for the issues it rules. The most frequent term is one year. For instance, one year is the term for actions arising from charter parties, towing contracts, nautical lease contracts or to demand contribution to a general average. Notwithstanding, Article 337 sets up a two-year term in relation to claims for damage, loss or delay under port handling contracts. Article 438 establishes the same term regarding insurance contracts.

Contractual time bar periods for actions where the Law does not provide for a specific time limit shall be of five years. For non-contractual actions, the general time bar is one year from the date on which actions could have been brought.

ii Arbitration and ADR

Arbitration and mediation are ruled by Act 60/2003 on Arbitration, modelled on the UNCITRAL Model Law 1985, and Act 5/2012 on Mediation in Civil and Commercial Matters. There is no specialty for maritime disputes. Mediation is not often used in Spain.

iii Enforcement of foreign judgments and arbitral awards

Regulation 1215/2012 shall be applied by courts of all Member States, including Denmark. One of its main novelties is that the *exequatur* procedure has been removed. Hence, the enforcement of a judicial decision of another Member State shall be immediate. To be considered authentic the requirements are a copy of the judgment that meets the requirements and a certificate of the court of origin stating that the judgment has executive force. Although the *exequatur* is no longer necessary, the interested party can apply for refusal of the judgment's recognition.

Secondly, the effectiveness of choice-of-court agreements does not depend on the parties' domicile. According to Article 25, the chosen court shall have jurisdiction, unless the agreement is null and void due to its substantive invalidity under the law of the Member State.

Thirdly, the European legislature wanted to bring an end to the 'Italian torpedo' abuse (a party to a dispute would bring an action in a Member State court, usually that had a reputation for being slow, in order to frustrate or delay the main procedure before the court

⁹ Title X of the Spanish MNL.

that had competence according to a jurisdiction agreement). Article 31.2 orders the courts different from the one agreed by the parties to stay the proceedings until the court seized on the basis of the agreement declares that it is not competent.

Unlike its predecessor, the Brussels I bis Regulation deals with *lis pendens* and *res judicata* in third states. Hence, courts of a Member State can bring the procedure to an end when a court of a third state has given a judgment relating the same action and it is capable of recognition and enforcement in the European Union.

Regarding the recognition and enforcement of foreign arbitral awards, Spain has ratified the New York Arbitration Convention 1958.

The time bar period for the recognition and enforcement of judgments and awards is five years.

IV SHIPPING CONTRACTS

i Shipbuilding

Shipbuilding contracts are ruled by Articles 108 to 116 of the MNL. These rules are voluntary, in the sense that they are only applied when the parties have not otherwise agreed. Nonetheless, an exception is established in case of wilful misconduct or gross negligence of the builder (Article 113.4).

According to Article 109, the contract must always be made in writing. In the event of discrepancy between the construction contract and the technical specifications, the former shall prevail over the latter, and the technical specifications over the blueprints.

Delivery of the vessel will transfer ownership and risk.

The MNL outlines the consequences of delay. Indemnities apply to delays over 30 days and a right to cancel the contract for delays over 180 days without a justified cause.

ii Contracts of carriage

Under the title of 'On charter parties' (Articles 203 to 286), the MNL rules the contract of carriage of goods by sea. It is a broad regulation that comprises essentially the time charter, the voyage charter and the carriage of specific merchandise in the bill of lading. Although the Spanish legislature focused on these three issues, Articles 203 to 286 can also be applied *mutatis mutandi* to bulk contracts, multimodal contracts, chartering a ship for purposes other than carriage of goods, and sea waybills.

Whereas the provisions on the carriage of goods are mainly dispositive, the liability regime is mandatory. Articles 277 to 285 shall be imperatively applied to the carrier's liability for loss, damage or delay. Nonetheless, Article 277.1(2) excludes charter parties, regarding exclusively the relationship between the owner and the charterer. Therefore, the legal liability regime in the case of charter parties is revocable, on condition that there is no wilful misconduct or gross negligence by the shipowner.

The MNL deals extensively with the duties of the shipowner (carrier) and the charterer, laytime and demurrages, maritime transport documents, the early termination of the contract and the liability for loss, damage or delay. For instance, there are specific rules on the seaworthiness of the ship, the empty charter, the freight for lost or damaged goods, guarantee letters and electronic bills of lading, and the liability of the carrier for delay.

The carrier has a lien on the goods to guarantee his or her right to remuneration. It includes the freight, delays and other expenses arising from the carriage, as well. Such right lasts while the carrier has the possession of the goods and 15 days thereafter. It allows the

carrier to withhold the goods until the amounts due are paid or to request their sale through a notary public. The Law distinguishes between the charterer and third parties. It does not allow the carrier to exercise the lien against a consignee other than the charterer unless the bill or lading or the consignment note establish that the freight is payable at destination (Articles 237 and 238).

Regarding the documents, the Law stresses that the bill of lading is a negotiable document of title. It may be in paper format or on an electronic medium. On the other hand, sea waybills are non-negotiable documents. While they serve as evidence of the delivery of the goods to the carrier, they are not securities. Article 267 orders the application of the rules on bills of lading to multimodal or combined transport documents.

iii Cargo claims

The Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 25 August 1924) and its Protocols govern the liability of the carrier regarding the loss, damage and delay when a bill of lading has been issued and transferred to a third party. Nonetheless, it is important to distinguish between international and domestic carriage. The Hague-Visby Rules apply directly to international operations, but only through the MNL when the transport takes place between Spanish ports (Article 277.2). The difference is relevant because the Spanish law has supplemented the Hague-Visby Rules. For instance, it sets out the liability for delay and establishes a limitation of two-and-a-half times the freight payable for the goods. Another difference is the nature of the time bar. Although both laws establish a one-year time bar, Spanish courts consider the Hague-Visby Rules as a limitation period. Hence, proceedings cannot be suspended and shall be assessed by the judge of his or her own motion. The MNL qualifies the period as prescriptive.

The MNL also has some rules regarding the identification of the carrier. If the bill of lading does not provide sufficient information, Article 249 presumes that it has been signed on behalf of the ship operator. Secondly, the contractual carrier and the effective carrier are joint and severally liable. Article 278 identifies the former with the carrier's intermediaries as well as the charterer of the ship and the latter with ship operators. Lastly, if the time or voyage charterer issues a bill of lading to third parties, he and the shipowner shall be jointly and severally liable for loss, damage or delay (Article 207).

The MNL allows the insurer that has paid compensation pursuant to the insurance policy to subrogate in the insured's rights and actions against the liable party (Article 437.5). Moreover, the damaged person may bring a direct action against the civil liability insurer (Article 465).

The consignee should give the carrier a written notice of loss, damage or delay. Regarding the first two facts, the consequence of the lack of notice is an *iuris tantum* presumption that the carrier has delivered the goods as described in the bill of lading. Although nothing is expressly said regarding the delay, the lack of notice prevents the claiming of compensation.

According to Articles 251 and 468 of the MNL, the jurisdiction and arbitration clauses do not bind the acquirer of the bill of lading, when he is not the shipper, unless he has accepted them individually and separately. However, the validity of this rule is uncertain, because it could be considered incompatible with EU law and with the CJEU's case law.

iv Limitation of liability

The Spanish legal regime on limitation of liability is based on the 1996 Protocol that amends the Convention on Limitation of Liability for Maritime Claims (London, 19 November 1976).

On the one hand, Spain has ratified it; on the other, the MNL refers to it and establishes some supplementary rules. In particular, it establishes the proceedings that should be followed to limit liability (Chapter IV of Title IX).

Title VII of the MNL may be applied to all kinds of judicial procedures. Nonetheless, shipping companies may prefer to invoke the application of other specific regimes, corresponding to a particular contract to use of the ship (i.e., the Athens Convention regarding the carriage of passengers) or due to other specific clauses.

It is worth noting that preference is given to maritime and port authorities, except over death or bodily injury credits. Shipping companies claiming the right of limitation before Spanish courts should constitute a limitation fund. Competence lies with the mercantile courts.

The 1992 Civil Liability Convention (1992 CLC), the 1992 Fund Convention (1992 Fund) and the International Convention on Civil Liability for Bunker Oil Pollution Damage of 2001 (2001 Bunker) are part of the Spanish legal system.

V REMEDIES

i Ship arrest

Ship arrest in Spain is governed by the International Convention on the Arrest of Ships (Geneva, 12 March 1999), Chapter II of Title IX of the MNL and Act 1/2000 of 7 January on Civil Procedure (the Civil Procedure Law). The Convention also applies to arrest of ships flying the flag of a state that is not party to it.

The claimant must file an application requesting the arrest of the ship, alleging the right or rights claimed and explaining the cause that gives rise to them, as well as a general power of attorney for litigation. The competence lies with the courts competent to hear the main claim, or the courts of the port where the vessel is located or where it is expected to arrive. The claimant must also offer a guarantee to respond to the damages, losses and costs that the request may arise. The court fixes the sum of the guarantee, but it shall be at least 15 per cent of the amount of the maritime credit alleged. It may review the quantity of its own motion.

The court issues the arrest order and notifies it to the harbour master of the port who, with the help of the maritime authorities, should adopt the necessary measures to detain the ship. When the Spanish courts are not competent to hear the substantive case, the arresting court will establish a term, between 30 and 90 days, for the claimant to prove the commencement of the substantive proceedings against the debtor. If such proof is not presented, the arresting court shall order the release of the ship or the cancellation of the provided guarantee.

ii Court orders for sale of a vessel

Forcible sale of ships in Spain is governed by the International Convention on Maritime Liens and Mortgages (Geneva, 6 May 1993), Chapter III of Title IX of the MNL and the Civil Procedure Law. It can be done through judicial or administrative proceedings.

As a general rule, the holder of the claim against the ship or the shipowner, declared as such by a final judgment or arbitral award, may request the sale of the vessel. Competence lies with the court with jurisdiction in the location of the vessel. The court will make a valuation of the vessel and request a certificate of liens and encumbrances, since creditors can attend the judicial sale and exercise their right of priority (third-party rights). In addition, the

competent court or the administrative authority will inform about the sale to the authorities of the registries related with the vessel, to the owner of the ship and to the holders of registered mortgages or encumbrances.

The ship will be sold through public auction to the highest bidder or through a specialised company. As a general rule, the mortgages and encumbrances registered shall be considered cancelled. The sales outcome will first be used to pay the procedural costs and expenses arising from the judicial or administrative proceedings. The remainder will be distributed among creditors according to the Maritime Liens and Mortgages Convention. If any amount is left, it shall be delivered to the owner.

VI REGULATION

i Safety

The Spanish rules on maritime safety are a heterogeneous and dispersed set of laws that have different scope, legal force and come from different 'legislative' powers. First of all, Spain has ratified the United Nations Convention on the Law of the Sea, some of whose articles deal with maritime safety, and the Convention for the Safety of Life at Sea (SOLAS Convention) and its Protocols.

Secondly, the EU has also passed several laws on maritime safety. Due essentially to the accidents of *Erika* and *Prestige*, the Single European Act included provisions regarding maritime and air transport in order to protect the environment.

With the aim of protecting the environment, Spain has approved some laws that transpose and supplement the European directives:

- a* Royal Decree 877/2011 of 24 June on common rules and standards for ship inspection and survey organisations and for the corresponding activities of the Maritime Administration;
- b* Royal Decree 210/2004 of 6 February establishing a monitoring and information system on maritime traffic; and
- c* Royal Decree 1617/2007 of 7 December on measures for the improvement of the protection of ports and maritime transport.

ii Port state control

The competence to control ships' security lies with the Subdirectorate General for Maritime Security, Pollution and Inspection, integrated in the Directorate General for Merchant Shipping that depends on the Ministry of Development. There are two main laws. The first is the Regulation on inspection and certification of civil ships (Royal Decree 1837/2000). It establishes the legal framework of ship inspection and surveys, and is essentially for Spanish ships. Its purpose is to control the fulfilment of the security requirements of international conventions (i.e., SOLAS, MARPOL, STCW/95 and the ILO Convention). It covers the vessel's whole life, from the construction process until scrapping or sinking.

The second key law is Royal Decree 1737/2010. It applies to foreign ships that navigate in Spanish waters. Its aim is to substantially reduce the number of vessels that breach safety and security rules. Spain undertakes to inspect all the vessels that have been assigned priority level I and, on an annual basis, the number of ships, assigned priority levels I and II, that have been assigned to its area according to Paris MoU. All vessels that arrive at a Spanish port will be assigned a risk profile. The Ministry of Development will establish the vessels that will be inspected according to the risk profile. If the inspection reveals serious deficiencies

of the vessel, the Maritime Authority will ordain its immobilisation or the detention of the operations. This situation will remain until the deficiencies have been addressed. Nonetheless, the decision may be appealed before the Directorate General for Merchant Shipping.

During the first two months of 2019, six foreign ships were detained in Spain. Three were general cargo, one was a container, another a high-speed passenger craft and the last was a chemical tanker. During 2018 the total number of detained ships was 31.¹⁰

Two other relevant laws on this issue are the Regulation relating maritime radiocommunications on board Spanish civil ships (Royal Decree 1185/2006) and Royal Decree 877/2011 of 24 June on common rules and standards for ship inspection and survey organisations and for the corresponding activities of the Maritime Administration.

iii Registration and classification

It is often said that Spain operates a double registration system: the Vessels Section of the Movable Goods Register and the Ships and Shipping Companies Register. Nonetheless, there is a third registry that is very important in practical terms: the Special Registry for Ships and Naval Companies, located in the Canary Islands.¹¹

The Vessels Section of the Movable Goods Register is a private law register. It depends on the Ministry of Justice. Its aim is to provide legal certainty to individuals' relationships regarding ships. The purpose is the registration of the ship's property and rights *in rem*, encumbrances, judicial and administrative seizure, lease contracts and other situations that are legally determined. As a general rule, registration is mandatory for ships that fly the Spanish flag.

The Ships and Shipping Companies Register has an administrative nature. It consists of a central register, located in the Directorate General for Merchant Shipping, and peripheral registers, placed in the Maritime Authorities. Its aim is to allow Spain to fulfil the duty to control the vessel's fleet for the purpose of ensuring maritime security (Article 94.3 of the Law of the Sea Convention). Hence, the key data of the ships and their modifications should be registered, along with data related to the ownership and rights *in rem*. Regarding shipping companies, all legal persons that operate a merchant ship should register. In both cases, the registration is compulsory. Moreover, it is necessary for the vessel to fly the Spanish flag.

Theoretically, the Vessels Section of the Movable Goods Register and the Ships and Shipping Companies Register are coordinated (Article 66 MNL).

The Canary Islands Special Registry is an instrument to fight against flags of convenience and prevent the flight of national fleet to countries that have more lax labour and tax laws. It is administrative, optional and secondary, as only the vessels and enterprises appearing in the Ships and Shipping Companies Register can register. In addition they must meet the requirements provided by the Additional Provision 16.4 of the Consolidated Text of the Spanish Harbours and Merchant Shipping Law. The ships registered in the Canary Islands Special Registry fly the Spanish flag and are subject to the Spanish jurisdiction and the control of public administration, but they enjoy tax and employment benefits.

10 <https://www.fomento.gob.es/marina-mercante/inspeccion-maritima/buques-detenidos/buques-detenidos-en-puertos-espanoles-por-mou-de-paris>.

11 On 31 December 2017, 318 ships were registered, representing 2,418,249 gross tonnage. See The Special Registry of Ships and Shipping Companies of the Canary Islands, Ministerio de Fomento, 2018, page 16, available at https://www.fomento.gob.es/recursos_mfom/comodin/recursos/20180320guidelinesrebeca2018v1.pdf.

iv Environmental regulation

The Spanish marine environment regime is highly complex, because it includes a huge number of laws with different scope, legal force and origin. Spain is a member of the Law of the Sea Convention. Hence it has a duty to protect and preserve the marine environment (Article 192). To fulfil it, Spain has ratified several international conventions, some of which come from the IMO, including the International Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties (Brussels, 1969) and the International Convention on the control of Harmful Anti-fouling Systems on Ships (London, 2001).

Spain has also ratified MARPOL 73/78, whose aim is to prevent marine oil pollution. Following MARPOL, the Spanish legislature passed Royal Decree 1381/2002 of 20 December on port reception facilities for waste generated by ships and cargo residues. Other conventions ratified by Spain are 1992 CLC, 1992 Fund and 2001 Bunker. It is worth mentioning that the Spanish government approved Royal Decree 1892/2004, which establishes some enforcement rules regarding the first convention.

Protection of the environment is a main concern of the European Union too; especially after the *Erika* and *Prestige* disasters. Hence, the EU has undertaken several policies and approved some laws that are also part of the Spanish legal system. As a consequence, Spain has passed some laws in order to transpose directives or supplement EU legal rules, such as Act 41/2010 of 29 December on Protection of the Marine Environment. It incorporates Directive 2008/56/EC into domestic law, and it has become the general framework for marine environment planning.

Regarding the Spanish domestic laws, the MNL devotes Chapter V of Title VI to civil liability for pollution. Articles 384 to 391 rule civil liability for all kinds of maritime pollution. They have a subsidiary nature, as international conventions have primacy. The two main principles they follow are 'prevention at source' and 'the polluter pays'. It mandatorily imposes a civil liability insurance regarding pollution damage to the coast and navigable waters and it grants victims direct right of action against the insurer.

Concerning administrative liability, the State Ports and Merchant Navy Law and the Coastal Law typify and punish several polluting conducts. But pollution can also be a crime. The Spanish Criminal Code 1995 devotes to this subject Title XVI of Book II (i.e., Articles 325 to 337 *bis*).

Lastly, there are other general rules that deal with pollution and liability, such as the Consolidated Text of the Integrated Prevention and Control of Pollution (Legislative Royal Decree 1/2016 of 16 December) and Act 26/2007 of 23rd October on Environment Liability.

v Collisions, salvage and wrecks

Spain has a double regime regarding collisions and salvage. On the one hand, it has ratified the most important international conventions. On the other, the MNL devotes Chapters I and III of Title VI to these two 'navigation accidents'.

The Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels (Brussels, 1910), the International Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision (Brussels, 1952), and the Convention on the International Regulations for Preventing Collisions at Sea (London, 1972) are part of the Spanish legal system. Articles 339 to 346 of the MNL refer to and supplement them. Among other novelties, they have put an end to the doctrine established by a judgment of the Supreme Court from 17 January 1992. It held that the shipowner could not benefit from the limits of liability when the collision constituted a crime. Secondly, Spanish law clarifies the definition

of collision, as it applies it to cases where damage is caused due to an incorrect manoeuvre in navigation but without contact between ships. Thirdly, the provisions on collision do not apply to the parties bound by a charter party, passage or employment contract. The laws of these relations govern the liabilities of the parties. Lastly, when the ship operators of the collided vessels are to blame, they share joint and several liability regarding third parties.

Spain has signed the International Convention on Salvage (London, 1989) and its Protocols. Although the MNL has some provisions on this subject, they merely supplement the Convention. One of the main concerns of the Spanish legislature was to determine which assistances constitute salvage and give rise to bounty. Hence, the MNL devotes some rules to specify what is and what is not salvage.

The MNL grants the rescuer a withholding right upon the ship and the goods salvaged until the bounty is paid or a sufficient guarantee is constituted. Competence lies with the civil jurisdiction. Nonetheless, the parties can submit their dispute to an administrative maritime arbitration system. Although, theoretically, salvage is a private law issue, Article 367 gives competence to Maritime Authorities to intervene in salvage operations performed within the Spanish maritime areas when it is necessary to protect the safety of navigation, human life at sea and the environment. In this case, the rescuer can have a right to the bounty, but the sum shall be deposited directly at the Exchequer.

The MNL also rules shipwrecked and sunken goods (Articles 369 to 383). The removal and the recovery of ships or goods wrecks should be distinguished. The first appertains to public law. The MNL establishes some obligations on the owners and captains of vessels that have sunk or been wrecked in Spanish maritime areas, such as to inform to Administration, beaconing and preventing pollution. The recovery of wrecks belongs to the private law realm, except for state ships and goods. Although the general rule is that the owner maintains the property, in some cases the state has a right of appropriation.

The MNL has reduced the interventionism of the Spanish Administration, although it still grants an important role to the Navy in the case of the recovery of state ships that are sunk or wrecked. The current legal regime owes much to the *Nuestra Señora de las Mercedes* case. It was a Spanish frigate sunk by British Navy in 1804. In 2007 an American company found it and tried to recover it without mentioning that it was a state ship. The dispute was finally won by Spain. Lastly, Spain has also ratified the Convention on the Protection of the Underwater Cultural Heritage (2001).

vi Passengers' rights

Spain has ratified the International Convention relating to the Carriage of Passengers and their Luggage by Sea, done at Athens on 13 December 1973 (PYE/PAL) and its Protocols. It governs international and national contracts of carriage, as the MNL refers the regime of liability to it. Nonetheless, the Law does not just refer to PYE/PAL; it also contains some provisions regarding other issues of the relationship, such as the state of seaworthiness of the vessel, the interruption of the voyage, the lien on the luggage or the termination of the contract. It is worth highlighting that Article 300 orders the effective carrier to subscribe a liability insurance for death or bodily harm to the transported passengers. It also grants the victims a direct right of action against the insurer.

As a Member State of the European Union, Regulations 392/2009 and 1177/2010 apply in Spain too. The first one establishes the liability and insurance regimes regarding the carriage of passengers. It is essentially based on the PYE/PAL. As a consequence, the Spanish government approved Royal Decree 270/2013 of 19 April, which regulates the accreditation

certification of the carrier's civil liability insurance. Regulation 1177/2010 focuses on the rights of passengers. It forbids discrimination on grounds of nationality or disability; it establishes the consequences of cancellation or delay of the trip, and it imposes information duties on the carrier and the handling of complaints.

Passengers that have the status of consumer enjoy the protection of the Consolidated Text of the General Consumer and User Protection Act (Royal Legislative Decree 1/2007). Among other things, this Law governs package travel. Article 162 holds organisers and retailers liable for the correct compliance with obligations deriving from the contract (carriage, accommodation and other services not ancillary to them). It renders irrelevant whether the obligations had to be performed by organisers and retailers or by third parties.

vii Seafarers' rights

The Spanish seafarers' regime combines several different international and domestic laws. Spain has ratified most of the ILO Conventions that govern the criteria that seafarer should meet, for instance, the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW 78/95) and the International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel (STCW-F/95).

The most significant convention ratified in recent times is the Maritime Labour Convention 2006. As is well known, it establishes the minimum working and living standards for all seafarers. The instrument of ratification is dated 28 December 2009 and the Convention entered into force on 20 August 2013.

At national level, the two main laws are the Workers' Statute (Legislative Royal Decree 2/2015) and the MNL. The first one has a general scope and rules the relationship between workers and employers. Hence it governs the relationship between seafarers and shipowners. Nonetheless, there are other special legal rules in this field, some of which transpose European directives.

The MNL also applies to seafarers as Chapter III of Title III rules the crew. The aim is to coordinate the administrative and mercantile seafarers' provisions, because labour issues are governed by the Workers' Statute. Hence, Articles 156 to 164 establish the requirements that the seafarer should meet in order to be part of the crew. Articles 165 to 170 govern their qualifications and the control and inspection of Spanish ships on this topic. Lastly, Articles 171 to 187 deal with the master.

Finally, it is worth remembering that ships and shipping companies enrolled on the Canary Islands Registry enjoy a lighter labour legal regime, as they have some tax and employment benefits.

VII OUTLOOK

Originally, the Spanish legislature wanted a Maritime Navigation Code that contained all shipping law. During the legislative process, it decided not to repeal the State Ports and Merchant Navy Act at that time, but to merge it with the MNL in the future. Thus, final provision nine of the MNL authorises the government, within the term of three years, to consolidate into one Code these two laws and all the international conventions in the sphere of the Law of the Sea. However, four years have passed and no substantial changes are expected.

In recent years, the main modifications to Spanish maritime law have their origin in the European Union. It is likely that this will continue in the future. It will be interesting to see how Brexit will affect maritime law and international trade.

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 (Navigation Ordinance) and the Ordinance on Swiss Yachts Navigating on the High Seas (Yacht Ordinance).

Moreover, Switzerland is a signatory to numerous IMO conventions, which are imported into Swiss law and are therefore directly applicable to vessels flying the Swiss flag.

There are also specific pieces of legislation that apply to navigation on Swiss lakes and on the Rhine.

1 William Hold is a senior associate at HFW. The information in this chapter was accurate as at May 2018.

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

Swiss courts will, as a rule, recognise choice-of-law and jurisdiction clauses in contractual matters.

In the absence of a jurisdiction clause, the Swiss courts will determine whether they have jurisdiction under the standard civil procedure rules as far as contractual matters are concerned. In general, this means that the home court of the defendant has jurisdiction.

The civil courts in Basle have mandatory jurisdiction for all actions *in rem* with respect to a vessel entered 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. It does, however, 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, Bern, Geneva, Lausanne, Lugano, Neuchâtel and Zurich.

Arbitration proceedings with a seat in Switzerland are governed by the Private International Law Act, which grants arbitral tribunals a large degree of discretion and broad powers.

Appeals against arbitral awards must be brought directly to the highest court – the Federal Tribunal – within 30 days of receipt of the award or interim award.

The grounds under which an appeal may be brought are the following:

- a* if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;
- b* if the arbitral tribunal wrongly accepted or declined jurisdiction;

3 See, for example, ICC, *Dispute Resolution Bulletin* 2017.

- c* if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim;
- d* if the principle of equal treatment of the parties or the right of the parties to be heard was violated; and
- e* if the award is incompatible with public policy.

Interim awards can only be annulled on 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. The Federal Tribunal is, as a rule, extremely reluctant to allow appeals on grounds of public policy. Although no official statistics are available, the overall success rate of appeals against arbitral awards is understood to be lower than 10 per cent for all grounds combined.

Further, if none of the parties has its domicile, habitual residence or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, fully waive the right to appeal, or they may limit it to one or several of the grounds listed above. The insertion of a clause that disputes will be 'finally' heard by a given tribunal would most likely not be sufficiently explicit to achieve this result, so a more express renunciation of the right to appeal is necessary.

Mediation is also a well-accepted ADR mechanism in Switzerland. The Swiss Civil Procedure Code provides that a judge or parties may suspend proceedings in favour of a mediation attempt, and the Chambers of Commerce of Basle, Berne, Geneva, Lausanne, Lugano, Neuchâtel and Zurich also offer their services in commercial mediation based on the Swiss Rules of Commercial Mediation.

iii Enforcement of foreign judgments and arbitral awards

Arbitral awards are readily enforceable in Switzerland pursuant to the New York Convention.

Likewise, foreign commercial judgments issued in signatory states of the 2007 Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters (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 to civil judgments issued by courts in states that are not signatories of the Lugano Convention, the Swiss courts will recognise and register the judgment if the court that issued the judgment had jurisdiction to do so, if the judgment cannot be appealed under ordinary proceedings and if the recognition of the judgment does not conflict with Swiss public policy.

IV SHIPPING CONTRACTS

i Shipbuilding

No commercial seagoing vessels are built in Switzerland.

ii Contracts of carriage

Swiss-flagged vessels often perform contracts of carriage governed by the law of another country, usually English law.

The main Swiss legislation that deals with contracts of carriage is the Navigation Act, as supplemented by the general contract law rules found in the Swiss Code of Obligations. Swiss contract law, including the law relating to contracts of carriage, is derived from German contract law. Accordingly, in the presence of *lacunae*, the courts may consider the relevant position according to German case law as well as international commercial practice.

The relevant provisions are to be interpreted according to the Hague-Visby Rules and its various protocols, which have been imported into Swiss law. The Rotterdam Rules have been signed but have yet to be ratified.

During the time from reception of the cargo until its delivery, the freight carrier will be liable for the loss, complete or partial destruction or damaging of the goods and for any delay in the delivery unless it proves that neither the carrier nor the master, 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 legal basis the claim relies on, unless the damage was caused intentionally or through reckless carelessness.

The carrier will not be liable for the loss, destruction or damage of goods or delay if one of the following causes is proven:

- a* *force majeure*, accident, dangers or incidents on sea or other navigable waters;
- b* acts of war, riots and public disturbances;
- c* official measures such as sequestration, quarantine or other limitations;
- d* a strike, lock-out or other work impediment;
- e* the saving (successful or attempted) of life or property at sea or other justified deviation from the course of travel that does not constitute any violation of the contract of freight;
- f* acts or omissions of the shipper, consignee or owner of the goods, their agents or representatives;
- g* the shrinkage of volume or weight or other damage as a result of concealed defects of the goods;
- 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 defects 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 legal basis the claim relies on, to pay damages in excess of those stipulated in the Navigation Ordinance. These amounts are calculated according to a rate determined either for every unit or other transporting unit, or for each kilogram of gross weight of the lost or damaged goods, whichever amount is higher.

The carrier may not rely 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 start of the loading, and this value, which may be refuted by the charterer, has been entered in the bill of lading, or if maximum liability amounts have been agreed.

Any agreement in the bill of lading that has the direct or indirect purpose of excluding or of limiting the statutory liability of the carrier for the destruction or loss of, or damage to the goods, or of shifting the burden of proof for such liability will be unenforceable unless the agreement refers to the carrier's liability for the period of time before the loading of the goods and after their unloading.

In the event that a container, a pallet or a similar device is used to collect goods, every piece or transport unit mentioned in the bill of lading contained in or that is upon such a device shall be regarded as a separate piece or transport unit; in all other cases the whole device will be regarded as a piece or a transport unit.

The carrier and its auxiliary staff taken together may not be held liable for an amount in excess of the maximum amount for which the carrier alone would be liable.

Neither the carrier nor its auxiliaries may rely on the exemptions from and restrictions of liability if it is 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 only be liable for demurrage and other debts that accrued at the loadport if these debts are recorded in the bill of lading, or if the receiver otherwise found out about the claims.

The provisions of the York-Antwerp Rules apply to general average claims.

iii Cargo claims

See Section IV.iii 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 what the charter party terms are. Where 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 LLMC Convention 1976. Accordingly, liability may be limited for two types of claims: those for loss of life or personal injury and property claims. The limits under the LLMC Convention are based on the tonnage of the ship.

The second area of liability covered by the Navigation Act concerns ‘loss or damage due to hydrocarbons’. This is governed, as stipulated in Article 49, by the CLC Convention.

In the case of the limitation of liability under both the LLMC Convention and the CLC Convention, the fault on the part of the shipowner, operator, charterer or carrier that justifies the exclusion of the limitation of liability must be proven by the party that asserts the existence of 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 as well as the training of seafarers:

- a* the Load Lines Convention;
- b* SOLAS;
- c* the COLREGs;
- d* the Radio Regulations annexed to the International Communication Treaty of November 1982;
- e* MARPOL (with Annexes I to VI);
- f* the STCW Convention; and
- g* 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, it must have its registered office and the actual centre of its business activities located in Switzerland. Broadly, the majority of the entity's management must be domiciled or resident in Switzerland, and must be Swiss citizens.

There are additional requirements with 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.

⁴ There is, to our knowledge, no case law on the liability of classification societies 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.

Mortgages may be entered into the shipping register provided that certain requirements on the origin of the borrowed funds are satisfied. Moreover, the liens set out in the International Convention of 10 April 1926 on the unification of rules relating to liens and mortgages on seagoing vessels rank ahead of any liens entered into the Swiss 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 London Convention, the Bunker Convention, the 2001 Anti-Fouling Convention and 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 up to 20,000 Swiss francs.

iv Collisions, salvage and wrecks

In the event of a collision between two or more vessels, the provisions of the Brussels Collisions Convention determine the rights and obligations of each party. Switzerland is also a signatory of the 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 such costs in proportion to its respective shares against the persons who hold rights to the other valuables salvaged.

v Passengers' rights

The provisions of Articles 1 and Articles 3 to 21 of the Athens Convention apply to the liability of a carrier and its personnel in respect of passengers and their luggage.

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 does. 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.

TAIWAN

Daryl Lai and Jeff Gonzales Lee¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Taiwan has one of the best shipping locations in the world. It sits squarely between Hong Kong, China, Japan and Korea, and is at the gateway to the Far East along the ocean trade routes coming up from South East Asia, working into the Pacific and on to the Americas. Taiwan is home to Evergreen Lines, the fifth-largest container carrier worldwide with 187 owned and chartered vessels and a combined capacity of 989,529 twenty-foot equivalent units (TEUs). Other operators include Yangming Lines, the eighth-largest container carrier with 100 vessels² and an operating capacity of 576,269 TEUs. Also worth noting is Wan Hai Lines, the 17th-largest carrier with 87 vessels and a capacity of 223,110 TEUs.

Taiwan has international commercial harbours at Taipei, Keelung, Kaohsiung, Hualien and Taichung, of which Kaohsiung is the busiest. It was the sixth-largest port in the world between 2003 and 2006 in terms of container handling, at 9.77 million TEUs. However, with the rise of the Chinese economy and the migration of Taiwanese manufacturers into mainland China, Kaohsiung's ranking dropped to 13th in 2015 – nevertheless, there was an increase in container throughput to 10.26 million TEUs. One of the possible reasons for Kaohsiung being able to maintain its container traffic is the opening of direct cross-strait shipping links with mainland China in 2008, which attracted transshipment opportunities from China.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Taiwan adopts the continental legal system, similar to that of PRC China. One of the distinct features is the codification of laws. Judges play an inquisitorial role in court; they investigate evidence and give directions to the parties on the degree, form, character or sufficiency of proof tendered. Legal actions start with very short pretrial proceedings – usually the writ and statement followed by defences. A trial date can be obtained in as little as six to eight weeks after the filing of the writ. Trials are broken up into various adjournments. They do not finish within a single contained setting, but over a long period of time. There is no separate admiralty court in Taiwan; all shipping matters are dealt with by the Civil Court. Court fees are approximately 1.1 per cent of the claim at district court level, payable by the plaintiff. Otherwise each party pays its own costs. There is no case law in Taiwan and all judgments are merely persuasive in nature. A district court judge need not follow a Supreme Court

1 Daryl Lai and Jeff Gonzales Lee are partners at JTJB-Taipei.

2 Source: Wikipedia – List of Container Shipping Companies by Ship Fleet.

judgment. Therefore, the doctrine of *stare decisis* is not adhered to. Exceptions to this would be on a list of precedent cases published by the Supreme Court at the end of each legal year. However, these are few in number and infrequent.

III FORUM AND JURISDICTION

i Courts

Taiwanese jurisdiction is established as long as one of the following criteria is satisfied:

- a* the defendant is a Taiwanese-registered company;
- b* there is actual proof that the defendant operates mainly in Taiwan;
- c* the defendant's assets are in Taiwan;
- d* the cause of the legal action happened in Taiwan (e.g., collision, contract for bunker);
- e* Taiwan is the place of torts;
- f* Taiwan is the place of salvage or the first port of call after salvage;
- g* the defendant submits to the jurisdiction of the Taiwan courts;
- h* all the co-defendants are jointly liable and one of them can be sued in Taiwan; or
- i* there is an established contract between the parties choosing Taiwan as the place of jurisdiction.

The arrest of a vessel establishes Taiwanese jurisdiction to hear the dispute concerning the arrest.

ii Arbitration and ADR

During litigation, either party is entitled to motion the court for a stay of proceedings pending arbitration in the event that there is a prior arbitration agreement between the parties. The Taiwan court will then order the plaintiff to submit his or her claim for arbitration within a specific time frame determined by the court, failing which the court is empowered to dismiss the original legal action.

Taiwan has no maritime arbitration procedures in place. Arbitration rules and proceedings are non-sector-specific in nature.

The Chinese Arbitration Association (CAA) is the leading arbitration centre in Taiwan. It acts according to the Taiwan Arbitration Act of 1998, which is modelled after the UNCITRAL Model Law of 1985 and applies its own Taipei Arbitration Rules to the tribunal proceedings. It is, however, extremely rare to find parties referring dispute resolution of a maritime nature in Taiwan to arbitration or to the CAA. The CAA's own statistics showed that there were seven international cases in a total of 109 for arbitration in 2011, and that shipping-related disputes took up 1.45 per cent of all arbitration cases heard by the association between 2000 and 2009.³ Apparently, the preference for arbitration forum over maritime matters still lies with more shipping-established foreign institutions, such as the London Maritime Arbitrators Association.

Arbitration tribunals in Taiwan have no authority to grant interim relief.

3 Source: Chinese Arbitration Association.

iii Enforcement of foreign arbitral awards

Taiwan is not a contracting state to the 1958 New York Convention. As a general rule, during the review of an application made for the recognition of a foreign award, the Taiwan courts will not consider the merits of the case but simply deal with the procedural aspects.

The Taiwan courts are inclined to approve the recognition of foreign awards unless one of the following three grounds for rejection under the Taiwan Arbitration Act has arisen:

- a* rejection by the court through its own discretionary powers;
- b* rejection through lack of mutual reciprocity; and
- c* rejection on grounds of procedure raised by the respondent.

There are records showing that arbitral awards from the United States, the United Kingdom, Hong Kong, South Korea, France and Switzerland are recognised in Taiwan. Awards from China are dealt with by the Regulations Governing Cross-Straits Relationship and will be recognised as long as they do not contravene public policy and the 'good morals' of Taiwan.

iv Enforcement of foreign judgments

There are two extremely important things to be aware of on the subject of the enforcement of foreign judgments in Taiwan. First, foreign judgments are not given immediate recognition and must be presented to a Taiwan court for approval. Under Article 4(1) of the Mandatory Enforcement Act, a trial must be held and judgment rendered before a foreign judgment can be acknowledged and recognised for enforcement. Second, it would be much more practical to simply sue a Taiwanese defendant in Taiwan rather than obtain a foreign judgment against him or her first and then have to go through a separate process of applying to the Taiwan courts for a full trial to have that foreign judgment recognised before it can be enforced.

Before a foreign judgment can be approved for enforcement, the following requirements must be met:

- a* the original foreign court has jurisdiction to judge the matter in its own country;
- b* the defendant has gone through due service process and was notified sufficiently of the action against him or her;
- c* the original judgment is not against public policy and the good morals of Taiwan; and
- d* there is reciprocity between the two countries.⁴

The limitation period for applying to recognise a foreign judgment is 15 years from the date the judgment becomes final and binding on both parties.

IV SHIPPING CONTRACTS

i Shipbuilding

Taiwan is renowned for its luxury yacht building industry. It is the sixth-largest manufacturer of yachts worldwide with annual revenues exceeding US\$250 million. It is the biggest producer in Asia of 80ft luxury yachts. Two Taiwanese companies are listed in the world's top 30 yacht builders. For larger ships, China Shipbuilding Corporation is the biggest builder of merchant vessels. It has built more than 670 vessels, including 8,500 TEU eco-friendly

⁴ Article 402 of the Taiwan Civil Code.

container ships, general cargo vessels, tankers and naval missile guided frigates. It has 22 ship types listed by the Royal Institute of Naval Architects as significant ships. It ranks 40th in the global merchant shipbuilding market.

Taiwan shipbuilders usually adopt the frequently used international forms, such as the Norwegian Form or the SAJ Form, as the basis for contracts. Even for smaller shipbuilders, a choice of foreign law and jurisdiction is common to facilitate the sale to and building for the international market. However, if Taiwan law applies, the shipbuilding contract will be viewed as a common agreement to sell a future product and, hence, provisions in the Taiwan Civil Code regarding description, quality and purpose will govern. Also, there is a special provision under the Taiwan Maritime Code entitling the buyer to take possession and continue with the work at the yard in the event of the builder being declared insolvent. This is on the proviso that the liquidator has refused to proceed with construction work and the buyer is willing to pay the assessed value of the ship minus any monies already paid by him or her.

ii Contracts of carriage

Taiwan is not a signatory to the Hague Rules, Hamburg Rules, Hague-Visby Rules or any UN conventions for the International Carriage of Goods by Sea. Domestic laws to govern ocean transportation are founded in the Taiwan Maritime Code and the Taiwan Civil Code.

Taiwan law provides that a contract for the carriage of goods by sea shall be made in writing and contain the names and a description of the parties, cargoes and the vessel employed. A contract for the carriage of cargoes cannot be affected by a transfer in the ownership of the indicated vessel. If the vessel is defective to the extent that it is unable to perform carriage, the shipper is entitled to rescind the contract.

The duties of the shipper, according to Taiwanese law, are primarily to pay freight and to guarantee the accuracy of the information provided to the carrier with regard to the cargo for the issuance of the bills of lading. Article 55 of the Taiwan Maritime Code states that the shipper shall be liable for all loss and damage arising from any misstatement it has made. The carrier, however, will not be able to rely on the shipper's wrongdoings as a defence against a third-party bill of lading holder, other than any liability incurred by the shipper.

The duties of the carrier are to perform carriage and exercise due diligence at the beginning of the voyage to make the ship seaworthy, properly man, equip and supply the vessel, and to ensure that the holds and all parts of the ship are fit and safe for the reception, carriage and preservation of the goods.⁵ Taiwanese law states that the burden of proof is on the carrier seeking to discharge its duties, as aforementioned.

Parts of the Taiwan Maritime Code relating directly to the entitlements of the carrier reflect the provisions of the Hague-Visby Rules. For example, the defences afforded to a carrier in Article 69 of the Taiwan Maritime Code that include error of navigation, act of God and insufficiency of packing defence were taken from Articles 4(2)(a), (b), (c), (e), (g), (i), (m) and (o) of the Hague-Visby Rules 1968.

Upon arrival of the goods at the destination, the carrier is obliged to despatch immediate notification to the notify party or the consignee. Should the situation arise that nobody is available to take delivery of the cargo, Article 51 of the Taiwan Maritime Code provides that the carrier or master may store the goods in a warehouse at the expense of the consignee and

5 Article 62 of the Taiwan Maritime Code.

notify him or her. If the consignee is unknown or refuses to take delivery, the carrier may petition the court for permission to effect an auction and sale. The carrier is then allowed to deduct its freight and expenses from the proceeds of sale.

Cabotage is prohibited in Taiwan according to Article 4 of the Transportation Industry Act.

Maritime liens are recognised differently under Taiwanese law and are treated as rights of priority for payment against assets in the event of liquidation. This is because there are no *in rem* actions under the Taiwanese system and therefore a person, for example, will not be able to sue a vessel as the wrongdoer.

The objects of a maritime lien include the vessel and all her machinery and equipment, freight earned on a voyage when the lien occurred, compensation owed to a ship owner for loss or damage to the vessel, indemnities due for general average and a salvage reward. The following is the order of priority of maritime liens recognised by Taiwan law:⁶

- a* wages due to the master and crew of the vessel;
- b* claims against the vessel in respect of loss of life or personal injury in relation to the operation of the vessel;
- c* rewards for salvage, expenses for wreck removal, and ship's contribution for general average;
- d* claims based on torts against the shipowner in relation to the operation of the vessel; and
- e* harbour charges, canal and waterway dues, and pilotage expenses.

These liens rank above the costs incurred for ship construction or repair. Ship mortgages rank last.

There is a one-year limitation period on maritime liens starting from the day they arise.

As for multimodal bills of lading, where Taiwanese law applies, the Taiwan Maritime Code⁷ governs all claims arising from the leg of the journey involving carriage by sea. The Taiwan courts will usually apply the provisions in the Taiwan Civil Code to deal with claims arising from inland transportation of goods, which carry no package liability limitation.

iii Cargo claims

Taiwan law is uncertain with regard to the treatment and recognition of terms found on the reverse side of bills of lading. Traditionally, the Taiwan courts view such terms as something unilaterally put across by one party to the other without prior or mutual agreement and therefore should not be regarded as binding. An analogy would be a contract that contains the signature of only one party. In 1978, the Civil Branch of the Taiwan Supreme Court issued its 4th Meeting Resolution that confirmed this train of thought. The effect is that most terms contained on the reverse side of the bill are viewed as being invalid.⁸ The scenario in 2017 is that there are some judges on the Taiwanese Civil Bench who had demonstrated their willingness to take a more modern approach and follow international trends and standards when dealing with these issues. There are, therefore, various judgments from all tiers of the

6 Article 24 of the Taiwan Maritime Code.

7 Article 75 of the Taiwan Maritime Code.

8 Examples of known cases rejecting the validity of the reverse B/L clauses include Supreme Court Judges' Conference on Precedent Cases 1978, Supreme Court Case No. 2362 of 1991, High Court Maritime Case No. 3 of 2003, and High Court Insurance Case No. 16 of 2004.

Taiwan courts showing a complete difference in views as to whether printed clauses on the reverse side of a bill of lading should be binding or not.⁹ The uncertainty has far-reaching effects because it touches on issues relating to the recognition of clauses paramount, demise clauses, law and jurisdiction clauses, and the like.

There is, however, a trend for the courts to reject the application of demise clauses. The clear reason is that the courts see this as unfair to third-party consignees seeking remedy for damages and that the question of the identity of a carrier of a bill should not be decided merely by looking at the inclusion of a printed clause on the reverse side of that bill but by considering all apparent and circumstantial evidence available, including the title of the bill, whether it was signed 'for and on behalf of the master' or 'as agents', and the identity of the party freight was paid to, among other things.

The Taiwan courts commonly reject the validity of foreign law and jurisdiction clauses using the reverse side of the bill as grounds. If a foreign law clause is rejected, the courts will apply Taiwanese law in its place. The courts will then decide whether Taiwan has jurisdiction by considering the issues discussed in Section III.i.

iv Limitation of liability

Shipowners will be able to limit their liability as long as it relates to the following:¹⁰

- a* claims for loss or damages relating to the salvage or operation of a vessel;
- b* claims resulting from the infringement of rights other than contractual claims relating to the salvage or operation of a ship;
- c* claims in connection with wreck removal, not including claims relating to a reward or payment made under a contractual obligation; or
- d* claims for measures taken to avert or minimise the liabilities in points (*b*) and (*c*).

The definition of 'shipowners' for the purposes of this limitation includes legal owners, charterers, managers and operators of a vessel. There is no differentiation in the meaning of charterers, and time or voyage charterers may fall within the ambit as long as they are operators and have control over the crew and vessel.

Consideration for the liability limitation process was based on a comparison of the regimes set out in the 1957 Convention on Limitation of Shipowners' Liability and the 1976 Convention on Limitation of Liability for Maritime Claims. Article 22 of the Taiwan Maritime Code in whole states that the principle calculation would be that a shipowner's liability is restricted to the value of the ship, its freight and all other ancillary charges from the last voyage. 'Last voyage' means the previous port-to-port voyage undertaken by the vessel, and 'ancillary charges' covers any compensation payable to the vessel for loss or damages, not including payouts from insurance policies.

The shipowner's principle liability will not be more than the maximum value of the ship. However, where this value is lower than the calculations set out below, the owner is liable to pay the difference:

- a* 54 special drawing rights (SDRs) for each tonne of the ship's gross tonnage (GT) for claims in respect of loss or damage to property;

9 Examples of known cases upholding the validity of the reverse B/L cases are High Court Maritime Case No. 6 of 2002, High Court Insurance Case No. 44 of 2004, Supreme Court Case No. 2304 of 2004, High Court Insurance Case No. 48 of 2005, and High Court Insurance Case No. 102 of 2005.

10 Article 21 of the Taiwan Maritime Code.

- b* 162 SDRs for each tonne of the ship's GT for claims in respect of loss of life or injury; and
- c* in the event that there are both property and personal injury claims, 162 SDRs per tonne of the ship's GT, of which the first 108 SDRs go towards the payment of personal injury or death claims, and where this is insufficient to cover all injury or death claims, such claims will rank *pari passu* with the property claims against the remaining compensation for property damage.

Limitation of shipowners' liability under Taiwanese law does not extend to the following:¹¹

- a* obligations or liabilities arising out of faults that are intentional or as a result of the wilful acts of the shipowner, obligations or liabilities owed to the master and crew of a vessel;
- b* rewards for salvage or a contribution to general average, damages arising from toxic chemicals carried on a ship or oil pollution;¹²
- c* damages arising from incidents caused by nuclear substances or waste matter carried by vessels; and
- d* claims for nuclear damage caused by nuclear-powered vessels.

Finally, note that there are no facilities for the filing of a limitation fund to the courts under Taiwanese law or the local legal system.

V REMEDIES

i Ship arrest

Ship arrests in Taiwan are similar to *Mareva* injunctions. They are based on an action *in personam* against a creditor for debts owed. Arrest of sister ships is not allowed.

The procedures involved are complicated but, simply put, they principally involve convincing the court to issue a conditional order for the arrest based on a *prima facie* case, filing the security amount set by the court, and getting a judge to physically perform the arrest of the vessel. The security amount ordered by the court is usually one-third of the amount of the claim. The courts do not accept Club letters of undertaking. Cash is the best option. However, it takes time for applicants to arrange and transfer funds into Taiwan. Shipowners are able to apply for the release of a vessel by filing a counter-security with the court. This will usually be set at three times the amount of the security filed earlier by the arrest applicant. The Taiwan legal system does not permit the filing of a *caveat* against ship arrest as a precautionary measure.

There are uncertainties as to whether bunker suppliers can arrest vessels where there is privity of contract with shipowners. Recent non-binding case law, however, seems to indicate that Taiwan judges are willing to allow the arrest as long as the claim is based on a maritime lien recognised under the flag of the vessel.¹³

11 Article 22 of the Taiwan Maritime Code.

12 This would form part of the regime covering non-limitation of liability on oil pollution incidents.

13 Article 10(v) of the Taiwan Conflict of Laws Act, Taipei District Court Maritime Case No. 11 of 1996, and Taiwan Appeals Case No. 609 of 2011.

ii Court orders for sale of a vessel

Upon acquiring a final judgment from the court, applicants for an order for auction and sale of a vessel will need to pay an execution fee of 0.8 per cent of the judgment amount. The vessel is auctioned on an 'as if, where is' basis and there are no guarantees to bidders for the ship to be 'free of encumbrances'.

VI REGULATION

i Safety

Taiwan has not implemented any of the international conventions on safety of ships into its domestic law. The local regime on safety relies heavily on port state control to enforce standards that follow the international conventions. Rights of vessel detention are available in the event of non-compliance. The Taiwan Law of Ships Act, which deals with classification surveys and the certification of ships' nationality, tonnage and load lines, also touches on safety issues in that it imposes a duty on Taiwan-flagged vessels to undergo periodical classification surveys and inspections to ensure the safety of the hull, stability and equipment. Taiwan-flagged vessels are prohibited from sailing otherwise. Foreign vessels calling at a Taiwan port must also possess valid classification certificates issued in accordance with international conventions. The relevant port authority will have a right to detain a vessel where this is lacking.¹⁴ Other than that, the Taiwan Pilotage Act establishes compulsory pilotage on all foreign vessels sailing into harbour that are more than 500 GT¹⁵ to ensure safety of navigation when approaching a berth. Note that under Taiwan law, a pilot is considered an employee of the shipowner for the leg of the voyage into harbour covered by compulsory pilotage.¹⁶ A shipowner, therefore, can be held liable for the acts of the pilot deemed to have been hired by him or her.¹⁷ The Commercial Harbours Act further touches on the safety of navigation within a commercial port by providing that ships must comply with the rules on the prevention of collision, and that vessels must cruise at a reduced speed and cannot overtake while in a narrow navigation channel, which no doubt includes sailing along the traffic separation scheme.

ii Port state control

Taiwan is neither a member of the International Maritime Organization (IMO) nor a state party to the Tokyo MOU. The country is, however, well aware of the importance of a fundamentally strong port state control (PSC) system and acknowledges the need to guard against substandard ships calling into port and to protect its marine environment from such vessels. In 1998, the Taiwan Ministry of Transport and Communications contracted the Canadian Trade Office in Taipei to assist with the development of a PSC system in Taiwan. This was introduced and put in place in 2001 with the aim of covering ship safety, pollution prevention, shipboard living and working conditions.

Taiwan's present PSC system aims to meet all aspects of the requirements of the Tokyo MOU by requiring all foreign merchant vessels calling into port to comply with the relevant

14 Article 32 of the Taiwan Law of Ships Act.

15 Article 16 of the Taiwan Pilotage Act.

16 Taiwan Appeals Case No. 2476 of 1991.

17 Article 98 of the Taiwan Maritime Code.

convention standards. Each of the international ports (Taipei, Keelung, Kaohsiung, Taichung and Hualien) is staffed by a minimum of two PSC officers who are either licensed as a master mariner or chief engineer. PSC officers are authorised to board and conduct ship inspections.

The centrepiece of the PSC's authority comes from its power to delay or officially detain a vessel under the Taiwan Commercial Harbour Act.¹⁸ Compliance requirements are the same as those adopted under the Tokyo MOU, which include the Load Lines Convention, the Tonnage Convention, the COLREGs, the STCW Convention, MARPOL (73/78), ILO Convention No. 147 76/81,¹⁹ SOLAS as amended in 1978, 1988 and 2002, the Maritime Labour Convention 2006, and the Protocol of 1978 relating to SOLAS 1974. It is possible to challenge a PSC decision to detain a vessel but the appeals process is time-consuming and it is therefore more practical to satisfy the PSC's requirements in order for the vessel to depart expeditiously.

Statistics show that in 2003, when the first PSC was implemented in Taiwan, 140 foreign vessels were boarded for inspection, 74.3 per cent of which were found to have compliance deficiencies; 33.8 per cent of those vessels were detained. Three years later, 261 foreign vessels were boarded for inspection, 47.9 per cent of which were found to have compliance deficiencies; the detention rate was 48 per cent.²⁰ This is an indication of the increasing efficiency of the Taiwan's PSC system as PSC officials have become better trained and equipped to board, scrutinise and enforce standards on incoming vessels.

In 2014, Taiwan went as far as to voluntarily complete an IMO-compliant audit, despite not being a member state. The country was assessed on compliances relating to IMO conventions on safety, security and the environment. This was reported to be 'a proactive move by a non-IMO member state, believed to be a first'.²¹

iii Registration and classification

A ship can be registered under Taiwanese nationality as long as it is owned by a Taiwanese national or company. Owners are free to choose a port of registry within the country for these purposes. Once a vessel is registered under Taiwanese nationality, it is obliged to undergo periodical inspections and surveys. The China Corporation Register of Shipping (i.e., the CR Classification Society) has been commissioned to conduct these statutory inspections and surveys. Businesses operating in the coastal ports of Taiwan apparently prefer their vessels to acquire Taiwanese nationality because foreign-flagged vessels are only allowed to call at the international ports of Taipei, Keelung, Kaohsiung, Taichung and Hualien.

iv Environmental regulation

The Ocean Pollution Prevention Act (OPPA) is the main regime in Taiwan governing shipowners' responsibility for the prevention and cleaning up of oil pollution following an oil spill. The Environmental Protection Agency (EPA) is the governmental authority established and empowered by the OPPA to supervise and enforce this law. The EPA in turn is empowered under law to order shipowners to remedy or mitigate an oil pollution incident. If the shipowner fails to do so, the EPA may undertake its own clean-up or preventative

18 Article 60 of the Commercial Harbour Act.

19 Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147) of the International Labour Organization, which entered into force on 28 November 1981.

20 R H Chiu et al.: *Journal of Marine Science and Technology* Vol. 16, No. 3, pages 207 to 218 (2008).

21 Reported by Jack Gallagher in *The Maritime Executive*, 26 January 2015.

measures own and seek reimbursement from the shipowner for its costs and expenses.²² Harbour authorities are also given rights under the OPPA to detain or arrest a ship or its crew following an oil pollution incident, except where the shipowner provides the authorities with a satisfactory guarantee.²³ In the event that a shipowner has failed to follow the EPA's orders promptly, a daily penalty of between NT\$300,000 and NT\$1.5 million can be imposed in accordance with Article 49 of the OPPA – as demonstrated in the case of the *SAMHO BROTHER* in Administrative Supreme Court Case No. 802 of 2010.

A shipowner is defined under the OPPA to include a legal owner, lessee, agent or operator of a vessel. The OPPA requires the owner of a vessel to maintain liability insurance or provide a guarantee at the time of the spillage. This requirement covers tankers of more than 150 GT and all other ships exceeding 400 GT. Liability underwriters of a vessel can be sued directly under the OPPA.²⁴

Shipowners cannot limit their liability for oil pollution under Taiwanese law. Article 22 of the Maritime Code states clearly that the liability against claims for loss or damages arising from chemical or oil pollution cannot be restricted. Article 21 of the Maritime Code further supports this position by failing to list oil pollution as one of the permitted incidents where shipowners are allowed to seek to limit liability under Taiwan law. The claim for loss or damages relating to oil pollution is a claim based on torts. Restitution or pecuniary damages are permitted. Claimants will, however, need to show causation and proximity.

If the pollution occurs within the statutory boundaries of a harbour, the port authority is also empowered under the Commercial Harbours Act to order the master or owner of a vessel to mitigate or clean up the spill, failing which the port authority can elect to undertake its own responsive measures and subsequently claim reimbursement.²⁵ The port authority has a right to detain a vessel from leaving under Article 39 of the Act until all expenses are fully paid. Furthermore, the port authority can impose a fine of between NT\$300,000 and NT\$1.5 million for each instance if a shipowner fails to comply with orders to mitigate or clean up a spillage expeditiously.

v Collisions, salvage and wrecks

Collision

An action for damages accruing from a collision incident is seen in Taiwan as an action based on torts that would allow a claim for repair costs and loss of earnings. Judges sitting in the civil branch of the Taiwanese courts are not maritime experts, so a judge hearing a matter concerning collision will appoint the port authority that has jurisdiction over the incident to convene a special maritime casualty committee from a selected panel of port officials, scholars and experts to decide on liability and apportionment. The rules in the COLREGs are usually applied by such a committee. The findings of this committee will usually be highly persuasive before the judge, who will then decide the issue of *quantum*. The statutory limitation period for a claim of damages arising from a collision event is two years from the date of the incident.²⁶

22 Article 33 of the Ocean Pollution Prevention Act.

23 Article 35 of the Ocean Pollution Prevention Act.

24 Article 34 of the Ocean Pollution Prevention Act.

25 Article 39 of the Commercial Harbour Act.

26 Article 99 of the Taiwan Maritime Code.

Salvage

International salvage agreements containing a foreign law or jurisdiction clause, such as Lloyd's Open Form (LOF), are usually used by parties following a casualty incident so there is no issue on the salvage regime in Taiwan. In the event that Taiwan law applies, Article 103 of the Maritime Code states that the basis for a reward is no-cure-no-pay where a 'useful salvage service' has been provided and thus there is a claim to a 'reasonable salvage reward'. A salvor can claim all his or her incurred expenses if there is a possibility that he or she has through his or her actions prevented damage to the environment. This can be increased up to 200 per cent of the incurred expenses if it is proven that the salvor has indeed prevented damage to the environment. The statutory limitation period for the rights to claim for a salvage reward under Taiwan law is two years from the date of the salvage.²⁷

Wreckage

The Commercial Harbours Act governs situations concerning the sinking and wreckage of a vessel within the statutory boundaries of a commercial harbour in Taiwan. However, Article 53 of the Act extends coverage as far as the grounding, sinking or drifting of a vessel to an area 'outside' the port environs. Under the Act, the port authority is empowered to order the master or owner of a vessel to remove the wreck, failing which the port authority can elect to undertake its own responsive measures and subsequently claim reimbursement.²⁸ Alternatively, the port authority can choose to salvage or retrieve the wreck and have it auctioned to pay for all related expenses. The port authority has a right to request the tendering of a guarantee covering the removal costs and to detain a vessel from leaving under Article 53-2 of the Act until this guarantee has been submitted. Furthermore, the port authority can impose a fine of between NT\$100,000 and NT\$500,000 if a shipowner fails to comply with orders to remove a wreck expeditiously. Shipowners can seek to limit their liability concerning wreck removal operations under Article 21-1-3 of the Taiwan Maritime Code. The calculation of shipowners' recourse to liability limitation has already been discussed.

vi Passengers' rights

A passenger carrier is obliged to carry its passengers to the place of destination as indicated in the passenger ticket, failing which a claim for breach of contract and damages is allowed under Taiwanese law. Any clause printed on the ticket purporting to limit the liability of a passenger carrier will not be upheld by the Taiwanese courts unless it can be proven that there had been prior mutual consent between the parties, which is usually not the case. The passenger carrier is also required to procure insurance cover for its passengers; however, the sum insured is not specified by law. A passenger carrier must endeavour to carry its passengers to the port of destination to the best of its ability. In the event that this is not possible, the carrier must return passengers to the original port or allow them to alight at the nearest port.

On the other hand, a passenger is obliged to pay the full price of a ticket if he or she fails to board the vessel for the voyage. He or she will also be held responsible for the full price of the ticket if he or she decides not to complete the voyage. However, the passenger can choose to rescind the contract of carriage if a ship fails to start the voyage on the scheduled date.

27 Article 103 of the Taiwan Maritime Code.

28 Article 53 of the Commercial Harbour Act.

vii Seafarers' rights

Taiwan is not a party to the Maritime Labour Convention 2006 nor any conventions concerning seafarers. There is, however, a Seafarers' Act that governs the employment of Taiwanese personnel on board Taiwan-flagged vessels, which deals with a myriad of issues concerning the master and crew, including hiring contracts, welfare, conduct, remuneration, termination, working conditions, safety and retirement.

Under the Seafarers' Act, the qualifications of seafarers must comply with the standards set in the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers. Employers must provide seafarers with adequate and suitable food, quarters, bedding, medical supplies and protective work gear. The employer must enter into a written contract of employment with the seafarer. This contract must follow a standard set of terms provided by the Taiwan Ministry of Transport and Communications to ensure fairness to the employee. The minimum standard on wages, shore pay and overtime pay is also set by this Ministry. Seafarers must be given one day's rest in every seven, and 30 days of annual leave upon completion of one year of service. The surviving family of a deceased seafarer who dies while performing his or her duties is entitled to receive a lump sum equivalent to 40 times the seafarer's average monthly wage.

Taiwanese seafarers must be members of the National Chinese Seamen's Union of the Republic of China (NCSU). The NCSU may be able to assist seafarers in gaining better employment benefits through collective bargaining agreements. The NCSU also acts as a mediator between seafarers and shipowners in the event of employment disputes.

VII OUTLOOK

There will be a complete overhaul of the Taiwan Maritime Code in the next few years. The Code is the primary legislation governing a wide variety of shipping issues, including carriage, insurance, general average, towage and liens. There are 152 articles in the Code. The current proposals seek revisions that will eventually lead to 229 articles in all. The aim of the amendments would be to bring local shipping law in line with international standards by referencing the latest international conventions. However, the Ministry of Transport and Communications has yet to finish considering the proposals and perfecting the final draft, which is required for legislative review. In view of the level of uncertainty, there is little point in discussing the prospective changes at this stage.

There is also a proposal to increase the limit of the maximum penalty for marine oil pollution from NT\$1.5 million to NT\$300 million. The Taiwan Environmental Protection Agency is currently drafting an amendment to the OPPA to create guidelines for imposing heavier fines and to offer rewards for tip-offs. This follows a recent oil spill that stretched for 10 kilometres along the northern coast of the tourist destination of Green Island. The draft is still in its early stages.

UKRAINE

Evgeniy Sukachev, Anastasiya Sukacheva and Irina Dolya¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

As a maritime country with access to the Black Sea and the Sea of Azov, Ukraine has one of the most extensive inland waterway systems in Europe. It connects sea ports with river ports and terminals along the Danube, Europe's longest river – which flows through 10 countries (not counting new private terminals and ports).

The Crimea Peninsula has been under Russian control since 20 February 2014 and Russia's annexation of the Autonomous Republic of Crimea is not recognised by Ukraine. As of 15 July 2014, all ports in the Autonomous Republic of Crimea have been closed and all vessels and their crews that violate the occupied territory regime would be held liable under Ukrainian law.

The maritime industry in Ukraine is made up of sea and river ports, and cargo terminals under various forms of ownership, all of which are developing rapidly and attracting investment by both Ukrainian and international financial groups. There are about 100 enterprises within the Ukrainian maritime industry, including shipbuilding, ship repair and research, development and design bureaus. Moreover, Ukraine is one of the five countries that supplies the most seafarers worldwide.

Shipbuilding and ship repair are undergoing a series of reforms. This sector of the Ukrainian economy is attempting to expand the development of inland infrastructure with the support of the government and private business.

An important aspect of the development of Ukraine's maritime sector is the adoption of the draft law 'On Concessions' (relating to sea and river port concession projects), which is the result of joint efforts by the Ukrainian Sea Ports Authority, the Ministry of Infrastructure of Ukraine and the European Bank for Reconstruction and Development. Two sea ports for concession projects have already been launched – Kherson Sea Port and Specialised Sea Port 'Olvia' – and other projects are now in progress.

Ukraine's sea ports processed approximately 135 million tonnes of cargo in 2018. Port Yuzhniy remains the port with the highest cargo turnover rating.

Cargo transfer by river has become more popular in Ukraine. In 2018, 9.9 million tonnes of cargo were carried on the Dnipro. In comparison to 2017, cargo turnover on Ukrainian rivers increased by 22.4 per cent.

Ukraine has the most profitable and competitive maritime market in the Black Sea region despite the low level of regulation by maritime administration, bureaucracy, corruption

¹ Evgeniy Sukachev is the senior partner, Anastasiya Sukacheva is a partner and Irina Dolya is an associate at Black Sea Law Company Ltd.

at all levels of government structure and the inefficient use of technology. The reform that is currently under way will support new opportunities for investors to create thriving businesses and build healthy economic relationships.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The shipping industry is regulated by domestic law, the international conventions ratified by the Ukrainian parliament, international merchant and shipping customs, and other applicable law.

The regulations applicable to legal relationships are defined according to the provisions of the Ukrainian Law 'On international private law'.

If one party is a foreign entity, the parties in a legal relationship are entitled to specify the applicable law that is acceptable to all parties.

When no law is specified by the parties, the international agreements concluded by Ukraine and Ukrainian law provisions will define the applicable law.

The law that defines the status of a foreign legal entity in Ukraine is the local law of the jurisdiction where the legal entity is registered.

All entities must act according to the law that applies in the place where the action is carried out. Any act concerning immovable property must be carried out according to the law that applies in the location of the immovable property. The procedure for issuing a power of attorney and the subsequent legal consequences shall be regulated by the law applicable in the place of issue.

The law applicable to labour relations is the law applicable in the place of work.

International conventions that have been ratified by the parliament of Ukraine become an integral part of the Ukrainian legislation. Moreover, international conventions' provisions dominate all Ukrainian codes and laws.

Ukraine has ratified the following conventions:

- a* the International Regulations for Preventing Collisions at Sea 1972 (the COLREGs);
- b* the International Convention for the Prevention of Pollution from Ships (MARPOL);
- c* the International Convention on Maritime Search and Rescue 1992;
- d* the York-Antwerp Rules, taking into consideration the YAR 2016 edition;
- e* the International Convention Relating to the Arrest of Sea-Going Ships 1952 (the Brussels Convention);
- f* the Athens Convention on the Carriage of Passengers and their Luggage by Sea; and
- g* the 1989 Salvage Convention.

On 21 November 2018, Ukraine acceded to the 1988 Protocol relating to the International Convention on Load Lines.

The Maritime Labour Convention 2006 has not yet been ratified by Ukraine. When it is an integral part of employment contracts, the courts may utilise its provisions for decisions in employment disputes.

The domestic law regulating the shipping industry is made up of codes, laws and regulations issued by the Cabinet of the Ministry of Ukraine, and Orders issued by the Ministry of Infrastructure of Ukraine.

The main regulatory act is The Merchant Shipping Code of Ukraine. For commercial dealings, The Commercial Code of Ukraine and The Civil Code of Ukraine are applicable. The Commercial Procedure Code of Ukraine and The Civil Procedure Code of Ukraine are also used in deciding court cases.

The Customs Code of Ukraine and The Taxes Code of Ukraine are also used to regulate commercial activity.

The following laws and acts are the most relevant to the shipping industry:

- a* the Ukrainian Law 'On ports';
- b* the Ukrainian Law 'On international private law';
- c* the Ukrainian Law 'On foreign economic activity';
- d* the Ukrainian Law 'On environmental protection';
- e* 'The list of marine ports of Ukraine open to foreign vessels', approved by Decree No. 466–p of the Cabinet of the Ministry of Ukraine; and
- f* 'On port customs', approved by Order No. 316 of the Ministry of Infrastructure.

In addition, the Ukrainian merchant shipping market has many expectations about the project of the new Ukrainian Law 'On concessions'. It is believed that provisions of the new law shall bring the opportunity to transfer Ukrainian merchant shipping ports from state management to private business management.

III FORUM AND JURISDICTION

i Courts

There are no specialised maritime courts in Ukraine. Shipping disputes are decided by the relevant court, depending on its specialisation and the location of the dispute.

There are three main types of court: general, commercial and administrative.

General courts deal with civil and criminal cases under the Civil Procedure Code of Ukraine and the Criminal Procedure Court of Ukraine.

Commercial courts are competent when both parties are legal entities that are engaged in commercial activity. Proceedings at commercial courts are conducted according to the provisions of the Commercial Procedure Code of Ukraine.

The administrative courts are competent when one of the parties is a public entity of Ukraine, according to the Code of Administrative Procedure of Ukraine.

The courts are divided into different levels: courts of first instance, courts of appeal and the High Court.

The High Court is the court of the highest instance and consists of the Civil Court of Cassation, the Criminal Court of Cassation, the Commercial Court of Cassation, the Administrative Court of Cassation and the Great Chamber.

In addition, Ukraine recognises and enforces the decisions of the European Court of Human Rights.

Any Ukrainian court can rule on a shipping dispute. In general, a case is heard by the defendant's local court. In some cases (such as wages debts and moral damage remuneration), the claimant is entitled to turn to the local court of their place of residence.

Cases concerning vessels are heard at the court that is local to the port of registry or where the vessel is berthed.

The term 'maritime claim' is included in the Civil Procedural and Commercial Procedural Codes. The procedure for ship arrest is provided under the rules of claim security, before and after the presentation of the claim.

Once an application for ship arrest is approved, the court sets a term of 30 days within which the main claim must be heard in court.

Ukrainian procedural legislation also introduces the term 'electronic evidence'. Since 15 December 2017, parties in civil and commercial procedures have the right to present information to the court in any format, such as email, voicemail, databases, pictures, graphics that are available on memory cards and servers. A printed version of electronic evidence is defined as 'paper copy of electronic evidence'.

ii Arbitration and ADR

There are no obligatory procedures for arbitration or mediation in maritime cases.

Arbitration procedures are regulated by the Ukrainian Law 'On international commercial arbitration'.

Parties in a foreign commercial deal or foreign entities operating in Ukraine are entitled to have arbitration cases heard in Ukraine courts. All parties in the case shall agree the specific arbitration court. This decision is made by concluding an arbitration agreement and signing an arbitration clause.

The Maritime Arbitration Commission (MAC) at the Ukrainian Chamber of Commerce and Industry (UCCI) is the specialised institution for rulings on maritime disputes. It operates under the provisions of the Statute on the Maritime Arbitration Commission at the UCCI and the Rules of the Maritime Arbitration Commission at the UCCI.

The MAC settles disputes arising out of contractual or other civil law relationships in the merchant shipping sector regardless of whether (1) all parties are subject to the law of one jurisdiction (either Ukrainian or foreign), or (2) some parties are subject to Ukrainian law and others are subject to foreign laws. In particular, the MAC settles disputes arising out of the following:

- a* the affreightment of vessels, the carriage of goods by sea and the carriage of goods in mixed navigation (river–sea);
- b* the marine towage of vessels or other floating objects;
- c* marine insurance and reinsurance;
- d* the sale and purchase, mortgage and repair of seagoing vessels and other floating objects;
- e* the pilotage, escorting through ice, agency or other servicing of seagoing vessels, or vessels engaged in inland navigation insofar as the relevant operations are connected with the sailing of those vessels on sea routes;
- f* the use of vessels for scientific research, extraction of minerals, hydrotechnical or other related work;
- g* the salvage of seagoing vessels or vessels engaged in inland navigation;
- h* the raising of vessels and other property sunk in sea waters;
- i* a collision between seagoing vessels, or between vessels engaged in inland navigation and at sea, and damage caused by a vessel to port structures, navigational aids or other objects; and
- j* damage to fishing nets or other fishing gear, or injury sustained in the conduct of fishing at sea.

The MAC also settles disputes arising in connection with the sailing of seagoing vessels and vessels engaged in inland navigation on international rivers in the instances specified in this chapter, and disputes arising in connection with the transportation of the cargo of foreign countries by vessels engaged in inland navigation.

The procedures for court hearings and decisions and the amounts of fees are stipulated by statute and the rules of the arbitration court.

An arbitration court decision can be appealed to the local commercial court of appeal within 90 days of the decision being issued. The party to the case and any other person concerned in the case are entitled to appeal the decision.

The Commercial Procedure Code of Ukraine lists the following grounds for overruling a decision by the arbitration court:

- a* the case cannot be decided by an arbitration court;
- b* the decision concerns a matter not covered by the arbitration clause;
- c* the arbitration agreement or clause is invalid;
- d* the arbitrator or arbitrators are not authorised to issue the decision;
- e* the decision concerns the rights of a person or persons who are not party to the case.

Decisions by arbitration courts are enforced by the Commercial Court of Appeal.

A party can apply to the Commercial Court of Appeal for enforcement of a decision up to three years after the date of issuance of the decision. An application for enforcement of an arbitration court decision must be approved within 15 days of the date of receipt.

Article 355 of the Commercial Procedure Code of Ukraine states the list of grounds for refusing to enforce an arbitration court decision:

- a* the decision of the Commercial Court of Appeal cancelling the arbitration court's decision has come into force;
- b* the arbitration court's decision was in respect of a case that the arbitration court was not authorised to judge;
- c* the time limit for enforcing the arbitration court's decision has expired and cannot be extended;
- d* the arbitration court's decision concerns a matter not covered by the arbitration clause;
- e* the arbitration agreement or clause is invalid;
- f* the arbitrator or arbitrators are not authorised to make the decision;
- g* the arbitration court that heard the case refused to present the materials of the case to the Commercial Court of Appeal; or
- h* the arbitration court's decision concerns the rights of a person or persons who are not party of the case.

Mediation procedures have started to develop in the past few years.

A draft of the Ukrainian Law No. 3665 'On mediation' has been presented to the Committee of the Ukrainian parliament on the Legal Policy and Justitia for amendment.

A mediation programme piloted by the US Agency for International Development (USAID) was launched in the Commercial Court of Appeal for the Odessa region.

Anyone who needs the services of a mediator can apply to the Ukrainian Mediation Centre free of charge.

iii Enforcement of foreign judgments and arbitral awards

The procedures for enforcement of foreign judgments and arbitral awards are stipulated by Section IX of the Civil Procedure Code of Ukraine.

Enforcement of foreign rulings in any disputes (including maritime disputes) is dealt with by the general courts.

An application to enforce in Ukraine the judgment of a foreign court must be made within three years of the date of the judgment coming into force.

An application to enforce a foreign court judgment requiring periodic payments can be made up to the date of the final payment. A creditor must apply to the general court that is local to the place of the debtor's official residence or of the debtor's property.

The creditor must include with the application:

- a* a certified copy of the foreign judgment;
- b* a document certifying that the foreign judgment has come into force (if not stated in the text of the judgment);
- c* a document verifying that the debtor has been notified of the outcome of the case (when the debtor did not take part in the hearing);
- d* a document certifying the terms and means of enforcement (if applicable);
- e* a power of attorney (if applicable); and
- f* a certified translation of all the documents into Ukrainian (or other language as stated in the international agreement).

The court notifies the debtor of the filing of the application within five days of receipt thereof. The debtor then has one month to file an objection with the court.

The court is entitled to refuse to enforce a foreign judgment on the following grounds:

- a* the international agreement denies enforcement;
- b* the foreign judgment did not come into force;
- c* the debtor did not have an opportunity to participate in the case because no proper notification had been provided;
- d* the case must be decided exclusively by a Ukrainian court or other Ukrainian authority according to Ukrainian law;
- e* a case between the same parties and on the same grounds was initiated in Ukraine before initiation of the case in question in the jurisdiction of the judgment at issue;
- f* the terms of the judgment enforcement have not been met;
- g* the subject of the case cannot be decided by a Ukrainian court, according to Ukrainian law;
- h* enforcement of the judgment would endanger the interests of Ukraine; or
- i* a judgment concerning the same parties and the same grounds has already been enforced in Ukraine.

A foreign judgment that cannot be enforced shall be acknowledged as a judicial fact under the procedure defined by Section IX, Chapter 2 of the Civil Procedure Code of Ukraine.

An applicant for a foreign judgment enforcement procedure must conclude the application on receipt of acknowledgment and attach a certified copy of the foreign judgment, a document certifying that the foreign judgment has come into force (if this is not stated in the judgment text), a power of attorney (if applicable) and a certified translation into Ukrainian (or another language stated in the international agreement) of all the documents.

IV SHIPPING CONTRACTS

i Shipbuilding

There are a lot of shipbuilding companies in Ukraine, mostly concentrated in the Nikolaev and Kherson regions. Dealings concerning shipbuilding contracts and sale and purchase agreements are regulated by the Civil and Commercial Codes of Ukraine. Ukrainian law allows the parties to define the wording of obligations and rights, the means of fulfilment of the contract, and any other terms and conditions of purchase. The parties are entitled to conclude both preliminary agreements and additional agreements. As soon as an agreement is finalised, it is deemed to have been accepted by all parties. The parties also define the form of the agreement (whether in writing or certified by a notary). Title passes to the buyer when the ship is delivered in accordance with the acceptance protocol; however, the parties can opt for an alternative means for the ship's title to pass. By concluding the preliminary agreement, the purchaser has control of the shipbuilding process.

It is preferable for the parties to declare the amount of the bank guarantee provided by the shipyard during the construction period. Penalties for non-performance of the agreement may be included in the wording of the agreement. In the event of a shipyard's failure to fulfil any provision of the contract, the purchaser has the right to apply to court for reimbursement of costs.

On 13 March 2018, changes to the Customs Code of Ukraine were initiated with the aim of liberalising the shipbuilding market. According to the changes to Article 151 of the Customs Code, objects for shipbuilding and ship reconstruction shall be under customs control for up to 730 days. Therefore, the legislation changes have increased the term for the reconstruction customs regime, which is usually used for foreign vessels that proceed to Ukrainian shipyards for reconstruction.

The shipbuilding prospects in Ukraine are not great; however, some shipbuilding projects have been under way in Ukraine. In 2018, six vessels were built by Ukrainian enterprises and registered under the Ukrainian flag, and the Maritime engineering bureau located in Odessa prepared projects for 22 newbuild vessels in three countries.

ii Contracts of carriage

The carriage of goods is regulated by the Merchant Shipping Code of Ukraine, the Commercial Code, the Civil Code and the Law on Transport. Carriage of goods by both river and sea is regulated by the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways. Ukraine has not ratified the Hague Rules, the Hague-Visby Rules or the Hamburg Rules, and is not a party to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. However, any provisions of, for example, the Hague Rules that are incorporated in bills of lading shall be obligatory for the parties thereto.

There are no laws specifically regulating transport by more than one mode or multimodal bills of lading. The Ukrainian Law 'On transport' is the main legislation regulating transport in general. The Merchant Shipping Code of Ukraine regulates the maritime transport sector. Contracts of carriage by maritime transport are regulated by Section V, Chapter 2 of the Merchant Shipping Code of Ukraine.

The bill of lading is the main document proving acceptance of a cargo for carriage. According to the Merchant Shipping Code of Ukraine, 'other written evidence' issued by the carrier may prove acceptance of the cargo for carriage.

The shipper is entitled to cancel the contract of carriage and return the cargo at any time by presenting all bills of lading issued for the shipper.

The carrier is obliged to prove the seaworthiness of the ship. Any agreements reducing the responsibility of the carrier regarding seaworthiness are invalid. The carrier can avoid responsibility by proving that he or she exercised due diligence in preparing the ship.

Cabotage is carried out by ships flying the Ukrainian flag or foreign ships that have the necessary permission from the Ministry of Infrastructure of Ukraine, as required by the Merchant Shipping Code of Ukraine. Permission to carry out cabotage is not included in the list of permission documents issued by the Ministry of Infrastructure of Ukraine. The Ministry responds to applications by shipowners with formal letters of permission.

A carrier may execute the right of lien at the port of arrival if the freight is not paid in time. The cargo shall be held by the carrier on the vessel or in the warehouse at the port of arrival. The carrier has the right of lien as long as he or she possesses the cargo. This is a natural right of the carrier and may not be stipulated in the charter party. The vessel, cargo or freight may be the lien when this is commensurate with the claim.

iii Cargo claims

The party whose rights have been violated has the right to claim for damages. Most cargo claims are heard by the commercial courts, which are authorised to decide a case between two or more legal entities. However, if one of the parties is a physical person, the commercial court is not authorised to hear the case. The claimant is entitled to apply to the court that is local to the place of registration of the defendant.

When the defendant is related to a legal entity, the claimant should apply to the court that is local to the place of registry of the relative. When the defendant is a foreign legal entity and does not have a place of registration in Ukraine, the claim shall be applied to the court at the place that is local to the defendant's property. If a carrier is the defendant, the case can only be heard by the court that is local to the carrier's location.

Cases concerning the arrest of a vessel in respect of a maritime claim can only be heard at the court that is local to the port where the vessel was registered or is currently located.

The parties to the case are entitled to draw up an arbitration agreement or sign an arbitration clause. The commercial court assumes the validity of any arbitration agreement or clause, unless proven otherwise.

The charter party terms may be incorporated into the bill of lading when the charter party is identified on it. Demise clauses and identity-of-carrier clauses are not recognised or binding.

iv Limitation of liability

Limitation of liability is regulated generally by the Merchant Shipping Code of Ukraine and the Commercial Code.

The general time limit is three years. This may be extended by written agreement of the parties involved. The claim limit as stated by law cannot be shortened by the written agreement.

The court or arbitral tribunal cannot extend the time limits. A party that exceeds the time limit may apply to the court for an extension. If the court can verify that the time limit was missed on reasonable grounds, it will approve the extension.

If the cargo value is not declared in the bill of lading, the carrier's liability for damaged or lost cargo shall be limited to 666.67 units of account or 2 units of account per kilogram of the gross mass of the cargo, whichever is the greater.

Claims arising from marine casualties caused by the pilot are covered by an emergency pilotage fund, which corresponds to 10 per cent of all pilot charges received in the preceding year.

The liability of a nuclear vessel operator in respect of nuclear damage is limited by the provisions for limitation funds set out in Article 324 of the Merchant Shipping Code.

A carrier's liability in respect of a claim resulting from death or injury of a passenger is limited to 175,000 special drawing rights.

In respect of damaged or missing luggage, a carrier's liability is limited to 1,800 special drawing rights per item per passenger.

V REMEDIES

i Ship arrest

Ukraine ratified the 1952 Brussels Convention on 16 May 2012. Despite that, it was not until the end of 2017 that new versions of the Civil Procedure Code of Ukraine and the Commercial Procedure Code of Ukraine, which, among other things, regulate ship arrests in maritime claims, were adopted by the national legislative system.

The general practice used for ship arrests has become more stable. Changes to the procedural legislation have sped up the ship arrest procedure.

Parties have the right to apply for arrest of a vessel at its scheduled port of destination in Ukraine. At the time of applying for registration, the vessel may be outside Ukrainian territory.

An application for arrest in respect of a maritime claim must contain:

- a* a description of the maritime claim;
- b* grounds for the need to arrest the ship; and
- c* evidence to prove that the vessel is registered in Ukraine or stands in the territorial waters of Ukraine or plans to move into the territorial waters of Ukraine.

Arrest of a sister ship is possible in Ukraine but the practice is rare. An application for such an arrest is decided within two days of receipt. The court is entitled to request counter-security from the party applying for an arrest to cover possible loss. The type and amount of the counter-security is defined by the court considering the case. Ukrainian courts recognise bank guarantees as an appropriate form of counter-security.

A defendant is entitled to claim reimbursement of costs and for damages resulting from a wrongful arrest.

ii Court orders for sale of a vessel

The judicial sale of an arrested vessel may be initiated by:

- a* the claimant who suffered damage or injury in direct connection with the operation of the vessel;
- b* the creditor;
- c* a crew member;
- d* local port authorities; or
- e* the salvor.

The judicial sale of the vessel shall be public and accessible. The initiator of the judicial sale must issue a written notice to every party concerned within 30 days. The relevant parties to

the judicial sale of a vessel are (1) the registered owner of the vessel, (2) the local authority in the country of registration of the vessel, and (3) all holders of the vessel's encumbrances issued to the bearer and that have not been issued to bearer.

The written notice shall inform the parties concerned of the time and place of the judicial sale. When it is uncertain whether all concerned parties are known, a public announcement shall be made in the central state newspaper.

Generally, the right to ownership of the vessel arises from the moment of its registration in the State Register of Vessels. According to the procedure for the judicial sale of a vessel, the new owner of a vessel that has been forcibly sold will not be able to register it unless the previous owner has filed an application for removal of the vessel from the State Register. If this has not been done, the new ownership right to the vessel will not officially arise, in contradiction of Part 5, Article 12 of the International Convention on Maritime Liens and Mortgages of 1993, which came into force in Ukraine on 4 January 2003.

VI REGULATION

i Safety

The Ukraine acceded to the International Convention for the Safety of Life at Sea, 1974.

The safety regime for maritime transport is regulated by the Decree of the safety control system for sea and river transport stipulated by the Order of the Ministry of Transport of Ukraine No. 904, dated 20 November 2003.

The Decree on security was concluded in line with the standards of the ISM Code, IMO Assembly Resolution A.847(20), IMO Assembly Resolution A.884(21), IMO Assembly Resolution A.851(20), IMO Assembly Resolution A.852(20) and IMO Assembly Resolution A.912(22).

The administrators of maritime ports are authorised to control safety within the territory of a maritime port. The harbour master provides security over the territorial waters and the waters of the maritime port. The safety regime in Ukraine has no distinctive features that differ from international standards.

Anyone engaged in international shipping that plans to enter the territorial waters of Ukraine should be mindful that in the event of any violation of safety standards, the vessel concerned will be detained by the harbour master.

ii Port state control

The State Service for Marine and River Transport of Ukraine (Maritime Administration) is a central executive body whose activities are directed and coordinated by the government of Ukraine through the Minister of Infrastructure, and which implements state policy in the areas of sea and river transport, merchant shipping, navigation on inland waterways, navigational and hydrographic navigation facilities, as well as in the field of safety in sea and river transport (except for the safety of navigation of ships in the fishing industry).

The Maritime Administration only started to function in August 2018. However, the position of the institution is not concrete. Ukrainian legislation still contains controversial provisions that create a conflict of powers between the Maritime Administration, Harbour Masters and the Ukrainian Sea Ports Authority.

The Maritime Administration has obtained the following authorities:

- a* to provide fulfilment of obligations arising from Ukraine's membership in international organisations, whose activities are related to sea and river transport, commercial shipping, navigation on inland waterways, navigational and hydrographic navigation facilities;
- b* the implementation of state supervision (control) for safety at sea and river transport, for merchant shipping, navigation on inland waterways, navigational and hydrographic provision of navigation (except for fishing vessels of the fleet of the fishing industry); and
- c* to carry out the supervision of the state of sea routes, the operation of the services of regulating the movement of ships and pilotage, etc.

iii Registration and classification

An application for registration must include the following documents:

- a* State Shipping Registry of Ukraine questionnaire;
- b* a copy of the document confirming ownership;
- c* a copy of the tonnage certificate;
- d* a copy of the certificate of seaworthiness or classification survey certificate;
- e* (for a passenger vessel) a copy of the passenger certificate;
- f* a copy of the manning certificate;
- g* a copy of the civil liability insurance policy (or other similar document) held by the shipowner against damage from oil pollution under the international treaties to which Ukraine is a signatory;
- h* a temporary certificate of the right to sail under the Ukrainian flag (if any);
- i* a document confirming the vessel's encumbrances or the absence thereof;
- j* a copy of a document of identification of the shipowner; and
- k* a document that confirms cancellation of the previous registration.

In addition, information about the vessel's function, documents of identification and photographs of the vessel shall be presented. Temporary registration in a bareboat charter requires additional documents, such as a copy of the charter party, written approval from the shipowner and the mortgagee's approval (if applicable). The documentary copies must be certified by a notary or other authorised entity.

iv Environmental regulation

The relevant legislation is the Ukrainian Law 'On environmental protection' and MARPOL.

The State Ecological Inspection of the North-West Region of the Black Sea and the State Ecological Inspection of the Azov Sea were liquidated in 2018. The Ukrainian government initiated the enactment of a new environmental institution on the sea, the State of Azov Maritime Ecological Inspection.

Ecological inspectors take measurements of polluting liquids near a ship. If there is sufficient evidence of pollution, the inspector is authorised to board the ship for inspection. A ship's master's refusal to allow an inspector on board or to carry out an inspection constitutes an administrative offence.

The ecological inspector is authorised to address the following administrative offences and violations:

- a* violation of another person's right to a secure environment;
- b* violation of ecological standards;

- c* providing false information about the environmental status of the vessel;
- d* violation of demands for environmental security;
- e* pollution;
- f* ignoring orders from public authorities regarding environmental security;
- g* refusal to provide authentic information regarding the environmental state of the vessel and pollution; and
- h* humiliation of the honour and dignity of an ecological inspector.

If a source of pollution is detected, the ecological inspector will calculate the damage incurred. The shipowner is then issued with a claim, signed by the relevant Ecological Inspection, requesting compensation for the damage with an out-of-court settlement. If the shipowner refuses to pay the stated settlement amount, Ecological Inspection can initiate detention or arrest of the ship.

The practice of arrest removal is positive. The fines imposed by the Ecological Inspection may be appealed through the administrative court of Ukraine.

v Collisions, salvage and wrecks

Ukraine is a party to the International Convention on Civil Liability for Oil Pollution Damage (the CLC Convention) as of 4 July 2002 and became a party to the International Convention on Salvage, 1989 on 22 March 2017.

Ukraine is also a party to the Agreement on Cooperation of the Black Sea Countries in Search and Rescue at the Black Sea, which was ratified on 28 November 2002. The Agreement regulates the procedure for carrying out joint salvage operations.

The law of the flag will regulate the reimbursement for damage or loss caused by the collision of vessels of the same flag in inland waters and territorial waters, which does not involve any third parties. If one party to the collision violated the COLREGs, that party will be liable for all damage suffered by other parties.

If a collision results from a force majeure or when the cause of a collision is unknown, the parties cover any loss or damage suffered at their own cost. If one or more parties involved in a collision are in violation of the COLREGs, each party will be liable to an amount equivalent to its guilt or in equal parts. All parties are liable for death or injury suffered by a third party in a collision.

vi Passengers' rights

Ukraine acceded to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea on the 15 July 1994.

Any passenger transportation agreements limiting passenger rights are assumed to be invalid.

Passenger insurance must be provided for the duration of the passenger transportation agreement. The insurance premium is included in the cost of the ticket. A passenger is entitled to cancel the passenger transportation agreement at any time before the journey start. In this case, the passenger receives the money paid for passage and luggage transportation.

vii Seafarers' rights

The Maritime Labour Convention has not been ratified by Ukraine. The status of Ukrainian seafarers is defined by the Merchant Shipping Code of Ukraine, the Code of the Labour Laws of Ukraine and the Ukrainian Law 'On payment of wages'.

The status of the crewing agency is stipulated by the 'licence demands to provide the commercial activity of mediation in employment abroad'.

The provisions of the Maritime Labour Convention are applicable to Ukrainian seafarers in the event that the country of the vessel's flag has ratified the Convention.

Ukrainian seafarers are entitled to turn to the Ukrainian courts for protection of their rights. Under Ukrainian employment law, a seafarer may claim the full amount of wages due, remuneration for any period of non-payment of wages, and compensation for any personal injury.

A seafarer's relatives (not only the next of kin) are entitled to claim compensation in the event of the death of a seafarer and for any moral damage suffered by seafarers.

VII OUTLOOK

The Ukrainian merchant shipping market is full of prospects and opportunities equally for big international companies and for local players. Ukraine is known as a country with huge export capacities. Grain, iron, corn and oil make up the largest exports of the country. Now, the Ukrainian authorities, as well as local specialists, are open to Western partnership suggestions and international investments. The Ukrainian infrastructure is being renovated with the aim of welcoming new businesses. On 13 March 2018, the government announced that Kherson merchant shipping state port and the state enterprise Olvia are ready for concession project proposals.

UNITED ARAB EMIRATES

Yaman Al Hawamdeh and Meike Ziegler¹

I INTRODUCTION

The United Arab Emirates (UAE) is a vibrant region that continues to thrive, despite the global downturn and the drop in the oil price. 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 worldwide.²

The economic free zones also have an important economic role, as they permit 100 per cent foreign ownership of companies that would otherwise have to have an Emirati majority shareholder. There are 36 free zones in the UAE.³ Jebel Ali Free Zone, with around 6,000 companies, is the largest of all by company size.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. However, to turn the region into a true competitor, the Emirates recognised that they also had to improve dispute resolution facilities for maritime disputes. The Emirates Maritime Arbitration Centre (EMAC) was therefore launched in 2016. It is the first specialised maritime arbitration centre in the Middle East and is expected to further the ability of parties to resolve maritime disputes by having them determined by a specialist maritime tribunal.

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 recently obtained a particularly significant judgment from the Dubai Court of Cassation, recognising a London arbitration award under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), despite the underlying charter party not 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.

1 Yaman Al Hawamdeh is a partner and Meike Ziegler is an associate at Holman Fenwick Willan Middle East LLP. The information in this chapter was accurate as at May 2018.

2 www.eia.gov/countries/cab.cfm?fips=tc.

3 www.uaefreezones.com.

4 www.uae-embassy.ae/Embassies/uk/Content/579.

II COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

The UAE is the shipping centre of the Middle East, with 14 operating commercial ports. The key ports include Jebel Ali in Dubai, Abu Dhabi, Sharjah and Fujairah, which is one of the biggest bunkering hubs.

Jebel Ali Port and its free zone area is also 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 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 law. 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 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 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 for all cases with a value of above 200,000 dirhams, which can prolong court proceedings as no leave to appeal is required. 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 UAE Civil Procedure Rules do not apply and as a result the DIFC provides an independent administration of justice system that has its own laws and regulations, and where 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, have 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 courts of the relevant Emirate. As mentioned in Section I, for that reason the UAE set up EMAC in 2016. Parties now have the option to make their contracts subject to EMAC and have disputes determined by specialist maritime arbitrators. The default seat of EMAC arbitrations is the DIFC, which allows smooth enforcement of EMAC arbitration awards onshore in Dubai and the region.

Similar steps have been taken in Abu Dhabi with the creation of the Abu Dhabi Global Market Courts in 2015, which was broadly modelled on the English judicial system.

ii Jurisdiction

The UAE courts will seize 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 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 was 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 and collision claims;⁹

5 Article 31 of the Civil Procedure Code (CPC) of Federal Law No. 11 of 1992 as amended (the CPL).

6 Article 203 CPC.

7 Article 298 of the Civil Code (Federal Law No. 5 of 1985).

8 Articles 224 and 287 of the Maritime Code.

9 Article 326 of the Maritime Code.

- 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; and
- i* one year for rights of recourse of a defendant ship against another ship for settled claims for death or personal injury;¹⁴

The UAE did not adopt the Hague, Hague-Visby or Hamburg rules and their limitation periods therefore do not apply. Terms similar to the Hague-Visby Rules are, however, incorporated into the UAE Maritime Code.

iv Arbitration and ADR

Some basic requirements relating to arbitration procedures are set out in Articles 203 to 218 of the CPL. To further cement the UAE's role as a global maritime centre, the Dubai Maritime City Authority established the aforementioned EMAC. EMAC is based offshore in the DIFC and has its own arbitration rules based on the rules of the London Maritime Arbitration Association and the Singapore Chambers of Maritime Arbitration. Accordingly, the CPL does not apply to EMAC arbitrations. It is expected that EMAC will solidify Dubai's role as a global maritime centre and will provide greater certainty and an improved service for parties wishing to resolve maritime disputes in Dubai.

There are four other arbitration centres, namely 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.¹⁵

In May 2018, the UAE legislature enacted a federal arbitration law based on the UNCITRAL Model Law.

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.

¹⁰ Article 399 of the Maritime Code.

¹¹ Article 299 of the Maritime Code

¹² Id.

¹³ Article 302 of the Maritime Code.

¹⁴ Article 326 of the Maritime Code.

¹⁵ The DIAC is currently still located onshore, but its seat will be moved to the DIFC once its new arbitration rules come into force in 2018.

Procedure for recognising and enforcing foreign arbitration awards through the civil courts

Articles 235 to 238 of the CPL set out the process of recognising and enforcing foreign arbitration awards in the UAE.

The first step is to file an application with the court of first instance for recognition of the foreign arbitration award.¹⁶ The application will be served on the defendant and will be considered in a series of hearings and submissions by the parties. The judgment recognising the foreign arbitration award can be appealed to the court of appeal and subsequently to the court of cassation or the High Federal Supreme Court.

If recognition is approved, the second step involves an application to the execution judge, who will notify the judgment debtor 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.¹⁷

Procedure for 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 was not properly informed of the arbitrator's appointment;
- c* the award is addressing points not covered by the submissions;
- d* the arbitral procedure was not in compliance with the arbitration agreement; or
- e* the award is not yet binding, as it is subject to appeal.¹⁸

Defendants wishing to challenge the DIFC court's jurisdiction in favour of the onshore UAE courts will face difficulties, as case law has confirmed that (1) the question of the DIFC courts' jurisdiction is determined by its own laws and not by the CPL, and (2) the DIFC Arbitration Law does not require there to be a connection with the DIFC for the DIFC to have jurisdiction.

However, defendants to recognition proceedings might under certain circumstances 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 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.

¹⁶ Article 235 CPL.

¹⁷ Article 239(2) CPL.

¹⁸ Article 44(1)(a) of the DIFC Arbitration Law.

Recognising and enforcing foreign judgments through the UAE courts

The UAE courts will recognise and enforce foreign judgments, provided:

- a* the UAE courts did not have jurisdiction over the dispute;
- b* the judgment or order has been issued by a court having jurisdiction under the law of the country in which it was issued;
- c* the defendants were properly summoned and represented;
- d* the judgment or order acquired the force of *res judicata* in accordance with the law of the court that issued it; and
- e* the judgment or order is not in conflict with existing UAE judgments.¹⁹

This makes recognition and 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.

The UAE is, however, a party to treaties for the reciprocal enforcement of judgments, such as 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 these 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 Law²⁰ 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 confirmed this position in *DNB Bank ASA v. Gulf Eyadah Corporation & Gulf Navigation Holding PJSC* (CA/007/2015).

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 where there are (1) competing invocations of jurisdictions or (2) competing judgments from both courts.

Although there have been decisions where the JT held that the DIFC Court did not have jurisdiction to hear the recognition of a foreign judgment,²¹ these decisions have not changed (1) the statutory basis on which the DIFC Court recognises the foreign judgments and (2) the enforceability of DIFC Court orders in the Dubai Court.²²

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 in fact actively enforcing such a DIFC order. Seeking enforcement of a foreign judgment therefore remains difficult, unless it falls under one of the above-mentioned conventions."

¹⁹ Article 235 CPL.

²⁰ Law No. 12 of 2004 in respect of the Judicial Authority at Dubai International Financial Centre, as amended.

²¹ 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*.

²² 2009 Memorandum of Understanding Between Dubai Courts and DIFC Courts.

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 that (1) they are void unless in writing, (2) ownership does not pass until delivery of the vessel after sea trials, and (3) the builder guarantees the vessel is free of latent defects.²³ Claims for latent defects are time-barred one year after discovery or two years after delivery of the vessel.²⁴

ii Contracts of carriage

As previously stated, the Hague, Hague-Visby 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.²⁵

The carrier's duties under the Maritime Code mirror those of the Hague-Visby Rules. The vessel has to be seaworthy before and upon the commencement of the voyage, and the carrier has to take care when loading, stowing, carrying and discharging the cargo.²⁶

Likewise, 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.²⁷ 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 per gross weight of the goods, whichever is the higher. These limitations shall not apply if the shipper declared the value of the goods.²⁸ The Maritime Code does not incorporate a provision akin to Article IV.5(e), 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. Further, reference to the 'civil court' in Article 222 causes 'urgent matters'

23 Articles 67 to 68(1) of the Maritime Code.

24 Article 68(2) of the Maritime Code.

25 Articles 256(2) and 282 of the Maritime Code.

26 Article 272 of the Maritime Code.

27 Articles 275 and 272 of the Maritime Code.

28 Article 276(3) of the Maritime Code.

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.

Likewise, 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.²⁹ 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 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.³⁰

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.³¹ 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.³² Compensation will be assessed according to the level of harm suffered and can include loss of profit.³³

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. Likewise, 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.

29 Article 135.

30 Articles 258 and 259(1).

31 Articles 259(4) and 266.

32 Article 283 CTL.

33 Article 292 CTL.

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 1957 International Convention Relating to the Limitation of Liability of Owners of Seagoing Ships. In 1997, the UAE ratified the 1976 Convention on the Limitation of Liability for Maritime Claims (the 1976 Convention).³⁴

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 1976 Convention or the Maritime Code. Very broadly, however, under either the 1976 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 1976 Convention without reservations. In theory, therefore, 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 1976 Convention: this may be because few disputes in this respect are litigated, as opposed to the fact that local courts are reluctant to uphold the terms of the 1976 Convention. For instance, the Dubai Court of Cassation overruled a Court of Appeal judgment that ignored the limits under the 1976 Convention.³⁵ This seems indicative of a willingness at the highest levels of the judiciary to implement the 1976 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 1976 Convention. Accordingly, although the right to limit under the 1976 Convention is likely to be upheld, there remains some uncertainty in this respect.

There is also uncertainty on whether limitation funds can be created. These are defined by Article 11(1) of the 1976 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 1976 Convention can apply to court to create a fund against which all valid claims would be settled, up to the applicable limitation amount.

³⁴ Federal Decree No. 118 of 1997.

³⁵ Dubai Court of Cassation Judgment No. 24 of 2008 dated 13 May 2008.

Article 14 of the 1976 Convention adds, however, 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 (DWT) 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 DWT. Although this judgment is a first in the UAE, whether it will have any wide-reaching influence is questionable. Some of the reasons for this are that:

- a* the DWT is a specialist court, which only has jurisdiction over claims by or against Dubai World entities;
- b* it is not clear whether other UAE courts will adopt the DWT’s approach. There is currently no indication that they would and they are not bound by decisions of the DWT. 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 DWT), it is unclear whether and how this would be recognised and upheld by other courts in the UAE. In other words, where a limitation fund is created in one court, there currently appears to be no legal basis upon 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 1976 Convention, 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.

The UAE has not yet ratified the 1996 Protocol amending the 1976 Convention and the increased limits, which came into force on 8 June 2015.

VI REMEDIES

i Ship arrest

Obtaining an order for the arrest of a ship in UAE waters is straightforward and 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 200,000 dirhams. Although P&I club LOUs are widely accepted in most jurisdictions, UAE courts will only accept a bank guarantee or a cash payment into court as an alternative security to release a vessel.

The UAE did not ratify International Convention Relating to the Arrest of Ships 1952, but the corresponding sections of the Maritime Code³⁶ are based on its provisions.

³⁶ Articles 115 to 134 of the Maritime Code.

It is not possible to obtain an arrest order for security only as the arresting party has to file substantive proceedings with the relevant UAE court to maintain the arrest order. However, it is possible to stay the proceedings in the UAE courts pending the outcome of an arbitration or to give effect to the law and jurisdiction clause in the contract.

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.³⁷

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 UAE court immediately, otherwise the arrest will be null and void.³⁸ 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.

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.³⁹ 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'.⁴⁰

Wrongful arrest claims

The Maritime Code does not define or contain any provisions in relation to wrongful arrest. There is, however, an argument that an arrest is wrongful if the arrest order was malicious 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.

37 Article 115(2), Paragraphs (a) to (o) of the Maritime Code.

38 Article 225 CPR.

39 Article 116 of the Maritime Code.

40 *The Maritime Laws of the Arabian Gulf Cooperation Council States*, Volume I by Richard Price, 1986, Graham & Trotman, p. 197.

Bunker arrest claims

There have been hundreds of cases of bunker arrests during the past few years following the collapse of the Danish marine fuel company OW Bunker.

The Maritime Code does not include express provisions granting 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. Physical bunker suppliers can therefore arrest a vessel for unpaid bunkers, regardless of the bunker supply contract having been entered into with the owner, charterer or another trading or contractual supplier. This has made the UAE a very effective jurisdiction to pursue claims for unpaid bunkers, although the position may differ from Emirate to Emirate. For example, the Dubai court found that although the shipowner was not liable to the physical bunker supplier, the bunker supplier could nevertheless arrest the vessel and the security to release the vessel from arrest responded to the physical bunker supplier's claim. Ras Al Khaimah has taken the same approach as the Dubai courts.

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.⁴¹ 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.⁴² 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 only be made on the ground of a defect in form.⁴³

VII REGULATION

i Safety

The UAE has ratified most of the international conventions relating to ship safety,⁴⁴ including:

- a* the International Convention for the Safety of Life at Sea 1974, as amended;
- b* the Protocol of 1978 relating to the International Convention for the Safety of Life at Sea 1974;
- c* the International Convention on Maritime Search and Rescue 1979;
- d* the International Convention for Safe Containers 1972, as amended; and
- e* the International Convention on Tonnage Measurement of Ships 1969, as amended.

41 Article 126 of the Maritime Code.

42 Article 127 of the Maritime Code.

43 Article 130 of the Maritime Code.

44 International Maritime Organisation, www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx.

Conventions that have not been ratified by the UAE are often dealt with in similar terms by local laws. Broadly, these deal with:

- 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 controls and inspects ships inside UAE territorial waters.
- c* Administrative decisions and penalties for breach of the applicable laws and conventions.⁴⁵

In addition, as of 1 September 2014, the UAE adheres to the GCC Code implementing safety regulation for ships that are not covered by the international convention.⁴⁶

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 (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 National Transport Authority (NTA).⁴⁷

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;⁴⁸ and
- b* detain vessels that it considers hazardous to safety, health or the environment until the hazard is remedied.⁴⁹

The NTA must inspect annually approximately 10 per cent of the estimated number of foreign merchant ships entering UAE waters⁵⁰ and must provide appropriate safety training programmes.⁵¹

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

45 Richard Price, *The Maritime Laws of the Arabian Gulf Cooperation Council States*, Volume 1.

46 www.tasneef.org.

47 International Maritime Organisation, www.imo.org/blast/blastDataHelper.asp?data_id=28163&filename=6-Annex1-FlagStates-31Mar10.pdf

48 Riyadh MOU, Article 3.1.

49 Riyadh MOU, Article 3.14.

50 Riyadh MOU, Article 1.3.

51 Riyadh MOU, Article 6.

to Article 18(1) of the Maritime Code, fishing and pleasure boats, lighters, barges and those vessels not exceeding 10 tons are exempted from registration.⁵² Oil and gas tankers that are more than 10 years old require permission from the Council of Ministers to be registered.⁵³

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.⁵⁴ 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 of 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 combating operations in the event of pollution.⁵⁵

The matter of air pollution is addressed in a number of articles, including Article 48, which stipulates that establishments producing air pollutants must not exceed the acceptable permissible limits specified in the Executive Order.

v Collisions, salvage and wrecks

Collisions

The UAE has not ratified the 1910 International Convention for the Unification of Certain Rules of Law with respect to Collision between Vessels (the 1910 Convention); however, Articles 1 to 6 and 8 of the 1910 Convention are contained in Articles 318 to 326 of the Maritime Code. The 1972 Convention on the International Regulations for Preventing Collisions at Sea, as amended (the 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, negligence or failure to observe national legislation or international agreements.⁵⁶

52 Article 18 of the Maritime Code.

53 Article 19 of the Maritime Code.

54 Article 14 of the Maritime Code.

55 Articles 22 to 24 of the Environment Regulation.

56 Article 318 of the Maritime Code.

Questions of liability, as set out in Articles 3 to 5 of the 1910 Convention, are essentially provided for in Articles 320 to 322 of the Maritime Code.

Although the UAE did not ratify the 1952 International Convention for the Unification of Certain Rules relating to Civil Jurisdiction in Matters of Collision, provisions regarding jurisdiction are set out in Article 325 of the Maritime Code.

Salvage

The 1910 Salvage Convention⁵⁷ has not been ratified by the UAE, but like 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'.

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.⁵⁸ 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, where the salvage operation takes place in UAE waters and the salvaged and salvaging 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.⁵⁹ Further, where 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 Forum. Lastly, 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 of 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 to wreck removal are that (1) the costs of removing obstacles to navigation caused by a vessel rank as priority debts,⁶⁰ and (2) the relevant maritime authority has the right to seize a wreck as security for the removal costs and may carry out an administrative sale of the wreck to recover its debts.⁶¹ No federal body exists to deal with wreck removal in the individual Emirates.

57 Brussels 1910 Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea (the 1910 Salvage Convention).

58 Article 335 of the 1910 Salvage Convention.

59 Article 339 of the Maritime Code.

60 Article 85(a) of the Maritime Code.

61 Article 95 of the Maritime Code.

Ship recycling

The UAE has not signed up to the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships. No similar provisions exist in other UAE codes.

vi Passengers' rights

The UAE is not a party to the Athens Convention, but Articles 288 to 302 of the Maritime Code cover contracts of carriage of passengers.⁶² 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* law in the criminal code and any attempts by the carrier to limit its liability below such sums are void.⁶³ Under Article 84(d), compensation due for bodily injuries to passengers and crew are considered priority debts.

vii Seafarers' rights

The UAE has not ratified the Maritime Labour Convention 2006 and 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.⁶⁴

62 Articles 288 to 302 of the Maritime Code.

63 Articles 290, 295, 296 and 297 of the Maritime Code.

64 Article 169(2) of the Maritime Code.

UNITED STATES

James Brown, Michael Wray, Jeanie Goodwin, Thomas Nork, Chris Hart, Marc Kutner, Alejandro Mendez and Melanie Fridgant¹

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 the world's largest trading country, making up one-quarter of the world's imports and exports, which includes more than 2.2 billion metric tonnes of cargo. Despite this volume of international trade, the US-flagged merchant fleet (ocean-going vessels over 1,000 gross tonnes) is comprised of 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. Additionally, the deregulation of offshore oil and gas exploration and production is expected to increase an already robust offshore vessel fleet.

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.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Admiralty and maritime law is one of the oldest sources of American common law. The US Constitution extends admiralty jurisdiction to federal courts and provides that Congress may pass legislation in this field. There are four general 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 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.

¹ James Brown, Michael Wray, Jeanie Goodwin and Thomas Nork are partners, Chris Hart is an of counsel, Marc Kutner and Alex Mendez are senior associates and Melanie Fridgant is an associate at HFW.

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 (SOLAS);
- c* the International Convention for the Prevention of Pollution from Ships (MARPOL);
- d* the Load Lines Convention; and
- e* the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (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, 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, Customs and Border Protection, and the Federal Maritime Commission play 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 US 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 the 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.

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. While 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 in order 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 Carriage of Goods by Sea Act (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 more recently in the 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.

As noted above, 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 (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 they are exempt from arbitrating their claims under the Jones Act and general maritime law as seafarers' contracts are exempt from arbitration under the FAA. Recently, in *Dahir v. Royal Caribbean Cruises Ltd.*, a federal court found that the claim of an American 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 more recently 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 FAA² 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. While 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 New York 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 that the United States is a party to concerning judgment enforcement, 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 is comprised of 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. 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.

Currently there are 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 US Coast

2 9 USC Section 10.

Guard, is an important source of demand for US shipbuilders. While just 1 per cent of the vessels delivered in 2014 (11 of 1,067) were delivered to US government agencies, 10 of the 12 large deep-draft vessels delivered went to the US government: five to the US Navy, four to the US Coast Guard and one to the National Science Foundation.

There are no statutory formalities or requirements (beyond standard contractual requirements) that must be complied with by parties 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 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, 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*,³ 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 IMO standards. The flag state authority is the US Coast Guard, which has delegated a significant portion of its monitoring of newbuilds to the American Bureau of Shipping (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, the 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 American vessel returns home, it must file a vessel repair declaration with Customs and Border Patrol (CBP), even if the vessel incurred no foreign repairs.⁴

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

3 230 F3d 549, 556 (2d Cir. 2000).

4 19 CFR Section 4.14 (d).

labour.⁵ US-flagged vessels are exempt for the repairs if the repairs were made in countries with which the US has a free trade agreement or if the repairs 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 US – 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.⁶

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.⁷

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 a multi-model carriage. As such, there are often overlapping contracts in place between shippers, ocean carriers, freight forwarders and non-vessel owning common carriers (NVOCCs).

Contracts of carriage are generally governed by the COGSA and its precursor, the Harter Act. Enacted in 1936, COGSA is the US enactment of the Hague Rules. The United States has not adopted the Hague-Visby or the Rotterdam Rules.

Contracts of 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 serve as the contract of carriage and as documents of title. The interpretation of the clauses on 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.

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'. COGSA Section 1305 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. Further, 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'.

5 19 CFR Section 4.14 (e).

6 19 CFR Section 4.14 (i)(1).

7 19 CFR Section 4.14 (j)(1)-(2).

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 \$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 \$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*,⁸ 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 \$500 package limitation in favour of a more advantageous limitation scheme.

An interesting recent 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 *Norfolk Southern Railway Co v. Kirby*,⁹ 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

8 407 US 1 (1972).

9 543 US 14 (2004).

to the bill of lading. The *Kirby* decision was reinforced by the Supreme Court's decision in 2010 *Kawasaki Kisen Kaisha Ltd v. Regal-Beloit Corp.*¹⁰ which extended the reach of a forum selection clause to a rail company under a through bill of lading.

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.¹¹ The COGSA 'ping pong ball' burden of proof follows the following well-established path:

- a 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.¹²
- b A shipper's *prima facie* case creates a presumption of liability, which may be rebutted by the carrier.¹³
- c 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.¹⁴
- d 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.¹⁵
- e 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.¹⁶

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.¹⁷

¹⁰ 561, US 89 (2010).

¹¹ *US v. Ocean Bulk Ships, Inc.*, 248 F.3d 331, 335 (5th Cir. 2001).

¹² *Id.*

¹³ *Id.*

¹⁴ *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995).

¹⁵ *Tenneco Resins, Inc. v. Davy Int'l, AG*, 881 F.2d 211, 213 (5th Cir. 1989).

¹⁶ *Tenneco Resins*, 881 F.2d at 211.

¹⁷ *Id.*

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 a COGSA package is. 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 is often determinative of 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 as they were in when shipped and their value damaged. Incidental damages, such as survey costs, are recoverable. Damages for delay are more problematic to establish and will often be determined if 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. While many countries have since amended their limitation of liability schemes, the US Limitation Liability Act of 1851 remains essentially unchanged.

Purpose and benefits

Generally speaking, 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.¹⁸ In cases where the 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 \$420 per gross ton solely to pay personal injury or death claims.

Not all participants with an interest in the 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

18 46 USC Sections 30505 to 30512.

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 to not only pick its forum, but to force the many claimants that arise out of a major 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.¹⁹ 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. It does not, however, 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 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. While 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: (1) the vessel owner is totally exonerated; (2) the owner is found liable, but damages are limited to the post-casualty value and pending freight; or (3) 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.

19 Rule F of Supplemental Rules For Admiralty or Maritime Claims.

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 for fixing venue, marshalling claims in one convenient form, and maintaining control of what can be an expensive and complicated litigation.

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 necessities 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 necessities 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. Such 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 US Coast Guard (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 if (1) the property is perishable, or the vessel or property is subject to decay, deterioration or damage; (2) the cost of keeping the vessel or property is disproportionately expensive; or (3) 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:

- a* whether a minimum bid amount has been set;
- b* whether there are required minimum increments in the bidding (e.g., \$1,000 or more);
- c* whether credit bids are allowed;
- d* whether a certain amount of deposit or down payment is required;
- e* whether the number of days for the balance to be paid is designated;
- f* whether there are any limitations regarding who may bid (e.g., an alien restricted from bidding on the purchase of an American flag vessel);
- g* whether any special methods of payment are designated (e.g., a cashier's or certified cheque);
- h* whether there are any provisions regarding the filing of objections with the court;
- i* whether, in the absence of objections, the court or local rules provide for automatic confirmation of sale; and
- j* whether 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 is issued by the court, a notice of the sale must be prepared. It 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

A branch of the US Department of Homeland Security, the USCG 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 US Coast Guard 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 become inspected and carry a certificate of inspection (COI). Now codified at 46 CFR 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 will be phased in over four years (from July 2018 through 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 (AWO) 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 United States towing industry's equivalent of the International Safety Management (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 Code of Federal Regulations (CFR) at parts 33 and 46. As is further described in other sections, a recent development is the expansion of USCG regulations under 33 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'.²⁰ Participation in USCG investigations are 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.²¹ 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

20 46 CFR 4.03-10.

21 46 U.S.C. Section 6308(a); 49 U.S.C. Section 1154(b).

the investigation report can be admissible in litigation.²² 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.

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 ISPS and US law.²³ 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 2017, 10,190 individual vessels from 84 different flag administrations, made 83,566 port visits to the United States. In 2017, the USCG conducted 9,105 SOLAS safety exams and 8,793 ISPS exams on these vessels.²⁴ The USCG detained 91 vessels for environmental protection and safety-related deficiencies and six vessels for security related deficiencies. Over 30 per cent of the vessels detained were bulk carriers. The overall number of vessels detained in 2017 decreased by about 10 per cent from 2016. Even though the overall number of detentions has decreased the number of detentions related to firefighting and fire protection systems increased for the fourth straight year. In addition, the number of MARPOL Annex I deficiencies also increased. 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, it seems as if the overall number of detentions for 2018 will increase slightly from that of the 2017 numbers.

In recent years, ballast water management (BWM) has been receiving a great deal of attention from Port State Control agents. In 2017, the USCG issued 219 deficiencies for BWM compliance issues. With the approval of more and more ballast water treatment systems by the USCG (as of 26 February 2019, 16 systems had received approval and 10 others are under review²⁵), 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 programme (QS21), which allows eligible flag administrations and vessels to receive less frequent and reduced examinations, ended the 2017 calendar year with an enrolment of 2,013 vessels. That is an increase of over 500 vessels from 2016. However, there was a net loss of two flag administrations, as four flag administrations lost their eligibility while two additional flags became eligible. The new additions were France and the Netherlands. 2018 was the second year of the USCG's QS21

22 *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).

23 www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/CG-5PC/CG-CVC/CVC2/psc/AnnualReports/annualrpt16.pdf.

24 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.

25 https://www.dco.uscg.mil/Portals/9/MSB/BWMS/BWMS_Approval_Status_26FEB19.pdf.

E-Zero programme, which is aimed at adding environmental stewardship to the existing QS21 programme. E-Zero focuses on compliance with international environmental conventions, anti-fouling and US ballast water regulations. E-Zero eligibility requires (1) QS21 enrolment; (2) no worldwide MARPOL detentions for three years; (3) no environmental deficiencies in the United States for three years; (4) no letters of warning, notices of violation or civil penalties for Right Whale Mandatory Ship Reporting violations for five years; and (5) a USCG-approved ballast water management system. As of 5 February 2019, 54 ships received the E-Zero designation.²⁶

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 US Customs and Border Protection (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 went 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 play an important part 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*, 346 F.3d 530 (5th Cir. 2003) 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: (1) the classification society, in the course of its profession, supplied false information for the plaintiff's guidance in a business transaction; (2) the classification society failed to exercise reasonable care in gathering the information; (3) the plaintiff justifiably relied on the false

26 https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/CG-5PC/CG-CVC/CVC2/psc/safety/qualship/List_of_EZero_Vessels.pdf.

information in a transaction that the classification society intended to influence; and (4) the plaintiff thereby suffered pecuniary loss. *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 Justice Department (DOJ) boasts that by the end of fiscal year 2016, the United States had imposed \$363 million in criminal penalties and more than 32 years of confinement against shipping companies and their crew for intentional discharges of pollution from ocean-going vessels.²⁷

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. The APPS and MARPOL set limitations on the oil content that is allowed to be discharged into the sea and places recording requirements on vessels. The APPS and MARPOL 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 Environmental Protection Agency (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, recently, the USCG inspected the oil record book of a Liberian-flagged vessel and found at least eight occasions 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 \$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

27 <https://www.justice.gov/enrd/page/file/925411/download>.

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. Recently, two Greek shipping companies were sentenced to pay \$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.

Recent amendments to MARPOL Annex VI – Regulations for the Prevention of Air Pollution from Ships, which is an annex to the International Convention on the Prevention of 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* International Maritime Organization (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 130 kW.
- 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.
- p* Hours under way.

Upon receipt of reported data, the Administrator of the Environmental Protection Agency 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 US Coast Guard to issue international energy efficiency (IEE) 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).

v Collisions, salvage and wrecks

Collisions

The United States adopted the COLREGs with effect from January 1977 (Title 33 of the US Code, Sections 1601 to 1608). However, a second set of navigational rules has also been adopted, namely the Uniform Inland Navigation Rules (Inland Rules), which apply generally in inland waters. The Inland Rules are applicable inside certain demarcation lines set forth in regulations by the USCG and that generally conform to a line connecting the outermost aids to navigation along the US coastline. The Inland Rules are generally in harmony with the COLREGs; however, they include rules particularly applicable to inland river navigation.

Salvage

The United States is a party to the International Convention on Salvage, 1989, which entered into force on 14 July 1996. The Salvage Act gives rise to a right to a reward, and a maritime lien is created 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 (1) a marine peril that places the property at risk, (2) the salvage is voluntarily rendered, and (3) the salvage effort must be successful in whole or in part.

Wreck removal

A vessel grounded or sunk in the navigable waters of the United States is subject to the requirements of the Wreck Removal Act (a part of the Rivers and Harbors Act of 1899, found at 33 USC Sections 409 to 415) (Wreck Act). The Wreck Act imposes a strict, non-delegable duty upon 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 wreck who has failed to mark or remove the wreck is liable for damages caused if another vessel collides with the wreck.

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 worker safety and health, and adverse environmental impacts.

US ship scrapping and recycling is 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 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 fall protection, use of cranes, forklifts, cutting and welding, fire prevention and protection, and so forth.

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.

vi Passengers' rights

The United States is not a signatory to the Convention Relating to the Carriage of Passengers and Their Luggage by Sea (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.²⁸

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, where 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.²⁹

With regard to 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 related to mechanical failures, medical care, essential provisions and unspecified emergencies. However, the Bill of Rights does not specify any specific compensation if a cruise line violates these rights.

vii 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 the course of 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

28 46 USC Section 30509.

29 In the Ninth Circuit, see *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827 (9th Cir. 2002). In the Eleventh Circuit, see *Wajnsat 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 *Wajnsat v. Oceania Cruises, Inc.*, No. 11-13670 (11th Cir. 12 August 2011); *Wajnsat v. Oceania Cruises, Inc.*, 684 F.3d 1152 (11th Cir. 2012).

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 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 that his or her employer was negligent, he or she need only show that the employer's negligence is the cause, in whole or in part, of his or her injuries. In other words, once a seafarer establishes negligence, 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'.³⁰ 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 referred to as 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 upon which he or she worked. The doctrine of unseaworthiness imposes upon the shipowner an absolute and non-delegable duty to furnish a seaworthy vessel and appurtenances that are reasonably safe and fit for their intended use.³¹ Unseaworthy conditions may include defective equipment, hull, tools or appliances; slippery decks; insufficient or incompetent crew; inadequate supplies; improper methods of work; failure to provide adequate safety equipment; and failure to provide safe means of ingress and egress from the vessel.

In addition to the unseaworthy condition, the seafarer must also 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 that may be recovered 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. Since the US Supreme Court's decision in *Miles v. Apex Marine Corp.*,³² federal and state courts have grappled with whether a seafarer has the right to recover punitive damages under a general maritime law claim of unseaworthiness. Currently, the federal circuit courts are split, with the Ninth Circuit answering in the affirmative and the First, Second, Fifth and Sixth Circuits answering in

30 *Rogers v. Missouri Pac. R.R. Co.*, 352 US 500, 506 (1957).

31 *Seas Shipping Co. v. Sieracki*, 328 US 85, 89 (1946), overruled on other grounds.

32 498 US 19 (1990).

the negative. In late 2018, the United States Supreme Court agreed to hear a case resolving this split. *Batterton v. Dutra Group*, 880 F.3d 1089 (2018), cert. granted, 139 S.Ct. 627 (7 December 2018) (No. 18-266).

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 upon 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. A seafarer, however, has a duty to 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*,³³ 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

As 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 – domestic shipbuilding could see real gains.

33 557 US 404 (2009).

VENEZUELA

José Alfredo Sabatino Pizzolante¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Shipping and port activities are of paramount importance to the Venezuelan economy, bearing in mind that the country's population (with nearly 30 million inhabitants), relies very much on the importation of bulk and manufactured goods, as well as the export of oil and steel-related products. According to the most recent estimated figures held by the national shipping registry, the domestic fleet over 500 gross tonnage (GT) comprises approximately 400 vessels totalling 1.2 million GT. The state remains as the principal shipowner, since in addition to the tanker fleet of *Petróleos de Venezuela SA* (PDVSA), it has acquired by expropriation *Conferry*, the firm in charge of transport services between the mainland and Margarita Island; and in 2011 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 few years ago, the PDVSA embarked on a renovation and expansion programme of its fleet, to be able to carry at least 45 per cent of all exports and to diversify its clients, with China at the forefront. However, this programme did not work 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 lack of investment and obsolescence. The public fleet has also been affected by lack of maintenance.

The port system involves petrochemical terminals in the east and west of the country (such as La Salina, El Tablazo, Puerto Miranda, Amuay, Cardon, José) under control of the PDVSA; bulk terminals in the Orinoco river (e.g., Sidor, Ferrominera) under the administration of *Corporación Venezolana de Guayana*; and the public ports (such as Puerto Cabello, La Guaira, Maracaibo, 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. Unfortunately no recent cargo and traffic figures have been released by *Bolipuertos SA*; nevertheless, because of the rigid exchange control in place and huge decline in oil prices, there has been a significant reduction in cargo volumes, said to reach 60 per cent nationwide. The construction of the Container Terminal at Puerto Cabello by China Harbour Engineering Company, at a cost of US\$520 million and with the capacity to handle 700,000 twenty-foot equivalent units (TEUs) in its first

1 José Alfredo Sabatino Pizzolante is a partner at Sabatino Pizzolante Abogados Marítimos & Comerciales.

phase, was stopped because of a lack of funds. Fortunately, the expansion and modernisation of the port of La Guaira, entrusted to the Portuguese Teixeira Duarte Consortium, has been completed and the container terminal is now open; it is operated by the aforementioned Consortium.

The main shipyard and dry dock facilities are Diques y Astilleros Nacionales CA (Dianca) and the Uococar. 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, naval structures of steel and aluminium up to 30,000 deadweight tonnage (DWT) and Uococar up to 1,000 DWT. Both have entered into strategic associations with Damen Group and Navantia for the constructions of tugs and patrol vessels.

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 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 will exercise 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 related to the ports regime and infrastructure, governing public and private ports nationwide, to ensure coordination in order to consolidate a modern and efficient port system. Title IV of the Law introduces provisions related to the liability regime of port operators and port administrators, based on the 1991 United Nations Convention on Liability of Operators of Transport Terminals in International Trade; however, some of the provisions have been reviewed to adjust them to particular Venezuelan port practices, whereas others have been introduced to cover situations that the Convention does not contemplate.

III FORUM AND JURISDICTION

i Courts

Shipping disputes are litigated in the 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 specialised 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 on 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. While provisions related to the carriage of goods are compulsory, those related to 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 the field. The arbitration procedures are conducted in accordance with the rules set up by each arbitration centre, and in the absence of rules, the procedure specified in the Law for Commercial Arbitration enacted in 1998 should apply. Few cases on maritime matters referred to conciliation or arbitration are known in the domestic forum; however, 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 the assessment of the facts and the solvency of the petitioner, arbitrators agreed to place the ship in the possession of the mortgagee without requesting any guarantee, but holding the bank responsible for the damages that such measure might cause to the defendants or third parties.

iii Enforcement of foreign judgments and arbitral awards

Foreign judgments are only enforceable in Venezuela after obtaining the *exequatur* from the Supreme Court of Justice, pursuant to the provisions of the Code for Civil Procedure (Article 850). Nevertheless, the *exequatur* may be denied pursuant to Article 851, for instance, if the judgment deprives domestic courts of jurisdiction or if it falls within one of the scenarios

2 *Ativenca v. Oceanlink Offshore III AS* Constitutional Chamber – Supreme Court of Justice – File No. 09-0573.

provided for by the civil procedural rules, such as a judgment contrary to public policy or one resulting from proceedings that have not been properly served to the defendant or one where his or her right to defence was not guaranteed.

With regard to arbitral awards, Venezuela is a signatory to the Convention for the Recognition and Execution of Foreign Arbitration Awards (since 1994) 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 the *exequatur*.

IV SHIPPING CONTRACTS

i Shipbuilding

No significant shipbuilding takes place in Venezuela; the existing shipyards are mainly involved with maintenance and repairs. However, the PDVSA has embarked on an expansion of its fleet by entering into strategic associations with Japan, China and South Korea for the constructions of Suezmax, Aframax and VLCC vessels. Some agreements have also been concluded with Spain, Brazil and Argentina. The navy has done the same with Spain. In these cases financing has been granted by foreign governments and bankers in the context of said agreements.

ii Contracts of carriage

Venezuela is not a signatory of either the Hague, the Hague-Visby or the Hamburg Rules. Instead, the Law on Maritime Commerce adopts a mixed regime for the regulation of the carriage of goods by water, making it clear that these provisions shall apply whatever the nationality of the ship, carrier, actual carrier, shipper, consignee or any other interested person. However, these provisions do not apply to charter parties, unless a bill of lading is issued pursuant to the charter party that governs the relationship between the carrier and the holder of the bill of lading that is not the charterer. It follows that any shipment to or from Venezuela under liner traffic will be subject to these provisions in terms of, *inter alia*: liability regime, exoneration from and limitation of liability and time bar, irrespective of the nationality of the ship, being cargo claims under jurisdiction of the domestic maritime courts, whether the goods are moved in international trade or cabotage.

All actions derived from the contract of carriage of goods by water are subject to a one-year time bar, counted from date of delivery of the merchandise by carrier to the consignee, or the date when the merchandise should have been delivered. Domestic law adheres to the period of responsibility, exoneration and limitation of liability as stated in the conventions.

It is important to point out that the carrier is not entitled to retain goods on board to guarantee his or her credits; however, pursuant to Article 259 of the Law on Maritime Commerce and to safeguard the payment of freight, use of containers, demurrage, contribution to general average and signature of the bond, the carrier through an order of a maritime court may place the goods in the hands of a third party (warehouse). Should the carrier guarantee the corresponding fiscal credit and in the absence of anyone claiming the goods, these will be taken to court auction. The carrier may also exercise a lien upon the cargo for freight, demurrage, costs for loading and unloading operations as well as other costs

derived from the contract of carriage and the charter party. This lien, however, 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 former (including the servant or agent) is not liable for loss sustained by the carrier or by the ship, unless it was caused by the shipper's fault. Specific provisions are set out in connection with dangerous goods, imposing upon the shipper the obligation to suitably mark or label dangerous goods as such and to inform the carrier about the dangerous nature of any cargo and the precautions to adopt. Should the shipper fail to do so, the carrier may at any time unload or destroy the cargo, without payment of compensation and irrespective of the damages owed by the shipper towards the carrier (Article 231). Likewise, according to the General Law on Ports (Article 101) a port operator in charge of warehouses and container yards who has not been informed about the dangerous nature of goods, may also destroy or dispose of the cargo without payment of compensation to its owner and is entitled to have its costs reimbursed by the person who was obliged to notify the port operator of the dangerous nature of the cargo.

iii Cargo claims

As in the Hamburg Rules, the Law on Maritime Commerce defines the consignee as the person entitled to receive the goods, so domestic provisions allocate the title to sue on the former (Article 249). As to who can be sued, Article 197 states that for the purposes of the law, 'carrier' means 'any person who by himself or through another person acting on his behalf has concluded a contract of carriage of goods by water with a shipper'; whereas 'actual carrier' means 'any person to whom the carrier has entrusted the performance of the carriage of goods by water or of part of it'. Consequently, in the light of the maritime provisions the owners will be the carrier if they have the direct exploitation of the ship, whereas charterers will be regarded as the carrier if undertaking the commercial operation of the ship and issuing the bills of lading. In other words, the responsible party for the execution of the contract of carriage is the one issuing the bill of lading.

The provisions related to bareboat charters as well as 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 LLMC Convention 1976. Shipowners and their insurers are thus allowed to contractually limit liability in the same manner and in accordance with the limitation figures prescribed by Articles 2 and 6 of the Convention.

Anyone seeking to limit liability (such as shipowners, charterers, insurers, salvors) may appear before a maritime court and request the commencement of a proceeding to constitute a limitation fund (Articles 52 to 74 of the Maritime Law). This is set in motion by the submission of a petition indicating the circumstances giving rise to the damages in respect of which limitation is invoked; the maximum amount of the limitation fund calculated in accordance with the Maritime Law; the list of creditors known by the petitioner and the definite or provisional amount of their credit and its nature; 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) upon a ship will be suspended once the limitation fund is constituted.

V REMEDIES

i Ship arrest

The arrest of ships is mainly governed by the provisions of the Arrest Convention, incorporated in the Law on Maritime Commerce, to the extent that Article 93, following the Convention, sets out the list of maritime claims giving rise to a ship arrest. Similarly, the governing provisions allow the arrest of the ship in respect of which the maritime claim arose, as well as the arrest of a sister ship. The maritime courts shall grant the arrest for a maritime claim when this is founded in a public document or a private document recognised by the other party, accepted invoices, 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. The defendant, however, may oppose the arrest or request the lifting of it, if in the opinion of the court sufficient security has been provided, save in cases in which the ship has been arrested for any dispute as to the possession of the ship or any dispute resulting from a contract of sale. Under domestic provisions the action for the arrest of the ship must be brought against the ship and her master at the same time, as prescribed by Article 15 of the Law on Maritime Commerce, otherwise the action will be dismissed.³

In practical terms, an arrest is executed through an order forwarded by the court to the port captaincy via fax or email, resulting in the withholding of clearance to sail by the maritime authority. Consequently, an arrest order granted upon an unberthed ship within Venezuelan jurisdictional waters would be possible.

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 of the ship, the estimated price, the time and date of the sale and identification of the port where the ship is. In the case of a forced sale or execution the court will notify the competent authorities of the flag state, the owners, beneficiaries of mortgages and holders of maritime privileges. In the court sale of *MV Josefa Camejo*, the defendants attempted to obtain an injunction, arguing that the ferry performed a public service, an argument rejected by the Supreme

3 First Instance Maritime Court – File No. 2005-000059.

Court of Justice upon assessing the facts, as it was found that the vessel had been anchored for several years without carrying out any activities and was therefore not performing any public service 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 Load Lines Convention, the COLREGSs, SOLAS, the Convention on the International Maritime Satellite Organization, the Torremolinos International Convention for the Safety of Fishing Vessels, the STCW Convention and 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 Viña del Mar MOU of 1992, 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 then the port captaincy will send a surveyor to check this and will then inform the coastguard of whether the vessel should or should not be detained. Inspectors check for compliance with the principal IMO instruments; the most common deficiency is a lack of the certificates prescribed by 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. Because of the lack of a comprehensive legal framework governing the activities of different agencies in the maritime field, in many instances port state control is confused in its implementation, occasionally causing serious delays to ships. According to available statistics, an average of 1,500 vessels are inspected by the port state control authorities each year, resulting in 20 to 25 detentions. Figures held by the secretariat of the Viña del Mar MOU show that the port of Puerto Cabello conducted 60 per cent of the inspections carried out in Venezuela, putting Venezuela in third place in terms of the number of inspections carried out, after Brazil and Argentina.

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) had been repealed by the now enacted legislation. Thus, the office of the Venezuelan Shipping Registry (Renave), is now located within the INEA and has branches in the different port captaincies. Existing ships or ships under

⁴ Constitutional Chamber, Supreme Court of Justice – File No. 06-1803.

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 INEA that the ship complies with the requirements of national and international legislation regarding safety, and that there is no available tonnage in the shipping registry. Even so, irrespective of the granted waiver, the ship must comply with the process for temporary admission with the customs office before arrival.

A ship may be wholly owned by foreign parties; the only requirement is the incorporation of a domestic company, but once again 100 per cent of the shares may be wholly owned by a foreign interest. Also, a foreign-registered ship bareboat-chartered to a Venezuelan company for up to or over one year may be registered with Renave. The basic documentation to be submitted is:

- a* an application for inscription of the vessel with Renave, which must be submitted through the INEA website;
- b* a copy of the articles of incorporation of the company acting as owner or charterer;
- c* evidence of the deletion or suspension of the previous registration or equivalent document;
- d* the vessel's document of ownership or bareboat or leasing agreement as the case might be, duly translated into Spanish; and
- e* plans and technical characteristics of the ships, including former 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 then it is generally accepted that the applicable customs regime will be that of a temporary admission, whereby the import duties will be suspended.

An important aspect in connection with flag registration is also the inspection and certification. There is no specific age requirement, but vessels over 10 years old are subject to a special inspection regime for registry with Renave. In general terms, once the flagging process has advanced, inspection and certification of the ship by an appointed flag surveyor is needed. Note that maritime administration allows up to three months for the homologation of the certified original, at which time the Venezuelan documents should be issued. Homologation must also be carried out for the ISM Code documentation within three months.

iv Environmental regulation

Venezuela is a signatory to the CLC Convention 1969, as amended in 1976 and 1984, and the 1992 Protocol. Therefore, shipowners bear strict liability for damages resulting from an

oil spill, unless such damage has been caused by the events specified in the Convention. Shipowners are entitled to limit liability in accordance with the Convention, following the procedural rules set out in the Law on Maritime Commerce.

Venezuela has also enacted the Organic Law on the Environment (Official Gazette No. 5,833 Extraordinary of 22 December 2006) and the Criminal Law on the Environment (Official Gazette No. 39,910 of 2 May 2012), prescribing provisions concerning air and sea pollution. The first is a comprehensive set of provisions intended to establish the guiding principles for the conservation and improvement of the environment. It declares the conservation and improvement of the environment a matter of public utility and general interest, including within the activities capable of degrading the environment those that directly or indirectly pollute or cause a deterioration of the atmosphere, water, seabed, soil, or subsoil, or that have an unfavourable impact on fauna or flora. The second law defines those acts that violate the legal provisions for environmental conservation, imposing heavy penalties such as imprisonment, arrest and fines. A significant number of offences are set out, including: discharge of pollution in lakes, the coast or marine environment as a result of non-compliance with the technical rules in force; pollution of the marine environment resulting from leaks or discharges of oil and other products during transportation, exploration and exploitation on the continental platform and in the Venezuelan exclusive economic zone; construction of works without authorisation or breach of the technical rules that are capable of causing contamination to the lakes, coast and marine environment; and breach of the international conventions on oil pollution.

Additionally, the captain, shipowner or operator that negligently caused the polluting incident will be subject to imprisonment of between one and three years. A captain's failure to give notice of a polluting accident within the national waters will be subject to imprisonment for between four and eight months, and the responsible ship can be detained by court order. On the other hand, Article 96 states that anyone emitting or allowing the escape of gases or biological or biochemical agents of any nature capable of deteriorating or polluting the atmosphere or air is in breach of the technical rules applicable to the matter and will be subject to imprisonment for between six months and two years and a fine of between 600 and 2,000 tributary units.

v Collisions, salvage and wrecks

Rules relating to collision are included in the Law on Maritime Commerce, based on the Collision Convention 1910. In this sense 'collision' does not solely refer to violent physical contact between two or more vessels, since the domestic rules also extend to repair of damage caused by a vessel, even if a collision has not actually taken place and the damage is caused as a result of a negligent manoeuvring (e.g., without physical contact). In cases of damage to the port infrastructure, including fenders, the port authority may request a guarantee to cover the repairs. P&I club letters of undertaking are usually accepted, with the guarantee remaining in place until the costs are paid or the responsibility is determined; nevertheless, the guarantee must be executed within six months of the incident. Legal actions in connection with collisions are subject to a two-year time bar.

The main provisions of the Salvage Convention 1989 are also incorporated into domestic legislation. The master and the shipowner are free to enter into contracts of salvage, but even so such contracts can be annulled by the maritime court if they were executed under undue pressure, influence or danger or if the conditions are not fair and the agreed reward

is excessively high in relation to the services rendered. With regard to the criteria for fixing the reward, domestic provisions follow Article 13 of the Convention. Any action relating to payment under salvage operations shall be subject to a two-year time bar.

Regarding wrecks, the Law on Merchant Marine and Related Activities (Article 92) sets out provisions regarding navigation channels, which also apply to wreckages in general. Thus, the obstruction of a navigation channel caused by the grounding of a vessel, collision, allision or sinking will impose upon the shipowner a number of obligations aimed at giving prompt notice of the incident to the maritime authority through the port captaincy in order to take measures to reduce the risks for other ships sailing nearby and to remove the wreckage if necessary. Following casualties, the maritime authority will set up an investigation committee that, besides determining the causes, may recommend steps to be taken, including 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 take such measures, in which case the shipowner is obliged to reimburse the costs incurred by a third party appointed by the authorities to this end.

vi Passengers' rights

The main provisions of the Athens Convention have been included in the Law of Maritime Commerce. These provisions apply to the carriage of passengers in both international and domestic traffic. Pursuant to Article 278, 'carriage of passenger' comprises the following:

- a* In respect of a passenger and his or her cabin luggage, the period aboard the vessel or on any vehicle or means of access to come aboard or disembark, and that period in which the passenger and his or her cabin luggage are carried by water to or from the vessel and always when the price of this service is included in the passenger's ticket or the vehicle used to perform this carriage has been put at the disposal of the passenger by the carrier.
- b* In respect of the passenger, the period of carriage does not include that period when the passenger is at a terminal, maritime station, berth or any other port premises.
- c* In respect of luggage that is not cabin luggage, this includes the period starting when the carrier, his 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, whichever were the documents that the carrier omitted to deliver (Article 279).

The indemnity paid by the carrier in cases of death or personal injury to a passenger shall not exceed 46,666 special drawing rights (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* in the case of cabin luggage – 833 SDRs per passenger and per voyage;
- b* in the case of vehicles, including luggage carried inside or on top of vehicles – 3,333 SDRs per vehicle and per voyage; and
- c* in the case of 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 Convention.

vii Seafarers' rights

Labour provisions for domestic shipping can be found in the Organic Law on Labour (Official Gazette No. 6,076 Extraordinary of 7 May 2012), which is generally regarded as having generous provisions towards seafarers. Article 346 of the Law sets out the obligations of shipowners to provide seafarers with minimum standards on board, such as clean accommodation; healthy, nutritional and sufficient food; medical care, hospitalisation and medicines where social security does not provide them; repatriation and travel for boarding expenses; notification to the authorities of any accident at work; granting licence for the exercise of electoral rights; and accommodation and food ashore when the ship is abroad for repairs and seafarers cannot remain on board.

The provisions of the Organic Law on Working Conditions and Accident Prevention (Official Gazette No. 38,236 of 26 July 2005) also have a significant impact on shipping, in cases 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 that happen during working hours, should the employer fail to properly instruct and warn the worker about the nature of the risks he or she is exposed to, 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 the ship could well be the result of the employer's failure to instruct and warn the seafarers about the risks concerned with the assigned task. It follows that in 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 safety and health at work, the employer will be obliged to pay indemnification to the worker or his or her heirs, in accordance with the degree of fault and the injury. Claims brought by seafarers for personal injuries or occupational illness are generally founded on the provisions of this law.

Venezuela has not ratified the Maritime Labour Convention 2006, although the PDVSA has announced that its fleet has already been voluntarily certified; the first Venezuelan shipowner to comply with this instrument.

VII OUTLOOK

Although in the past year there was a significant number of reported drug cases involving the conviction of seafarers and the arrest of ships, cases are mainly related to drugs attached to the vessel's hull or placed inside the rudder stock spaces as well as on the superstructure or in loaded or empty containers affecting tankers, bulk carriers and container ships alike. It is fair to say that there has been a noticeable reduction in recent times. Even so, it is recommended that ships trading with Venezuela take precautionary measures such as underwater inspections and extra security services when calling at domestic ports, as drug trafficking through Venezuelan territory seems to be a recurrent problem. These cases are exclusively handled by the criminal courts and the corresponding investigations by the Prosecutor's Office have proved to be very cumbersome and time-consuming.

Other common risks for ships are attempts of smuggling or theft of cargo through forged loading orders or overloading of cargo at some PDVSA marine terminals, oil stain of hulls while calling at Lake Maracaibo and other ports and rising delays and disputes between

shipowners and charterers. Customs fines for cargo shortage or over-landing and especially the matter of shipping containers remaining within the national territory for longer than the permitted 90 days after arrival should also be noted, following amendments to the Organic Customs Law (Official Gazette Extraordinary No. 6,155 of 19 November 2014).

In the context of the serious economic crisis Venezuela is currently experiencing, the government announced the implementation of the 'petro', so called because it is linked to the country's oil reserves, and is said to be a cryptocurrency or digital currency, designed to circumvent US and European sanctions. In line with the former, on 23 March 2018 the Venezuelan maritime authority (INEA) issued Circular 006 announcing the imminent payment by ship agents of services such as pilotage and towage in 'petros', on behalf of foreign flag ships. This system of payment, however, has not been implemented so far. In addition to this, the Ministry of Transport published Resolution No. 033 (Official Gazette No. 41,389 of 3 May 2018), setting the tariffs for services and related activities to be applied by the INEA in euros. The resolution states in the final provisions that key services such as pilotage, towage, launch and re-floating rendered to foreign flag ships, among others, will be payable to INEA in euros 'or its equivalent in the multicurrency system' adopted by Venezuela, according to the law, whereas the rest of the services are payable in bolivars at the applicable exchange rate. It can be assumed that the multicurrency system referred to opens the doors for the long awaited petro payments, although the question remains as to whether the conjunction 'or' used for the wording of the provisions makes the petro payment an optional and not a compulsory one, an important point especially in view of US sanctions to Venezuela in connection to transactions in crypto or digital currencies.

Finally, following recognition by the Trump administration of the opposition leader Juan Guaidó as the legitimate president of Venezuela, on 28 January 2019 the United States announced new and severe sanctions on the PDVSA by regarding it as a specially designated national, and so included it on the list of companies that US citizens are generally prohibited from dealing with. These sanctions have caused disruptions in terminals such as Jose and Amuay, since the PDVSA has ordered customers with tankers waiting to load Venezuelan crude oil bound for the United States to prepay for the cargoes, resulting in a number of delays in tankers departing port due to lack of loading documents issued by the PDVSA. Sanctions are also having a significant impact on vessels loaded with Naphtha and other products intended for the internal market, since the PDVSA is urging them to discharge their cargo, sometimes backed by court orders in the form of constitutional injunctions, even where there have been instructions to stop the operations by the master, resulting in charter party disputes.

ABOUT THE AUTHORS

ADEDOYIN AFUN

Bloomfield Law Practice

Adedoyin is a partner and chair of Bloomfield Law Practice's acclaimed shipping and oil services practice group. He holds an LLB (Hons) from Nigeria's premier university, University of Ibadan, an LLM (international commercial and maritime law) from Swansea University, Wales, and he is dually 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 fora. He has also, over the years, been recognised in the shipping and transport rankings of international directories such as *Who's Who Legal* and *The Legal 500*.

For the second consecutive year, *The Legal 500* (2018 and 2019 rankings) has listed Adedoyin as a leading individual in its commercial, corporate and M&A rankings for Nigeria. Adedoyin also has considerable experience in asset management and private equity, corporate finance, commercial litigation and arbitration, and project and asset financing.

YAMAN AL HAWAMDEH

Holman Fenwick Willan Middle East LLP

Yaman 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.

SIMON BLOWS

HFW

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 20 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.

MIGUEL SOARES BRANCO

Vieira de Almeida

Miguel joined VdA in 2016. He is a senior associate in VdA's oil and gas practice. Miguel has been actively involved in multiple transactions within the petroleum sector, such as production sharing contracts, joint operating agreements, EPC contracts for FPSOs and other service agreements for exploration and production activities. Miguel has also advised on regulatory matters and bidding procedures for the oil and gas industry.

JAMES BROWN

HFW

Mr 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 the *Journal of Maritime Law & Commerce*, the *American Journal of Trial Advocacy* and the State Bar of Texas *Environmental Law Journal*.

JONATHAN BRUCE

HFW

Jonathan Bruce specialises in marine and energy insurance and reinsurance, as well as shipping. He acts mainly for insurers, reinsurers, energy companies, shipowners, P&I and charterers. He has significant experience in Latin American matters (he speaks Spanish and Portuguese, having lived in Brazil), and has worked extensively with eastern European countries, including Russia.

On the marine side, Mr Bruce acts in coverage and recovery and defence claims arising from losses worldwide, including hull and machinery damage, groundings and collision, salvage and towage, GA and defective bunkers. He also acts in 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 CAR, DSU and control of well in both onshore and offshore energy, extending also to the power, mining and industrial sectors, often in claims involving Latin America.

EDWIN CAI

AsiaLegal LLC

Edwin is an associate director at AsiaLegal LLC and has been involved in various areas of practice, including shipping, admiralty and arbitration. His experience in shipping and admiralty work includes regularly advising and acting for a wide range of stakeholders, including shipowners, charterers, cargo interests, and bunker suppliers in claims relating to charter parties, bills of lading, cargo, collisions, and international trade and commodities disputes.

ANDRÉS CANDOMEQUE

Mestre Abogados

Andrés Candomeque joined Mestre Abogados in January 2001 after graduating in law from the University of Barcelona (Abat Oliba-CEU) and specialising in shipping law by attending the master's in shipping law and business at the Universidad Politècnica de Catalunya. Supporting his training, he had also the opportunity of a secondment at two major firms in London.

JEAN CAO

HFW

Jean Cao is a PRC-qualified lawyer with eight 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 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.

SIMON CARTWRIGHT

Hesketh Henry

Simon is a transport and trade law specialist, with expertise in shipping, 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 maritime practice.

He has extensive experience in advising on commercial contracts related to the international sale of goods and services and the transportation of goods. He has global litigation and arbitration experience, regularly handling disputes in international arbitration (including trade forums for commodities) and the English High Court, as well as managing claims in Europe, Asia, the Middle East, Africa and the Americas.

LARRY JOHN RABB CARVALHO

Promare | Rabb Carvalho Advogados Associados

Larry John Rabb Carvalho is a senior partner at Promare | Rabb Carvalho Advogados Associados. He has a wealth of experience in litigation, with an emphasis on shipping matters, and an extensive record of advising P&I clubs, maritime agents, port operators, trading companies, shipowners, charterers, cargo owners and underwriters. He is active in the area of international sales of goods and commodities. In addition, he advises importers and exporters regarding transaction legalities, and acts as a consultant during international claims, having considerable experience in complex arbitrations and Admiralty Court proceedings. He has received recognition from international publications and several awards as a leading Brazilian lawyer in the fields of shipping, customs law and international trade law.

He has an LLM degree in maritime law and a postgraduate qualification in international trade law. He currently provides legal counsel to the Brazilian Association of Ship Suppliers, and is a member of several shipping industry associations. He is also a member of the Brazilian Bar Association, São Paulo and Ceará, the Brazilian Association of Maritime Law (ABDM) and the Ibero-American Institute of Maritime Law (IIDM/BR).

JENNIFER E CERRADA

VeraLaw (Del Rosario Raboca Gonzales Graspasil)

Jennifer E Cerrada specialises in corporate law and taxation. She has almost 14 years of experience working on special projects to create appropriate corporate structures to maximise tax benefits for foreign corporations and individuals wishing to do business in the Philippines. In addition, she is active in ship deliveries, registration and de-registration of ship mortgages.

She completed her BSc in management majoring in legal management and a minor in French studies at Ateneo de Manila University, and obtained her bachelor of laws at Arellano School of Law.

ANDREW CHAMBERLAIN

HFW

Andrew Chamberlain is a partner at HFW and is the global head of admiralty and crisis management. He is a former Royal Navy officer and specialises in 'wet' shipping cases, including salvage and wreck removal (acting for salvors as well as owners and their

underwriters), collisions, fire and explosion, total loss and wreck removal. He also advises on both civil and criminal pollution liabilities, marine insurance coverage disputes and the full range of other shipping-related commercial and contractual disputes.

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

Andrew lectures regularly on salvage, wreck removal and casualty response and is an acknowledged expert in the field. He has been invited to be chairman of the Lloyd's Salvage and Wreck Removal conference in London (the leading global industry event) every year since 2013. He is consistently recommended in *Chambers* and *The Legal 500* for his work on shipping and casualty matters, with one source commenting, 'What he doesn't know about shipping isn't worth knowing' (*Chambers* 2016).

KIMARIE CHEANG

HFW

Kimarie is dual-qualified in Singapore and Hong Kong. Prior to joining HFW in Singapore, Kimarie worked in the HFW Hong Kong office. She also spent four years with a leading Singapore legal practice, where she specialised in shipping and admiralty litigation (dealing with both dry and wet aspects of shipping law). Her practice encompasses international arbitration, international trade and transportation, admiralty, shipbuilding and offshore disputes, and other trade-related matters. Kimarie has been involved in several substantial arbitrations involving sale of goods, oil and gas, mining, trade, shipbuilding and other commodities, trade-related issues in Singapore, London and Hong Kong. She speaks fluent Mandarin, Cantonese and English.

Kimarie has successfully completed a number of client secondments, including with a major oil and gas company in Singapore, assisting in the trading business (products including oil, liquids and liquefied natural gas), an international commodities trading company, a Singapore-based Norwegian P&I club, and an international mining company.

MAGDALENE CHEW

AsiaLegal LLC

Magdalene set up AsiaLegal LLC with three others in November 2002. Since 1 July 2015, AsiaLegal LLC has been a member of HFW AsiaLegal, a Formal Law Alliance with HFW Singapore. In 2017, Magdalene was appointed onto the Expert Panel (Maritime) of the Singapore Mediation Centre. In January 2019, she was accredited as a Senior Accredited Specialist in Maritime and Shipping Law by the Singapore Academy of Law. From 2013–2015, she was nominated for the Euromoney Legal Media Group Asia Women in Business Law Awards under the Shipping practice area. Since Aug 2015, she has served as the President of the Singapore chapter of the Women's International Shipping and Trading Association (WISTA). She is also on the management committee of Mensa Singapore. Magdalene has accumulated experience in both contentious and non-contentious work in her years of practice in general commercial litigation, and in more specific areas of litigation practice, such as insolvency, shipping and admiralty. She has handled and advised on cargo claims, demurrage claims, claims for charter hire and freight, crew claims, detention of cargo

disputes, charter party disputes, collision claims, *Mare del Nord* orders and general average claims. She has independently advised on and attended to the closure or completion of many sale, purchase and ship financing transactions, both local and international.

WINNIE CHUNG

HFW

Winnie is an associate in HFW's Hong Kong shipping and transport litigation department. She specialises in dispute resolution particularly in the area of shipping and international trade. She has experience acting for and advising shipowners, charterers, trades and P&I clubs in a range of litigation and arbitrations, including disputes arising from charter parties, bills of lading, cargo claims, general average, shipbuilding contracts and MOAs. She was admitted as a solicitor in Hong Kong in 2016 and has also spent time in HFW's Shanghai office.

CATARINA COIMBRA

Vieira de Almeida

Catarina Coimbra joined VdA in April 2016 as an associate in VdA's projects – infrastructure, energy and natural resources practice. Catarina graduated in law in 2011 from the University of Lisbon School of Law. She obtained a master's degree in administrative law and public procurement from the the Law School of the Catholic University of Portugal in Lisbon in 2013 and she has attended a postgraduate course in water law at the University of Lisbon School of Law in 2018.

Catarina is admitted to the Portuguese Bar Association.

HOLLY COLAÇO

HFW

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

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

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

PAUL DEAN

HFW

Mr Dean is global head of offshore at HFW. He focuses mainly on dispute resolution and advisory work involving offshore vessels and rigs, including contractual disputes and drafting, collisions, fire and explosion, total loss, towage, seismic and limitation.

He regularly speaks at and chairs offshore vessel conferences and is on the BIMCO panel for its 'Using SUPPLYTIME' course, the review committee for the SUPPLYTIME 2005 revision and on the drafting committee for BIMCO's new standard form offshore dismantling services agreement. Experience gained working for an International Group of P&I Clubs member specialising in offshore vessels enables Mr Dean to combine practical understanding with the legal role and he is identified in the legal directories as one of the leading individuals in his fields.

Mr Dean was thanked for his contribution to the most recent edition of the leading textbook on 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 on a host of tricky problems on the various BIMCO forms'.

Mr Dean is qualified in England and Wales and was admitted as a solicitor in 1991.

MONA DEJEAN

HFW

Mona Dejean has been an associate at HFW for 10 years and specialises in shipping and transport. As a French *avocat*, her job consists of providing advice on legal risks, assisting with or carrying out settlement negotiations, legal representation in arbitration or before the commercial, administrative and criminal courts.

She has broad experience in resolving disputes arising out of charter parties, contracts of carriage, freight forwarding, marine insurance and shipbuilding contracts, and deals with the legal and practical issues arising out of maritime casualties. Her litigation experience also includes arresting and releasing vessels (including in jurisdictions of developing countries) and judicial sale of ships.

Ms Dejean studied law at University Paris V – René Descartes, where she obtained a master's degree in French contracts and torts law, and a master's degree in international business law. Ms Dejean is a member of the French Shipping Law Association, Wista France and the Paris Propeller Club.

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.

THOMAS DICKSON

HFW

Mr Dickson specialises in international commercial dispute resolution, with a focus on shipping and offshore disputes. He has advised on both wet and dry shipping matters, including salvage cases, wreck removal, groundings, collisions and cargo damage as well as various charter party-based disputes.

Mr Dickson spent six months in HFW's Geneva office, where he acted on a range of contentious matters.

Mr Dickson has experience of English Commercial and Admiralty Court proceedings, and international arbitration. Mr Dickson is qualified in England and Wales.

IRINA DOLYA

Black Sea Law Company Ltd

Ms Dolya is an associate in the Odessa office of Black Sea Law Company and a member of the company's shipping practice. Although Irina is still a young practising lawyer, she has already established herself as a specialist in various shipping matters, including ship arrest, personal injury and loss of life.

Ms Dolya graduated from the faculty of law of Odessa National Maritime Academy. She is fluent in Ukrainian, English, German and Russian.

CATHERINE DUFFY

A&L Goodbody

Catherine Duffy is a partner in A&L Goodbody's finance department and is head of aviation and transport finance. Catherine's practice focuses on all aspects of banking, including corporate and acquisition financing, asset financing (aircraft, property, and shipping), securitisation, tax-based financing and leasing, and general banking.

Catherine was recognised as one of Ireland's most influential and successful businesswomen at the Women's Executive Network (WXN) 2017 Awards.

GEORGE EDDINGS

HFW

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

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

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

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

LEA FERZLI

Baroudi & Associates

Lea holds a bachelor's degree from Saint Joseph University of Beirut School of Law (2009), and a master's degree in private international law and international trade law from Saint Joseph University (2011). Lea is a member of the commercial and transport departments. She has considerable expertise in transport, corporate and employment law. Lea regularly advises major corporations on various areas of Lebanese law. She joined the firm in 2011 and has been a member of the Beirut Bar since 2009.

JOÃO AFONSO FIALHO

Vieira de Almeida

João Afonso Fialho joined VdA in 2015. He is currently head of VdA's oil and gas practice, having been involved in shipping matters since his first years in the legal profession.

With more than 20 years of practice in the transport sector, his experience in shipping includes the contract of international transport, particularly in providing advice to owners, charterers, P&I clubs and port operators, commodities traders and various industry brokers. Advice is rendered in most shipping industry legal matters, with relevance in particular to the bunkering industry, as well as assistance and salvage at sea, ship arrest, customs and maritime litigation.

João also has an extensive track record with construction contracts and ship acquisition, charter parties, bills of lading, ship finance, mortgages and insurance.

His practice is focused in particular on specific matters arising from shipping activities associated with the oil and gas cluster, including wreck removal and environmentally sensitive issues.

JAVIER FRANCO

Franco & Abogados Asociados

Javier Franco is an attorney-at-law who graduated from the Externado University with a postgraduate degree in maritime law and an LLM (distinction) in international commercial and maritime law from the University of Wales in Swansea, UK.

He is an arbitrator (B list) of the Bogotá Chamber of Commerce in the fields of transport and commercial law. He is also a member of the standing young committee of the Comité Maritime International (CMI), a member of the board of the Colombian Association of Maritime Law (ACOLDEMAR) and a member of the Colombian branch of the Ibero-American Institute of Maritime Law (IIDM).

He has relevant experience in local and international law firms dealing with issues in the fields of commercial law, transportation law, shipping law, contract law, logistics, insurance and port matters. He is the author of many different articles on the subject of transportation law and maritime law and of the book *Legal Aspects of Logistics and Logistics Contracts*.

Currently he is a partner at Franco & Abogados Asociados and is acting as a lecturer in transportation law and maritime law at the Externado University in Bogotá, Colombia.

MELANIE FRIDGANT

HFW

Melanie is an associate in the shipping group. Her practice focuses on maritime and offshore energy matters, transactional matters, and commercial litigation.

Melanie is a member of the Order of the Barrister's an honorary award recognising excellence in oral and written advocacy. Having lived in France, the United Kingdom and Qatar, Melanie is bilingual English-French and speaks Romanian fluently.

Melanie received her bachelor of science from Northwestern University and her law degree from the University of Houston Law Center. While in law school, she was a member of the alternative dispute resolution team and she served as a senior article editor for the *Houston Journal of Health Law and Policy*, where her work on technological developments in the medical industry was also published.

She is admitted to practise in all Texas state courts and before the United States District Court for the Southern District of Texas.

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.

Jean-Pie's focus throughout his career has been in different areas of the maritime industry. Following stints with the EU Commission cabinet for Fisheries and Maritime Affairs 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.

Jean-Pie is a guest lecturer at various institutions, notably the World Maritime University and the Malta Institute of Taxation, and contributes to various publications.

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 almost 17 years of legal experience in four practice areas: intellectual property law, commercial and maritime litigation, recognition and enforcement of foreign arbitral awards and foreign judgment, and construction arbitration. She obtained her law degree from San Beda College of Law and her master's in international commercial law at the University of Nottingham.

Ms Gonzales was chair of the board of trustees of the Maritime Law Association of the Philippines in 2011 and president in 2010. She was a member of the Technical Working Group of the House Transportation Committee of the Philippine Congress in drafting the Proposed Maritime Code. She is regularly invited as a speaker on ship arrest, most recently at the Lloyd's Maritime Academy in London. As a maritime litigator, she handles cargo claims, ship arrest and foreclosure of ship mortgages. She regularly advises foreign clients on a variety of wet and dry maritime matters.

JEANIE GOODWIN

HFW

Jeanie Tate Goodwin is an experienced civil trial lawyer. Her practice focuses on maritime law, including Jones Act personal injury, vessel status and cruise ship cases. She also spends significant time defending energy companies in complex commercial litigation. In addition, she has substantial experience in insurance law, both first-party and third-party litigation, as well as coverage opinions. Ms Goodwin has been licensed to practise law in Texas since 2004, and she is admitted to practise before the Southern, Northern and Eastern Districts of Texas, the US Court of Appeals for the Fifth Circuit and the Supreme Court of the United States. She is a member of the State Bar of Texas, the Houston Bar Association and DRI.

Ms Goodwin is a graduate of Baylor University School of Law in Waco, Texas, where she obtained a Certificate in Criminal Practice. While in law school, she served as the technical editor of the *Baylor Law Review*. Ms Goodwin also obtained a bachelor of science in secondary education, summa *cum laude*, from Baylor University, where she was honoured as the Outstanding Student in Secondary Education and the Distinguished Student in Political Science.

CARLOS GÓRRIZ

UAB / Mestre Abogados

Carlos Górriz is a professor at the UAB (Universitat Autònoma de Barcelona) and a consultant at Mestre Abogados.

DAPHNE RUBY B GRASPARIL

VeraLaw (Del Rosario Raboca Gonzales Grasparil)

Daphne Ruby B Grasparil has 16 years' experience in various area of law, including corporate law, focusing on 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.

She has occupied various positions at the Maritime Law Association of the Philippines (MARLAW), such as the 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 her BA in economics and *juris* doctor degrees both from Ateneo de Manila University. She was admitted to the Philippine Bar in 1996.

CHRIS HART

HFW

Chris'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.

He has broad experience in maritime liens, ship arrests, maritime attachment and garnishment remedies, transport and sale of goods contracts, cargo claims, shipping casualties and marine pollution. For energy companies, Chris has experience in upstream and midstream commercial disputes and casualties, offshore and onshore, and with eminent domain condemnation cases for pipelines, including disputes arising from joint operating agreements, gas processing and gas measurement, mineral leases, and various conveyances of royalties and oil and gas interests.

Chris has been a speaker and author for presentations and articles on topics including offshore drilling, coastwise trade laws, OSV 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 Switzerland

William Hold is a solicitor 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 ICC, the SIAC, the RSA and the DIS.

Mr Hold also has a non-contentious practice and he often advises lenders and borrowers on commodity finance matters, and other parties on general commercial issues, which are usually related to commodities trading.

Before joining 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.

REBECCA HUGGINS

HFW

Rebecca Huggins is responsible for knowledge management for the HFW insurance and reinsurance group. She focuses on the provision of know-how support to the group and its clients, working on a variety of publications, training and current awareness projects.

Prior to working in knowledge management, Ms Huggins practised as a senior associate, advising on a wide variety of high-value multi-jurisdictional insurance and reinsurance disputes, in which she represented the London Market and overseas insurers and reinsurers

in the Commercial Court and in arbitration proceedings. In addition to marine insurance, she has experience in professional indemnity, employers' liability, industrial disease, D&O and fraud claims.

NICOLA HUI

HFW

Nicola is a senior associate in HFW's Hong Kong shipping, offshore and logistics department. She has extensive experience in maritime and trade disputes, and acts for clients in Hong Kong and English High Court proceedings, HKIAC, CIETAC, SIAC and LMAA arbitrations, as well as local proceedings relating to ship arrests, winding up, recognition and enforcement of arbitration awards and criminal cases (maritime and environmental liabilities). She was admitted as a solicitor in Hong Kong in 2010.

JYOTIKA JAIN

Bose & Mitra & Co

Jyotika is a senior associate at Bose & Mitra & Co. Prior to joining the firm in 2016, she worked with a dispute resolution law firm in New Delhi. Jyotika appears before various courts and before different national company law tribunals, for a broad range of shipping and commercial matters, including enforcement of foreign awards. She also deals extensively with personal injury and crew claims. Jyotika has been involved in numerous arbitrations and litigation involving admiralty, laytime and demurrage issues.

Jyotika graduated from Amity Law School (GGSIU) in 2010 and holds an LLM in maritime law from the National University of Singapore. She has been enrolled with the Bar Council of Delhi since 2010.

JONG KU KANG

Bae, Kim & Lee LLC

Jong Ku Kang is a partner in Bae, Kim & Lee's maritime and insurance practice group. His exposure to product liability issues started from an insurance-related context where he defended product liability claims on behalf of the manufacturers and their insurers as well as from defending shipbuilders and ship engine manufacturers against product liability claims. Since then, he has developed his practice and is now highly experienced in all areas of product liability, including advising on the relevant laws and regulations, assisting in preparation of drafting recall protocols and customer complaint manuals to representing clients in product liability proceedings. He frequently provides legal advice to multinational car manufacturers or car component manufacturers, engine manufacturers and major electronic companies on various areas of product liability.

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.

ALEX KEMP

HFW

Alex Kemp works in the admiralty team of the HFW shipping group. He works predominantly on wet disputes, including salvage, wreck removal, groundings, collisions, fires and piracy, and has been involved in more than 50 hijacking cases. These disputes often require advice in respect of limitation of liability, jurisdiction, insurance coverage and interlocutory applications.

Mr Kemp is also involved in advising on more general shipping matters, including charter party disputes and off-hire claims for which either LMAA arbitration or representation in the High Court is required. He has been involved in a number of reported High Court cases.

He has spent time in the firm's Dubai office and has recently finished a secondment to the legal department of an oil major.

Mr Kemp is an associate member of the Association of Average Adjusters, having recently passed the requisite examinations. He regularly lectures and writes articles, including the firm's biannual marine insurance case update. He is involved in the UK Chamber of Shipping's working group on general average.

JOON SUNG (JUSTIN) KIM

Bae, Kim & Lee LLC

Joon Sung (Justin) Kim is an attorney at Bae, Kim & Lee LLC. His practice area mainly focuses on shipping and maritime and insurance. He earned an LLB degree from Korea University and an LLM degree from Sungkyunkwan University Law School. Prior to joining BKL in 2018, he worked at Law Offices Moon & Song and Law Offices Kwon & Co and advised on carriage of goods by sea, charter party disputes, marine accidents, P&I insurance, and marine insurance.

TAKUTO KOBAYASHI

TMI Associates

Takuto Kobayashi is an associate in the shipping team at TMI Associates.

He graduated from Kyoto University and completed an MA in maritime law at Waseda University after qualifying as an attorney in Japan. He advises shipowners, charterers, P&I clubs, underwriters, shipbuilders, trading houses, etc. 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.

ADITYA KRISHNAMURTHY

Bose & Mitra & Co

Mr Aditya Krishnamurthy has recently been made a partner at Bose & Mitra & Co after having been associated with the firm for more than eight years. He has more than a decade's experience in the industry and previously worked with two English law firms in Singapore. He has been extensively involved in admiralty matters concerning the arrest and release of ships before various Indian High Courts. He has also been involved in a number of wet matters for investigation on maritime casualties. Aditya is a commercial litigator and heads the

firm's fraud, asset-tracing and insolvency department. He specialises in complex, high-value cross-border fraud and insolvency matters, including those that involve enforcing foreign arbitral awards and judgments in India. Aditya holds an LLM degree in maritime law from the University of Southampton (England) and has been mentioned in *The Legal 500 Asia Pacific 2018* as a 'next generation lawyer'.

MARC KUTNER

HFW

Mr Kutner joined the firm in 2015 and represents clients in a wide array of maritime, Jones Act, longshore and harbour workers' compensation, and product liability cases at the administrative, trial and appellate levels nationwide. He has developed extensive expertise and experience in the trial of cases featuring complex scientific or medical issues. He has extensive experience as a trial attorney, in state and federal courts in Texas and Louisiana, having participated as lead trial counsel in numerous jury and bench trials. Mr Kutner is admitted to practise in all Texas courts and the US Court of Appeals for the Fifth Circuit. He has also been admitted to practise in the Eastern and Western Districts of Louisiana. He is licensed in both Texas and New York.

Mr Kutner earned his undergraduate degree from Brandeis University and his law degree from the University of Houston. He spent more than 20 years litigating in the areas of personal injury, product liability, workers' compensation, medical malpractice, and oil and gas law. He has been litigating maritime lawsuits in state and federal courts for eight years.

JOSIANE LAHOUD

Baroudi & Associates

Josiane Lahoud holds a bachelor's degree from Saint Joseph University of Beirut School of Law (1984) and a degree in judicial computer science from the University of Montpellier, France (1985) and a master's degree in international law from University of Paris II (Panthéon-Sorbonne) (1984–1985). Josiane leads the litigation department and is a co-chair of the transport department. She has extensive experience in transport, corporate, civil, banking, employment, arbitration, taxation, public and administrative laws. She is also active in the areas of insurance and reinsurance, real estate, health, aviation and international law. Josiane joined the firm in 1986 and has been a member of the Beirut Bar Association since 1987. She attained her current position in 2006.

DARYL LAI

JTJB-Taipei

Daryl Lai is a partner at JTJB-Taipei. He qualified in 1997. He handles wet matters, including collisions and pollution, and a wide array of other matters, from charter party disputes to ship finance. He was named as a lead individual for shipping by *The Legal 500* for 2017.

ALEXANDRA LAMONT

HFW

Alexandra specialises in shipping and deals mostly with contractual disputes arising from charter parties and bills of lading. She also provides advice on regulatory issues involving shipping and trade matters.

JEFF GONZALES LEE

JTJB-Taipei

Jeff Gonzales Lee is a partner of JTJB-Taipei. He qualified in 1998. He handles cargo claims, marine insurance and all typical dry matters.

CHARLOTTE LEWIS

Hesketh Henry

Charlotte began working at Hesketh Henry as a law graduate in October 2017. She completed a BA/LLB (Hons) from University of Auckland. She was admitted to the Bar in May 2018.

Charlotte is a member of the maritime team and works on cargo claims and other maritime matters.

She is a member of the Women's International Shipping and Trading Association.

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 transshipment plants. He has been appointed as an arbitrator by clients and courts both in Italy and abroad.

Mr Lopez has been professor in maritime law at the University of Milan since 2001. 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*.

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 shipowners, 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.

IVO MAHUMANE

Vieira de Almeida

Ivo Mahumane joined VdA in 2016. He is a trainee in VdA's oil and gas practice, having been involved in several transactions in Portugal, Angola and Mozambique. In his experience with VdA, he worked as a summer trainee in the projects – infrastructure, energy and natural resources practice area and, between 2017 and 2018, as a trainee in the banking and finance practice area.

AMITAVA MAJUMDAR

Bose & Mitra & Co

Amitava Majumdar (Raja) is the managing partner at Bose & Mitra & Co. Mr Majumdar regularly advises the government of India on the incorporation of international conventions into Indian law and has been part of the Indian delegation representing the legal committee meetings at the IMO. He has also recently been appointed trustee of the Maritime Training Trust, chaired by DG Shipping.

He has been involved in a number of international commercial arbitrations in London, Singapore and India. Mr Majumdar regularly appears in shipping and international trade-related litigations before the Supreme Court of India and various High Courts and district courts of coastal states in India. He is a fellow of the Indian Council of Arbitration and has been appointed as a committee member of the maritime committee of the Indian Council of Arbitration and a member of the governing counsel of the Singapore Chamber of Maritime Arbitration.

During the past few years, Mr Majumdar has consistently been highly recommended by *Chambers and Partners* and *The Legal 500* in the field of shipping law.

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 (MACN).

Daniel is ranked in *The Legal 500* and he was featured in *Acritas Star Lawyers* (February 2017), in which clients described him as 'down to earth, commercially minded, understands my business and thinking outside the box'.

JENS V MATHIASSEN

Gorrissen Federspiel

Jens V Mathiasen, born 1971, is a partner at Gorrissen Federspiel. He graduated with a master's degree in law from the University of Copenhagen in 1996. In 1997, he became a Master of Laws (LLM) at the University of Southampton and worked as an attorney at Gorrissen Federspiel until 2001. In 2001, he was admitted to the Norwegian Bar, and from 2001 to 2003, he worked at Wiersholm, Mellbye & Bech, Norway. In 2003, he returned to Denmark and was admitted to the Danish High Court in 2005.

Jens works on all aspects of shipping and ship finance. He is an author of the Danish-annotated Merchant Shipping Act, 2012 and 2018, and contributor to a number of other publications. He is a member of the Comité Maritime International (CMI), Danish branch, and the Danish Association of Banking and Finance Law.

ROB MCSTAY

Hesketh Henry

Rob began working at Hesketh Henry as a law graduate in February 2016. He completed a BA/LLB (Hons) from the University of Auckland. He was admitted to the Bar in July 2016.

Rob has a keen interest in maritime law from his studies at law school. His maritime work includes the review and drafting of commercial marine contracts, such as charter parties.

Rob is also a member of the Maritime Law Association of Australia and New Zealand. Otherwise, he mainly assists with insurance and construction claims.

ALEJANDRO MENDEZ

HFW

Alex 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 in order 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 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 EEOC, NLRB, 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 also fluent in Spanish.

ANNA MESTRE

Mestre Abogados

Anna Mestre is the managing partner and founder of Mestre Abogados. She graduated in 1987; she obtained a master's degree in shipping from IME (ICADE) in Madrid. After three years of marine law practice and insurance in London, she started legal practice in Madrid and Barcelona, where she established the firm in 1994.

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 was 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), 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.

CRAIG NEAME

HFW

Craig specialises in shipping, logistics and supply chain and marine insurance. Craig is particularly well known for his expertise in container shipping, multimodal transport, ports and terminals and project shipments. As well as dispute resolution, Craig also advises on transactional, technology/IP and regulatory projects. He was previously a main board director of a leading logistics provider, where he combined commercial and legal roles. Craig is a member of the Legal and Insurance Committee of the British International Freight Association.

Craig is recommended in *Chambers UK* (2016) for his 'massive industry knowledge of not only legal, but also business aspects'. Clients appreciate his 'very clear reporting and fantastic memory for facts', describing him as 'ferociously detailed but not to the extent it becomes obstructive to a case'.

Craig is a qualified lawyer in England and Wales.

IGOR NIKOLAEV

IN Law Office

Igor Nikolaev started his legal practice as an in-house lawyer with the Students Trade Union Association in 1991. Following this he worked in the St Petersburg Property Fund. In

1995 he left the position as head of the legal department and joined the St Petersburg City Bar Association. During that year he participated in a legal programme organised by the Law Society of England and Wales and practised in different solicitors' firms in England.

In 1997, he worked for Herbert Smith in London in a project group. From January 1998 until May 2001, he worked as an in-house lawyer at Rothmans in St Petersburg. He dealt with a large range of legal work, including customs issues, arbitration and litigation in local Russian courts and voluntary tribunals.

From May 2000 until April 2002, he was the only Russian lawyer who ran Clyde and Co's office in Russia (St Petersburg). He was involved in a number of different types of maritime, insurance, debt recovery, P&I and general practice cases related to Russian law and international issues. Since April 2002, he has run his own law office in St Petersburg.

THOMAS NORK

HFW

Mr 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 Jones Act and LHWCA personal injury claims, collision and cargo claims, contract and general liability claims. He represents clients with energy, insurance, marine and land transportation-related disputes, including COGSA 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.

JOSÉ MIGUEL OLIVEIRA

Vieira de Almeida

José Miguel Oliveira joined VdA in 2015. He is a managing associate in VdA's oil and gas practice. He has gained extensive experience within the international shipping industry, particularly across African jurisdictions, where he has been particularly active in assisting all sorts of industry players, from owners, charterers, P&I clubs, ship brokers, ship managers, ship agents, freight forwarders, port operators and stevedores, to commodities traders on all sorts of wet and dry shipping matters. In addition, he provides advice on regulatory matters to oil companies and service providers to the offshore oil and gas industry, notably with respect to the use and employment of rigs, FPSOs, support and multipurpose vessels. He also has a deep knowledge of the bunkering industry, having assisted major players in the setting up of their local structures, securing licences and deals (cargo and bunkering contracts). José is dual qualified (Portugal and Angola) and his regular presence in Angola and Mozambique allows him to gain an in-depth understating of the local and neighbouring industry and relevant legal environment.

WOLE OLUFUNWA

HFW

Wole is an UK qualified shipping lawyer. He practised with city firms in London for several years before moving to HFW Singapore in 2010, where he has since continued to develop his contentious practice spanning Europe, West Africa and South East Asia.

Wole is first and foremost an international arbitration practitioner advising primarily on contentious shipping, energy and offshore matters as well as international trade (particularly coal) and joint ventures. In the context of arbitration, Wole advises on contracts subject to both Singapore and English law and has good experience with arbitrations governed by LMAA, SCMA, ICC, LCIA and ad hoc English and Singapore arbitration rules.

The shipping aspect of Wole's practice encompasses disputes arising under bills of lading, charter parties, contracts of affreightment, pool agreements and shipbuilding contracts.

Wole spent four months on secondment to an international group P&I club in Singapore, where he was tasked with handling cargo claims, piracy issues, and vessel collision and salvage matters.

JUMPEI OSADA

TMI Associates

Jumpei Osada is a head partner of the shipping team 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 maritime law. He also trained in 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 team has been listed as a recommended law firm in *The Legal 500, Asialaw Profiles*, and was awarded Shipping Law Firm of the Year at the ALB Japan Law Awards 2016. He was also named a Rising Star lawyer for corporate and banking law in *IFLR1000* (2017 and 2018 editions).

ZOE PAJOT

Hesketh Henry

Zoe Pajot was admitted to the French Bar in December 2014, after completing a master's degree in law and safety of maritime activities at Southampton (UK) and Nantes (France) universities (with honours). She joined Hesketh Henry in March 2018.

She has previously worked as a legal counsel at IMO (London) for the French delegation, in the Maritime Safety Division of the French Ministry in charge of the sea (Paris), and at the Mediterranean Shipping Company (Le Havre, France), on short-term contracts.

She handles cargo claims (subrogated recovery and defence), construction, purchase or sale of yacht and pleasure craft, and admiralty cases.

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 Catholic University 'Our Lady of the Assumption' (law, first-class honours, 2010), where he currently teaches maritime law, the University of Brasilia (UnB) (2009) and the University of Southampton (LLM in maritime law with merits, 2011). He is a former clerk of the Supreme Court of Paraguay and speaks Spanish, English and Portuguese.

PIETRO PALANDRI

Studio Legale Mordiglia

Pietro Palandri has been a qualified lawyer since 1983. He is an expert on shipping and intermodal transportation, insurance, tourism and passenger transportation. In the past 10 years, he has been asked by shipowners and insurance companies to deal with some prominent casualty claims. He also assists shipowners and banks with the purchasing, building and financing of ships. He has acted as an arbitrator in many foreign arbitration and judicial proceedings, and he often provides affidavits on issues regarding Italian legislation for foreign judicial proceedings.

Mr Palandri is on the board of directors of the Italian Association of Maritime Law. He has written many articles for the specialist magazine *Diritto Marittimo* and for Lloyd's of London, and he is often invited to speak at conventions, both in Italy and abroad.

ELECTRA PANAYOTOPOULOS

HFW

Electra has over 20 years' expertise in shipping litigation and dispute resolution and specialises in disputes arising from international trade and shipping. She specialises in both dry shipping matters (e.g., charter party, bills of lading, ship management and shipbuilding disputes) and wet matters (e.g., collisions, groundings, salvage and general average). She is fluent in English, Greek and French and basic Spanish.

ISABEL PHILLIPS

HFW

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

VINCENT POWER

A&L Goodbody

Dr Vincent Power is a partner specialising in EU law, EU and Irish competition and antitrust law, merger control, regulatory law and transport law for national and international as well as public and private clients. He is the author of the award-winning book *European Union Shipping Law*, part of the Lloyd's Shipping Law Library, and the third edition of which was published in 2019 in two volumes.

He is head of the firm's EU, competition and procurement group, which is consistently ranked at the forefront of Irish law firms, and he is regarded as the most experienced competition lawyer practising in Ireland. He is a member of the board of the European Maritime Law Organisation. He is a member of the Executive Committee of the Irish Maritime Law Association (which is the Irish member of the Comité Maritime International (CMI)) and he is the EU Maritime Law Rapporteur for the CMI.

In 2017, he won the ILO Client Choice award in the EU competition and antitrust category across the entire EU, which is awarded by the International Law Office in recognition of a partner who excels across the full spectrum of client service. In 2018, he won the ILO Client Choice award for the EU competition and antitrust category in Ireland.

Vincent has advised on most of the leading competition, merger control, EU law, cartel, abuse of dominance, state aid, joint venture, pricing, refusal to supply, competition investigations and competition litigation cases in Ireland during the past 25 years. He has been involved in several hundred merger filings in Ireland and the EU, and has experience and expertise in all the issues involved. He has developed particular expertise in regard to Brexit law.

NICHOLAS POYNDER

HFW

Nicholas Poynder is a partner in the Shanghai office of HFW, where he has been based for 13 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.

CHRISTIAN R RASMUSSEN

Gorrissen Federspiel

Christian R Rasmussen, born 1988, is an attorney at Gorrissen Federspiel. He graduated with a master's degree from the University of Copenhagen in 2015, has worked as a qualified attorney since 2019, and was admitted to the High Court in 2019. Christian mainly works in matters relating to shipping, offshore and transportation and dispute resolution.

MICHAEL RITTER

HFW

Michael Ritter is a senior associate within the HFW shipping and transport team. He advises predominantly on issues arising from marine casualties, including collisions, fires, groundings and wreck removals, covering, among others, issues of limitation of liability, jurisdiction and underlying liabilities both in tort and any underlying contracts of carriage. He is adept at

dealing with practical, legal and compliance issues arising in casualty response scenarios, both those above and maritime piracy and onshore kidnap events. In particular, he has advised on issues relating to the payment and reimbursement of ransoms, the impact of the Terrorism Act 2000 and the risks faced by companies operating in difficult environments. This has included assisting owners in a significant number of Somali and Nigerian cases, most recently in December 2018, March 2019 and April 2019, both during the period of the hijack and following the crew's release in attending the port of refuge to debrief the crew and collect evidence as well as in handling the subsequent commercial litigation.

EILEEN ROBERTS

A&L Goodbody

Eileen Roberts is the chairman of A&L Goodbody and a partner in its litigation and dispute resolution department. She is an experienced commercial litigator specialising in large-scale commercial disputes, in particular in the areas of property, corporate disputes, financial, pensions, transport (maritime and aviation) and insurance. She represents clients not only in court work but also has extensive experience of arbitration, mediation, and tribunals and inquiries. Her clients include blue-chip corporates and financial institutions.

RICARDO ROZAS

Jorquiera & Rozas Abogados

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 2011, is listed in *Chambers Latin America* (2013–2014) and profiled in *Who's Who Legal: Shipping* (2010–2011, 2019), *Who's Who Legal: Transport* (2016–2018) and *Who's Who Legal: Insurance & Reinsurance* (2011–2016, 2019).

He 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 Latin American Maritime Law Institute, the International Association of Insurance Law and the Chilean Maritime Law and Bar Associations.

He 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.

LAWRENCE RUTKOWSKI

Seward & Kissel LLP

Lawrence Rutkowski is a partner in Seward & Kissel's corporate finance department. He has practised law since 1979.

Mr Rutkowski is head of the firm's maritime and transportation finance group. In this capacity, he has worked on matters ranging from the formation of joint ventures, asset finance transactions, secured and unsecured lending, registered and unregistered securities

transactions, mergers and acquisitions and cross-border leases to restructurings and bankruptcy. Mr Rutkowski's practice also includes considerable experience in equipment finance and in the energy and mining fields.

He is a member of the Association of the Bar of the City of New York, the American Bar Association and the Maritime Law Association of the United States (chair, committee on maritime bankruptcy and insolvency). In addition, Mr Rutkowski is an adjunct law professor at the Charleston School of Law, where he teaches courses in ship finance and maritime arrests and attachment.

Mr Rutkowski has been cited in Euromoney Legal Media Group's *Expert Guides: Best of the Best*, *Chambers USA* and *Chambers Global*, *The Best Lawyers in America* and *Who's Who Legal: Shipping*. He has also been recognised by *Best Lawyers* in the practice of admiralty and maritime law from 2006 to 2018, inclusive. He was named one of the top 10 lawyers in the 2014 and 2015 *Lloyd's List One Hundred People* – 'The Most Influential People in the Shipping Industry'.

He has made appearances on national media regarding piracy off the coast of Somalia.

JOSÉ ALFREDO SABATINO PIZZOLANTE

Sabatino Pizzolante Abogados Marítimos & Comerciales

José Alfredo Sabatino Pizzolante holds a law degree from the University of Carabobo (Venezuela). He studied at the University of Wales, College of Cardiff, where he obtained an MSc in port and shipping administration and an LLM in maritime law. Currently he is a partner at Sabatino Pizzolante Abogados Marítimos & Comerciales, the managing director of Globalpandi SA (P&I correspondents) and a professor at the Universidad Experimental Marítima del Caribe (Caracas). He is also a legal adviser to the Venezuelan Shipping Association, President of the Venezuelan Association of Maritime Law, executive vice-president of the Venezuelan Association of Port Law and a titular member of the Comité Maritime International and the Iberoamerican Institute of Maritime Law. He has written extensively on the subject of Venezuelan maritime law, attending many international seminars and congresses as a speaker.

MASAAKI SASAKI

TMI Associates

Masaaki Sasaki is a senior associate in the shipping team at TMI Associates.

He works principally on shipping disputes resolution, including charter parties, bills of lading, insurance and shipbuilding contracts, as well as international trade. He graduated from Kyoto University (Japan) with a BSc degree and from Waseda University (Japan) with an MA in maritime law. He obtained a second master's degree in maritime law from Swansea University (UK). He was seconded to a leading member of the International Group of P&I Clubs and trained in a London-based shipping law firm.

DAMAYANTI SEN

Bose & Mitra & Co

Damayanti is a senior associate at Bose & Mitra & Co and joined the firm in 2016. She holds a BBA LLB (Hons) in international law from the National Law University Odisha and has completed a full-credit course in international trade law from the Indian Society of

International Law, Delhi. Damayanti appears before various high courts and arbitrations in various commercial matters of shipping and trade, including admiralty and enforcement of foreign awards. Damayanti is also specialised in shipping taxation disputes and court auctions of vessels.

She has been enrolled with the Bar Council of Maharashtra and Goa since 2015.

SIMON SHADDICK

HFW

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.

EVGENIY SUKACHEV

Black Sea Law Company Ltd

Mr Sukachev is the senior partner at Black Sea Law Company and head of the company's shipping practice department, practising in maritime law, particularly related to ship arrest and release, seafarers' rights, insurance, and assisting Ukrainian and international clients such as shipowners, ship-repair factories and shipyards, seafarers, insurance companies, banks and other parties of maritime business. He has extensive litigation experience before Ukrainian courts in ship arrest and release cases. Mr Sukachev worked in the Commercial Court of Appeal of the Odessa region for about seven years, while also acting as head of the Trade Union of the Commercial Court of Appeal of the Odessa region. In 2011, he was appointed as head of G.A.S. Law Firm and in 2013, he became a senior partner at Black Sea Law Company.

Mr Sukachev is the attorney-at-law and a board member of the Ukrainian Maritime Bar Association (UMBA) and represents Ukraine on the Comité Maritime International (CMI). He is also a board member of the Odessa regional branch of the Ukrainian Bar Association, and a member of the International Bar Association and Odessa Bar Association.

Mr Sukachev has been a delegate for the UMBA at the CMI annual meetings, seminars and conferences since 2014; one of them was the Assembly, which was held in New York in 2016 to bring into force the York Antwerp Rules.

Mr Sukachev takes part in analysing and developing the international and Ukrainian legal acts mentioned with the aim of protecting the underwater archaeology heritage.

Mr Sukachev graduated from the faculty of law of Odessa National Maritime Academy (LLB) and the faculty of administrative law of Odessa National Law Academy – High School of Judgment (LLM).

ANASTASIYA SUKACHEVA

Black Sea Law Company Ltd

Mrs Sukacheva assists companies and individuals in maritime insurance and has significant experience in commercial litigation and solving infrastructure cases. She has been a partner at Black Sea Law Company since 2015.

Mrs Sukacheva is a member of the Ukrainian Maritime Bar Association and the Ukrainian Bar Association.

She graduated from the faculty of law of Odessa National Law Academy (LLB) and the faculty of economics of Odessa National Economic University (LLB). She is fluent in Ukrainian, English and Russian.

VANESSA TATTERSALL

HFW

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.

GAVIN VALLELY

HFW

Gavin Vallely has more than 25 years' experience advising on contentious and non-contentious matters concerning commercial shipping, offshore oil and gas, and international trade. His work in the shipping sector includes advising on all forms of 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, ITF boycotts, OH&S prosecutions and port state control issues.

DIMITRI VASSOS

HFW

Dimitri 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*. He is fluent in English and Greek.

YVANKA VELLA

Gauci –Maistre Xynou

Dr Yvanka Vella is a senior associate at Gauci-Maistre Xynou (GMX). She has practised law since 2008 when she graduated from the University of Malta, following which she also read for and successfully obtained a master's degree in financial services in 2011. Prior to joining GMX, Yvanka headed the legal and compliance department of a group of companies; also one of the largest bunker suppliers in Malta; and worked closely with both foreign and local service providers and clients. At GMX, Yvanka has continued to specialise in maritime, corporate and commercial law matters.

She is licensed to practise the legal profession in the Maltese courts and is fluent in Maltese, English and Italian.

TOM WALTERS

HFW

Tom worked for a naval architecture practice on the south coast of the UK 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 the Gulf of Mexico and other areas of the world. Tom is a member of the Royal Institution of Naval Architects (RINA), sits on the BIMCO drafting subcommittee for the new standard form offshore dismantling contract and is a member of the Society of Underwater Technology (SUT) participating in the Salvage & Emergency Subsea Response subcommittee.

MATTHEW WILMSHURST

HFW

Matthew is a senior associate in HFW's London shipping department. He works with shipowners, NVOs and transport operators, cargo interests and insurers on logistics and supply chain-related disputes and projects. Matthew's dispute resolution and litigation practice includes claims arising out of the carriage of goods, which encompasses defence work, cargo recovery, and salvage and general average claims; representing ports and terminal operators on third-party liability, property damage and business interruption claims; and marine insurance policy and commercial disputes. Matthew also provides advisory services to transport operators on standard terms and conditions and contracts of carriage, and to insurers on products and policy wordings.

Matthew 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.

He is a freeman of the City of London Solicitors' Company and a member of its committee on commercial law and the steering committee of the Procurement Lawyers' Association. He is a member of the UK Chamber of Shipping's core committee on Brexit. He is also a member of the Law Society's Competition Section, the UK Association for European Law and the Competition Law Association.

Anthony was ranked seventh in the top 10 lawyers worldwide by Lloyd's List for 2016, with his contributions on Brexit being highlighted. He is recommended in *Chambers* (2019), which quotes clients as highlighting him for his 'excellent analytical skills'. *Chambers* (2018) quoted clients as saying he is 'approachable, down-to-earth and fun to work with'. In *Chambers* 2017, he is described by a client as 'affable and approachable' and as someone who is 'thoughtful and doesn't rush to judgment'. In *Chambers* (2016), clients provided an array of praise. 'He is very experienced, with good instincts and a highly professional manner. He closely managed every stage of our project through to the end,' says one. Another states: 'His technical knowledge is second to none.' *Chambers* has previously recommended him as a 'notable practitioner, earning acclaim for his in-depth knowledge of a wide number of industries'. It reported clients as saying he is 'measured in his approach', and that they appreciate that 'he takes the time to consider and evaluate all details' and is able to 'think on his feet when it comes to linking the item for discussion with relevant issues'. *The Legal 500* comments in 2017 and 2018 that he is noted by clients for his 'keen, analytical mind' and 'good grasp of the commercial impact', with an 'accessible', 'practical' and 'business-oriented' manner, heading the 'professional', 'responsive' and 'client-focused' team at HFW.

MICHAEL WRAY

HFW

Mr Wray is a partner at the firm in Houston, Texas. His practice areas include marine and energy, commercial litigation, environmental, insurance coverage and transactional matters. He is part of the firm's regulatory team and has advised clients on issues involving the Bureau of Safety and Environmental Enforcement and the United States Coast Guard. Before joining the firm, Mr Wray practised in New York and Louisiana and is admitted to state and federal courts in New York, Louisiana and Texas as well as the US Court of Appeals for the Fifth Circuit. Mr Wray has worked with operators, service companies, oil spill removal organisations and London underwriters.

Mr Wray is a graduate of University of North Carolina at Chapel Hill and received a *juris* doctorate from Tulane School of Law, where he also obtained a Certificate in Environmental Law. He has authored or co-authored numerous presentation papers and articles on contractual risk allocation, insurance, regulatory and environmental issues. He is published in the *Texas Journal of Oil, Gas, and Energy Law* and has been listed in *Who's Who Legal: Energy*.

DESPOINA XYNOU

Gauci-Maistre Xynou

Despoina is a co-founder and partner of Gauci-Maistre Xynou (GMX), and has been actively practising her legal profession 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 her profession in Greece and Malta. With GMX, she specialises in maritime and corporate law, ship registration, ship finance, mortgages and international taxation. Her client portfolio naturally comprises local and international law firms, financial institutions, ship owners and managers.

Despoina is warranted to practise her legal profession both in Greece and Malta and she is fluent in both English and Greek.

MEIKE ZIEGLER

Holman Fenwick Willan Middle East LLP

Meike Ziegler is an associate at Holman Fenwick Willan Middle East LLP. She qualified as a solicitor in England and Wales and joined the Dubai office in 2014. Prior to joining HFW, Meike worked for a leading P&I club in London, where she gained first-hand experience in dry shipping litigation. At HFW she specialises in shipping litigation, advising owners, charterers, operators, P&I clubs and underwriters on all types of marine disputes with particular emphasis on disputes arising out of charter parties and bills of lading. Meike also regularly advises commodity traders in relation to disputes arising out of sale and purchase agreements and in general issues arising out of the transportation of commodities.

In addition, Meike is experienced in enforcement and recognition proceedings in the UAE and worked on the leading case in which the DIFC Court issued its landmark judgment confirming it can be used as a conduit jurisdiction for the enforcement and recognition of foreign arbitration awards.

Meike speaks English, German and French and spent some time living in Paris.

Appendix 2

CONTRIBUTORS' CONTACT DETAILS

A&L GOODBODY

International Financial Services Centre
North Wall Quay
Dublin 1
D01H104
Ireland
Tel: +353 1 649 2000
Fax: +353 1 649 2649
cduffy@algoodbody.com
vpower@algoodbody.com
eroberts@algoodbody.com
www.algoodbody.com

ASIALEGAL LLC

10 Collyer Quay
No. 18-01 Ocean Financial Centre
Singapore 049315
Tel: +65 6333 1121
Fax: +65 6333 1191
magdalene@asialegal.com.sg
mail@asialegal.com.sg
www.asialegal.com.sg

BAE, KIM & LEE LLC

133 Teheran-ro
Gangnam-gu
Seoul 06133
Korea
Tel: +82 2 3404 0000
Fax: +82 2 3404 0001
jongku.kang@bkl.co.kr
justin.kim@bkl.co.kr
www.bkl.co.kr

BAROUDI & ASSOCIATES

9th Floor, Achrafieh 5585 Building
Pierre Gemayel Avenue
Achrafieh
Beirut
Lebanon
Tel: +961 1 428777
Fax: +961 1 423582
josiane.lahoud@baroudilegal.com
lea.ferzli@baroudilegal.com
www.baroudilegal.com

BLACK SEA LAW COMPANY LTD

66/2 French Boulevard
Odessa 65009
Ukraine
Tel: +38 50 390 24 24
Fax: +38 48 737 37 10
e.sukachev@blacksealawcompany.com
i.dolya@blacksealawcompany.com
a.sukacheva@blacksealawcompany.com
www.blacksealawcompany.com

BLOOMFIELD LAW PRACTICE

15 Agodogba Avenue
Parkview
Ikoyi
Lagos
Nigeria
Tel: +234 1 454 2130 / 7944
Out-of-office hotlines: +234 706 4379 421 /
803 7165 596
adedoyin.afun@bloomfield-law.com
www.bloomfield-law.com

BOSE & MITRA & CO

72, 7th Floor, Sakhar Bhavan
230 Nariman Point
Mumbai
Maharashtra 400 021
India
Tel: +91 22 2285 2825 / 2828
Fax: +91 22 2285 2826
aditya.k@bosemitraco.com
jyotika.j@bosemitraco.com
raja@bosemitraco.com
d.sen@bosemitraco.com
www.bosemitraco.com

**FRANCO & ABOGADOS
ASOCIADOS**

Calle 75, Nos. 13–51
Of. 408
Bogotá
Colombia
Tel: +57 1 7035633
jfranco@francoabogados.com.co
www.francoabogados.com.co

GAUCI-MAISTRE XYNOU

147/8, St Lucia Street
Valletta VLT1185
Malta
Tel: +356 212 47785
Fax: +356 212 20101
jpgm@gmxlaw.com
despoina.xynou@gmxlaw.com
yvella@gmxlaw.com
http://gmxlaw.com

GORRISSEN FEDERSPIEL

Axeltorv 2
1609 Copenhagen V
Denmark
Tel: +45 33 41 41 41
Fax: +45 33 41 41 33
jym@gorrissenfederspiel.com
chra@gorrissenfederspiel.com
www.gorrissenfederspiel.com

HESKETH HENRY

Level 14, 188 Quay Street
Auckland 1010
New Zealand
Tel: +64 9 375 8700
Fax: +64 9 309 4494
richard.belcher@heskethhenry.co.nz
simon.cartwright@heskethhenry.co.nz
charlotte.lewis@heskethhenry.co.nz
rob.mcstay@heskethhenry.co.nz
zoe.pajot@heskethhenry.co.nz
www.heskethhenry.co.nz

HFW

Level 39, Bourke Place
600 Bourke Street
Melbourne
Victoria 3000
Australia
Tel: +61 3 8601 4500
Fax: +61 3 8601 4555
alexandra.lamont@hfw.com
simon.shaddick@hfw.com
gavin.vallely@hfw.com

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

25–27 rue d'Astorg
75008 Paris
France
Tel: +33 1 44 94 40 50
Fax: +33 1 42 65 46 25
mona.dejean@hfw.com

83 Akti Miaouli Street
6th floor
Piraeus 18538
Greece

Tel: +30 210 429 3978
Fax: +30 210 429 3118
electra.panayotopoulos@hfw.com
dimitri.vassos@hfw.com

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

10 Collyer Quay
No. 18-01 Ocean Financial Centre
Singapore 049315
Tel: +65 6411 5300
Fax: +65 6411 5355
kimarie.cheang@hfw.com
wole.olufunwa@hfw.com

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

Friary Court
65 Crutched Friars
London
EC3N 2AE
United Kingdom
Tel: +44 20 7264 8000
Fax: +44 20 7264 8888
simon.blows@hfw.com
jonathan.bruce@hfw.com
andrew.chamberlain@hfw.com
holly.colaco@hfw.com
paul.dean@hfw.com
thomas.dickson@hfw.com

george.eddings@hfw.com
william.hold@hfw.com
rebecca.huggins@hfw.com
alex.kemp@hfw.com
william.maclachlan@hfw.com
daniel.martin@hfw.com
craig.neame@hfw.com
isabel.phillips@hfw.com
michael.ritter@hfw.com
vanessa.tattersall@hfw.com
tom.walters@hfw.com
matthew.wilmshurst@hfw.com
anthony.woolich@hfw.com

5151 San Felipe
Suite No. 400
Houston
Texas 77056
United States
Tel: +1 713 917 0888
Fax: +1 713 953 9470
jim.brown@hfw.com
melanie.fridgant@hfw.com
jeanie.goodwin@hfw.com
chris.hart@hfw.com
marc.kutner@hfw.com
alex.mendez@hfw.com
tom.nork@hfw.com
michael.wray@hfw.com

www.hfw.com

IN LAW OFFICE

PO Box 10
St Petersburg 194214
Russia
Tel: +7 921 969 3786
Fax: +7 812 320 1218
igor@inlaw.ru
www.inlaw.ru

JORQUIERA & ROZAS ABOGADOS

Avenida Isidora Goyenechea 3250
4th floor
Las Condes
Santiago
Chile
Tel: +56 2 2580 9300
Fax: +56 2 2580 9311
rrozas@jjr.cl
www.jjr.cl

JTJB-TAIPEI

No. 205 Tun Hua South Road Section 1
11th floor, Rooms 10–11
International Trade Building
Taipei City
Taiwan 106
Tel: +886 2 2772 0567
Fax: +886 2 2772 0228
daryl@jtjb-taiwan.com
jeff@jtjb-taiwan.com
www.jtjb-taiwan.com

MESTRE ABOGADOS

C/ Hercegovina No. 18-20
08006 Barcelona
Spain
Tel: +34 934 140 685
Fax: +34 934 141 209
amestre@mestreabogados.com
acandomeque@mestreabogados.com
carles.gorriz@uab.cat
www.mestreabogados.com

MORGAN & MORGAN

MMG Tower, 23rd Floor
Avenue Paseo del Mar, Costa del Este
Panama City
Panama
Tel: +507 265 7777
Fax: +507 265 7700
juandavid.morganjr@morimor.com
www.morimor.com

PALACIOS, PRONO & TALAVERA

Jose Berges No. 988 esquina Peru
Asunción
Paraguay
Tel: +595 21 202 148
Fax: +595 21 228 951
juan.palacios@ppt.com.py
www.ppt.com.py

PPT LEGAL

61–65 Filonos Street
Piraeus 18536
Greece
Tel: +30 210 413 5407
Fax: +30 210 413 5505
pk@pptlegal.gr
www.pptlegal.gr

**PROMARE | RABB CARVALHO
ADVOGADOS ASSOCIADOS**

Rua Osvaldo Cruz, 01
Gr 1908
Edifício Beira Mar Trade Center
Meireles
Fortaleza CE
Brazil

Avenida Colares Moreira, 10
Gr 1003
Jardim Renascença
São Luís MA
Brazil

Tel: +55 85 3023 7030
larrycarvalho@promare.adv.br
www.promare.com.br

**SABATINO PIZZOLANTE
ABOGADOS MARÍTIMOS &
COMERCIALES**

Centro Comercial 'Las Valentinas'
Nivel 2, Oficinas 12/13
Calle Puerto Cabello, Puerto Cabello 2050
Estado Carabobo
Venezuela
Tel: +58 242 3618159 / 3614453
Fax: +58 412 4210545 / 4210546
jose.sabatino@sabatinop.com
mail@sabatinop.com
www.sabatinop.com

**VERALAW (DEL ROSARIO RABOCA
GONZALES GRASPARIL)**

2nd floor, A&V Crystal Tower
105 Esteban Street
Legazpi Village
Makati City 1229
Philippines
Tel: +63 2 550 1888
Fax: +63 2 550 2888
vrdelrosario@veralaw.com.ph
tcgonzales@veralaw.com.ph
dbgrasparil@veralaw.com.ph
jecerrada@veralaw.com.ph
www.veralaw.com

SEWARD & KISSEL LLP

One Battery Park Plaza
New York
NY 10004
United States
Tel: +1 212 574 1200
Fax: +1 212 480 8421
rutkowski@sewkis.com
www.sewkis.com

VIEIRA DE ALMEIDA

Rua Dom Luís I, 28
1200-151 Lisbon
Portugal
Tel: +351 21 311 3400
Mobiles: +351 91 701 86 39 (J A Fialho) /
+351 91 537 01 44 (J M Oliveira)
Fax: +351 21 311 3406
jaf@vda.pt
jmo@vda.pt
ivo@vda.pt
www.vda.pt

STUDIO LEGALE MORDIGLIA

Via XX Settembre 14/17
16121 Genoa
Italy
Tel: +39 10 586841
Fax: +39 10 562998
pietro.palandri@mordiglia.it
marco.lopez@mordiglia.it
www.mordiglia.it

TMI ASSOCIATES

23rd floor, Roppongi Hills Mori Tower
6-10-1 Roppongi
Minato-ku
Tokyo 106-6123
Japan
Tel: +81 3 6438 5511
Fax: +81 3 6438 5522
josada@tmi.gr.jp
www.tmi.gr.jp

GLOSSARY

INTERNATIONAL LEGISLATION

1910 Salvage Convention – Brussels Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea 1910

1989 Salvage Convention – International Convention on Salvage 1989

Abuja MOU – Memorandum of Understanding on Port State Control for West and Central African Region 1999

Anti-Fouling Convention – International Convention on the Control of Harmful Anti-Fouling Systems in Ships 2001

Arrest Convention 1999 – International Convention on Arrest of Ships 1999

Athens Convention – Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974

Athens Convention Protocol 2002 – Protocol of 2002 to the Athens Convention

Ballast Water Management Convention – Convention for the Control and Management of Ships' Ballast Water and Sediments 2004

Barcelona Convention – Convention for the Protection of the Mediterranean Sea Against Pollution 1976

Black Sea MOU – Memorandum of Understanding on Port State Control in the Black Sea Region 2000

Brussels Convention – International Convention Relating to the Arrest of Sea-Going Ships 1952

Bunker Convention – International Convention on Civil Liability for Bunker Oil Pollution Damage 2001

CLC Convention – International Convention on Civil Liability for Oil Pollution Damage 1969, replaced by 1992 Protocol

Fund Convention – International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage – wound up in 2014

CMR Convention – Convention on the Contract for the International Carriage of Goods by Road 1956

Collision Convention 1910 – Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910

Collision Convention 1952 – International Convention for the Unification of Certain Rules relating to Civil Jurisdiction in Matters of Collision 1952

- COLREGs** – International Regulations for Preventing Collisions at Sea 1972
- Criminal Collision Convention 1952** – International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision and Other Incidents of Navigation 1952
- Directive 93/75/EEC** – Council Directive 93/75/EEC of 13 September 1993 concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods
- Directive 2009/16/EC** – Directive 2009/16/EC of 23 April 2009 of the European Parliament and the Council on port State control
- FAL Convention** – Convention on Facilitation of International Maritime Traffic 1965
- Fund Convention** – see CLC Convention
- 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
- 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
- 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
- IMDG Code** – see SOLAS
- IMSBC Code** – see SOLAS
- INF Code** – see SOLAS
- INMARSAT Convention** – Convention on the International Mobile Satellite Organization 1976
- Intervention Convention** – International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969
- Intervention Protocol** – Protocol relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil 1973
- ISM Code** – see SOLAS
- ISPS Code** – see SOLAS
- LLMC Convention 1976** – Convention on Limitation of Liability for Maritime Claims 1976
- LLMC Protocol 1996** – Protocol to amend the LLMC Convention 1996
- Load Lines Convention** – International Convention on Load Lines 1966
- London Dumping Convention** – Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972

- 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 Liens and Mortgages Convention** – International Convention on Maritime Liens and Mortgages 1993
- MARPOL (73/78)** – International Convention for the Prevention of Pollution from Ships 1973 (as modified by the Protocol of 1978)
- IBC Code** – International Code for the Construction and Equipment of Ships carrying Dangerous Chemicals in Bulk
- Mediterranean MOU** – Mediterranean Memorandum of Understanding 1997
- MLC** – The Maritime Labour Convention 2006
- Nairobi WRC 2007** – Nairobi International Convention on the Removal of Wrecks 2007
- New York Convention** – Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
- Nuclear Convention** – Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material 1971
- Oil Pollution Fund Convention** – International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992
- OILPOL Convention** – International Convention for the Prevention of Pollution of the Sea by Oil 1954
- OPRC Convention** – International Convention on Oil Pollution Preparedness, Response and Co-operation 1990
- OPRC-HNS Protocol** – Protocol on the Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances 2000
- Rotterdam Rules** – UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009
- Paris MOU** – Paris Memorandum of Understanding on Port State Control 1982
- Search and Rescue Convention 1979** – International Convention on Maritime Search and Rescue 1979
- SOLAS** – International Convention for the Safety of Life at Sea 1974
- IMDG Code** – International Maritime Dangerous Goods Code 2004
- IMSBC Code** – International Maritime Solid Bulk Cargoes Code 2011
- INF Code** – International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes on Board Ships 2001
- ISM Code** – International Safety Management Code 1998
- ISPS Code** – International Ship and Port Facility Security Code 2004
- STCW Convention** – International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1995
- SUA** – Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation 1988

Tokyo MOU – Tokyo Memorandum of Understanding on Port State Control in the Asia-Pacific Region 1994

Tonnage Convention – International Convention on the Tonnage Measurement of Ships 1969

UNCLOS – United Nations Convention on the Law of the Sea 1982

Viña del Mar MOU – Latin American Agreement on Port State Control of Vessels 1992

ORGANISATIONS

BIMCO	The Baltic and International Maritime Council
CAMP	Paris Arbitral Chamber for Maritime Matters
IACS	International Association of Classification Societies Ltd
ICS	International Chamber of Shipping
ILO	International Labour Organization
IMO	International Maritime Organization
LMAA	London Maritime Arbitrators Association
SCMA	Singapore Chamber of Maritime Arbitration
SIAC	Singapore International Arbitration Centre
UNCITRAL	United Nations Commission on International Trade Law

ABBREVIATIONS

ADR	alternative dispute resolution
CIF	cost, insurance and freight
DWT	deadweight tonnage
FDI	foreign direct investment
FOB	free on board
FSU	floating storage unit
GA	general average
GRT	gross registered tonnage
GT	gross tonnage
LDT	light displacement tonnage
LOF	Lloyd's Open Form
LOU	letter of undertaking
MOA	memorandum of agreement
MTPA	million tonnes per annum
NRT	net registered tonnage
NVOC	non-vessel operating carrier
NVOCC	non-vessel operating common carrier
P&I	protection and indemnity
RT	revenue ton
SDRs	special drawing rights
SOV	service operation vessel
TEU	twenty-foot equivalent unit
VLCC	very large crude carrier

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