Table of Contents

Frank Stuart Dethridge Memorial Address

Charting Our Own Courses: The Australia, New Zealand, and Singapore Journeys in Maritime Law

The Honourable Justice Steven Chong 1 – 11

Refereed Articles

Cruise Ship Operators, Their Passengers, Australian Consumer Law and Civil Liability Acts: Part Two

Kate Lewins 12 – 27

Reviewing Knock for Knock Indemnities: Risk Allocation In Maritime And Offshore Oil And Gas Contracts

Dr Pat Saraceni and Nicholas Summers 28 – 43

Student Submissions

Oil and Water – Can the Offshore Minerals Industry and Environmental Protection Ever Mix?

Brendan Abley 44 – 63

Conference Papers

Maritime Law in the Asia-Pacific Region

Dr Bevan Marten 64 – 66

The European Union and International Maritime Law – Lessons for the Asia-Pacific Region?

Henrik Ringbom 67 – 77

State Cooperation in Combating Transboundary Marine Pollution in South East Asia

Craig Forrest 78 – 89
Shipping and Air Pollution: New Zealand’s Failure to Ratify MARPOL Annex VI

Dr Bevan Marten 90 – 98

The Tokyo Mou: Its Implications for Taiwan

Chen-Ju Chen 99 – 106

Openness and Inclusiveness: Nature of Chinese Maritime Law and Legal Practices

Dr Shan Hong Jun and Liang Yun 107 – 113

A Study on the Updating of the Law on Carriage of Goods by Sea in China

James Zhengliang Hu and Siqi Sun 114 – 124

Japan’s Maritime Law Reform in an International and Regional Context

Souichirou Kozuka 125 – 133

Recent Admiralty Decisions in Hong Kong – Are the Courts Ready to Deviate from Their English Predecessors?

Poomintr Sooksripaisarnkit 134 – 146

Book Reviews

Damien J Cremean, Admiralty Jurisdiction Law and Practice Australia, New Zealand, Singapore, Hong Kong and Malaysia. (Federation Press, 4th ed, 2015)

Nigel Meeson 147 – 148
Editorial Board: Volume 30 2016

Student Editors
Mr Zackary George, LLB student, TC Beirne School of Law, University of Queensland
Ms Erin Gourlay, LLB student, TC Beirne School of Law, University of Queensland

Guest Editor, Conference Section
Dr Bevan Marten, Senior lecturer, Victoria University of Wellington

General Editor
Professor Craig Forrest, Director Marine and Shipping Law Unit, University of Queensland

Associate Editors
Professor Sarah Derrington, Marine and Shipping Law Unit, University of Queensland
Professor Nicholas Gaskell, Marine and Shipping Law Unit, University of Queensland

Citation
This issue can be cited as (2016) 30 ANZ Mar LJ (page number).

Refereed articles
All articles published in the refereed section of ANZ Mar LJ have been independently peer reviewed in accordance with the Journal policy. The balance of content is not refereed unless the author specifically requests.
Frank Stuart Dethridge Memorial Address

CHARTING OUR OWN COURSES: THE AUSTRALIA, NEW ZEALAND, AND SINGAPORE JOURNEYS IN MARITIME LAW

The Honourable Justice Steven Chong*

1 My Own Voyage Begins

I am deeply honoured to be invited to deliver this address. When the late Mr Frank Dethridge first conceived the idea of establishing a maritime law association in the early 1970s, I dare say that he would not have dreamt that, more than 40 years on, it would grow to be as successful as it now is. It is a measure of the respect and esteem with which he is held that, since 1977, an annual lecture has been delivered each year in his memory by such luminaries as Sir Anthony Mason, Justice Michael Kirby, Justice Steven Rares, and Lord Cooke of Thorndon, just to name a few.1 Like Justice Waung in 2008, I approached this task with no small measure of trepidation, conscious that I follow in the wake of the giants who have preceded me.2

The process of preparing for this speech has been an opportunity for personal reflection and introspection. In a sense, my career in shipping law can be traced back to 1977, the year the first memorial address was delivered. By then, I had secured a place in law school and was serving as a young midshipman in the Singapore Navy. As part of my training, I served onboard the RSS Endurance3 which sailed for Darwin in 1977. The grand ol’ dame — an LST-542 Class tank landing ship — was then the pride of the Republic of Singapore Navy, having recently been purchased in 1975. In its previous incarnation, it was the USS Holmes County, which first saw service in Okinawa in the closing years of World War II before being deployed in Korea and, later, in Vietnam. By the time it was sold to Singapore, it was the proud owner of four battle stars (one earned for service in World War II, three in the Korean War) and 11 campaign stars garnered during the Vietnam War.4 Thankfully, the battle stars ceased after she was acquired by Singapore.

As you might imagine, the old lady did not like to be hurried. Her RSN motto was “slowly, but eventually” — when you consider that she moved at the stately pace of 8 knots an hour (with currents assisting), you can well understand why. Given that almost 3,500 km lies between Singapore and Darwin, you will appreciate that it was a painfully slow and long voyage. I spent my days practising the ancient craft of seamanship: I got up before the break of dawn to shoot the stars with my sextant (which has since been “decommissioned” and now sits in my chambers as a conversation piece), I chipped away the rust which covered the deck — a daily ritual — and I spent endless hours interpreting Morse code in order to earn my much coveted shore leave. (The passing mark was initially 90% but it had to be reduced to 80% to ensure that at least some midshipmen could board the liberty boat!) In between, time was gainfully spent staring at the ocean, serenaded by the cries of seagulls and the dull steady throb of the ship’s engines. Somehow, in the midst of all that — lurching between bouts of frenzied activities interspersed with periods of intolerable monotony — I fell in love with the sea. And that love for the sea, combined with my interest in shipping law (which is essentially contract and tort together with private international law) confirmed my future vocation as a shipping lawyer.

---

1 I would like to record my appreciation to my law clerk, Scott Tan, for his assistance in the preparation of this address.
2 They were the speakers in the years 1998, 2007, 2013, and 1989 respectively.
It was hardly surprising that on leaving law school, there was only one destination for me: M/s Drew & Napier. It was, at that time, the pre-eminent shipping law firm in Singapore. In 1983, when I joined the firm, it was still located at Clifford Centre at the banks of the Singapore River. My pupil master was Mr Joseph Grimberg, the then doyen of the Singapore Bar while my supervising partner was Mr G P Selvam, both of whom were subsequently elevated to the Bench. I recall, with some embarrassment, my first day of pupillage. I was asked to join in a discussion. Mr Selvam enquired whether I was familiar with the UCP4 to which I said that I had some idea of the subject given that I took banking law in law school. I was then invited to comment on the case. I gave a most forgettable response. Mr Selvam then paused and grinned at me and, in his inimitable manner, uttered — “Steven, that’s rubbish”. The moral of the story is simply this. Even with the worst start in one’s career, with some self-belief, drive and a touch of good fortune, you can still have a decent career in the law and end up as the firm’s managing partner!

Through my years in practice, and later, as a Judge, one aspect of shipping practice that has always stood out for me is its dynamism and its international character. Like the sea which gives it life, maritime law never stands still. Perhaps uniquely of all parts of the legal corpus (save, perhaps, for public international law) the ocean of maritime jurisprudence is fed by streams of diverse and multifarious origin, with the decisions of each court drawing from and building on the decisions of courts many thousands of kilometres away. However, just as there is convergence, there will also be divergence. Occasionally, the courts of one country will decide that a decision which was appropriate for another country in another time might not be suitable for their own.

It is in that spirit that I have chosen, as the topic for my address, “Charting Our Own Courses: the Australia, New Zealand, and Singapore Voyages in Maritime Law.” What I hope to do, in the remainder of my speech, is to illustrate the ways in which our three nations, drawing from our common English heritage, have nevertheless proceeded to diverge in ways both great and small from the position in England to forge our own paths and, in so doing, contributed to this great enterprise of maritime law.

2 From Colony to Autonomy: The Search for Autochthony

The development of admiralty law from the time of the Rhodian law of the 9th century BC to the 12th century Laws of Oleron is a topic which has been well-traversed in academic literature and I do not propose to cover the same material today.5 For present purposes, my focus will be on the historical development of admiralty jurisdiction in our three nations which can be traced to the High Court of Admiralty in England.

The precise origin of the High Court of Admiralty jurisdiction in England is a matter of academic dispute but there is broad consensus that it reaches back at least as far as the reign of Edward III who, after the Battle of Sluys, proclaimed himself the sovereign of the seas and set up a Court of Admiralty to assert his dominion.6 Soon after its promising beginnings, however, the Court of Admiralty found itself mired in a series of bitter jurisdictional conflicts. The court’s bold assertion of jurisdiction over civil claims brought it into a collision course with the common law courts which did not take kindly to the competition. The common law courts retaliated with the issuance of writs of prohibition in the 16th century, effectively restricting admiralty jurisdiction to prize, droits, restraint and possession suits, bottomry and seamen’s wages, and torts committed and contracts entered into on the high seas.7 There it lay, moribund and neglected, until its revival in the 19th century.

2.1 The Umbilical Cord of English Law: The Colonial Courts of Admiralty Act 1890

Of particular interest to us is the year 1890, for that was when the most common recent ancestor of our respective admiralty jurisdiction statutes — the Colonial Courts of Admiralty Act 1890 — was passed.8 The 1890 Act, which came into force on 1 July 1891, enacted major changes in the administration of maritime law in the colonies.

---

5 See: Damien Cremean, ‘The Early History of Admiralty Jurisdiction’ (2014) 28 Australian and New Zealand Maritime Law Journal, who challenges the received notion that admiralty jurisdiction in England began at 1340 and argues that it may be traced to the early 1300s at least, if not the late 1200s.
9 53 & 54 Vic. C. 27 (“1890 Act”).
Under the Act, every “Colonial Court of Admiralty”\(^{11}\) was vested with jurisdiction over

... like places, persons, matters, and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England ... \(^{12}\)

The rather elliptical words of this enactment was the subject of an important decision delivered by the Privy Council in 1927 — *The Yuri Maru*.\(^{13}\) The issue in that case was whether a Colonial Court of Admiralty (the District Court of British Columbia) had the jurisdiction to order the arrest of a vessel pursuant to a claim arising out of a charterparty. The problem was this: when the 1890 Act was passed, the admiralty jurisdiction of the High Court of England did not extend to claims arising out of charterparties. That jurisdiction was only conferred much later, when the Administration of Justice Act 1920 was passed.\(^{14}\) In the lower court, the two warrants of arrest had been set aside for want of jurisdiction. Before the Privy Council, it was argued that the jurisdiction of the Colonial Courts of Admiralty mirrored that of the High Court of England in all respects and for all time. Thus, any later enactments expanding the remit of the admiralty jurisdiction of the English High Court would also apply to the Colonial Courts of Admiralty.

Unsurprisingly, the Privy Council disagreed. It held that the purport of the 1890 Act was to limit the jurisdictional competence of the Colonial Courts of Admiralty to that which was exercised by the High Court of England in 1890, when the Act was passed. Thus, subsequent statutes passed in England amending the admiralty jurisdiction of the English High Court would not apply to Colonial Courts of Admiralty unless there were express words to that effect.

This effectively meant that admiralty practice in the Colonial courts was frozen at 1890.\(^{15}\) This proved to be a tremendous impediment to the development of a robust admiralty practice because litigants were deprived of the benefit of the many vital improvements to admiralty jurisdiction and procedure passed after 1890.\(^{16}\) Many claims which presently form the bread and butter of admiralty practice today (eg, claims arising out of the use and hire of a ship or for torts committed in connection with the carriage of goods)\(^{17}\) would not have fallen within the ambit of the jurisdiction of the Colonial Courts of Admiralty.

With that being said, however, it seems to me that the decision of the Privy Council was in fact the lesser of two evils. Lord Merrivale, delivering the joint opinion of the Board, made two important points. The first is the extension of admiralty jurisdiction was by no means an uncontroversial decision. Even within England, considerable divergence of opinion existed as to the proper limits of its exercise. Thus, s 3 of the 1890 Act empowered the colonial legislatures with the competence to set limits on the jurisdiction of their courts of admiralty, though this power was subject to two important provisos: (a) the colonial legislatures were only empowered to cut back on the jurisdiction of their courts but could not confer jurisdiction beyond that which was granted by the 1890 Act; (b) that any reservation passed under s 3 was subject to approval by Royal Assent.\(^{18}\) The second point is that the appellant’s argument would have the effect of making the colonies the recipients of legislation that they had neither input in drafting nor any say in its passage. It would mean that the Imperial Parliament could, without the self-governing states having any say in the matter, enlarge the jurisdiction of the courts in admiralty by decree.\(^{19}\) As Lord Merrivale put it, the appellant’s construction would have

... the singular effect of introducing by an automatic process unasked changes in the jurisdiction and procedure of the Courts of self-governing dominions, with possible power in the local legislature by a cumbrous process to revoke an extension of jurisdiction in rem, but no power to undo an unwelcome abatement ...

At the end of the day, the choice was an invidious one: it lay between a construction of the statute which provided for sclerosis and ossification and one which exposed the colonies to the risk of manifestly unsuitable legislation. It was clearly an untenable situation.

---

\(^{11}\) “Colonial Courts of Admiralty” comprised courts in British possessions which were expressly declared to be a court of admiralty under the 1890 Act or, if no such declarations were made — as was the case in New Zealand — courts with unlimited original civil jurisdiction: s 2(1) 1890 Act.

\(^{12}\) Section 2(2) 1890 Act.


\(^{14}\) 10 & 11 Geo 5 c. 81

\(^{15}\) Admiralty Jurisdiction at 5.


\(^{17}\) Sections 5(1)(a) and (c) Administration of Justice Act 1920.

\(^{18}\) Sections 3 and 4 1890 Act.

\(^{19}\) *The Yuri Maru* at 914 and 915.
To me, the decision in *The Yuri Maru* was a watershed moment. It laid bare that the only way forward was for independent legislative intervention by the Parliaments of the respective territories in question. The door was theoretically opened (at least for Australia and New Zealand) with the passage of the Statute of Westminster 1931.20 Section 2(2) of the Statute of Westminster 1931 provided that no law made by the Parliament of a Dominion would be void or inoperative merely by reason of it being contrary to an English enactment. This meant that the previous restriction placed by s 3 of the 1890 Act, which prevented the enlargement of the admiralty jurisdiction of the Colonial Courts of Admiralty beyond the bounds set by the 1890 Act, would no longer pose an obstacle to legislative reform.21

### 2.2 Legislative Reform

Understandably (given that *The Yuri Maru* was a case on appeal from the Exchequer Court of Canada), Canada was the first one to seize the opportunity for law reform. In 1934, it passed the Admiralty Act 1934, which repealed the Colonial Admiralty Act of 1890 insofar as it applied to Canada, and granted their courts the same admiralty jurisdiction which the English High Court had enjoyed since 1925.22 However, reform in other parts of the Commonwealth was not immediately forthcoming. This, however, changed when the UK Parliament passed the Administration of Justice Act 1956 (UK). The Administration of Justice Act, which implemented the 1952 Arrest Convention,23 provided, for the first time, for “sister-ship arrests”.24 I will return to the subject of sister-ship arrests shortly but the point to be made for now is that the Administration of Justice Act appears to have provided the impetus for legislative reform in many commonwealth countries, including our own.25

(a) In Singapore, the Courts (Admiralty Jurisdiction) Ordinance 1961 was passed in the closing days of the British Empire.26 In the explanatory statement to the bill,27 it was specifically stated that its purpose was two-fold: first, it was intended to bring the law of Singapore in line with that in the UK following the passage of the Administration of Justice Act 1956; second, it was intended to enlarge the admiralty jurisdiction of the High Court which had hitherto been restricted under the 1890 Act.

(b) In New Zealand, the Admiralty Act 197328 was passed on 23 November 1973 pursuant to the Special Law Reform Committee’s Report on Admiralty Jurisdiction.29 Section 14(1) of the Act provided for the repeal of the Colonial Courts of Admiralty Act of 1890 and expanded the admiralty jurisdiction of its courts along the lines set out in the Administration of Justice Act 1956.

(c) In Australia, the Admiralty Act 1988 (Cth) came into force on 1 January 1989. It was based largely on recommendations set out in the magisterial work of the Australian Law Reform Commission on Civil Admiralty Jurisdiction and it codified and clarified Australian admiralty jurisdiction.30

Each of these acts provided for the repeal of the Colonial Courts of Admiralty Act of 1890.31 With that, the umbilical cord of English law was, if not severed, then severely constricted. In a way, this development was long-overdue. The age of empire had long past and, with it, the time when it sufficed merely to look to the English courts and Parliament for guidance on maritime law. Today, differences of geography (the UK is literally half the world away); politics (the increasing influence of European jurisprudence in the UK),32 and economics stand in the way of automatic reception. It was no longer sufficient to assume that an English transplant could always be successfully grafted onto Singaporean or Antipodean stock without difficulty.

---

20 22 & 23 Geo 5. c. 4. See also, its equivalents in Australia — Statute of Westminster Adoption Act 1942 (Cth) and New Zealand — Statute of Westminster Adoption Act 1947 (NZ).
22 Admiralty Act 1934 (Can) (c 34).
24 Toh Kian Sing at 4.
25 For other examples (drawn from para 22 of the ALRC Report) see: For other examples, see: also: Supreme Court (Admiralty Jurisdiction) Act 1962 (Bermuda); Courts of Judicature Act 1964 (Malaysia).
28 Admiralty Act 1973 (NZ), which came into effect on 1 August 1976.
30 Admiralty Act 1988 (Cth); *Australian Admiralty Law* at 20.
31 Section 14(1) Admiralty Act 1973 (NZ); s 44 Admiralty Act 1988 (Cth). Although the Colonial Courts of Admiralty Jurisdiction Act 1890 was never specifically repealed in Singapore, the consensus is that it was implicitly repealed by the Courts (Admiralty Jurisdiction) Ordinance 1981; see *Admiralty Law and Practice* at 8.
While English cases continued to be cited regularly, the presence of a domestic statute stimulated the development of an autochthonous jurisprudence informed by local conditions and policy considerations. This is perhaps best exemplified in the case of Australia where the Law Commission, in making the case for reform, argued that that “Australia’s ‘basic maritime transport policy orientation’ is dictated by its ‘status as a shipper rather than as a maritime nation...[and] as a user rather than supplier of shipping services.” This, it was argued, gave rise to a “strong interest in providing effective local remedies for persons dealing with ships, whether as importers, ship suppliers, crew members, or otherwise. Even in Singapore and New Zealand, whose acts are largely “transplants” of the Administration of Justice Act 1956, the development of the law has acquired a decidedly local flavour. As the scholar Alan Watson opined, “[a] successful legal transplant — like that of a human organ — will grow in its new body and become part of that body just as the rule or institution would have continued to develop in its parent system.” From that point onwards, the maritime jurisprudence of our three nations have branched out from their English roots and developed in their own unique ways in response to local needs and circumstances.

3 Singapore — The “Sister Ship” Arrest Broadened

Let me begin with Singapore. At the risk of stating the obvious, maritime law is chiefly about ships. And the problem, as Lord Simon of Glaisdale pointed out in The Atlantic Star, is that “ships are elusive”. By their very nature, they are mobile and can easily sail in and out of port, evading the claimant’s attempt to pursue his claims. (Speaking of evasion, in my early years of my practice, I used to enjoy boarding vessels to effect warrants of arrest. On one such occasion, as my harbour launch was approaching the vessel to be arrested, the “MV Seatra Express”, I observed to my horror, the crew painting a new name “MV Sea Leopard” over her existing name! It did not stop the arrest. The crew could not have used a worse replacement name. They overlooked the old adage — “A leopard can’t change its spots”.)

For this reason, the core of admiralty practice is the action in rem, which is typically accompanied by the arrest of the ship owned by the person who would be liable in personam in respect of the claim relating to that ship. The importance of the right of arrest was recognised more than 150 years ago by Dr Lushington when he said that “an arrest offers the greatest security for obtaining substantial justice, in furnishing a security for prompt and immediate payment.” However, there was one significant limitation to this doctrine. Under the common law, the right of arrest was limited only to the “offending ship” which was directly implicated in the cause of action. There was no right to arrest or even to effect service upon a ship which was not directly connected with the cause of action. The emasculation of the arrest jurisdiction of the admiralty courts was, as explained by Lord Denning MR in The Banco, another casualty of the jurisdictional wars of earlier years.

What this meant was that it was altogether too easy for shipowners to evade arrest by keeping the offending ship out of port. This loophole provided the impetus for the development of the doctrine of the “sister ship” arrest (or the “surrogate ship” arrest, as it is known in Australia) which was first introduced in the 1952 Arrest Convention before being given effect to in Administration of Justice Act 1956, albeit in a different form. The difference between the two provisions is critical and I will return to it soon. For now, I will focus on s 3(4) of the Administration of Justice Act 1956, which reads:

In the case of any [non-proprietary maritime claim] ... being a claim arising in connection with a ship, where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, the Admiralty jurisdiction of the High Court... may... be invoked by an action in rem against —

(a) that ship, if at the time when the action is brought it is beneficially owned as respects all the shares therein by

---

33 This does not appear to have changed. In 2011, the Australian Minister for Transport said in a speech that 99% of Australia’s international trade by volume is carried by ships of which only 0.5% were Australian-flagged. See: Anthony Albanese MP, “Stronger Shipping for a Stronger Australia”, speech delivered on 9 September 2011 <http://anthonyalbanese.com.au/speech-to-the-maritime-industry-stronger-australia/> (accessed 26 August 2015).
34 ALRC Report at [93] and [96].
36 The Atlantic Star [1973] 2 WLR 795 at 818B.
that person; or
(b) any other ship which, at the time when the action is brought, is beneficially owned as aforesaid

This provision, which was eventually incorporated into the Singapore and New Zealand Admiralty statutes, is not the most felicitously drafted. On the face of it, there are two categories of ships which may be arrested:

(a) The offending ship, provided the relevant person (ie, the person who would be liable in personam) was, when the cause of action arose, the owner or charterer or in possession or in control of the offending ship and was, when the action was brought, her beneficial owner; or
(b) Any other ship which (though not connected at all to the cause of action) was beneficially owned by the relevant person, at the time when the action was brought.

However, in the 1977 decision of the House of Lords in *The Eschersheim*, Lord Diplock, in an obiter dictum, arrived at a different construction of the same provision. He opined that in order for a ship to be liable to arrest, it must either be (a) the offending ship itself; or (b) a “sister ship” of the offending ship, by which he meant that the offending ship and the arrested ship had to be owned by the same person. Now, it is important to appreciate that Lord Diplock’s gloss — the addition of a requirement of “common ownership” — severely attenuated the scope of the doctrine of the “sister ship” arrest. It meant, for example, that if the “relevant person” were merely the charterer of the offending vessel (instead of its owner) then the “sister ship arrest” doctrine would not apply because in such a situation, there would be no “sister” to speak of. This was the case in *The Maritime Trader* where Sheen J, despite expressing misgivings about the construction placed by Lord Diplock, felt constrained to follow it. If the narrow construction favoured in *The Eschersheim* were followed, the policy rationale for the introduction of sister ship arrests would be greatly undermined since it would effectively restrict “the sister ship arrest” to owner-operated vessels.

It appears that Lord Diplock felt compelled to reach this conclusion because Art 3(2) of the 1952 Arrest Convention, upon which s 3(4) of the Administration of Justice Act 1956 was based, was worded quite differently. It read:

... a claimant may arrest either [A] the particular ship in respect of which the maritime claim arose [ie, the offending ship], or [B] any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship ... (emphasis added; interpolations in square brackets)

Under the 1952 Arrest Convention, a ship is only liable to arrest if it is either: (a) the offending ship itself; or (b) any other ship owned by the relevant person; provided the relevant person also owned the offending ship at the time the cause of action arose. This stands in contrast with the position under the Administration of Justice Act, where the right of arrest was extended also to situations where the relevant person is the charterer or in possession and control of the vessel. Notwithstanding the clear difference in the wording of the two provisions, Lord Diplock felt constrained to read down s 3(4) of the Administration of Justice Act in order to interpret it consistently with the 1952 Arrest Convention, which it was enacted to give effect to.

One year after *The Eschersheim* was decided, this exact issue arose for determination halfway round the world in Singapore in the case of *The Permina*. In that case, the plaintiffs were the owners of a vessel, the “Ibnu”, which they let out to the defendants under a time charterparty. Following the non-payment of charter hire, the plaintiffs commenced an *in rem* action against the defendants’ vessel, the “Permina 108” and arrested it. The defendants argued that the warrant of arrest should be set aside for two reasons: (a) first, relying on *The Eschersheim*, they argued that the “offending ship” — the Ibnu — and the arrested ship — The Permina 108 — were not “sister ships” as they were not in common ownership; (b) second, they argued that the expression “charterer” must be read to mean “demise charterer” so only vessels owned by demise charterers were liable to arrest.

41 Section 3(4) High Court (Admiralty Jurisdiction) Act; s 5(2)(b) Admiralty Act 1973 (NZ).
42 *The Eschersheim* [1976] 2 Lloyd’s Rep 1
43 *The Eschersheim* at 7.
46 *The Eschersheim* at 6.
The Singapore Court of Appeal rejected both contentions. As a starting point, the court held that it was unnecessary to look to the words of the 1952 Arrest Convention in interpreting the provisions of its own domestic statute since Singapore was neither a party to the 1952 Arrest Convention nor had it ever, even while a British Colony, been subject to it (it was not one of the colonies to which the United Kingdom had extended the Convention). On that premise, the court held that on a plain reading of the provisions in question, it was clear that if the relevant person were the charterer of the offending vessel at the time when the cause of action arose, then other ships beneficially owned by him when the action is commenced would also be liable to arrest. In so doing, it widened the scope of the “sister ship” arrest rule considerably and freed it from the constraints which had been imposed by the Eschersheim. This decision was soon followed in the UK (in The Span Terza),49 Hong Kong (in The Sextum),50 and in New Zealand (in The Fua Kavenga),51 all of which cited The Permina 108 in arriving at this interpretation.

4 New Zealand — Release of a Vessel Against the Security of a P&I Club Letter

From Singapore I turn to New Zealand and to a decision whose brevity belies its considerable practical importance. This is the case of The Pacific Charger,51 a decision handed down by the New Zealand Court of Appeal in 1981. In that case, the plaintiff had commenced an action in rem against the ship, “Pacific Charger”, for, inter alia, damage to the cargo carried on board the vessel. After arrest, the shipowners offered a letter of guarantee provided by the Britannia Steam Ship Insurance Association Ltd., a significant Protection and Indemnity Club in London, for the sum of NZ$7,500,000. At first instance, Savage J held that the court had the discretion under r 17(4) of the New Zealand Admiralty Rules 1975 (NZ) to determine the adequacy of security and also to specify the form that the security would take.52 The Court of Appeal, presided over by Cooke J (later Lord Cooke of Thornton), affirmed his decision, holding that the court indeed had the power to decide on the form of security.

In 1988, the High Court of Singapore followed New Zealand’s lead in The Arcadia Spirit.53 In the course of his judgment, Grimberg JC cited The Pacific Charger with approval and held that O 70 r 12(4) of Singapore’s Rules of Court54 likewise reposed the court with the discretion to order the release of the vessel against the provision of a letter of undertaking from a P & I Club. On that occasion, it was the Japan P & I Club,55 another member of the International Group of P & I Clubs. In so doing, the Singapore High Court departed from English decisions which have long held that such letters of undertaking are purely private arrangements in respect of which the court will not enforce acceptance.

This decision is of particular interest to me for reasons both personal and professional. On the personal front, Grimberg JC was my pupil master before he was elevated to the bench and although I did not handle this particular application, I eventually acted as counsel for the shipowner at the trial of the action. On the professional front, it was a decision of immense importance to the shipping industry. At that time, the bulk of my practice consisted of briefs from shipowners who always lamented the difficulties they faced when attempting to secure an appropriate form of security for the release of their vessels. Back in the day, banks were typically reluctant to issue guarantees without a specific expiry date. By contrast, P & I Clubs whose interests are usually aligned with that of shipowners, were far more forthcoming with the provision of letters of undertaking containing automatic renewal clauses which specified that the undertakings would be valid until the final disposal of the action. Thus, the possibility of securing release against a P & I Club letter allowed shipowners to secure the expeditious release of their vessels and, in so doing, prevent further losses from accumulating while their vessels lay idle in harbour. The significance of this facility to secure a quick release cannot be overstated not just because time is money to shipowners but, more significantly, because any losses arising from the delay in arranging security will not be recoverable even if the underlying claim is ultimately defeated. The only exception, of course, is when one is able to make out a case of wrongful arrest, which I shall touch on when I discuss the Australian voyage.

51 CA 101/81, Court of Appeal (New Zealand), 30 July 1981. It was an unreported judgment. However, a copy of the judgment was published as an appendix in the Malay Law Journal at [1981] 3 MLJ 263.
52 The first instance decision of Savage J (High Court, Wellington, AD 135, 24 July 1981) was also not reported. In setting out the facts, I have relied principally on an article written by David Chong (see ‘Security in Actions in Rem’ (1989) 1 SAcLJ 81), who reviewed the court transcript of the first instance hearing in setting out the facts in the article.
54 The Rules of the Supreme Court 1970.
55 The Japan Ship Owners’ Mutual Protection and Indemnity Association.
I note, however, that the scope for curial intervention in matters of security appears to be quite different in Australia. In the *MSC Samia*, a dispute arose over the terms of a security proffered for the release of a vessel arrested following a collision. The defendant had offered a letter of undertaking from “CIGNA Insurance Europe.” However, the plaintiff rejected this, demanding that the undertaking be furnished either by “Cigna (UK),” a P & I Club of international standing, or by a “first class bank” which traded in Australia. Finding themselves deadlocked, the defendant applied to court for the release of the vessel under r 52 of the Admiralty Rules 1988 (Cth), which provided that “the court may order the release from arrest of the ship... on such terms as are just.”

In refusing the application, Tamberlin J held that the sufficiency of the security offered was a matter for the parties. Should they be unable to agree, the court could not step in to impose an agreement upon them. In the course of arriving at this conclusion, Tamberlin J appeared to have been persuaded by the argument that the provision of security was a purely private arrangement so the court had no power to interfere in this process. While this might be the correct decision in the context of the Australian statutory provisions, there is no denying that it has significant negative practical ramifications. As the authors of the Australian Maritime Law Update 1997 pointed out, parties only come to court if they are unable to agree. If the court does not have the power to decide on the terms of security then the deadlock will continue to persist.

5 Australia — damages for wrongful arrest

Finally, I turn to the Australian voyage and the issue of damages for wrongful arrest. Few decisions have cast as long a shadow as the judgment of the Privy Council in *The Evangelismos*. The Rt Hon Pemberton Leigh, delivering the judgment of the Board, held that damages for wrongful arrest may only be had where there is “either mala fides or... crassa negligentia, which implies malice.” For nearly 150 years, this test has prevailed throughout the Commonwealth, having been applied consistently in Canada, New Zealand, Hong Kong, Singapore, and, of course, the United Kingdom. In plain English, the test envisages recovery for wrongful arrest in two limited situations: (a) first, where the arresting party has no honest belief in his entitlement to arrest the vessel; (b) second, where there is so little objective basis for the arrest that it may be inferred that the arresting party either did not believe in his entitlement to arrest or acted without any serious regard as to whether there were adequate grounds for arrest.

Thus framed, it is clear that the test is an extremely onerous one. The high threshold set has deterred many shipowners from pursuing claims for wrongful arrest, a fact which is perhaps best exemplified by the dearth of reported cases on wrongful arrest in England in the 20th century. After the 1896 decision of *The Schooner Village Belle*, there was no reported decision on the issue of damages for wrongful arrest in the English courts until the decision of the Court of Appeal in *The Damianos* in 1971.

It has persuasively been argued that the test is now anachronistic. The reason why such a high threshold was set was because at that time, the arrest of a ship used to constitute the commencement of an in rem action. At the initiation of an action, a plaintiff might not be able to prove his claim on a balance of probabilities. Thus, he should not be held liable for the wrongful commencement of an action unless it could be shown that it was either malicious or initiated without reasonable or probable cause. In this regard, an analogy was drawn between recovery for wrongful arrest and the tort of malicious prosecution (where, likewise, either malice or an absence of reasonable or probable cause must be shown). Were this still the case, there might be an important policy rationale to maintain the high threshold set in *The Evangelismos* since allowing recovery for wrongful arrest too easily might have the unintended effect of stifling what would otherwise be legitimate in rem claims.

---

56 Owners of the Ship Carina v Owners or Demise Charterers of the Ship MSC Samia (148) ALR 326 (“MSC Samia”).
57 MSC Samia at 629–630.
59 *The Evangelismos* (1858) 12 Moo PC 352.
62 The Maule [1995] 2 HKC 769
63 The Kiku Pacific [1999] 2 SLR(R) 91
64 The Kommunar (No 3) [1971] 2 QB 588
65 The Damianos [1971] 2 QB 388
66 See, generally, Shane Nossal, ‘Damages for the wrongful arrest of a vessel’ [1996] LMCLQ 368 (“Shane Nossal’s article”); *The Vasily Golovnin* at [123]–[125].
68 G L Poulson v The Remaining Owners of the Schooner Village Belle (1896) 12 TLR.
69 *E L Poulson v The Remaining Owners of the Schooner Village Belle*.
However, since the passage of the Supreme Court of Judicature Act 187371 in the UK, admiralty actions can now be commenced by way of the issuance of a writ without an accompanying arrest of the vessel. Thus, the historical rationale for the high threshold set in _The Evangelismos_ no longer holds. It has been argued successfully in Singapore in _The Vasiliy Golovnin_ that “the law ought not to perpetuate the now false analogy between malicious prosecution and damages for wrongful arrest.”72 Given that historical backdrop, I think the test can justifiably be criticised for being one-sided and excessively plaintiff-friendly.73 For shipowners, time is money. Even the loss of a few hours can cause huge financial losses. Should the arrest prove ill-founded, any legal costs awarded will be a manifestly inadequate recompense.74

Recognising these concerns, Australia, acting on the recommendation of its Law Reform Commission and following the lead of South Africa, spearheaded the shift away from _The Evangelismos_ in the Commonwealth. Under s 34 of the Admiralty Act 1988, a plaintiff in Australia may recover damages for wrongful arrest if it can be proven that the arrest was initiated “unreasonably and without good cause.” While there has yet, to the best of my knowledge, to be any decided cases on the precise ambit of this statutory test, I think the purport of the provision is clear: it is designed to strike an equitable balance between the interests of the claimant and the shipowner.75

This timely development has certainly not gone unnoticed. The apex courts in Canada,76 New Zealand,77 and Singapore78 have, noting the problems with _The Evangelismos_, all cited Australia as a possible model for reform. At the end of the day, each of them decided, recognising the polycentric nature of the issues concerned and the need for international comity, that any change would be best left to the legislature. When that day comes, I think the position in Australia will prove to be a valuable guide.

6  **A Transnational Judicial Dialogue — The Termination of Demise Charters**

I have spent much of this address talking about the ways in which each of our nations have developed a unique maritime jurisprudence as distinct from that we inherited from our colonial past. I think it is fitting, therefore, if I should end with a discussion of a topic on which our three courts have made unique contributions: the termination of a demise charter.

It has long been held that the quintessence of a demise charter is the complete transfer of possession and control from the shipowner to the charterer. It is therefore brought to an end only if there is, by the same token, a transfer back of possession and control which is achieved through the physical redelivery of the vessel to its owner. The first inroad into this rule was made in _The Turakina_,79 which was a decision of the Federal Court of Australia handed down in 1998. The ship, Turakina, was sub-demise chartered on the standard Barecon 89 form. She was arrested in Sydney by the plaintiff stevedoring company pursuant to a claim for services rendered. The owner then applied for a release of the vessel on the basis that the court’s admiralty jurisdiction had been improperly invoked. The owner’s case was that the court lacked jurisdiction because the vessel was no longer on demise charter at the time when the proceedings for arrest were instituted, the charter having been validly terminated by way of the issuance of a notice of termination sent the day before. The central question in _The Turakina_, therefore, was whether the notice of termination was adequate to terminate the demise charter.

Tamberlin J answered the question in the negative. After reviewing the authorities, he noted that the critical difference between time and demise charters was that the latter involved the complete transfer of possession and control of the vessel. Thus, demise charters could only be brought to an end when there was a reversion of possession and control from the charterer to the owner which the notice of termination, per se, could not achieve. He added that this seemed to be the contractual position as well since the provisions of the charterparty provided that hire itself would continue to be payable until redelivery of the vessel and made mention of the “mechanical steps necessary to effect delivery of actual possession”. Thus, the mere issuance of a notice of termination was insufficient to achieve the termination of the demise charter. I pause to observe that while Tamberlin J made reference to the sui generis nature of demise charters, he did not go so far as to say that the common law mandated

---

71 Supreme Court of Judicature Act (c 66) 1873
72 Shane Nossal’s article at 377, cited in _The Vasily Golovnin_ at [125].
74 See, generally, ALRC Report at para 301.
76 Armada Lines at [26] and [27].
77 _The Rangiora_ at 65.
78 _The Vasily Golovnin_ at [118]
that physical redelivery was required for the termination of a demise charter. Instead, he principally relied on the terms of the charterparty in reaching his conclusion that the notice was insufficient.

As in many things in maritime law, things did not stay still for long. In the “Socofl Stream”,80 which was decided a year later, Moore J took the position even further when he held that the question of whether a demise charter could be terminated without repossessions fell to be decided on the terms of the charterparty. He went on to hold that “if a charterparty expressly provided for its termination and the power to terminate was exercised, then the charterer ceased to be a demise charterer from the time of termination.”81

It did not take long for these decisions to travel across the Tasman Sea. While the two cases were making their journey through the Australian court system, three of the Turakina’s sister ships, which were also on demise charter, were arrested in Auckland. Termination notices had also been issued in this case and the question, once again, was whether the court’s in rem jurisdiction had been properly invoked. Giles J held that the mere issuance of termination notices were insufficient to terminate the demise charters in the absence of the physical redelivery of the vessels. After affirming the common law rule, however, Giles J then went on to remark in obiter that “the deficiency here lies in the drafting of the contract” and that “an experienced craftsman could cover ‘redelivery’ in an early termination context in a way which would be contractually effective.”82 In other words, Giles J contemplated that parties could contract out of the requirement of physical redelivery as a requirement for the termination of a demise charter.

However, this position was not without its dissentients. In the later case of ASP Holdings Ltd v Pan Australia Shipping Pty Ltd83 Finkelstein J, while constrained by comity to follow The Socofl Stream, nonetheless expressed serious reservations about the notion that one could contract out of the requirement of physical redelivery. He remarked at [14] – [15]:

If I may say so, this is a troubling conclusion. It is troubling because until the owner actually withdraws the vessel not only does the charterer retain possession it still mans and supplies her. The problem becomes acute if the notice of termination is served while the vessel is at sea. Applying The Socofl Stream, she is not under demise while returning to port. If that be true it may surprise the owner to learn that the master now has ostensible authority to bind it. There is also the possibility that the owner may decide to retake possession at the next port of call or at a convenient port or place as contemplated by cl 29. The result of the application of The Socofl Stream is that the owner has control of the vessel during the voyage. The true position is probably different.

I prefer the view that it is not until the vessel has been withdrawn that the demise comes to an end for it is only then that the charterer has lost exclusive possession of the vessel. That the charterparty describes the charterer’s possession before delivery as that of “gratuitous bailment” is not to the point. The real relation between the charterer and the vessel cannot be disguised by the use of an inapposite label or description. I appreciate, however, that others take a different view.

Such was the state of the law when I had to consider the same issue in my recent judgment in The Chem Orchid.84 When I reviewed the authorities, Finkelstein J’s concerns resonated with me. While the designation of the charterer as a “gratuitous bailee” under the terms of the revised 2001 Barecon form appeared to notionally re-vest possession and control in the owner, it did not change the reality that, until physical redelivery, the demise charterer continued to enjoy the full rights of control and possession of the vessel and, more importantly, that third parties would continue to deal with him on that basis. To my mind, to allow a shipowner to contract out of the requirement of physical redelivery as a requirement for the termination of a demise charter.

For these reasons, it was my view that the question of the subsistence of a demise charter is not simply a matter of contract as it has crucial implications on the court’s jurisdiction to order the arrest of demise charted vessels. I therefore declined to follow the Socofl Stream and The Rangiora and instead preferred the view of Finkelstein J, holding that parties cannot contract out of the requirement of physical redelivery of the vessel to bring about an end to a bareboat charter.

I have no doubt that my judgment will not be the last word on this subject. Just as I found my views being informed

---

80 CMC (Australia)Pty Ltd v The Ship “Socofl Stream” [1999] FCA 1419 (“Socofl Stream”)
81 Socofl Stream at [28].
82 The Rangiora at 78.
83 ASP Holdings Ltd v Pan Australia Shipping Pty Ltd (2006) 235 ALR 554
84 The “Chem Orchid” [2015] 2 SLR 1020.
and sharpened by the exchange of ideas in Australia and New Zealand so, too, I hope that later courts will also benefit from my own modest contribution to the subject. Such is the dynamism in the practice of maritime law that even where we disagree, the general body of maritime jurisprudence is enriched by the continuing dialogue that takes place between our courts. This dialogue has always operated and will continue to operate as the catalyst for further evolution and refinement.

7 Concluding reflections

I have spent much of my speech talking about the ways that our laws have diverged, but I want to conclude it with some reflections on the theme of universality. I started by observing that the ocean of maritime jurisprudence is fed by streams of diverse origin. That is true. However, it is equally true, as Homer observed, that the ocean is the source of all rivers.

Since antiquity, it has been acknowledged that the laws governing the affairs of men at sea are distinct from that which govern their affairs on land. In the 6th century Digest of Justinian the jurist Volusius Maecianus is recorded as having written that a sailor, one “Eudaimon of Nicomedia”, was shipwrecked off the Greek island of Icaria whereupon he was robbed by farmers. Understandably aggrieved, Eudaimon petitioned the Emperor Antoninus who, with characteristic imperial hauteur, replied,

I am, indeed, the Lord of the World, but the Law is the Lord of the sea; and this affair must be decided by the Rhodian law adopted with reference to maritime questions, provided no enactment of ours is opposed to it.

What the Emperor was referring to was the unwritten body of Rhodian laws which has existed since the 8th or 9th century BC and which is now cited as one of the earliest sources of the lex maritima which is generally practised in much of the world today. Until today, strong statements of the existence of a “general maritime law” can be found in the law reports, albeit in somewhat humbler tones. It may be the case, as Lord Diplock remarked in The Tojo Maru, that, “outside the special field of ‘prize in times of hostilities there is no [such thing as a] ‘maritime law of the world’ as distinct from the internal municipal laws of its constituent states that is capable of giving rise to rights or liabilities enforceable in domestic legal systems.” However, it does not change the fact that the substantive content of our maritime laws have a common root or anchor. Even as our laws continue to develop (and, possibly, diverge) in the future, there will always be much we can learn from each other and from the general maritime law of which we are all part.

It has been a tremendous privilege for me, in the past 30 years, to be associated with the practice of maritime law and to have contributed to its development. Because of my career in this area of the law, I have watched the sun set in far-flung corners of the globe; I have shared a drink or two with persons I would otherwise never have met; and I have laughed, sung, and dined in a dozen time-zones. If someone should ask me: given all the varied choices available in the legal profession today, would you still have opted to practise maritime law? Without a moment’s hesitation, my answer will be a resounding “yes”. If I could, I would wind the clock back to 1977 and tell my 19 year old self, standing there on the bow of the RSS Endurance: “Stay the course. The voyage might be a slow one, but you will get there eventually. And what is more, you will love the ride.” It has truly been a fascinating journey for me.

Thank you.

---

85 In a celebrated passage, Homer describes the ocean as the source of all waters, “from whom all rivers and seas with all springs and deep wells proceed”: see Homer’s Iliad Book XXI.193–7 (trans Samuel Butler) (Orange Street Press Classics: 1998) at 412.
88 In the mid-18th century case of Luke v Lyde (1759) 2 burr 882 at 887, Lord Mansfield wrote that the “the maritime law is not the law of a particular country, but the general law of nations.” In a similar vein, the US Court of Appeals for the 4th Circuit wrote, in the 1999 case of RMS Titanic, Inc. v Haver, 171 F.3d 943 at 960–961, of a “jus gentium” and of the “time-honoured principles of the common law of the sea.”
89 The “Tojo Maru” [1972] AC 242 at 290L.
This paper is the second of two papers. Part One outlined the common law duty to exercise reasonable care for passenger safety. It set out the basic provisions and history of the Trade Practices Act ('TPA')/Australian Consumer Law and the Civil Liability Act ('CLA') reforms insofar as they relate to personal injury claims arising out of breach of contract. In particular, Part One considered the extent to which the TPA/Consumer law 'picks up and applies' the state laws 'as surrogate federal law'. Of particular interest to ship operators, it also considered the extraterritorial application of Australian law.

Much of Part One lays the groundwork for the discussion that will take place in Part Two. It is here that the particular issues faced in dealing with a passenger’s claim for personal injury in Australia will be canvassed. The purpose of Part Two is to consider the potential interaction of the various statutes by considering questions likely to be posed by the lawyers for either the passenger or the cruise ship operator in assessing a claim. Therefore this part will deal with the following questions:

- Will the CLA quantum limits apply to statutory guarantee claims?
- Will the CLA changes to tests of liability apply to statutory guarantee claims?
- Will the CLA provisions on risk warnings apply to statutory guarantee claims?
- Can the CLA provisions allowing exclusion of liability for recreational activities be relied upon to excuse liability in statutory guarantee claims?
- When can a corporation rely upon a contractual exclusion/limitation clause to exclude liability arising under a statutory guarantee?

The interplay between the Commonwealth and State provisions is a key issue here. It is important to bear in mind some key points that were covered in Part One; namely that:

- Corporations will be caught by the Commonwealth laws if contracting in Australia or in circumstances where chosen governing law or the objective proper law is that of an Australian State or territory, no matter where the cruise takes place.
- There may be territorial restrictions on the operation of the CLAs. Insight Vacations3 tells us that the NSW CLA provisions dealing with recreational services do not apply to services provided wholly outside NSW because the Act contains no expression of extraterritorial application. The courts are yet to determine whether the remainder of the CLA, or indeed the CLAs of other States, are similarly afflicted.
- The CLAs differ in wording State by State, which means that a decision of a court in one State concerning a wording from a different State’s CLA must be treated with caution.
- The wording of s 275 (formerly s 74(2A)) is extremely important in determining which of the State CLA provisions – or indeed any of their laws generally - will be regarded as ‘surrogate federal law.’ This is not yet settled.
- It is at least arguable that a State law not falling within the narrow wording of CCA s 275 can be applicable by reason of the Judiciary Act 1903 (Cth) ss 79 or 80; but only if it is not inconsistent with Commonwealth law. Further, there may be difficulties in applying the State CLAs to harm occasioned outside Australia.

For the purposes of this discussion, we will assume that the cruise operator is a corporation and that the proper law of the contract is that of an Australian State or territory. By reason of s 131 CCA, that corporation is therefore caught by the Commonwealth iteration of the Consumer Law found as a schedule to the CCA. That, in turn, means that s 275 Consumer Law applies.

---

1 Sincere thanks Paul Myburgh for his comments and suggestions on a draft of this paper. Any errors are of course my own.
3 Insight Vacations Pty Ltd v Young [2011] HCA 16.
If a passenger establishes a corporation has breached the statutory guarantee leading to personal injury, will the applicable State CLA reform award quantum limits apply?

Once Consumer Law sections 275 (a) and (b) are satisfied, the short answer to this question is yes.4 The award quantum provisions5 full squarely within the ambit of s 275. State laws concerning quantum ‘limit and preclude… recovery…’. They apply to ‘liability for breach of a term of the contract’ because the laws apply to awards of personal injury damages, ‘regardless of whether the claim is brought in tort, contract, under statute or otherwise.’6 The assessment of damages in various cases has proceeded on this basis.7

However there has been little discussion as to whether the CLA should apply to assess damages where the injury was sustained overseas. In the context of the recreational activities aspects of the CLA, the High Court in Insight Vacations8 did not need to explicitly deal with whether the quantum provisions of the CLA would have applied to the assessment of Mrs Young’s claim, because the parties had accepted from the outset that that was the case.9 But the extraterritorial application of the CLA (NSW) was discussed by the court. The High Court considered whether the recreational activity provisions could apply where the activity occurred outside NSW in any event. The court pointed out that this required analysis of the particular CLA.10 The CLA (NSW) made no provision for extraterritorial operation. The joint judgment of the court said:

The definition of ‘recreational activity’ talked of activity at a ‘beach, park or other public open space’. After a lengthy discussion, the Court decided there was ‘no reason to read those references to place as extending beyond places in New South Wales.’11 The High Court was considering the extent to which the NSW CLA provisions constricted the consumer protection provided for in the Consumer Law. Given the intent of the Consumer Law and its status as Federal legislation, it therefore makes sense that the CLA provisions were not interpreted expansively. But will the same reasoning apply to different parts of the CLA not so fixated on ‘place’ such as that dealing with assessment of damages? That is relevant to determine whether an Australian court should apply the CLA quantum provisions where the incident occurred overseas.

General principles of conflicts law will also come into play. They are generally outside the scope of this paper so only a brief comment will be made.

For contract claims, the relevant choice of law clause, an implied choice of law or the objective proper law of the contract, will dictate how the damages are to be assessed. If the choice of law is a foreign law, but the objective proper law is Australian, it may be overridden by the Consumer Law,13 which in turn ‘uplifts’ the State CLA legislation. However, if the objective proper law is not Australian, an Australian court will need to scrutinise the terms, object and purpose of the CLA to determine if it should apply regardless. The court might consider the

---

4 We are assuming that the accident took place after the enactment of the predecessor of s 275, s 74(2A) TPA, in 2004. See Nair-Smith v Perisher Blue Pty Ltd [2013] NSWSC 727, [121].
5 See, eg, Civil Liability Act 2002 (WA), Part 2; Civil Liability Act 2002 (NSW), Part 2.
6 See, eg, Civil Liability Act 2002 (NSW), s 11A.
7 Insight Vacations Pty Ltd v Young (2010) 78 NSWLR 641, 643 (Spigelman CJ); Nair-Smith v Perisher Blue Pty Ltd [2013] NSWSC 727, [121] where the judge held that the CLA did not apply because s 74(2A) was not operational at the time of the accident, but in Nair-Smith v Perisher Blue Pty Ltd (No 2) [2013] NSWSC 1463 the judge otherwise accepted the limitations on damages from the CLA would have applied: [5].
8 Insight Vacations Pty Ltd v Young [2011] HCA 16.
9 [2009] NSWDC 122, [32].
10 South Australia’s CLA, for example, expressly states that their provisions apply to claims brought in the State, no matter where the harm was suffered.
11 At [16].
12 At [35].
13 TPA, s 67; Consumer Law, s 67.
extent to which the CLA permits a contractual opt-out, delineates its scope of application or conversely, whether the CLA will override any such choice of law such that the CLA quantum limits apply. Whether the policy behind the CLA changes is served by their application to contractual claims under foreign law is a moot point.

As for tort claims, in *John Pfeiffer v Rogerson*, the High Court ruled that ‘questions about kinds of damage, or amount of damages that may be recovered would… be treated as substantive issues governed by the *lex loci delicti*’. The High Court extended this to foreign torts in *Regie National Des Usines Renault SA v Zhang (Zhang)*. Therefore if the tort has occurred overseas, the plaintiff may argue that *Zhang* means a court must apply foreign law to determine the quantum of damages, and not the CLA. Faced with such an argument, again, the court will need to discern whether the CLA legislation – by its terms, or by divining its purpose and intent – ought to apply regardless.

On a practical level, if it is asserted that foreign law applies, the effect of that foreign law must be proven in court. Unless a party persuades the court that the law of that jurisdiction is the applicable law and leads evidence of the effect of that law, then the court will be required to adopt the default rule. That rule is even if foreign law applies, if no evidence is led of its effect, it is assumed to be of the same effect as the law of the forum. A pragmatic solution at the best of times, it becomes positively fractured in the new reality of 7 different systems of tort law within Australia. In some states, the ‘law of the forum’ applicable by default might be argued to be purely common law (in a state in which the CLA has no extraterritorial applicability), and in others, it might be argued that it is assessment modified by the CLA statute (if the CLA does have extraterritorial applicability, like SA).

There is clearly a significant problem with the application of the CLAs in cases concerning events that have occurred overseas. That problem is of particular relevance to passenger claims.

2 Will the CLA provisions altering tests that establish or modify liability apply to statutory guarantee claims?

This issue is not straightforward, although some recent case law is insightful. The CLAs seek to apply to any action for personal injury, whether brought in contract, tort or based on statute.

As highlighted by the judgment of the High Court in *Insight*, the context of the statutory guarantees within the *Consumer Law* (then TPA) is important. Section 64 of the *Consumer Law* renders void a term of a contract that purports to ‘exclude restrict or modify the application of; the exercise of a right by, or any liability for breach’ of a term/guarantee imposed by the *Consumer Law*. There are only narrow exceptions to s 64. Relevantly, they are s 139A CCA which relates to recreational services (discussed below) and s 275, which allows State laws that modify or limit liability to continue to operate in stipulated circumstances.

Section 275 expressly uplifts State laws that apply to modify liability once a defendant has been found to be liable. This would mean laws relating to, for example, contributory negligence and proportionate liability would be clearly capable of uplift to apply to claims for breach of the statutory guarantee.

But what about provisions that recast the duty, such as s 5B and s 5C CLA (NSW)?

As outlined above, there appear to be at least two alternative paths by which the CLA provisions regarding liability can apply to statutory guarantee claims brought under the Commonwealth iteration of the *Consumer Law*.

1. The first path is when the CLA reform can satisfy s 275 CCA. If s 275 CCA is satisfied then the State law becomes surrogate federal law. Any inconsistency will be dealt with by construction rather than by application of s 109 of the *Constitution*.

2. The second is by reliance on ss 79 or 80 of the *Judiciary Act 1903* (Cth). It must be stressed that the *Judiciary Act* path is only available where the State law is not inconsistent with the federal law.

---

14 Some CLAs do permit a contractual ‘opt out’, but generally not in relation to quantum calculations. An interesting question is whether a passage contract incorporating the Athens Convention might be considered an ‘opt-out’ clause.

15 (2000) 203 CLR 503, [100].


17 Martin Davies, Andrew Bell and Paul Brereton, *Nygh’s Conflict of Laws in Australia* (LexisNexis Butterworths, 8th ed, 2010) [17.37].

18 See, eg, CLA (NSW), s 5A.

19 *Insight*.

20 As was decided in *Motorcycling*, see [176].
Therefore, any CLA provision upon which a party relies must, to the extent it undermines the protection offered by the Consumer Law, satisfy s 275. Section 275 is only triggered once there has been ‘a failure to comply with a guarantee that applies to a supply of services’. A majority of the NSW Court of appeal has held that, in effect, the trigger for the operation of the section is a pre-existing liability that has accrued under the CCA provision for a breach of the guarantee.\(^1\) As the cases discussed below will show, there has been some judicial disagreement as to the extent that contractual liability can be ‘unpicked’ and recast using the CLA tests.\(^2\)

The case of Motorcycling Events Group Australia Pty Ltd v Kelly\(^3\) is instructive. In that case the plaintiff alleged there was a breach of s 74 TPA that had given rise to personal injury. The NSW Court of Appeal decided that s 74(2A) TPA did not pick up the State CLA provisions that provided the test for a breach of duty of care (s 5B), or negated the existence of that duty where a risk warning had been provided (s 5M).\(^4\) The court was open however to the use of ss 79 and 80 of the Judiciary Act as a means to uplift the CLA provisions into a claim for breach of s 74. The Judiciary Act provisions were relevant because the court was exercising Federal jurisdiction in determining the Trade Practices Act claim. Those provisions would not work for a provision that negated the duty (s 5M) as that provision was directly inconsistent with s 74.\(^5\)

Gleeson JA delivered the lead judgement for the majority. His Honour decided that because the due care and skill obligation in s 74 was not a statutory civil cause of action, and it did not outline a code regarding the standard of conduct required, then the common law had to ‘fill the gaps’. The court held that pursuant to s 80 of the Judiciary Act, the common law to be applied was the common law of Australia as modified by the statute law in force in the State of New South Wales [emphasis added].\(^6\) Ss 5B and 5C were held not inconsistent with the implied warranty in s 74(1). Thus ss 5B and 5C were applied to determine liability pursuant to s 74.\(^7\)

The Gleeson approach would require parties to carefully analyse the particular provisions of the CLA that may not be captured by the particular words of s 74 (2) but might nevertheless be ‘rescued’ by s 79 or 80 of the Judiciary Act 1903. The secondary option of using s 79 or s 80 Judiciary Act to ‘fill the gaps’ adds to the complexity of advising either party as to the likely outcome of a dispute.

The approach of Gleeson JA awaits the imprimatur of the High Court. Further, it may well be that the Gleeson approach is not available under the new statutory guarantees, because they are now a statutory civil cause of action the remedy for which is now found within the ACL not at common law.

In any event, is it even possible to apply the CLA to determine contractual liability where the injury was sustained outside the territory of Australia? As we have seen above, there is some uncertainty regarding the extra-territorial reach of the CLA in respect of tort-based claims, and the High Court in Insight Vacations made it clear that the waiver provisions relating to recreational services as contained in the NSW CLA could not apply to services wholly supplied outside NSW. The same issue may affect the other provisions of the CLA, in the sense that courts were prepared to hold that Part 1A of the CLA was inapplicable to actions for the breach of s 74(1) by the operation of s 109 of the Constitution.

The secondary option of using s 79 or s 80 Judiciary Act to ‘fill the gaps’ adds to the complexity of advising either party as to the likely outcome of a dispute.

---

\(^{1}\) See Insight, per Sackville AJA at [144] – [146]; Basten JA [91]. Spigelman CJ dissented on this point [30] – [46]; [55]. (the unreported version of the judgment must be consulted to find this discussion; inexplicably, it was omitted from the report of the case in the NSWLR).

\(^{2}\) The High Court generally affirmed the majority view on appeal although did not need to decide whether s 74(2A) TPA would pick up laws that modify or extinguish the duty imposed by s 74.

\(^{3}\) As noted by Beech-Jones J in Nair Smith v Perisher Blue Pty Ltd (No 2) [2013] NSWSC 1463; ‘if Pt I A of the CLA NSW applies to claims for a breach of the term implied by s 74(1) then it would effectively rewrite the term.’ That case was decided on the basis that that s 74(2A) had not been enacted at the time of the plaintiff’s accident and therefore was not applicable. Absent s 74(2A), his Honour was prepared to hold that Part 1A of the CLA was inapplicable to actions for the breach of s 74(1) by the operation of s 109 of the Constitution, consistent with Wallis v Doward Pickford (North Queensland) Pty Ltd (1994) 179 CLR 388. For another discussion see the NSW Court of Appeal decision in Insight Vacations Pty Ltd v Young [2010] NSWCA 137.

\(^{4}\) [2013] NSWCA 361; 303 ALR 583. The leading judgment was delivered by Gleeson JA.

\(^{5}\) Ss 5B and 5M were the particular provisions in question in this case.

\(^{6}\) The appeal did not raise this argument, knowing it would be met by s 109 Constitution – Motorcycling, [142] (Gleeson JA).

\(^{7}\) Here we are talking of contractual liabilities under the Consumer Law. If the claim is brought purely in tort, it could be argued that the law of the place of the tort is applicable to decide liability. A passenger seeking to rely upon the laws of another country would need to bring evidence of those laws, failing which the court will assume the laws are the same as the State of Australia in which proceedings are brought.
3 Will the ‘no duty’ provisions of the CLA apply to statutory guarantee claims?

The CLAs contain a number of provisions that remove the duty of care in a given situation. For example, in NSW and WA, the reforms provide that there is no duty of care:

- For recreational activities where there is a risk warning that complies with the requirements set out;\(^{29}\)
- or
- To warn of an obvious risk.\(^{30}\)

Do these provisions satisfy s 275 such that they are surrogate federal laws that can then apply to statutory guarantee claims?

In *Insight* the High Court held that s 74(2A), the precursor to s 275, ‘should not be construed as picking up and applying as a surrogate federal law a provision…which in its terms does not limit or preclude liability for breach of contract.’\(^{31}\) (emphasis added)

By its terms, s 275 will only uplift and apply as surrogate federal law if there has been ‘a failure to comply with a guarantee that applies to a supply of services.’ This was implicitly acknowledged by the High Court in *Insight*, when the Court noted that as a ‘consequence of the satisfaction of those conditions’ in (a) and (b), s 74(2A) could be enlivened.

The question was also discussed in *Motorcycling Events*. The defendant claimed that a risk warning had been given to the plaintiff prior to the motorcycling activity, and sought to rely upon s 5M of the CLA (NSW) to negate the duty and therefore no liability ensued. The defendant argued that s 5M was applicable to the defendant’s claim because it satisfied s 74(2A), and was therefore an exception to s 68 that would otherwise have the effect of rendering the contractual provision void.

JA Gleeson considered whether s 5M CLA (no duty of care for recreational activity where risk warning) fell within the criteria of s 74(A) TPA. His Honour pointed to the significance of the two conditions in s 74(2A). Section 5M purported to negate the very existence of the statutory warranty contained in s 74(1). Yet the language of s 74(2A) appeared ‘to require the existence of the implied warranty, and its breach, before the provision applies a State law’.\(^{32}\) The question, his Honour surmised, was ‘whether s 74(2A) may operate to pick up and apply a State law which purports to negate the very existence of the statutory warranty in s 74(1)’. His Honour concluded that it would not, in so doing approving the obiter comments by both Sackville JA and Basten JA of the NSW Court of Appeal in *Insight*.\(^{33}\) Section 5M therefore failed to meet the description given in s 74(2A). It did not limit or purport to limit or preclude liability for breach of a term. Nor could there could it be argued that s 5M CLA would negate the implied warranty of the TPA. That would raise a direct inconsistency argument under s 109 of the *Constitution*.\(^{34}\) As a result, the court held that those provisions of the CLA\(^{35}\) that seek to extinguish the existence of a duty in the first place cannot be relied upon by a Defendant in response to a claim for breach of s 74 TPA. There is no obvious reason why that conclusion would be different under the *Consumer Law*.

The recent case of *Alameddine v Glenworth Valley Horse Riding Pty Ltd*\(^{36}\) is also illuminating. The NSW Court of Appeal confirmed its decision in *Motorcycling* that s 5M (no duty of care for recreational services where risk warning) falls outside the operation of s 275.\(^{37}\) However s 5L (no liability for harm suffered from obvious risks of dangerous recreational activities) was found by the court to of a type of provision able to be ‘picked up and applied’ by s 275. Section 5L purports, of itself, to exclude liability of the defendant.\(^{38}\) Although obiter, these are important comments.

The reasoning of the NSW Court of Appeal in *Motorcycling* and *Alameddine*, and the majority of the NSW Court of Appeal in *Insight* awaits the scrutiny of the High Court. When a CLA provision is taken in isolation, the reasoning appears sound. However, it will lead to different results for related provisions that happen to use a

---

\(^{29}\) CLA (NSW), s 5M; CLA (WA), s 5 L.

\(^{30}\) CLA (NSW), s 5I; CLA (WA), s 5O.

\(^{31}\) At [26].

\(^{32}\) At [93].

\(^{33}\) *Motorcycling*, [93].

\(^{34}\) *Motorcycling*, [98].

\(^{35}\) The same fate would apply to any State laws with the same wording.


\(^{37}\) [2015] NSWCA 219, [63].

\(^{38}\) Ibid.
different drafting device. For example, a provision under the title ‘Assumption of Risk’ provides that ‘[a] person is not liable in negligence for harm suffered by another person as a result of a materialisation of an inherent risk.’

On the reasoning of Motorcycling and Alameddine, this provision would appear to satisfy s 275. It purports to extinguish liability, not the existence of the duty, and could therefore be relied upon in defence of a claim based on s 60. Did the drafters consider there to be any significant difference between the expressions ‘no liability’ and ‘no duty’? In essence, both have the effect of relieving the defendant of the obligation to compensate.

If one adopts the Gleeson methodology, the extent to which the CLA provisions will apply to federal statutory guarantees would lead to a patchwork of applicable and inapplicable provisions in a cruise ship passenger claim based on s 60 ACL. That in itself is undesirable. The law is rendered uncertain, there is a risk the result will turn on questions of form rather than substance, and there is the possibility of different outcomes in different States if provisions of similar effect have been drafted with different wordings.

This area is ripe for legislative reform; in the meantime, we must await a ruling from the High Court.

4 Can a corporation rely upon their contractual exclusions that comply with the State CLA provisions to exclude liability under a statutory guarantee?

To the extent that the Commonwealth Consumer Law applies, in the Insight case the High Court answered this definitively in the negative. In that case an exclusion clause was contained in the contract which was to be wholly performed outside New South Wales. The service provider alleged that it was permitted to rely upon the exception clause because it was a permitted exclusion under the NSW iteration of the CLA, and that the CLA provisions were ‘surrogate federal laws’ under s 74 (2A) TPA.

In Insight the High Court confirmed that the operation of s 74(2A) was to ‘pick up and apply State laws that fit the description given in that subsection as surrogate federal laws; namely, those that ‘apply to limit or preclude liability for breach, and recovery’. However, the High Court found that that did not include the provision that simply permits contractual exclusion of liability for recreational services, namely s 5N CLA (NSW). Section 5N was not itself a provision that limited or precluded liability and did not satisfy s 74(2A). In any event, s 5N did not have extraterritorial application.

As a result, s 5N and its equivalents in other States cannot be relied upon by incorporated recreational service providers to legitimise the use of contractual waivers where the proper law of their contract is a State in Australia. If there was an exclusion/limitation clause, to be valid it needs to fall within the permissive provision ‘built in’ to the CCA, namely s 139A. Unless and until Federal Parliament amends s 275 Consumer Law, corporations cannot rely upon the provisions in State CLAs to permit the contractual waiver of liability for injuries sustained during the provision of recreational services.

In unusual circumstances it might be possible for the State CLA to apply. If a passenger from Australia sues in relation to a contract that does not have as its proper law the law of a State in Australia then the Commonwealth Consumer Law will not apply. Accordingly, the relevance of s 64 and s 275 drops away. The State laws, both CLA and the mirroring Consumer Law, would need to be examined to see which of them would apply to the contract in question. However, the CLA in that State may not have the requisite extraterritorial application.

39 CLA NSW, s 5 I.
40 Insight (HCA), [12].
41 CCA, s 131.
42 S 67 TPA and s 67 CCA mean that the Commonwealth iteration will apply.
43 Formerly s 68B. Although the section numbers and terminology (warranty – guarantee) are different to those scrutinised by the High Court, it is submitted that the position regarding s 5N remains the same.
44 Ss 79 and 80 of the Judiciary Act 1903 (Cth) cannot apply because the State provisions are inconsistent with the Commonwealth.
45 For example, on the facts of Oceanic Sun Line v Fay (1988) 79 ALR 9, several members of the High Court commented in obiter that the proper law of the contract could well have been Greek law.
46 As an aside, in 2010, New South Wales amended the Consumer Law provisions contained in its Fair Trading Act 1987 (NSW) so as to provide that s 5N CLA will apply to the consumer law enacted in NSW. By doing so, NSW has grafted its own broader recreational waiver provisions onto the supposedly uniform Consumer Law. (While this amendment occurred after the Insight ruling in the High Court, the legislature in NSW did not take the opportunity to elaborate on the extraterritorial application of s 5N). Section 88A reads:

88A Relationship with certain provisions of other Acts
(1) Section 64 (Guarantees not to be excluded etc. by contract) of the Australian Consumer Law is, with respect to a term of a contract for the supply of recreation services within the meaning of section 5N of the Civil Liability Act 2002, subject to that section of that Act.

47 As the High Court decided in insight Vacations v Young as regards the CLA (NSW).

(2016) 30 ANZ Mar LJ 17
5 When can a corporation rely upon a contractual exclusion/limitation clause to exclude liability arising under a statutory guarantee implied by the Consumer Law?

If a consumer enters a contract for services with a corporation then it is the Commonwealth version of the statutory guarantee regime found in the Consumer Law, and the Commonwealth Consumer and Competition Act (CCA) that applies to the transaction.\(^\text{48}\)

In order to ensure the consumer benefits from the guarantee it is imperative that the supplier not be able to avoid its statutory responsibilities. Therefore the CCA, like the TPA before it, contains ‘general avoiding provisions’\(^\text{49}\) which render void a contractual term that attempts to negate the benefits of the statutory guarantees imposed by the Consumer Law – s 64.\(^\text{50}\) The CCA goes on to outline exceptions to the general avoidance provision; situations where the contractual provisions that would otherwise be rendered void will be allowed to take effect. In summary, for corporations there are now only two methods by which a contract term is permitted to ameliorate the full effect of s 64:\(^\text{51}\)

- Certain types of limitation of liability will be allowed where the goods or services are not of a kind ordinarily acquired for personal, domestic or household use or consumption.\(^\text{52}\) This will not capture passenger contracts. Even if a cruise is undertaken for business, such as a conference, it is still of a kind *ordinarily* acquired for personal domestic or household use.

- the avoiding effect of s 64 is qualified for certain terms of a contract for the supply of ‘recreational services’ – s 139 CCA. This provision defines recreational services and spells out the extent to which an exclusion or limitation is protected from avoidance under s 64. As the High Court noted in *Insight*, the definition of ‘recreational services’ is narrower than its definition in the Civil Liability Acts.\(^\text{53}\) But it will permit exclusion of liability for injuries sustained during recreational services that involve a sporting activity or one with a significant degree of physical exertion or physical risk.

The third possible method was eviscerated by the High Court in *Insight*.\(^\text{54}\) That involved harnessing the permissive provisions of the State CLAs which allowed providers to exclude or limit liability for recreational activities. The argument relied upon s 74(2A) (now s 275) to uplift State and territory laws precluding liability or limiting quantum as surrogate laws applicable to, inter alia, due care and skill claims. The High Court said that s 74(2A) was engaged only by State laws that have the effect of limiting liability, not where those laws simply permit contractual exclusions. Reliance on those State laws would lead to an argument they are invalid to the extent they are inconsistent with s 74(2A) TPA/275 CCA.\(^\text{55}\)

Therefore, for passenger carriage contracts to which Australian law applies, the provider may only rely upon an exclusory term that satisfies the ‘recreational services’ provision of s 139A of the CCA. Any such term that falls outside this provision will be void under s 64. Significantly, it is submitted that s 64 will render void a clause that imposes any limits on passenger claims for maritime accidents or resulting from hotel type risks. In particular, it will render void a general limitation seeking to incorporate the 2002 Athens Convention\(^\text{56}\) quantum limits.

---

\(^\text{48}\) CCA, s 131.
\(^\text{49}\) High Court in *Insight*, [24].
\(^\text{50}\) Quoted in Part One.
\(^\text{51}\) A non-incorporated service provider not otherwise captured by the CCA will have to consider the State provisions of the Consumer Law.
\(^\text{52}\) To be effective the provision must comply with the terms of s 64A, in relation to services the limit must be supplying services again or payment of the cost of supplying services again. The provision is subject to a ‘fair and reasonable’ threshold (sub-s 3) and the court is given guidance in assessing what will be fair and reasonable (sub-s 4). This provision will only apply where goods/services are of a kind not ordinarily acquired for personal domestic or household use. Even if a cruise is undertaken for business, such as a conference, it is still of a kind *ordinarily* acquired for personal domestic or household use.
\(^\text{53}\) *Insight*, [25].
\(^\text{54}\) In so doing, the High Court affirmed the majority of the NSW Court of Appeal and rejected the strong dissent of Spigelman CJ on this point.
\(^\text{55}\) *Insight*, [26].
\(^\text{56}\) Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974, 1463 UNTS 19.
Section 139A is set out in Part 1 but bears repeating here:

CCA, s 139A Terms excluding consumer guarantees from supplies of recreational services

(1) A term of a contract for the supply of recreational services to a consumer by a person is not void under section 64 of the Australian Consumer Law only because the term excludes, restricts or modifies, or has the effect of excluding, restricting or modifying:
   
   (a) the application of all or any of the provisions of Subdivision B of Division 1 of Part 3-2 of the Australian Consumer Law;
   or
   (b) the exercise of a right conferred by such a provision; or
   (c) any liability of the person for a failure to comply with a guarantee that applies under that Subdivision to the supply.

(2) Recreational services are services that consist of participation in:
   
   (a) a sporting activity or a similar leisure time pursuit; or
   (b) any other activity that:
      
      (i) involves a significant degree of physical exertion or physical risk; and
      (ii) is undertaken for the purposes of recreation, enjoyment or leisure.

(3) This section does not apply unless the exclusion, restriction or modification is limited to liability for:
   
   (a) death; or
   (b) a physical or mental injury of an individual (including the aggravation, acceleration or recurrence of such an injury of the individual); or
   (c) the contraction, aggravation or acceleration of a disease of an individual; or
   (d) the coming into existence, the aggravation, acceleration or recurrence of any other condition, circumstance, occurrence, activity, form of behaviour, course of conduct or State of affairs in relation to an individual:
      
      (i) that is or may be harmful or disadvantageous to the individual or community; or
      (ii) that may result in harm or disadvantage to the individual or community.

(4) This section does not apply if the exclusion, restriction or modification would apply to significant personal injury suffered by a person that is caused by the reckless conduct of the supplier of the recreational services.

(5) The supplier’s conduct is reckless conduct if the supplier:
   
   (a) is aware, or should reasonably have been aware, of a significant risk that the conduct could result in personal injury to another person; and
   (b) engages in the conduct despite the risk and without adequate justification.

There are many requirements to be satisfied before a service provider can rely upon this provision to give efficacy to its exclusion clauses.

5.1 Section 139A (1) ensures the usual rules regarding exclusion clauses apply

At common law, the principle of caveat emptor means that as a general rule, parties to a contract can agree to exclude or limit liability for loss pursuant to the terms of the contract. For the exclusion or limitation clause to be relied upon, it must be properly incorporated in the contract. Once incorporated, to be effective the clause must, on its proper construction, actually apply to the situation in question. Section 139A can only operate if the exclusion is in fact a term of the contract; and implicitly the exclusion clause can only take effect if by its terms it applies to the facts of the case.

Defendants seeking to rely on exclusions or limitations often display a misplaced optimism that their standard clauses form part of the contract. For example, in Nair-Smith v Perisher Blue Pty Ltd the parties had not addressed whether the conditions printed in approx. 1 mm print on the reverse of ski lift ticket had contractual effect. The parties also proceeded on the assumption that the terms printed on the sign at the ticket window for the ski lift were part of the contract. The Judge was not satisfied that either the ticket terms or the sign had contractual effect.

Even if the clauses are incorporated in the contract, they must also be engaged on the particular facts of the case. In Insight, the High Court interpreted the exclusion clause as inapplicable on the facts of the case. The contract provided:

---

57 For cases dealing with waivers and exclusions in contracts for recreational activities under the CLA, see Lormine Pty Ltd v Xuereb [2006] NSWCA 200; and Alameddine v Glenworthy Valley Horse Riding Pty Ltd [2015] NSWCA 219.

58 [86]. His Honour dealt with the clauses as if they were contractual, so as to show that they did not assist the Defendant.
Where the passenger occupies a motorcoach seat fitted with a safety belt, neither the operators nor their agents... will be liable for any injury... or for any damages or claims whatsoever arising from any accident or incident, if the safety belt is not being worn at the time of such accident or incident.

The plaintiff was injured when she stood from her seat to retrieve an item from the overhead locker on a moving bus. The High Court concluded the exclusion clause did not apply in those circumstances as she was not ‘occupying’ a seat at the time of the accident. The terms did not require the passengers to remain seated at all times.\(^{59}\)

5.2 Section 139A (2) CCA ‘contract for the supply of recreational services’ according to the Consumer Law

(1) A term of a contract for the supply of recreational services to a consumer by a person is not void under section 64....

(2) Recreational services are services that consist of participation in:

(a) a sporting activity or a similar leisure time pursuit; or
(b) any other activity that:

(i) involves a significant degree of physical exertion or physical risk; and
(ii) is undertaken for the purposes of recreation, enjoyment or leisure.

In order to take advantage of the immunity from the consequences of s 64 ACL, there must be a term of a contract for the supply of ‘recreational services.’

It is clear the TPA/Consumer Law wording is narrower than the definitions of recreational services caught by the State CLA provisions.\(^{60}\) The NSW Court of Appeal considered that a contract for tourist activities would satisfy the CLA definition of recreational services, although it fell outside the Consumer Law definition. The awkwardness of the wording in the definition of ‘recreational services’ in Consumer Law has been discussed by several courts.\(^{61}\)

Nair-Smith v Perisher Blue Pty Ltd also considered the definition of ‘recreational services’ found in s 68B TPA, the former iteration of s 139A.\(^{62}\) Based on the wording of the ski lift pass purchased by the plaintiff, the trial judge found that the contract was for the service of being transported up the ski slopes or between ski slopes.\(^{63}\) It was not a contract for ‘participation in a sporting activity or similar leisure-time pursuit’, and therefore the trial judge held that s 68B was not applicable.\(^{64}\) This was a narrow reading of the contract, and the defendant appealed on this and other grounds.

Before the Perisher Blue appeal was heard, another appeal on this matter was before the NSW Court of Appeal. In Motorcycling Events, Court of Appeal appeared to take a broader view. The court found that the nature of the activity (‘sporting or other leisure-time pursuit’) and, for sub-s (b), the purpose of the activity (‘for the purpose of recreation, enjoyment or leisure’) were relevant to the fulfillment of the definition. The purpose of the activity was to be assessed objectively, taking into account the subjective intention of the participant.\(^{65}\) In that case, a course teaching advanced motorcycling skills was held to be a recreational service because the injured participant had undertaken the course to increase his enjoyment of motorcycling which was for him a recreational activity. It would seem to follow, therefore, that if the participant’s objective in participating in the course was to improve his motorcycling skills so as to make him a more defensive driver, that there may not have been a contract for recreational services within the scope of s 68B.

\(^{59}\) [38] – [39]. The discussion was obiter, as the court had already decided the provision could not apply to services provided outside of NSW and that the CLA provision permitting exclusion of liability was not uplifted by s 275 Consumer Law. See also the recent decision of the NSW Court of Appeal in Alameddine v Glenworthy Valley Horse Riding Pty Ltd [2015] NSWCA 219 where it was held the exclusion clause was ineffective on the facts of the case, at [54] – [57].

\(^{60}\) The High Court also acknowledged this in Insight that the TPA wording (in this respect identical to the CCA wording) is narrower than the CLA definitions of recreational services (at [25]) and this was explicitly noted by the New South Wales Court of Appeal both in Insight [2010] NSWCA 137, and in Motorcycling Events [2013] NSWCA 361 (Gleeson JA (with whom the other members of the Court agreed) at [127]).

\(^{61}\) Motorcycling [2013] NSWCA 361; 303 ALR 583 at [129]. Nair-Smith, [105].

\(^{62}\) Motorcycling, [134] (Gleeson JA delivering the leading judgment).
After the Court of Appeal decided Motocycling Events came the Perisher Blue appeal. The appeal was upheld on the basis that while Perisher Blue had been negligent, the injured claimant had not demonstrated the causal link between the negligence and the accident. Accordingly, questions as to the TPA and ‘recreational services’ were discussed in obiter only. The court concluded that the ski lift contract had been too narrowly characterised by the trial judge. The ‘purpose and object’ of the transaction was to facilitate resort skiing, which included the provision of the ski lift services. Therefore the services provided did fall within the definition of ‘recreational services’. Nonetheless the Court of Appeal found that Perisher Blue would not have been entitled to rely on the exemption clause because it did not satisfy s 68B(3). The clause excluded property damage as well as personal injury claims.

For cruise ship passenger contracts the Consumer Law definition of ‘recreational services’ poses at least two questions:

5.2.1 Can an entire contract for a cruise be a ‘contract for recreational services’ under s 139A?

It is doubtful that a cruise contract in its entirety could be construed as a contract for the provision of recreational services as defined in the CCA. The provision speaks of a sporting activity ‘or similar leisure time pursuit’. The words ‘similar leisure time pursuit’ must be interpreted ejusdem generis. While cruises offer sporting activities, they are hardly compulsory; and many people on board cruises undertake nothing more strenuous than a gentle stroll to the buffet or bar. Subsection (2)(b) of the definition requires that the activity needs to involve significant physical exertion or risk. Therefore, as many aspects of a cruise that fall outside of the definition of recreational services, the guarantee of due care and skill will not be excludable for every aspect of the cruise contract or for the cruise in its entirety. Further, to accept it applied to whole contract would be to allow exceptions for such things as failure to exercise good seamanship, or failure to supply uncontaminated food, and it would be unlikely that a court would hold that this satisfies the intent of the provision.

It follows, therefore, that a cruise ship provider could not exclude liability arising from negligence in the navigation of the ship.

This view takes support from the judgment of the NSW Court of Appeal in Insight. Spigelman CJ stated ’s 68B had no application to the type of tourist travel occurring in this case. It was simply not engaged…it was common ground in this Court that it was irrelevant.’ (In contrast, the NSW Court of Appeal found the entire service would have satisfied the CLA definition).

5.2.2 As part of a cruise contract will be for recreational services, can s 139A apply to terms relating to those services?

There are a range of activities offered on board ships would fall within the CCA definition of ‘recreational services’. Optional activities on board ships, such as rock climbing, ice skating, ziplining, ‘flowrider’ surfing machines, waterslides and the like would be considered as ‘sporting activities’ or ‘similar leisure time pursuits’ with ‘significant degree of physical exertion or physical risk’. Adventure based activities such as zodiac expeditions from the cruise ship to view glaciers would also qualify. There are some that will fall into the grey area; for example, dancing, and fitness classes. It is not clear whether the courts will regard these types of activities as being ‘recreational services’ but it seems likely that they are ‘a sporting activity or a similar leisure time
pursuit’. Many cruise ships also facilitate activities in port but disclaim liability arising from them. If those activities are of a kind that falls within the recreational services definition, such as paragliding, spearfishing or water-skiing, an appropriately drafted and incorporated exclusion or limitation clause could effectively restrict liability for personal injury arising from that accident under Australian law. However, sightseeing tours or walking tours are unlikely to fall within s 139A.

It is clear that the wording of the exclusion needs to be effective to exclude liability for the injuries sustained, and validly incorporated in the contract. However, what is uncertain is whether a cruise contract may validate its exclusion of liability for its recreational services under s 139A for only that part of the contract for the supply of recreational services. Clearly a cruise contract consists of many elements and not all of them relate to recreational services. It is at least conceivable that a court could find that, as the cruise contract taken as a whole is not such a contract for recreational services then s 139A can have no application. The provision could have been drafted as ‘contract for or including recreational services’.

If the carrier cannot trigger s 139A for part of its contract only, then the carrier may need to frame its exclusion as part of a freestanding contract for that recreational service: a much more onerous and inefficient solution for carriers. The contractual status of a waiver in an unsigned document, or a notice on display (a ‘risk warning’), is questionable – and even if it is contractual in nature, the question then becomes whether sufficient steps have been taken to bring the notice to the attention of the passenger.

5.3 Section 139A(3) Exclusion clause must only relate to personal injury or death

Subsection 3 reads (emphasis added):

(3) This section does not apply unless the exclusion, restriction or modification is limited to liability for:
(a) death; or
(b) a physical or mental injury of an individual...or
(c) the contraction, aggravation or acceleration of a disease of an individual; or
(d) the coming into existence, the aggravation, acceleration or recurrence of any other condition, circumstance, occurrence, activity, form of behaviour, course of conduct or state of affairs in relation to an individual:
(i) that is or may be harmful or disadvantageous to the individual or community; or
(ii) that may result in harm or disadvantage to the individual or community.

The wording of s 139A(3) is slightly different to the previous provision, s 68B. Section 68B provided:

(1) A term of a contract for the supply by a corporation of recreational services is not void under section 68 by reason only that the term excludes, restricts or modifies, or has the effect of excluding, restricting or modifying:
(a) the application of section 74 to the supply of the recreational services under the contract; or
(b) the exercise of a right conferred by section 74 in relation to the supply of the recreational services under the contract; or
(c) any liability of the corporation for a breach of a warranty implied by section 74 in relation to the supply of the recreational services under the contract;

so long as:
(d) the exclusion, restriction or modification is limited to liability for death or personal injury; and
(e) the contract was entered into after the commencement of this section. (section goes on to define personal injury).

The qualifying words that trigger s 68B were considered by the NSW Court of Appeal in Motorcycling Events. The Court of Appeal was of the view that a clause that excluded anything other than liability for personal injury or death would not satisfy the provision. Gleeson JA, with whom the other judges agreed, stated:

73 There is a fascinating question about the appropriate interpretation of this provision. As it is an exception to liability to a consumer, one might think it should be interpreted narrowly given the overall purpose of the Consumer Law. On the other hand, the exception was introduced with its own particular purpose; to permit those who supply recreational services as defined to limit modify or exclude their liability to their customers and it could be argued this should guide the interpretation of the section.
74 See for example Alameddine v Glenworthy Valley Horse Riding Pty Ltd [2015] NSWCA 219, [52]. Although concerned with the CLA provision concerning contractual waivers, it is submitted that the case reflects the broader common law as regards incorporation and interpretation of exclusion clauses.
75 [2013] NSWCA 361; 303 ALR 583.
The words “so long as” are words of limitation which impose a requirement that the relevant term of the contract “is limited to”, that is, do no more than exclude restrict or modify liability for death or injury. If the qualification of the general avoiding effect of s 68(1) which s 68B(1) provides for was intended to have a broader operation… then the words “so long as” would be most inappropriate to achieve that result. The language appropriate to achieve such a wider excision from the operation of s 68(1) would have been words such as “insofar as” or “to the extent that” in the place of the words “so long as”.76

The appellant’s clauses77 purported to apply to injury, death and property damage. They were held not to be saved by s 68B because they were not limited to injury and death, and therefore the clauses were rendered void by s 68.78

The same reasoning found favour with Justice Beech-Jones in Nair Smith v Perisher Blue Pty Ltd,79 and was approved, albeit in obiter, on appeal.80

The words ‘so long as’ did not survive the transition to s 139A. Instead, the critical part reads ‘[t]his section does not apply unless the exclusion, restriction or modification is limited to liability for… death…personal injury…’. It is submitted that the effect of the wording is unchanged. The section will not apply (and therefore a clause will be void by reason of s 64 unless the clause is limited to liability for death or personal injury as defined. Despite the legislative drafters reworking this phrase, it appears to achieve the same purpose as the previous provision. Had the drafters intended the provision to operate more broadly, this certainly could have been achieved. Therefore it is submitted that the reasoning of the New South Wales Court of Appeal in Motorcycling Events remains valid for s 139A, and this has been recently confirmed by the NSW Court of Appeal in Alameddine v Glenworthy Valley Horse Riding Pty Ltd.81

Passenger ship operators, along with other recreational providers, must ensure their provisions excluding or limiting liability for personal injury or death stand apart from other provisions that seek to exclude or limit liability for property damage or other claims.

5.4 Section 139A(4) reckless conduct causing significant personal injury.

(4) This section does not apply if the exclusion, restriction or modification would apply to significant personal injury suffered by a person that is caused by the reckless conduct of the supplier of the recreational services. (emphasis added)

Reckless conduct is defined in sub-s 5.

As noted by Dominic Villa in his annotation of the CLA NSW;82 this provision can be read two ways:

- If a clause has been drafted such that it would protect against liability for reckless conduct, then it will not be protected under s 139A.
- A clause will not apply to exclude restrict or modify liability where a person has sustained significant personal injury as a result of reckless conduct by the supplier.

The former is much wider than the latter, as it would have the effect of striking down a clause that would potentially have that effect, regardless of whether there was reckless conduct or not. As Dominic Villa suggests,83 the latter interpretation appears to align best with the purpose of the section; and this interpretation gives the definition of reckless conduct in s 5 some work to do.

76 [116] – [117].
77 See [67].
78 The court held it was unnecessary to decide whether the words of s 68 permitted a clause to be void only to the extent of the inconsistency with s 74(1) such that other parts of the clause – such as exclusion of liability over negligence- might remain valid. Justice Beech-Jones had been in favour of this construction of s 68(1) in Nair Smith v Perisher Blue Pty Ltd; [93].
79 See [113], [115] – [116].
83 Ibid 204.
5.5 Conclusion on contractual exclusions and s 139A

It appears that s 139A CCA might be effectively harnessed to permit the operation of exclusion clauses for those specific activities engaged in by passengers that might constitute recreational services. However the case law tells us that it is a rare instance that such a clause will be:

- incorporated;
- worded such that it addresses the particular circumstances of the plaintiff’s accident; and
- comply with the rigours of the TPA/CCA without falling foul of its other provisions.

The clauses need to be drafted with forensic accuracy, paying close attention to the pitfalls that befell such provisions in *Insight, Motorcycling Events, Nair-Smith and Alameddine*.

6 Concluding comments

In summary, a claim brought in Australia by a passenger claiming damages for injuries sustained on an international voyage is dealt with by a mix of common law and federal and State statutes. The interaction of the CLAs with the consumer protection regime in the context of personal injury claims can best be described as labyrinthine. The laws are difficult to navigate and their application is not straightforward, particularly when sought to be applied to contracts that may not have been entered into in Australia and in many cases are performed entirely or significantly outside Australian territory.

A summary of the position is as follows:

- The Commonwealth iteration of the Consumer Law, and its enabling Act the Competition and Consumer Act, applies to all corporations.\(^{84}\)

  - The contractual duty to exercise due care and skill at common law is now enshrined as a statutory guarantee in the Consumer Law, applicable via Commonwealth and State legislation.

  - The Commonwealth iteration of the Consumer Law States that duty to render services with due care and skill will apply where the objective proper law of the contract is that of any State or Territory in Australia.\(^{85}\) It will probably be extended to conduct outside Australia by Australian corporations, those carrying on business in Australia, Australian citizens and residents.\(^{86}\) The application of State iterations is also worded broadly, but uses a different trigger.\(^{87}\)

  - The assessment of liability for the injury (including such matters as contributory negligence, and proportionate liability), together with the calculation of damages, would appear to be determined in accordance with the applicable State CLA provisions which are ‘surrogate federal laws’ for that purpose, pursuant to s 275 CCA. (A separate set of questions arise where the harm has been suffered outside Australia).

  - The extent to which s 275 will ‘pick up and apply’ state based civil liability laws to s 60 statutory guarantee claims is far from certain.

The prevailing view is that the CLA provisions providing ‘no duty’ are probably not ‘surrogate federal laws’.

- The CLA provisions permitting contractual exclusions and waivers for injuries sustained during recreational activities are not ‘federal surrogate laws’: High Court in *Insight*. Therefore, these State provisions are inconsistent with the CCA/Consumer Law (Cth) and are inapplicable to the statutory guarantees. The NSW Court of Appeal has ruled that ‘risk warning’ provisions will suffer the same fate.

---

\(^{84}\) As well as some others caught by the operation of the Act, such as those using Australia post or other telecommunications.

\(^{85}\) TPA, s 67; Consumer Law, s 67. The proper law must be expressed as that of a particular State or Territory. This choice of words is because there is no such thing as ‘Australian law’ in the same way there is no such thing as the law of the United Kingdom.

\(^{86}\) CCA, s 5.

\(^{87}\) See 1.3.5 above dealing with extraterritorial application of State based Consumer Laws.
For corporations, their waivers must therefore satisfy s 139A of the CCA to be valid. The CCA will apply to a contract the applicable law of which is a place in Australia, even if the services are supplied outside Australia.\(^8\) Notably, to rely on the provision, the clause must be properly incorporated and effective to exclude the actual event; the clause can only exclude liability for injury and death, the contract has to be one for ‘recreational services’ as (more narrowly) defined in the CCA, and the reckless conduct qualification must not be triggered. There is a risk that the provision may be interpreted as operating only if the entire contract is for ‘recreational services’.

For unincorporated service providers, their waivers need to comply with the requirements of the State Consumer Law.\(^9\)

- The State CLA provisions are not uniform as between the States. We have moved from a uniform Australian common law of negligence to fractured State and territory based laws. Intrastate conflicts of law issues are inevitable.\(^9\) The outcomes of cases could be different depending on where the litigation is held. (Cruise ship operators tend to manage this risk by identifying the law of a particular state, usually NSW, as the law of the contract.) There may also be territorial limitations on the State CLA provisions that are particularly relevant for passenger claims where the harm has occurred outside Australia. The recreational service provisions in particular will only apply to services supplied within the State unless there is a clear statement of extraterritorial application.

These two papers have only considered the operation of the Consumer Law provisions and the CLA regimes applicable to passenger claims under Australian law. Even in that limited respect, it is clear that the Australian law applicable to personal injuries sustained by breach of contract, generally, and passenger claims in particular, is a complex web that belies the consumer flavour of such claims. There is a general review of the Australian Consumer Law due to take place in 2016, and one can only hope that the review considers the troublesome interactions between the ACL and the state CLAs as outlined in this paper.

For cruise ship operators and passengers, this is only part of the story. Beyond the ambit of this paper are other difficulties with Australian law that compound the complexity for those on both sides of a passenger claim. For example:

- The need for the passenger to establish, and the carrier to refute a breach of the statutory guarantee even in the event of a maritime accident (comparing unfavourably with the position under the 2002 Athens Convention that renders shipowners strictly liable for claims arising from a shipping incident)\(^9\)1;

- The unknown ambit and effect of the Consumer Law unfair terms regime on cruise ship conditions. For example, will a truncated time bar be ‘unfair’? Will the contractual imposition of 1974 Athens quantum limits be ‘unfair’?\(^9\)2 Could an Australian choice of law clause be ‘unfair’ if the 2002 Athens Convention would otherwise apply (ie if a passenger embarks on a cruise in an Athens signatory State)? Are clauses stripping passengers of a class action process ‘unfair’? Will passage conditions that misrepresent the entitlement to exclude liability for personal injury be considered unfair, and asserting a right to rely on such terms misleading and deceptive?\(^9\)3 Will an exclusive jurisdiction clause in favour of courts in Florida be unfair, where an Australian passenger has contracted for a 3 day cruise to nowhere from an Australian port?\(^9\)4

---

\(^8\) If the contract is governed by the law of another country, it may still be subject to the State Consumer Law and CLA. See the discussion at 1 above.

\(^9\) Matters of interstate conflict of laws are not discussed in this paper. However the Jurisdiction of Courts (Cross-Vesting) Act 1978 (Cth) s 5(2) permits the transfer of proceedings interstate to a more appropriate court. An application based on an exclusive jurisdiction clause contained in standard terms will be relevant but will carry little weight: Correa v Carnival plc [2013] VSC 718.


\(^9\) ‘Hotel risks’ are still subject to the usual burden of proof under Athens.

\(^9\) Such clauses may well fall foul of s 64 ACL in any event, at least in relation to a maritime accident.

\(^9\) See, eg, eBay International AG v Creative Festival [2006] FCA 1768. The eBay case also provides a sobering warning. Justice Rares held that asserting by way of the website a right to rely upon a term to cancel tickets obtained from scalpers, when that term was not actually part of the contract, was itself misleading conduct in breach of s 52 TPA (s 18 ACL). Asserting that a contractual clause operates to exclude or limit liability when it cannot have that effect under Australian law would also be contrary to s 29(m). Passenger ship operators would do well to check their own practices both on websites and brochures to ensure they are not asserting rights they do not have.

\(^9\) It is submitted this would constitute a relatively clear-cut case: yet a consumer, on reading such a term, may not realise that it is likely to be struck down. See the comments made in relation to the eBay case, ibid.
• The apparent requirement that passenger claims be commenced in admiralty and therefore before a court rather than a consumer tribunal. 95

Overall, the position of cruise ship passengers under Australian law is in the best interests of no-one save possibly the lawyers, although they will strain to fulfil their duty to establish the true state of their client’s legal position no matter which side they represent. All but the most steel-willed (and deep pocketed) consumer will be disheartened upon being advised of the many variables and uncertainties. The ship operator, running a commercial venture, is similarly disadvantaged by the lack of business certainty and expensive defence costs. This scenario can lead to paying out unworthy claims or the dragging out of those worthy of quick settlement.

Although the quantum of claims under the Australian consumer law may appear uncapped, they are in fact constrained in real terms by the Civil Liability Acts. Further, it is submitted that the opacity of Australian law renders it less protective of a passenger’s claim for personal injuries than the 2002 Athens Convention. Space does not permit a discussion of the benefits and drawbacks of the 2002 Athens Convention, so only a few observations will be made. Whatever Australia’s reasons for not signing the original 1974 Athens Convention, the small numbers of passengers carried on international voyages by sea from Australian ports in the latter part of last century meant it was hardly a legislative priority. Certainly by the time 1974 Athens Convention entered into force, its limits were widely regarded as far too low; indeed, the UK unilaterally increased its limits in 1987 and 1999. 96 However the 2002 Protocol, known as 2002 Athens Convention, has been in force since 2014. The 2002 Athens Convention still permits capping of claims, but the limit is much more generous: up to 400,000 SDR per passenger per distinct occasion, if negligence can be proven. This amounts to approximately AUD $750,000. 97 The limit does not include interest or legal costs. 98 This limit means few claims will be capped. Under the 2002 Athens Convention it is open to signatory states to set higher quantum limits, or impose no caps on personal injury claims. 99 Importantly for passengers:

• the Convention provides a regime for assessing liability of a carrier to passengers;
• the carrier will be strictly liable for injuries sustained as a result of a shipping incident such as a shipwreck, collision, fire or stranding up to the amount of 250,000 SDRs (approximately AUD $484,000) with up to 400,000 SDR available if negligence can be proven;
• the compulsory insurance regime, with direct recourse to the insurer, provides protection against the insolvency of a cruise ship operator up to 250,000 SDR per passenger, and the passenger has direct recourse against the insurer.
• the carrier cannot contract out of the Convention, and choice of law issues are virtually eliminated; 100
• the Convention eliminates jurisdictional disputes by nominating courts of competent jurisdiction.

If Australia chose to implement the 2002 Athens Convention, the enabling Act would need to explicitly outline its interaction with the CLAs. It is submitted that the liability regime of the 2002 Athens Convention should supplant the parts of the CLA dealing with modifying or excising liability.

One critical question is whether the state based CLAs should be permitted to apply to the quantum of claims brought under the 2002 Athens Convention. Given that the 2002 Athens Convention itself contains caps on liability, the passenger claim should not be subject to multiple limits each further reducing the quantum of the claim. It is submitted that it is inappropriate to permit passenger claims to be capped twice (or possibly even three times). 101

---

95 See Morland v Carnival Pty Ltd t/as P&O Cruises (“Pacific Jewel”) unreported GEN 13/13604 26 July 2013 (Member Levingston).
96 From the convention limit of 46,666 SDR to 100,000 SDR with effect from 1 June 1987: The Carriage of Passengers and their Luggage by Sea (United Kingdom Carriers) Order 1987 (SI 1987/855), then to 300,000 SDR per passenger with effect from 1 January 1999: The Carriage of Passengers and their Luggage by Sea (United Kingdom Carriers) Order 1998 (SI1998/2917). The limit increases could only take effect for UK flagged carriers. Under the 2002 Athens Convention, state parties can raise the limits applicable for its territory, regardless of the flag state of the carrier: Article 7.2.
97 As at 21 December 2015.
98 Art 10.
99 Article 7.2.
100 Article 18.
101 If the total of all claims by passengers was sufficient to invoke the limits set out in the Limitation of Liability for Maritime Claims Act 1989 (Cth) (LLMCA).
Granted, all of this, and more, would need careful consideration.\textsuperscript{102} However it is submitted that implementation of the 2002 Athens Convention, in some form or another, could provide a much clearer and more certain framework for these claims, benefitting both Australian passengers and cruise ship operators alike.\textsuperscript{103} One only needs to look at the dearth of case law on passenger claims in England to see that the regime leads to a reduction in litigation. There are also the advantages of a semblance of international consistency: in particular, the case law of other Convention countries could be considered in aid of its interpretation. This would lower legal costs for all concerned.

Perhaps most importantly, implementation of Athens would give Australian passengers direct recourse against insurers if the cruise ship operators were unable to pay claims. Under the 2002 Athens Convention, the insurer is required to use sums provided by insurance ‘exclusively for the satisfaction of claims under this Convention’.\textsuperscript{104} Australian passengers are without a ‘financial lifeboat’.\textsuperscript{105}

With Australians so eager to embrace international carriage by sea, it is time our laws were designed to embrace it too.\textsuperscript{106}

\begin{thebibliography}{9}
\bibitem{102} Other aspects that would need to be considered include whether the Convention ought to apply to interstate and intrastate travel, to non-seagoing ships, whether the LLMCA limits would apply or ‘stand aside’ for the Athens limits or vice versa (Article 15.3bis, \textit{Convention on Limitation of Liability for Maritime Claims} 1976 as amended by the 1996 Protocol) and whether the quantum limits for personal injury claims under Athens should be increased or removed as permitted by Article 7.
\bibitem{103} Kate Lewins ‘Australian cruise passengers travel in legal equivalent of steerage – considering the merits of a passenger liability regime for Australia’ (2010) 38 Australian Business Law Review 127.
\bibitem{104} Article 4bis 11.
\bibitem{105} With acknowledgements to Professor Nick Gaskell who coined this term.
\bibitem{106} Postscript: in May 2015 the Supreme Court of New South Wales heard the matter of \textit{Moore v Scenic Tours Pty Ltd}. It is a class action brought by 1265 plaintiffs who claim the defendant did not deliver on the contractual promise to provide luxury river cruises during the floods in Europe in May-June 2013. The plaintiffs claim includes damages for disappointment and distress: another aspect of claims against carriers that falls outside the ambit of this paper but also presents challenges and uncertainties. The judgment in that case is keenly awaited.
\end{thebibliography}
REVIEWING KNOCK FOR KNOCK INDEMNITIES: RISK ALLOCATION IN MARITIME AND OFFSHORE OIL AND GAS CONTRACTS

Dr Pat Saraceni and Nicholas Summers*

1 Introduction

Participants in the maritime and offshore oil and gas sectors operate in a unique environment, characterised by inherently hazardous conditions, high financial stakes and the potential for catastrophe around every corner if things go wrong. A knock for knock regime is an effective contractual tool that offers parties certainty.

Knock for knock clauses first appeared in the context of motor insurance in the early 20th Century. These clauses entered the maritime and energy sectors in the 1960s with the commencement of the North Sea oil and gas exploration. Most maritime and offshore oil and gas contracts now contain a knock for knock regime which either adopts standard industry wording or forms part of a standard form contract.

A number of the standard BIMCO forms which contain knock for knock clauses include TOWCON, TOWHIRE, SUPPLYTIME, and HEAVYCON.3

The Lord President in Caledonia North of the Sea Ltd v London Bridge Engineering Ltd commented that such indemnification is ‘fundamental to the economics of the North Sea operation’. Those remarks are apposite to other operations around the world.

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. This is accompanied by a series of mutual indemnities, all of which leads to circuity of action among contracting parties. 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 or damage to its property and any other specified losses, for example, consequential loss or environmental liability.

The significant advantages of knock for knock clauses are well documented – from fixing liability at the time of contracting to reducing insurance costs, simplifying (or ideally avoiding) the time, expense and difficulties inherent in attributing fault from both a factual and legal perspective, facilitating expeditious payments of compensation to injured parties where appropriate and encouraging co-operation in establishing and maintaining safe operational practices. The advantages of expediency and co-operation are particularly attractive in light of the complexities inherent in incidents involving multiple parties.

Knock for knock clauses generally have the following features:6

- the primary parties and their employees and sub-contractors constitute a ‘group’ for purposes of risk allocation purposes;
- damage and loss suffered by a member of the primary party’s group is borne by that primary party regardless of fault – the loss lies where it falls;

---

* Dr. Pat Saraceni, Director of Litigation & Dispute Resolution, Perth, Clifford Chance; BJurs/LLB(UWA), LLM(UWA), SJD(UWA);
Nicholas Summers, Associate, Clifford Chance; BComm/LLB(Murdoch), LLM(UNiMelb).

1 Bell Assurance Association v Licensees & General Insurance Corporation & Guarantee Fund Ltd (1923) 17 Lloyd’s Rep. 100.
3 See also the industry initiative in the United Kingdom offshore oil and gas sector (LOGIC) which resulted in the development of an industry scheme of a mutual hold harmless deed (IMHH) which aims to fill the contractual lacuna that often exists between contractors working on the UK Continental Shelf concerning risk allocation. Often the contractual relationship between the contractors and the subcontracts is vertical only. IMHH is a background agreement to cater for situations where there is no direct privity of contract between the various contractors. IMHH applies to the UK’s territory of the Irish Sea and the North Sea. The list of signatories to the IMHH is substantial: http://www.logic-oil.com/imhh/general-guidance.
4 [2000] Lloyd’s Rep IR 249; sometimes referred to as the London Bridge Engineers case.
5 Lord Bingham also referred to knock for knock indemnities that cover employees as a ‘market practice [that] has developed to take account of the peculiar features of offshore operations.’
• group members (including employees, agents and subcontractors) have the same protection as the primary party by virtue of a Himalaya clause;  

• the allocation of risk is accompanied by an indemnity of other primary parties and their groups against any liability for claims, irrespective of fault. Where possible, the indemnity covers liability for employees and property of all parties for whose benefit the work is being undertaken;  

• primary parties have insurance coverage to protect against losses and to underwrite their obligation to indemnify other primary parties and their groups. The insurers are generally required to waive their rights of subrogation against the other primary parties and their groups. The contract may require that each party be named in the other party’s insurance contract.

Knock for knock regimes are a simple, consensual scheme of mutual risk allocation. The clauses should be mutual or co-extensive to cover the same liabilities. Notwithstanding this mutuality, knock for knock indemnities can be construed as contractual exclusion clauses, with each party seeking: (a) to exclude its own liability for losses to other parties, even if caused by its own fault; and (b) to obtain an indemnify from other parties for any liability to which it may be exposed, such as to third parties or the other parties’ employees, irrespective of fault. The parties contract out of remedies to which they would otherwise be entitled. In some jurisdictions as we will see below, the proper characterisation of knock for knock clauses may potentially impact on their construction.

2 Knock for Knock Clauses in Action

Where better to see knock for knock clauses in action than in the litigious aftermath of the Piper Alpha and Deepwater Horizon incidents.

2.1 Piper Alpha

On 6 July 1988, off the coast of Aberdeen, two rescuers and 226 workers were killed and or injured in what was the world’s deadliest ever oil rig accident. Piper Alpha was once Britain’s largest oil and gas producing platform, producing over 300,000 barrels of crude a day (10% of the country’s total). The accident cost the Lloyd’s insurance market over £1bn, making it the largest insured man-made catastrophe. The platform was owned by a consortium of companies including Texaco and was operated by Occidental.

The initial explosion was caused by an employee of Occidental who started a pump without noticing that a pressure safety valve had been removed for maintenance by a specialist valve contractor engaged by Occidental. Due to the negligence of both the operator and valve contractor, hydrocarbons escaped and ignited when the pump was engaged.

Most of the dead and injured were employed by various contractors hired under a series of contracts to perform specific tasks on the platform. The claimants alleged breach of statutory duty and negligence on the part of the operator. Initially, Occidental settled claims by the victims and their dependants for £66m. Subsequently, Occidental’s insurer instituted a series of subrogated proceedings in England and Scotland against twenty-four contractors seeking indemnity under the knock for knock provisions in the respective contracts.

---

7 A Himalaya clause extends the benefit of the indemnity of the primary party to other members of the group. The concept of a Himalaya clause arose out of the decision in Adler v Dickson; The Himalaya [1955] 1 QB 158; Port Jackson Stevedoring Pty Ltd v Salmond & Spragggon (Australia) Pty Ltd (1978) 139 CLR 231; Article IV bis (2) of the Hague-Visby Rules; and M White, Australian Maritime Law (Federation Press, 3rd ed, 2014), 4.5.8.


9 Section 21 of the Insurance Contracts Act 1984 (Cth) provides that an insured has a duty to disclose to the insurer, before entry into the contract of insurance, every matter that is known to the insured that: (a) the insured knows to be relevant to the decision of the insurer whether to accept the risk and, if so, on what terms; or (b) a reasonable person in the circumstances could be expected to know would be relevant. Whether the insured has entered into any cross-indemnities which may expose the insurer to additional risk, is relevant to the insurer’s decision.

10 Parties should ensure that the waiver of subrogation is limited to those claims that fall within the scope of the knock for knock provisions of the contract, and extends to all potential claims.

One such action was the Scottish case of *Caledonia North Sea Ltd v British Telecommunications plc*, in which the operator sought to enforce mutual indemnities in respect of death of, and injury to, the contractors’ own personnel. The indemnity clause read as follows:

Contractor shall indemnify, hold harmless and defend the Company and its parent, subsidiary and affiliate corporations and Participants and their respective officers, employees... from and against any and all suits, actions, legal or administrative proceedings, claims, demands, damages, liabilities, interests, costs... any expenses of whatsoever kind or nature whether arising before or after completion of the Work hereunder and in any manner directly or indirectly caused, occasioned or contributed to in whole or in part, by reason of omission or negligence... of contractor, or of anyone acting... on contractor’s behalf in connection with or incidental to the work...the Contractor shall indemnify...the Company...from and against any claim, demand, cause of action, loss, expense or liability...arising...by reason of...injury to or death of person employed by or damage to or loss or destruction of property of the Contractor...irrespective of any contributory negligence...of the party to be indemnified, unless such injury, death, damage, loss or destruction was caused by the sole negligence or wilful misconduct of the party which would otherwise be indemnified. (emphasis added)

Ensuing litigation continued for some 14 years, until the House of Lords pronounced its final judgment in 2002. The court upheld the efficacy of the knock for knock regime agreed by the parties and found that the contractors and their insurers had to bear the ultimate liability for damages paid in respect of the death of, and injury to, the contractors’ own employees; that is to say the loss lay where it fell, irrespective of fault.

The contractors had argued that they were not liable to indemnify the operator unless the contractors were negligent or had breached their statutory duty; in other words, they argued that the knock for knock clause did not impose liability where none otherwise existed. The court rejected this argument, holding that on its proper construction, the indemnity clause imposed a general liability to indemnify the operator against any liability in respect of their own employees. The only express exception was if the accident was attributable to the sole negligence or wilful misconduct of the operator. As such, the contractors had to indemnify the operator under the knock for knock clause even though the contractors were not at fault.

Lord Bingham said:

> It is understandable that the right to indemnity should be excluded where the negligence or breach of statutory duty of the party seeking indemnity was the sole cause of the death or injury, but that is the limit of the derogation from the rule that each party, operator or contractor, assumes the ultimate responsibility for compensating its own employees regardless of fault. (emphasis added)

Lord Hoffmann found that the cross-indemnity dispelled any concern that it might otherwise be unreasonable to require contractors to indemnify the operator against loss for which the contractors were not responsible. This practice was found to be "normal" industry practice.

The litigation following the Piper Alpha disaster is testimony to the efficacy and operation of knock for knock clauses.

### 2.2 Deepwater Horizon

On 20 April 2010, the Macondo exploratory well in the Gulf of Mexico was being drilled by the Deepwater Horizon when it suffered a blowout, causing a fire. The Deepwater Horizon sank 36 hours after the fire began. Over the next 87 days, five million barrels of oil spilled into the Gulf of Mexico. Deepwater Horizon was owned by Transocean and leased to BP, who operated it on behalf of a joint venture. Halliburton was engaged as BP’s cement contractor and Cameron had designed the blowout preventer that failed on the rig.

Thousands of law suits were filed against BP, and in August 2010 all of the actions were consolidated into proceedings in the United States District Court for the Eastern District of Louisiana. By agreement with the US Government, BP established a trust fund of US$20bn to satisfy claims arising from the disaster. Settlement negotiations commenced in 2011, resulting in the Economic Property Damages Settlement and the Medical Benefits Settlement, which received court approval in December 2012. To date, BP has settled approximately 100,000 claims totalling some US$7.8bn. On 20 May 2015, BP settled the multi-billion dollar lawsuits with

---

13 The contractors’ obligation under the indemnity clauses were described as a ‘primary liability’, whereas the operator’s insurer’s duty to indemnify the contractor was described as a ‘secondary liability’.
14 Lord Bingham summarized the commercial purposes of knock for knock indemnities based on industrial commentaries, such as D Sharpe, *Offshore Oil and Gas Insurance* (Witherby, 1994) and T Daintith and G Willoughby, *Manual of United Kingdom Oil and Gas Law* (Oyez, 1977).
15 [2002] 1 Lloyd’s Rep. 553, [7].

(2016) 30 ANZ Mar LJ 30
Transocean, Halliburton and Cameron. BP still faces a potential fine of between US$5bn and US$21bn under the U.S. Clean Water Act. Transocean settled its Clean Water Act liability for $1bn. BP has paid $43.8bn in pre-tax charges for clean-up and other costs.

Transocean and its contractors relied on knock for knock clauses in the respective contracts to exclude their liability for loss and damage other than to their own employees and property. Most of the legal issues raised concerning these indemnities were addressed in the decision of Judge Barbier of the United States District Court for the Eastern District of Louisiana.

3 Construing Knock for Knock Indemnity Provisions

In the context of commercial contracts, knock for knock clauses are construed in accordance with ordinary canons of contractual construction. In Darlington Futures Ltd v Delco Australasia Pty Ltd,16 the High Court of Australia held that an exclusion clause is to be construed according to its ‘natural and ordinary’ meaning, read in light of the contract as a whole, giving due weight to the context in which the clause appears. Where appropriate, the clause is construed contra proferentem in the case of ambiguity.17 These same principles are of general application to commercial contracts in Australia.

In Andar Transport Pty Ltd v Brambles Ltd,18 Brambles, who provided laundry delivery services, contracted with Andar to outsource that service. Andar employed drivers, including Mr Wail, to collect and unload the linen. Andar contracted to indemnify Brambles for all losses and damages for which Brambles may become liable due to the negligence of Andar. During the course of his employment, Mr Wail was injured and sued Brambles, who in turn joined Andar as a third party seeking indemnity under the contract. The majority of the High Court found ambiguity in the language used in the clause and strictly construed it against Brambles (as the party seeking indemnity) and in favour of Andar (as in effect the surety). In doing so, the High Court applied the traditional rule of construction, that indemnities should be construed strictly against the surety.19

The approach in Australia may differ somewhat from that adopted in England, where a distinction appears to be drawn in the construction of exclusion clauses on the one hand and limitation clauses on the other. The English position is exemplified by Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd,20 where the House of Lords held that a limitation clause need not be construed in accordance with the same principles that apply to exclusion or indemnity clauses. The absence of a reference to negligence in the generally expressed limitation clause did not prevent it from protecting against the contractor’s liability for negligence.

This should be contrasted with the approach taken by the court in E. E. Caledonia Ltd v Orbit Valve Co Europe,21 which is one of the leading cases arising from the Piper Alpha disaster. The operator sought indemnity from the employer of the service engineer retained to overhaul certain equipment. The indemnity clause was expressed generally and without reference to negligence. The court found that the parties’ right to sue each other for negligence had been preserved, and the plaintiff had exclusively assumed the risk of its own negligence and breach of statutory duties. The court held that for negligence to be covered by a knock for knock regime, an indemnity clause should expressly and clearly refer to negligence.22 As the indemnity clause in this contract did not do so, it was found that the knock or knock regime did not extend to liability caused by a party’s own negligence.

3.1 Are Knock for Knock Clauses Indemnity or Exclusion Clauses?

The question whether knock for knock clauses are properly construed as indemnity or exclusion clauses was considered in Farstad Supply A/S v Envirotec Ltd.23 The case concerned the outbreak of a fire on an oil rig supply vessel in July 2002. The fire caused causing substantial damage to the vessel and death of an employee of a contractor engaged by the charterer to clean the vessel’s tanks. The owner of the vessel sued the tank cleaning

---

17 See also Selected Seeds Pty Ltd v QBEMM Pty Ltd (2010) 242 CLR 336, [29]–[30]. In Oz Minerals Holdings Pty Ltd v AIG Australia Ltd [2015] VSC 185, Hargrave J confirmed that ‘the court does not strain to find ambiguity in exclusion clauses. It is only appropriate to apply the contra proferentem principle where ambiguity remains after applying accepted principles of contractual interpretation.’ The issue of the method of construction of exclusion clauses is considered further in the context of exclusion of consequential losses from the operation of knock for knock indemnities.
21 [1994] 1 WLR 221.
22 See further Smith v South Wales Switchgear Ltd [1978] 1 All ER 18.
contractor in tort alleging that the fire was caused by the negligence of the contractor’s employees. The contractor denied liability and alleged that the rig owner and the charterer had caused or contributed to the accident. It sought a contribution from the charterer pursuant to section 3(2) of the *Law Reform (Miscellaneous Provisions) (Scotland) Act 1940*.  

On appeal, Farstad argued that on its proper construction, cl 33.5 was an exclusion clause and the parties had agreed that the charterer was not liable for loss or damage to the vessel, even if caused by its negligence. Lord Clarke (with whom Lords Phillips, Hope, Rodger and Mance agreed) held that the clause was an exclusion clause which operated to exclude the charterer’s liability to Farstad for damage to the vessel. The exclusion was held to be operative even where the damage was caused by the charterer’s negligence. Lord Clarke said at [24] ‘The natural meaning of that expression is that, since [Farstad] must hold [the charterer] harmless from a claim by the owner in respect of damage to the vessel caused by [the charterer’s] negligence, [the charterer] cannot be liable to [Farstad] in respect of such damage.’

The clause also operated as an indemnity in respect of claims by third parties. Hence, the contractor was not entitled to a contribution from the charterer under section 3(2) of the *Law Reform (Miscellaneous Provisions) (Scotland) Act 1940*, because it could not establish that ‘if sued’, the charterer would have been liable to Farstad; the charterer would have a defence to Farstad’s claim as any such liability was excluded by cl 33.5 of the charterparty.

The case (despite its somewhat tortuous path) confirmed the efficacy of contractual indemnity clauses, thereby enabling parties to procure insurance for their assumed risks effectively and efficiently. The case exemplifies the protection afforded to parties by knock for knock clauses, even against third parties who are not privy to the knock for knock arrangement.

### 3.2 Knock for Knock Clauses as Part of Standard Form Contracts

In Australia, the principles of contractual construction are well settled:

- commercial contracts are construed objectively – the subjective intention of the contracting parties is irrelevant;
- the court must give effect to the contractual words used, the context, subject matter and purpose of the provisions ascertained by reference to the contractual language used;
- words in commercial contracts are given the meaning that a reasonable business person would have understood those terms to mean;
- commercial contracts are construed so as to avoid commercial nonsense or commercial inconvenience. Courts generally will assume that a commercial result is intended to be achieved;
- contracts are construed as a whole, giving consistent meaning to all of their terms, and avoiding any apparent inconsistency. Preference is to be given to a construction that gives ‘a congruent operation to the various components of the whole’.

---

24 Section 3(2) applies to a claim for contribution by a person who has been held liable ‘in any such action as aforesaid’. The reference to ‘any such action’ is a reference to the action identified in subsection (1) and is thus a reference to an action by a plaintiff against a defendant ‘in respect of loss or damage arising from any wrongful acts or negligent acts or omissions’ by the defendant. If a defendant, as such a wrongdoer, has been held liable to pay damages or expenses to a plaintiff and if he pays damages, he has a right to recover such contribution, if any, as the court may deem just from ‘any other person who, if sued, might also have been held liable in respect of the loss or damage on which the action was founded’: *Farstad Supply A/S v Enviroco Ltd* [2010] Lloyd’s Rep. 387, [11] (Clarke LJ) (‘Farstad Supply’).

25 [2010] Lloyd’s Rep. 387; notably, this case is not at odds with Judge Barbier’s decision in *Re: Oil Spill by the Oil Rig “Deepwater Horizon”* Judge Barbier held that knock for knock clauses merely shift responsibility, and do not exclude it. However, Judge Barbier was interpreting this from the perspective of all parties to the agreement. Properly construed, knock for knock clauses do not create lacunas where no liability exists; one party (or more) will always be liable. Conversely, Lord Clarke in *Farstad Supply* interpreted the knock for knock clause from the perspective of a singular party. In this context, these clauses do exclude liability, but another party will always be liable.


29 Ibid.

in giving a business like interpretation to contracts, if an exclusion clause is reasonably open to two competing constructions, the construction to be preferred is the one that avoids ‘capricious, unreasonable, inconvenient or unjust consequences’; and

courts must not re-write the terms of a commercial contract. In Interpretation of Contracts in Australia, Lewison and Hughes warned that ‘reliance on background must be tempered by loyalty to the contract text’. This assumes that there is no basis for the court to rectify the contract on the basis of mistake or otherwise.

In cases where contracts contain a knock for knock regime which either adopts standard industry wording or forms part of a standard form contract, the factual matrix is likely to be irrelevant, as the parties’ particular circumstances and contractual matrix will not inform the drafting of the clauses. That being said, courts have shown a willingness to give effect to the object and purpose of knock for knock clauses, as set out below.

4 Possible Restrictions on the Operation of Knock for Knock Indemnities

It is axiomatic that the scope of the knock for knock indemnity clauses is governed by the parties’ contractual language. Some knock for knock clauses expressly exclude certain types of claims. For example, clause 14 of the SUPPLYTIME 2005 charter party excludes from the knock for knock indemnity: (a) undeclared dangerous cargo or hazardous or noxious substances shipped by the charterers on board the vessel, (b) pollution claims and (c) general average. Such claims must be resolved under traditional fault based liability regimes.

As set out above, courts consider that knock for knock indemnities are in effect exclusion clauses and, as such, any attempt to exclude a party’s liability for negligence is only enforceable if its wording is unambiguous. Other issues that frequently arise concern the scope of knock for knock clauses and in particular if they are sufficiently wide to protect the indemnified party include:

- gross negligence;
- wilful misconduct;
- material breach of contract;
- statutory or strict liability;
- consequential loss; and
- proportionate and concurrent liability.

These areas shall be considered in turn.

31 Australian Broadcasting Commission v Australasian Performing Rights Association Ltd (1973) 129 CLR 99, 109; Oz Minerals Holdings Pty Ltd v AIG Australia Ltd [2015] VSC 185, [21].
32 Euphoric Pty Ltd v Ryedale Pty Ltd [2006] NSWSC 2, [31]–[33] (Palmer J).
33 Sir Kim Lewison and David Hughes, Interpretation of Contracts in Australia (Thomson Reuters, 1st Australian ed, 2012), [3.14.5].
34 S Rainey, ‘The Construction of Mutual Indemnities and Knock-for-Knock Clauses’ in B Soyer and A Tettenborn (eds), Offshore Contracts and Liabilities (Routledge, 2015) 68, 78–9; see Dairy Containers Limited v Tasman Orient CV [2005] 1 WLR 215, [13]: ‘There may reasonably be attributed to the parties to a contract such as this such general commercial knowledge as a party to such a transaction would ordinarily be expected to have, but with a printed form contract, negotiable by one holder to another, no inference may be drawn as to the knowledge or intention of any particular party. The contract should be given the meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed.’
35 Caledonia North Sea Ltd v British Telecommunications Plc [2002] 1 Lloyd’s Rep. 553; Re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010 (case 2:10-md-02179-CJB-SS Document 5446); E. E. Caledonia Ltd v Orbit Valve Co Europe [1994] 1 WLR 221.
4.1 Gross Negligence

4.1.1 Defining ‘Gross Negligence’

‘Gross negligence’ is not traditionally recognised as a distinct concept in either Australia or England. Nonetheless, knock for knock clauses traditionally exclude liability for ‘gross negligence’ or ‘wilful misconduct’. Courts, therefore, have had to deal with these concepts as a matter of contractual construction. Some guidance has emerged from the cases including that:

- gross negligence involves a serious disregard of an obvious breach;\(^{37}\)
- conscious wrongdoing is not an element of gross negligence – the conduct need not be intentional or contumelious to qualify as gross negligence. As such, it is not contrary to public policy for a party to exclude liability for gross negligence;\(^{38}\) and
- the difference between ‘gross negligence’ and ordinary negligence appears to be one of degree rather than being a difference in kind.\(^{39}\)

Under New York law, the principle of ‘gross negligence’ is well established. It is described as conduct that is so careless as to show a complete disregard for the rights and safety of others, or conduct that is ‘truly culpable or harmful conduct’,\(^{40}\) ‘egregiously negligent’ or includes a ‘high degree of careless conduct’.\(^{41}\) Professor Keeton explains that gross negligence is less than reckless disregard or conscious indifference to the consequences but is greater than ordinary inattention or inadvertence.\(^{42}\) Gross negligence involves a conscious choice of conduct involving an obvious or high degree of risk with serious ramifications. Whether conduct constitutes gross negligence is a matter of objective determination.\(^{41}\)

4.1.2 Excluding Losses Caused by Gross Negligence

In Re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 2010 (‘Re: Oil Spill by the Oil Rig “Deepwater Horizon”’),\(^{44}\) Transocean claimed that the drilling contract between it and BP required BP to defend and indemnify Transocean from claims and liabilities arising from oil pollution, even if caused by Transocean’s negligence or ‘gross negligence’. BP accepted that it was liable to indemnify Transocean for pollution claims caused by Transocean’s fault or negligence, but it denied liability to indemnify Transocean for claims caused by Transocean’s ‘gross negligence’ or strict liability, such as claims under the US Clean Water Act. BP argued that public policy prohibited a contractual indemnity for ‘gross negligence’, punitive damages or statutory penalties. BP further argued that, as a matter of construction, the inclusion of the phrase ‘negligence or fault’ in the knock for knock indemnity clause excluded an indemnity for losses from other causes, such as gross negligence.

Judge Barbier interpreted the clause as emphasising that BP assumed the risk of subsurface pollution, even if caused by Transocean’s negligent conduct. His Honour found that the clause did not exclude gross negligence, strict liability or other cause of damage. Judge Barbier said that this interpretation was consistent with the

---


\(^{37}\) L Brown, ‘Gross Negligence in Exclusion Clauses: Is there an intelligible difference between ordinary negligence and gross negligence’ (2005) 16 Insurance Law Journal 1, 9, where the author suggests that risks which are not actually understood or contemplated by the defendant but are due to a ‘serious heedlessness or indifference to the consequence in intended actions or inactions’ are included in the meaning of gross negligence.


\(^{39}\) Canerata v Credit Suisse [2011] EWHC 479 (Comm); Armitage v Nurse [1997] 2 All ER 5, 713; contrast Spread Trustee Co. Ltd v Hutcheson [2012] 2 AC 194. Lord Clarke expressed support for the notion that a difference lies between negligence and gross negligence. Lord Clarke concluded that English law did recognise gross negligence in some contexts; and that English law recognised the difference in legal principle between negligence and gross negligence and between those types of negligence and fraud: [2012] 2 AC 194, [50]:[51]. Sir Robin Auld stated: ‘On the plain meaning of the words, and as a matter of logic and common sense, the terms ‘negligence’ and ‘gross negligence’ differ only in the degree or seriousness of the want of due care they describe. It is a difference of degree, not of kind’: [2012] 2 AC 194, [117].

\(^{40}\) Metro Life v Noble Loundes 84 N.Y.2d 430, 439 (1994).


\(^{42}\) W P Keeton (ed), Prosser and Keeton on Torts (West Publishing Co, 5th Lawyer’s ed, 1984), 215.

\(^{43}\) Lester v Atchison, Topeka and Santa Fe Railway Co 272 F 2d 42, 47 (1960).

\(^{44}\) (case 2:10-md-02179-CJB-SS Document 5446).
obligation that BP assume ‘any loss, damage, expense, claim, fine, penalty, demand, or liability for pollution or contamination…not assumed by [Transocean]…’ (emphasis added).

As to whether public policy prohibited a party from being indemnified against its own gross negligence, Judge Barbier noted that he was not able to find a binding case, and was free to decide the question himself. His Honour noted the general rule of freedom of contract, finding that agreements that have been voluntarily and fairly made should be upheld. However, contracts can be invalidated on the grounds that they violate public policy. With reference to the commercial purpose of knock for knock indemnities, on the grounds of public policy, Judge Barbier emphasised that the drilling contract allocated risk to both BP and Transocean, and given this risk allocation, a grossly negligent act by Transocean could have resulted in liability to Transocean as easily as it could have resulted in liability to BP. On that basis, Judge Barbier stated that the reciprocal nature of the indemnity created an incentive for Transocean to avoid grossly negligent conduct, or at the very least, the indemnity could not be said to encourage grossly negligent conduct. As such, the knock for knock clause that included an indemnity for gross negligence was found not to be contrary to public policy.

In Red Sea Tankers Ltd and Others v Papchristidis “The Hellespont Ardent”, the High Court in England construed the phase ‘gross negligence’ under New York law. Mance J concluded that the concept of gross negligence embraces “…serious negligence amounting to reckless disregard, without any necessary implication of consciousness of the high degree of risk or the likely consequences of the conduct.” Mance J goes on to state that:

If the matter is viewed according to purely English principles of construction, I would reach the same conclusion. Gross negligence is clearly intended to represent something more fundamental than failure to exercise proper skill and/or care constituting negligence. But as a matter of ordinary language and general impression, the concept of gross negligence is capable of embracing not only conduct undertaken with actual appreciation of the risks involved but also serious disregard of or indifference to an obvious risk. (emphasis added)

On the balance of authority, it appears likely that in England and Australia, loss and damage caused by negligence in any form or degree will be regulated by the knock for knock regime, subject to the proper construction of the particular clause. If parties do not want to indemnify for certain conduct which may be classified as gross negligence, the exclusion of that conduct should be expressly provided for in the knock for knock clause, rather than relying on the wording of gross negligence as a catch all.

### 4.2 Wilful Misconduct

The main distinction between ‘gross negligence’ and ‘wilful misconduct’ appears to be that wilful misconduct involves an element of wilfulness or intention, where a party acts recklessly, not caring whether it is right or wrong, regardless of the consequences of its conduct. In *Lewis v Great Western Railway Co*, Bramwell LJ held that wilful misconduct includes actual knowledge that harm will result from the conduct, knowing indifference and wilful blindness. Brett LJ stated that:

…if it is brought to [a party’s] notice that what he is doing, or omitting to do, may seriously endanger… and he wilfully persists in doing that against which he is warned, careless whether he may be doing damage or not, then I think he is doing a wrong thing, and that is misconduct, and that, as he does it intentionally, he is guilty of wilful misconduct; or if he does, or omits to do something which everybody must know to be a wrong thing to do. I think that those terms together import a knowledge of wrong on the part of the person who is supposed to be guilty of the act or omission.

---

48 See Sucden Financial Ltd v Fluxo-Cane Overseas Ltd [2010] EWHC 2133 (Comm), [54], (Blair J); Marex Financial Ltd v Fluxo-Cane Overseas Ltd [2010] EWHC 2690 (Comm), [9] (David Steel J); Deutsche Bank AG v Sebastian Holdings Inc [2013] EWHC 3463 (Comm), [1096], (Cooke J): which are recent Commercial Court cases which cast doubt on whether there is any distinction between negligence and gross negligence.
50 (1877) 3 QBD 196, 206.
In Alpstream AG v PK Airfinance Sàrl the court considered the meaning of ‘wilful negligence’ in the context of an attempt to equate it to gross negligence and to thus remove the element of conscious wrongdoing. Burton J rejected this construction and adopted the test set out by Longmore J in National Semiconductors (UK) Ltd v UPS Ltd, that wilful misconduct equates to: ‘…either (1) an intention to do something which the actor knows to be wrong or (2) a reckless act in the sense that the actor is aware that loss may result from his act and yet does not care whether loss will result or not or… ‘he took a risk which he knew he ought not to take’. While the basic concept of wilful misconduct is relatively clear, the concept is capable of significant tailoring to more fully set out what the parties wish to achieve, should they seek to exclude liability arising from wilful misconduct. By way of example, it is possible to limit the scope of the knock for knock indemnities in the face of intentional or conscious disregard at the senior management level of either a contractual provision or of good oil field practices.

4.3 Material Breach of Contract

Courts have refused to limit the operation of mutual indemnity regimes by predicating their operation on compliance by the party seeking indemnity with its contractual obligations, provided that the indemnity does not undermine the purpose of the contract. A ‘material breach’ of contract is one which substantially adversely affects the interests of the other party: Elders Ltd v E J Knight & Co Pty Ltd. A similar approach was taken in Androvitsaneas v Members First Broker Network Pty Ltd, where the Victorian Court of Appeal accepted that the word ‘material’ means ‘important’ and connotes ‘significance’. In Smit International (Deutschland) GmbH v Josef Mobius Bau-gesellschaft GmbH it was argued that clause 18 of the TOWCON contract (concerning damage to a third party’s property) had to be read restrictively, so as not to apply where the tugowner fails to provide a seaworthy tug. Morison J rejected that argument on the basis that it conflicted with the purpose of knock for knock indemnities. His Honour said:

The knock for knock agreement is a crude but workable allocation of risk and responsibility: even where the tug or tow is wholly responsible for the accident liability depends entirely upon the happenstance of which of the two collided with the third party. Where damage is caused to an innocent third party during a tow it may often be difficult to ascertain whether the tug or tow or both were at fault. So far as the innocent third party is concerned, provided he receives full satisfaction, the identity of the tortfeasor is unimportant. But if there were disputes between tug and tow, with each blaming the other, absent the agreement there would be a risk that the third party would have to institute proceedings and await judgment before receiving compensation...

Introducing arguments about seaworthiness into this blunt and crude regime would lessen the effectiveness of the knock for knock agreement. (emphasis added)

The operation of a knock for knock clause in the face of a material breach of contract also arose in A Turtle Offshore SA v Superior Trading Inc. The tug Mighty Deliverer was contracted to tow the A Turtle semi-submersible drilling rig from Brazil to Singapore on the terms of TOWCON. The tugowner was obliged to use its ‘best endeavours’ to perform the towage and to exercise due diligence to ‘tender the tug at the place of the departure in a seaworthy condition and in all respects ready to perform the towage.’ The knock for knock clause provided that loss or damage ‘of whatsoever nature, howsoever caused or sustained by the Tow’ would be to the sole account of the hirer, without recourse to the tugowner.

During the tow, the tug ran out of fuel and deliberately abandoned the rig in the South Atlantic. After refuelling, the tug returned to collect the rig, however, the rig ran aground. The owners of the rig sued the tugowners for loss.
of the rig and removal costs. The tugowners counterclaimed against the rig owners for freight that was due on
arrival of the tug and tow at the destination.

While TOWCON obliges the tugowner to exercise due diligence in tendering a seaworthy tug ready for towage,
the court held that the tugowner’s breach of its express duties under the contract did not preclude the tugowner
from relying on the protection afforded by the knock for knock indemnity. Teare J said that the wording of the clause
was sufficiently wide that, construed literally, the tow must take for his sole account any damage whatsoever
suffered by the tow, so long as it does not defeat that main purpose of the contract or which reflects the contractual
context. Thus, the clause would protect the tugowner provided it was ‘actually performing their obligation under
the TOWCON, albeit not at the required standard.’ As the tugowners had not abandoned their efforts to complete
the tow, notwithstanding that those efforts fell short of the required standard of care; the court held the tugowner
was protected by the knock for knock indemnity.63 This may be problematic as it may be difficult in any given
situation to discern when contractual obligations are no longer being performed, such as would exclude the
operation of a knock for knock clause.

In Smedvig Ltd v Elf Exploration UK plc; “The Super Scorpio II”64 Smedvig and Elf Exploration entered into an
agreement containing mutual indemnities. Elf Exploration agreed to indemnify Smedvig against all claims in
respect to Company Items. Under the contract, Smedvig undertook to ‘take all necessary care of Company
Items as required by good oil and gas industry practices and to return them to [Elf Exploration] in their original
condition’. During operations, a Company Item, a ROV called the Super Scorpio II was damaged by one of
Smedvig’s employees. The owners of the ROV obtained damages from Smedvig for the cost of repairs to the
ROV, and Smedvig sought an indemnity from Elf Exploration. Elf Exploration contended that it was not obliged
to indemnify Smedvig where Smedvig breached its contractual obligation to take all necessary care of the
Company Items.

The court held that the allocation of risk in the knock for knock clause was clear; Smedvig was obliged to take
care of any Company Item entrusted to it, but any liability for any damage caused by lack of care was nonetheless
allocated to Elf Exploration under the knock for knock clause.

This issue was addressed by Judge Barbier in Re: Oil Spill by the Oil Rig “Deepwater Horizon”. BP claimed that
Transocean breached the contract and, or alternatively, acted in a way that materially increased BP’s risk, which
voided BP’s obligation to indemnify Transocean. Judge Barbier accepted that breach of a fundamental, core
obligation of the contract could invalidate the indemnity clause. His Honour cited Mobil Chem Co v Blount Bros
Corp,65 where the court explained that where there is a serious breach of contract, the entire contract becomes
void for mutuality: ‘[the indemnitee] would have no obligations under the contract; it could breach the contract
in any way and to any extent and [the indemnitor] would be liable to itself! This interpretation would be
ridiculous.’

While accepting the possibility that a material breach of the contract could invalidate an indemnity clause, by
reference to article 25.1, which required BP to indemnify Transocean ‘without regard to the cause or causes
thereof, including…breach of representation or warranty [or]…breach of contract…’, Judge Barbier said that
BP’s arguments appeared doubtful. However, he was not prepared to resolve these issues in a summary judgment
application.

4.4 Statutory or Strict Liability

Courts will not generally allow indemnities to extend to criminal penalties if they offend public policy.

In Re: Oil Spill by the Oil Rig “Deepwater Horizon”, Transocean argued that the statutory penalties were in the
nature of civil penalties under the US Clean Water Act in respect of which it sought an indemnity were primarily
remedial, such that an indemnity in respect of the statutory liability did not offend public policy. Judge Barbier
rejected Transocean’s argument. He found that the primary goal of the civil penalty provisions was to punish and
deter future pollution, and as such it was analogous to punitive damages. The indemnity clause therefore was not
valid in respect of civil penalties imposed under the US Clean Water Act. On the other hand, the court noted that

63 To a similar effect, albeit in a non-maritime context, see Kudos Catering (UK) v Manchester Central Convention Complex [2013] EWCA
Civ 38, where the Court of Appeal considered a knock for knock clause in a catering and hospitality services contract.
65 809 F 2d 1175, 1182 (5th Cir. 1987).
unlike a penalty, removal costs are aimed at restoring the status quo and are remedial in nature. As such, public policy did not invalidate the indemnity in so far as it covered removal costs.\textsuperscript{66}

Similarly, in England, courts will not generally allow indemnities to extend to criminal penalties, subject to important caveats.\textsuperscript{67} In Askey v Golden Wine Co Ltd,\textsuperscript{68} the plaintiff sought an indemnity in respect of repartition expenses and fines imposed on him under the Food and Drugs Act for his crime of selling ‘contaminated cocktails unfit for human consumption.’\textsuperscript{69} The claim for indemnity failed on public policy grounds. Denning J upheld the principle of English law that punishment inflicted by a criminal court is personal to the offender, and that civil courts will not allow an indemnity for the consequences of that punishment. Furthermore, Denning J noted that public policy prohibits an indemnity in respect of expenses that an offender has incurred by reason of being compelled to make reparation for their crime.

In Osman v J Ralph Moss Ltd,\textsuperscript{70} the plaintiff sought to recover a fine imposed in criminal proceedings against him and an indemnity for damages which the plaintiff paid in a civil action arising out of the same conduct. The Court of Appeal held that the plaintiff could recover those sums, because the plaintiff had no mens rea (it was a strict liability offence and the plaintiff did not himself know the conduct was unlawful), nor was he culpably negligent.

The latter two cases were cited with approval in the Australian case of Krakowski v Trenorth Ltd.\textsuperscript{71} Thus, it can be said that whether knock for knock indemnities are unenforceable in respect of claims for statutory liability is determined on a case by case basis, having regard to the nature of the offence, the legislative intention and the nature of the conduct. The criminal nature of the offence is not by itself determinative of the position. It is advisable for market participants to have an understanding of the laws of the jurisdiction in which they operate, so as to understand what risks/potential liabilities can be contractually allocated.

### 4.5 Consequential Loss

Some contracts seek to exclude consequential loss from the operation of knock for knock indemnities. An analysis of the relevant case law highlights that when drafting knock for knock clauses the specific term ‘consequential loss’ should be avoided to minimise ambiguity.

#### 4.5.1 The Meaning of ‘Consequential Loss’

A party claiming damages for breach of contract is to be placed in the same position as if the contract had been performed, as far as monetary compensation can do so. This rule is subject to the limitations of mitigation and remoteness. The limitation of remoteness was established in Hadley v Baxendale,\textsuperscript{72} where Baron Alderson identified the two types of losses:

- those that arise naturally or directly (the first rule); and
- those that may reasonably be supposed to have been in the contemplation of both parties at the time of contracting as the probable result of a breach because of special knowledge at the date of the contract (the second rule).

In Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd,\textsuperscript{73} Nettie JA (as his Honour then was) stated that the true distinction between the two rules in Hadley v Baxendale is that ‘normal loss’ is loss that every plaintiff in a like situation will suffer, and ‘consequential loss’, is anything beyond the ‘normal measure of damages’, such as profits lost or expenses incurred through breach.\textsuperscript{74} It is not correct to construe ‘consequential loss’ as limited to the second rule in Hadley v Baxendale. His Honour held it would be unrealistic to suppose that the parties used the term ‘consequential loss’ in any other sense other than in its natural and ordinary meaning, when read in light of

\textsuperscript{66} Ibid, 23.
\textsuperscript{67} C Egbochue, Reviewing ‘Knock for Knock’ Indemnities Following the Macondo Well Blowout (2013) 7 Construction Law International 7, 13.
\textsuperscript{68} [1948] 2 All ER 35.
\textsuperscript{69} The contaminant was methylated spirits.
\textsuperscript{70} [1970] 1 Lloyd’s Rep. 313.
\textsuperscript{71} (1996) Aust Torts Reports 81-401, 39–43.
\textsuperscript{72} (1854) 9 Exch 341.
\textsuperscript{73} [2008] VSCA 26.
\textsuperscript{74} Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd [2008] VSCA 26, [87]; H McGregor, McGregor on Damages (Sweet & Maxwell, 18th ed, 2009), [1-039].
of the contract as a whole, giving due weight to the context in which the clause appears, including the nature and object of the contract.\footnote{Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd [2008] VSCA 26, [93].}

A similar approach was adopted in \textit{Ferryways NV v Associated British Ports; “The Humber Way”;}\footnote{[2008] EWHC 225 (Comm).} where Teare J considered whether the words ‘including without the limitation the following’ indicated that the parties were giving their own definition of indirect or consequential losses so as to include the specified losses even if they are the direct and natural result of the breach in question. Teare J found that:\footnote{Ferryways NV v Associated British Ports; The Humber Way [2008] EWHC 225 (Comm), [84].}

...those words do not provide the sort of clear indication which is necessary for the defendant’s argument. The parties are merely identifying the type of losses (without limitation) which can fall within the exemption clause so long as the losses meet the prior requirement that they “of an indirect or consequential nature”. Had the parties intended that liability for losses which were the direct and natural result of the breach could be excluded they would have hardly have described such losses as “indirect or consequential”.

Based on the above case examples, the question whether a knock for knock clause excludes consequential loss will depend upon the construction of the particular clause in question. Against this background, we shall now consider of some of the standard form clauses used in the maritime and offshore oil and gas sectors dealing with consequential loss.

\subsection*{4.5.2 Example Clauses Excluding Consequential Loss}

\textbf{SUPPLYTIME 89}

Clause 12 (c) of the SUPPLYTIME 89 form reads:

Neither Party shall be liable to the other for, and, each party hereby agrees to protect, defend and indemnify the other against, any consequential damages whatsoever arising out of or in connection with the performance or non-performance of this Charter Party, including, but not limited to, loss of use, loss of profits, shut-in or loss of production and cost of insurance. (emphasis added)

The intention behind this clause has been considered in 2002 by a London arbitral tribunal in a confidential arbitration,\footnote{2002 LMLN 585, 18 April 2002.} in which the charterers claimed damages for breach of contact. The owners argued that the losses claimed were ‘consequential’ losses, which were expressly excluded by the contract.

The arbitral tribunal held that most of the damages claimed by the charterers related to the loss of use of equipment rented by the charterers and that, even if those losses were considered to be direct (and fell within the first rule in \textit{Hadley v Baxendale}) they would be excluded by the words ‘loss of use’ in clause 12(c). The tribunal also held that the cost of hiring and purchasing substitute equipment was recoverable as direct losses, which were not excluded under the clause. This decision appears to be inconsistent with \textit{Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd} and \textit{Ferryways NV v Associated British Ports}. Following the construction adopted in those cases, ‘loss of use’ would only have been an excluded loss if it was indirect or consequential. This case highlights the importance of clarity in drafting, so as to avoid uncertain outcomes.

\textbf{TOWCON/TOWHIRE}

The TOWCON and TOWHIRE standard form contracts contain a similar exemption in cl 18(3): ‘…neither the Tug owner nor the Hirer shall be liable to the other party for loss of profit, loss of use, loss of production or any other indirect or consequential damage for any reason whatsoever’.

This clause was considered in \textit{Tsavliris v OSA Marine Ltd (trading as OIL Marine Ltd); The Herdentor}.\footnote{Unreported 19 January 1996.} The \textit{Herdentor} was chartered by Tsavliris, a salvor, from the tugowners, OSA Marine, to assist in a salvage operation. A disagreement arose as to the duration of services provided by the \textit{Herdentor}. OSA Marine argued that the tug would only be provided for a limited period, as the tug was already engaged for another tow, and on this basis OSA Marine withdrew the tug. Tsavliris sued OSA for wrongful termination and claimed damages, arguing that the base award given to it as a contractor in a separate arbitral dispute was less than it would have received had
the tug remained in service until the salvage was complete. Clarke J held that the phrase ‘any other indirect or consequential damage’ gives meaning to ‘loss of profit, loss of use, loss of production’, such that only indirect loss of profits, use and production were excluded under clause 18(3).

In *Ease Faith Ltd v Leonis Marine Management Ltd*, an agreement provided that the tug operator would use its best endeavours to tow the *Kent Reliant* to China, where it was to be sold for scrap. The tug was delayed and by the time the *Kent Reliant* arrived, the market price for scrap had fallen, and Ease Faith was only able to sell the vessel at a reduced rate. Ease Faith sued Leonis alleging the tug’s failure to proceed with the voyage with proper dispatch had caused damages in the amount of the reduction in purchase price. Leonis argued that the claim was one for loss of profits, which was excluded under cl 18(3). Ease Faith argued that its claim was not for loss of profits and, in any event, the exclusion in cl 18(3) only applied to loss of profit where they are indirect; and in this case, the claim was for direct losses.

In characterising Ease Faith’s claim as one for a diminution of price rather than loss of profits, the court held the claim fell outside the meaning of cl 18(3). Andrew Smith J held that:

> It is true that loss of profits is capable of being a direct loss, but it need not be. For my part I do not find it remarkable that parties seeking to exclude all indirect loss but being particularly concerned about indirect loss of profit should agree upon provision that makes specific reference to loss of profits.

Unlike the arbitral tribunal’s construction of the indemnity clause in the SUPPLYTIME 89 form, this decision is consistent with *Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd and Ferryways NV v Associated British Ports*, focusing the inquiry on the characterisation of the loss claimed and the nature and object of the clause in issue.

It is evident from these cases that the term ‘consequential loss’ is prone to conflicting interpretations. If parties wish to make reference to *Hadley v Baxendale’s* second rule, they should use alternative express and clear language.

### 4.6 Proportionate and Concurrent Liability

Proportionate and concurrent liability has the potential to impact on the commercial allocation of risk.

Each Australian State and Territory has adopted a statutory scheme of risk allocation, which applies to ‘apportionable claims’ where there are two or more concurrent defendants. If a claim falls within the proportionate liability provisions, the legislation provides that the liability of each concurrent wrongdoer is limited to an amount which the court considers justly reflects that proportion of the loss and damage for which each tortfeasor is responsible.

Apart from circumstances where liability is proportionate, each Australian State and Territory has legislation which allows tortfeasors to recover from the other concurrent tortfeasors a contribution towards the amount paid to claimants. The amount of contribution which may be recovered is ‘such as may be found by the court to be just and equitable having regard to the [other party’s] responsibility for the damage’.

If either proportionate or concurrent liability were to apply, can a contractual right of indemnity be enforced? The answer to this question depends on the operation of the specific legislation. There are variances in the

---

81 Civil Law (Wrongs) Act 2002 (ACT), ch 7A; Civil Liability Act 2002 (NSW), pt 4; Proportionate Liability Act 2005 (NT), ch 2; Civil Liability Act 2003 (Qld), pt 2; Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA), pt 3; Civil Liability Act 2002 (Tas), pt 9A; Wrongs Act 1958 (Vic), pt IVAA; Civil Liability Act 2002 (WA), pt 1F.
82 Civil Law (Wrongs) Act 2002 (ACT), s 107F(1); Civil Liability Act 2002 (NSW), s 35(1); Proportionate Liability Act 2005 (NT), s 13(1); Civil Liability Act 2003 (Qld), s 31(1); Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA), s 8(2); Civil Liability Act 2002 (Tas), s 43B(1); Wrongs Act 1958 (Vic), s 24A(1); Civil Liability Act 2002 (WA), s 5AK(1); see also R Balkin and J Davis, *Law of Torts* (LexisNexis Butterworths, 4th ed, 2009), [29.41].
84 Civil Law (Wrongs) Act 2002 (ACT), s 21(2); Law Reform (Miscellaneous Provisions) Act 1946 (NSW), s 5(2); Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA), s 6(5), (7); Wrongs Act 1954 (Tas), s 3(2); Wrongs Act 1958 (Vic), s 24(2); Law Reform (Contributory Negligence and Tortfeasor’s Contribution) Act 1947 (WA), s 7(2); Law Reform Act 1995 (Qld), s 7.
proportionate liability legislation of each jurisdiction. In Queensland, parties cannot contract out of the proportionate liability scheme. In Western Australia, New South Wales and Tasmania, parties are expressly permitted to opt out of the legislation and the legislation expressly provides that contractual indemnities are effective as between concurrent tortfeasors. The legislation of the other States and Territories is silent on the parties’ ability to opt out of the legislation. In each Australian State and Territory, tortfeasors under the concurrent liability regime are not entitled to claim a contribution in circumstances where there is a contractual indemnity in respect of the damages for which the contribution is sought.

Further, there is some doubt as to whether proportionate liability can apply to a claim made between a primary party and a subcontractor of another primary party. According to Professor Davis:

There is...a series of decisions at first instance in Australia in which a building owner has been denied the right to sue a sub-contractor of the prime contractor in negligence for pure economic loss resulting to the owner from the carelessness of the sub-contractor, on the basis that the sub-contractor does not owe a duty of care to the owner. The reason for the denial of a duty of care is that, the parties having structured their relationship in such a way as to preclude any contractual liability between owner and sub-contractor, because of the operation of the doctrine of privity of contract, it would be inconsistent with their presumed intentions to impose a duty of care in negligence on the subcontractor.

5 Limitation of Liability

Most knock for knock clauses expressly provide that nothing in the contract is to deprive either party from relying on any right to limit liability that may be available to them under any relevant law, statute or convention, and that, before invoking the indemnity each party must, utilise any rights it has to limit its liability to third party claimants. Relevantly, the knock for knock regime does not give rise to a right of limitation, it merely allows parties who have that right to access it. If no right to limit exists under the relevant law, an indemnifying party under a knock for knock regime will not be able to limit the quantum of that indemnity.

The Convention on Limitation of Liability for Maritime Claims 1976 and the Limitation of Liability for Maritime Claims Act 1989 (Cth), which gives it the force of law in Australia, allows shipowners to limit their liability to pay compensation for general ship-sourced damage. The 1976 Limitation Convention applies to claims for loss of life and personal injury, as well as loss of or damage to property and to pollution damage where no other convention applies. The 1976 Limitation Convention does not impose strict liability to pay compensation for damage on the shipowner, rather the amount of compensation that a court is able to award is limited and calculated based on the size of the ship. There are three categories of ships, offshore structures, platforms or rigs that do not come under the 1976 Limitation Convention: (a) ships constructed for, or adapted to, and engaged in drilling; (b) air cushion vehicles and (c) floating platforms constructed for the purpose of exploring or exploiting the natural resources of the seabed or the subsoil thereof.

In Australia, there are no limitation provisions that are applicable to offshore drilling ships while they are engaged in drilling. The 1976 Limitation Convention only applies to ‘ships’, and drilling rigs are not ships. Similarly, the

5 Limitation of Liability

Most knock for knock clauses expressly provide that nothing in the contract is to deprive either party from relying on any right to limit liability that may be available to them under any relevant law, statute or convention, and that, before invoking the indemnity each party must, utilise any rights it has to limit its liability to third party claimants. Relevantly, the knock for knock regime does not give rise to a right of limitation, it merely allows parties who have that right to access it. If no right to limit exists under the relevant law, an indemnifying party under a knock for knock regime will not be able to limit the quantum of that indemnity.

The Convention on Limitation of Liability for Maritime Claims 1976 and the Limitation of Liability for Maritime Claims Act 1989 (Cth), which gives it the force of law in Australia, allows shipowners to limit their liability to pay compensation for general ship-sourced damage. The 1976 Limitation Convention applies to claims for loss of life and personal injury, as well as loss of or damage to property and to pollution damage where no other convention applies. The 1976 Limitation Convention does not impose strict liability to pay compensation for damage on the shipowner, rather the amount of compensation that a court is able to award is limited and calculated based on the size of the ship. There are three categories of ships, offshore structures, platforms or rigs that do not come under the 1976 Limitation Convention: (a) ships constructed for, or adapted to, and engaged in drilling; (b) air cushion vehicles and (c) floating platforms constructed for the purpose of exploring or exploiting the natural resources of the seabed or the subsoil thereof.

In Australia, there are no limitation provisions that are applicable to offshore drilling ships while they are engaged in drilling. The 1976 Limitation Convention only applies to ‘ships’, and drilling rigs are not ships. Similarly, the
limitation provisions do not apply to floating platforms constructed for the purpose of exploring or exploiting the natural resources of the seabed or the subsoil. Thus, any claim that is likely to be the subject of a limitation of liability will involve support vessels operating in the offshore oil and gas industry. By their nature, these claims will be of the type that would normally be the subject of limitation rights under various international liability conventions that are in force in the relevant jurisdiction, including Australia.

The operation of limitation of liability within the context of a knock for knock regime may result in an imbalance of compensation payable. By way of example, property owned by a company within the owner’s primary group is damaged by a company within the charterer’s group. The former company pursues a claim and recovers its full loss against the latter company. The charterer will have to indemnify the latter for its full loss paid and then claim an indemnity from the owner under the knock for knock indemnity in the charter party. If the owner is able to limits its liability in accordance with the size of the vessel, the limitation fund which is available to the charterer from the owner may not be sufficient to indemnify it for the full amount of the damages it paid to the compensate it for the amount it paid to the injured company in the owner’s primary group.

6 The Intersection between Insurance and Indemnity

It is important to note the intersection between insurance (particularly protection and indemnity liability) and knock for knock contracts.

P&I Clubs are mutual insurance associations, owned by shipowner members and controlled by a board of directors. The shipowner members effectively act as the insurer and the insured. On a regular basis, shipowners contribute to a pool of funds which exists to pay out legitimate claims of the Club’s members. The international ‘top-tier’ P&I Clubs have rigorous standards that must be met for shipowners to become members, and, similar to standard insurers, will pay out claims if Club rules are met.

Poolable cover generally does not respond to liabilities that members incur voluntarily. Members should not therefore assume responsibility for any loss for which they would not otherwise be liable. However, P&I Clubs will often review and, if appropriate, approve knock for knock clauses provided they are balanced and mutual and provided the member has not waived any right to limit liability under any applicable law. Unbalanced knock for knock contracts are not poolable in respect of any liabilities to which the member would not have been exposed in the absence of the contract.

In addition, for knock for knock liabilities to be poolable, they must incorporate indemnities, protecting members if they are sued by a third party who is not bound by the contract.

Knock for knock clauses must apply regardless of fault or negligence. Some P&I Clubs recommend that contracts should not carve out an exception gross negligence or wilful misconduct. If a party does not indemnify the other party for claims arising out of the indemnified party’s gross negligence or wilful misconduct, the main advantages of knock for knock regimes may be undermined. The ambiguity and subjectivity of what amounts to ‘gross negligence’ or ‘wilful misconduct’ obviates the certainty and clarity in the consensual allocation of liabilities. Further, the application of the exception is likely to lead to litigation, which again undermines the advantage of avoiding time-consuming and expensive disputes as to causation or fault.

The P&I Clubs’ general approach to knock for knock clauses has been influenced by the recognition that knock for knock contracts have become industry standards in offshore business. They have devised a standard knock for knock provision for members’ convenience. Ultimately, it is most important that members contract on terms that do not expose them to disproportionate liabilities.

7 Governing Law Clauses

The choice of a governing law clause is a very material consideration when allocating risk under a knock for knock regime. This paper has addressed the enforceability of knock for knock clauses under Australian, English and US law. However, such clauses may not be embraced in some other jurisdictions. It is therefore advisable to

97 The 1924, 1957 and 1976 Limitation Conventions (and the 1996 Protocol to the 1976 Convention) are currently in force in a number of jurisdictions; for a summary of which jurisdiction the above conventions apply see the help guide prepared by Hill Dickinson: Shipping ‘At a Glance’ Guide 2.
consider whether the jurisdiction selected to govern the contract will uphold knock for knock clauses, or any
exclusions that have been carved out of the operation of the clause, such as gross negligence. As we have seen,
an exclusion of gross negligence that will operate under New York law, may have no effect under Australia or
English law.

8 Conclusion

Knock for knock clauses are a fundamental part of the maritime and offshore oil and gas sectors. English and
Australian courts recognise the role that these hold harmless and indemnity clauses play in commercial operations
within those sectors and give effect to knock for knock clauses, although, there is the potential to limit their
scope.

Courts will carefully examine the wording of knock for knock clauses in determining their meaning, scope,
operation and efficiency. Clarity in drafting such clauses is therefore paramount to ensure that they achieve their
intended purpose. Some issues that require specific attention include:

- what liabilities are to be covered by the indemnities? Do the knock for knock clauses expressly provide
  indemnity in the event of negligence? Do the indemnities cover loss arising out of gross negligence,
  wilful misconduct or breach of contract? These matters should, where possible, be expressly dealt with
  in the clauses.
- which parties are to be covered by the indemnities as part of the primary parties’ respective groups?
- do the clauses extend to cover third party liabilities and if so are they subject to that party’s negligence?
- what losses are to be covered by the indemnity; is the indemnity intended to cover consequential loss or
  statutory liabilities?
- do the parties intend to exclude any proportionate or joint tortfeasor legislation where possible?
- do the knock for knock clauses express preserve the parties’ right to limit liability?
- are the knock for knock provisions reciprocal or back to back?
- do the insurance provisions cover the hold harmless and indemnity provisions?

It is important to ensure that the specific terms of the knock for knock clause are acceptable to, and have been
approved by, the P&I Club (or other insurer) before the terms are agreed, particularly given the potential for
massive environmental liabilities, such as were incurred in the Deepwater Horizon and Piper Alpha disasters.

One issue that warrants further consideration is the apportionment of liabilities to other parties within the
operational supply chains. As set out above, there is capacity, at least under Australian law to apportion liability
or to claim contribution from other parties. Traditionally, international oil companies have been considered to be
better placed to manage the risk of loss and damage than the contractors they engage. The converse argument,
which was touched on by Judge Barbier in Re: Oil Spill by the Oil Rig “Deepwater Horizon”, is that exposing
contractors to risk may incentivise ‘best’ behaviour in identifying and managing risk. Undoubtedly, in light of the
massive operational risks faced by operators, the apportionment of risk and carve outs for negligence and material
breach of contract is a discussion worth having. A detailed discussion of this question is beyond the scope of this
paper.

99 Whether such clauses are enforceable in other jurisdictions is beyond the scope of this paper. Before agreeing the governing law of the
contract, it is prudent to check that the law of the chosen jurisdiction recognises and gives effect to knock for knock clauses. For a
summary of the position in Canada seen Kangles, R Rogers, Z Allidina, C Harris B, ‘Risk allocation provisions in energy industry

100 See for example the Texas Oilfield Anti-Indemnity Act, Civ. Prac. & Rem Code 127.001-127.007, which provides that agreement[s]
pertaining to wells for oil, gas or water or to a mine for a mineral which provides indemnity to a person against liability for death,
personal injury, property loss or damage, is unenforceable. Allowance is made for indemnity agreements if they are backed up by liability
insurance cover which accords with specified requirements; T Makarov, ‘Indemnity in the international oil and gas contracts: key features,
drafting and interpretation’ University of Dundee.
OIL AND WATER – CAN THE OFFSHORE MINERALS INDUSTRY AND ENVIRONMENTAL PROTECTION EVER MIX?

Brendan Abley

1 Introduction

Take an emerging global energy crisis, mix it with some convenient United Nations rules that allow a small country to claim fifteen times its land area in ocean space, and then add a splash of cutting-edge extraction technology. With these factors in place, New Zealand’s potential to develop a significant offshore minerals industry increases dramatically. All that is needed is an effective legal regime to attempt to balance the ensuing raft of economic, environmental and social concerns that arise from mineral extraction in the exclusive economic zone (the ‘EEZ’) and on the continental shelf.

New Zealand now largely regulates offshore mineral activities under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (NZ) (the ‘EEZ Act’). This Act came into force on 28 June 2013 and has become a fast moving area of law. To date, the Environmental Protection Authority (the ‘EPA’) has received four notified marine consent applications under the new framework. The EPA declined seabed mining proposals from Trans-Tasman Resources Limited (‘TTR’) and Chatham Rock Phosphate Limited (‘CRP’) (the ‘TTR decision’ and ‘CRP decision’). TTR lodged, then withdrew, an appeal to the High Court, while CRP opted not to appeal at all.

On the other hand, the EPA has approved notified applications for oil drilling activities, from OMV New Zealand Limited (‘OMV’) and Shell Todd Oil Services Limited (‘Shell Todd’) (the ‘OMV notified decision’ and ‘Shell Todd notified decision’). It also granted marine consents to those companies on a non-notified basis in late 2014 (the ‘OMV non-notified decision’ and the ‘Shell Todd non-notified decision’).

In this paper, I have considered the prior regime for accessing resources in the EEZ. I have attempted to analyse the EEZ Act in the context of the first marine consent decisions under the new framework. I have supplemented this analysis with reference to the Australian regime for accessing petroleum and minerals. The EEZ Act has provided a much-needed response to a gap in the environmental management of New Zealand’s offshore resources. Despite this, cracks are already starting to appear in the regime. The overall regulatory structure for offshore activities remains fragmented, with many agencies involved at different stages of the process. As a result, New Zealand still lacks a comprehensive, integrated management regime for offshore resource developments. Given the high levels of reward and risk associated with developing the offshore minerals industry, such a regime is a necessary and desirable step if New Zealand is to benefit from its offshore resources in a responsible and environmentally sound way.

---

1 BA/LLB (Hons) student, University of Auckland. I would like to thank Associate Professor Paul Myburgh for his encouragement and input into this paper.
2 This article considered the EEZ Act as passed. The New Zealand government has proposed a number of changes to the EEZ Act under the Resource Legislation Amendment Bill 2015. That Bill is currently before a select committee, which is due to issue its report in September 2016.
3 I have excluded applications for marine consents under the transitional provisions of the EEZ Act. The notified application process requires public input. Non-notified applications are not open to public submissions.
4 Environmental Protection Authority, Trans-Tasman Resources Limited Marine Consent Decision (17 June 2014) (‘TTR decision’);
   Environmental Protection Authority, Decision on Marine Consent Application by Chatham Rock Phosphate Limited to mine phosphorite nodules on the Chatham Rise (10 February 2015) (‘CRP decision’).
7 Environmental Protection Authority, Decision on Marine Consent Application OMV New Zealand Limited Development drilling at the Maari Field at the Taranaki Bight (15 December 2014) (‘OMV notified decision’);
   Environmental Protection Authority, Māui Offshore Facilities – Shell Todd Oil Services Limited Reasons for Decision on Application for Marine Consent (4 June 2015) (‘Shell Todd notified decision’).
8 Environmental Protection Authority, OMV New Zealand Limited Whio-1 – located within the South Taranaki Bight Environmental Protection Authority (26 August 2014) (‘OMV non-notified decision’); Environmental Protection Authority, Shell Todd Oil Services New Zealand Limited Ruru-2 and Māui-8 – Located within the South Taranaki Bight (14 October 2014) (‘Shell Todd non-notified decision’).
2 New Zealand’s Claim to the Exclusive Economic Zone and Continental Shelf

Administratively, New Zealand’s offshore area is divided into the territorial sea, the contiguous zone, the EEZ and the continental shelf, as detailed below:

Figure 1: New Zealand’s offshore zones

The 1982 United Nations Convention on the Law of the Sea (‘UNCLOS’) regulates New Zealand’s authority in each of these zones. The territorial sea extends from baselines to a line 12 nautical miles away. This forms part of the sovereign territory of New Zealand. The contiguous zone extends a further 12 nautical miles from the limits of the territorial sea. In the contiguous zone, New Zealand can exercise the level of control necessary to enforce customs, fiscal, immigration or sanitary laws.

The EEZ extends from the 12 nautical mile limit of the territorial sea to a line 200 nautical miles from the territorial sea baseline. At approximately four million square kilometres, New Zealand’s EEZ is one of the largest in the world. In the EEZ, New Zealand has ‘sovereign rights’ to explore, exploit, conserve and manage all living and non-living natural resources on and under the seabed and in the waters above it. The use of the term ‘sovereign rights’ over some aspects of the EEZ suggests that the State’s powers are more than jurisdictional, yet fall short of full sovereignty. New Zealand then has mere ‘jurisdiction’ under the Convention with regard to offshore installations and structures, marine scientific research and protection of the marine environment.

This raises an interesting point of international law about the extent to which the New Zealand Parliament can make and enforce law to protect and preserve the marine environment – an area over which New Zealand only has ‘jurisdiction’. Under UNCLOS Article 211(5), States can make laws and regulations in the EEZ, provided that these laws and regulations conform to accepted international rules and standards. This provision could validate the EEZ Act, assuming that it is actually legislation designed to protect and preserve the marine environment. An alternative may be to justify the EEZ Act as an exercise of New Zealand’s sovereign right to explore, exploit, conserve and manage resources in the EEZ. A more detailed analysis of this topic is beyond the

---

10 Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977 (NZ) s 3.
12 Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act (NZ) s 8A(2).
13 UNCLOS art 56.
14 Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act (NZ) s 9(1).
16 UNCLOS, art 56(1)(a).
18 UNCLOS art 56(1)(b).
19 See also Shearer, above n 16, 62.
scope of this paper, but New Zealand’s exercise of legislative control over the EEZ does raise pertinent questions about the interface between state sovereignty and the freedom of the high seas.

The continental shelf is the ‘natural prolongation’ of New Zealand’s submerged landmass.\textsuperscript{20} The continental shelf extends beyond the EEZ in places, adding a further 1.7 million square kilometres to New Zealand’s submarine resource hoard.\textsuperscript{21} New Zealand has fewer entitlements under UNCLOS to resources on the continental shelf, as the state’s rights are limited to resources on or under the seabed.\textsuperscript{22} This opens the continental shelf to oil drilling and seabed mining proposals.

Figure 2: Map of the exclusive economic zone and continental shelf\textsuperscript{23}

\textsuperscript{20} UNCLOS art 76.
\textsuperscript{21} Land Information New Zealand, above n 14.
\textsuperscript{22} UNCLOS art 77(4).
\textsuperscript{23} Land Information New Zealand, above n 14.
3 The Previous Regime

A key issue with the pre-2013 regime was the absence of any effective environmental protection requirements for activities in the EEZ and on the continental shelf.24 A regulatory gap arose from the fact that the environmental management regime under the Resource Management Act 1991 (NZ) (the ‘RMA’) ended abruptly at the 12 nautical mile limit of the territorial sea.25 The Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977 (NZ) defines the various zones, but it does not set standards for activities within each zone. Beyond the territorial sea, the Crown Minerals Act 1991 (NZ) (the ‘CMA’) and Maritime Transport Act 1994 (NZ) (the ‘MTA’) governed access to minerals.

The CMA deals with the acquisition of property rights in Crown owned minerals.26 It applies27 to the EEZ by virtue of the Continental Shelf Act 1964 (NZ), which imposes the rights allocation system of the CMA to petroleum on the continental shelf.28 The Continental Shelf Act initially applied its own requirements to other minerals on the continental shelf, but this has since been replaced with the CMA regime.29 The rights to all natural resources on the entire continental shelf are vested in the Crown.30 This includes areas of the continental shelf within and outside the EEZ.31 Operators must obtain a permit before they are able to access minerals on the continental shelf.32 Before 2013, the CMA essentially did not require decision makers to take environmental factors into account when issuing permits. Instead, the key factors were efficient allocation of resources and a fair financial return to the Crown.33 As a result, activities in the EEZ authorised by the CMA were not subject to any principles of sustainability or environmental management.34 On land and in the territorial sea, activities would need to comply with the environmental protection requirements of the RMA, even if that activity were authorised by the CMA.35 A similar comprehensive environmental management regime did not apply to mineral exploitation in the EEZ.

Instead, environmental protection came under the safety framework of the MTA. Offshore resource extraction activities fall under Part 200 of the Marine Protection Rules, issued under the MTA.36 The Rules apply to New Zealand’s territorial and continental waters.37 Operators of offshore installations must prepare a Discharge Management Plan (‘DMP’), to be approved by the Director of Maritime New Zealand (‘MNZ’).38 Operators must maintain the level of training and equipment necessary to deal with an oil spill.39 The DMP must contain the appropriate measures to identify, assess and prevent the risk of a discharge.40 It must also set out emergency response procedures in the event of a spill.41

The MTA framework does not comprehensively ensure environmental protection. The oversight of offshore drilling and mining is at best a peripheral activity that does not really fit with the main purpose of MNZ, which is essentially the regulation of marine transport systems.42 Secondly, the Marine Protection Rules are reactionary in nature: the required DMP focuses more on dealing with the consequences of a blowout as opposed to providing...
stringent requirements to prevent such an accident from occurring in the first place.\textsuperscript{43} The discharge management provisions of the Marine Protection Rules appear to focus predominantly on discharges of oil, with less emphasis on the effects of other offshore activities such as seabed mining.

Greenpeace of New Zealand Incorporated v Minister of Energy and Resources highlights this regulatory gap.\textsuperscript{44} Greenpeace applied for judicial review of a decision by the Minister to grant an exploration permit to Petrobras International Braspetro BV over an area of seabed in the Raukumara Basin. Under the CMA as it stood, the Minister only had to consider the relevant Minerals Programme.\textsuperscript{45} The Minerals Programme for Petroleum 2005 (NZ) (the ‘MPP 2005’) required the Minister to promote the responsible discovery and development of petroleum resources.\textsuperscript{46} It deliberately omitted any environmental considerations, on the basis that these would be adequately dealt with under the RMA – but this had no effect beyond the 12 nautical mile limit.\textsuperscript{47}

Greenpeace contended that the Minister had not correctly exercised his power under the CMA and MPP 2005, as he did not take into account environmental factors or international environmental obligations.\textsuperscript{48} The judge reviewed the legislative regime as a whole and held that the Minister was entitled to conclude that these considerations were outside his discretion.\textsuperscript{49}

\begin{quote}
The Minister would have known of the possibility that offshore oil exploration and drilling might have an impact on the environment. He was entitled to conclude that those were not matters for him to consider in the exercise of his mandated function and powers. He knew they fell within the province of others. [...] [The MPP], read in the context of the Crown Minerals Regime as a whole, and other regulatory provisions, cannot require the Minister to either call for an environmental impact assessment … or to undertake inquiry into and give consideration to international environmental obligations. They are dealt with elsewhere, and fall outside his powers.
\end{quote}

This case demonstrates the lack of comprehensive environmental management under the former regime. Environmental concerns could not be adequately addressed through the CMA permit process. MNZ was arguably not well-equipped to handle complex applications for offshore activities. A (probably apocryphal) story has circulated about an unnamed oil company that prepared an environmental impact assessment for proposed activities, then was unable to find an agency in New Zealand that wanted to review it.\textsuperscript{50} In any event, the regulatory gap surrounding activities in the EEZ had become obvious.

4 The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012

4.1 Overview

The EEZ Act has now been in force for over two years. The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill (NZ) (the ‘EEZ Bill’) was introduced in 2011 in order to address the regulatory gap for activities in the EEZ.\textsuperscript{51} Parliament eventually passed the bill by 72 votes to 49.\textsuperscript{52} Opponents to the Bill acknowledged the need for legislation, but maintained that the Bill in its final form did not adequately protect the environment.\textsuperscript{53}

The Act’s purpose is as follows:

10 Purpose
(1) The purpose of this Act is to promote the sustainable management of the natural resources of the exclusive economic zone and the continental shelf;
(2) In this Act, sustainable management means managing the use, development, and protection of natural resources in a way, or at a rate, that enables people to provide for their economic well-being while—

\begin{itemize}
\item \textsuperscript{44} Greenpeace of New Zealand Incorporated v Minister of Energy and Resources [2012] NZHC 1422 (22 June 2012) (‘Greenpeace’)
\item \textsuperscript{45} Crown Minerals Act 1991 (NZ) (6 April 2012 Reprint) s 22.
\item \textsuperscript{46} Minerals Programme for Petroleum 2005 (NZ) policy 2.2.
\item \textsuperscript{47} Minerals Programme for Petroleum 2005 (NZ) preamble at [11].
\item \textsuperscript{48} Greenpeace [2012] NZHC 1422 (22 June 2012) [58].
\item \textsuperscript{49} Ibid [115]-[116].
\item \textsuperscript{50} Barry Barton, ‘Offshore Petroleum and Minerals’ [2011] New Zealand Law Journal 211, 212.
\item \textsuperscript{51} New Zealand, Parliamentary Debates, 13 September 2011, 21215.
\item \textsuperscript{52} New Zealand, Parliamentary Debates, 28 August 2012, 4803.
\item \textsuperscript{53} Ibid [4799]-[4800].
\end{itemize}
(a) sustaining the potential of natural resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
(b) safeguarding the life-supporting capacity of the environment; and
(c) avoiding, remediery, or mitigating any adverse effects on the environment.

(3) In order to achieve the purpose, decision makers must—
(a) take into account decision-making criteria specified in relation to particular decisions; and
(b) apply the information principles to the development of regulations and the consideration of applications for marine consent.

The purpose of the EEZ Bill as introduced was to ‘achieve a balance between the protection of the environment and economic development’. 54 Opponents criticised this initial purpose as ‘effectively putting a price on environmental degradation’. 55 The initial purpose section prompted much of the opposition to the EEZ Bill in Parliament and meant that the Select Committee was unable to recommend that the Bill be passed. 56 In separate submissions, the New Zealand Law Society and Parliamentary Commissioner for the Environment noted that the ‘balance’ purpose would be inconsistent with New Zealand’s international obligations, and recommended a shift to a ‘sustainable management’ purpose. 57 Eventually, a Supplementary Order Paper (‘SOP’) substituted the ‘sustainable management’ standard. 58 The Minister for the Environment acknowledged the ‘considerable benefit’ of incorporating sustainable management into the Bill’s purpose section. 59

The Act classifies activities as: permitted, meaning they can be carried out as of right; 60 discretionary, meaning they require a marine consent; 61 and prohibited. 62 Discretionary activities may in turn be classified as non-notified or notified. 63 The default position is for activities to be classified as discretionary. 64 Regulations prescribing non-notified activities and permitted activities are currently in force. 65

The EPA is the primary body responsible for managing activities in the EEZ under the EEZ Act. 66 Operators must apply to the EPA for a marine consent to carry out discretionary activities. 67 Applications must ‘fully describe the proposal’ and include an Environmental Impact Assessment (‘EIA’). 68 The EIA must describe factors such as the current state of the environment and the effect of the proposed activity on the environment and existing interests. 69 The EPA may delegate its decision making function to a Decision Making Committee (‘DMC’) appointed under the Crown Entities Act 2004 (NZ). 70 In May 2013, the EPA delegated all of its functions and powers to every DMC appointed under the Crown Entities Act 2004 (NZ). 71 The DMC process has become standard, with all past consent applications referred to DMCs.

Despite the new legislation, the EPA is not the only entity responsible for activities in the EEZ. The permitting regime under the CMA remains in force, with New Zealand Petroleum and Minerals responsible for issuing permits. WorkSafe New Zealand maintains health and safety standards. Interestingly, MNZ is still in charge of overseeing DMPs and managing oil spill responses. 72 This seems anomalous and highlights a point of tension in the regime between the EPA’s authority to seek enough information to make an informed decision, and the role

54 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011 (NZ) cl 10(1).
56 See, eg. New Zealand, Parliamentary Debates, 13 September 2011, 21217. See also New Zealand Local Government and Environment Committee, Report on the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill (15 May 2012), in particular the minority views at 8, 10, 16.
59 New Zealand, Parliamentary Debates, 16 August 2012. [4492].
60 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (NZ) s 35 (‘EEZ Act’).
61 Ibid s 36.
62 Ibid s 37.
63 Ibid ss 29D, 44C, 45(1).
64 Ibid s 36(1).
65 Exclusive Economic Zone and Continental Shelf (Environmental Effects—Non-notified Activities) Regulations 2014 (NZ) and Exclusive Economic Zone and Continental Shelf (Environmental Effects—Permitted Activities) Regulations 2013 (NZ).
66 EEZ Act s 13.
67 Ibid ss 13(1)(a), 36(2).
69 Ibid s 39(1).
70 Ibid s16(a) and Crown Entities Act 2004 (NZ) sch 5 cl 14.
71 OMV non-notified decision [5].

(2016) 30 ANZ Mar LJ 49
of other agencies in administering their own particular patch in the EEZ. I will address this issue in more detail later in this paper.

4.2 Comparison with the Resource Management Act 1991

The EEZ Act applies a regime with broadly similar principles and processes to the RMA. Both Acts share a ‘sustainable management’ purpose, with some minor variations. The RMA enables people to provide for their ‘social, economic and cultural wellbeing’. The EEZ Act refers only to ‘economic’ well-being. The RMA then goes on to provide a range of matters of national importance and other matters that decision makers must take into account. A similar overarching list is not present in the EEZ Act. The RMA is entirely subject to the principles of the Treaty of Waitangi. The EEZ Act does not generally apply the principles of the Treaty, but has some requirements for Māori input into the decision making process.

Some commentators suggested that extending the RMA would have been the simplest and most cost-effective means of implementing an environmental management regime for the EEZ. The establishment of a separate regime could have caused unnecessary fragmentation and confusion, especially for projects straddling the boundary between the territorial sea and EEZ. Applying the RMA would also have avoided the need for unnecessary litigation, as any cases would have followed the same principles set out in previous resource management decisions.

Nevertheless, the nature of resource management in the EEZ is such that a wholesale application of the RMA would have been difficult. In passing the Bill, the Government emphasised that the RMA framework could be ‘overkill’ given the relative lack of competing interests offshore. The EEZ Act centralises decision making functions with the EPA. As a specialist environmentally-focused agency, the EPA has the necessary expertise in environmental analysis and processes to be able to handle the technically complex nature of marine consent applications. Regional authorities under the RMA may not necessarily be equipped to handle these applications. The EEZ Act regime also allows for uniform and nationally consistent standards to be applied across the entire EEZ. Commercially, this is desirable because operators are able to work with a consistent and predictable set of requirements. On balance, the potential strategic and economic importance of resources in the EEZ justifies a more centralised and uniform approach than the framework available under the RMA.

5 Implementing the Legislation: The Environmental Protection Authority’s Processes and Decisions

5.1 Transitional provisions

The EEZ Act’s transitional provisions gave operators a grace period (now expired) to continue existing and planned petroleum activities without a marine consent. The extent of the EPA’s control over operators under the transitional provisions was controversial.

In *Greenpeace of New Zealand Incorporated v Environmental Protection Authority*, Anadarko NZ Taranaki Company (‘Anadarko’) applied for permission to continue with a planned petroleum activity. Section 166 of the Act outlined that activities already authorised under the former regime could proceed without a marine consent. The only requirement was for the operator to submit an EIA to the EPA. Section 41 of the EEZ Act applied to

---

52 Compare EEZ Act s 10 with Resource Management Act 1991 (NZ) s 5 (‘RMA’).
53 RMA s 5(2).
54 EEZ Act s 10(2).
55 RMA ss 6, 7.
56 RMA s 8.
57 EEZ Act s 12.
58 Mulcahy, above n 41, 43.
59 Barton, above n 49, 212.
60 Ibid 212.
61 New Zealand, Parliamentary Debates, 30 May 2012, 2735.
62 Barton, above n 49, 212.
63 EEZ Act ss 161, 166.
64 Greenpeace of New Zealand Incorporated v Environmental Protection Authority [2013] NZHC 3482 (19 December 2013) (‘Greenpeace 2’).
65 EEZ Act ss 166(1), (2), (8).
66 Ibid s 166(3).
applications under the transitional provisions. This section says that the EPA may decide that an application is incomplete because it does not meet all of the requirements for an EIA under section 39. The EPA must return an incomplete application.

Anadarko’s EIA contained parts of the DMP that it had provided to MNZ under the previous regime. Anadarko omitted some appendices to the original DMP that contained information such as oil spill modelling. In particular, Greenpeace contended that Anadarko’s EIA did not contain information about an oil spill travelling away from New Zealand towards the open ocean. The EPA’s external consultants recommended that the EPA exercise its discretion under section 41 to return the EIA as incomplete. EPA staff disagreed and advised Anadarko that the EPA would accept its EIA.

Greenpeace applied for a judicial review of the EPA’s decision. Greenpeace submitted that the EIA was incomplete and that the EPA had erred in law by not exercising its discretion to return it to Anadarko. The judge held that section 41 did not give the EPA the authority to consider the merits of the content of the EIA. The only purpose of the initial consideration under section 41 was to ensure that the public and the EPA would have enough information to be able to submit on the application when it reached the actual decision making stage. Any evaluative function would be carried out under other provisions such as sections 59 and 61, which outline factors for the EPA to consider when the application reaches the substantive decision making stage. As a result, the EPA’s role under section 41 is “essentially administrative”.

This decision understates the extent of the EPA’s discretion to consider the merits of the EIA under section 41. The transitional provisions gave the EPA discretion to return an incomplete application under section 41, if the EIA did not meet the requirements of section 39. Section 39(2) states that the EIA must (a) give a level of detail proportionate to the scale and significance of the potential effects of the activity and (b) sufficient detail to enable the EPA to understand the nature of the activity (emphasis added).

Section 39 appears to give the EPA an evaluative role in determining whether the EIA actually contains enough information, with the level of detail necessary to allow the EPA to come to an informed conclusion as to the effects of the activity. The decision seems inconsistent with the fact that the EEZ Act explicitly provides for the EPA to seek independent advice as to whether the EIA complies with section 39. This provision would seem to be irrelevant if the question is simply whether all the necessary information is present. Reducing this discretion to a “box-ticking exercise” does not give full effect to the power granted to the EPA under section 41.

This issue has remained live in marine consent decisions issued under the new legislation. It raises two problems. The first is that if the EPA’s completeness check is simply administrative, the EPA cannot assess if the applicant’s information is sufficient to decide the application until the substantive decision making stage. This means that the relevant DMC must seek further information under pressing time constraints – a problem noted by the DMC in the OMV non-notified decision. The EPA’s completeness check also reveals a more fundamental problem about the extent of the EPA’s authority to seek information that is relevant, but governed by other marine management regimes. There appears to be some tension between the EPA’s function in processing marine consent applications and MNZ’s role in administering DMPs. In the OMV and Shell Todd non-notified decisions, the DMCs requested complete copies of each applicant’s DMP. In both cases, neither the applicant nor MNZ complied (OMV provided a partial copy). I will discuss this issue in more detail in part 66 of this paper.

---

88 Ibid s 166(4).
89 Ibid s 41(3).
90 Greenpeace 2 [2013] NZHC 3482 (19 December 2013) [20].
91 Ibid [14].
92 Ibid [21].
93 Ibid [28].
94 Ibid [29].
95 EEZ Act s 41(2).
96 See the DMC’s recommendations in the OMV non-notified decision, appendix 2 at 61-62.
97 See OMV non-notified decision [80] and Shell Todd non-notified decision [29].
5.2 The Current Process

Briefly, a marine consent application for a proposed activity wholly within the EEZ undergoes the following process:

- The applicant lodges its application with the EPA. The application must contain an EIA with the information required by section 39.

- The EPA reviews the EIA and decides if it meets the requirements of section 39. The EPA may seek independent advice or commission an independent review on this matter. The EPA may also request further information before a hearing (or before it makes its decision if there is no hearing). The applicant can challenge these decisions under section 101. If the EIA is incomplete, the EPA must return the application.

- If the activity is non-notified, the EPA may conduct a hearing if it decides that a hearing is necessary, or if the applicant requests it. A hearing is not essential. The EPA must issue its decision on non-notified applications within 50 days of the completion of the application.

- If the activity is notified, the EPA must give public notice. Any person may make a submission on a notified application.

- A notified application will proceed to a hearing if the EPA decides that one is necessary, or if the applicant or a submitter requests a hearing. Hearings must be completed within 40 days.

- The EPA will consider the application in accordance with sections 59 to 61. Section 59 outlines the factors that the EPA must take into account. Section 60 outlines mandatory considerations in respect of existing interests. Section 61 imposes a set of ‘information principles’ that the EPA must apply in its decision.

- The EPA may then grant or refuse the application. It must do so within 20 working days from the end of the hearing. The EPA may apply conditions to the marine consent.

- If favouring caution and environmental protection means that the consent is likely to be declined, the EPA must consider whether it could approve the activity subject to an adaptive management approach. This means that the activity can go ahead on a smaller scale to allow its effects to be monitored. The EPA may order the operator to stop the activity if the adverse effects are unacceptable.

- Applicants and submitters may appeal to the High Court against the EPA’s decision, but only on questions of law.

---

98 EEZ Act s 38.
99 Ibid s 38(2)(c).
100 Ibid s 41(1).
101 Ibid s 44(1).
102 Ibid s 42.
103 Ibid s 41(3).
104 Ibid s 44B.
105 Ibid s 68(2).
106 Ibid s 45.
107 Ibid s 46(1).
108 Ibid s 50.
109 Ibid s 52.
110 Ibid s 62.
111 Ibid s 68(1).
112 Ibid s 61.
113 Ibid s 61(3).
114 Ibid s 64(2)(a).
115 Ibid s 64(2)(b).
116 Ibid s 105.
5.3 **Information Principles**

An important feature of the marine consent process is section 61, which outlines the Act’s information principles. The EPA must apply these principles when it considers marine consent applications. This includes making full use of its powers to seek additional information. 117 The EPA can request additional information from the applicant itself, call for an independent review of the applicant’s EIA and commission reports or seek advice on any aspect of the marine consent application. 118 The EPA must base its decisions on the best available information and take into account any uncertainty or inadequacy in the information it receives. 119 Crucially, if the information available to the EPA is uncertain or inadequate, the EPA must favour caution and environmental protection. 120 This creates a presumption that if there is uncertainty about any aspect of a marine consent application, the EPA will decline the application, although it appears to fall short of making it mandatory for the EPA to refuse to give consent (a point that I will discuss in more detail in part 6 below).

5.4 **Case Studies: Trans-Tasman Resources and Chatham Rock Phosphate**

5.4.1 **Trans-Tasman Resources**

TTR submitted the first notified application for a marine consent, to be decided entirely under the new regime. TTR sought consent to excavate up to 50 million tonnes of seabed material annually, in a 65.76 square kilometre zone just beyond the territorial sea in the South Taranaki Basin. TTR proposed sending a ‘Floating Processing Storage and Offloading Vessel’ (‘FSPO’ or ‘ship’) into the project area. The ship would tow an extraction machine called a ‘crawler’, which would excavate ten metre wide trenches in the seabed across a 300 square metre block. A tube would shift material from the crawler to the ship, where it would be processed to extract iron ore. At the same time, the ship would deposit processed material back onto the seabed in another block, through a deposition pipe positioned four metres above the ocean floor. 121

The responsible DMC declined TTR’s application in June 2014. In a 200-page decision, the DMC comprehensively evaluated all aspects of TTR’s application and considered the wide range of environmental impacts that would flow from TTR’s proposed activities. In particular, the DMC was concerned with the sediment plume that would be created by the initial excavation of material and by the subsequent discharge of material from the ship onto the seabed. 122 This would have flow on effects on primary productivity – the energy entering the food chain at the bottom level from small flora – and subsequently further up the food chain. 123 The DMC also considered the effects that the proposal could have on existing interests, including iwi, 124 various fishing interests, 125 recreation and tourism, 126 existing petroleum mining licence holders 127 and marine traffic. 128

On the other side of the ledger, the DMC then considered the economic benefits of the proposal. The royalty payments alone to the New Zealand Government were assessed at approximately NZD 50 million per year. 129 The DMC noted some uncertainty in terms of quantifying the economic benefit. Experts disagreed firstly over whether to use a computable general equilibrium model or a cost-benefit analysis to establish the economic outcomes of the project. 130 The likely increase in Gross Domestic Product from the project and the number of jobs that would be created as a result were also uncertain. The DMC ultimately found that the project would return a positive net economic benefit. 131 However, the economic case in TTR does not appear to have been particularly strong. This meant that TTR was unable to fully capitalise on section 59(2)(f), which makes economic benefits a mandatory consideration for the DMC. This could have been a major factor in favour of the application. As a result, the decision is perhaps of limited value in determining how the EPA will balance adverse environmental effects with economic benefits.

---

117 Ibid s 61(1)(a).
118 Ibid ss 42, 44(1).
119 Ibid ss 61(1)(b), (c).
120 Ibid s 61(2) (emphasis added).
122 TTR decision [147]-[189].
123 Ibid [190]-[253].
124 Ibid [591]-[642].
125 Ibid [643]-[700].
126 Ibid [701]-[711].
127 Ibid [712]-[720].
128 Ibid [721]-[726].
129 Ibid [735].
130 Ibid [728], [731].
131 Ibid [753].
A key factor in declining the application was the level of scientific uncertainty about the effects of TTR’s proposal. The DMC stated that: 132

Put simply, we do not know enough about the existing environment … and how that environment may be affected by the proposed mining […] We were surprised at the applicant’s inability to clearly articulate from the outset how it was going to mine and operate to ensure that it achieved the environmental results – and especially the plume characteristics – that its experts had modelled. […] We find that there is considerable uncertainty in the information provided as to both the nature of the environment and the way the mining operation might affect it.”

Scientific uncertainty in the TTR decision stemmed largely from difficulties in modelling the effects of TTR’s proposed activities. This modelling would have to accurately assess the impact on one particular aspect of the environment in the project area, and then show the ramifications elsewhere. For example, TTR’s primary productivity impact assessment was based on the probable reaction of primary producers (such as plankton) to a change in light levels. Information about the change in light levels was drawn from another model, which predicted the movements of suspended sediment plumes. The DMC stated that this ‘layering of model predictions’ had the effect of compounding the level of scientific uncertainty. 133 The DMC decided that, on the basis of incomplete and uncertain information, it would apply caution and environmental protection and decline the consent – as required by the EEZ Act’s information principles. 134

The DMC then had to consider whether it could grant consent subject to TTR proceeding according to an adaptive management approach. Generally, this relates to allowing the activity to commence on a smaller scale, to allow its effects to be monitored. 135 TTR took a novel approach to adaptive management. TTR submitted that it could not operate a standard adaptive management plan: if it were forced to carry out the project in stages with no certainty of being allowed to continue, the project would collapse as TTR would not be able to find the necessary (and substantial) capital investment to continue. 136 Instead, TTR set out a number of environmental performance objectives, baseline monitoring proposals, quantitative measures and operational monitoring proposals as a substitute. 137 The DMC agreed in principle that a similar framework could meet the criteria for an adaptive management approach, but ultimately found that TTR’s proposal was not clear or robust enough to meet these requirements. 138 On this basis, the DMC rejected TTR’s adaptive management framework and declined the marine consent application. The DMC considered overall that the application was ‘premature’ and that TTR should have taken more time to comprehend the environment, the operation and the likely impact of the operation on the environment. 139

5.4.2 Chatham Rock Phosphate

A similar narrative unfolded in the CRP decision, where the responsible DMC rejected CRP’s application to mine phosphorite nodules on the Chatham Rise. CRP applied to mine up to 30 square kilometres of seabed annually. Similarly to TTR, it intended to extract material from the sea floor (although using a conventional “drag head” as opposed to a crawler machine) and pump this material to a mining vessel for on-board processing. The processed material would then be returned to the sea floor through a deposition hose. 140

CRP’s project faced a rocky consent process from the outset. The EPA released its initial staff report in August 2014. 141 This report stated that the EPA could not recommend the application. A key factor in this conclusion was the level of uncertainty surrounding CRP’s proposal. The EPA acknowledged that CRP could provide additional information, but that some uncertainty would remain. 142

CRP’s application was further hindered by the fact that the company intended for most of its mining to occur within a ‘Benthic Protection Area’ (‘BPA’), established under the Fisheries (Benthic Protection Areas) Regulations 2007 (NZ). The purpose of these regulations is to establish “Benthic Protection Areas”, regulate

132 Ibid [133], [136], [138].
133 Ibid [230].
134 Ibid [773].
135 EEZ Act s 64(2).
136 TTR decision [794]-[795].
137 Ibid [796].
138 Ibid [850].
139 Ibid [853].
140 CRP decision [15], [17].
141 The EPA may commission Staff Reports under EEZ Act s 44.
142 Environmental Protection Authority, EPA Staff Report: Chatham Rock Phosphate Limited Marine Consent Application (EPA, August 2014) [588], [597].
activities within those areas (including prohibiting the use of dredges) and create offences and penalties for breaches.\textsuperscript{143}

Ninety-two percent of CRP’s consent area sat within the Mid Chatham Rise BPA. The company submitted that seabed mining was not specifically prohibited within the BPA – meaning the area was not closed to such an activity.\textsuperscript{144} The DMC did not accept this argument. It noted that: \textsuperscript{145}

\[
[...] \text{mining the seafloor in an area in which a comparable activity is prohibited would be, at the very least, contradictory. [...] The net effect, being the destruction of a sizeable benthic area that is protected from an activity similar to mining, is clearly contrary to purpose (a) of the BPA, which is not just to prohibit the specific activities of trawling and dredging, but also to protect the benthos.}
\]

As with TTR’s application, however, it was the level of uncertainty surrounding CRP’s proposal that ultimately led the DMC to decline consent. Despite CRP’s efforts to address the issues that the EPA raised in its staff report, uncertainty remained a key theme in the DMC’s final decision. The DMC stated:

\[
[...] \text{it is incontestably the case that there remained significant gaps in the data and information provided about the consent area’s marine environment as well as uncertainty about the impact of the proposal on existing interests and the environment.\textsuperscript{146} [...] a complete understanding of the environment and absolute certainty about the risks posed by the proposal are not a prerequisite to the granting of a consent. On the other hand, scientific knowledge of the Chatham Rise ecosystem is manifestly incomplete and the DMC does need to have sufficient, and sufficiently certain, information to identify and evaluate the risks involved in a proposal such as this.}\textsuperscript{147}
\]

Accordingly, the DMC concluded:

\[
\text{The DMC’s overall conclusion is that the information available to it on the application, while it met the EEZ Act’s definition of best available, was uncertain and in some areas inadequate.\textsuperscript{148} [...] To favour caution and environment protection [sic] would in this case mean that the proposal would be likely to be refused consent.}\textsuperscript{149}
\]

Having reached this conclusion, the DMC proceeded to consider adaptive management. In parallel with the \textit{TTR} decision, the DMC and the applicant were not able to agree on a viable adaptive management approach. The DMC considered a three stage programme – with the first stage being limited to information gathering only.\textsuperscript{150} CRP responded that such an approach would present unacceptable commercial risk, given the level of upfront investment needed to conduct even a trial period.\textsuperscript{151} As a consequence, the DMC declined the application.\textsuperscript{152}

\section{Issues with the Current System}

The EEZ Act as a whole represents a positive first step towards an effective management regime for New Zealand’s offshore resources. In this section, I will highlight areas of the regime that are contentious, or where some reform could better serve the Act’s sustainable management purpose. Where appropriate, I have supplemented this analysis with reference to the Australian regime for offshore minerals. Due to space constraints, I have not comprehensively analysed the Australian system. Instead, in assessing certain areas of the New Zealand framework, I have referred to relevant areas of Australian law that highlight either strengths or inadequacies in the New Zealand system.\textsuperscript{153} I have limited my comparative analysis to Australia, because its recent overhaul of its offshore minerals legislation makes it a useful counterpoint to the New Zealand regime.

\textsuperscript{143} Fisheries (Benthic Protection Areas) Regulations 2007 (NZ) reg 3.

\textsuperscript{144} CRP decision [717].

\textsuperscript{145} Ibid [731].

\textsuperscript{146} Ibid [823].

\textsuperscript{147} Ibid [824].

\textsuperscript{148} Ibid [826].

\textsuperscript{149} Ibid [827].

\textsuperscript{150} Ibid [847].

\textsuperscript{151} Ibid [850].

\textsuperscript{152} Ibid [930].

Australia regulates activities in ‘Commonwealth waters’ under the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth) (the ‘OPGGSA’). The OPGGSA and subsidiary instruments regulate the allocation of property rights and the environmental management and health and safety aspects of offshore activities. The key regulatory agency is the National Offshore Petroleum Safety and Environmental Management Authority (‘NOPSEMA’). NOPSEMA has responsibility for health and safety, structural integrity, environmental management and day-to-day operations associated with offshore petroleum activities. The Australian framework has recently undergone substantial reform in response to the 2008 Varanus Island pipeline explosion and Montara oil spill in 2009. These incidents highlight valuable lessons for New Zealand’s own development.

### 6.1 Composition of Decision Making Committees

The EPA to date has delegated all decisions to DMCs. There are no guidelines for the necessary qualifications and experience of the committee in the legislation. There is also no standing panel of decision makers for EEZ activities. Instead, the EPA appoints DMCs on an ad hoc basis, raising the concern that DMC members will not have an appropriate range of expertise. Some commentators have suggested replacing the current ad hoc approach with a standing board of inquiry dedicated to processing applications in the EEZ. The benefit of this would be to ensure that the body responsible for processing applications would have the necessary experience within its own ranks to assess information and impact assessments. On the other hand, the desirability of a full-time committee would need to be tempered by financial considerations. Given the comparatively low volume of applications, a standing committee could be an unnecessary expense. An appropriate compromise could be to adjust the EEZ Act to allow regulations as to the composition of the decision making body appointed by the EPA. This would ensure adequate expertise in areas such as geology, marine biology, Māori concerns, law, and planning and resource management.

### 6.2 Non-notified Applications

The original EEZ Bill did not contain provisions for non-notified applications. The non-notified consenting process came in through a supplementary order paper attached to the Marine Legislation Bill 2012 (NZ). The SOP was introduced after the Select Committee process, leading to criticism that there had not been enough of an opportunity for public comment. Section 29D of the EEZ Act now allows for regulations to classify discretionary activities as non-notified. The activity must have a low probability of significant adverse effects and must be routine or exploratory, or of brief duration, or a dumping activity. Regulations have classified activities related to exploratory petroleum drilling as non-notified. In 2014, DMCs appointed by the EPA approved applications by OMV and Shell Todd for marine consents to drill exploratory wells off Taranaki. The DMCs considered the environmental effects and potential economic benefits of the proposal and concluded that both proposals would achieve the purpose of the EEZ Act.

Unsurprisingly, the non-notified application process has raised objections. A key concern is that there is now no scope for public input into marine consent decisions for non-notified activities. This is not just restrictive in the sense of preventing the public at large from having its say about an application. The notification process also allows submitters to adduce technical and expert evidence on the application – which may challenge the evidence provided by the applicant. This runs the risk that the EPA will have to make the decision solely based on information submitted by the applicant, with no ‘second opinion’ in the form of evidence from submitters. The EPA does have the power to request additional information or commission an independent review of the

---

154 Under Australia’s Offshore Constitutional Settlement 1980, the Commonwealth has authority over the area of ocean from three nautical miles to the outer limits of the continental shelf: see Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth), ss 4, 5 (‘OPGGSA’).
155 Wawryk, above n 155, 54.
156 Ibid 53.
157 Hunter, above n 155, 604.
159 Palmer, above n 24, 143.
160 Wawryk, above n 155, 51.
162 Somerville, above n 157, 2.
163 EEZ Act s 29D(2).
164 Exclusive Economic Zone and Continental Shelf (Environmental Effects—Non-notified Activities) Regulations (NZ) reg 5. This regulation states that applications activities described in EEZ Act s 20(2), (4) that are related to exploratory drilling may proceed on a non-notified basis.
165 See OMV non-notified decision, Executive Summary, 2-3; Shell Todd non-notified decision, Executive Summary, 2-3.
166 Somerville, above n 160, 4.
applicant’s EIA, but this relies on the EPA being vigilant in exercising this power. In the OMV non-notified decision, the DMC considered that the information principles outlined in Section 61 empowered it to seek further information, as the applicant’s evidence alone may not have been sufficient. In both the OMV and Shell Todd non-notified decisions, the EPA requested further information from a variety of sources. Future DMCs should follow this example.

In favour of non-notified consents, the EEZ context is such that the same principles that underlie the RMA’s public participation element are not all present. Public participation under the RMA ensures that neighbouring persons who will be directly affected by a project can have an input. This direct neighbourhood or community interest does not arise in the EEZ context. The opposing interest falls more into the category of a wider overall environmental concern, which is perhaps best addressed through the EPA’s ability to call expert and technical evidence, rather than through a broad base of (potentially non-technical) individual submissions.

This is a fine line: the EPA cannot afford complacency in terms of uncritically accepting the information provided by applicants, particularly as the avenues for providing alternative evidence are so restricted. The Deepwater Horizon incident should be a sobering reminder of the catastrophic impact that can result, in the worst case scenario, from even exploratory activities. Removing the opportunity for public submissions reduces the scope for rigorous testing of applications. This in turn increases the onus on DMCs to use their information gathering powers to the fullest extent possible. Provided they uphold this obligation, the non-notified consent process may prove an acceptable compromise.

6.3 The Decision Making and Hearings Process

When deciding applications for activities in the EEZ, it is important that the decision making process is as comprehensive and transparent as possible. The stakes in the EEZ are high, with substantial potential economic benefits jostling with significant environmental risks. A sound process at the EPA level is of paramount importance because the application stage is the only point where parties can establish the substantive facts of the application: appeals to the High Court are only on questions of law. This means that applicants and submitters only have one opportunity to present and critique factual evidence.

The timeframe for hearings and decisions has emerged as a key barrier to an effective process. Hearings on notified applications are limited to 40 days. Decisions on notified applications must then be issued within 20 days of the hearing. The EPA must decide on non-notified applications within 50 days of the application being completed. Given the amount of material that must be processed, the complexity of the subject matter and the range of interests that must be represented, this is not an adequate timeframe. Writing on the similar Board of Inquiry process under the RMA, Michael Pickford notes that compressed time periods raise a number of problems. Submitters may not have enough time to read applications and evidence and formulate an adequate response. There will generally be time limits on the presentation of expert evidence and subsequent cross-examination, which may prevent submitters from exposing deficiencies in the evidence. Shifting timetables may mean that experts are required to prepare material at short notice. As a result, strict timeframes run the risk that crucial information will be omitted or that certain evidence will not be adequately tested.

The DMC in the TTR decision was particularly critical of the EEZ Act’s timeframes, stating that they were ‘a source of considerable challenge for all parties and for this Decision-making Committee’. The DMC also noted that the problems arising under the restrictive timeframes were exacerbated by the fact that the facts and opinions can only be tested at the DMC stage. The DMCs in the CRP decision and the OMV and Shell Todd non-notified decisions also referred to the time limits on decisions as a source of considerable “challenge” to those Committees.

168 EEZ Act ss 41(2), 42(1), 44.
169 OMV non-notified decision [76].
170 Somerville, above n 160, 5.
171 New Zealand, Parliamentary Debates, 15 October 2013, 13869.
172 EEZ Act s 105.
173 Ibid s 52.
174 Ibid s 68(1)(a).
175 Ibid s 68(2).
177 TTR decision [34].
178 Ibid [39].
179 See CRP decision [32]; OMV non-notified decision [32] and Shell Todd non-notified decision [40].
Strict timeframes could also inadvertently lengthen the entire consent process, by leading to appeals on grounds that could be avoided with a less restrictive timetable. In the TTR hearing, for example, counsel for the fisheries interests tried to introduce expert evidence in the late stages of the hearing process. The DMC declined to hear this evidence, citing procedural fairness. Counsel reserved their right to appeal on this particular point. This means that the EEZ Act’s interest in an efficient procedure could potentially create a minefield in terms of grounds for appeal on issues such as procedural fairness and natural justice. These grounds may arise where the DMC takes action such as excluding a witness or cutting short submissions in order to meet time constraints.

In the same vein, such strict timeframes may inadvertently increase the likelihood that the EPA will decline applications. Section 61 of the EEZ Act requires the EPA to favour caution and environmental protection in the event of uncertainty. If an applicant does not have adequate time to present its case, increased levels of uncertainty could be inevitable – meaning that the EPA will be more likely to decline the application. Referring to the TTR decision, industry commentators noted that the DMC and TTR could have agreed on conditions to allow the project to go ahead, if there had been more time to negotiate. Ironically then, the EEZ Act’s time limits appear to have impeded, rather than hastened, offshore mineral developments. These time limits have the rare, if dubious, achievement of raising the ire of environmental protection groups, industry lobbyists and the DMCs responsible for considering applications. A prompt revision of the EEZ Act’s timeframes would be in the interests of all concerned and lead to a higher quality process.

6.4 Standards of Evaluation

The overarching purpose of the EEZ Act is clear. The Act seeks to enable economic development, subject to a certain level of environmental protection. The key question under this heading is whether the standards applied by the EEZ Act are sufficient to achieve the Act’s purpose and to balance the complex factors at play in the EEZ. Developing offshore resources requires a nuanced approach to assessing risks and rewards. Activities in the EEZ give rise to multiple categories of risk. There is complexity in terms of linking causes and effects in offshore environments, scientific uncertainty in predicting the outcomes of offshore activities, and socio-political ambiguity as reflected in the range of viewpoints on whether New Zealand should continue to develop offshore minerals industries. These issues will undoubtedly become more pressing as offshore minerals become an increasingly lucrative economic prospects as a result of higher demand and improved technology.

Section 59 of the EEZ Act imposes a ‘shopping list’ of factors for the EPA to take into account. Broadly, these factors are environmental, social (including the impact on human health and other non-regulated activities in the area), economic (including the economic benefit to New Zealand and potential economic detriment to other interests) and legal (including other legal regimes, conditions of consent and best practice standards). There is also a catch-all category of any other relevant matter.

The list is fairly exhaustive and applies to a range of different interests that may be affected by activities in the EEZ. However, there is a potential risk that companies will tailor their applications to ‘tick the boxes’ listed in section 59. This could lead to applications that resemble information silos, with detailed technical material on specific issues, and less emphasis placed on a coherent and holistic assessment of the effects of the project as a whole. As a counterpoint, the International Seabed Authority’s 2013 Mining Code sets out a series of standards for the exploitation of seabed minerals. The Code appears to have a more unitary standard, which is ‘to ensure effective protection for the marine environment from harmful effects which may arise from the contractors’ activities in the Area’.

180 TTR decision [125]-[126].
181 Transcript of Proceedings, Trans-Tasman Resources Limited Marine Consent Application (Environmental Protection Authority Hearing, 1 May 2014) 2431.
183 These categories are outlined in Bruce Glavovic. ‘Disasters and the Continental Shelf: Exploring new frontiers of risk’ in Myron Nordquist and others (eds) The Regulation of Continental Shelf Development (2013) 225, 237-238.
184 EEZ Act ss 59(2)(a), (b), (d), (e), (g).
185 Ibid ss 59(2)(b), (c).
186 Ibid ss 59(2)(a), (b), (f).
187 Ibid ss 59(2)(b), (b), (i), (j), (k), (l).
188 Ibid s 59(2)(m).
189 Palmer, above n 24, 145.
190 Recommendations for the guidance of contractors for the assessment of the possible environmental impacts arising from exploration for marine minerals in the Area ISBA/19/LTC/8 (2013) [9(a)].
This ties in to a further potential weakness of the EEZ Act, in that it leaves the EPA with substantial discretion to approve or decline applications. The Act says simply that the EPA may grant or refuse the application.\(^{191}\) The EPA is permitted, but not obliged, to refuse consent if it considers that it does not have enough information.\(^{192}\) In the event of any uncertainty, the EPA must ‘favour caution and environmental protection’.\(^{193}\) Admittedly, on this point, the DMC in the \textit{TTR} decision considered that this was an absolute obligation that could not be “traded off” against potential economic wellbeing.\(^{194}\) However, even the information principles as they stand fall short of actually imposing a fixed threshold of environmental acceptability, because the EPA is not under an explicit obligation to decline consent if the applicant cannot meet a certain environmental standard.

The DMC’s discussion in the \textit{CRP} decision highlights this issue. During the hearing, counsel for the Environmental Defence Society submitted that the definition of ‘sustainable management’ in the Purpose section of the EEZ Act\(^{195}\) should be read as setting out environmental ‘bottom lines’ that must be observed.\(^{196}\) \textit{CRP}, by contrast argued that the EEZ Act was intended as a “resource and economic development statute” as opposed to an environmental protection statute. The DMC (having reviewed the Minister for the Environment’s speech during the EEZ Bill’s Third Reading) ultimately disagreed with both propositions:\(^{197}\)

From the above, the DMC concludes that the Minister was reflecting a position somewhere between the approaches of Mr Winchester and Mr Enright. As the words of the Minister imply, the intention was that the EEZ’s economic resource be unlocked in an environmentally responsible way that supports our clean, green reputation.

The Australian legislation offers guidance in this area. Under the \textit{Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009 (Cth)} (the ‘OPGGS Environment Regulations’), operators must submit an environment plan in order to carry out activities in Commonwealth waters.\(^{198}\) Regulators\(^{199}\) must accept the environmental plan if there are reasonable grounds for believing that, among other things, the environmental impacts and risks of the activity will be reduced to as low as reasonably practicable and of an acceptable level.\(^{200}\) If the regulator is not satisfied that the applicant has met these standards, and the applicant cannot amend its \textit{environmental plan} to the contrary in the \textit{DDC}’s assertion to the contrary in the \textit{TTR} decision.

The Select Committee deleted this pure cost-benefit approach.\(^{201}\) Despite this, the obligation to consider economic benefits under section 61(2)(f) may still implicitly condone a ‘sliding scale’ of environmental acceptability. Under the legislation as it stands, the EPA is permitted, but not obliged, to refuse consent if it considers that it does not have enough information.\(^{202}\) To an extent, the inclusion of section 61(2)(f) appears to be an environmental ‘bottom line’ that must be observed.

\(^{191}\) EEZ Act s 62(1).
\(^{192}\) Ibid s 62(2).
\(^{193}\) Ibid s 61(2).
\(^{194}\) TTR Decision [139].
\(^{195}\) EEZ Act s 10.
\(^{196}\) CRP Decision [44].
\(^{197}\) Ibid [48] (emphasis added).
\(^{198}\) Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009 (Cth) (the ‘OPGGS Environment Regulations’).
\(^{199}\) The regulator for petroleum activities is the ‘Designated Authority’. This appears to be the responsible State or Territory Minister, not NOPSEMA. See definitions of ‘Regulator’ in OPGGS Environment Regulations reg 4 and of ‘Designated Authority’ in OPGGSA s7. For an outline of the role of the Designated Authority, see Wawryk, above n 155, 52.
\(^{200}\) OPGGS Environment Regulations 11(1)(b), (c).
\(^{201}\) Ibid reg 11(3).
\(^{202}\) Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011 (321—1) (NZ) cl 61(2)(a).
\(^{203}\) Ibid cl 61(2).
considerations to the market. From a commercial point of view, allowing the EPA to assess economic factors runs the risk of the EPA acting as financial controller and declining applications on the basis that the project is not economically feasible. The EPA is a specialist entity whose function is to ‘contribute to the efficient, effective, and transparent management of New Zealand’s environment and natural and physical resources’. The result is the potential for the EPA to have conflicting roles in terms of enforcing environmental standards, but at the same time needing to consider economic benefits. The legislation could be more effective if the EPA were required to focus solely on assessing the environmental elements of an application.

Despite this, leaving economic considerations entirely out of the equation may be too extreme. A potential compromise could be a two-tiered system. At first instance, applicants would have to demonstrate that their project would meet a fixed standard of environmental protection, as proposed above. This would give the EPA a more concrete means of ensuring that the proposed activity would meet the Act’s purpose of sustainable management. There would be scope at this point for clear bottom lines in terms of levels of risk and the ability of applicants to respond if any aspect of the project were to go wrong.

Beyond this standard, economic benefits would still have a role in determining whether the application should still proceed, even if the applicant could demonstrably meet a minimum standard of environmental acceptability. Most mineral extraction activities in the EEZ will carry a level of risk. The EPA should still be able to consider economic and other benefits, to ensure that the potential rewards of the proposed project justify any actual or potential adverse effects on the environment. If the EPA were not able to consider these benefits, it would be forced to regard projects as environmental degradation with no upside. This proposed solution is not a major shift from the current system. The EPA’s discretion should be tempered, however, by a mandatory, non-negotiable standard of environmental protection.

6.6 The Information Principles and Adaptive Management

The EPA has declined the first two seabed mining applications under the new legislation. Uncertainty was a key factor in both the TTR and CRP decisions. In these decisions, at least, the EPA appears to have taken a relatively strong approach to the information principles outlined in section 61. This uncertainty about seabed mining contrasts with the first notified oil drilling applications. In the Shell Todd notified decision, for example, the responsible DMC confirmed that:

> We are satisfied that we have sufficient information regarding the risks of a hydrocarbon spill event. […] The overall environmental effects from a hydrocarbon spill on fish, zooplankton, marine mammals, seabirds and coastal ecosystems within close proximity to the spill, taking into account the nature and scale of those effects discussed above, and the low probability of such an event occurring, are likely to be negligible to minor.

For seabed mining at least, TTR and CRP’s experience with the new regulatory framework could dissuade companies from investing significant amounts of money in preparing EIAs. There seems to be a perception that the EPA’s standard has been set at a level that will impede the Government’s offshore resources programme. The EPA’s relatively narrow view on adaptive management could also be a cause for concern. Applicants may be left in a position where they must reduce the scale of their operations to a level that is not commercially viable in order to obtain consent. This could also be a barrier to investment in relatively new offshore industries such as seabed mining. The offshore petroleum industry, by contrast, has not faced the same issues to date.

---

204 Barton, above n 49, 212.
205 Environmental Protection Authority Act 2011 (NZ) s 12(1)(a).
206 Blue, above n 42, 166.
207 Shell Todd notified decision [341]. See also OMV notified decision [258].
208 ‘Seabed Mining Sets Very High Bar’ The New Zealand Herald (online), (23 June 2014).
6.7 Enforcement – What Happens When It Goes Wrong?

The spectre of a major offshore disaster looms large when evaluating the merits of offshore mineral extraction, especially oil. With oil drilling, an ‘uncontrolled blowout’ remains the worst case scenario. In the OMV and Shell Todd non-notified decisions, the responsible DMCs stated that the likelihood of such a blowout was ‘remote’, but the consequences would be ‘massive’ or ‘catastrophic’. This led to overall findings that the environmental risks would be ‘low’ and ‘medium’ respectively. The DMCs in the later, notified, applications by OMV and Shell Todd came to similar conclusions.

Despite the low probability of an uncontrolled blowout, such an incident is still possible. New Zealand’s response framework at present is fragmented, which reduces the capacity of agencies to effectively manage offshore incidents. At the root of the problem is the fact that the EEZ Act does not in itself contain a comprehensive disaster response framework.

6.7.1 The Environmental Protection Authority’s Enforcement Role

The EEZ Act gives the EPA some enforcement powers. The EPA may review the duration or conditions of a marine consent. The EPA can cancel a marine consent in extreme circumstances where new information comes to light and the activity has significant adverse effects. To ensure that operators comply with their obligations under the Act, regulations under the Act and their marine consents, the EPA may appoint enforcement officers. The EEZ Act empowers enforcement officers to inspect ships and installations involved in offshore activities. In the event of a breach, an enforcement officer may serve an abatement notice on the operator. This notice can prohibit an activity or threatened activity that contravenes the operator’s obligations. Alternatively, the abatement notice can require an operator to take some positive action to comply with its obligations or avoid, remedy or mitigate adverse environmental effects. At a higher level, the EPA or an enforcement officer or any other person can apply to the Environment Court for an enforcement order that requires the operator to comply with its obligations. The scope of the actions able to be ordered by abatement notices and enforcement orders appears broad. This suggests that there is considerable overlap with the more detailed emergency response powers available under the MTA.

Under the EEZ Act, it is an offence to carry out any activity that is not permitted or authorised by a marine consent. It is also an offence to breach an abatement notice or enforcement order. A company that commits one of these offences is liable to the $10 million maximum penalty under the Act, with additional fines for ongoing breaches. However, the Act does not have its own “polluter pays” sections to oblige operators to meet the costs of an environmental disaster.

6.7.2 The Maritime Transport Act 1994 Response and Enforcement Framework

The MTA contains detailed provisions for protecting the marine environment and responding to offshore accidents. The MTA is responsible for preparing New Zealand’s Marine Oil Spill Response Strategy. In the event of a spill in the EEZ, MNZ manages the response. MNZ appoints a National On-Scene Commander, with extensive powers to direct clean-up operations. A crucial aspect of the MTA framework is the ‘polluter pays’ principle. This essentially means that operators whose activities result in discharge of harmful substances will be liable to the Crown for all reasonable clean-up costs. In addition, operators will be liable in damages for any pollution damage they cause. The MTA has clear sections to ensure a strong response to an environmental disaster.

---

209 See OMV non-notified decision [153]; Shell Todd non-notified decision [209].
210 See OMV notified decision [258]; Shell Todd notified decision [341].
211 EEZ Act s 76.
212 Ibid s 81(3).
213 Ibid s 138(1).
214 Ibid ss 140, 141.
215 Ibid s 125(1)(a).
216 Ibid s 125(1)(b).
217 Ibid s 115.
218 Ibid s 132(1).
219 Ibid s 133(1)(b), (2).
220 MTA s 283.
222 MTA ss 305, 319.
223 Maritime New Zealand, above n 26, 21-22.
224 MTA s 385B.
225 Ibid s 385C.
disaster and to ensure that operators will be liable for any clean-up costs. The polluter pays principle is an important element of the framework, provided it can actually be enforced against operators whose activities cause large-scale damage.

In this area, New Zealand and Australia have developed similar provisions. The OPGGSA obliges title holders to control petroleum releases and remedy any resulting damage to the environment.226 If the title holder does not meet this obligation, NOPSEMA or the responsible Commonwealth Minister can take remedial action and pursue the title holder for the costs.227 NOPSEMA can also give directions to title holders in the event of ‘significant offshore petroleum incidents’.228 An interesting point of difference with the OPGGSA is that it appears to place a stronger initial obligation on the operator to remedy the situation before Government agencies step in. It also has a more explicit requirement to ‘remediate’ any environmental damage, where the MTA refers in more general terms to ‘dealing with’ discharges and liability for ‘pollution damage’.229 A more specific obligation to remedy the environment could be a valuable addition to New Zealand’s oil spill response provisions.

6.8 A Fragmented Regime?

During the exploration and production phases of an offshore minerals project, five organisations are involved in overseeing various parts of the process. New Zealand Petroleum and Minerals regulates prospecting and mining permits. The EPA issues marine consents. MNZ administers DMPs and essentially takes full responsibility for any clean-up operations. WorkSafe New Zealand evaluates health and safety processes. In the exploration phase, the Department of Conservation ensures that seismic surveying does not affect marine mammals.230 This is a key structural weakness in the current regime. The EEZ Act may have plugged an environmental gap, but it falls well short of creating the unitary, integrated system that is arguably needed for effective resource management in the EEZ. The drafters of the Act never intended to create such a system: at the EEZ Bill’s second reading, the Minister for the Environment noted that ‘[t]he bill is not about oil response, mineral allocation, marine reserves, fishing or shipping. These are all addressed under other legislation’.231

Despite this, the Act’s sustainable management purpose would be better served if the EPA took on a more multi-level role in overseeing offshore activities. The most obvious issue is the fragmentation between the EPA and MNZ in terms of assessing DMPs and in acting in response to a major oil spill. On three occasions, the EPA has effectively had to decide applications without full information, because it was not able to fully assess the relevant DMP.232 Admittedly, there appears to have been some progress in this area. In both the notified OMV and Shell Todd decisions, the EPA requested, and received, copies of the DMP.233

Although there appears to have been more co-operation between the EPA and MNZ on this issue, the fact that MNZ is not obliged to provide the EPA with the DMP is troubling. An uncontrolled blowout in the EEZ remains a significant, if improbable, environmental risk. For the EPA to grant consent without ascertaining whether an applicant is actually capable of responding to such an occurrence deeply contradicts the purposes of the Act, to say nothing of its information principles. It would be a logical step to put the EPA in charge of evaluating DMPs. As a dedicated environmental management agency, the EPA would have the necessary expertise to handle these plans, in addition to the other environmental assessment documents that are already under the auspices of the EPA.

This paper proposes extending the EEZ Act to create a single entity that handles the full process for extracting offshore resources. Permits should continue to be handled under the CMA regime, because this addresses the separate concern of allocation of property rights. Due to space constraints, I have not evaluated the current health and safety regime. A transfer of these functions from WorkSafe New Zealand to the EPA could also potentially be a desirable step.

Such measures would see the EPA taking on a role similar to that of NOPSEMA in Australia. It would be responsible for deciding marine consent applications, as it is now. In addition, it would also take on MNZ’s current functions in terms of assessing DMPs, creating emergency response frameworks and actually responding to

226 OPGGSA s 572C(2).
227 Ibid ss 572D, 572E.
228 Ibid s 576B.
229 Compare OPGGSA s 572C(2)(b) with MTA ss 385B(3), 385C(1).
230 Environmental Protection Authority, above n 72.
231 New Zealand, Parliamentary Debates, 30 May 2012, 2733.
232 Anadarko’s application as reviewed in Greenpeace v Environmental Protection Authority, the OMV non-notified application and the Shell Todd non-notified application.
233 See OMV notified decision [118]; Shell Todd notified decision [150].

(2016) 30 ANZ Mar LJ 62
offshore disasters. The MTA’s oil spill response and liability sections should be transferred to the EEZ Act, with authority for implementing those sections vested in the EPA.

The Australian framework provides a useful model in this regard. Australia has increasingly harmonised its regulatory approach to offshore activities, particularly in response to the Varanus Island and Montara incidents. These incidents highlighted the problem that a system with multiple regulators relies on each agency carrying out its functions in a competent way. Such a system can lead to inconsistencies of regulatory approaches and procedures.234 A more unified approach would not only address environmental concerns, but could also lead to benefits for the industry. Prior to the establishment of NOPSEMA, the Australian Petroleum Production and Exploration Association (‘APPEA’) argued strongly in favour of a single regulatory authority that would bring ‘a number of practical and administrative benefits’.235 APPEA also noted the ‘strong synergies’ between health and safety and environmental issues.236 The Australian framework as it stands represents a much more unified and comprehensive system for managing offshore resources. New Zealand should learn from Australia’s past incidents and consider adopting Australia’s more unitary approach in any future reform of the EEZ Act and other marine management regimes.

7 Conclusion

The recent changes to New Zealand’s offshore resource regime have called for a thoughtful and nuanced evaluation of complex questions of risk and reward. At the heart of this question is the interplay between economic, social and environmental concerns in a world of increasingly scarce resources. The EEZ Act has been a credible first step in addressing concerns surrounding the management of resources in the EEZ. The Act has largely succeeded in its purpose of filling an obvious void in New Zealand’s offshore regulatory regime. The marine consent process under the Act appears to have struck a sensible balance in terms of assessing risk and ensuring that offshore activities can proceed, but in a way that minimises their actual and potential impact on the environment. Guided by the Act, decision makers have been sensitive to the range of factors involved in evaluating proposals for economic activities in the EEZ. Despite this, the first decisions under the new system have exposed weaknesses in the regime.

The strict timeframes for decisions remain a point of contention and warrant prompt review. They appear unworkable from a commercial and environmental standpoint, as they do not allow decision makers the time to properly assess the effects of a proposal. A further omission in the Act is the lack of an explicit obligation on the EPA to decline marine consents if an applicant cannot meet a minimum standard of environmental protection. This obligation is implied in the Act’s information principles, but clarification on this point would be desirable in order to better ensure environmental protection. Such a standard could ease public anxiety about offshore projects, which continues to be a barrier to development.

The final issue is the very structure of New Zealand’s entire offshore management regime. As it stands, the EEZ Act only regulates part of the complex process for extracting resources and dealing with the aftermath if something goes wrong. There is fragmentation between the EPA and the various other bodies responsible for managing different facets of offshore activities. Recent consent decisions have revealed this tension. This fragmentation increases the risk that important elements of proposed activities will not be adequately considered, if the various agencies seek not to encroach on each other’s sphere of interest.

The creation of a single regulatory body responsible for all aspects of offshore activities would be a significant step towards making the EEZ Act a comprehensive and robust instrument to govern the development of offshore resources. This would have multiple commercial and environmental benefits. It would reduce the potential for regulatory overlap and ensure that uniform, predictable standards could be applied across the entire EEZ. Such a system would also avoid regulatory gaps. New Zealand should learn from Australia’s experience, which reveals the dangers inherent in a system with multiple regulatory bodies. It increases the risk that some aspect of an offshore project will slip through the cracks, leading to a preventable incident with large-scale environmental impacts. The scope of the EEZ Act and the EPA’s powers should be progressively extended so that the Act ultimately provides an effective resource management regime for all aspects of activities in the EEZ. Only then will the economic potential of this precious resource be realised in a manner that truly recognises the environmental value of our oceans.

234 Hunter, above n 155, 598.
235 Ibid 608.
236 Ibid 608.
The following collection of articles arose from a workshop held at Victoria University of Wellington’s School of Law on 25-26 February 2016, hosted by the New Zealand Centre of International Economic Law. The aim of this gathering was to discuss maritime law issues confronting the Asia-Pacific region, specifically those concerning maritime transport. This topic has received less attention than it deserves. First, because maritime law discussions tend to be dominated either by efforts at the international level, connected with the International Maritime Organization (IMO) and other global bodies, or by European and North American interests in particular. Second, because the maritime issues for which the region is most notorious tend to be those connected with disputed maritime boundaries, such as the South China Sea.

While global efforts towards uniformity are valuable, and territorial disputes will continue to loom large in the near future, the Asia-Pacific region’s shipping sector nonetheless faces a unique set of opportunities and challenges that should be the focus of more interaction and research. It is home to 12 of the world’s top 35 flag states, and 9 of the top 35 ship-owning states. Countries within this region such as Korea and China are major ship-builders; Singapore and Shanghai boast enormous ports; Australia and Indonesia have expansive coastlines; while the Pacific Islands struggle with poor maritime infrastructure and infrequent shipping services. Increased maritime traffic across the region has heightened environmental concerns, whereas initiatives such as China’s “One Belt, One Road” policy prompt deeper reflection on the nature of shipping connections between this region and the rest of the world.

Taking these matters into account, it might nonetheless be argued that the Asia-Pacific region is too diverse and divided for any successful efforts at regional cooperation in the maritime sphere. However, I believe the experience of this workshop suggests that we need to think harder, and more optimistically, in this regard. Henrik Ringbom’s piece on the lessons this region may be able to draw from the European Union’s efforts at regional cooperation highlights that much can be achieved without the need for “an EU-type powerful, constitutional, institutional or financial framework to be put in place”. A local example of where more might be achieved concerns Hong Kong’s efforts to curb air pollutions from ships visiting its port. As one of the four ports in the world “with the largest absolute emission levels” (the other three being Singapore, Tianjin, and Port Klang), Hong Kong has good reason to focus on emissions for environmental and health reasons. Therefore, after a disappointing level of success with a programme to have vessels voluntarily switch to low-sulphur fuels, in July 2015 Hong Kong brought into force a unilateral emissions regime for vessels at berth. However, the importance of shipping to Hong Kong’s economy means that if vessel operators face higher costs when trading there, the port may lose business to competitors in the Pearl River Delta such as Shenzhen and Guangzhou, while perpetuating air pollution within the same geographic area. It has been proposed that this situation is ripe for a level of regional cooperation, for example by having the area designated an Emissions Control Area by the IMO under Annex VI of the International Convention for the Prevention of Pollution from Ships (MARPOL). While any such
application would require a great deal of scientific and economic research, and law change within Macao and mainland China.³ Hong Kong’s position provides an illustration of why regional cooperation is worth exploring in the Asia-Pacific region. Once specific problems are isolated, and the common interests of the countries involved identified, a diverse and difficult situation can resolve into a more manageable path to reform. And in a region that has ongoing disputes over boundaries and security, a focus on maritime transport – on which all states are reliant for trade – may provide a useful basis on which to encourage cooperation and build goodwill.

Another means of analysing maritime law in the Asia-Pacific is to determine the extent to which various countries are engaging with the IMO-led conventions that characterise much of international maritime law, and assess any region-specific factors that may be hindering deeper engagement. In this vein, Craig Forrest examines the current state of preparedness within South East Asia for transboundary marine pollution, highlighting some “startling gaps” in the regional coverage of otherwise widely-ratified conventions such as the Oil Preparedness, Response and Co-operation Convention.⁴ An example of the kind of decision-making that leads to such gaps is analysed in my article on New Zealand’s lack of engagement with the air pollution standards of MARPOL Annex VI,⁵ while a different form of challenge is outlined in Chen-Ju Chen’s contribution addressing Taiwan’s position in respect of port state control.⁶ Due to its lack of engagement with the IMO, connected with its uncertain status under international law, Taiwan has had to be innovative in the way it goes about engaging with internationally-agreed maritime regulatory standards to match what the rest of the region does under the auspices of the Tokyo Memorandum of Understanding on Port State Control.⁷

A different perspective on this theme is given by Shan Hong Jun and Liang Yun in their article on the “openness and inclusiveness” of Chinese maritime law, demonstrating how China’s maritime law – and the 1993 Maritime Code in particular – has evolved to incorporate a wide range of international influences.⁸ For example, in the carriage of goods context, China has borrowed from both the Hague-Visby and Hamburg Rules to create a hybrid regime.⁹ The likelihood of a similar approach continuing to be applied is highlighted by James Zhengliang Hu and Siqi Sun, who suggest that China’s law on the carriage of goods by sea needs updating, but do not advocate for the wholesale adoption of the Rotterdam Rules.¹⁰ Instead a hybrid regime that follows international commercial practices, while continuing to meet the particular needs and priorities of Chinese business is seen as preferable.¹¹

Domestic law reform is also the subject of Souichirou Kozuka’s article, focusing on Japan’s ongoing work towards the reform of its maritime code of 1899. Japan’s attitude towards the incorporation of international maritime conventions into its domestic law is complex, with a tendency to borrow from uniform law without necessarily acceding to the instrument at the international level.¹² The extent to which Japan’s approach in this regard through the current reform project remains to be seen, but it will no doubt provide an interesting model for China to examine when the time comes to reform its own maritime code, given the similarities between the two countries’ method of engaging with the commercial aspects of international maritime law.

The final paper in the series, from Poomintr Sooksripaisarnkit, approaches the theme from a case law perspective, questioning whether Hong Kong’s courts are growing increasingly comfortable with taking some steps away from English precedent when deciding admiralty cases. Drawing comparisons with related Australian and New Zealand decisions, he argues for example that the Hong Kong courts have been right to take a more independent approach.

---

⁷ Memorandum of Understanding on Port State Control in the Asia-Pacific Region (Tokyo MOU), 1993.
in respect of recent cases involving the relationship between *in rem* and arbitration proceedings, and the piercing of the corporate veil in the admiralty context.\textsuperscript{18} His article reminds us that it is not only through legislation that the Asia-Pacific region’s approach to maritime law should be assessed, but also through countries’ attitudes to dispute resolution and the way in which their courts go about interpreting and developing the law. In this regard Shan and Liang have pointed to the growing caseload of China’s specialised maritime courts, and the Chinese Supreme People’s Court’s use of guidance cases to resolve ambiguities in aspects of China’s maritime law.\textsuperscript{19}

The workshop received generous support from both the Maritime Law Association of Australia and New Zealand (MLAANZ) and the New Zealand Law Foundation. I am incredibly grateful to these organisations for their commitment to scholarly research, and the value they place on enabling this research to be shared with a wider audience. I would like to thank Rozina Khan for her tireless assistance in organising the event, and my student James Kim for his assistance during the workshop, especially in providing participants with a scene-setting overview of the region’s maritime sector. Tom Broadmore, Piers Davies, Chris Griggs, and Joanna Mossop were excellent workshop participants, bringing their deep and diverse maritime law experience to bear following each presentation. Professor Jay Batongbacal graciously shared his insights on the marine environmental implications of China’s One Belt, One Road initiative with us. Professor Craig Forrest, along with his student editors Zack George and Erin Gourlay, have provided marvellous support during the publication phase. Finally, I would like to thank my colleague Professor Susy Frankel for guiding me through my first experience of running an academic event.

The articles collected here will play their part in bringing a scholarly perspective to the maritime law issues confronting the Asia-Pacific region, and in demonstrating the opportunities for ongoing study in this field. There is still much more to be done in this respect, and my hope in organising this project has been to develop some momentum for further cooperation.

Bevan Marten
Wellington, June 2016

\textsuperscript{18} Poomintr Sooksripaisarnkit, ‘Recent Admiralty Decisions in Hong Kong - Are the Courts Ready to Deviate from Their English Predecessors?’ (2016) 30 *Australia and New Zealand Maritime Law Journal* 134.

\textsuperscript{19} Shan and Liang, above n 13, 109-111.
THE EUROPEAN UNION AND INTERNATIONAL MARITIME LAW – LESSONS FOR THE ASIA-PACIFIC REGION?

Henrik Ringbom*  

1 Introduction

The European Union (EU) has established itself as a key player in international maritime regulation in a relatively short space of time. In 30 or so years it has proceeded from being a group of states with their own national policies and preferences on maritime matters to a region where shipping is highly regulated and international actions closely coordinated.

The process has not been problem-free, and certainly not unanimously endorsed by its own member state representatives in the maritime sector. The EU’s entry into the maritime policy-making arena has sometimes been likened to the infamous bull’s entry into the china shop. However, with more than 40 legal acts in place and an impressive constitutional and institutional apparatus to make sure these rules are implemented and enforced, it seems uncontested that the EU by now is a key international player in almost any aspect of maritime regulation.

The EU’s role and rules in maritime regulation illustrate that regional rules in shipping need not necessarily be in violation of international law and need not even require a very heavy institutional structure in their support.

In view of this, this article asks whether a similar development towards increased regionalisation could be an option for other maritime regions in the world, in particular the Asia-Pacific region. The focus is purely on the legal and administrative feasibility, rather than the desirability, of such a development.

In order to explore this matter further, the article begins by making some general observations on regional rule-making in shipping and on the EU’s regulatory role (section 2). The latter half of the text (section 3) includes a closer examination of five different examples of how the EU maritime policy operates in more detail, in particular as regards their relationship to the IMO rules. The nature of the measures, the applicable restraints and the transferability to the Asia-Pacific region is briefly discussed for each measure, while section 4 offers some concluding remarks of a more general nature.

2 On the EU’s shipping policy

2.1 General

The EU, like the Asia-Pacific, is heavily dependent on maritime transport. It consists of 28 Member States, all of which are members of the IMO and most of which have a considerable coastline and/or fleet. Added to these are the three states parties to the European Free Trade Agreement (EFTA) (Norway, Iceland and Lichtenstein) that are linked to the EU internal market through the ‘European Economic Area’, which are also subject to the shipping rules of the EU.

In terms of numbers, 90 per cent of the EU’s external freight, and more than 40 per cent of the internal trade in the region, is seaborne. Around one third of global shipping has an EU port as origin or destination. The EU/EEA states are also significant flag states. 25 per cent of the world tonnage is registered in and flying the flag of an EU/EEA Member State, but the share of the world’s tonnage that is controlled by EU interest is estimated to be around 40 per cent and increasing.1 These figures are not dramatically different from those of the Asia-Pacific region.2

However, it is uncontested that shipping is a highly international business and therefore needs global rules to govern it. Not only is the geographical scope of the activity global, as ships travel the whole world, but operators may also easily choose the jurisdiction of their operations by more or less freely choosing the flag state of their

---

* Professor II, Scandinavian Institute of Maritime Law, Faculty of Law, University of Oslo, Norway; Adjunct Professor (Docent) Department of Law, Åbo Akademi University, Turku/Åbo, Finland


ships. In addition, there is a very strong tradition of rule-making at global level, i.e. at the IMO, and correspondingly very little tradition of regional regulation. The privileged status of the IMO is recognized in the ‘Constitution of the oceans’, the 1982 UN Convention on the Law of the Sea (UNCLOS), where the minimum limits of flag state regulation and often also the maximum limitation of coastal state legislation is referenced by means of “generally accepted international rules and standards”, often coupled with the specification “adopted by the competent international organization” (in the singular).

This starting point is strongly backed up by political realities. The international maritime community carefully monitors and reacts against what is regarded as ‘unilateral tendencies’ by individual states and regions. Efforts to impose non-global regulatory burdens on international shipping do not pass unnoticed and will generally give rise to controversies.

2.2 The different ‘faces’ of the EU maritime regulator

The characterization of the EU’s role in shipping and its contribution to maritime regulation is complicated by the fact that Union has several, rather different, roles and displays different ‘faces’ under these roles. To simplify, its maritime activities may be divided into two main strands.

The first strand stands closer to the original purpose of the European (Economic) Community, which was about the integration of markets, ensuring the freedom movement of goods, services, persons and capital between member states and the liberalization of markets. Maritime regulation in this field started in the mid-80’s, as part of a general strengthening of the single European market. In this area, the EU generally has acted as a facilitator, a body that assists the shipping industry in liberalizing trade and opening up new markets, both within the Union and abroad through bilateral agreements with selected third countries. In this role, the EU is accordingly a ‘friend’ of the region’s shipping industry; it fights restrictive market practices around the globe and takes measures to ensure a fair competition at home, including by outlawing unduly favourable state aid by EU governments.

The second strand of activities, which is the focus of this article, relates to maritime safety (including maritime security and environmental protection). This activity took somewhat longer to emerge as an independent policy objective for the EU, and it was only following some major oil tanker accidents in the region in the early 1990’s that the first policy and detailed action programme for maritime safety could be agreed upon. Since then the development has been exponential and the EU’s maritime safety policy by now includes more than 50 binding rules (directives and regulations) covering the whole range of maritime safety matters, from port state control, classification societies to crew training and social conditions on board; from special safety requirements for passenger ships and oil tankers to rules on liability and compensation etc. In addition, a European Maritime Safety Agency (EMSA) has been established to assist the EU and its Member States in the field, while at the international arena the EU is acting as an evermore coordinated region with pre-agreed positions and policy objectives for most regulatory issues in the field.

In these maritime safety-related activities, the EU has tended to side with its (coastal) population and with environment and sustainability values rather than with the interests of shipping companies, despite the very significant flag state interests of its member states. Its activities in this field encountered considerable opposition among industry and member states with large shipping interests, at least in the early phases, but the opposition was not strong enough to withstand political pressure from serious environmental or passenger ship accidents.

Finally, when speaking about the EU, it should be borne in mind that the EU is composed of several different institutions, who have different views, roles and ambitions when it comes to policy and regulation, including shipping regulation. In a simplified format, the setting is the following. Three EU institutions are important in the legislative process. The European Commission is the ‘watchdog’ of the EU, with a responsibility for ensuring that EU rules, once adopted, are effectively implemented by the member states and it has been given broad powers to exercise this function. The Commission has the right of legal initiative and is the body that proposes legislation and undertakes the necessary background work in its support. However, the adoption of the legal act, whether in the form of a directive or a regulation, is done jointly by the other two main institutions, the European Parliament, consisting of 751 directly-elected Members and the Council, where each Member State is represented.\(^7\)

---

\(^{3}\) E.g. UNCLOS Articles 94, 21(2) and 211(5)

\(^{4}\) See e.g. UNCLOS Article 211(5)

\(^{5}\) The Common Policy for Safe Seas (COM(93)66 final). The policy was particularly inspired by the Aegean Sea accident outside La Coruña, Spain, in 1992 and the Bræger in the Shetland Islands, UK, in 1993.

\(^{6}\) See e.g. H. Ringbom, The EU Maritime Safety Policy and International Law (Brill, 2008).

\(^{7}\) On the ordinary decision-making procedure, see Article 294 of the Treaty on the Functioning of the European Union (TFEU).
2.3 The Different Tasks

In view of the fact that the emphasis of maritime regulation lies at global level, there are essentially three main types of actions that may be taken by a regional body wishing to establish itself in the domain. All three paths have been explored and utilized by the EU, but not all of them are equally available for other regional organizations or groups of states.

2.3.1 Co-ordination

First, the regional body may co-ordinate its approach at the international level in order to improve its chances to achieve its policy objectives at the international level. This particular approach has been increasingly diligently pursued by the EU in the maritime field. While this practice was much more informal and randomly implemented in the early years of the EU maritime safety policy, it has been significantly strengthened and formalized since the turn of the Millennium. By now, the EU member states spend considerable time in jointly elaborating EU-wide positions for almost any matter of importance prior to almost all IMO committee meetings.

The strong coordination at EU-level ahead of all major IMO meetings creates a dilemma for the member states. They have to choose between the unquestionable benefits in achieving the desired results at IMO that co-ordination among 28+3 states brings about and the limitation of sovereignty that such co-ordination inevitably entails. On the other hand, the EU member states do not have much of a choice in this matter, as the European Court of Justice already in the early 1970’s established the so-called ERTA doctrine, under which EU member states lose the competence to negotiate at international level matters which may affect acts of EU legislation or alter their scope. Once an EU act is adopted, competence for international negotiations in the field covered by that act is hence transferred from individual member states to the EU as such. This principle has been tightly implemented by the ECJ in the maritime field in the past decade.

While any group of states will probably benefit from prior co-ordination of positions ahead of international negotiations in matters that concern them, the EU-model is not easily exported to other regions. A very strong constitutional and institutional backing is probably a condition for the rigid approach that the EU is currently implementing. It may also be questioned whether all the efforts put in the EU coordination today are necessary and worthwhile. It is by no means excluded that a less formal approach focusing the co-ordination on key issues only might be more productive in achieving results, not least as it might free up resources for more discussions with other stakeholders and states outside the EU.

Other maritime regions, such as the Asia-Pacific, therefore have few reasons to copy the EU’s way of coordinating its position ahead of and at IMO meetings. They would probably do better limiting any prior co-ordination of matters discussed at IMO to high priority matters of mutual interest and concern, focusing on the potential benefits of co-ordination while ignoring the stick which has been used in the EU to foster discipline among its member states.

2.3.2 Implementation

A second way for a regional body to establish its presence in the regulatory arena is through a joint or harmonized implementation of the international rules in the region. To some extent this is already practiced among maritime regions around the world through regional port state control arrangements.

A more far-reaching application of this principle, which has been widely practiced by the EU, is to adopt common implementing legislation for the whole region. In fact the overwhelming majority of maritime safety requirements in EU law are copies of rules that already exist at international level, usually in one of the main IMO conventions such as SOLAS, MARPOL or the STCW. The method may not be very interesting from a political or international law point of view, but it is a very powerful and useful method to ‘give life’ to the IMO conventions.

---

8 Case 22/70, 1971 European Court Reports (ECR) 263.
9 In Case C-45/07, 2009 ECR I-701, Greece was deemed to have violated EU law by submitting a document relating to maritime security, even if the content of the document was not as such contrary to an act of EU legislation.
10 For a list of the current 11 port state control regions, see e.g. www.imo.org/en/OurWork/MSAS/Pages/PortStateControl.aspx. See also section 4.1 below.
Merely copying international rules at EU-level is, in other words, far from a meaningless exercise. First of all, it is a method for harmonizing the rules within the region irrespective of formal adherence to the international rule in question. Secondly, by bringing the substantive rules into the EU legal order, the full power of the EU legal machinery is brought in to help assuring implementation of the international rules. Features such as direct applicability (or direct effect) of EU law and its supremacy over national laws will raise the legal status of the rules concerned and widen the range of persons who may rely on it. This is particularly so as EU rules will normally distribute the obligations concerned directly to the persons addressed in the conventions (such as ship masters, classification societies, companies etc.) without relying – as the IMO conventions do - on the flag state to implement these matters in their national systems. Thirdly, the absence of legal ‘teeth’ of public international law against non-complying states ceases to be a problem if the requirement is also adopted at EU-level. The Commission supervises that rules are complied with and may, if not, bring member states to court. Member states may even face lump-sum penalties for non-compliance with EU law requirements. Finally, based on the ‘ERTA principle’ mentioned above, the adoption of EU rules will also affect the division of competence between member states and the Union and hence the organization of future international negotiations on the topic.

It is obvious that this latter type of regional implementation (by means of common implementing rules for the region) is only an option for regions with a very strong law-making and institutional infrastructure, which seriously limits its potential for being utilized elsewhere than in the EU for the time being.

2.3.4 Regulation

Finally, the region may also decide to be active in the prescriptive field, by adopting its own substantive rules alongside the international ones. If those rules exceed what is agreed at the international level, the regional rules will quickly be confronted with various limitations imposed by international law, and the law of the sea in particular.

It should be noted at the outset that regional organizations or other groupings of states have no legal advantage over individual states in this respect. The jurisdictional limitations for a single state wishing to impose its national rules on foreign ships are the same as those that apply for a region. For the EU, this starting point is not altered by the fact that the EU is a contracting party to UNCLOS in its own right.

The only legal solution which clearly supports legislation that exceeds global standards is for states to adopt the rules in their capacity as flag states. That, however, is likely to prove counter-productive since national rules will negatively affect the competitiveness of the state’s own fleet and may lead to flagging out. States are accordingly generally reluctant to impose requirements of this kind. Only five of the more than 40 EU maritime safety legal instruments are directed exclusively to ships flying the flag of a member state. In order to be effective, the regulation needs to cover ships irrespective of their flags. Yet, imposing national rules on ships from any nationality that merely navigate in the coastal waters of a state is more or less ruled out by the provisions of UNCLOS. This possibility is foreseen only for ships within the internal waters of the state, which are subject to the sovereignty of the coastal state. Beyond that, national rules are only permissible with respect to rules that do not relate to the construction, design, equipment and manning within the territorial sea and even they must not have the practical effect of denying or impairing foreign ships’ right of innocent passage. Beyond the territorial sea, unilateral coastal state legislation is essentially ruled out. Consequently, only very few of the EU rules target ships that merely transit the coastal waters of a member state.

Any regional ambition to regulate shipping will hence inevitably be closely connected with the legal constraints imposed under the law of the sea. The way around such constraints for the EU has been to focus its legislation on ships of any nationality that (voluntarily) enter a port (and internal waters) within the Union. For these situations, UNCLOS is considerably less prohibitive. Apart from certain general indications that confirm a right for port states to impose requirements on foreign ships, the limits of how far a (port) state can go in this respect is left to general international law. While it is widely accepted that international law does not include a right of ships to enter foreign ports (and a fortiori hence that port states may impose conditions for such access), the limits of such

---

12 TFEU Article 260  
13 A relatively recent example is Directive 2009/21 on compliance with flag state requirements. See also Ringbom, above n 6, chapter 4.  
14 UNCLOS Article 2(1).  
15 UNCLOS Article 21(2).  
16 UNCLOS Article 24(1)(a).  
17 UNCLOS Article 211(5), (6).  
18 UNCLOS Articles 25(2), 211(3) and 255.
requirements are not very clear. Subject to specific treaty limitations that may place limitations on the port states’ liberties in this respect, general international law only offers certain general reasonableness criteria as limitations. Port entry requirements may, for example not be discriminatory or constitute an abuse of right. They must be adopted in good faith and shall be proportional to the objective they seek to achieve. However, apart from this kind of general considerations, there are few concrete limits, which means that port states have considerable latitude in deciding on the content of such requirements. This latitude has been widely utilized by the EU and the clear majority of maritime safety rules that include some form of unilateral requirements are in the form of port entry requirements.20

The real difference between an individual state and a regional grouping seeking unilateral solutions has to do with size, rather than law. A small state that adopts strict conditions on ships entering its ports will be very vulnerable to the result that ships avoid that port and start using one in more lenient a neighbouring state instead. If the state is very big, or several states act in concert that risk will be reduced, which is probably the key explanation to why it is so far mainly the USA and the EU that have been active in exercising port state jurisdiction over foreign ships. In the Asia-Pacific region, it is primarily Australia that has occasionally implemented this type of requirements.21

2.4 Content of the EU rules

A second general parameter which is relevant to assess when discussing the EU rules relates to their relationship to the global (IMO) rules. Shipping is highly regulated at the global level and only very few of the EU’s maritime safety rules introduce entirely new substantive issues. Rather, as was already noted, the main part of the EU rules represent different applications of global rules that have already been adopted. Apart from that, the EU rules sometimes extend beyond the substantive requirements of the IMO rules and it is these parts, however small the divergence might be, that have received most attention. The way of exceeding the international rules may vary, and it is possible to discern a pattern towards greater independence from the global requirements over time. While in the 1990’s it was still controversial to implement international rules that were not yet in force22 or were only adopted in a non-binding format,23 some other rules begun to improve perceived gaps in the international rules. Around the turn of the Millennium, following important accidents such as the Erika and the Prestige, the EU rules began to represent more direct challenges of the IMO rules. The main example is the accelerated phasing out of single-hulled tankers,24 other controversial examples include the introduction of EU-based (criminal) penalties for violations of ship-source pollution.25

Similarly, the enforcement measures have become more harsh over time. While early sanctions for non-compliance included the detention of the ship, later measures include the banning of a particular ship from all EU ports, even on a permanent basis.

It should be observed, however, that in the past decade, the EU rules have not continued to challenge their global counterparts. On the contrary, most EU rules that have been adopted in this period, including the so-called ‘third maritime safety package’ in 2009, have not challenged IMO rules and have not raised major controversies from the point of view of international law. The most recent example relating to greenhouse gases from 2014 may signify an end to this trend, however.

The reasons for such a slowdown in legislative activism are to be found at many areas, but the following three development seem particularly relevant. Firstly, there have been no major shipping accidents or pollution incidents in EU waters in the past decade and hence not the same type of political pressure to act as in the early years of the Millennium. Secondly, the rapid enlargement of the EU along with a variety of other more pressing concerns for the Union has promoted moderation in the EU’s legislative activity more generally, which is clearly visible also in shipping. Thirdly, the EU’s substantive competence in maritime matters has grown considerably in

---

19 UNCLOS Article 300.
21 Examples include Australian Maritime Employment Legislation, Ballast Water Management requirements and the rules on mandatory pilotage in the Torres Strait. See also Marten, above n 20, 100, 105 and 161ff. with further references.
22 E.g. Regulation 305/95 on the safety management of roll-on/roll-off passenger ferries (ro-fo ferries).
23 E.g. Directive 2001/96 establishing harmonised requirements and procedures for the safe loading and unloading of bulk carriers.
24 Regulations 417/2002 and 1726/2003 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers.
the past decade, notably through the establishment of the European Maritime Safety Agency with more than 200 employees to assist the Commission and member states in technical matters. Through this a more technical dialogue with member states has been established, which by its nature is likely to prevent legislative initiatives which are completely at odds with IMO policies.

3 Five Examples

3.1 Port State Control

The EU Directive on port state control (PSC), which was originally adopted in 1995 and has since been amended a number of times, is probably the single most important EU regulatory measure in terms of affecting the standards of ships visiting the region. In substantive terms, the directive has always followed closely the provisions of the Paris MOU, which is the collaborative framework by a number of mostly European maritime administrations. The focus is on the implementation of international (IMO and ILO) maritime safety rules, which neutralises much of the potential political sensitivities linked to regional controls.

The main added value of EU legislation in this field is that the more solid legal basis of an EU directive strengthens the legal obligation and the commitment and permits the EU to introduce stronger enforcement measures with respect to non-complying ships or member states. For example, already in 1995, the possibility to (temporarily) ban ships from accessing any EU port was introduced as a sanction for ships that had been ordered to go to a repair yard but had failed to do so. Since then, the enforcement measures have been gradually strengthened and banning is now almost routinely employed against non-complying ships with a poor inspection record and may in extreme cases even be imposed on a permanent basis.

Member states that do not meet their inspection obligations will be subject to legal proceedings in the EU legal system. Up to now the Commission has already initiated a series of infringement proceedings against member states that have not implemented the PSC Directive properly, some of which have resulted in judgments against the member states.

Another important consequence of the EU’s involvement in PSC is that significant resources have been invested in maintaining and modernizing the regime in terms of data bases and other supporting systems such as training programmes for inspection officials. The introduction of the new database THETIS in 2011 paved the way for an entirely new inspection regime, which is based on an 100% EU-wide inspection commitment, rather than a national commitment to inspect 25% of the visiting ships. The new inspection regime targets high-risk ships, based on statistics of the ship and its operator, and accordingly provides less liberty for member states in selecting the ships for inspection.

In the Asia-Pacific region, port state control is based on the Tokyo MOU, which is another well-established PSC region based on decades of close co-operation among maritime administrations in the region. However, the Tokyo MOU regime has not developed as much as the EU system in terms of enforcement, inspection obligations and support infrastructure, which can at least in part be explained by the absence of a firm legal framework to support the implementation of such developments. On the other hand, a legal framework alone, such as a formal PSC convention in the region may reduce flexibility of the process without clear benefits. The EU experience suggests that it is the overall institutional structure and legal apparatus – together with the financial resources - which has created the internal discipline and incentives necessary for taking PSC to another level. In the absence of such institutional backing, the present form of administrative cooperation might very well be the optimal for the Asia-Pacific region.

---

26 Directive 95/21/EC concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (port State control).
27 See www.parismou.org. Some non-EU states, such as notably Canada and the Russian Federation, participate in this regional PSC scheme.
29 Directive 2009/16 on port state control, Article 16.
31 See e.g. Case C-315/98, Commission v. Italy 1999 ECR I-8001.
32 See https://portal.emsa.europa.eu/web/thetis/home
33 Directive 2009/16 on port state control. See also the list of currently banned ships at https://portal.emsa.europa.eu/web/thetis/refusal-of-access
3.2 Double Hull Tankers

The second example of EU activities in maritime safety is the construction requirements for oil tankers. The EU very suddenly became active in this field following the sinking of the tanker Erika outside France in 1999. In a period of unprecedented political and public pressure on the EU to regulate this matter in the early years of the Millennium, it was proposed - and eventually approved - that only double-hulled tankers should be allowed to enter EU ports from a certain date, on the basis of a specific phasing-out scheme for single-hulled tankers. The crucial issue from a political and legal point of view relates to the relationship between these rules and the IMO’s scheme for phasing-out single-hulled oil tankers that had been agreed in the Convention for the Prevention of Pollution from Ships (Marpol) earlier.

Following the Erika accident, the EU introduced a phasing-out timetable that corresponded closely to that applying in the USA under the 1990 Oil Pollution Act and was, hence, faster than the corresponding IMO regime. Unlike the US scheme, however, the EU maintained the international technical rules and definitions on the construction of oil tankers as laid down in Marpol. This ‘unilateral’ European schedule was potentially very controversial. However, in the end the rules did not give rise to a conflict with the international rules, since Marpol was amended at IMO in parallel to incorporate the EU requirements, subject to some minor compromises which were eventually accepted by the EU. Once EU Regulation 417/2002 entered into force, it therefore corresponded to the amended international rules.

Not long after the entry into force of that Regulation, however, the next major oil tanker incident involving an ageing single-hull tanker occurred in EU coastal waters. The sinking of the Prestige prompted the Community to revisit its phasing-out scheme in order to match it more closely with that originally proposed by the Commission. The revised EU Regulation 1726/2003 included a tighter phasing-out schedule than its predecessor and also introduced construction requirements for ships carrying heavy grades of oil. This time, the adoption of the EU Regulation was not linked to a corresponding amendment of Marpol. It entered into force while international negotiations to re-amend Marpol were still on-going and the two phasing-out schemes remained at odds until the Marpol amendments entered into force on 5 April 2005, some 18 months after the entry into force of EU Regulation 1726/2003.

The a priori banning of certain categories of ships from access to ports is a relatively simple measure in administrative terms. It does not require much monitoring and enforcement infrastructure by the port states and it is fairly easy to control. It is also a very effective measure in terms of impact since a ship that is barred from entering the ports of a whole region is in practice largely prevented from sailing in that region altogether.

However, a mismatch between the IMO rules and regional requirements is problematic from a political and a legal point of view. In terms of international law, the key issue is how far port states may go in placing access conditions on foreign ships. While conditions relating to ‘static’ aspects of the ship, such as its construction or design are the most disruptive to trade, since the ship cannot easily change those features, they are – paradoxically – fairly easy to justify in jurisdictional terms. As the requirements will be breached while the ship is in port or within the internal waters of the port state, where jurisdiction is complete, there is a fairly clear prescriptive jurisdictional basis for the access requirement. Moreover, simply refusing a ship access to the port is – again paradoxically – easier to justify in jurisdictional terms than letting it in and issuing other types of sanctions, such as fines. As was noted above, it is widely acknowledged that ships do not have a right of access to foreign ports under international law and, save in the case of specific treaty obligations to the contrary, a state’s right to refuse – or place conditions on – access for foreign ships to its ports is mainly limited by general principles linked to the reasonableness of the action.

In view of this, it would seem legally and practically feasible for the Asia-Pacific region to agree on a similar joint access conditions for certain categories of ship, should a need for that arise. The measure could be applied within the region as a whole or by a selected group of states only. However, the policy implications of regional rules on shipping should not be under-estimated. The international protests and concerns expressed against the EU double hull rules suggest that any such measure should be handled with care. Moreover, as is evidenced by WTO case law, the efforts made to achieve global rules before adopting unilateral rules may very well play a role also for the lawfulness of the unilateral measure.

34 The Oil Pollution Act of 1990 (33 U.S.C. 2701-2761), section 4115.
35 See regulations referred to in note 24 above.
36 See Ringbom, above n 6, 328-341.
37 See e.g. the report of the Appellate Body of the WTO Dispute Settlement Body in the US-Shrimp Implementation, WTO Doc. WT/DS58/AB/RW, at [134].
3.3 **Passenger ships – inventing the notion of a ‘host state’**

A third example of EU measures in the field of maritime safety that may be of interest for other regions relates to the concept of the ‘host state’, which the EU introduced for the safety of passenger ships following a series of high-profile passenger ship accidents in Europe in the mid 1990’s.

The term ‘host state’ is intended to bridge the gap between the flag state’s strong regulatory control over ships and the port state’s much weaker control, when it comes to shipping services of particular importance for the port state. The carriage of passengers on regular routes to or from a member state, in particular, has been considered too important to be left only to be controlled by a flag state, which may be only very remotely linked to the ship, and the sporadic controls by the port state. The main example of an instrument making use of this term is the Directive 1999/35 which applies to ro-ro passenger ships in regular services to or from an EU port. Broadly speaking, the directive equates the rights and obligations of a host state with those of a flag state for the particular ship services concerned. Among other things, it introduces a mandatory annual in-depth inspection of the ship by the port state as a *sine qua non* for the permission to trade on a regular basis to and from EU ports. The prescriptive rules to be complied with include both IMO and certain regional rules relating to safety, accident investigations etc.

Interestingly, the Directive also calls for certain commitments to be made directly by the ship’s operating company. In this way the role of the operator of the ship is emphasized and that of the flag state is correspondingly reduced. This also serves to de-emphasize the law of the sea elements of the rules and rather points towards a scheme where the state licenses parties to operate the service, along the lines which is used in internal ‘cabotage’ trade in many countries.

The term ‘host state’ does not exist in the law of the sea at all, but features in certain other fields of international law, such as international investment law or in relation to headquarter agreements for international institutions. From a law of the sea point of view, it is clear that the introduction of a new term will not as such change the jurisdictional balance between states. The justification of the measures must therefore be based on the existing jurisdictional framework, i.e. port state jurisdiction which is quite sparingly regulated in UNCLOS. In view of the strong substantive interest and link of between the port state and regular passenger services, requirements of this type have not - perhaps surprisingly - been considered to be legally problematic in the EU and there have been very few if any legal protests against the host state requirements by flag or other states.

If such measures can be introduced in one region, they can of course be adopted elsewhere as well, even on a national basis. For this type of requirement, the institutional infrastructure needed for their implementation is quite limited and they might therefore be well-suited as a regulatory option also for regions which lack a strong EU-type institutional backing. The EU experience further suggests that the political controversy of this type of measure is quite limited as long as the measures focus on passenger ships, in particular when on a regular route to or from the ‘host’ state. On the other hand, it should be also noted that emphasising the role of host state requirements in regulating a right for ships to perform a specific maritime service (rather than a right for them to navigate) will make the requirements more vulnerable to challenges under international trade law and, in particular, under the General Agreement on Trade in Services (GATS).

3.4 **Greenhouse gas emissions**

One of the few almost unregulated areas in shipping are the emission of greenhouse gases. In the EU, by contrast, reduction of greenhouse gases has been a top priority more generally for decades and the absence of emission reduction rules for shipping has repeatedly been indicated as a concern for the Union. Warnings have occasionally been made that EU rules may be introduced in this area if satisfactory global rules cannot be established at IMO, but so far this has not materialised.

---

38 Directive 1999/35 on on a system of mandatory surveys for the safe operation of regular ro-ro ferry and high-speed passenger craft services.

39 It may be noted, though, that in some later measures for passenger ship safety the EU also introduced the host state concept for ships on non-regulatory voyages.

40 Relevant case law has not yet developed at the WTO Dispute Settlement Body.

41 But note Regulations 19-21 of Marpol Annex VI, adopted in 2011, on the ‘energy efficiency design index’ concerning (future) reduction requirements through the design of new-built ships.

42 See e.g. third recital of Directive 2009/29 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community.

A precondition for any type of rules that aim at reducing operational CO\(_2\) emissions (i.e. fuel consumption) from ships is reliable information on the fuel consumption. Based on corresponding rules for the aviation industry,\(^{44}\) the EU in 2015 adopted a regulation for monitoring, reporting and verification of CO\(_2\) emissions by ships entering EU ports.\(^{45}\) Even if the Regulation does not impose any reduction obligation, fee or other operational obligations for ships, it has proven to be quite controversial, *inter alia* as it disregards the parallel but less advanced discussions at IMO.

Regulation 2015/757 gradually introduces obligations for ship owners to plan and to monitor and to report to the EU their estimated CO\(_2\) emissions and includes strong enforcement measures for non-compliers (including – as a measure of last resort – the banning of the ship in question from all EU ports\(^{46}\)). Critics have pointed at the associated administrative burden, the effects of the plans to make public the reported figures and questioned the feasibility in terms of international law. The main concern, however, relates to what all this information is going to be used for in the longer run. It is commonly considered to be a first step of a future regional market-based regulatory regime for GHGs in shipping, which also raises several difficult questions of international law.\(^{47}\)

There is no immediate policy reason for the Asia-Pacific region, or any other maritime region, to follow EU’s determination to make regional rules in this field. Any measure inevitably will require a lot of political, administrative and financial resources before it can be put in place. The Asia-Pacific region has been considerably more cautious (and divided) than the EU about regulating GHGs more generally, and this certainly applies to maritime regulation as well.

The matter is only worth mentioning here because of the possibility that individual states in the Asia-Pacific region might decide to join a regional regime established elsewhere. If the IMO failed to regulate operational CO\(_2\) emissions from ships and if the EU were to lead the creation of a regional scheme in its place, nothing prevents other states from joining that scheme. On the contrary, a broader participation in such an alternative scheme would no doubt strengthen its legal legitimacy under international law.

### 3.5 EU and Maritime Liability

Finally, some words should be said about the EU’s regulatory activities in the field of civil liability in maritime transport, which started around the turn of the Millennium. This area of maritime law is particularly sensitive, not only because it so directly deals with the financial consequences of events for ship operators and insurers, but also because the whole premise of the current international regulation on liability, particularly environmental liability, is based on global participation. Thanks to constructions such as exclusive jurisdiction, channelling of liability and compensation funds based on imports in receiving states,\(^{48}\) regional initiatives in this field pose a real threat to the very survival of the global schemes.

The EU appears to have accepted this premise and has not – despite some signals to the contrary in the early 2000’s – proposed to create a regional maritime liability regime of its own. Its activities in the field build upon the existing IMO conventions and regimes, and in many cases EU activities have been aimed at speeding up international rules or implementing them jointly within the EU. However, this starting point has not prevented the EU from initiating various measures to complement or ‘improve’ the international rules by regional additions where the global rules have been deemed to be unsatisfactory.

For example, the maritime liability rules have been complemented by EU rules for compensating environmental damage where the IMO conventions do not apply;\(^{49}\) civil liability rules have been complemented by criminal liability rules in case of pollution damage;\(^{50}\) and certain minor substantive additions have been made to pollution and passenger liability rules.\(^{51}\) In addition, non-maritime EU policies in fields that are related to civil liability have

---

\(^{44}\) Commission Regulation No 601/2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC.

\(^{45}\) Regulation 2015/757 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport.

\(^{46}\) Ibid., Article 20(3).

\(^{47}\) See Ringbom Regional solution.

\(^{48}\) All these elements feature in the international oil pollution liability regime, as established by the International Convention on Civil Liability for Oil Pollution Damage, 1992, and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992., but also in the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, which has yet to enter into force.

\(^{49}\) Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage, Article 4.

\(^{50}\) Directive 2005/35 on ship-source pollution and on the introduction of penalties for infringements.

\(^{51}\) See e.g. Regulation 392/2009 on the liability of carriers of passengers by sea in the event of accidents, which implements the 2002 Athens Convention, but adds certain EU features, such as the obligation of the ship operator to make an advance payment to cover the immediate economic needs of a passenger who is killed or injured in a shipping incident.
at times had important incidental effects on maritime liability matters. Examples include the EU rules on jurisdiction and recognition of judgment, choice of law, and waste legislation.

This type of regulation can probably not be achieved without a very solid legal institutional structure to back it up and a common court to ensure consistency in application. It is therefore not an example that can be easily followed by other regions. The EU development in maritime liability regulation does, however, illustrate that even given the starting point that the international conventions shall apply, there is considerable scope for rules and principles to fill gaps or to harmonize their application and interpretation. Such initiatives need not even be in the form of binding legal texts. Regional guidelines on ratification or interpretation may very well serve the intended purpose at regional level.

4 Concluding observations

The brief – and far from exhaustive – review of EU maritime legislation above give rise to certain observations that could be interesting for other marine regions with policy ambitions in the maritime field.

The first observation is that even if the law of the sea is generally based on a very strong jurisdictional presumption in favour of the flag state, it does not rule out complementary regulatory measurers by maritime states or regions, in particular when acting collectively in the capacity of port states. The evolution of the EU’s maritime safety measures over the past two decades illustrates a clear gradual development towards more independence from IMO rules. This trend has not been linear, however, and since 2005 or so EU has introduced very few rules challenging the international regulatory regime.

The second observation is that many of the rules discussed here do not require an EU-type powerful constitutional, institutional or financial framework to be put in place. Some of the examples listed above (notably construction requirements of ships in ports and ‘host state’ inspections) are available through relatively minor legislative means and do not require a very sophisticated enforcement apparatus. In many areas the main function of the EU’s institutional structure is to foster internal discipline to implement the agreed rules. If the incentives for complying are strong, that function might not be necessary.

It was noted above the jurisdictional rights of a regional body or a group of states are not different from those of an individual state. The third observation is that the real difference between regional and national ‘unilateralism’ has to do with weight, size and effect and this is particularly the case with respect to port state requirements. A single port state in Europe could, for example, hardly have introduced drastic port state entry requirements, such as the phasing out of single-hulled tankers on its own. Ship operators and flag states that disapproved of the rules could easily have opted to call at another port in a neighbouring state where more lenient rules apply. That option is significantly curtailed if the scheme covers a whole region. Irrespective of what region is concerned, it is therefore obvious that a coordinated policy on port state measures, be it on PSC or more drastic regulatory requirements, will significantly strengthen the effect of the action.

The fourth observation is based on a cursory comparison between the Asia-Pacific and the EU as regions. As was noted in the introductory section, the two regions have a number of similarities in terms of size, interest and traditions in the maritime field. Both regions also include civil and common law traditions (the accommodation of which has not been a problem in EU). It is obvious therefore that many interests are shared and that a very strong alliance could be reached if the two groups were to coordinate more closely in matters of mutual concern. It seems true, however, that the Asia-Pacific region houses an even wider variety of maritime interests and cultures, encompassing very important flag and port states (some of which are single port states, with a muddled borderline between the – mainly private – interests of the port and those – mainly public – of the government), and very vulnerable small island states, some of which, such as the Marshall Islands, are also very important shipping registers. It may therefore be challenging to find agreement on the internal policy line for the region as a whole. Yet, in view of what has been said above there is nothing to exclude sub-regional solutions where consensus does exist, such as measures by the ASEAN group of states or other combinations of states.

Finally, the principal purpose of this text has been to illustrate, by using the EU as an example, that should there be a desire by the states in the Asia-Pacific region to adopt a more harmonised shipping policy, international law offers several opportunities for translating that policy into regulatory initiatives. While many of the EU’s shipping laws are not suitable for an organization without a very solid constitutional and institutional structure to support

---

52 Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
53 Regulation 864/2007 on the law applicable to non-contractual obligations.
54 See notably Case C-188/07 (Commune de Mesquer), 2008 ECR 1-4501.
it, others are not dependent on that. On the basis of the examples considered above, it might even seem as if the most powerful regulatory measures are the ones that require least infrastructural backing to be put in place.

Whether it is a good idea for the Asia-Pacific region to build up a joint regulatory policy in the maritime field is an entirely different question, which is not discussed here. Suffice it to note that in the EU there was a lot of opposition against such moves, mainly from its own member states, in the early days of its maritime policy. Today, most people are probably prepared to accept that the entry of the EU into the scene of maritime regulation has not only complicated the regulatory process (which is no doubt true), but has also had a number of benefits. Many (though not all) EU measures adopted in the past two decades are recognized as having had advantageous consequences for maritime safety and environmental protection. Generally speaking, the bull has entered the china ship without any serious casualties. It has found its place there and is not planning to go anywhere.
STATE COOPERATION IN COMBATING TRANSBOUNDARY MARINE POLLUTION IN SOUTH EAST ASIA

Craig Forrest

Introduction

The close geographical proximity of the nation states of South East Asia¹ exposes them to rapid and extensive transboundary pollution from incidents arising in their ‘shared’ ocean spaces. These waters have long been an important international trade route and it is estimated that more than half of the world’s merchant tonnage now sails through the waters of this region.² The risk of pollution incidents arising from collisions at sea, particularly those involving tankers, has long been appreciated.³ Indeed, the Straits of Malacca and Singapore in particular, has been victim to numerous significant pollution incidents. In 1975 the tanker Showa Maru ran aground off Singapore spilling 3,300 tons of crude oil, affecting Singapore, Indonesia and Malaysia.⁴ In 1987, the tanker Elhami also ran aground off Singapore’s Raffles Lighthouse, spilling 2,300 tons of crude oil. The following year the tankers Asian Energy and Century Dawn, collided and spilled oil that formed a 5.2 sq km slick off Singapore's east coast. The 1990s say a number of incidents, including the collision between the tankers Orahip Global and Evoikos about 5 km south of the Singapore Port Limit, spilling 28,463 tons of oil.⁵ In 2000, 7000 tons of crude oil were spilled when a Panama-registered vessel, Natuna Sea, ran aground in the Straits of Singapore⁶, and in 2002, 450 tons of marine fuel oil spilled into the waters of Singapore when the Thai-registered freighter MV Hermion collided with the Singapore-registered bunker tanker Neptank VII. In the same year, the collision between the tanker Agate and the cargo ship Tian Yu resulted in the loss of 350 tons of light crude oil. In the following year, the container ship MV APL Emerald hit some rocks about 1.3 km south of the lighthouse on Pedra Branca, spilling 150 tons of fuel oil. In 2010, the tanker, MT Bunga Kelana 3 collided with the bulk carrier MV Waily spilling up to 2,500 tons of crude oil.⁷ In 2011, the MV Oceania was sunk off Pulau Pisang, Malacca Strait Malaysia after being struck by the MV Xin Tai Hai.⁸ More recently, the LNG carrier Al Gharrafa collided with the containership Hanjin Italy.⁹ Other States in the East Asian region have also experienced significant shipping losses, many with loss of cargo or bunker oils or, with the sinking of the vessels, the prospect of future spills from these wrecks.¹⁰

It has not only been shipping activities that pose a transboundary oil pollution threat in the region. Recently the rapidly growing economies of South East Asia have necessitated and facilitated greater offshore oil and gas

¹ Professor and Director, Marine and Shipping Law Unit, TC Beirne School of Law, University of Queensland. The author thanks Dr Bevan Marten for his valuable comments on an earlier version of this article.
² In the context of this article, South East Asia is used to describe a geographical area that includes the territories of Brunei Darussalam, Cambodia, East Timor, Indonesia, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam. Other than East Timor, these States make up the membership of ASEAN (Association of South East Asia Nations) together with Laos, which, as a land locked State, is not directly impacted upon by trans-boundary marine pollution incidents. Given its immediate geographical proximity to South East Asia, Australia is also covered.
exploration and production.11 The risk associated with offshore oil and gas production has been fully exposed by the Deepwater Horizon catastrophe, and within the South East Asia region, the Montara spill12.

This significant transboundary oil pollution risk requires a commensurate response capability. This necessitates a collaborative international legal framework within which a practical response capability can be formulated. This article considers the degree to which such a collaborative international legal framework exists in South East Asia, both for pollution arising from shipping and that arising from offshore oil and gas activities. In its focus on shipping, this article addresses the participation of the South East Asian nations in the International Maritime Organisation’s (IMO) marine pollution prevention, response and compensation suite of conventions. In what amounts to a mediocre degree of participations with some startling gaps in the South East Asian coverage, consideration is also given to the regional agreements that address the issue. In its focus on offshore oil and gas, the problematic “gap” that arising from the IMO’s activities and its mandate is touched upon.

The International Cooperation Framework

The United Nations Convention on the Law of the Sea (UNCLOS)13 provides the “constitutorial” framework within which both shipping and offshore oil and gas pollution regulation is considered. The rights and obligations of States with respect to addressing marine pollution is reflected in the convention’s broad balancing of interests between maritime (or shipping) states and coastal states.

Part XII of UNCLCS imposes the broad obligation “to protect and preserve the marine environment”.14 This obligation applies notwithstanding the sovereign right of a coastal state to exploit the natural resources of its continental shelf15 pursuant to its own environmental policies.16 This immediate consideration in UNCLOS of marine pollution arising from coastal state activities turns to the risk of trans-boundary marine pollution and provides in article 194(2) that;

States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.

An obvious activity that falls within a coastal States jurisdiction is oil and gas exploration and exploitation in the territorial sea and in the exclusive economic zone17 or on the continental shelf18. In this respect, article 194(3)(c) provides that measures taken to deal with marine pollution shall be designed to minimise to the fullest extent possible “pollution from installations and devices used in exploration or exploitation of the natural resources of the seabed and subsoil, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices.” Furthermore, should the risk of a trans-boundary marine pollution incident arise, the State must immediately notify other States it deems likely to be affected.19 Given the trans-boundary nature of such an incident, a number of obligations are imposed on States to cooperate in addressing the pollution incident.20 Nevertheless, the primary obligation to prevent, reduce and control pollution falls on the coastal State and it is obliged to adopt laws and regulations to that effect.21 These laws and regulations, however, “shall be no less

---

14 UNCLOS art 192.
15 UNCLOS arts 76 and 77.
16 UNCLOS art 193.
17 UNCLOS art 60 addresses the rights and obligations of States to construct installations and structures in the Exclusive Economic Zone (EEZ).
18 UNCLOS art 80- provides that art 60 applies mutatis mutandis to artificial islands, installations and structures on the continental shelf. Moreover, UNCLOS art 81 provides that the “coastal State shall have the exclusive right to authorize and regulate drilling on the continental shelf for all purposes”.
19 UNCLOS art 198.
20 UNCLOS arts 194(1), 197, 199, 200 and 201. Cooperation extends to providing technical assistance to developing States – arts 202 and 203. Art 123 also requires States bordering enclosed or semi-enclosed sea to cooperate with each other in the exercise of their rights and in the performance of their duties under the Convention, including in the implementation of their rights and duties with respect to the protection and preservation of the marine environment.
21 UNCLOS art 208 (and see art 193(3)(c)).
effective than international rules, standards and recommended practices and procedures’. 22 This poses some difficulty as a literal interpretation would subject UNCLOS States Parties to obligations arising out of other international conventions to which they are not necessarily a party to, or to standards and practices that, strictly speaking, are not mandatory. A purposive interpretation would essential bind the coastal State to such standards, though they would not arise out of the conventions themselves. These interpretational difficulties are a natural result of the negotiating history of UNCLOS and this approach was an attempt to harmonise national laws and regulations with generally accepted rules. 23 Notwithstanding this uncertainty, determining exactly what international rules, standards and recommended practices and procedures actually exist with respect to offshore oil and gas activities is problematic. While the IMO had adopted some standards in this regard 24, there is no comprehensive or integrated framework for regulation of offshore oil and gas activities and addressing trans-boundary pollution arising from incidents.

The obligation ‘to protect and preserve the marine environment’ by adopting laws and regulation for the prevention, reduction and control of pollution from vessels is imposed on the flag State of the vessel. 25 In waters over which a coastal State exercises sovereignty, jurisdictional problems necessarily arise. This is most acute in the territorial sea, particularly where the foreign flagged ship is exercising the right of innocent passage. 26 Given the interest of coastal States in vessel source pollution in their waters, it is granted some enforcement measures. 27 These jurisdictional difficulties can be minimised through uniformity in flag State and coastal State laws, and UNCLOS is most concerned with facilitating such uniformity, providing that the flag States laws and regulation ‘shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference’. 28 The competent international organisation in this respect is the IMO. 29 While the interpretation of this provision varies greatly 30, a literal interpretation of this provision gives rise to the same uncertainty as that which prevails with respect to article 208(3). A purposive interpretation, it is argued, will require States to give effect to rules arising out of other international conventions to which they are not necessarily a party. 31 Importantly though, this uncertainty can clearly be avoided though through wide participation in the relevant IMO conventions and it is in this respect that the participation to the South East Asian maritime nations is considered.

**The IMO Conventions**

The IMO’s mandate is to promote the safety and security of shipping and the prevention of marine pollution by ships. While it has touched on matter relevant to offshore oil and gas exploration, its mandate does not technically extend to such activities. Nevertheless, the relationship between shipping and offshore oil and gas is naturally very close, and considerable overlap occurs when Floating Offshore Units (FSO), Floating Production, Storage and Offloading Units (FPSO) or Floating and Storage Units (FSU) are being utilised. 32 For some purposes, such as the liability and compensation regimes established for oil pollution, the definition of ship is such that these floating entities will fall within its coverage. 33 On the other hand, the Intervention Convention 34 does not apply to

---

22 UNCLOS art 208(3). See also Youna Lyons, ‘Transboundary Pollution from Offshore Oil and Gas Activities in the Seas of Southeast Asia’ in Simona Marsden and Robin Warner (eds), Transboundary Environmental Governance: Inland, Coastal and Marine Perspectives (2012), 167.
24 See for example the Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and in the Exclusive Economic Zone (IMO Res A.672(16), 19 October 1989).
25 UNCLOS art 211(2).
26 UNCLOS art 211(3) and (4).
27 UNCLOS art 220.
28 UNCLOS 211(2). UNCLOS 211(1) provides that ‘States, acting through the competent international organization or general diplomatic conference, shall establish international rules and standards to prevent, reduce and control pollution of the marine environment from vessels and promote the adoption, in the same manner, wherever appropriate, of routing systems designed to minimize the threat of accidents which might cause pollution of the marine environment, including the coastline, and pollution damage to the related interests of coastal States. Such rules and standards shall, in the same manner, be re-examined from time to time as necessary’.
29 Franckx, above n 23, 20.
31 Ibid 28.
32 See for example, Guidance for the Application of Safety, Security and Environmental Protection Provisions to FPSOs and FSUs (IMO MSC-MEPC.2/Circ.9, 25 May 2010).
33 For example, the International Convention on Civil Liability for Oil Pollution Damage 1992 Protocol (CLC) adopted 27 November 1992, 1953 UNTS 330; UKTS 86 (1996)(entered into force 30 May 1996), art 1(1) provides that “Ship” means any sea-going vessel and seaborne craft of any type whatever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard’.
34 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969,
these floating entities. Broad participation in the IMO suite of conventions that address, or are directly pertinent to, trans-boundary marine pollution whatever its source, will reduce, though not eliminate, some of these difficulties. Unfortunately, a number of key IMO conventions have poor traction in South East Asia. Of greatest concern is the poor participation in the Oil Preparedness, Response and Co-operation (OPRC) Convention35; the Intervention Convention, the Salvage Convention37 and the Bunker Convention38.

**Oil Preparedness, Response and Co-operation Convention**

‘Recognising the serious threat posed to the marine environment by oil pollution incidents involving ships, offshore units, sea ports and oil handling facilities’ the OPRC was adopted to facilitate effective preparation for combating oil pollution once it occurred. It requires each State Party to establish a national system for responding promptly and efficiently to oil pollution incidents which includes amongst other things, the establishment of a competent authority and the development of a national contingency plan for preparedness and response. It also requires that each State establish ‘a minimum level of pre-positioned oil spill combating equipment, commensurate with the risk involved, and programmes for its use; a programme of exercises for oil pollution response organizations and training of relevant personnel; detailed plans and communication capabilities for responding to an oil pollution incident …and a mechanism or arrangement to co-ordinate the response to an oil pollution incident with, if appropriate, the capabilities to mobilize the necessary resources’.41

Less than half of the ASEAN Asian States considered here are party to the OPRC. Those not party are Brunei, Cambodia, Indonesia, Myanmar, Timor-Leste and Vietnam. This is a particular concern as the OPRC not only provides a framework for national oil spill response, but forms the bedrock upon which international cooperation rests. For a number of South East Asian states (and many in other regions), compliance would be a particularly difficult burden. Recognising this difficulty, these obligations are not absolute, and qualified in that it is made subject to each State Party’s specific capability. Nevertheless, such a capability is at the heart of the Convention, and compliance is promoted by encouraging bilateral or multilateral cooperation or indeed through cooperation with the private sector, especially the oil and shipping industries. Participation of industry, both the shipping and oil industries, is crucial to the success of a preparedness and response capability. A number of South East Asian States, such as Singapore, Malaysia and Thailand rely on industry led preparedness and response with varying degrees of government oversight. Other States, such as Indonesia and the Philippines, preparedness and response responsibility rests entirely with the State. This necessarily affects the way States with differing primary responsibilities coordinate a response to a transboundary incident. The OPRC provides, at least, a common framework from which these States might base their respective responsibilities.

An important part of the OPRC regime is the obligation of States Parties to ensure that oil pollution emergency plans are devised and implemented for each vessel flying its flag or offshore unit within its jurisdiction. These are then to be consistent with, and integrated into, the national contingency plan. Participation in the OPRC offers coastal States in particular distinct advantages with respect to shipping. Not only can the coastal State inspect the vessel, but also then to be consistent with, and integrated into, the national contingency plan. These are then to be consistent with, and integrated into, the national contingency plan. Not only can the coastal State inspect the vessel, but also then to be consistent with, and integrated into, the national contingency plan. These are then to be consistent with, and integrated into, the national contingency plan. Not only can the coastal State inspect the vessel, but also then to be consistent with, and integrated into, the national contingency plan. These are then to be consistent with, and integrated into, the national contingency plan. Not only can the coastal State inspect the vessel, but also then to be consistent with, and integrated into, the national contingency plan. These are then to be consistent with, and integrated into, the national contingency plan. Not only can the coastal State inspect the vessel, but also then to be consistent with, and integrated into, the national contingency plan. These are then to be consistent with, and integrated into, the national contingency plan. Not only can the coastal State inspect the vessel, but also then to be consistent with, and integrated into, the national contingency plan. These are then to be consistent with, and integrated into, the national contingency plan. Not only can the coastal State inspect the vessel, but also then to be consistent with, and integrated into, the national contingency plan. These are then to be consistent with, and integrated into, the national contingency plan. Not only can the coastal State inspect the vessel, but also then to be consistent with, and integrated into, the national contingency plan. These are then to be consistent with, and integrated into, the national contingency plan. Not only can the coastal State inspect the vessel, but also then to be consistent with, and integrated into, the national contingency plan. These are then to be consistent with, and integrated into, the national contingency plan. Not only can the coastal State inspect the vessel, but also then to be consistent with, and integrated into, the national contingency plan. These are then to be consistent with, and integrated into, the national contingency plan. Not only can the coastal State inspect the vessel, but also then to be consistent with, and integrated into, the national contingency plan. These are then to be consistent with, and integrated into, the national contingency plan. Not only can the coastal State inspect the vessel, but also then to be consistent with, and integrated into, the national contingency plan. These are then to be consistent with, and integrated into, the national contingency plan. Not only can the coastal State inspect the vessel, but also then to be consistent with, and integrated into, the national contingency plan. These are then to be consistent with, and integrated into, the national contingency plan. Not only can the coastal State inspect the vessel, but also then to be consistent with, and integrated into, the national contingency plan. These are then to be consistent with, and integrated into, the national contingency plan. Not only can the coastal State inspect the vessel, but also then to be consistent with, and integrated into, the national contingency plan. These are then to be consistent with, and integrated into, the national contingency plan. Not only can the coastal State inspect the vessel, but also then to be consistent with, and integrated into, the national contingency plan. These are then to be consistent with, and integrated into, the national contingency plan. Not only can the coastal State inspect the vessel, but also then to be consistent with, and integrated into, the national contingency plan. These are then to be consistent with, and integrated into, the national contingency plan. Not only can the coastal State inspect the vessel, but also then to be consistent with, and integrated into, the national contingency plan. These are then to be consistent with, and integrated into, the national contingency plan. Not only can the coastal State inspect the vessel, but also then to be consistent with, and integrated into, the national contingency plan. These are then to be consistent with, and integrated into, the national contingency plan. Not only can the coastal State inspect the vessel, but also then to be consistent with, and integrated into, the national contingency plan. These are then to be consistent with, and integrated into, the national contingency plan. Not only can the coastal State inspect the vessel, but also then to be consistent with, and integrated into, the national contingency plan. These are then to be consistent with, and integrated into, the national contingency plan. Not only can the coastal State inspect the vessel, but also then to be consistent with, and integrated into, the national contingency plan. These are then to be consistent with, and integrated into, the national contingency plan. Not only can the coastal State inspect the vessel, but also then to be consistent with, and integrated into, the national contingency plan. These are then to be consistent with, and integrated into, the national contingency plan.

---

35 See Appendix to this article, which sets out in tabular form a summary of State participation in the key IMO Conventions.
39 OPRC first recital.
40 OPRC art 6.
41 OPRC art 6(2).
42 As at 11 February 2016, there were 108 States Parties covering 72.75% of global shipping tonnage.
44 OPRC art 3.
45 OPRC art 4.
without delay.\textsuperscript{46} In the narrow seas of South East Asia this has very obvious advantages, but breaks down when key State are not party to the OPRC.\textsuperscript{47}

Whilst concerned with constructing a national preparedness and response capability, the convention is also concerned with establishing an international cooperative system for responding to pollution incidents. States Parties are required to cooperate and ‘provide advisory services, technical support and equipment for the purpose of responding to an oil pollution incident, when the severity of such incident so justifies, upon the request of any Party affected or likely to be affected’.\textsuperscript{48} This obligation is qualified in that it is subject to the capabilities and the availability of relevant resources of the State.

Where another State does provide assistance, the requesting State is required to ensure that the necessary legal or administrative steps are taken to facilitate the expeditious arrival, use of and departure from its territory of ships, aircraft, personnel, cargoes, materials and equipment required to deal with such an incident.\textsuperscript{49} Non-participation in the OPRC has meant that some State have not given due to consideration to these necessary steps to facilitate prompt response. It is the case, for example, that in some South East Asian States, air control is strictly controlled by the military such that aerial observation of spills and its movement, as well as access to an oil spill site by foreign aircraft delivering equipment and personnel, is severely restricted. Similarly, in exercises undertaken by industry, stockpiled equipment has been prevented from entering a State due to customs irregularities.\textsuperscript{50} This has been particularly problematic, for example, where stockpiled equipment in one State has not been authorised for use in another State.

Where a State Party does provide assistance to another State, the OPRC provides a mechanism for determining who bears the costs of that assistance if there is no standing or ad-hoc agreement between the States on this issue prior to the oil pollution incident. It thus provides a default cost mechanism that States parties may base decision on in emergency situations. The OPRC provides, as a default position, that where the action was taken by one Party at the express request of another Party, the requesting Party shall reimburse to the assisting Party the cost of its action. If, however, the action was taken by a Party on its own initiative, this Party shall bear the costs of its action.\textsuperscript{51} This is likely to be the case in trans-boundary marine pollution incidents that threatens a State emanates from a spill in a neighbouring State.\textsuperscript{52}

The conclusion of cost provisions in the OPRC are particularly helpful to States whose initial response to an oil spill may be tempered by financial concerns. These are, however, complex consideration as the basic principles set out in the Annex do not fully account for the cost allocation exercise, which is merely raised in the Annex by noting that its provisions are ‘not be interpreted as in any way prejudicing the rights of Parties to recover from third parties the costs of actions to deal with pollution or the threat of pollution under other applicable provisions and rules of national and international law’.\textsuperscript{53} In this respect, the CLC and Fund Conventions\textsuperscript{54} are specifically mentioned; though other Conventions would also be applicable, such as the Bunker Convention and the Wreck Removal Convention.\textsuperscript{55} This is of great import as a State may seek assistance from another State on the basis that is will then be obliged to cover the costs of that assistance in circumstances where those cost will then be covered by the compulsory insurance provisions in the CLC or Bunker Conventions for example. Naturally this then requires that the relevant States are party to the relevant liability convention. Unfortunately, in South East Asia this is not the case with Timor-Leste and Thailand in particularly not being a party to any of the liability regimes, while Indonesia and Vietnam have failed to join the 1992 Fund Convention. The OPRC thus provides a sound basis for regional cooperation as well as a basis for considering the national response plans to oil spills.

---

\textsuperscript{46} OPRC art 5. Importantly, major shipping States such as Liberia, Marshall Islands, Hong Kong, Greece, Bahamas, Malta and Singapore are Party to the OPRC.

\textsuperscript{47} Other international conventions do also provide for notification of oil spills, including International Convention for the Prevention of Pollution from Ships (MARPOL) adopted 17 February 1978, 1340 UNTS 61; 17 ILM 546 (as Amended) (entered into force 2 October 1983).

\textsuperscript{48} OPRC art 7.

\textsuperscript{49} OPRC art 7(3).

\textsuperscript{50} Tan, above n 43.

\textsuperscript{51} OPRC Annex art 1. The requesting Party may cancel its request at any time, but in that case it shall bear the costs already incurred or committed by the assisting Party.

\textsuperscript{52} It is now supplemented by the IMO’s 2014 Guidance for International Offers of Assistance in Response to a Marine Oil Pollution Incident IMO PPR 2/10, 16 October 2014.

\textsuperscript{53} OPRC Annex art 4.


**The Intervention Convention**

The uncertainty as to the powers of a coastal State in international law to intervene when a non-flag vessel on the high seas posed a pollution risk arose in the wake of the *Torrey Canyon* disaster in 1967. The IMO initiated a review of a range of matters associated with wrecked ships, oil pollution, ship safety and ‘[t]he extent to which a State directly threatened or affected by a casualty which takes place outside its territorial sea can, or should be entitled to, take measures to protect its coastline, harbours, territorial sea or amenities, even when such measures may affect the interest of shipowners, salvage companies and insurers and even of a flag government’. The result was the adoption in 1969 of the International Convention57 as well as the original CLC58 and Fund Conventions59. While the latter two conventions address, in the main, liability and compensation regimes, the Intervention Convention addresses the rights of States to intervene in the case of a foreign ship that poses a grave and imminent danger to its coastline.

At the time of the *Torrey Canyon* disaster, few States questioned the right of the United Kingdom to take the action it did, which included bombing the wreck, yet it was not immediately clear on what international basis this action could have been taken. Principles of self-defence or self-help60, on the grounds that such pollution ‘may affect the coastal State or threaten its security’61 was said to underpin the action. Alternatively, it was also argued that the international community’s apparent acceptance of United Kingdom’s intervention in the case of the *Torrey Canyon* resulted in the emergence of a new rule of customary international law.62 While such a right may have existed63 or come into existence, the *Torrey Canyon* disaster certainly raised issues as to the extent of this right and highlighted the need for clarification through conventional rules.64

The Intervention Convention itself provides that:

> Parties to the present Convention may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences.65

The Convention does not specify precisely what measures can be taken by the coastal State, essentially limiting such action only by the principle of proportionality of the response to the hazard66 and by a requirement to enter into consultation with other States affected by the maritime casualty, particularly with the flag State.67 It does, however, embrace and endorse the right of coastal State intervention, which become exceptionally important in a timely response to a pollution incident arising outside of the territorial sea. Both Spain and Portugal, for example, exercised this right of intervention in 2002 when ordering that the sinking of an oil tanker off the coast of Spain be excluded from Portugal’s EEZ and kept at least 120 nm off Spain’s coast.68 Ratification of the Intervention Convention is therefore an important preparatory consideration in transboundary marine pollution incidents. Indeed, the rights derived

---

56 IMO Doc C/ES. III/5, 8 May 1967, 5.
57 As at 1 February 2016 there were 88 States Parties to the Intervention Convention covering 73.93% of global shipping tonnage while the 1973 Protocol has 56 States parties covering 51.70% of global shipping tonnage.
64 That a right of intervention might have existed prior to the adoption of the Intervention Convention is suggested by the IMO in its introduction to the Convention when it declared that the Convention ‘affirms the right of a coastal State to take such measures on the high seas as may be necessary to prevent, mitigate or eliminate danger to its coastline or related interests from pollution by oil or the threat thereof, following upon a maritime casualty’. Own emphasis. See <http://www.imo.org/Conventions/mainframe.asp?topic_id=1604>, 25 November 2009. UNCLOS art 221 reaffirms the right of a coastal State to intervene in cases where a ship, situated beyond its territorial seas, posed a pollution threat to its coastline or related interests.
65 M’Gonigle and Zacher, above n 61, 143-149.
66 Intervention Convention art. I. While this original right of intervention was limited to incidents involving oil it was extended by protocol to any incident which involves a substance which is liable to create a hazard to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea; though the intervening State bears the burden of establishing that the substance reasonably posed a grave and imminent danger. 1973 Intervention Convention protocol, art. 1.
67 Intervention Convention arts. I and V.
68 Intervention Convention art. III(a).
69 de la Rue and Anderson, above n 60, 901.
therefrom form a necessary part of the contingency planning process envisaged in the OPRC Convention. It is therefore unfortunate that no ASEAN States are party to the Intervention Convention, nor the 1973 Protocol.70

**Salvage Convention**

The 1989 Salvage Convention introduced, for the first time, environmental considerations into what was essentially a private property regime.71 Traditional admiralty salvage law rewarded the salvor for saving maritime property from the ravages of the sea, and the salvage reward was then a function of the value of the property saved.72 The limitation of determining the salvage reward in this way was exposed with the development of oil tankers and the risk they posed to the environment. No longer was saving the tanker a primary concern, replaced by the need to ensure that its cargo did not spill. Traditional admiralty law of no cure no pay was such that salvors had no incentive to consider the marine environment, and where the tanker could not be saved, no salvage incentive existed.73

The Salvage Convention was negotiated to address this development, and did so in two ways. Frist, it introduced an additional criterion for assessing a salvage award. Article 13 of the Salvage Convention sets out the usual considerations to be taken into account in determining the salvage reward, such as the value of the salvaged property. To this was added “the skill and efforts of the salvors in preventing or minimizing damage to the environment”.74 Secondly, it introduced a safety net for salvors whose salvage reward was restricted, or absent, due to the limited success, or no success, in saving property, but by whose actions the threat to the marine environment was prevented or minimized.75 In such circumstances the salvors were entitled to ‘special compensation’ that was at least equivalent to the salvors expenses, with an additional upload of between 30% and 100% of the expenses.76 Subsequent salvage arbitration has revealed this safety net to be generally beneficial, though the “mechanics of assessing it, in accordance with the provisions of Article 14, proved to be time-consuming, cumbersome, expensive and uncertain”.77 The salvage industry, through the International Salvage Union, has managed to address some of these difficulties through a negotiated compromise with the International Groups of P&I clubs in the form of the SCOPIC clause that can be incorporated into a Lloyds Open Form (LOF) Salvage Contract. However, only about one third of all of today’s salvage operations are undertaken under an LOF contract.78 While the remainder may be subject to contractual terms similar to that of LOF and SCOPIC, they are not supported by the international structure that underpins LOF and SCOPIC. Moreover, if an arbitral tribunal or court applies the law of a State that is not party to the Salvage Convention, the risk arises that salvors will not be entitled to special compensation. There is then no incentive in that jurisdiction for salvors to aid a vessel that poses an environmental threat where the value of the vessel itself (and its cargo) is low, or unlikely to be saved.

The Salvage Convention appears to offer States Parties a number of advantages in addition to the environmental provisions discussed above. It introduces an element of uniformity to the applicable salvage regime across States which allows salvors to respond to incidents immediately knowing that the Convention regime will underpin the national salvage regime. This is particularly important for large international salvage entities that operate globally. However, no ASEAN State is party to the Salvage Convention. This is surprising, especially for States such as Singapore, Malaysia and Indonesia. Singapore or example has no fewer than 9 salvage companies based there, and it was from Singapore that the salvors of the *MV Rena* were able to obtain the crane barge.79

---

71 As at 11 February 2016 there were 67 States Parties covering 51.31% of the global shipping tonnage.
75 Salvage Convention art 13(1)(b).
76 Salvage Convention art 14.
77 Salvage Convention art 14. By 2013, the highest uplift award was 65% in the case of the salvage of the *Nagasaki Spirit* (see *The Nagasaki Spirit* [1997] 1 Lloyd's Rep 323). Bishop, above n 73, 6.
78 Ibid, above n 73, 8.
Bunker Convention

The Bunker Convention\(^90\) was adopted to introduce the type of compensation and liability regime that applied to oil damage from tankers to that from all other vessels. As essentially an expansion of the CLC regime to non-tankers it follows that regime relatively closely, providing for strict, but limited, liability of shipowners for pollution caused by bunker oils, requires the registered shipowners of ships over 1,000 gt to maintain insurance, and allowing claimants to sue the insurer directly.\(^91\)

Naturally, there are some slight variations to the CLC theme. ‘Bunker oil’ is defined to mean: “[a]ny hydrocarbon mineral oil, including lubricating oil, used or intended to be used for the operation or propulsion of the ship, and any residues of such oil”.\(^92\) The definition therefore goes beyond the normal meaning of bunkers as fuel, in order to cover lube oil, and unlike the CLC there is no reference to ‘persistent’, so it covers HFO and lighter fuels such as marine diesels. The Convention definition of ‘ship’ is very wide and\(^93\) means ‘any seagoing vessel and seaborne craft, of any type whatsoever’. The effect of this definition is highly significant as, unlike the CLC, it applies the liability regime to any ship (e.g. bulk carrier, passenger ship, container ship, tug, fishing vessel, launch etc), whatever its size provided that it is seagoing.\(^94\) Pollution damage is defined in a similar way to the CLC but with specific reference to bunker oil.\(^95\)

Unlike the CLC, the Bunker Convention provides not only that the shipowner is strictly liable for pollution damage caused by any bunker oil on board or originating from the ship, but also that “shipowner” means “the owner, including the registered owner, bareboat charterer, manager and operator of the ship”.\(^96\) In part this expanded category of defendant is due to the fact that the Bunker Convention does not have an industry linked second tier of liability, as the CLC does in the Fund Convention, and as such, and expanded category provides the alternative avenues for claimants. This strict liability is not, however, absolute, as the standard defences, as found in CLC\(^97\), provide that no liability shall attach to the shipowner if the shipowner proves that damage resulted from an act of war, hostilities, civil war, insurrection etc; or was wholly caused by an act or omission done with intent to cause damage by a third party; or was wholly caused by the negligence or other wrongul act of an entity responsible for the maintenance of lights or other navigational aids.\(^98\)

The compensation and liability regime would cover bunker pollution damage arising from a range of incidents, most commonly groundings,\(^89\) collisions,\(^90\) or operational discharges.\(^91\) It includes basic clean-up costs caused by contamination and includes reasonable measures of actual reinstatement of the environment as well as economic losses in the form of loss of profit from impairment of the environment.\(^92\) It also covers ‘preventative measures’, being those that prevent or minimise pollution damage.\(^93\) However, the Bunker Convention only covers pollution damage; it does not specifically cover death and personal injury, although it is accepted that injury actually caused by contamination would be covered.\(^94\)

---

\(^90\) As at 11 February 2016, there were 81 States party to the Bunker Convention covering 91% of global shipping tonnage. See Nicholas Gaskell and Craig Forrest, ‘Marine Pollution Damage in Australia: Implementing the Bunker Oil Convention 2001 and the Supplementary Fund protocol 2003’ (2008) 27(2) University of Queensland Law Journal, 103.


\(^92\) Bunker Convention art 1(5).

\(^93\) Bunker Convention art 1(1).

\(^94\) Bunker Convention art 4(2) provides that it does not apply to warships, naval auxiliary or other ships owned or operated by a State and used, for the time being, only on Government non-commercial service.

\(^95\) Bunker Convention art 1(9).

\(^96\) Bunker Convention art 3 and 1(3).

\(^97\) CLC art 3(2).

\(^98\) Bunker Convention art 3(3).

\(^89\) South East Asian, Australian and New Zealand examples include the Showa Maru, Elhami, Natuna Sea, MV APL Emerald, Korean Star, Nella Dan, Sanko Harvest, Iron Baron, Pasha Bulker and MV Rena.

\(^90\) South East Asian, Australian and New Zealand include the Asian Energy and Century Dawn, Oargin Global and Evoikos, MV Hermion and Neptank VII, Agate and Tian Yu, MT Bunga Kelana 3 and MV Wally MV Oceania and MV Xin Tai Hai. Al Gharrafa and Hanjin Italy and Global Peace and Tom Tough.

\(^91\) South East Asian, Australian and New Zealand include Pacific Quest and Pax Phoenix.

\(^92\) Bunker Convention art 1(9).

\(^93\) Bunker Convention art 1(7).

\(^94\) The IOPC Fund Executive Committee accepted the advice of its Director, in the light of discussion at the 1969 conference, that inhalation of oil vapour and skin complaints caused by contact with oil could be covered as ‘damage’ within the CLC/Fund; see eg, Fund/Exc 37/3, para 4.2.11, Annual Report 1995, 65. In the Braem case, the Fund rejected claims for psychological damage (eg, for stress at the destruction of livelihood) and these were ultimately withdrawn before trial: see Annual Report 1999, 61. The Bunker Oil Convention was intended to replicate Fund practice: see eg, LEG 78/5/2, 14 August 1998, LEG 77/11, 28 April 1998.
The insurance regime too is borrowed directly from the CLC, embodying two important features the compulsory nature of the cover as demonstrated by a convention insurance certificate,\textsuperscript{95} and the ability of a claimant to sue the insurer directly. Unlike the CLC, the Bunker Convention does not set out the limitation of liability limits for shipowners, but reserves the rights of shipowners to limit their liability under any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims, 1976.\textsuperscript{96}

The importance of the Bunker Convention in South East Asia, and in the Straits of Malacca and Singapore are immediately obvious, and an important adjunct to the CLC and Fund regimes. It does not come with the financial obligations on industry that the CLC and Fund regimes does and ought not then to deter coastal State ratification. Given that most of the shipping traversing the oceans and seas of South East Asia will have an international character, it is likely that these ships already have bunker liability P&I club cover. Indeed, it is applicable to 91% of global shipping tonnage.\textsuperscript{97}

Yet some States, such as the Philippines, have yet to ratify the Convention despite previous bunker spills.\textsuperscript{98} The Philippines, as an archipelago, had been concerned with the imposition on shipowners requiring compulsory insurance cover for vessels that were essentially on domestic services but travelling through the EEZ, and had sought to have an exclusion provided for in the Convention.\textsuperscript{99} At the end of negotiations, however, the exclusion was only extended to vessel in the territorial sea.\textsuperscript{100} Indonesia, as a complex archipelagic State, had had similar concerns, but appears to have addressed these as it a party to the Convention. As such, the advantage of Convention for a States such as Philippines appears to outweigh the disadvantage for local interests.

**Regional Agreements**

This international legal framework supports regional agreements that provide greater focus for States most threatened by transboundary marine pollution incidents, both form shipping and form oil and gas exploration. Heightened concerns in South East Asia over sovereignty and security, and especially with respect to maritime spaces, have frustrated the conclusion of bi-lateral and multi-lateral regional agreements that provide a comprehensive oil spill preparedness and response regime.\textsuperscript{101} UNCLOS, as a ‘constitutional’ convention, clearly envisages regional agreements to give content to the framework provided in particular in Part XII.\textsuperscript{102} Similarly, where OPRC clarifies and extends UNCLOS, it also exhorts States parties to endeavour ‘to conclude bilateral or multilateral agreements for oil pollution preparedness and response’.\textsuperscript{103} Within the UNLCOS framework, if not, unfortunately, within the OPRC regime, a number of regional agreements have been concluded between South East Asian nations that address various aspects of oil pollution preparedness and response. An early example of which is the Sulawesi Sea oil Spill network Response Plan agreed between Indonesia, Malaysia and Philippines in 1980. Similarly, in 1994, Malaysia and Brunei concluded the Brunei Bay Oil Spill Contingency Plan. At the same time, with the ASEAN framework, the Oil Spill Response Action Plan (OSRAP) was agreed in the form of a Memorandum of Understanding (MoU) by Singapore, Indonesia, Malaysia, Brunei, Thailand and Philippines. It was substantially supported by Japan, which provided extensive funds for the stockpiling of equipment in 11 key locations throughout the area. Unfortunately, the Plan was never fully implemented, remaining static for a number of years with the stockpiled equipment gradually falling into disrepair.\textsuperscript{104}

\textsuperscript{95} Alternative financial security is possible, such as a bank guarantee, but it seems unlikely that these will be used except perhaps for state commercial vessels.


\textsuperscript{97} IMO <http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx>, 15 February 2016.

\textsuperscript{98} In 1994, the bunker barge PETRO QUEEN spilt 7900 barrels of fuel oil following a collision at the entrance to the Pasig River, ITOPF, <http://www.itopf.com/knowledge-resources/countries-regions/countries/philippines/> 15 February 2016. In 2013, the RORO passenger vessel St Thomas De Aquinas collided with containership Sulpicio Express 7 on approach to port in Cebu, Philippines. While the Sulpicio Express was able to steam back to port, and suffered no casualties or bunker loss, the St Thomas De Aquinas sank quickly with loss of over 100 lives, and the loss of a quantity of the 120 tonnes of Intermediate Fuel Oil (IFO180) on board. In this case both vessels were flagged in the Philippines and thus were subject to national law. ITOPF, <http://www.itopf.com/in-action/case-studies/?tx_itopfacasetudies=itopfacasetudies%5Buid%5D=47&tx_itopfacasetudies%5Bcontroller%5D=itopfaCaseStudies&cHash=9ed3e576fbd61c325e55f7b318b10>, 15 February 2016.


\textsuperscript{100} Bunker Convention art 7(15).

\textsuperscript{101} Tan, above n 43. See also Robin Warner, ‘Stemming the Black Tide: Cooperation on Oil Pollution Preparedness and Response in the South China Sea and East Asian Seas’ (2015) 184, 192.

\textsuperscript{102} UNCLOS arts 192, 197 and 208(4) in particular.

\textsuperscript{103} OPRC art 10.

These agreements have had varying degrees of success, but none have provided an adequate oil pollution preparedness and response regime. The need for such a regime is clearly evident and developments in that direction have been reinvigorated. In 1996, the Global Initiative Program was launched as a partnership between the IMO and the International Petroleum Industry Environmental Conservation Agency (IPIECA)\(^{105}\) to enhance global preparedness and response capacity to respond to oil spills.\(^{106}\) It brings both government and industry together and includes important partners such as the International Oil Pollution Compensation (IOPC) Fund and the International Tanker Owners Pollution Federation (ITOPF). Within this program, the Global Initiative for Southeast Asia (GISEA) was launched in 2013 to cover the member States of ASEAN. Within GISEA, the ASEAN OSRAP has been revitalised and extended to all members of ASEAN with the updated Memorandum of Understanding being concluded in November 2014 (ASEAN OSRAP MOU).

GISEA coordinates and implements capacity-building activities that target the six key elements of preparedness, namely: legislation, contingency planning, equipment, training, exercises, and forces for implementation. The first of these elements addresses not only national legislation but also the incorporation of international conventions. Notwithstanding the non-participation of some of these States in the OPRC regime\(^{107}\), the ASEAN OSRAP MOU is based on the OPRC, and indeed, has OPRC ratification as one of its key objectives.\(^{108}\) The plan itself though calls for the implementation of a range of IMO conventions that address oil spill preparedness and response as well as compensation regimes, particularly the CLC and Fund conventions. This would create a framework within which the other objectives can be achieved, particularly in narrowing, if not eliminating, the gaps and differences in national capacities to deal with major oil spill incidents and thus erasing what now considered to be a disjointed approach to preparedness and response.

Funded originally through the Global Environment Facility\(^{109}\) and implemented by the United Nations Development Programme (UNDP), the regional project on Prevention and Management of Marine Pollution in the East Asian Seas (PEMSEA)\(^{110}\) has since become a focal partnership, and in international organisation in its own right, addressing marine environmental issues in East Asia. Within the PEMSA partnership, regional agreements have arisen, including the Framework Programme on Partnerships in Oil Spill Preparedness and Response in the Gulf of Thailand (GOT program) between Thailand, Cambodia and Vietnam in 2006. Whilst not transboundary in the same sense as the GOT program, the Manila Bay Oil Spill Contingency Plan\(^{111}\) was also adopted in 2006. In 2015, PEMSEA adopted an updated Sustainable Development Strategy for the Seas of East Asia (SDS-SEA).\(^{112}\) The 2015 SDS-SEA notes the importance of a framework for the protection of the marine environment made up of an integration of existing international conventions. Specifically addressing those of the IMO, it notes the need to take all the convention into account, but with special reference to the OPRC, the CLC and FUND, Ballast Water Convention\(^{113}\), Wreck Removal Convention and Hong Kong Chip Recycling Convention\(^{114}\). While alluded to it does not, inexplicably, address the importance of the Intervention Convention, the Salvage Convention or, given its reference to the CLC and Fund, the Bunker Convention.

**Conclusion**

Numerous reasons underpin a State’s reluctance to ratify international conventions, including political inertia, lack of expert capacity, cost of compliance and cultural sensitivities. In many cases, a State may not be opposed to the content of the particular international convention, but see not direct advantage in becoming a party to the convention if similar results can be obtained merely through the enactment of national legislation that mirrors the content of the convention. This, for example, may very well be the case for the Salvage Convention, where a call for the implementation of a range of IMO conventions that address oil spill preparedness and response as well as compensation regimes, particularly the CLC and Fund conventions. This would create a framework within which the other objectives can be achieved, particularly in narrowing, if not eliminating, the gaps and differences in national capacities to deal with major oil spill incidents and thus erasing what now considered to be a disjointed approach to preparedness and response.

106 Guevarra, above n 104.
107 Brunei, Cambodia, Myanmar, Timor-Leste and Vietnam are not party to the OPRC Convention.
108 Guevarra, above n 104.
109 The (GEF) was established on the eve of the 1992 Rio Earth Summit, to help tackle our planet’s most pressing environmental problems. The United Nations Development Programme, the United Nations Environment Program, and the World Bank were the three initial partners implementing GEF projects. <https://www.thegef.org/gef/whatgef>, 15 February 2016.
fear that participation in the international regime exposes them to potential liability for breaching the convention, or, at the very least, international embarrassment.

While these may be the case in the South East Asian region, the difficulty in agreeing comprehensive and effective oil spill preparedness and response arrangements in the South East Asian waters does not bode well for a region through which such extensive maritime traffic traverses. If regional security issues and heightened concerns of sovereignty in the region undermine this, then greater reference to broader internationally agreed frameworks provide at least a minimum level of cooperation. Indeed, this avoids uncertainty as to which rules and regulation may apply as ‘generally accepted international rules and standards’ emanating from IMO and harmonises applicable national laws. This then will more ably support regional initiatives such GISEA and the revitalised ASEAN OSRAP which presupposes participation in OPRC as well as encouraging broader participation in the IMO Conventions. This is also then encourages private sector engagement which, in many cases, are the entities that are the primary responders to oil pollution incidents, as well as being the entities most likely to develop capacity building in addressing oil pollution incidents. In this light there appears to be no reason why States of the South East Asian region should not more fully embrace the IMO’s conventions that address in some way transboundary marine pollution, and most particularly, the OPRC, Intervention Convention, Salvage Convention and Bunker Convention.
## Appendix

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>X</td>
<td>X</td>
<td>d</td>
<td>X</td>
<td>d</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Brunei Darussalam</td>
<td></td>
<td>X</td>
<td>d</td>
<td>X</td>
<td>d</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cambodia</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Indonesia</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>d</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Malaysia</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Myanmar</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Zealand</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>d</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Philippines</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Singapore</td>
<td>X</td>
<td>d</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Thailand</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Timor-Leste</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Viet Nam</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>12</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>9</td>
<td>1</td>
<td>7</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>6</td>
<td>3</td>
<td>6</td>
</tr>
</tbody>
</table>

X = party; d = denounced
SHIPPING AND AIR POLLUTION: NEW ZEALAND’S FAILURE TO RATIFY MARPOL ANNEX VI

Dr Bevan Marten*

1 Introduction

The global conversation around the amount of pollutants that enter earth’s atmosphere is impossible to ignore, and shipping-related emissions are no exception. Whether the focus is on public health impacts in coastal settlements, or broader concerns connected with greenhouse gases and climate change, the maritime transport sector will inevitably face closer scrutiny over how ships are fuelled and operated over the course of this century. This article focuses in on New Zealand’s lack of engagement with this issue, and in particular its omission to ratify Annex VI of the International Convention for the Prevention of Pollution from Ships (MARPOL). The country’s failure to address shipping emissions has made it a real outlier internationally, and raises important policy questions connected with international shipping regulation. The aims of this article are first, at the international level, to provide an illustration of a form of “negative” State practice in this field, in this instance a State’s decision not to engage with an aspect of widely-accepted international maritime law. Here New Zealand provides a useful example of the challenges faced by those who seek to improve environmental and regulatory standards by way of uniform international law. Second, at the domestic level, the article attempts to refute the reasons given for New Zealand’s position, and to help steer this matter on to New Zealand’s legislative agenda.

2 MARPOL Annex VI

The importance of regulating vessel emissions is illustrated by Cullinane and Bergqvist in the following terms, highlighting the fact that even the most modern marine engines produce a high level of emissions relative to road transport:9

The vast majority (95%) of the world’s shipping fleet runs on diesel. However, the diesel used in ships (usually referred to as bunker oil) is much lower quality than that used in road vehicles. Bunker fuel is much cheaper as it is virtually a waste product of the standard oil refining process. It is a cross between a solid and a liquid that is too thick for road vehicles – it is literally ‘the bottom of the barrel’.

Although the prevention of shipping-related pollution has been a major international priority since the middle of the twentieth century, the air pollution rules that became Annex VI of MARPOL were not agreed to until 1997. These provisions entered into force in 2005 and, following a rocky start and subsequent amendment in 2008, have been highly successful at the global level. Annex VI currently has 86 States parties representing 95% of the world’s tonnage.4

Annex VI contains regulations dealing with ozone-depleting substances, sulphur oxides (‘SOX’), nitrogen oxides (‘NOX’), volatile organic compounds from tankers, and shipboard incineration.3 The Annex sets out a testing and certification regime,6 along with rules on fuel supplies and reception facilities,7 and also provides for IMO-designated emission control areas (such as the Baltic Sea, North Sea, and the North American seaboard).8 This article will primarily focus on the SOX and NOX aspects of the Annex.

---

* School of Law, Victoria University of Wellington, New Zealand.
3 For the background to these developments within the IMO see: James Harrison, ‘Recent Developments and Continuing Challenges in the Regulation of Greenhouse Gas Emissions from International Shipping’ (2012) 27 Ocean Yearbook 359; Sherry P Broder and Jon M Van Dyke, ‘The Urgency of Reducing Air Pollution from Global Shipping’ in Aldo Chircop et al (eds) The Regulation of International Shipping: International and Comparative Perspectives (2012), 261-278.
5 MARPOL Annex VI, regs 12-16.
6 MARPOL Annex VI, regs 5-9.
7 MARPOL Annex VI, regs 17-18.
8 MARPOL Annex VI, regs 13.6 and 14.3.
SOX is one of the by-products of marine diesel engines, forming during the combustion process, and also leads to particulate matter emissions when the gases leaving the exhaust system cool and condense. This can have a negative impact on both the environment, for example by contributing to acidification, and on human health. The New Zealand Ministry for the Environment advises that:

Sulphur dioxide can cause respiratory problems such as bronchitis, and can irritate your nose, throat and lungs. It may cause coughing, wheezing, phlegm and asthma attacks. The effects are worse when you are exercising. Sulphur dioxide has been linked to cardiovascular disease.

Shipping accounts for around 4% to 9% of global anthropogenic SOX emissions, but as the figures cited below in relation to New Zealand demonstrate, shipping’s relative contribution can be much greater in some locations.

The SOX requirements in Annex VI simply refer to permitted sulphur percentages for marine fuels. The current limit, which came into effect in 2012, calls for a maximum sulphur content of 3.5%. This is already comfortably met by existing marine fuel supplies, meaning this aspect of MARPOL has had little impact on vessel operators in many parts of the world. However, in 2020 this limit should lower to 0.5% (subject to a review ascertaining the availability of adequate fuel supplies for the world’s tonnage), while in emissions control areas the limit is already just 0.1%.

NOX is another by-product of ships’ engines, with shipping accounting for around 10% to 15% of global anthropogenic emissions. NOX emissions and related particulate matter (nitric acid and nitrates) contribute to atmospheric pollution, acidification, eutrophication, and can also be linked to human health problems. Unlike with SOX emissions, which can be reduced by using lower-sulphur fuels, the nature of diesel combustion means fuel quality has little impact on the amount of NOX produced. As a result MARPOL’s NOX regulations are more complex, and are aimed at improving engine efficiency. The regulation does this by prohibiting NOX emissions above a certain level based on an engine’s rated speed. For example, marine diesel engines installed on ships after 1 January 2016 must not have NOX emissions exceeding 3.4 g/kWh when the rated engine speed is less than 130 revolutions per minute.

3 The New Zealand Position

New Zealand could not be described as a fast mover in relation to MARPOL generally, having only been a party to the Convention since 1998 (Australia, for example, ratified in 1987), but its lack of interest in Annex VI is still concerning. The country has not overlooked this development on the basis that it has an equivalent, or even a more stringent set of laws, and has therefore declined to support a lesser international standard: New Zealand law currently permits any discharge of contaminants relating to the “normal operations of a ship”, including discharges into the air from propulsion and waste incineration.

Nor has New Zealand omitted to ratify Annex VI on any principled basis. In July 2011 the Associate Minister of Transport told local media that New Zealand was not looking to ratify Annex VI ‘because we do not consider emissions from shipping to be a significant air pollution problem around New Zealand ports and any change is likely to result in increased compliance costs.’ On the basis of this pragmatic position, consideration of this

---

12 Endresen et al, above n 10, 162.
15 MARPOL Annex VI, reg 14.4.
16 Endresen et al, above n 10, 162.
17 Endresen et al, above n 10, 163 and 167-168.
18 Goldworthy, above n 9, 21.
19 MARPOL Annex VI, reg 13.5.1.
Annex is not on the Ministry of Transport’s work programme, and the Ministry of Transport’s current advice on the matter is that ratification is not a priority because:

- First, ‘New Zealand does not currently have significant air pollution problems arising from shipping largely due to weather conditions and the low volume of shipping’;
- Second, New Zealand has no international shipping fleet operating under its flag, while virtually all foreign vessels visiting New Zealand will already be subject to the Annex VI standards as a result of flag or port State measures;
- Third, the adoption of Annex VI would increase costs for domestic shipping operators, at least once the 2020 SOX emissions levels come into effect.

The first point can be summarised as the practical argument, namely that there is insufficient local air pollution to make regulation a priority. The second can be summarised as the international regulatory argument, namely that it does not make sense for New Zealand to regulate this aspect of international shipping. The third is the economic argument around operator costs that accompanies any raising of regulatory standards. This article addresses each argument in turn below.

### 3.1 Is there a Pollution Problem?

At an anecdotal level New Zealand’s air pollution levels could hardly be compared with those confronting large cities in other parts of the world. Still, this does not excuse the country from examining the limited data available on air quality to obtain a more scientific basis to assess the extent of any problem, particularly where human health is concerned.

New Zealand’s shipping-related emissions are likely to be highest in Auckland, Tauranga and Wellington due to the amount of shipping and the geography of these cities. The busiest commercial ports in New Zealand, Auckland and Tauranga, currently receive around 1,500 commercial ship visits each year. Wellington’s CentrePort receives less commercial traffic at around 600 ship visits per year, but hosts the regular interisland ferry services that involve around six to ten return voyages to Picton each day. This boosts the annual total to around 4,200 visits.

Although the presence of other industries can make it difficult to separate out shipping-related emissions from shore-based emissions in some data sets, the strong connection between shipping and SOX emissions has been reflected in studies commissioned by the Auckland Regional Council. In 2004 shipping was recorded as the highest producer of SOX emissions in the region, accounting for 1.47 of 4.20 kt/year from all sources (transport, industry and domestic). In the winter of 2007 17 sites around Auckland were tested for SOX emissions. This testing found:

… elevated concentrations around the port of Auckland and the Penrose site compared with all the other sampling locations. This is due to the environmental impact of shipping and industrial activities. Ships use high sulphur fuels which emit SO₂ during combustion ….

A less detailed 2015 report stated that air quality across the Auckland region had improved, although shipping was still singled out as a source of air pollutants, and data released in 2014 suggested that shipping-related SOX emissions were likely to increase. In 2012 the Auckland Council’s Environment and Sustainability Forum

---

22 Email from Melanie Hutton, Ministry of Transport, to Elizabeth Bolton, Maritime New Zealand (7 November 2011).
24 The port of Lyttelton (Christchurch) is also likely to be affected, but no data on shipping-related emissions appears to have been sourced from this port to date.
26 CentrePort <http://www.centreport.co.nz/>.
31 Auckland Council, Auckland Air Emissions Inventory 2006 (April 2014), 34 and 47.
expressed concern about cruise ship emissions in particular,32 and other groups have continued to express such concerns in more recent times as cruise visits continue to grow.33

Information on SOX emissions is also available for Mount Maunganui, the site of Tauranga’s port. However, due to the presence of a fertiliser factory with a sulphuric acid plant, which is clearly the largest source of sulphur emissions in the area,34 the specific contribution of shipping to the total emissions is not available in the Regional Council’s 2010 report.35 An earlier report had estimated the impact of shipping at the port as 390 tonnes of SOX over the course of 2001.36

In Wellington the impact of sulphur from shipping is highlighted as a “knowledge gap” to be addressed by the Regional Council’s 2012 air quality report.37 An earlier study had found that commercial shipping was the principal source of SOX emissions in the region,38 and concern has been expressed in the past about the impact of the interisland ferries on air quality in the city.39

NOX emissions from shipping have been less prominent in New Zealand, as shown in the Auckland Regional Council’s 2004 study whereby shipping was the third highest source of NOX, but contributed just 2.06 of 35.00 kt/year (5.9%) – a long way behind motor vehicles and industry.40 The Bay of Plenty data for 2001 suggested that the region’s shipping was the fourth highest source of NOX, and contributed just under 6% of the region’s emissions, compared with the 73% arising from motor vehicles and 8% from rail transport.41 In Wellington the relative contribution of shipping to NOX emissions is possibly higher: in 1998 shipping and aviation were reported as contributing 28% of NOX emissions compared with 68% from motor vehicles.42 In any event, most of the focus on NOX emissions at a national level is aimed at road transport, and New Zealand’s roads generally meet World Health Organization (‘WHO’) guidelines in this respect.43 In addition, the country does not typically experience the smog-related problems connected with NOX prevalent in some other parts of the world.44

On this basis the NOX side of the equation alone is unlikely to make shipping emissions a priority in New Zealand in the near future. However, the impact of SOX emissions on human health means that the issue of shipping emissions overall may give more cause for concern. Based on the reports referred to above, it is reasonable to conclude that shipping is a major contributor to SOX emissions in New Zealand. Furthermore, given the close proximity of New Zealand’s main ports to population centres, if these emissions are recorded at unhealthy levels in port areas, then there could be a risk to human health.

The current New Zealand legal standards for SOX emissions are 350 or 570 micrograms per cubic metre (µg/m³), expressed as a one-hour mean (nine exceedances of the lower limit are allowed in each 12 month period, but no exceedances of the higher limit).45 The non-binding “Ambient Air Quality Guideline” set by the Ministry for the Environment is lower, namely 120 µg/m³ as a 24-hour average.46 Since 2006 the equivalent WHO guideline has been lower still, at 20 µg/m³.47 Recent New Zealand data shows that this WHO guideline is being exceeded from time to time:48

---

34 Bay of Plenty Regional Council, Mount Maunganui Ambient Sulphur Dioxide Monitoring (September 2010), 6; see also Environet Ltd, New Zealand Sulphur Dioxide Industrial Emission Survey 2007 (2008).
36 Bay of Plenty Regional Council, Bay of Plenty Regional Air Emission Inventory – Final Report (August 2001), 28; Bay of Plenty Regional Council (2010), above n 34, 9.
37 Greater Wellington Regional Council, Air Quality in the Wellington Region (January 2012), 44, 86, 89, 90.
38 Ministry for the Environment, Emissions Inventories for CO, NOX, SO2, ozone, benzene and benzo(a)pyrene in New Zealand: Air Quality Technical Report No 44 (November 2003), 22.
39 Vance, above n 21.
40 Auckland Regional Council, State of the Auckland Region 2009 (16 March 2010), 70.
41 Bay of Plenty Regional Council (2001), above n 36, ii.
42 Ministry for the Environment (2003), above n 38, 19; Greater Wellington Regional Council, above n 37, 19.
45 Resource Management (National Environmental Standards for Air Quality) Regulations 2004 (NZ), sch1.
In 2012, none of the nine sites monitoring sulphur dioxide breached the short-term (one-hour) national standard. Of the nine sites, three peak sites exceeded the WHO short-term (daily) guideline for sulphur dioxide. These sites have large emissions from industrial or shipping activities. The two sites influenced by industry emissions (Woolston in Christchurch and Mount Maunganui) exceeded the guideline 54 and 69 times over the year respectively, and the site influenced by shipping (Auckland waterfront) did so 13 times.

Similarly:

Sulphur dioxide (associated with respiratory problems) exceeded the short-term guideline at 4 of the 8 monitored locations in 2013. The four sites exceeded the guideline between 1 and 65 days of the year. The four sites were three industrial locations (Mount Maunganui, Woolston in Christchurch, and Timaru) and one port location (Auckland waterfront).

On this basis it is possible to conclude that shipping is making more than a minor contribution to air pollution in New Zealand, particularly in relation to SOX emissions. Therefore, contrary to the current government position on this issue, there is a shipping-related air pollution problem that is at least worthy of closer attention.

Although it could be argued that there is an insufficient amount of data available on this issue to reach such a conclusion, the precautionary principle would hold that a State in New Zealand’s position could introduce restrictions to address the potential risks notwithstanding the lack of comprehensive data, particularly given the known risks to public health. In other words, New Zealand should at least take care to adopt the international agreed minimum standards represented by Annex VI, given the potential health implications of the current position, so that by 2020 the sulphur levels in ships’ fuel can be reduced in its ports.

Going by the Australian experience, where localised concerns over the health impacts of shipping emissions have led to authorities investigating the need for stricter controls, New Zealand government agencies including regional authorities are likely to have an increasing interest in SOX emissions. This may already be emerging at the central government level: in the press release announcing the launch of Environment Aotearoa 2015, the first major report into New Zealand’s environment under the Environmental Reporting Act 2015, the Minister for the Environment noted that “We need to make more progress on transport emissions”.

3.2 International Regulatory Considerations

While the previous section focused on shipping’s impact on New Zealand’s land-based communities, from a legal perspective domestic concerns are not necessarily the most important consideration when assessing MARPOL Annex VI. Air pollution is a global problem, shipping is a global industry, and MARPOL represents global standards. With this wider context in mind, New Zealand’s current position on Annex VI can be seen as overly inward-looking at best, and cynical at worst.

It is certainly true that there are no New Zealand-flagged ships plying international trade routes on a regular basis, meaning that New Zealand relies on foreign-flagged shipping to provide virtually all of its international trade needs. Not being a significant flag State understandably affects New Zealand’s policy priorities in the maritime context, but it has not stopped the country from being an active participant at the IMO. As a very rough guide New Zealand has ratified 32 of the 60 conventions currently listed on the IMO’s “status of conventions by country” record, and the Government has been working to extend this on several fronts in recent years, meaning the total should soon rise to 36.

Engagement with IMO by a State like New Zealand is of course not unusual because, as the number of Annex VI ratifications globally makes clear, it is not only flag States that have an interest in ratifying international maritime

51 Danielle Shaw, ‘Port emissions were the special focus at shipping sector meeting’ (26 February 2015) Lloyd’s List Australia, 10; Jim Wilson, ‘NSW acting on resident concerns, holds cruise ships from terminal pending use of low-sulphur fuel’ (11 June 2015) Lloyd’s List Australia, 3.
environmental conventions. The practice of port State control, through which States inspect visiting foreignflagged vessels against international standards, and enforce compliance with those standards if necessary, is applied to all vessels regardless of whether the flag State is a party to the relevant convention (the “no more favourable treatment” approach). In this way the regulatory net closes around countries whose fleets are dragging behind the international norm, and the more widely-ratified a convention is the fewer places substandard vessels have to hide. From New Zealand’s perspective, ratifying Annex VI would involve being able to enforce its standards against all visiting vessels, not just parties to the Annex. The lack of a foreign-going fleet is arguably of no importance to a coastal State that values high environmental standards.

In the case of MARPOL Annex VI New Zealand should not rely on its regional partners within the Tokyo Memorandum of Understanding on Port State Control (Tokyo MoU) to carry this enforcement burden. The Ministry of Transport in its policy advice expressly refers to New Zealand’s current “free rider” position: “International ships would not likely be affected [by New Zealand’s ratification] as most or all would already be complying with MARPOL VI as a result of their visiting other countries who are Party to the convention.” This statement, which reflects a particularly inward-looking and ungenerous attitude, is not an accurate reflection of the position were New Zealand to ratify the Annex. First, international ships would be affected to the extent that New Zealand is carrying out its responsibilities under the Tokyo MoU to inspect visiting vessels. If some vessels in the region are failing to comply with Annex VI then New Zealand’s contribution to the Tokyo MoU inspection regime will help ensure that these vessels are caught by the regulatory net of which New Zealand forms one part.

Second, in the air pollution context it is port States that are best placed to regulate vessels, as opposed to flag States. A flag State, relying on regular class surveys for example, is in a good position to ensure that vessels have particular equipment fitted, such as the shipboard incinerator requirements of Annex VI. However, given that most vessels operate independently of their flag States for the majority of their voyages, flag States are not well positioned to regulate ongoing operational matters, such as fuel use or ongoing engine emissions. For example, a vessel that was carrying MARPOL-compliant fuel at the time of its most recent flag survey might have switched to a lower-grade fuel shortly afterwards. Only port State control inspections have the capacity to monitor such requirements on a regular basis, which is something that New Zealand should be considering in the context of Annex VI. Vessels are capable of carrying different quality fuels in different tanks, and switching to the lower-quality one where regulation is light or non-existent to save costs. If New Zealand’s does not adopt Annex VI then there is no guarantee at all that vessels visiting New Zealand – which is of course a considerable distance from other countries – will not switch to lower-quality fuel for voyages to this part of the world. The ‘free rider’ approach outlined in the Ministry of Transport’s advice will therefore be of limited assistance.

While a New Zealand policymaker will naturally focus on the practical benefits of a prospective law to New Zealand, any national interest analysis of an IMO regulatory convention should also take into account certain principled arguments connected with the role of international maritime law. At a broad level this can be connected with the general obligation to protect the marine environment in UNCLOS (to which New Zealand is a party), as well as the particular emphasis in art 212 of UNCLOS to prevent “pollution of the marine environment from or through the atmosphere”.

In addition to the general obligation to protect the environment, the organisational background from which treaties like MARPOL stem is important. The IMO is a cooperative enterprise through which the world’s maritime standards are improved at a level that countries are broadly comfortable with. The compromises reached are often

---

54 MARPOL, art 5(4); see Erik Jaap Molenaar, Coastal State Jurisdiction over Vessel-Source Pollution (1998) at 119-121; Harrison, above n 3, 366-367.
55 See Bevan Marten, Port State Jurisdiction and the Regulation of International Merchant Shipping (2014) 46-49.
56 MARPOL Annex VI, reg 10.
57 Memorandum of Understanding on Port State Control in the Asia-Pacific Region (Tokyo MoU), 1993.
60 MARPOL Annex VI, reg 16.6.1 and appendix IV.
61 See Marten, above n 55, 61-62.
64 Zha, Jessen and Zhang, above n 44, 213.
66 See MARPOL Annex VI, reg 11.6; Molenaar, above n 54, 500-503 and 506.
described as favouring maritime nations with strong shipping interests. So it would be one thing for a coastal State like New Zealand to refrain from ratifying an agreement on the basis that the standard was not stringent enough, and the country wanted to introduce its own more demanding one. However, it is an unusual and cynical stance to decide not to ratify on the basis that enough other countries have already done so, making it easier and cheaper not to bother. Standing with the international community and raising marine environmental standards is the more responsible position for a country like New Zealand, which values its commitment to international law.

Adding further pressure in this specific context is the fact that 86 other countries have already put their name to Annex VI, so it is likely that this lack of engagement would be raised in any IMO audit of New Zealand – this was a factor Iceland considered when it decided to begin the ratification process recently. Maritime New Zealand, the agency responsible for New Zealand’s engagement with IMO, has published a Strategy for New Zealand’s Engagement with IMO (2013–2020), which includes the goals of ‘strengthening New Zealand’s ability to influence international outcomes consistent with New Zealand’s interests’ and ‘safeguard[ing] New Zealand’s “brand” as a responsible maritime regulator and constructive participant in the international maritime system’. Neither of these strategies can be achieved without government prioritising core marine environmental regulations under MARPOL, which has been described as one of the four ‘pillars’ of international maritime regulation.

MARPOL updates, including new annexes, should be something that a State like New Zealand ratifies as a matter of course and in a timely fashion – the question should really be whether there are strong reasons for not doing so.

There is also a cost to not being party to Annex VI in terms of the wider international discussion about emissions in connection with climate change. This is noted in the Ministry of Transport’s advice which notes that ‘NZ’s ability to influence related issues at IMO is limited by not being a signatory’ to the instrument. As shipping-related emissions were left to the IMO by the Kyoto Protocol, and this did not change following the December 2015 Paris climate agreement, discussions in this important area coalesce around the IMO, and MARPOL Annex VI in particular. New Zealand can have no meaningful part in any discussion in this area until it becomes a party to Annex VI, particularly if a vote of Annex VI parties is called for. The Ministry of Transport has also advised that even if New Zealand does not become a signatory there may be flow-on effects in terms of future SOX levels in fuel and regulations concerning greenhouse gas emissions: “this international regulation will not go away”. Before New Zealand could even start talking about whether this is the best solution, or whether the standards should change in future, it will need to join the club.

This is not just a matter of principle, although principle alone should be a sufficient basis for a State to seek deeper engagement with one of the most important issues facing the globe. There is an economic angle that will also be of importance to New Zealand in the form of the market-based measures under consideration in connection with the IMO’s approach to curbing emissions. For example, the proposal put forward by Jamaica would involve:

… member States participat[ing] in levying a uniform emissions charge on all vessels calling at their respective ports based on the amount of fuel consumed by the respective vessel on that voyage (not bunker suppliers).

The potential implications of such a scheme for New Zealand, which is a long distance from any other country, are obvious. At a minimum there would be higher freight costs, and while this is arguably inevitable in the context of improved environmental standards, the price increase in isolated New Zealand could be higher than in other markets. At worst, some shipping lines could factor New Zealand out of their schedules altogether if the cost of

---

69 Email from Sverrir Konradsson, Specialist Maritime Affairs – Legal Coordination and Translations, Icelandic Transport Authority, to author, 23 January 2016.
71 IMO, IMO Secretary-General welcomes entry into force of Maritime Labour Convention (press release, 20 August 2013).
73 Kyoto Protocol to the UN Framework Convention on Climate Change (Kyoto Protocol), 1997, 2303 UNTS 148, art 2(2).
74 IMO, Full speed ahead with climate-change measures at IMO following Paris Agreement (press release, 14 December 2015).
77 See Shi, above n 75, 98-102.
78 IMO, Reduction of GHG Emissions from Ships (13 August 2010, MEPC/61/INF.2), 80
trading there became too high, which would be a major blow to New Zealand’s export-led economy. Accordingly, with this type of proposal in mind, New Zealand should be more inclined to seek a seat at the table, so that it can guide this process as a party to MARPOL Annex VI, and not later ratify a package of measures that is poorly designed for New Zealand trading conditions (or worse still, never adopt the Annex and refuse to regulate shipping-related air pollution to avoid higher costs).

Finally, one can look to broader considerations of international reputation to support New Zealand’s ratification of Annex VI. New Zealand is a developed nation that traditionally prides itself on its commitment to international law and its ‘clean, green brand’. However, to date it is one of only four OECD countries not to have ratified the Annex (the others are Iceland, Israel and Mexico). New Zealand compared itself to other OECD countries when introducing its environmental reporting legislation in September 2015, noting it was the ‘only OECD country to not have a statutory requirement for state of the environment reporting’. Similarly New Zealand sees itself as a leader within the South Pacific Commission (SPC) group of countries, but is proving a late follower in this area, which is of added significance given the importance of climate change issues for these States.

### 3.3 The Cost to Shipping

The financial burden placed on industry by higher regulatory standards is a common refrain in any debate of this nature, and in the context of shipping bunker fuel represents a major component of a vessel operator’s costs. In particular, New Zealand’s domestic shipping industry faces very stiff competition from international players who enjoy lower operating costs and a largely unfettered ability to trade on the New Zealand coast.

While it is not the place of this article to conduct a full economic analysis of the impact an increase in standards aligned with Annex VI’s requirements might have in New Zealand, it is possible to make some broader comments. First, ratifying Annex VI would have no immediate impact on domestic operators’ fuel costs: marine fuel currently produced in New Zealand at Marsden Point contains around 3% sulphur. This meets the 2012 limit of 3.5% max sulphur, but not the 2020 limit of 0.5%. There is also some protection through the review clause in Annex VI requiring an assessment in 2018 to determine whether there are adequate supplies of appropriate fuel.

The New Zealand Shipping Federation, which represents domestic New Zealand operators, is conscious of shipping’s ability to promote itself as the most energy-efficient mode of transport for each kilometre per tonne of cargo, and argues in this context that:

> The large potential benefits of reduced CO2 emissions from increased use of domestic sea freight need to be supported by a continuing focus on reducing more localised environmental impacts, including efforts to reduce sulphur dioxide and nitrous oxide emissions from vessels.

This suggests that, with the right adjustments to their competitive environment, domestic shipping operators would be prepared to bear the costs of higher fuel and engine efficiency standards if it enabled them to increase their competitive advantage as the ‘greenest’ of the transport modes available for domestic cargo. Otherwise fuel standards might be perceived as just one more aspect where ‘equality’ with international players simply puts local players at a greater disadvantage.

---


80 Iceland is in the process of ratification: email from Sigurrós Fríðriksdóttir, Advisor, Department for Nature, Iceland, to author, 23 January 2016.


82 Australia, Cook Islands, Kiribati, Niue, Palau, Samoa, Tonga, Tuvalu and Vanuatu have ratified. Fiji, New Zealand and the Solomon Islands have not.

83 See New Zealand Shipping Federation, *Full Steam Ahead* (7 December 2015), 8.

84 Such work is being undertaken in relation to other areas, see for example: Johan Holmgren et al, ‘Modeling Modal Choice Effects of Regulation on Low-Sulphur Marine Fuels in Northern Europe’ (2014) 28 *Transportation Research Part D* 62. Research into options available to ship operators considering alternative fuel sources is also being pursued: see for example Michele Acciaro, ‘Real Option Analysis for Environmental Compliance: LNG and Emission Control Areas’ (2014) 28 *Transportation Research Part D* 41.

85 Email from Melanie Hutton, Ministry of Transport, to Elizabeth Bolton, Maritime New Zealand (7 November 2011). New Zealand has just one oil refinery providing all of the country’s marine fuel needs, namely Refining NZ’s Marsden Point facility in Whangarei. Foreign ships plying international routes tend to take on bunkers outside of New Zealand.


Second, the requirements of Annex VI do not affect all ships equally, and complete fleet refits would not be required immediately. Older vessel engines are held to lesser NOX standards than newer ones, and a State can choose to exempt pre-2005 engines from the NOX regulation altogether where domestic vessels are concerned.\footnote{\textit{MARPOL} Annex VI, reg 13.1.3.} In terms of SOX regulations the local fleet might benefit from earlier ratification, providing a few years to prepare for the 2020 sulphur limit if some form of change is seen as inevitable, rather than joining after 2020 and having a very short window for compliance.

4 Final Comments

The example of New Zealand’s omission to ratify Annex VI gives an insight into the competing priorities faced by countries when ratifying international conventions. On a cursory examination the New Zealand government’s lack of interest in MARPOL Annex VI might seem justifiable – the country’s air seems clean, and other countries are looking after international vessels, so why raise costs for local operators? However, this article has argued that the position is unsound. First, there is some evidence of significant sulphur levels in the vicinity of major New Zealand ports, which at least warrants further investigation. But even if the practical impact on New Zealand itself is less pronounced than in more populous regions, air pollution is not an issue that only affects individual States, but rather an issue of immense global significance.

Second, where international regulatory considerations are concerned, there are both principled and practical reasons for New Zealand to ratify the Annex. New Zealand cannot and should not rely solely on other port States to enforce the operational aspects of MARPOL, and the IMO-led regulatory framework is one that all responsible States should engage with. New Zealand’s economic interests may also be affected by any market-based measures that are eventually introduced to combat greenhouse gas emissions from shipping, and it would be prudent for the country to acquire a place at the table for future discussions on this theme. Third, while increased regulation will result in higher costs, there is reason to believe that New Zealand’s domestic industry would be willing to work towards reducing emissions, especially if the competitive balance with international shipping is improved. From an international maritime lawyer’s perspective, New Zealand’s current position on MARPOL Annex VI is an embarrassment. Ratification of MARPOL Annex VI is overdue and should be made a priority on the government’s agenda.
THE TOKYO MOU: ITS IMPLICATIONS FOR TAIWAN

Chen-Ju Chen

1 Introduction

Most global ocean areas are operated by several Memorandums of Understanding (MoUs) on port State control. These MoUs’ legal and political bases are rooted in the port State control concepts developed within the maritime conventions. The port State control allows ports to inspect foreign vessels to verify that the vessel conditions, equipment, personnel, and operations comply with the requirements of applicable domestic and international regulations. Adopted in 1982, the Paris MoU on Port State Control in Europe and the North Atlantic Ocean (Paris MoU)\(^1\) was the first mechanism developed at the regional level—to exercise this power to inspect foreign vessels. In December 1993, signed was the MoU on Port State Control in the Asia-Pacific Region (Tokyo MoU).\(^2\) Since then, a group of Asia-Pacific regional ports have cooperated with each other to harmonize their respective practices. Located in a strategically important international shipping route, Taiwan’s ports face various challenges from this regional development; particularly as Taiwan is not an International Maritime Organization (IMO) Member State and has no means to take part in Tokyo MoU in any form. Thus, Taiwan unilaterally claimed its compliance with relevant conventions and instruments via its domestic regulations and established its port State control system with foreign governmental assistance.

This paper commences with port State jurisdiction and port State control concepts established under the law of the sea. Next, investigated at the regional level are the Tokyo MoU concepts and practices. Given Taiwan’s status under international law impedes its international law approaches, this paper investigates how Taiwan responds to such regional development. Conclusively, this paper intends to point out—based on previous regional experiences—what areas Taiwan can improve on to effectively enforce its port State control system.

2 Port State Jurisdiction and Port State Control under the LOS Convention

2.1 Port State Jurisdiction

Upon the most extensive and comprehensive codification activities under the UN aegis,\(^3\) the UN Convention on the Law of the Sea (LOS Convention)\(^4\)—in 1982—was adopted to act as the most fundamental legal instrument of maritime activity governance. As the “constitution for the oceans,” this Convention establishes maritime zones, including those under coastal State jurisdictions (internal waters, archipelagic waters, territorial seas, contiguous zones, exclusive economic zones and continental shelves), as well as those outside coastal State jurisdictions (high seas and the Area). These establishments show that the LOS Convention does not deal with port State jurisdiction in great depth.

More specifically, over the internal waters and territorial seas, the coastal States enjoy full jurisdiction with the major exception of foreign vessels’ innocent passage rights.\(^5\) In facing any conditions breaches involving access admission to the coastal States’ internal waters and ports, the coastal States are granted the right to take the necessary prevention steps.\(^6\) In contrast, over the high seas, it is the flag States’ responsibility to carry out the duties to exercise the jurisdictions and controls over vessels flying their respective flags or registries.\(^7\) These flag States’ duties include enforcing applicable international rules and standards established via the competent international organization or general diplomatic conference, along with domestic laws and regulations adopted accordingly with the LOS Convention to prevent, reduce, and control vessel-source pollution.\(^8\) To complement this often ineffective flag State jurisdiction, the port States are granted enforcement jurisdiction regarding discharges from vessels outside of their waters.\(^9\) The jurisdiction granted to port States is largely established in

---

\(^5\) Article 17 of the LOS Convention.
\(^6\) Article 25(2) of the LOS Convention.
\(^7\) Article 94 of the LOS Convention.
\(^8\) Article 217 of the LOS Convention.
connection with territorial jurisdiction, which is one of customary international law’s jurisdiction principles. Hence, prior to the LOS Convention’s adoption, technical maritime conventions developed by the IMO already contained provisions to authorize port States the powers to inspect foreign vessels. Prominent examples include: the 1929 Safety of Life at Sea Convention (SOLAS Convention), Article 21 of the 1966 Load Lines Convention (LL Convention), Regulation 6 of the 1978 Convention for the Prevention of Pollution from Ships (MARPOL Convention), as well as the Article X of the 1978 Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention). Thus, the roles and functions of the port States have been gradually expanded.

### 2.2 Port State Control and the MoU

Based on the above-mentioned developments, the port State control system as an innovative exercise was established for the port States to inspect foreign vessels to verify that the vessel condition, equipment, personnel, and operations complied with generally accepted international rules and standards. As the close coordination between the regional ports can effectively enforce and harmonize the port State control system, concluded has been the regional Memorandum of Understanding (MoU) on Port State Control. This regional MoU serves as an inter-governmental cooperative mechanism to regularly and systematically control ships.

#### 2.2.1 Paris MoU on Port State Control

In 1982, as the first regional mechanism to develop as this type, the Paris MoU on Port State Control in Europe and the north Atlantic Ocean was adopted by the fourteen Maritime Administrations of European port States to timely respond to “a strong political and public outcry in Europe for more stringent regulations” raised from the 1978 Amoco Cadiz oil spill incident. As of April 2016, it has been expanded to twenty-seven Maritime Administrations, including Canada and Russia. It is not only the earliest developed to, but also the most up-to-date in incorporating the requirements of international instruments in pursuits of maritime safety, vessel-source pollution prevention, along with the board vessels’ living and working conditions. Following this initiative and based on the established principles, many other regional MoUs have been concluded. All these existing regional MoUs cover most of the world oceans. Within the scope of internationally instruments legally binding to the port States, namely the IMO and ILO Conventions, these MoUs aim to eventually eliminate the operation of substandard vessels via a harmonized system and to ensure all vessels operating in their respective regions meet international rules and standards.

#### 2.2.2 Tokyo MoU on Port State Control

**Reflecting the Paris MoU**

Inspired by the Paris MoU, signed in 1993 was the Tokyo MoU on Port State Control in the Asia-Pacific Region. Over the past years, the Tokyo MoU was subject to several amendments. The newest ones were adopted on 5 and
6 October and enforced on 5 October 2015 and 1 December 2015 respectively. With its full vitality, the Tokyo MoU has been considered as a proper regional regime of port State control; particularly as it has achieved the highest inspection number and rate amongst existing regional MoUs. The Tokyo MoU is, in every other respect, identical to the Paris MoU and generally reflective of the Paris MoU’s established framework. For instance, like the Paris MoU’s Section 2.4, the Tokyo MoUs adopted the “no more favourable treatment” under its Section 2.5 to ensure that no more favorable treatment will be granted to ships flying the flags of non-Tokyo-MoU-Members.

Members and Observers

As of April 2016, the Tokyo MoU consists of twenty Member Authorities, one Cooperating Member Authorities and five Observers in the Asia-Pacific region. Amongst these, noteworthy is that both China and Hong Kong (China) are full MoU Members, while Macao (China) enjoys Observer status. Also, the United States Coast Guard (USCG) enjoys Observer status of the Tokyo MoU. This is even though the United States is not a party to any of the MoUs on Port State Control. For Observers, the MoU is not legally binding on them. However, they still apply the principles behind the MoU concepts. For instance, the USCG operates a program in which vessels operating within its jurisdiction are systemically inspected to verify their substantial compliance with applicable domestic plus international laws and regulations.

Legal Instruments Included


Also, questions might be raised as to whether the Tokyo MoU Members are the contracting parties of these conventions and whether the participation of these Members in the Tokyo MoU makes the conventions which have not been signed and ratified legally binding on them. Take China as an example. Although China is a contracting party of the above-mentioned IMO conventions, it has not ratified the ILO Convention No. 147 and just ratified the MLC on 12 November 2015 which will enter into force for China on 12 November 2016. This fact shows that the Tokyo MoU would to a certain degree indirectly make the conventions binding on the MoU Members which have not signed or ratified them. For this, the Tokyo MoU provides a special provision regarding the conventions adopted by the ILO. The implementations of the ILO Convention No. 147 and MLC will not require any alternations to structure or facilities involving accommodation for ships whose keels were laid down before 1 April 1994 and 20 August 2013 respectively. This arrangement seems to reduce the reluctance of the Tokyo MoU Members to accept the MoU contents, as the Tokyo MoU Members may not fully ratify the IMO and ILO conventions incorporated into the Tokyo MoU.

21 Section 2.1 of the Tokyo MoU.
22 Section 2.1 of the Paris MoU.
Governing Structure and Inspection Procedures

The Tokyo MoU also establishes a governing body, the Port State Control Committee, located in Tokyo, to carry out specific tasks assigned to it under the MoU; promote by all means necessary that includes: training and seminars, harmonization of procedures and practices relating to inspection, rectification and detention whilst having regard to Section 2.4; develop and review guidelines for carrying out inspections under the MoU; develop and review procedures for the exchange of information; and keep under review other matters relating to the MoU’s operations and effectiveness. Under the Committee’s coordination, each Maritime Authority will determine an appropriate annual percentage of individual foreign merchant ships for inspection.27 In respect of shipping industry costs and operations, inspections should be done at an acceptable rate and thus avoided should be unnecessary inspections. The inspection should consist of a visit on board a ship in order to check certificates and documents. These are coupled with surveys of the overall satisfaction of the crew and the ship’s overall condition, its equipment, machinery spaces and accommodation, hygienic conditions, as well as the meeting of the relevant instruments’ requirements.28 In selecting ships for inspection, the Maritime Authorities will determine the priority order based on the New Inspection Regime introduced in 2014.29 In deficient cases, which are clearly hazardous to safety, health or the environment, the Maritime Authorities will ensure that the hazards are removed before the ship is allowed to proceed to sea. For this purpose, appropriate action will be taken that might include the detention or a formal prohibition of a ship to continue an operation due to established deficiencies, which, individually or together, would render the continued operation hazardous.30 Under the Tokyo MoU, appeal procedures are also provided.31 The company of a ship or its representative has an appeal right against a detention taken by the Maritime Authority of the port State. Thus, the Port State Control Officer should properly inform the shipmaster of such right prior to detention. Also, the shipmaster should be advised to use the official domestic procedure if an appeal against a detention order is desired.

Statistics

Though some doubts have been raised about the Tokyo MoU’s efficiency,32 the efforts of its Member Authorities are all to view. Under the Tokyo MoU, the target annual inspection rate set in 1993 was 50% by the year 2000.33 According to its Annual Reports, the inspection rate since then has increased to 65% in 2000 and 69% in 2014.34 In 2003, 20,124 inspections were carried out on ships registered under 98 flags, while in 2014, 30,405 inspections were carried out on ship registered under 99 flags. In 2003, 1,709 detentions were carried out on ships registered under 67 flags, while in 2014, 1,203 ships registered under 64 flags were detained due to serious deficiencies found on board. These statistics show an 8.49% detention rate in 2003 and a decrease to 3.96% in 2014.35 Thus, this decrease in detention rates may demonstrate that the Tokyo MoU has been effective as less serious deficiencies are found and that the vessel conditions seem to have improved.

Amongst the Tokyo MoU Members, in 2014, China conducted 7,361 inspections with a 38.66% inspection rate and Hong Kong (China) conducted 736 inspections with a 14.34% inspection rate. Both China and Hong Kong (China) contributed up to 26.63% of total inspections conducted within the Tokyo MoU region. Following the inspections, 476 detentions were made by China with a 6.47% detention rate and 47 detentions were made by Hong Kong (China) with a 6.39% detention rate. Along with Australia’s 7.9% detention rate, these three Tokyo MoU Members performed the three highest detention rates in 2014.37 Unequivocally, China – with or without Hong Kong – has become an influential player in the Tokyo MoU regime.

In conclusion, the regional MoUs are developed as a type of instruments to implement port State control at present type, such as the Paris MoU and Tokyo MoU, although doubts exist primarily due to its inefficiency. Should be considered are other forms of international cooperation on port State control being able to increase the effective

27 Section 1.4 of the Tokyo MoU.
28 Section 3.1 of the Tokyo MoU.
29 Section 3.3 of the Tokyo MoU.
30 Section 3.7 of the Tokyo MoU.
35 Ibid.
36 Ibid., 23.
37 Ibid.
implementation of port State control. Other than this, given the coasts and ports’ prosperity, China and Hong Kong (China) have, to a great degree, contributed to the enforcement of the Tokyo MoU. The next section focuses on Taiwan’s practices to view how it responds to the Tokyo MoU’s developments.

3. **Tokyo MoU’s Implications for Taiwan**

To investigate how Taiwan responds to the port State’s regional development surrounding it, one must first be cognizant of Taiwan’s status in international law and accompanying challenges.

3.1 **Status of Taiwan under International Law**

Although the Republic of China was the Member of the UN Charter and one of the five UN Security Council Permanent Members, since the establishment of the People’s Republic of China in 1949, the government of the Republic of China lost the Chinese Civil War and relocated to Taiwan, the international situation that the Republic of China faced had been more and more unfavorable to it from the 1950s to 1970s. Eventually, Taiwan or more specifically the Republic of China was expelled from the UN in 1971 by the UNGA Resolution 2758, and thus replaced by the People’s Republic of China as the only lawful representative of China to the UN. Since then, Taiwan has lost much formal participation opportunities in international society. Exceptions only exist for it as the Separate Customs Territory for World Trade Organization participation, along with the Fishing Entity in the Regional Fisheries Management Organizations.

3.2 **Possibility of Taiwan’s Participation in the IMO and the Tokyo MoU**

Taiwan’s significant maritime sector is—as discussed in the following—in a position to share information with other port State control authorities within the region. Thus, it is of benefit for the international community to include both Taiwan’s IMO and Tokyo MoU’s involvements. Concerning Taiwan’s IMO participation, the Convention on the IMO was first accepted—on 1 July 1958—on behalf of the Republic of China. Since then, the Republic of China had been an IMO Member. However, following the changing international situation and with the supporting statement of the Socialist States, the People’s Republic of China took place in the IMO on 1 March 1973. Possessions, territories or organic political members geographically outside or not fully integrated into their superior State governments which are the IMO Members, may be granted the Associate Member status. The notifications in writing should be submitted by the Member or by the UN to the Secretary-General of the UN. The Special Administrative Regions of the People’s Republic of China, namely Hong Kong and Macao, became IMO Associate Members due to their former colonial States (the United Kingdom and Portugal). On 7 June 1967 and 2 February 1990 respectively, such States made notifications under Article 8 of the Convention on the IMO. Even with the reunification with the People’s Republic of China (1997 for Hong Kong and 1999 for Macao), both Hong Kong and Macao have retained their Associate Member status. For Taiwan, it has been claimed as a province by the People’s Republic of China as based on the “one China” policy. However, Taiwan—coupled with its internal differences—would not officially agree with the aforesaid claim due to Taiwan’s de facto independent sovereignty and jurisdiction. Given this political background, Taiwan is not even an IMO full Member or Associate Member.

Taiwan’s approaches for IMO access would be to participate in the NGOs that have obtained the “Consultative Status Observer” status in the IMO. This approach was also proposed by the ROC National Association of Chinese Shipowners to Taiwan’s Ministry of Foreign Affairs. John Cartner, Richard Fiske, and Tara Leiter once mentioned that the Asian Shipowners Forum, whose Members included Taiwan had applied for the “Consultative Status Observer” status in the IMO. However, facts have shown that the Asian Shipowners Forum have still not gained such status.

38 Suggested is to conclude ‘a MoU on Cooperation between States bordering Enclosed or Semi-enclosed Seas with regard to the Harmonised Exercise of Port State Jurisdiction over Illegal Discharges from Ships.’ Ho-Sam Bang, above n 34, 129.
45 UNTC, above n 44.
46 John A. C. Cartner, Richard Fiske, and Tara Leiter, above n 45, 43.
Regarding Taiwan’s participation in the Tokyo MoU, Section 8.2 of the Tokyo MoU provides that any Maritime Authority meeting required criteria under Annex I to the MoU can be a Member Authority or Cooperating Member Authority. Further provided is that any Maritime Authority or an intergovernmental organization wishing to participate as an Observer to the MoU needs to submit in writing an application to the Committee. No matter to become a Member Authority, Cooperating Member Authority or Observer, required is the unanimous consent of the authorities present and voting at the Committee meeting. Different criteria and responsibilities are also set for different types of participation. In Taiwan’s case, the major obstacle of its participation would be to get the unanimous consent of the authorities present, as China is one of the Maritime Authorities present and it usually opposes Taiwan’s participation in intergovernmental organizations. The status of Taiwan and the situation that it is facing are different from the cases of Hong Kong and Macao.

Although Taiwan is not able to participate in the IMO and Tokyo MoU, among the top twenty shipping operators in the world, three originated from Taiwan, including Evergreen Line, Yang Ming Marine Transport Corp., and Wan Hai Lines. Also, as Taiwan is not able to formally sign and ratify the IMO conventions, how the IMO conventions would be binding on it is then doubtful. Thus, Taiwan voluntarily and unilaterally claimed its law, like the MoUs on Port State Control.

**3.3 Taiwan’s Domestic Laws**

In respect of the port State control system, considering that a port State need not be a signatory of such conventions to exercise port State control, Taiwan has adopted the following domestic laws to authorize the port State control to be implemented and administered.

Article 58 of the Commercial Port Law—as amended and promulgated in 2011—states that “[t]he Procedures for Port State Control and its regulations announced by the commercial port authority according to the International Maritime Organization or other relevant authorities, should implement examination of ship certificate, security, equipment, crew quotas and other matters towards the entrance and departure of foreign merchant ships.”

Article 59 of the Commercial Port Law—as amended and promulgated in 2011—states that “[w]hen the commercial port authority executes foreign merchant ship control examination, they should hand it to the master to sign after information have been recorded in the inspection record. If there are any violations, the commercial port authority has to be improved in a limited time,” and “[a]fter foreign merchant ships have made improvements according to the preceding paragraph, they should request the commercial port authority for reexamination, and pay for the reexamination fees as well. The amounts should be stipulated by the commercial port authority, and check and ratified by competent authority.”

Article 60 of the Commercial Port Law—as amended and promulgated in 2011—further states that “[w]hen foreign merchant ships seriously violate control examination regulations, influence ship navigation safety of ship personnel, and can seriously threaten marine environment, the commercial port authority have to retain ships till improvements are completed, in order for them to be approved to navigate,” and “[w]here foreign merchant ships violate control examination regulation, our country has no repairing equipment technology, and no accessory material to provide to change or retain illegal ships. Those that will influence port safety or public interests, have to produce entry level verification proof, and receive approval from commercial port authority to be able to navigate.” These Commercial Port Law provisions provide the legal basis for Maritime Authorities to detain commercial vessels. A ship may be detained if it is found to be operating under a certificate issued in accordance with applicable conventions that are found to be invalid, and if either its condition or that of its crew fails to correspond substantially with applicable conventions. The ship will not be permitted to sail until compliance with such conventions is demonstrated in order to ensure the safety of the vessel, crew, and marine environment.

---

47 Sections 2 and 3 of the Tokyo MoU.
48 Sections 2, 4 and 5 of Annex I to the Tokyo MoU.
52 Bevan Marten, above n 10, 118.
Furthermore, Taiwan’s domestic laws provide rules to authorize the Maritime Authority to determine which rules and standards are to be referred to. Namely, Article 75 of the Commercial Port Law—as amended and promulgated in 2011—states that “[w]hen commercial port safety and management items involve international affairs, competent authorities shall refer to international conventions, agreements, and rules, methods, standards, suggestions of its supplementary rules.” Also, Article 101 of the Law of Ships—as promulgated in 2010—states that “[f]or other rules and regulations on ship technology and management, the competent authority may refer to the standards, recommendations, measures or procedures set down in the relevant international conventions or agreements and their annexes, and adopt them for promulgation and enforcement.” Article 89 of the Seafarer Act—as amended and promulgated in 2014—states that “[f]or matters not provided herein which involving in international transactions, the competent authority may adopt and implement the rules, regulations, guidelines, standards, recommendations and programs set forth under the relevant international conventions or agreements and their protocols thereof.” Through these provisions, granted to its Maritime Authority by the legislators are the rights to determine which relevant conventions to incorporate into domestic laws. Such model was adopted by Taiwan to transform international law into its domestic laws in the maritime affairs field. Unlike its international law practices, such as trade law (amending or adopting domestic laws to comply with WTO Agreements) and human rights law (adopting the enforcing act), this mode is rather unique. A major reason would be for this field’s technicality. Also, a similar provision is provided in the civil aviation field, as Article 121 of the Civil Aviation Act—as amended and promulgated in 2001—states that “CAA may, making reference to the standards, recommendations, measures or procedures outlined in relevant international conventions and annexes thereto, propose to MOTC for adoption of provisions involving international affairs not covered in this Act, for their promulgation and implementation.”

3.4 Legal Instruments Included

From the official websites of Taiwan’s port State control system, the following applicable conventions have been identified. They are the: (1) International Convention on Load Lines 1966; (2) Protocol of 1988 relating to the International Convention on Load Lines, 1966; (3) International Convention on Tonnage Measurement of Ships, 1969; (4) Convention on the International Regulations for Preventing Collisions at Sea, 1972; (5) International Convention on Standards for Training, Certification and Watchkeeping for Seafarers, 1978, as amended; (6) International Convention for the Prevention of Pollution from Ships 1973, as modified by the Protocol of 1978 relating thereto; (7) Merchant Shipping (Minimum Standards) Convention, 1976 (ILO Convention No. 147); (8) International Convention for the Safety of Life at Sea, 1974 as amended; (9) Protocol of 1978 relating to the International Convention for the Safety of Life at Sea, 1974; and (10) International Ship and Port Facility Security (ISPS) Code, 2002. Thus, a ship found not compliant with terms with the aforesaid conventions shall be deemed as holding invalid certificates and henceforth subject to detention. 54

Compared to the applicable conventions covered under the Tokyo MoU and Taiwan’s port State control system, Taiwan’s port State control system fails to cover the: (1) Maritime Labour Convention, 2006 (MLC, 2006), (2) International Convention on the Control of Harmful Anti-fouling Systems on Ships, 2001, (3) Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC PROT 1992), and (4) Protocol of 1988 relating to the International Convention for the Safety of Life at Sea, 1974. Obviously, amongst the instrument covered under Taiwan’s port State control system, the ISPS Code is the only one adopted later than the establishment of Taiwan’s system in 2001. Not being up-to-date can to a certain degree explain the reasons why Taiwan’s system covers fewer instruments and why the Maritime Labour Convention and the International Convention on the Control of Harmful Anti-fouling Systems on Ships are left behind. Also, excluded are the issue of civil liability for oil pollution damage and the newest Protocol relating to the International Convention for the Safety of Life at Sea. More improvement in this regard is thus required.

3.5 Taiwan’s Practice of Port State Control

Based on these provisions, a port State control system was to be established in Taiwan. In September 1998, the Canadian Trade Office in Taipei (hereinafter referred to as CTOT) was contracted to assist Taiwan’s Ministry of Transportation and Communications (hereinafter referred to as MOTC) to develop Taiwan’s port State control system. CTOT, together with the Canadian Coast Guard, submitted their proposal to the MOTC. The MOTC, with a mandate to implement a port State control system covering all domestic ports open to foreign shipping, joined with Transport Canada, Canada’s federal-level transportation authority, and CTOT to determine the most effective

way to implement such a system in Taiwan. The cooperative project was defined to cover ship safety, pollution prevention, as well as shipboard living and working conditions. Since the Canada-Taiwan agreement’s introduction in January 2001, the port State control system has been in place in Taiwan for several years. This agreement aims to establish a port State control system that meets or exceeds, in all respects, the Tokyo MoU’s requirements. It requires foreign merchant ships calling at, or anchoring off, Taiwan ports to comply with applicable convention standards. The Maritime and Port Bureau, MOTC is the office in charge of the port State control system in Taiwan.

According to its official website, Taiwan considers that after the port State control system’s establishment, immediate results have been realized in enhanced ship safety, reduced marine environmental pollution, along with improved living and working conditions on board. Within this system, the recording and reporting schemes shall comply and agree with that currently used by Tokyo MoU signatories. The system further allows for the delay or detention of ships identified as substandard or unsafe. Contained is an appeal process available to shipowners to challenge Port State Control Officer decisions. To improve the Port State Control Officers’ professional qualifications and to augment port State control activities in the Asia-Pacific region, the system also fosters effective and comprehensive technical cooperation programs. In addition, training courses, seminars and visits to ports in other countries sponsored by the MOTC are applied as tools for Port State Control Officers to raise professional standards and sharing experiences.

According to statistics between 2003 and 2014, the inspection rate has increased from 4.65% to 12.3%. The deficiency rate was 74.2% in 2003 and 87.3% in 2014. However, it did not show the steadily increased trend as it once dropped to 43.4% in 2005. The detention rate was 5.43% in 2003 and 25.37% in 2014. With this rough increase trend, it still had a slight drop to 19.63% in 2010. Compared the inspections conducted by Taiwan to those by China and Hong Kong (China) under the Tokyo MoU, the inspection rate of Taiwan in 2014 is much lower than that of China and slightly lower than that of Hong Kong (China). However, just these statistics cannot conclude Taiwan’s efficiency or inefficiency as the detention rate of Taiwan in 2014 is several times higher than those of China and Hong Kong (China).

Even so, some scholars have mentioned that Taiwan’s system can still improve in some areas, such as establishing an independent governmental agency to carry out the port State control duty, enacting comprehensive domestic laws for enforcing the system, establishing full-time task of port State control, recruiting and training more qualified persons as Port State Control Officers, as well as increasing informal contacts with Tokyo MoU or foreign State’s port State control authorities to exchange information and experience on the implementation.

4 Conclusion

With all of the above-mentioned, Taiwan has shown its willingness to comply with relevant conventions, both IMO and ILO ones by adopting specific provisions in its domestic laws and establishing the port State control system based on the model of the Tokyo MoU. However, in terms of the scope of legal instruments, obviously Taiwan’s port State control system does not fully reflect the Tokyo MoU’s. Should be improved is being up-to-date. Even so, one should consider that Taiwan is not a full Member State of the IMO or any regional MoU on Port State Control, its willingness to comply with these instruments can thus be encouraged. Furthermore, mentioned should be its experience in establishing the port State control system based on a bilateral agreement with Canada. Therefore, this could also be a model for the entity sui generis that is not able to participate in the IMO or regional MoUs on Port State Control to establish an effective system.

Overall, demonstrated is that regardless of the international cooperation forms and the MoU’s signing on port State control, there are still some directions that States can move to for further enhancing the port State control’s enforcement. That would be the comprehensive domestic laws to reflect the relevant IMO and ILO conventions and the best practice of the domestic administrative system of port State control. Overall, Taiwan still has some room for improvement.

OPENNESS AND INCLUSIVENESS: NATURE OF CHINESE MARITIME LAW
AND LEGAL PRACTICES

Dr Shan Hong Jun*  Liang Yun**

1 Introduction

The concept of “Chinese maritime law” in this article does not refer to a particular law or act. Instead, it refers to the legal system consisting of all specific Chinese laws and regulations with a maritime and admiralty flavor, which include administrative regulations, administrative rules and international treaties joined or acceded to by China.

Chinese maritime law is well known for being international and advanced, as compared with other branches of Chinese law. These extraordinary characteristics are borne in its nature of openness and inclusiveness. In a broad sense there is no clear distinction between the “openness” and “inclusiveness” referred to in this article. In this context both words jointly refer to being open to and inclusive of international ideas and precedents. For example, the use of the 1989 Salvage Convention and the 1994 York-Antwerp Rules as the basis for Chapters 9 and 10 of China’s Maritime Code, and, sometimes, when adjudicating a case, the court’s being open to international ideas and precedents.

However, in a narrow sense, this international openness provides Chinese maritime law with a wide range of sources of law and a variety of mature legal models for selection. Inclusiveness helps Chinese maritime law to embrace various legal institutions and incorporate legal ideas of a diverse nature in an amicable way. Inclusiveness is premised on openness, which can be seen from the provisions of Chinese maritime law and aspects of maritime litigation. Openness is grounded on inclusiveness which allows legal institutions “shipped” from overseas to root and sprout in the soil of Chinese laws, and to mellow their fruit in the admiralty litigation of China.

The main purpose of this article is to provide some insights into the nature of Chinese maritime law and give a general picture of maritime legal practices in China for the benefit of international scholars and experts who are interested in Chinese maritime law and legal practices.

2 Overview of Chinese Maritime Law

2.1 Connotation/Intension of Chinese Maritime Law

In the Chinese language, “maritime law” refers to all of the legal norms which regulate the specific social relations arising from maritime transport and those pertaining to ships. Similar to the situation in English where the word of “maritime” has various different meanings, Chinese maritime law covers both maritime law in a broad sense and maritime law in a narrow sense. Maritime law in a narrow sense refers to the Maritime Commercial Law, being a kind of commercial law whose regulatory object is maritime commerce. The Chinese Maritime Code, which came into force as from 1 July 1993 (hereinafter referred to as ‘CMC’), is maritime law in this narrow sense, and governs the civil relations in maritime transport and those pertaining to ships as a special civil law. Maritime law in a broad sense governs maritime administrative relations and maritime criminal relations between unequal subjects as well as maritime commercial relations between equal subjects. Maritime law in a broad sense involves port laws, ship inspection laws, crew laws and maritime environmental protection laws, etc. No matter how wide the scope of maritime law in the broad sense extends, however, the social relations arising from maritime transport and those pertaining to ships are the central relations which it governs.

[This paper is under the support of the Social Science Fund of Liaoning Province (Project No.: L13BFX006)].

1 Professor in Law of Dalian Maritime University Law School.

2 PhD Candidate in Law of Dalian Maritime University Law School.


2.2 Sources of Chinese Maritime Law

As maritime transport businesses are the core relations which maritime law governs, the social relations pertaining to ships should be at the centre of the social relations regulated by maritime law. This ship-centred feature is an important one which distinguishes maritime law from other sea-related laws such as marine environmental protection laws. The current Chinese maritime law consists of the provisions of the CMC as its key contents and other laws, regulations and rules including the important international maritime conventions joined or acceded to by China such as the 1992 International Convention on Civil Liability for Oil Pollution Damage (hereinafter referred to as ‘CLC-92’) and the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage (hereinafter referred to as the ‘Bunker Convention’), among others.

2.2.1 Laws Governing Contractual Relations in connection with Maritime Transport and the Hire of Ships

Contractual relations in connection with maritime transport and the hire of ships are mainly subject to the relevant provisions of the CMC, i.e., Chapter 4 on contracts of carriage of goods by sea, Chapter 5 on contracts of carriage of passengers by sea, Chapter 6 on charterparties, Chapter 7 on contracts of sea towage, Chapter 9 on contracts of maritime salvage and Chapter 12 on contracts of marine insurance. For issues in respect of which there is no provision in the CMC, notably general principles of contract law, the relevant provisions of China’s Contract Law may kick in and govern those issues.

2.2.2 Laws Governing Maritime Torts

Chapter 8 of the CMC contains the provisions for tortious liabilities for ship collisions. Meanwhile, damage caused by vessel-source marine pollution is governed by laws, regulations and departmental rules in a total of 13 pieces of legislation, such as China’s Marine Environment Protection Law, and the Regulation on the Prevention and Control of Vessel-Source Pollution to the Marine Environment. Damage for loss or injury of human life at sea is governed by the relevant provisions of the General Principles of Civil Law and the Law of Tortious Liability. In addition, a number of judicial interpretations issued by the Supreme People’s Court of China, such as the detailed provisions in relation to the trial of cases regarding foreign-related loss or injury of human life at sea (now repealed) and the provisions in relation to certain issues in the trial of cases regarding vessel-source oil pollution damages, can be applied as helpful supplements to the current legislation. Subject to certain conditions, the relevant provisions of CLC-92 and the Bunker Convention may also be applied.

2.2.3 Laws Governing the Social Relations resulting from Special Maritime Risks

The laws governing special maritime risks include those pertaining to general average and limitation of liability for maritime claims. Chapter 10 and Chapter 11 of the CMC contain corresponding provisions for these two regimes. The rules in respect of the amount of limitation applicable to ships under 300 gross tonnage and ships engaged in coastal transport, and the rules in respect of the amount of limitation applicable to damages for the carriage of passengers by sea between ports in China, are supplementary provisions made in accordance with authorisations conferred by paragraph 2 of Article 210 and paragraph 2 of Article 211 of the CMC.

2.2.4 Laws Governing the Specific Social Relations peculiar to Ships

The specific social relations pertaining to ships generally cover such matters as the legal status of ships, property rights in ships, safety of ships, ship management, and so on. The legislation regarding property rights in ships includes the relevant provisions of the China Property Law and China Security Law in addition to the provisions of Chapter 2 of the CMC. The law governing the relations of ship management falls into the category of administrative law. There are, for example, Regulations on Ship Registration and Rules on Administration of Ship Distinctive Numbers governing ship registration, and some 18 other pieces of legislation governing maritime traffic safety, such as the China Maritime Traffic Safety Law, Regulations on the Investigation and Handling of Maritime Traffic Accidents, Rules of Administration of Ship Pilotage, Rules of Navigation in Foggy Weather at Sea, Regulations on Inspection of Ships and Offshore Facilities, Rules of Ship Safety Inspection, and Rules of Administration of Ship Visas governing ship inspection. There are a further 13 pieces of legislation governing

---

7 Tanaka Seiji, A Discussion on Maritime Law (Keiso Shobo, 1985) 2.
crew-member administration, such as Regulations on Seamen, Rules of Examination and Certification of Qualified Crewmembers of Sea-going Ships, and Rules of Crewmember Service Administration.

### 2.2.5 Laws Governing the Special or Peculiar Contractual Relations arising from Maritime Production and Operation

Special or peculiar contractual relations related to shipping include various maritime commercial contracts, such as shipbuilding contracts, ship sales contracts, ship finance leasing contracts, ship-related loan contracts, ship operation and management contracts and ship agency contracts. For these contractual relations, there are no equivalent provisions in the CMC, so the provisions of the General Principles of Civil Law of China, the China Contract Law, China Property law and China Security Law will in principle be applied. Additionally, the relevant provisions in the Law of Foreign Trade of China, Regulations on International Maritime Transport and Rules of Administration on International Ship Agency as special rules will govern the ship agency relations.

### 2.2.6 Laws Governing Conflict of Laws in relation to Foreign-Related Maritime Matters and Limitation Periods

Chapter 13 of the CMC provides for the limitation periods applicable to various maritime claims, and Chapter 14 of the CMC provides for the application of law in relation to foreign-related matters. These provisions, together with the provisions in the General Principles of Civil Law of China and Law of Application of Law in relation to Foreign-related Civil Relations of China, constitute the legal regimes regarding limitation of time and application of law in relation to foreign-related maritime matters in Chinese maritime law.

### 2.2.7 Laws Governing Maritime Litigation Procedure

In China, the maritime litigation procedures are subject to special procedures as provided in the Special Maritime Procedure Law (hereinafter referred to as the ‘SMPL’). The SMPL contains special provisions regarding jurisdiction over maritime litigation, preservation of maritime claims, maritime injunctions, maritime evidence preservation, maritime security, service of legal documents and trial procedures, procedures for the constitution of limitation funds for maritime claims, procedures for the registration and satisfaction of maritime claims, and procedures relating to maritime liens. Where there are no equivalent provisions in the SMPL for certain procedures, the relevant provisions of the Civil Procedure Law of China will be applied. The competent courts exercising jurisdiction over maritime and admiralty cases are China’s specialized maritime courts. To date, there are 10 maritime courts all over the country entertaining disputes arising from or in connection with maritime torts, maritime contracts, resource exploitation and production in the ocean and navigable waters, marine environmental protection, maritime administration and maritime special procedures: the total categories of which number more than 110. Notably, in 2015, more than 18,000 maritime cases were heard by the 10 maritime courts.

### 3 Openness and Inclusiveness Demonstrated by the Current Chinese Maritime Law Provisions

#### 3.1 Provisions of Chinese Maritime Law in line with International Standards

The CMC is the core of the current provisions of Chinese maritime law. The drafting work of the CMC took over 40 years of development, which ended up with a statute of 15 chapters and 278 articles covering every aspect of the traditional maritime law in details including property rights in ships, contracts of carriage of goods by sea, contracts of carriage of passengers by sea, charterparties, towage contracts by sea, ship collisions, salvage, general average, limitation of liability for maritime claims, and marine insurance contracts. The CMC keeps in line with international shipping practices, and reflects the latest developments of international codification in the field of maritime law. The nature of openness and inclusiveness has been manifested in Chinese maritime law through the legislative techniques used in codifying the content of provisions with an international reference-point.

---

8 See, Provisions of the Supreme People's Court of China on the Scope of Acceptance and Hearing a Case of Maritime Court [Fa Shi (2016) No. 2], coming into force as of March 1, 2016.

China’s CMC drafting committee was initially founded in the early 1950s, but drafting work was suspended. In the 1980s, drafting work resumed and three principles for drafting the CMC emerged, i.e. ‘being independent and autonomous’, ‘based on equality and mutual benefit’, and ‘referring to international customs’, which was an approach unique to maritime law at that time. The drafting committee abided by these principles during the drafting work. In order to make the CMC more international, the drafting research group consulted widely with industry representatives who had advanced experience at the international level. The reference even reached the president of the Comite Maritime International (CMI), and international organizations such as the International Maritime Organisation (IMO) and the IOPC Fund, along with well-known firms in the field of maritime and admiralty law. Five American maritime law experts were invited to China to consult on the drafting work. This principle of ‘referring to international customs’ acted upon throughout the drafting process best illustrates the openness underlying the CMC.¹⁰

The drafting of the CMC was based to a significant extent on international conventions, with the rules which reflect international customs being absorbed, widely-used standard contracts being referred to, and developments in the codification of international maritime law being considered. Specifically, the provisions on ship mortgages under the CMC referred to the 1967 International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, (hereinafter referred to as ‘Maritime Liens and Mortgages Convention’). The provisions on maritime liens were designed in accordance with international custom and the Maritime Liens and Mortgages Convention. The provisions on contracts of carriage of goods by sea observed the criteria recognized by the international shipping industry, and combined the core of the Hague Rules and the Visby Rules with a few provisions from the Hamburg Rules, which reflected a tendency towards international codification.¹¹ The provisions on contracts of carriage of passengers by sea were in line with the 1974 Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea. The provisions on charterparties followed widely-used standard contracts. The provisions on towage contracts by sea considered models from foreign legislation as well as standard contracts. The provisions on ship collision kept up with the tone set by the 1910 Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels. The provisions on salvage came from the 1989 International Convention on Salvage. The provisions on general average were built on the basis of the 1974 York-Antwerp Rules. The provisions on limitation of liability for maritime claims adhered to the 1976 Convention on Limitation of Liability for Maritime Claims. The provisions on marine insurance contracts respected the international commercial customs of the marine insurance market. The provisions on limitation periods and the application of law in relation to foreign-related matters were both taken from relevant international conventions.¹²

The drafting process of the CMC demonstrates that the codification of Chinese maritime law is not a systematic and continuous transplantation of western legislation. Instead it is, under the command of the General Principles of Civil Law of China, a well-directed reference to and re-arrangement of the traditional maritime law based on models and ideas that are internationally accepted. On one hand, chapter 4 of the CMC on Contracts of Carriage of Goods by Sea was drafted on the blueprint of the Hague Rules and the Visby rules based on which a limited liability regime for carriers has been adopted.¹³ In addition, the concepts of the carrier and the actual carrier, and their respective responsibilities, together with the provisions in relation to deck cargo and the issuance of the bill of lading, which originated from the Hamburg Rules, have also been adopted in the CMC. On the other hand, rules unique to maritime law, such as maritime liens, salvage, general average, limitation of liability for maritime claims, were all rooted in the soil of Chinese law through legal transplants. It is generally accepted that regulations regarding ship mortgages, maritime liens, in rem actions, Mareva injunctions, and no-cure-no-pay all arise out of contributions from Anglo-American maritime law,¹⁴ and which otherwise had no equivalent in Chinese law before the drafting of the CMC. With the openness and inclusiveness of the CMC, rules unique to maritime law that have no proper root in the civil law theories have actually left great impacts on the codification of the civil law. An example can be seen from article 9 of the CMC regarding the requirements of the transference of vessel ownership which has evidently cast a shadow in article 24 of the China Property Law.¹⁵

¹¹Personally, under the historical background in early 1990s, the authors support the practice of taking aspects from different conventions without ratifying a convention at the international level. Now, with the strong economy and international trade of China, it is reasonable for China to aim for international uniformity.
¹⁵Maritime Code Art 9: ‘The acquisition, transference or extinction of the ownership of a ship shall be registered at the ship registration authorities; no acquisition, transference or extinction of the ship's ownership shall act against a third party unless registered.’ Property Law Art.24: ‘The creation, change, transfer or elimination of the real right of any vessel, aircraft or motor vehicle, etc, if it is not registered, may not challenge any bona fide third party.’
3.2 Provisions of the Chinese Maritime Law Covering a Broad Range

In addition to the CMC, under the Chinese maritime law system there are nearly 140 other laws, administrative rules and administrative regulations. Examples can be seen from the administrative rules and regulations in relation to ship registration and safety management such as the Maritime Traffic Safety Law, Regulation on the Prevention and Control of Vessel-Source Pollution to the Marine Environment, Regulations Governing the Registration of Ships; the regulations in relation to the competency requirements and the administration of seamen such as the Regulation on Seamen; and other regulations such as the Code for safe operation of ships, Rules for Administration of Endorsement of Vessels, and Procedures for the Administration of Salvaging Sunken Vessels. All these rules and regulations keep pace with international practices in terms of standards and liabilities.

The provisions of Chinese maritime law deal not only with traditional maritime law rules, but also with the latest developments of the codification which are outside the traditional maritime law field. With the regulations governing the legal relationship between non-equal-position parties and the supplementary rules regarding the special area beyond the coverage of the CMC, the Chinese maritime law system is under continuous improvement.

The way that Chinese maritime law has learned and borrowed from international conventions and different countries’ legislation constitutes a picture of its openness and inclusiveness. Its unique design has, on one hand, made Chinese maritime law able to compete with others in the same tone of legal language. On the other hand, through judicial practice, it has produced great impacts on the development of maritime law theory and the path towards the codification of other civil laws.

4 Openness and Inclusiveness Demonstrated by the Maritime Judicial Practices

Chinese maritime law has been continuously subject to judicial construction when being applied in litigation, which in turn has gradually localized the CMC. Being localized on the basis of openness and inclusiveness, Chinese maritime law has been nourished by local legal developments as well as China’s active role on the international stage.

4.1 Openness and Inclusiveness Demonstrated by the Application of CMC

The codification of Chinese maritime law started earlier than the codification of the country’s ordinary civil laws. The CMC has shown its openness and inclusiveness when being applied together with the China Contract Law, China Property Law, China Tort Liability Law and other laws which were promulgated after the CMC.

First of all, from the perspective of civil law, those rules which appear to be independent and unrelated under different chapters of the CMC are indeed connected with relevant theories of civil law. Property rights over vessels, for example, is a special form of general property rights, which necessitates particular and specific property rules in the field of maritime law. Among the contracts of carriage of goods by sea, the contracts of carriage of passengers by sea, charterparties, towage contracts, marine insurance contracts and the contracts that might occur in the context of salvage and general average, none is listed or classified contract under the China Contract Law. However, connections do exist between these maritime contacts and the relevant listed contracts under the general contract law, and basic rules and principles of the civil law and contract law can be applied to each of them. As a special law within the civil law, the maritime law of China has a close connection with the basic principles and rules of the general civil law in terms of the construction of the system as well as the source of theory.

Secondly, as a special law within the civil law, maritime law rules have priority over civil law rules in maritime matters, and civil law rules as general law will apply where maritime law has no specific provisions. There are mainly two kinds of circumstances where the civil law rules can be applied directly in maritime cases. One is to the non-maritime matters arising under a maritime case. Another is to the issues where maritime law has made it clear that civil law rules can be applied directly. The maritime law per se is an integrated system, not a combination of fragmented special rules or a special reflection of the general civil law rules. The openness and inclusiveness of maritime law provides the opportunity and prerequisite for the application of fundamental principles of civil law, which also makes contribution to the flexible resolution of particular issues in judicial practice.

---

In addition, in the matter of the application of international conventions, the CMC has shown its openness and inclusiveness to the international conventions and international practices. For an example, article 268 of the CMC provides that:

if any international treaty concluded or acceded to by the People’s Republic of China contains provisions differing from those contained in this Code, the provisions of the relevant international treaty shall apply, unless the provisions are those on which the People’s Republic of China has announced reservations. International practice may be applied to matters for which neither the relevant laws of the People’s Republic of China nor any international treaty concluded or acceded to by the People’s Republic of China contain any relevant provisions.

Chinese maritime law has shown its strong openness and inclusiveness in the matters of applicable law, limitation periods, and the validity of arbitration agreements where foreign elements are involved. For an example, under the current rule, the China’s maritime courts have no right to assert the invalidity of a foreign-related arbitration agreement without referring the case to the Supreme People’s Court. The reason the Supreme People’s Court established this rule was to unify the national criteria necessary to invalidate a foreign-related arbitration agreement and most likely respect the principle of party autonomy, which also reflects a form of international custom. Also, as in the above-mentioned circumstances, parties’ autonomy is respected in determining applicable domestic laws, foreign laws or international conventions. Article 268 makes it clear that the international conventions and international practices can be applied as a matter of priority in foreign-related matters. Such a provision came in 20 years earlier than the provisions of the Law of the Application of Law for Foreign-Related Civil Relations which serves as the conflict rules for determining the application of law. Therefore, Openness and inclusiveness of the CMC in terms of the application of law where foreign elements are involved could be easily inferred from the article.

4.2 Inclusiveness Demonstrated by the Application of Chinese Maritime Law in the Judicial Interpretations and Guidance Cases

Over the years, a quantity of judicial interpretations has been promulgated by the Supreme People’s Court of China pursuant to Chinese maritime law. Such interpretations have remedied defects or filled in gaps in the provisions of maritime law, which has also shown the openness and inclusiveness of Chinese maritime law to judicial guidance, providing the scientific construction of provisions, and aiding the “ bedding down” of maritime law rules transplanted from foreign jurisdictions. Openness and inclusiveness of Chinese maritime law is also demonstrated by the system of “guidance cases” established by the Supreme People’s Court of China. The guidance cases issued by the Supreme People’s Court of China have been used to instruct the lower courts to deal with the same or similar cases in a uniform manner. Notably, in no event could a guidance case be invoked as the law in adjudicating a similar case. The guidance cases shall be taken as a reference by courts of all levels when adjudicating a similar case.

Historically, the Supreme People’s Court started to draft judicial interpretations from its early days. The interpretations covering the jurisdiction of foreign-related litigation, the pre-litigation arrest of ships, and the auction of arrested ships opened a new era in the application of maritime law. More interpretations have since been released and their coverage has been extended to personal injury and death at sea, marine insurance, ship collision, freight forwarding, release of cargo without the original bill of lading, limitation of liability for maritime claims, vessel-source oil pollution, and the application of laws in relation to the arrest and auction of ships. Being drafted in accordance with Civil Procedure Law, CMC, and Special Maritime Procedure Law, these interpretations have covered almost every corner of maritime cases from procedure matters to substantive aspects of law, and have provided important instructions for adjudicating troublesome cases and the application of law. The judicial interpretations which came out of the practice of maritime litigation bring about another good illustration of the openness and inclusiveness of the Chinese maritime law. On one hand, the judicial interpretations embraced different source of maritime law which have reflected its nature of openness and inclusiveness. On the other hand,

17 See also, Regulation on the Prevention and Control of Vessel-Source Pollution to the Environment (2014) Article 52: ‘The compensation limit for a vessel-source pollution accident shall be governed by the provisions on the limitation of liability for maritime claims in the Maritime Code of the People’s Republic of China. However, if the persistent oil substances in bulker carried by a vessel cause pollution to the seas areas of the People’s Republic of China, the compensation limit shall be governed by the provisions of the relevant international treaties concluded or acceded to by the People’s Republic of China. The term “persistent oil substances” as mentioned in the preceding paragraph shall refer to all persistent hydrocarbon mineral oil.’
18 Compared with a common law court, the Supreme People’s Court does not make law. The purpose of a guidance case is just to fill in gaps.
the co-existence of different scientific rules under the embrace of the judicial interpretation has also shown its nature of openmess and inclusiveness.

The Supreme People’s Court also released the guidance cases to make sure that the deciding of maritime cases can achieve unification in terms of its effect on law as well as its effect on the society. To date, the Supreme People’s Court has issued 56 guidance cases. Three of them are maritime cases. Specifically, Case No. 16 concerns the petition of China Shipping Development Co. Ltd. to establish a limitation fund for maritime claims, the decision of which has clarified what the notion of ‘vessels in transport services between the ports of the People’s Republic of China’ under article 210(2) of the CMC means. Case No. 31 is in relation to damages arising from ship collision and the decision of this case has confirmed that the rules under the Convention on the International Regulations for Preventing Collisions at Sea, 1972 shall be taken as the determinative test for asserting collision liability. Case No. 52 covers the disputes arising from the marine cargo insurance contract and it has pointed out that in the absence of the willfulness and negligence of the insured, where risks other than those listed in the exclusion clause have caused the damage to the insured cargo, such risks shall be taken as “external causes” and the insurer shall cover all losses arising from such external causes. These three guidance cases have demonstrated that the flexible application of maritime law in litigation can make good defects or fill gaps in the provisions of maritime law and enrich the provisions with more specific explanations.

5 Concluding Words

In summary, openness and inclusiveness are the nature of Chinese maritime law, as evidenced by both the provisions of maritime law and the litigation practices discussed above.

The Chinese economy and society have gone through huge changes over the 20 years since the CMC was promulgated. Being examined in light of China’s current circumstances, Chinese maritime law arguably contains a number of defects or gaps, such as for example the obsolete rules falling behind the development of the economy, the absence of rules on offshore platform-source oil pollution, and the uncoordinated status of the maritime law system under the Chinese general legal system.

In order to better serve the needs of maritime dispute resolution and the fast growing marine economy of China, Chinese maritime law and legal practices should hold fast to its nature of openness and inclusiveness. With improvements made in light of such an approach, the authors believe that Chinese maritime law and legal practice can be vastly improved in the near future.
A STUDY ON THE UPDATING OF THE LAW ON CARRIAGE OF GOODS BY SEA IN CHINA

James Zhengliang Hu* and Siqi Sun**

1 Introduction

Unlike in the common law countries such as the UK which has its COGSA 1971, China does not have a statute solely regulating the carriage of goods by sea. The law on carriage of goods by sea is mainly embodied in Chapter IV ‘Contract of Carriage of Goods by Sea’ in the Maritime Code of the People’s Republic of China 1 (hereinafter referred to as the Maritime Code) was adopted in 1992 and came into force as of 1 July 1993. 23 years have passed since its adoption and it is commonly recognized in China that the Maritime Code need be updated by way of revision. Chapter IV of the Maritime Code does not apply to domestic carriage of goods by sea. Besides, the Rotterdam Rules, i.e. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea was adopted, which may be deemed as indicating the international tendency of the law on the carriage of goods by sea.

In this paper, based upon an introduction to the current law on carriage of goods by sea in China, the authors analyse the necessity for the updating of the law on the carriage of goods by sea in China, discuss the main contents required for the updating especially from the perspective of the Rotterdam Rules based upon an analysis of the China’s basic attitude towards the Rules. Anticipation of the revision of the Maritime Code including its Chapter IV is also made in this paper.

2 What is the Law on Carriage of Goods by Sea in China?

2.1 Sources of the Law

The law on carriage of goods by sea is embodied in: (a) Chapter IV of the Maritime Code which is applicable in the international carriage of goods by sea only; (b) Chapter XVII ‘Contract of Carriage’ of the Contract Law which is applicable in every kind of carriage of goods; (c) the judicial interpretations promulgated by the Supreme People’s Courts, e.g. the Provisions Relating Certain Issues of Application of Law in the Trial of Cases of Delivery of Goods without Original Bill of Lading, 2009 and the Provisions Relating Certain Issues in the Trial of Cases of Disputes over Freight Forwarding, 2012.

2.2 The Hybrid Regime Contained in Chapter IV of the Maritime Code

China is not a party to the Hague Rules, the Hague-Visby Rules or the Hamburg Rules. A hybrid regime has been adopted in Chapter IV of the Maritime Code which consists of: (a) the provisions of the carrier’s liability regime including the obligations, liability and exemptions, limits of liability which are based upon the Hague-Visby Rules as amended by the 1979 SDR Protocol; (b) the definitions of carrier, shipper and actual carrier contained in the Hamburg Rules and the provisions thereof regarding the obligations and liabilities of the shipper and actual carrier, non-contractual claims, transport documents etc.; (c) some unique provisions different from either Rules regarding the period of responsibility of the carrier, definition of delay in delivery and measures of indemnity etc.

* Ph.D., Professor of Law, Director of Institute of Maritime Law, Shanghai Maritime University; Lawyer & Partner, Shanghai Wintell & Co Law Firm. Email: james.hu@wintell.cn.
** PhD candidate in maritime law, Shanghai Maritime University. Email: 461413517@qq.com.
1 In this paper, “the People’s Republic of China” or “China” refers to the Mainland China unless otherwise expressly indicated.
2 Revision of the Maritime Code is necessitated by the facts including that the maritime shipping and trading situation in China and in the world, the contents of the principles followed in the making of the Maritime Code and the relevant domestic basic laws have undergone a significant development, that the Maritime Code does not apply to domestic carriage of goods by sea and lacks legal regime governing compensation for marine pollution damage from ships and that the admiralty judicial practice has demonstrated the existence of ambiguities, uncertainties and gaps in some aspects in the Maritime Code. See James Zhengliang Hu, ‘The Chinese Maritime Code need to be modernized’ (2015) 107 Maritime China 67.
3 The carriage between or among the Mainland China, Taiwan, Hong Kong and Macau is in the nature of domestic carriage, but is currently treated as international carriage as they are of different jurisdictions in law.
4 The domestic coastal carriage of goods and the carriage of goods in inland navigation were mainly regulated by the Regulations Governing Carriage of Goods by Waterways promulgated by the former Ministry of Communications in 2000 (known as ‘2000 Cargo Regulations’). However, the 2000 Cargo Regulations were recently abolished on 30 May 2016.
3 Why is Updating Needed?

In the opinion of the authors, the updating of the law on carriage of goods by sea is necessitated by the following main reasons:

3.1 The Inapplicability of Chapter IV of the Maritime Code to the Domestic Carriage

Chapter IV of the Maritime Code does not apply to the domestic carriage of goods by sea. This was due to the existence of the differences between the legal regime applicable to the international carriage goods by sea and that to the domestic carriage of goods by sea at the time of 1992.\(^7\) The application of the Contract Law to the domestic carriage of goods by sea causes significant differences in the carrier’s liability regime between the international carriage and the domestic carriage. As time has gone on, there still exist differences, but the gap has become narrower and it has become practicable to make Chapter IV of the Maritime Code applicable to the domestic carriage of goods by sea. It is well recognized that the inapplicability of Chapter IV of the Maritime Code to the domestic carriage of goods by sea is inappropriate in consideration of that China has large-scaled domestic carriage of goods by sea\(^6\) and that Chapter XVII of the Contract Law is too simple and lacks feasibility in practice. It is well recognized that the nature of the Maritime Code as a domestic law and Chapter IV thereof as the most important chapter logically requires its application to the domestic carriage of goods by sea.

So far as the effect of law is concerned, by virtue of the Law on Legislation, 2000 as amended in 2015, Chapter IV of the Maritime Code as special law has priority over Chapter XVII of the Contract Law which is a general law. The above judicial interpretations are followed by the courts of law in China.

Moreover, China has a very large inland transport market.\(^7\) Traditionally, the domestic carriage of goods by sea and that in inland navigation were governed by same laws and regulations. Therefore, there is a need and it is practicable to extend the application of Chapter IV of the Maritime Code to the carriage of goods in inland waterways adjacent to the sea in order to maintain the integrity of application of law in the whole domestic waterborne transport of goods.

3.2 The Significant Developments in the Maritime Transport and Related Areas Since the Adoption of the Maritime Code in 1992

In the past 23 years, the maritime trade in, to or from China and the related industries in China areas have significantly developed along with the implementation of the reform and open policy in China and with the economic globalization and freedom of trade in the world.\(^8\) At the same time, along with the fast development of containerization and multimodal transport of goods, most of the general cargoes and even part of the solid or

---

\(^6\) The differences between the international carriage of goods by sea and the domestic carriage of goods by sea were: (a) the State transport plans should be followed in the domestic carriage, whereas there were no such plans in the international carriage; (b) the basis of the carrier’s liability was based upon fault in the domestic carriage, whereas the carrier’s liability based upon the Hague-Visby Rules was followed in the international carriage; (c) the carrier could not avail of any limitation of liability for loss of or damage to goods in the domestic carriage, whereas the limit of carrier’s liability was based upon the Hague-Visby Rules in the international carriage; (d) the transport documents used in the domestic carriage were waybills, whereas bills of lading were used in the international carriage.

\(^7\) By the end of 2015, there were 10,721 coastal ships with total DWT of 68.58 million tons. In 2015, the total quantity of cargo carried in coastal trade was 1.93 billion metric tons. See the Ministry of Transport, Statistical Communiqué of Development in Transport and Communication Industry in 2015. <http://zizhan.mot.gov.cn/zfxgk/bnssj/zhghs/201605/t20160510_2040406.html> accessed 28 May 2016.

\(^8\) The inland waterways are as long as 127,000 km mainly in the Yangtze River located in the centre from west to east, the Pearl River located in the south from west to east, the Heilongjiang River located in the north from west to east and the Beijing-Hangzhou Grand Canal located in the east from north to south. Noticeably, the main inland waterways in the Yangtze River and the Pearl River are accessible by seagoing vessels and even large seagoing vessels. By the end of 2015, there were 152,500 inland vessels with total DWT of 124.94 million tons and 25,360 operating berths. In 2015, the total quantity of cargo carried in coastal trade was 3.46 billion metric tons. See the Ministry of Transport: Statistical Communiqué of Development in Transport and Communication Industry in 2015. <http://zizhan.mot.gov.cn/zfxgk/bnssj/zhghs/201605/t20160510_2040406.html> accessed 28 May 2016.

\(^9\) According to the Statistical Communiqué of the People's Republic of China on National Economic and Social Development in 2015 issued by the National Bureau of Statistics of China, the total import and export commodity trade volume of China in 1992 was USD165.53 billion and ranked 11\(^{st}\) in the world. As a result of the constantly fast growth of economy in China, the total import and export commodity trade volume of China in 2015 reached USD3,959 billion which is 25 times of that in 1992 and ranked 1\(^{st}\) in the world. About 90% of the imported and exported commodities to or from China are carried by sea. Such a development together with the growing domestic commodity trade greatly enhanced the maritime transport in China. In 2015, the total turnover of cargo in the scaled ports in China reached 12.75 billion metric tons and ranked 1\(^{st}\) in the world for more than 10 years, and the turnover of containers reached 212 million TEUs. According to the Review of Maritime Transport 2015 issued by UNCTAD, the number of vessels owned by the companies in the Mainland China was 4,966 with total DWT of 157,557,210 tons being 9.08% of the world merchant fleet and ranking 3\(^{rd}\) in the world, while the number of vessels owned by companies in Hong Kong was 1,258 with total DWT of 75,321,271 tons being 4.34% of the world merchant fleet and ranking 7\(^{th}\) in the world as of 1 January 2015.

(2016) 30 ANZ Mar LJ 115
Noticeably, the economic globalization and freedom of trade is still in progress mainly as supported by the regional economic and trade integration processes. Typical examples of regional free trade agreements are EU, OECD, APEC, ASEAN, CAFTA, FTAA, NAFTA, ETFA, TPP, TTIP and FTAAP, either in operation or under negotiations. So far as China and some other countries are concerned, it needs to mention the strategic plan of the construction of “The Belt and Road”. It’s quite understandable that the economic globalization and freedom of trade in the world not only enhances the seaborne trade, but requires more uniform commercial and technical rules in the maritime transport.

As a result of the significant developments in the maritime economy and trade and the related areas in China and in the world since the adoption of Maritime Code in 1992, modernization of the law on carriage of goods is required to reflect such developments, in particular, to follow the ever-growing trend of international uniformity of maritime law, to suit the reform of modes of transport (containerization, multimodal transport) and the fast-growing logistics, to promote maritime transactions and secure their efficiency, and to re-balance the ship interests, cargo interests and other interests in law. Besides, as China has become a power in terms of both maritime trade volume and merchant fleet in the world, such a position may require China to undertake more responsibilities of a big country in promoting the international uniformity of maritime law.

3.3 The Adoption of the Rotterdam Rules

The making of the Maritime Code followed the principle of taking into consideration of the tendency of international maritime legislation. Several new international conventions which are either in force or not in force yet and represent or may hopefully represent the tendency of international maritime legislations have been adopted since the adoption of the Maritime Code. A typical example is the adoption of the Rotterdam Rules which, although an ongoing subject of debate in China and even in the international community, represents to some extent the tendency of international legislation on the carriage of goods by sea.

There are a lot of arguments in the academic circle regarding China’s attitude towards the Rotterdam Rules. One main view is in favour of China’s ratification of the Rules on the ground that the Rules are considered to be a comparatively advanced international convention and China should ratify, although the Rules are not perfect and have some deficiencies. Another main view is that the contents of the Rules are too complicated and those innovative rules need to be tested in practice, and for these reasons, China should maintain a proactive and prudent attitude when considering ratification or not, i.e. China should not ratify the Rules at the present stage. Several scholars are further of the view that, while China should not ratify the Rules at this stage, those reasonable, mature and advanced rules contained in the Rules should be adopted or used for reference when the Chinese Maritime Code is revised.

---

10 For example, Chapter IX “Salvage at Sea” is basically a copy of the 1989 Salvage Convention as the draftsmen of the Maritime Code realized that this Convention represented the tendency of international legislation on salvage at sea, although this Convention had not come into force yet in 1992. This Convention is now widely accepted in the world.
Needless to say, the attitudes of the shipping industry and the maritime trading industry are important for the Chinese government to make decision as to whether and when China shall ratify the Rotterdam Rules, although an industry’s attitude is interests-oriented.

The shipping industry in China is of the view that, generally speaking, the provisions of the Rotterdam Rules in relation to the transport documents and electronic transport records and those for solving the practical issues commonly existing in shipping practice, e.g. provisions on delivery of goods in Chapter 9 will or may be beneficial to the shipping industry. However, the shipping industry as a whole does not support the Rules, because the industry, especially the small or even some medium-sized shipping companies, are not satisfied with the carrier’s liability regime which increases the carrier’s liability due to the deletion of nautical fault and fault in fire, and the increase of limits of liability. They are also not satisfied with the special rules for volume contracts in Article 80 which may put the medium-sized and small shipping companies in an unequal and less favourable position when facing large shippers.

The maritime trading industry in China (such as those firms involved in exports and related cargo interests) accepts the provisions of the Rules in relation to the carrier’s liability regime, transport documents and electronic transport records. Especially, they welcome the deletion of nautical fault and fault in fire and the increase of limits of carrier’s liability as these are in favour of their interests. However, they are of the view that the Rules were too complicated. Moreover, the small or even some medium-sized trading companies are not satisfied with: (a) the provisions of documentary shipper which may cause prejudice to the interests of FOB sellers; (b) the special rules for volume contracts in Article 80 which may put the small and even medium-sized trading companies in an unequal and less favourable position when facing large liner companies; (c) the provisions delivery of goods without surrender of transport documents or electronic transport record under Article 46 or 47 which may cause prejudice to the FOB sellers’ right to be paid for the sale of goods; and (d) the provisions in Chapter 14 ‘Jurisdiction’ and Chapter 15 ‘Arbitration’ by which a choice of court agreement or an arbitration agreement contained in a volume contract may be binding upon a person who is not a party thereto without his consent and may consequently compel a consignee obey to the jurisdiction of a foreign court or arbitration in a foreign country.

In consideration of the current situations of the shipping and trading industry in China, especially most of the shipping companies and trading companies are small or medium-sized ones and do not have competitive advantages in the international shipping and trading market which the Rotterdam Rules may imply to require, and the potential influences which China’s ratification of the Rules may bring about, China’s ratification of the Rules at this stage seems not beneficial to the overall economic interests of China. Consequently, it is quite probable that China will not consider to ratify the Rules in the near future, but will still take a “wait-and-see” attitude towards the Rules, at least before the Rules come into force and are ratified by most of China’s major maritime trading partners. However, the advanced, reasonable, mature and practicable provisions of the Rules may need to be adopted or used for reference when the Maritime Code is revised in the near future in order to modernize the hybrid regime of carriage of goods by sea contained in Chapter IV of the Code.\(^\text{14}\)

### 3.4 The Existence of Ambiguities, Uncertainties and Gaps in Chapter IV of the Maritime Code

The admiralty practice in the ten maritime courts and the courts of appeals viz. the high people’s courts of the municipalities directly under the State Council, provinces or autonomous regions in China in the past 23 years well demonstrated that Chapter IV of the Maritime Code has ambiguities and uncertainties and lacks detailed provisions on some issues, causing adverse effects in the application thereof.

In this regard, typical examples are the FOB seller’s legal position and its rights and obligations, the legal position of a freight forwarder and delivery of goods without production of bills of lading.

As regards the FOB seller’s legal position by virtue of Article 42 (3) of the Maritime Code,\(^\text{15}\) a person who has delivered the goods to the carrier is defined as a shipper (actual shipper), and assumes the shipper’s rights and obligations. However, Chapter IV does not differentiate rights and obligations from those of the shipper who has concluded a contract of carriage of goods by sea with the carrier, nor does it provide that the two shippers shall bear joint and several liability to the carrier or actual carrier.

---

\(^{14}\) James Zhengliang Hu and Siqi Sun, ‘China’s attitude towards the Rotterdam Rules in the authors’ view’ in the Papers Collection of the 8th International Conference on Maritime Law, Dalian, China, October 2015.

\(^{15}\) Art.42 (3) provides: “‘Shipper’ means: (a) the 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; (b) the person by whom or in whose name or on whose behalf the goods have been delivered to the carrier involved in the contract of carriage of goods by sea.”
As regards the legal position of a freight forwarder, freight forwarders as active intermediaries in the maritime transport of goods act either as a carrier/Non-Vessel Carrying Operator,16 shipper, consignee or an agent of the shipper or consignee, as the case may be. Many disputes arise between a freight forwarder and a shipper/consignee or between a freight forwarder and a carrier/actual carrier in practice partly due to lack of explicit statutory provisions regarding the legal position of a freight forwarder and its rights and obligations.

As regards delivery of goods without production of bills of lading, Article 71 of the Maritime Code requires the carrier to deliver the goods against surrendering of an original bill of lading even in the case of a straight bill of lading. However, Chapter IV does not stipulate who is entitled to claim, who shall be liable, when the liability can be exempted and what can be claimed for etc. Many disputes arise from delivery of goods without production of bills of lading every year, which has substantial connection with the lack of such provisions.

3.5 The Lack of Mandatory Scope of Application of Chapter IV of the Maritime Code

Unlike the law on the carriage of goods by sea in some other jurisdictions such as US COGSA of 1936 or the Hague or Hague-Visby Rules, Chapter IV of the Maritime Code does not have its scope of mandatory application by virtue of Article 269 in Chapter XIV ‘Application of Law in Relation to Foreign-related Matters’,17 because the parties to a contract may reach an agreement as to the applicable law or the principle of closest connection shall apply in determining the applicable law in the absence of such an agreement. However, it is commonly recognized in the academic circle in China that Chapter IV of the Maritime Code should have its scope of mandatory application.

4 What Updating is Needed?

The updating of the law on carriage of goods by sea shall be realized by way of revision of Chapter IV of the Maritime Code when the Code is revised. In the authors’ view, revision of Chapter IV and the related provisions of the Maritime Code shall focus on the following aspects:

4.1 Extending the Scope of Application of Chapter IV of the Maritime Code

The application of Chapter IV of the Maritime Code after revision shall be extended as a whole to the contracts of the domestic carriage of goods by sea or in inland navigable waters adjacent to the sea, but shall contain necessary special provisions applicable to the contract of the domestic carriage due to the differences between the international carriage and the domestic carriage18 which still exist and cannot be unified at this stage. Such special provisions shall mainly include: (a) the carrier’s strict liability regime; (b) no limitation of liability for loss or damage to goods and (c) use of water-borne waybill19 as the main form of transport document. The above (a) and (b) will be in line with the Contract Law of 199920 which is applicable to the contract of the domestic water-borne carriage of goods. In the authors’ view, other chapters of the revised Maritime Code shall also be applicable to the inland navigation in the same way.

---


17 Article 269 of the Maritime Code provides: ‘The parties to a contract may choose the law applicable to such contract, unless the law provides otherwise. Where the parties to a contract have not made a choice, the law of the country having the closest connection with the contract shall apply.’

18 See above n 5.

19 A water-borne waybill is defined as an evidence of contract of domestic water-borne carriage of goods and a receipt of goods by the carrier in Article 58 of the 2000 Cargo Regulations which was abolished recently. See above n 4.

20 Article 311 of the Contract Law 1999 provides: ‘A carrier shall be liable for damage to or destruction of goods during the period of carriage unless the carrier proves that the damage to or destruction of goods is caused by force majeure, by natural characters of the goods or reasonable loss, or by the fault on the part of the shipper or consignee.’ Article 312 further provides: ‘The amount of damage to or loss of the goods shall be the amount as agreed upon in the contract by the parties where there is such an agreement. Where there is no such an agreement or such an agreement is not nuclear, nor can it be determined according to the provisions of Article 61 of this Law, the market price at the place where the goods are delivered at the time of delivery or at the time when the goods should be delivered shall be applied. Where law or administrative regulations stipulate otherwise on the method of calculation of damages and on the limit of liability, those provisions shall be followed.’
4.2 Adopting the Reasonable and Mature Provisions of the Rotterdam Rules into Chapter IV of the Maritime Code

While China will still take a “wait-and-see” attitude towards the Rotterdam Rules as illustrated in 2.3 above, the reasonable and mature provisions of the Rules need be adopted to improve the hybrid regime contained in Chapter IV of the Maritime Code.

4.2.1 Acceptable Provisions

Besides part of the provisions which are acceptable regarding the carrier’s liability regime as illustrated in 4.2.2 infra, such provisions shall or may mainly include those regarding: (a) transport documents and electronic transport records (Ch.3 ‘Electronic Transport Records’, Ch.8 ‘Transport Documents and Electronic Transport Records’); (b) obligations of shipper (Ch.7 ‘Obligations of the Shipper to the Carrier’); (c) right of control (Ch.10 ‘Rights of the Controlling Party’) and transfer of rights (Ch.11 ‘Transfer of Rights’); (d) time for suit (Ch.13 ‘Time for Suit’). In particular, the adoption of the provisions regarding electronic transport records is helpful to meet the rapid use of electronic commence in the maritime transport, although, unlike that the traditional rules of maritime law were based upon mature shipping practice, these provisions lack mature experience and consequently their enforceability seems not certain.

4.2.2 Pros and Cons of the Carrier’s Liability Regime

It seems clear that the following provisions of the Rotterdam Rules are acceptable and can wholly or partly be adopted into Chapter IV of the Maritime Code:

(a) In Chapter 4 ‘Obligations of the Carrier’, Article 12 ‘Period of responsibility of the carrier’, Article 13 ‘Specific obligations’, Article 15 ‘Goods that may become a danger’ and Article 16 ‘Sacrifice of goods during the voyage by sea’;

(b) In Chapter 5 ‘Liability of the Carrier for Loss, Damage or Delay’, Article 17 ‘Basis of liability’ regarding burden of proof in cargo claims and the listed exemptions of liability, Article 18 ‘Liability of the carrier for other persons’, Article 19 ‘Liabilities of the maritime performing party’, Article 20 ‘Joint and several liability’, Article 21 ‘Delay’, Article 22 ‘Calculation of compensation’ and Article 23 ‘Notice in case of loss, damage or delay’;

(c) In Chapter 12 ‘Limits of Liability’, Article 60 ‘Limits of liability for loss caused by delay’, Article 61 ‘Loss of the benefit of limitation of liability’.

However, it is arguable that the following provisions of the Rules are not suitable to be adopted into Chapter IV of the Maritime Code:

(a) In Chapter 4 ‘Obligations of the Carrier’, Article 14 ‘Specific obligations applicable to the voyage by sea’ regarding the carrier’s obligation to exercise due diligence to keep the ship seaworthy, crewed, equipped and supplied and cargo-worthy during the voyage. That is, it seems preferable to maintain the time of exercise of due diligence to be limited to the time before and at the beginning of the voyage.

(b) In Chapter 5 ‘Liability of the Carrier for Loss, Damage or Delay’, deletion of the nautical fault\(^{21}\) and the fault in fire\(^{22}\) in subparagraph 3 of Article 17 ‘Basis of liability’.

\(^{21}\) Nautical fault means an act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship as provided for in Article 4(a) of the Hague-Visby Rules. Article 51 (1) of the Maritime Code contain similar provisions, i.e. “Fault of the Master, crew members, pilot or servant of the carrier in the navigation or management of the ship”. The deletion of the fault in the management of the ship in Article 17 of the Rotterdam Rules is identical to the provision of the carrier’s continuous obligation to exercise due diligence during the voyage in Article 14.

\(^{22}\) Article 4(b) of the Hague-Visby Rules provides “Fire, unless caused by the actual fault or privity of the carrier” as an exemption of liability. Article 51 (2) of the Maritime Code contains similar provisions, i.e. “Fire, unless caused by the actual fault of the carrier”. These provisions mean that the carrier is not liable for loss of or damage to goods caused by the fault in causing or extinguishing fire on-board committed by the master, mariner, pilot or the servants or agents of the carrier.
In Chapter 12 ‘Limits of Liability’, Article 59(a) regarding package or unit limit of carrier’s liability, i.e. the carrier’s liability for breaches of its obligations under this Convention is limited to 875 units of account per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever amount is the higher. Noticeably, the above limits of carrier’s liability are for breach of its obligations under the Rotterdam Rules, but not limited to loss of or damage to goods. By comparison, the amount of 875 SDR per package or other shipping unit is 31% higher than the Hague-Visby package limit of 666.67 SDR and 5% higher than the Hamburg package limit of 835 SDR. The amount of 3 SDR per kilogram of the gross weight of the goods is 50% higher than Hague-Visby kilo limit of 2 SDR and 20% higher than the Hamburg kilo limit of 2.5 SDR. It seems clear that the limits of liability provided for in the Rotterdam Rules are beyond the current commercial need in China. This is demonstrated by the statistics that in 2015, the total value of the imported and exported commodity in China was RMB24574 Yuan or USD3,959 billion and the total volume of the imported and exported goods discharged in the Chinese ports was 3.664 billion metric tons. Therefore, the average value of goods carried by sea in 2015 was USD3,959 billion ÷ 3.664 billion tons ÷ 1,000 = USD1.08 or about 0.72 SDR per kilogram. The value of the goods carried in container liner transportation is normally higher and the Rotterdam Rules are mainly applicable in such transportation. However, the figure of 0.72 SDR per kilogram proves that the limit of 3 SDR per kilogram in the Rotterdam Rules is excessively high and that the limit of 2 SDR per kilogram in the Hague-Visby Rules as amended by the 1979 SDR Protocol or in the Maritime Code remains appropriate, let alone the Rotterdam Rules are also applicable between the carrier/maritime performing party and the consignee under the contract of carriage evidenced by or contained in a transport document or electronic transport record issued under a charterparty or other contracts for the use of a ship or of any space thereon.

4.2.3 Unacceptable Provisions

It seems clear that China is not in favour of the provisions of the Rotterdam Rules regarding the following aspects and these provisions shall not be adopted in Chapter IV of the Maritime Code:

(a) Documentary shipper

A documentary shipper is defined in Article 1(9) as ‘a person, other than the shipper, that accepts to be named as “shipper” in the transport document or electronic transport record.’ According to the provisions of Article 35 ‘Issuance of the transport document or the electronic transport record’, an FOB seller shall be a documentary shipper, i.e. named as “shipper” in the transport document or electronic transport record and assumes the shipper’s rights and obligations according to Article 33 ‘Assumption of shipper’s rights and obligations by the documentary shipper’, but subject to the shipper’s consent. That is, an FOB seller shall not have any rights against the carrier or maritime performing party if the shipper does not consent to naming an FOB seller as “shipper” in the transport document or electronic transport record. By virtue of the definition of shipper contained in Article 42 (3) of the Maritime Code, a person who has delivered the goods to the carrier is a statutory shipper and assumes the shipper’s rights and obligations without the need of the contractual shipper’s consent. A considerable part of the commodities is exported on FOB term by small or medium-sized companies and as a result, protection of FOB sellers’ interests is of particular importance in China by way of expressly stipulating the FOB seller’s legal position and its rights and obligations. Obviously, the provisions of the Rotterdam Rules regarding the documentary shipper cannot service such a purpose.

(b) Volume contract

Article 80 ‘Special rules for volume contracts’ of the Rotterdam Rules allows a volume contract to conditionally derogate from the mandatory provisions of the Rules set forth in Article 79 thereof. As a result, as between the carrier and the shipper, a volume contract may provide for greater or lesser rights, obligations and liabilities than

25 See above n 15.
those imposed by the Rules. Article 80(2) provides the conditions for derogation. Article 80(4) indicates the rights and obligations which cannot be derogated, i.e. the rights and obligations provided for in Article 14(a) & (b), Articles 29 & 32 or the liability arising from the breach thereof, and the liability arising from an act or omission referred to in Article 61. Article 80(5) further provides that a volume contract that derogates from the mandatory provisions can be conditionally binding upon any person other than the shipper subject to its express agreement.

Furthermore, by virtue of Article 67(2) of Chapter 14 ‘Jurisdiction’, an exclusive choice of court agreement contained in a volume contract may conditionally be binding upon a person that is not a party to the volume contract without its agreement. Similarly, by virtue of Article 75(4) of Chapter 15 ‘Arbitration’, an arbitration agreement contained in a volume contract may conditionally be binding upon a person that is not a party to the volume contract without its agreement.

Although volume contracts are widely used in the form of service contracts in the modern liner transportation, the provisions of Article 80 of the Rotterdam Rules are not appropriate to be adopted into Chapter IV of the Maritime Code because derogation of a volume contract from the mandatory provisions may cause prejudice to the interests of the so many small or medium-sized shipping companies or cargo traders and even the overall national economic interests for the following reasons:

(i) It seems clear that the derogation of a volume contract from the mandatory provisions adheres to the traditional principle of freedom of contract and is based upon the presumption that the parties to a volume contract have equal or similar bargaining powers and the contract is concluded based upon detailed negotiations. In reality, however, this is not always the case. Quite possibly, a volume contract is concluded between a large container lines company and a small or medium-sized cargo trader or vice versa, in which case the parties to a volume contract do not have equal or similar bargaining powers. In addition, the contract is possibly concluded not based upon detailed negotiations, especially where the parties to a volume contract do not have equal or similar bargaining powers. In China, most cargo traders and shipping companies are small or medium-sized ones and do not have equal or similar bargaining powers when facing large shipping companies or cargo traders.

(ii) A volume contract that derogates from the mandatory provisions can be conditionally binding upon any person other than the shipper subject to its express agreement. In practice, such an express agreement may possibly be made not wholly in the own will of a small or medium-sized consignee. Instead, he is compelled to make the agreement due to its weak bargaining power.

(c) Delivery of goods without production of transport documents;

Noticeably, China has become the largest commodity export country in the world and as mentioned in paragraph (a) above, a considerable part of the commodities is exported on FOB term by small or medium-sized companies and as a result, protection of FOB sellers’ interests is of particular importance. Delivery of goods without

---

26 Article 80(2) provides: ‘A derogation pursuant to paragraph 1 of this article is binding only when: (a) The volume contract contains a prominent statement that it derogates from this Convention; (b) The volume contract is (i) individually negotiated or (ii) prominently specifies the sections of the volume contract containing the derogations; (c) The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Convention without any derogation under this article; and (d) The derogation is neither (i) incorporated by reference from another document nor (ii) included in a contract of adhesion that is not subject to negotiation.’ Article 80(3) further provides: ‘A carrier’s public schedule of prices and services, transport document, electronic transport record or similar document is not a volume contract pursuant to paragraph 1 of this article, but a volume contract may incorporate such documents by reference as terms of the contract.’

27 Article 80(5) provides: ‘The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of paragraph 2 of this article, apply between the carrier and any person other than the shipper provided that: (a) Such person received information that prominently states that the volume contract derogates from this Convention and gave its express consent to be bound by such derogations; and (b) Such consent is not solely set forth in a carrier’s public schedule of prices and services, transport document or electronic transport record.’

28 Article 67(2) provides: ‘A person that is not a party to the volume contract is bound by an exclusive choice of court agreement concluded in accordance with paragraph 1 of this article only if: (a) The court is in one of the places designated in article 66, paragraph (a); (b) That agreement is contained in the transport document or electronic transport record; (c) That person is given timely and adequate notice of the court where the action shall be brought and that the jurisdiction of that court is exclusive; and (d) The law of the court seized recognizes that that person may be bound by the exclusive choice of court agreement.’

29 Article 75(4) provides: ‘When an arbitration agreement has been concluded in accordance with paragraph 3 of this article, a person that is not a party to the volume contract is bound by the designation of the place of arbitration in that agreement only if: (a) The place of arbitration designated in the agreement is situated in one of the places referred to in subparagraph 2 (b) of this article; (b) The agreement is contained in the transport document or electronic transport record; (c) The person to be bound is given timely and adequate notice of the place of arbitration; and (d) Applicable law permits that person to be bound by the arbitration agreement.’
production of bills of lading is quite common, especially in the carriage of liquid or containerized goods and in the short sea trades. As a result of such delivery, a seller’s interest may be prejudiced because possibly he has not been paid for the sale of goods and has to pursue a claim against the carrier and/or the buyer/consignee. In practice, however, pursuing such a claim may prove difficult as the carrier and/or the buyer may be financially incapable or the claim has to be pursued in a foreign jurisdiction. Thus, delivery of goods without production of bills of lading should be prohibited or at least strictly restricted for the purpose of protecting the interests of the sellers in case of bills of lading. This is why Article 71 of the Maritime Code requires the carrier to deliver the goods against surrendering of an original bill of lading even in the case of a straight bill of lading. It can be anticipated that before the widespread use of electronic transport documents in the future, delivery of goods without production of bills of lading will still exist and even becomes more common as ships sail faster due to the development of technology and shipbuilding and maritime transport. Thus, the necessity of such protection shall remain unchanged.

Article 46 or 47 of the Rotterdam Rules allows delivery of goods without production of transport document or electronic transport record to some extent.

By virtue of Article 46, when a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods, the carrier may deliver the goods upon instruction of the shipper or the documentary shipper pursuant to subparagraph (b) of that article and such delivery shall discharge the carrier from its obligation to deliver the goods under the contract of carriage; if a non-negotiable transport document does not indicate that it shall be surrendered in order to obtain delivery of the goods, the carrier may deliver the goods upon the proof of the consignee’s proper identity.

By virtue of Article 47, when a negotiable transport document or a negotiable electronic transport record has been issued that expressly states that the goods may be delivered without surrender of the transport document or the electronic transport record, the carrier may deliver the goods without surrender of the negotiable transport document or without demonstration of a negotiable electronic transport record, but upon instruction of the shipper or the documentary shipper in accordance with subparagraph 2 (a) of that article and such delivery shall discharge the carrier from its obligation to deliver the goods under the contract of carriage to the holder.

It cannot be denied that the permissible delivery of goods without surrender of the transport document or the electronic transport record may facilitate timely delivery of goods at destination. However, such delivery may cause prejudice to the sellers’ especially the FOB sellers’ right to be paid for the sale of goods. In particular, where an FOB seller is not a documentary shipper, it has not right to claim against the carrier in the case of delivery of goods without surrender of the transport document or the electronic transport record. When the goods cannot be timely delivered after their arrival at the place of destination, the carrier is entitled to take action in respect of the goods at the risk and expense of the person entitled to the goods pursuant to Article 48 ‘Goods remaining undelivered’, which reduces the necessity for delivery of goods without surrender of the transport document or the electronic transport record.

Thus, based upon the situation of commodity export in China and from the perspective of balancing the interests of the sellers, especially the FOB sellers, and the carriers, it is advisable not to adopt into Chapter IV of the Maritime Code Articles 46 & 47 which stipulate the carrier’s permissible delivery of goods without surrender of the transport document or the electronic transport record.

(d) Jurisdiction and arbitration

As illustrated in 3.3 above, an exclusive choice of court agreement contained in a volume contract by virtue of Article 67(2) of Chapter 14 ‘Jurisdiction’ or an arbitration agreement contained in a volume contract by virtue of Article 75(4) of Chapter 15 ‘Arbitration’ may conditionally be binding upon a person that is not a party to the volume contract without its agreement and thus compels a consignee in China to be involved in a litigation or arbitration in a foreign country. Consequently, the interests of small or medium-sized shipping companies or cargo traders and even the overall national economic interests may be prejudiced. However, jurisdiction and arbitration are procedural issues and thus irrelevant to the Maritime Code.
4.3 Removing the Ambiguities and Uncertainties and Filling in the Gaps Existing in Chapter IV of the Maritime Code

As mentioned in 3.4 above, the admiralty practice in the implementation of Chapter IV of the Maritime Code demonstrated the existence of ambiguities and uncertainties and lacks detailed provisions on some issues. Thus, the revision of this Chapter has a task to remove the ambiguities and uncertainties and to fill in the gaps to solve the matters which often give rise to disputes in practice and to enhance its enforceability.

So far as the examples in this regard as illustrated in 3.4 above are concerned: (a) as regards the FOB seller’s legal position and its rights and obligations, it is advisable to strip the actual shipper from the definition of shipper and define it as a consignor and to stipulate a consignor’s rights and obligations based upon its delivery of goods for carriage to a carrier and maritime performing party together the shipper’s joint and several liability where the consignor fails to perform its obligations; (b) as regards the legal position of a freight forwarder, rules may be abstracted from the Provisions on Certain Issues regarding the Trial of Cases of Disputes over Maritime Freight Forwarding, 2012 which stipulates freight forwarder’s legal position according to the nature of its acts and form part of the provisions of Chapter IV after revision thereof; (c) as regards delivery of goods without production of bills of lading, it seems unnecessary to require surrendering of a straight bill of lading for taking delivery of goods and rules may be abstracted from the Provisions on Certain Issues regarding the Application of Law in the Trial of Cases of Delivery without Original Bills of Lading, 2009 to be part of the provisions of Chapter IV after revision thereof.

4.4 Stipulating Mandatory Scope of Application of Chapter IV of the Maritime Code

As illustrated in 3.5, the Chapter lacks mandatory scope of application. It seems advisable to stipulate in Chapter XIV ‘Application of Law in Relation to Foreign-related Matters’ after revision the Maritime Code that Chapter IV shall be applicable to the international carriage of goods wholly or partly by sea to or from China, unless the parties to a contract has chosen the law of another jurisdiction as the applicable law, provided that the application of such a law shall not make the Chinese shipper or consignee less favourable than under Chapter IV of the Maritime Code.

5 Expectation of Revision of the Maritime Code

Under the Chinese legislative system, as a principle, the making or revision of a law should first be listed in the national legislation plan which is made in every five years. The revision of the Maritime Code has not been listed in the national legislation plan yet mainly due to the limited resources of national legislation. However, the need for revision of the Maritime Code, especially Chapter IV thereof, is well recognized by the academic circle, the relevant industries and the judicial circle. The Ministry of Transport which was responsible for the drafting of the Maritime Code has been strongly proposing the revision and has designated maritime law experts to do research on the revision thereof to form basis for the revision in the near future. Hopefully, the revision of the Maritime Code will be listed in the national legislation plan in the coming years and the work of revision will officially start by virtue of such a plan.

6 Conclusions

From the above analysis, the following conclusions may be drawn:

(a) The updating of the law on carriage of goods by sea in China is necessitated by the inapplicability of Chapter IV of the Maritime Code to the domestic carriage, the significant developments in the maritime transport and related areas since the adoption of the Code in 1992, the adoption of the Rotterdam Rules, the existence of ambiguities, uncertainties and gaps in this Chapter and the lack of mandatory scope of application thereof;

(b) Chapter IV of the Maritime Code shall be updated mainly by way of extending its scope of application to the contracts of carriage of goods in coastal waters and in the inland waters adjacent to the sea, adopting the reasonable and mature provisions of the Rotterdam Rules to improve the hybrid regime contained in this Chapter while China takes a “wait and see approach” towards the Rules, removing the ambiguities and uncertainties and filling in the gaps existing in this Chapter and stipulating its mandatory scope of
application;

(c) Hopefully, the revision of the Maritime Code including its Chapter IV will be listed in the national legislation plan in the coming years through which the law on carriage of goods by sea will be modernized.
1 Introduction

The reform of maritime and transport law has been on the legislative agenda in Japan since a few years. First codified in 1899 as part of the Commercial Code, the Japanese maritime and transport law is the oldest in Asia. However, it has remained as originally enacted with only minimal amendments for more than a century, and is now one of the most outdated maritime laws in the region. During the last two decades, the People’s Republic of China enacted its Maritime Law in 1993, Vietnam made a comprehensive reform of its maritime law in 2005, and more recently, the Republic of Korea amended its maritime law in 2008. It was no longer possible for Japan to neglect modernising its maritime and transport law.

Prior to the commencement of the reform on maritime and transport law, the Japanese government worked on the modernisation of contract law part (‘law of obligations’) of the Civil Code. The work started as a private study by the group of academics, then developed into an official examination by the Legislative Council of the Ministry of Justice. The Council’s report formed a basis of the Bill to amend the Civil Code, which is now pending before the Diet. It took ten years to go through the whole of this process. Though the time spent was much shorter, the reform process for the maritime and transport law has apparently followed that of the Civil Code very closely. In the case of the maritime and transport law reform, the process started by forming a private Research Group, which consisted mainly of academics, but was also joined by several officials of the Ministry of Justice. Their participation implied that its work was expected to be a preliminary study to prepare for the official deliberations. The Research Group was formed in 2011 and focused mainly on comparative study of other countries’ laws. After its work was concluded with a Report in 2012, a Study Group was established. The Study Group was also a private body led by academics, but it was more obvious that its activity was part of the government’s legislative process, since industry representatives and maritime lawyers were among members and observers. Relevant government officials (mainly those of the Ministry of Land, Infrastructure and Transport) also attended the meetings as observers. The Study Group published its Report in November 2013. In the meantime, a few of the academic members of the Study Group made a survey of the industry practice at the request of the Ministry of Justice, which was also made public in March 2013.

Based on these preparatory works, the Legislative Council established a Committee on Commercial Law (transport and maritime law) in April 2014 and started deliberations to respond to the consultation by the Minister of Justice. The Report of the Study Group became the primary material for the Committee’s work, and determined issues and scope of deliberations. The Committee published the Interim Report in March 2015, accompanied by the Explanatory Note by the Ministry of Justice. After seeking for public comments on the Interim Report, the work of the Committee resumed, and was concluded in January 2016 with the publication of the Draft Outline of the Reform. The Legislative Council approved it as the Outline of the Reform and reported it to the Minister of Justice. The Outline of Reform is going to be drafted into a bill to amend the Commercial Code. It is anticipated that the bill will be submitted to the Diet probably in 2017.

The modernisation of the maritime and transport law forms a part of Japan’s legislative efforts on overall reform of basic private laws. In early 1990’s, the basic private law codes, namely the Civil Code, Commercial Code and Civil Procedure Code, as well as some important statutes, such as the Bankruptcy Act and Corporate Reorganisation Act, retained the structure of decades ago, updated by only piecemeal amendments and...
supplemented by several statutes outside the Codes. They were also written in archaic language, which prevented non-lawyers from understanding the text accurately. Since 1990’s, these laws were modernised one by one, both in substance and language. As far as the Commercial Code is concerned, the Companies Act of 2005 (later amended in 2014) and the Insurance Act of 2008 has taken out many provisions of the Code. Some of the provisions remaining in the Code were rewritten in modern language on the occasion of enacting the Companies Act in 2005.

Some of these law reforms were motivated by the regulatory competition between jurisdictions. In the case of the Civil Code reform, the central figure of the reform project mentioned the aspiration that the Japanese Civil Code after reform “serve[s] as one model for future worldwide unification of contract law, given that the results [of the reform] stand at a crossroads of comparative law including French, German, and Anglo-American law.” The idea obviously resembles the ambition of the German Ministry of Justice to lead the world’s law reform by “the law made in Germany.” In contrast, the corporate governance reform, most recently achieved by the 2014 amendments to the Companies Act as well as the adoption of the Corporate Governance Code, was advanced as part of the economic policy to enhance the competitiveness of the industry and to facilitate the growth of the economy by making Japanese companies more appealing to global investors. Such a policy goal was symbolised as a slogan of “growth-oriented governance.” No equivalent intention to fare the regulatory competition well is identified in the case of the maritime and transport law reform. In this sense, the motivation of the reform is principally a domestic one.

Still, such absence of international pressure does not mean that the deliberations are isolated from global or regional law. Rather, it is likely that the global or regional law has influence over the reform in one way or another, given that maritime law is the subject on which many efforts have been made for international unification. Thus, to what extent internationally unified law, whether global or regional, has affected the maritime law reform of Japan is an interesting question to ask. This is what this paper is going to address.

In the remaining part of this paper, analysis will be made as follows. First, the framework for analysis is advanced (2). It consists of a theoretical insight into how international instruments can affect domestic law reform and what other factors are conceivable to work in the reform process. Then a very brief overview of the current maritime and transport law of Japan follows (3). The structure of the Commercial Code, statutes and ratified treaties are described in this section. Based on these works, the Outline of Reform of reform is analysed (4). This section examines the scope of the reform and the sources of inspiration for each proposed amendments. The last section briefly concludes the analysis of this paper (5).

2 Theoretical Framework

2.1 How international instruments affect domestic law

An international instrument can affect domestic law making in several ways. The most direct way is through ratification of treaties. Many uniform law instruments in the field of maritime law take the form of treaties. Once a state ratifies a treaty, it is bound to implement the latter under the domestic law.

However, this takes place not often in the Asia-Pacific region. States in this region are not as positive in ratifying uniform law treaties as in other regions. The number of treaties to which Japan is a party is not large (see III below), but many other states have ratified even fewer treaties. For example, China, India and Korea, three of the major economies in the region, are not parties to any of the maritime transport treaties. They have ratified none of the Brussels Convention of 1924 (‘the Hague Rules’), its Protocol of 1968 (‘the Visby Rules’), its Protocol of 1979 (‘SDR Protocol’), the International Convention on Carriage of Goods by Sea of 1978 (‘the Hamburg Rules’) or the United Nations Convention on Carriage of Goods by Sea of 1978 (‘the Rotterdam Rules’). Further, there is no regional uniform law treaty on maritime and transport law in the

---

5 Uchida, above n 2, 717.
6 For the recent reform of corporate governance in Japan, see Gen Goto, Manabu Matusnaka and Souichirou Kozuka, ‘Japan’s Gradual Reception of Independent Directors: An Empirical and Political-Economic Analysis’ in Harald Baum et al. (eds) Independent Directors in Asia, forthcoming.
7 The Council of Experts Concerning the Corporate Governance Code, Japan’s Corporate Governance Code [Final Proposal], Background (2015), [7].

(2016) 30 ANZ Mar LJ 126
However, international treaties do exert influence on domestic maritime law in Asia. In particular, they serve as models or sources of inspiration. For example, the 2008 amendment of maritime law in Korea takes many provisions from international treaties, such as the Hague-Visby Rules, 1976 Convention on Limitation of Liability for Maritime Claims (\textquotedblleft LLMC\textquotedblright)\textsuperscript{17} or 1989 Salvage Convention.\textsuperscript{18} It is despite the fact that Korea has ratified none of them. References to international treaties in a similar way are observed with the Chinese maritime Law of 1993 or Vietnamese Maritime Code of 2005. A similar example in Japan was the amendments to the Act on Civil Liability and Compensation for Oil Pollution in 2004. The amendments renamed the law as the \textquotedblleft Act on Ship’s Civil Liability and Compensation for Oil Pollution (\textquotedblleft LCOP\textquotedblright)\textsuperscript{19} and required the vessels entering a Japanese port to insure the shipowner for the possible liability within the Japanese territory. While the introduced regulations were basically in line with the Bunkers Convention\textsuperscript{20} and the then draft of the Nairobi Wreck Removal Convention,\textsuperscript{21} Japan has not become a party to either of the two conventions.

It is also conceivable that a state, having ratified an international treaty, extends the rules beyond the original scope of application of the treaty. It is the case with Japan’s International Carriage of Goods by Sea Act (\textquotedblleft ICOSGA\textquotedblright), which not only implements the Hague-Visby Rules (the Hague Rules until 1992 amendments) but applies the same rules to any carriage of goods by sea whose port of loading or port of discharge is outside of Japan (see below 3.1). Where the subject is not covered by the international treaty (in this case, the Hague-Visby Rules), the domestic law can be seen as modelled after (or copied from) the international treaty’s rules.

As regards the reason why national lawmakers make references to international treaties, there are two possibilities. One of the possibilities, which may be called as a “strong” reason, is that the international treaty adopts a policy that makes good sense. It is true that not all of the international treaties are drafted according to a coherent policy. More often than not, they are products of compromise.\textsuperscript{22} Still, even when the policy is the product of compromise, there is a strong reason to adopt it if the practice has developed in accordance with the international treaty. The other possibility is that an international treaty is referred to just as other leading jurisdiction’s laws, such as English, French and German law. In some cases, the lawmaker may find no definite reason to pick one of the individual jurisdictions’ legislation as the model and choose the international treaty because it is a “neutral” solution. In fact, because existing jurisdiction’s law is based on the entire legal system, accompanied by legal culture, there can be difficulties in borrowing or copying it.\textsuperscript{23} An international treaty is, to the contrary, a stand-alone text without a context, and is easier to adopt as a model.\textsuperscript{24} This may be the “weak” reason to follow an international treaty.

Some of the international instruments are not treaties. They are sometimes called “soft law” instruments, as they cannot bind states legally. These soft law instruments can also be source of inspiration for national lawmakers, either for “strong” or “weak” reason. The “strong” reason to refer to such non-treaty rules may exist when the practice is based on the international instrument. One of the best known examples is the York Antwerp Rules on General Average, which is universally complied with in practice through parties’ agreement. The “weak” reason is that the instrument offers a conceivable set of rules on the subject, presumably good rules because of the expertise of the drafters. In some cases, the instrument aims to serve as such from the beginning and drafted as “model law” or “legislative guide”, although this is not common in maritime law.\textsuperscript{25}

\textsuperscript{12} The Convention on the Contract for the International Carriage of Goods by Road.
\textsuperscript{13} The Convention concerning International Carriage by Rail.
\textsuperscript{14} Acuerdo sobre Transporte Fluvial por la Hydrovia Paraguay-Paraná.
\textsuperscript{15} An international treaty is, to the contrary, a stand-alone text without a context, and is easier to adopt as a model. This may be the “weak” reason to follow an international treaty.
\textsuperscript{16} For example, the 2008 amendment of maritime law in Korea takes many provisions from international treaties, such as the Hague-Visby Rules, 1976 Convention on Limitation of Liability for Maritime Claims (\textquotedblleft LLMC\textquotedblright)\textsuperscript{17} or 1989 Salvage Convention. It is despite the fact that Korea has ratified none of them. References to international treaties in a similar way are observed with the Chinese maritime Law of 1993 or Vietnamese Maritime Code of 2005. A similar example in Japan was the amendments to the Act on Civil Liability and Compensation for Oil Pollution in 2004. The amendments renamed the law as the \textquotedblleft Act on Ship’s Civil Liability and Compensation for Oil Pollution (\textquotedblleft LCOP\textquotedblright)\textsuperscript{19} and required the vessels entering a Japanese port to insure the shipowner for the possible liability within the Japanese territory. While the introduced regulations were basically in line with the Bunkers Convention\textsuperscript{20} and the then draft of the Nairobi Wreck Removal Convention,\textsuperscript{21} Japan has not become a party to either of the two conventions.

It is also conceivable that a state, having ratified an international treaty, extends the rules beyond the original scope of application of the treaty. It is the case with Japan’s International Carriage of Goods by Sea Act (\textquotedblleft ICOSGA\textquotedblright), which not only implements the Hague-Visby Rules (the Hague Rules until 1992 amendments) but applies the same rules to any carriage of goods by sea whose port of loading or port of discharge is outside of Japan (see below 3.1). Where the subject is not covered by the international treaty (in this case, the Hague-Visby Rules), the domestic law can be seen as modelled after (or copied from) the international treaty’s rules.

As regards the reason why national lawmakers make references to international treaties, there are two possibilities. One of the possibilities, which may be called as a “strong” reason, is that the international treaty adopts a policy that makes good sense. It is true that not all of the international treaties are drafted according to a coherent policy. More often than not, they are products of compromise.\textsuperscript{22} Still, even when the policy is the product of compromise, there is a strong reason to adopt it if the practice has developed in accordance with the international treaty. The other possibility is that an international treaty is referred to just as other leading jurisdiction’s laws, such as English, French and German law. In some cases, the lawmaker may find no definite reason to pick one of the individual jurisdictions’ legislation as the model and choose the international treaty because it is a “neutral” solution. In fact, because existing jurisdiction’s law is based on the entire legal system, accompanied by legal culture, there can be difficulties in borrowing or copying it.\textsuperscript{23} An international treaty is, to the contrary, a stand-alone text without a context, and is easier to adopt as a model.\textsuperscript{24} This may be the “weak” reason to follow an international treaty.

Some of the international instruments are not treaties. They are sometimes called “soft law” instruments, as they cannot bind states legally. These soft law instruments can also be source of inspiration for national lawmakers, either for “strong” or “weak” reason. The “strong” reason to refer to such non-treaty rules may exist when the practice is based on the international instrument. One of the best known examples is the York Antwerp Rules on General Average, which is universally complied with in practice through parties’ agreement. The “weak” reason is that the instrument offers a conceivable set of rules on the subject, presumably good rules because of the expertise of the drafters. In some cases, the instrument aims to serve as such from the beginning and drafted as “model law” or “legislative guide”, although this is not common in maritime law.\textsuperscript{25}
2.2 Other factors that can affect lawmaking

Other than references to international rules, domestic lawmaking can be affected both by political and juridical factors.

Political factors include pressures from lobbying by the industry, consumer groups and other interested parties. In the law reform of transport and maritime law, consumer groups naturally are concerned about passenger transport, but is less likely to have large interests in the rules on cargo transport. Except for courier services and moving companies’ services, cargo transport is basically business to business transaction. On the other hand, the industry, whether carriers, cargo interests or insurers (including hull, cargo and P&I insurers), may exert pressures in one way or another when they have a serious interest at stake. Such a situation was reflected in the process of transport and maritime law reform in Japan. While the industry representatives have been present both at the Committee of the Legislative Council and the Study Group that preceded the Committee, the consumer group representative was not among the official members of either of them. Only in the Sub-committee on passenger transport, established under the Committee, a representative of the consumer group participated as a “stakeholder” and an official of the Consumer Affairs Agency as an observer. Such a limited participation of consumer representative is unusual with the recent legislative reform. The constitution of the Study Group and Committee has a large relevance in the law reform of Japan, because these bodies conclude negotiations by consensus as an unwritten practice, which mean the representation gives an interest group a veto. Further, the Council’s conclusion is usually decisive and unlikely to be modified in the Diet afterwards.

Practitioners sometimes resist a reform proposal that could result in changes to their current practice, even when there is no strong reason to stick to the latter. It may be named as an institutional inertia. Once a practice or contract clause is established within the industry, a convincing reason is required to change it, and the established practice or contract clause will otherwise survive. Such an institutional inertia is more likely to affect the reform, in particular, if the lawmaker has an intent to respect the current practice rather than to facilitate new entrants and innovation in business. If a survey of practice is conducted in the course of the reform, it may imply that the legislator has such an intention. Thus, there appears to be a good likelihood that the transport and maritime law reform in Japan is affected by the institutional inertia to recognise the current practice.

The second type of a factor to affect the legislative process is a juridical one. Where no political interest is involved, lawyers are often concerned about the consistencies among relevant codes and statutes, or among provisions within a statute. The juridical interest in ensuring consistencies is larger in a jurisdiction where there is no admiralty court and the maritime cases are governed by the general court procedure, as opposed to where the specialised admiralty court decides maritime cases according to the special procedure. In a jurisdiction with no specialised admiralty court, including Japan, maritime law is theoretically recognised as an application of the general private law. Judges, and in some cases lawyers as well, may not be specialised in maritime cases and tend to approach the case just as they approach ordinary private law disputes. Japan is one of such jurisdictions. As a result, consistencies not only between transport law and maritime law (within the same Commercial Code as well as between the Commercial Code and special statutes), but also between the maritime law and the general private law codified in the Civil Code can also be considered relevant.

As part of juridical factors, the legislator may wish to restate the case law on such issues as are not apparent from the text of the Code or codify the prevailing academic theory in the absence of a case law. Such restatement has the advantage of enhancing the foreseeability of the court decisions. Where the provisions of the existing Code or

---

25 At the Study Group, 8 of 19 full members and 22 of 26 observers were industry representatives, besides 4 lawyers participating as observers. This makes up 34 out of 45 attendants are on behalf of the industry in the broad sense. (The remaining members were 8 academics, 3 Ministry of Justice officials, as well as official of the Ministry of Land, Transport, Infrastructure and Tourism, whose number is undisclosed.) At the Committee of the Legislative Council, 8 out of 19 members and 1 of 12 associate members are industry representatives, and 3 of members and 1 of associate members were lawyers. As a result, industry-related participants occupy 13 out of 31. (The remainder consist of 6 academic members (including 1 former business person), 5 academic associate members, 2 members from the Ministry of Justice, 4 judges and Ministry of Justice staffs as associate members, 1 representative of the seamen’s union.

26 The situation is in contrast to the members involved in the reform of the Civil Code, see Kozuka and Nottage, above n 2. See also the involvement of consumer groups in some copyright issues, described in Souichirou Kozuka, ‘Copyright law as a new industrial policy?’ in Nissim Otmazgin and Eyal Ben-Ari (eds) Popular Culture and the State in East and Southeast Asia (Routledge, 2012) 106.


statute accompanies significant amount of case law, this advantage is great, as it helps the public to understand the law easily. It was the case with the reform of the Japanese Civil Code. In fact, many of the provisions in the Bill to amend the Civil Code are this kind of restatement. However, as the number of cases is much smaller in transport and maritime law than in the Civil Code, this factor is less likely to be influential in the transport and maritime law reform.

3 Current maritime law in Japan

3.1 The Commercial Code and Special Statutes

The current Commercial Code of Japan provides for a set of rules on transport law in Book II (Commercial Transactions) and devotes the whole Book III to maritime law. The former provisions are applicable to transport on land and inland waters (lakes, rivers and port), while the latter includes provisions on maritime transport. However, there is no reason to distinguish these modes of transport completely and, in fact, the maritime transport section refers back to several provisions on (land and inland waterway) transport.

On the other hand, the scope of the Book on maritime law is not limited to maritime transport but covers the whole maritime activities, including ownership and co-ownership of a ship, charter by demise, general average, salvage on the sea, collision of vessels, marine insurance as well as maritime liens and mortgages. There is no equivalent provisions with regard to land transport. As a result, for example, lease of a vehicle is governed by the provisions on lease contract, and the collision of trains is subject to the general rules on torts. Both of these rules are codified in the Civil Code.

The Commercial Code was drafted by making references to various countries’ laws at the end of the 19th Century. Of particular influence was the German General Commercial Code of 1861 (‘ADHGB’), codified prior to the construction of the Second German Empire. ADHGB itself borrowed many provisions from the French Commercial Code of 1807. As a result, the current Commercial Code of Japan includes many provisions from the days of sailing ships, and is not entirely adapted to the modern shipping. Further, as manned aircraft was not realised at the time of codification yet, the Commercial Code includes no provision applicable to air transport. There was an attempt to modernise the Commercial Code in the 1930s, which culminated in the Outline of Reform in 1935. However, only the part on corporate law and some general provisions were amended in 1938, while the rest of the proposed reform was never undertaken, having been frustrated by the outbreak of the Second World War.

After the Second World War, special statutes were enacted on the occasions of ratifying some international instruments, instead of amending the Commercial Code itself. In 1957, Japan ratified the Brussels Convention of 1924, and enacted the International Carriage of Goods by Sea Act (‘ICOGSA’) to implement it. It was amended in 1992 when Japan ratified the SDR Protocol, which also applies the Visby Rules to Japan. The enactment of ICOGSA was intended to be a substitute of frustrated modernisation of the Commercial Code. It therefore covers larger scope of maritime transport than the Brussels Convention (as amended by the SDR Protocol) and is applicable to transport of goods by a ship when either the port of loading or port of discharge is outside of Japan. It also includes many provisions that do not derive from the Convention. ICOGSA is a relatively brief statute with only 23 articles, but by referring to several provisions of the Commercial Code, offers a comprehensive set of rules to apply to international maritime transport of goods. As a result, the Commercial Code is only applicable to the domestic transport of goods by sea, besides international and domestic passenger transport by sea. The latter have remained subject to different set of rules from international maritime transport, which are left without modernization.

There are two other important special statutes. One is the Act on Limitation of Liability of Shipowners (‘ALLS’) of 1975 to implement the Limitation of liability convention of 1957. Japan ratified the 1957 Convention in 1975, effective 1 September 1976, which was only a few months before the adoption of the 1976 LLMC. Ratification of the latter took place in 1992, followed by the accession to 1996 Protocol to the 1976 LLMC in 2006. ALLS has...
been amended accordingly in 1982 and 2005. The other is the LCOP of 1975. It was enacted to implement the 1969 Civil Liability Convention (‘CLC’) and the 1971 Fund Convention (‘FC’), both of which Japan became a party in 1976. Now Japan is a Party to the 1992 Civil Liability Convention and 1992 Fund Convention, as well as the 2003 Supplementary Fund Protocol, and implements them by amending the LCOP from time to time.

3.2 International Conventions

Besides the already mentioned conventions, Japan has ratified two other maritime law conventions. They are the Salvage Convention and Collision Convention of 1910. The latter two conventions are applied directly, with no implementing statute being enacted. As a result, when all of the ships involved in the salvage or collision belong to States Parties of these Conventions, the Japanese court will apply these Conventions instead of the rules in the Commercial Code unless all the ships are Japanese ships.

Other than maritime law conventions, Japan is a party to 1999 Montreal Convention on air transport. To regulate air transport with a state not yet a party to the Montreal Convention, Japan has remained a Party to 1929 Warsaw Convention and its 1955 Hague Protocol as well as the Montreal Protocol No.4 of 1975. As mentioned, there is no international convention on road, rail or inland waterway transport to which Japan has become a party.

4 Analysis of the proposed reform

4.1 The structure remaining intact

As regards the scope of reform, the Outline of Reform proposes to streamline the structure of the law, but keeps the resulting changes to a minimum. Firstly, the distinction between the transport law in Book II (Commercial Transactions) of the Commercial Code and maritime law in its Book III will be maintained. In the Outline of Reform, it is proposed to apply the transport law provisions as amended to air and multimodal transport as well. As a consequence, only those rules unique to maritime transport will remain in the Book on maritime law. It is a significant improvement to the complicated structure of the Commercial Code, but the difference in the coverage of transport law and maritime law will remain as it is now. While Book III (maritime law) will continue to govern maritime law issues other than transport, Book II (commercial transaction) will include only provisions on transport contract. Issues related to the transport industry, for example aircraft liens and mortgages, will not be added to Book II of the Commercial Code.

Secondly, the reform will not integrate special statutes into the Commercial Code, still less enact an independent act covering comprehensively transport of all the modes. After enacting the Companies Act in 2005 and Insurance Act in 2008, it was conceivable to remove the provisions on transport and maritime law from the Code and enact a single statute on transport law, which would have entirely decodified the Commercial Code. Apparently, the legislator has not been bold enough to delete one of the major Codes. Conversely, if ICOGSA, ALLS and the LCOP were codified into the Commercial Code, the structure would have become simpler, with a single Code covering all the aspects of transport and maritime law. Such a modest reform was not taken up by the Outline, either, and the three special statutes will continue to exist separately from the Code as before.

Thirdly, the issue of whether Japan should ratify any international convention that it has not yet become a Party has remained out of scope of the deliberations. It might be the outcome of bureaucratism, as new ratification requires cooperation of the Ministry of Foreign Affairs and go beyond the authority of the Legislative Council.

---

35 ALLS was further amended in 2015 to implement the amendments to the limitation amount adopted in 2012.
38 International Convention on Civil Liability for Oil Pollution Damage, 1992. It is technically the CLC as amended by the 1992 Protocol to it.
43 There is another technical change proposed in the Outline of Reform, which will make the provisions in Book II (transport law rules) directly applicable to maritime transport, instead of application by reference as in the current Commercial Code.
44 Codification in East Asia (Springer, 2014) 121; Sasaoka, above n 3, 48-50.
which is a consultative organ of the Ministry of Justice. Whatever the reason may be, the reform has, as a result, fell short of pursuing the ideal law on the subject, but is limited to minimal.

Procedurally, these limits in the scope of reform were already defined by the mandate of the Legislative Council. The consultation by the Minister of Justice dated 7 February 2014 requested examination of the Commercial Code’s provisions relating to “transport and maritime law,” which implied that the basic structure of the current Commercial Code will be retained. Such a limitation in the scope of reform reflect the feature of law reform process commonly observed in Japan’s recent private law reform. On the one hand, minimalism seems to be a (tacit) principle, and the basic structure of the current law tends to be left unchanged, unless there is a pressing need for a change. On the other hand, compartmentalised government agency structure, combined with the Council (shingikai) system to involve academics and industry representatives, affects the scope of reform and prevents a radical reform overriding the existing division of powers among the agencies.46

4.2 Sources of inspiration

The Outline includes 57 items of reform as counted by the headings, 16 of them on transport law, 39 on maritime law and 2 categorised as “Others.” Applying the theoretical framework discussed above, among these items may be identified: (a) amendments to adapt rules to international conventions, (b) amendments to ensure consistencies between the Commercial Code and special statutes or provisions among the Code, (c) amendments to restate the established case law or prevailing academic theories, and (d) deleting the outdated rules that do not match the modern practice of the industry.

The reform of type (a) should be found only in the form of reference to international instruments as the model, because Japan has adequately implemented the treaties that it has ratified and no new ratification has been envisaged in the reform of this time. In some cases (a) and (b) can overlap, because ICOGSA implements the Hague-Visby Rules and, therefore, an amendment to make the Commercial Code to be in line with ICOGSA may (but not necessarily) lead to adopting the Hague-Visby Rules beyond the scope of application of the Brussels Convention. If a reform item includes two or more sub-items, each of which can be different in nature, each sub-item must be identified with different categories by indicating the proportion of the sub-item in the item (such as “0.5 item under type (a) and 0.5 item under type (b”).

Among the total of 57 reform items, 14.8 are type (a) reform. This is an underestimation, because there is no international convention on transport of modes other than maritime that are relevant to Japan. If focused on maritime law part of the Outline, 12.8 out of 39 reform items are type (a) reform. The figure indicates that international conventions have had significant influence on the Outline. A closer look reveals that 2.5 out of 3 items on general average adopt York Antwerp Rules, that all of the three items on collision of vessels adopt rules in 1910 Collision Convention, and that 5 out of 7 items on salvage at sea have adopted rules in 1989 Salvage Convention. It is interesting to see that the 1989 Salvage Convention has affected the Outline significantly, though Japan has not ratified it or has no plan to do so in the near future.

On the other hand, transport law part of the Outline is not influenced by international conventions. The Hague-Visby Rules, although Japan is a Party to it, has had little impact on the Outline. Limitation of liability per package and per kilogram is not extended to domestic maritime transport beyond the scope of application of ICOGSA on the understanding that parties are free to agree on such limitation.47 Neither was the exemption of the carrier’s liability for nautical fault or fire adopted by the Commercial Code. Interestingly, the standard contracts currently used by the domestic shipping industry exempt the carrier from liability for damages due to the nautical fault, which appears to be null and void in the face of a provision that prohibits exemption of the carrier’s liability due to the negligence of the shipowner or intentional act or gross negligence of the ship’s crew or other employees.48

The Outline proposes to delete this prohibition of exemption clauses, which will enable the carriers to continue

46 The same problem is observed with the reform on other subjects. In the case of corporate governance reform, as the focus is recently on public companies, the securities regulation and rules of securities exchanges play an important role besides the traditional corporate law (Companies Act). Although efforts have been made to realise coordination as much as possible, the process is divided between the Ministry of Justice (for Companies Act) and the Financial Services Agency (for securities regulation). See Goto, Matsunaka and Kozuka, above n 5.


48 The provisions of the Commercial Code are not mandatory except a few of them, and will remain as such after the amendments. (See Sasaoka & Goto, above n 3, 482.) Note also that ICOGSA itself has a larger scope of application than the Brussels Convention.
using the current standard contract with no problem with the validity. Similarly, although the Outline proposes to introduce rules on sea waybills, they are not modelled after the Uniform Rules for Sea waybill of the CMI. The Committee noted that parties are free to incorporate the CMI Rules by reference, but considered that there is no need to codify them, even as non-mandatory (default) rules.

An interpretation for such differences in the extent to which international conventions affect the Outline is that an international convention becomes more influential when combined with the industry practice. The York Antwerp Rules and the 1989 Salvage Convention are not merely uniform law instruments but form the basis of industry practice. On the other hand, domestic maritime transport has developed its practice under the Commercial Code’s rules, which has remained different from the Hague-Visby Rules under the ICOGSA. The failure to introduce the CMI Rules for sea waybills may also be interpreted as lack of support by the universal practice. In Japan, where the practice is diverse, international rules are unlikely to be adopted.

The second largest category of reform items is type (d) (removing out of date provisions) proposals, to which 8 out of total 57 and 7 out of 39 items in the maritime law part belong. However, if one looks only at the transport law part, the largest group (even larger than type (a)) is reform of type (b). The reason may be explained as follows. The difference between rules for land transport and maritime transport is mainly historical, deriving from the origin of the French Commercial Code. Therefore, as efforts to modernise the law on the subject, it is reasonable to reshuffle the provisions and extract the transport law rules commonly applicable to transport of any mode, distinguishing them from regulations specific to maritime transport. Once such a decision is made, it is not surprising that the consistency among the transport law provisions in Book II of the Commercial Code, maritime transport law rules in Book III of the Commercial Code and partly modernised maritime transport law rules in the ICOGSA have become a significant focus of reform. As a result, reform items of type (b) became important especially in the transport law part, which will also cover maritime transport contracts once the proposed reform is realised.49

As compared with other types of reform, type (c) is very limited in number. Restatement of case law is proposed as regards the effectiveness of general liens under the Civil Code vis-à-vis shipowner. The Supreme Court held in its decision of 5 February 200250 that a general lien, just as maritime liens under the Commercial Code, is effective against the shipowner when the debt secured by the lien is due to one of the co-owners of the ship. The Outline proposes to codify this case law. On the other hand, the rules on time charter, which will be codified for the first time in the Japanese Civil Code, are not restatement of the case law. This may be because the case law was not sufficiently clear: while the Great Court of Judicature held in its decision of 28 June 192851 that time charter was a combination of charter by demise (lease of the ship) and supply of crew’s labour, a more recent decision by the Supreme Court52 rejected to determine the nature of time charter in abstract and held that the question of who is liable as carrier under the time charter against the holder of the bill of lading (so-called “identity of carrier” question) shall be determined by the conditions of carriage to the extent incorporated in the bill of lading.53 The rules proposed in the Outline follow neither of them but based on the standard industry practice.

5 Conclusion

International instruments have influenced the transport and maritime law reform in Japan. On not a few of the items in the Outline, the Legislative Council proposes to introduce the rules in international instruments. This is in particular the case with the rules on general average, collision of ships and salvage at sea. To the extent that the 1910 Collision Convention and 1910 Salvage Convention are referred to, the proposals to follow these treaties mean employing the rules in them beyond their scope of application as models for domestic law making. In the case of the 1989 Salvage Convention, its rules are going to be introduced, but there is no plan of ratifying it. Thus, the influence of international instruments are, as often seen with Asian maritime law, rather as models for domestic law making than as binding instruments.

The reference to international instruments, however, is made not always made. The Hague-Visby Rules implemented through ICOGSA will be extended beyond the scope of the Brussels Convention, but only selectively and not in its entirety. Although there will be codified some provisions on sea waybills, the CMI Rules for Sea

49 Implicitly, the maritime law part will “lose” provisions governing maritime transport contracts (agreements on carriage of goods and passengers by sea), as a result of extending the transport law part to maritime transport contracts. However, it does not appear as items of reform and, therefore, not counted as any category.
50 Hanrei Jihô no.1787, 157.
51 Minsţ Vol.7, 519.
52 Supreme Court, 27 March 1998, Minsţ vol.52, no.2, 527.
53 It does not mean, though, that the proposed amendments will override the 1998 decision of the Supreme Court (Sasaoka & Goto, above n 4, 508), because the Supreme Court’ decision was vague enough to survive new provisions codifying the standard practice.

(2016) 30 ANZ Mar LJ 132
Waybills are not used as the model. It appears that international instruments are used as the model for law making only where supported by the prevailing practice; otherwise the legislator leaves to the parties whether to incorporate the rules by themselves or not. Then, the reason for making reference to an international instrument is the “strong” one, namely because the policy adopted by it is supported, and not due to its feature of being international.

The relevance of the industry practice in the extent of influence that international instruments can have is curious, given the fact that the motivation for reform of transport and maritime law is not to enhance the competitiveness of the industry, as in the case of corporate governance reform. It may possibly reflect the nature of the maritime law treaties. Most of the maritime law treaties are policy oriented, as opposed to uniform law treaties crystallising key concepts of the subject.54 Or, it might indicate the absence of active commitment to unification of law in Japan. After all, Japan appears to turn to international instruments only when there is a compelling reason to do so.55 Which of these possibilities is true shall be tested by comparison: on the one hand, comparison with the maritime law reform in other jurisdictions, and on the other hand, comparison with the law reform on other subjects in Japan.

54 For the distinction of these two types of uniform law instruments, see Souichirou Kozuka, ‘The bifurcated world of uniform law: the uniform law of “islands” and of “the ocean”‘ in Unidroit (ed) Eppur si muove: The age of Uniform Law—Festschrift for Michael Joachim Bonell, to celebrate his 70th birthday, forthcoming.

55 This observation may be supported by the apparent reluctance (“wait and see” attitude) of Japan towards the Rotterdam Rules, despite the fact that it was one of those countries that most actively participated in the negotiation. See Tomotaka Fujita, ‘The Rotterdam Rules in Japan’ in Tomotaka Fujita (ed) The Rotterdam Rules in the Asia-Pacific Region (Shojihomu, 2014) 231.
Recent Admiralty Decisions in Hong Kong – Are the Courts Ready to Deviate from their English Predecessors?

Poomintr Sooksripaisamkit

1 Introduction

In Hong Kong, the jurisdiction of the courts in Admiralty matters is derived from the High Court Ordinance (Cap. 4) (HK), in particular ss.12A-12E. These provisions are mostly identical to those contained in ss.20-24 of the Senior Courts Act 1981 (UK). Hence, it is also similar to the Admiralty Act 1973 (NZ) and largely resembles The Admiralty Act 1988 (Ch). Being a former colony of England, English case laws remain highly influential, if not directly binding in Hong Kong. As one of the State Parties to the ‘International Convention Relating to the Arrest of Sea-going Ships, Brussels, May 10, 1952’ (Arrest Convention 1952), judicial authorities from other State Parties to this Convention have provided much food for thoughts for Admiralty judges in Hong Kong. The continued reliance on Hong Kong as a centre of dispute resolution by the international shipping sector suggests their strong trust in Hong Kong’s judicial procedures and its rules of law. Likewise, Hong Kong has legal practitioners – solicitors and barristers – who are well-equipped with sophisticated knowledge to handle shipping matters. These unique features of Hong Kong should of course be maintained, undisturbed by any political concerns.

Despite its historical root from that of the English law, the development of Admiralty law in Hong Kong must largely be credited to judges. As observed by one of the leading practitioners in Hong Kong, the Admiralty Division of the Court of First Instance in Hong Kong has in recent years been active in developing its own precedents. Indeed, a review of recent cases seems to suggest that the courts in Hong Kong, where they deem appropriate, are more willing to depart from the English authorities. This is also a trend across the Asia-Pacific Region, as it can be seen in some cases in Australia and New Zealand. While there might be a benefit of uniformity, this has to be balanced against the need for the ‘best quality’ law – the law which most suits commercial reality. Two examples of such ‘best quality laws’ will be discussed in this work. The first example is the recent decision of the Hong Kong Court of Appeal in The Alas where the Court, in upholding the decision of Ng. J at first instance, refused an argument based upon the decision of the House of Lords in The Indian Grace (No. 2) in the context of the right to raise an in rem action in light of a prior arbitration award. The second example is from an observation of the Hong Kong Court of Appeal in The Almojil 61, which gave an indication that it prepared to go beyond the ship registration to determine the ownership of a vessel. Once again, if this is developed further in subsequent cases, it will be a clear sign of departure from the English authority represented by The Evpo Agnic. This work will conclude with a supporting voice for the courts in Hong Kong as well as for those other countries in the Asia-Pacific Region, to be ready to depart from the English authorities, especially those which are deemed to be too static and wrong.

---

1 Article 8 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Adopted on 4th April 1990 by the Seventh National People’s Congress of the People’s Republic of China in its Third Session): ‘The law previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.’


3 Handytankers KS v The Owners and/or Demise Charterers of the Ship or Vessel M/V ‘Alas’ subsequently renamed as ‘Kombos’ and those other vessels named in Schedule ‘A’ Annexed Hereto HCMP 2315/2014.


6 [2015] 3 HKLRD 598.

2 Casting Doubts On The Indian Grace (No.2)

As mentioned, this part deals with the case of The Alas. A fuller analysis of this case can be found in an article written by the author elsewhere. The fact of the case in short was that the plaintiff chartered its ship to the defendants for a period of five years. There were disputes between the parties on the alleged breach of the charterparty and the alleged non-payment or late payment of hire by the defendants. Their disputes were referred to the arbitration in London as per the dispute resolution clause in the charterparty stipulating the LMAA arbitration. The arbitrator made the award for the plaintiff. The plaintiff came to invoke the in rem jurisdiction of the Admiralty Jurisdiction of the Court of First Instance in Hong Kong and sought to arrest the defendant’s ship based on s.12A(2)(h) of the High Court Ordinance (Cap. 4) (HK), namely ‘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 defendants in turn came to apply for the warrant of arrest to be set aside or struck out and additionally challenged the in rem jurisdiction of the Court of First Instance. Ng J, relying primarily on the decisions of the Admiralty Court in The Rena K and of the Court of Appeal in The Tuyuti, found that the plaintiff’s claim was in the nature of the claim for breach of the charterparty and for unpaid hire as per s.12A(2)(h) and that there is nothing wrong for the plaintiff to invoke the in rem jurisdiction for the unsatisfied arbitration award.

The Rena K involved the carriage of sugar from Port Louis, Mauritius, to Liverpool. The charterers and the cargo-owners commenced proceedings in rem against Rena K for losses and damages to cargo. The ship-owners sought a stay of the action based on the arbitration agreement. One of the questions was whether the stay of the action would necessitate the release of Rena K. Brandon J delineated two scenarios. Where the stay of the action is likely to be final; the ship should be released. Where, on the other hand, the stay is unlikely to be final and that there might be a judgment; the ship may be released upon the provision of alternative security. He examined the facts before him and came to the conclusion that it was unlikely for the ship-owners to be able to satisfy the arbitration award. He concluded:

It follows, on my view that a cause of action in rem does not, as a matter of law, become merged in an arbitration award, that is a case where the stay might well not be final and there might well therefore still be a judgment in the action to be satisfied.

It should be observed, however, that nowhere in his judgment did Brandon J suggest that the action in rem in this context can only be invoked where the claim is framed within one of the headings of claim listed in s.20(2) of the Supreme Court Act 1981 (UK).

The Tuyuti involved the damage to cargo during the discharge operation. The relevant bills of lading contained a London arbitration clause. Nevertheless, the cargo interests came to issue the writ in rem and issued a warrant of arrest. The defendants contended the fact that the action in rem may be re-opened for the unsatisfied arbitration award means the action in rem is used to enforce the arbitration award. In response to the defendants’ challenge against The Rena K, Robert Goff LJ explained:

---

9 [2014] 4 HKLRD 160 [3].
10 Ibid [4].
11 Ibid [5].
12 Ibid [6].
17 Ibid.
18 Ibid 386.
19 Ibid.
20 Ibid 404–405.
21 Ibid 406.
23 Ibid 841.
24 Ibid.
25 Ibid 849.
26 Ibid. 
The cargoes were subsequently discharged at destination. It was only in the judgment of Robert Golf LJ that the writ containing the original cause of action was emphasised. However, his judgment must be construed with the context of the case. In neither The Rena K nor The Tayuti that the arbitration award had been obtained when the warrant of arrest was sought. Hence, The Alas was original in this respect.

In the course of arguments in The Alas, the counsel for the defendants maintained convincingly that the authority in The Rena K could not be reconciled with that of the House of Lords in The Indian Grace (No.2). As one could be recalled, the situation in The Indian Grace (No.2) was that the fire broke out from the cargo hold while the vessel was on its way from Sweden to India. The cargoes were subsequently discharged at destination. However, claims for loss of cargoes and short of delivery were raised against the ship-owners by the Indian government. The judgment in India was delivered in favour of the Indian government. Subsequently, the Indian government initiated a claim in rem in London against the sister ship of Indian Grace. The issue arose as to whether the action in rem was brought in contravention of s.34 of the Civil Jurisdiction and Judgments Act 1982, which basically bars an action between the same parties on the same cause of action. At first instance, the judge held that the action in rem was against the ship so one of the parties was different from that of the action in India. When the matter came to the House of Lords, Lord Steyn rejected the reasoning that the action in rem was an action against the ship. In his classic passage:

The role of fictions in the development of the law has been likened to the use of scaffolding in the construction of a building. The scaffolding is necessary but after the building has been erected scaffolding serves only to obscure the building. Fortunately, the scaffolding can usually be removed with ease...The idea that the ship can be a defendant in legal proceedings was always a fiction. But before the Judicature Acts the fiction helps to defend and enlarge Admiralty jurisdiction in the form of an action in rem. With the passing of the Judicature Acts that purpose was effectively spent...

...It is now possible to say that...an action in rem is an action against the owners from the moment that the Admiralty Court is seized with jurisdiction. The jurisdiction of the Admiralty Court is invoked by the service of a writ, or where a writ is deemed to be served, as a result of the acknowledgment of the issue of the writ by the defendant before the service...From that moment the owners are parties to the proceeding in rem...

However, Ng J rejected The Indian Grace (No.2) as irrelevant since the issue in that case did not concern the arbitration award. The Court of Appeal agreed with the reasoning of Ng J 'The Rena K was cited in argument before the House of Lords, and it would be surprising for it not to be explicitly approved by Lord Steyn in his judgment if he were intending to express disapproval of it'. It is submitted that this seems to be a correct reading as nowhere in The Indian Grace (No.2) was The Rena K decision considered. The issue in relation to the arbitration award was also not considered in that case.

Indeed, a similar conclusion was reached by the New Zealand High Court in The Irina Zharkikh. This case involved a hire of two vessels for the purpose of fishing in violation of the quota granted to the charterer. Subsequent to the termination of this charter, the charterer was investigated by the Ministry of Fisheries for breaching laws relating to fisheries. There was a clause in the charterparties to the effect that the ship-owners were to provide indemnity to the charterer in the event of 'losses, fines, penalties or costs, seizures and forfeitures' due to excessive catching of fish over the quota. Also, the ship-owners were to provide indemnity to the charterer for violation of laws regarding fishing. The charterer commenced the action in rem against the ship on the basis

---

28 Ibid.
29 Ibid 5.
30 Ibid.
31 Section 34 of the Civil Jurisdiction and Judgments Act 1982: ‘No proceedings may be brought by a person in England and Wales or Northern Ireland on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies, in a court in another part of the United Kingdom or in a court of an overseas country, unless the judgment is not enforceable or entitled to recognition in England or Wales or, as the case may be, in Northern Ireland.’
33 Ibid 10.
34 [2014] 4 HKLRD 160, [21].
36 [2001] 2 NZLR 801.
37 Ibid [6]–[7].
38 Ibid [9]–[11].
39 See ibid [15].
of s.4(h) of the Admiralty Act 1973 (NZ), which governs '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 ship-owners provided the security. Subsequently, the charterer was held liable by the Ministry of Fisheries. The charterer amended its claim in rem and sought to arrest the vessels. The ship-owners sought to stay the concerned action, relying on the arbitration agreement contained in the charterparties. They argued, among other things, that 'if arbitral awards are made, this would result in the underlying causes of action merging in the awards'. In the course of considering this issue, Young J considered the exact same line of arguments raised in Hong Kong in the Alas, which is that the authority in the Rena K was overruled by the judgment in The Indian Grace (No.2). This prompted Young J to analyse Lord Steyn's reasoning in detail in his judgment. However, before Young J's reasoning is discussed in this work, it is appropriate to pause at this point to mention as well the more recent decision of the Full Court of Federal Court of Australia in Comandate Marine Corp v Pan Australia Shipping Pty Ltd, where The Irina Zharkikh and relevant authorities were also discussed in the judgment. These cases will then be discussed together below.

In the Comandate case, the issues revolved around time charterparty disputes. The time charterparty was agreed on the basis of the 1999 version of the New York Produce Exchange (NYPE) form, with amendments to subject disputes to the London arbitration. Subsequently, disputes arose between the parties which had prompted the charterer to effect the arrest of Comandate in Australia albeit she was released upon security. The owners of the Comandate sought an anti-suit injunction in London. In anticipation of that, the judge in Australia granted an anti-suit injunction forbidding the owners of Comandate 'from taking any step in the High Court of Justice or in any other court to restrain the continuation of the proceeding in the Court...'. The owners of Comandate commenced arbitration in London and arrested Boomerang I, another ship owned by another company, which was on demise charter to the charterer. The main issue was: in arresting the Boomerang I, were the owners of the Comandate taken to waive or abandon the arbitration? In the course of discussing an argument that the action against Boomerang I can be taken the full equivalent of an action [between the parties], Allsop J considered implications of The Indian Grace No.2.

Allsop J, in his analysis, was much influenced by the Admiralty Act 1988 (Cth) and the report of the Australian Law Reform Commission (ALRC 33) on Civil Admiralty Jurisdiction published in 1982 which he alluded to. He arrived at the conclusion:

Until the High Court of Australia says otherwise, the law of Australia is that the action in rem, at least prior to the unconditional appearance of a relevant person, is an action against the ship, not the owner or demise charterer of the ship... After the appearance, it continues as an action in rem and also as if it were an action in personam against the relevant person who appears.

Of note is Allsop J joined Young J in The Irina Zharkikh on the thought that Lord Steyn arrived at the conclusion he reached in total disregard of The Rena K. This basically was a reference to his part of reasoning where Lord Steyn set out the judgment of the Court of Appeal:

It is well established since the time of Dr. Lushington that a plaintiff who has an unsatisfied judgment in personam can proceed by an action in rem. (Presumably there would be no advantage in doing so unless there had been a change in ownership of the vessel; otherwise the plaintiff could employ ordinary methods of execution...). Similarly a plaintiff who has proceeded in rem, recovered judgment against the vessel, and is left with it only partially satisfied, may start a second action in personam. Those two propositions emerge from The John and Mary, (1859) Swab. 471, Nelson v Couch, (1863) 15 C.B.N.S. 100, The Cella, (1888) 13 P.D. 82, The Joannis Vatis (No.2), [1922] P. 213, The Rena K, [1978] 1 Lloyd's Rep. 545; [1979] Q.B. 377...

---

40 Ibid [17].
41 Ibid [22]-[23].
42 Ibid [27]-[29].
43 Ibid [32].
44 Ibid [76].
45 See ibid [77]-[94].
47 Ibid [15].
48 Ibid [16].
49 Ibid [18].
50 Ibid [14] and [20].
51 Ibid [32].
52 Ibid [99].
53 See ibid [105]-[127].
54 Ibid [128].
55 Ibid [117].
Can it be that by s.34 [of the Civil Jurisdiction and Judgments Act 1982] Parliament has, in a case where the first of two actions is brought in a foreign Court (but not if it was brought in England and Wales or Northern Ireland), abolished the well-established rule that a judgment in personal is no bar to an action in rem and vice versa? If so, it is hard to see the rhyme or reason of it.

Lord Steyn in the same page of the judgment was of the view that the authorities so referred to by the Court of Appeal are in the context of maritime liens and he would not be willing to extend it beyond the ambit of maritime liens.57 However, as Young J pointed out in his judgment, the rule was not limited to cases on maritime liens. The Cella and The Rena K set out in the passage of the Court of Appeal which Lord Steyn should have been aware of were indeed not maritime lien cases.58 The factual circumstances of The Rena K were briefly mentioned above. In The Cella, the case involved a claim by the plaintiff who was a repairer.59 The plaintiff invoked an action in rem under the then s.4 of the Admiralty Court Act, 1861 (UK).60 The mortgagee intervened and provided undertaking. The payment was made into court. The plaintiff applied to receive such payment. The liquidator for the ship-owning company opposed and maintained his entitlement to payment.61 The Court of Appeal found for the plaintiff. In the passage of Lord Esher, M.R.: '...in the Admiralty Division, in an action in rem, the effect of the judgment is greater than it can be in another Division of the High Court, where money has been paid into Court. In the one case it is only a judgment between the parties, in the other it is a judgment between the parties and against all the world...'.62 To this end, it is submitted that Young J's criticism of The Indian Grace (No.2) was correct. Therefore, he proceeded to confirm the continuing effect of the principle in The Rena K:63

Although it is possible to read some of the cases establishing the rule that an unsatisfied in personam judgment does not exclude a later in rem claim as at least referable to the view that a claim in rem is against the ship, there is also the view, which also run through the cases, that a claimant who has an in rem claim should be regarded as having a "two-fold security" and when the first, a claim in personam, fails to produce any tangible result, is entitled to resort to the second (namely the in rem claim)...

This 'two-fold security' is in line with what Allsop J explained in the Comandate, which is that the action continued with both characteristics of the action in rem and the action in personam once the ship-owners enter appearance. Allsop J noted also in his judgment that The Indian Grace No.2 was distinguished by the Court of Appeal in Singapore in Kuo Fen Ching v Dauphin Offshore Engineering & Trading Pte. Ltd.64 In this case, the judgment in rem had been handed down in favour of a company which provided materials and services to the ship. The ship-owners entered an appearance and the ship was released with the guarantee by the bank.65 The ship-owners were subsequently dissolved.66 Regardless of the dissolution, the trial judge proceeded to enter the judgment in rem.67 On appeal, it was alleged that the trial judge was wrong in coming to the view that 'judgments in rem could be entered notwithstanding the fact that the defendant company had been dissolved'.68 Relying primarily on earlier cases in Singapore,69 the Court of Appeal affirmed the opinion of the trial judge that 'the action in rem continues to proceed against the res even though the real party to the action is the shipowner...'.70 To this end, it is respectfully submitted that the Singapore Court of Appeal was not clear on how it sought to distinguish from The Indian Grace (No.2). It explained:71

If one were to follow the reasoning of the House of Lords in The Indian Grace, the result would be that the defendant to an action in rem is not the ship but the ship-owners, whether or not the ship-owners had entered an appearance in the in rem action as the owner is in fact directly impleaded as a defendant once the ship had been served with the writ. However, the factual situation in The Indian Grace must be recalled. There, the plaintiffs were in fact seeking to institute two actions, one in personam action in India and the action in rem in England. The decision to strike out

58 [2001] 2 NZLR 801 [30].
59 (1888) 13 P.D. 82.
60 (1888) 13 P.D. 82, 83. Section 4 of the Admiralty Court Act 1861 (UK) provided: 'The High Court of Admiralty shall have Jurisdiction over any claim for the building, equipping, or repairing of any Ship, if at the Time of the Institution of the Cause the Ship or the Proceeds thereof are under Arrest of the Court. [As to Claims for building, equipping, and c. ships.].'
61 Ibid 83.
62 Ibid 87.
63 [2001] 2 NZLR 801 [94].
64 [1999] 3 SLR 721 referred to in [2006] FCAFC 192 [103].
65 Ibid [1].
66 Ibid [3].
67 Ibid [6].
70 Ibid [24].
71 Ibid [23].
the proceedings in England was based on the doctrine of res judicata and s.34 of the Civil Jurisdictions and Judgments Act. For these reasons, *The Indian Grace* is clearly distinguishable from the appeal.

It is true that the factual circumstances in *The Indian Grace (No.2)* were different from that of the *Kuo Fen Ching* case. However, the author does not believe that the question of law is so distinguishable that the reasoning in *The Indian Grace (No.2)* was found by the Court of Appeal as not deserving closer analysis. Both cases shared the same question of law - the fact of an in rem action once the ship-owners enter appearance! The Court of Appeal in *The Indian Grace (No.2)* adopted the approach of *The Indian Grace* and *The Indian Grace (No.2)* have been adopted, especially in the event of the subsequent insolvency of the ship-owners or the complication in getting the in rem judgment enforced. Nevertheless, it was not clear to the author's mind the scenario which the Court of Appeal had at the relevant time. On the other side of the same coin, Allsop J envisaged the difficulty had the approach of *The Indian Grace (No.2)* been adopted and the ship-owners did not care to enter the appearance. He put the matter in this way:

Further, to assimilate judgments resulting from the actions in rem and in personam is to debilitate the utility of the action in rem...If the claimant has to bring the action in rem knowing that this is its one action against the defendant owner, it may risk disaster in proceeding in rem. If the owner does not appear and if the claimant proceeds against the ship, it may gain little from the action (even if it has a strong case). Other claimants may come in - mortgagees, lienees, other statutory claimants. None of these, or at least the amount each is owned, would have been apparent to the claimant before judgment. Yet, having gone to judgment in rem, the claimant is precluded from proceeding again because really it has, according to *The Indian Grace*, already had its opportunity against [the] defendant owner in personam by in rem action. There has been no personal submission by the relevant person and so it is difficult to see how the plaintiff can somehow enforce the in rem judgment against other assets of the relevant person. If this is the position, there is a clear opportunity for a party liable for a maritime claim to collude with others to undermine entirely the worth of the underlying cause of action.

While there appears at first sight much force in this analysis, it is submitted that even if there is no assimilation of the action in rem and in personam, the overall objective of protecting the claimant is pretty much forfeited by the practice of using a 'one ship' company as a shield. Even if the claimant can bring a suit in personam independently from that in rem, doing so only costs the claimant time and money for the ship-owning company had no other assets apart from the ship which is the very subject of the in rem action. The technicalities arising from the recognition of such one-ship company will be discussed in further details below in the next part of his work.

Suffice it to say that for the present purpose, the judgment in *The Indian Grace (No.2)* has been the subject of much criticism. The courts in Hong Kong, New Zealand, Australia, and Singapore analysed it but either did not follow it or sought to distinguish from it. Academic commentators joined in casting doubts on the theoretical foundation of *The Indian Grace (No.2)*. Taking into account these relevant authorities from other jurisdictions, it is only appropriate to say that Ng J's reasoning in the Hong Kong case of *The Alas* (which was affirmed by the Court of Appeal in the same case) is solidly founded on authorities. One short note would be the unnecessary introduction of technicality - a distinction between an arbitration award and an underlying cause of action - depending on the very specific skills of the barrister on what to be put in a writ.

### 3 Piercing the Corporate Veil in Admiralty - Taking A Shield Out Of A Ship-Owned Company?

A doctrine of corporate personality is well-settled in English law in a celebrated case of *Salomon v Salomon & Co.* Shipping industries have been using this doctrine to their own advantage - even to the extent of abusing the doctrine by way of creating a 'single ship company'. The single ship company has two significant features - being a 'one man' company and being a single asset company. As a 'one man' company, the true owner of the ship - an individual or a company - changes its role to either a mere shareholder of a ship-owning company or becomes a shareholder in a company which in turn is a major shareholder of a ship-owning company. In this way, such individual or company still gains ultimate control of the ship. As a single asset company, the company is formed

---

72 Ibid [24].  
73 [2006] FCAFC 192 [118].  
75 ...once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself. *Aron Salomon (Pauper) v A. Salomon and Company, Limited; A. Salomon and Company Limited v Aron Salomon* [1897] AC 22, 30 (per Lord Halsbury L.C).  
77 Ibid 6.  
78 Ibid.
with a specific purpose of owning a specific ship. Such practice is facilitated by the use of the 'flag of convenience' made available by countries which adopt the 'open registry system'. This is not an over-statement. As described by Coles and Watt, 'the phrase [flag of convenience] has come to signify the evils of rampant capitalism, and the disregard of labour rights, safety standards and environmental protection in the pursuit of profit.' Of course, prima facie the use of the single ship company and the registration of ship with the flag of convenience are separate matters as the ship can be owned by the single ship company even though it is not registered with one of the countries adopting the open registry system. However, to be able to register a ship in a country adopting the open registry system, often it is necessary for the ship-owning company to be incorporated in that country.

In Admiralty cases, the courts mostly have to consider liabilities of the entity behind the ship-owning company when the question involves a statutory action in rem. In Hong Kong, the manner which the statutory action in rem may be invoked is provided for in s.12B(4) of the High Court Ordinance (HK) (similar in language to s.21(4) of the Senior Courts Act 1981 (UK)):

In the case of any such claim as is mentioned in section 12A(2)(c)-(q), where –

(a) the claim arises in connection with a ship; and

(b) the person who would be liable on the claim in an action in personam (the “relevant person”) 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 (whether or not the claim gives rise to a maritime lien on that ship) be brought before the Court of First Instance against –

(i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or

(ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

Cases where the corporate personality were considered are mostly those concerning the determination of the 'beneficial owner' in the above provision. The leading English authority which explained this term pre-dated the Senior Courts Act 1981 (UK). It was decided in the context of a similar provision under the Administration of Justice Act 1956 (UK). That is the judgment in The I Congreso. The factual background of the case was relevant to the political situation in Chile. Before the change of the government, the contract was made for the sale and purchase of sugar from Cuba to Chile. Two ships were engaged for carriage of the sugar. The first ship was engaged by means of a voyage charter entered into between the seller, a Cuban state enterprise, and the shipowner, another Cuban state enterprise (‘Mambisa’). The second ship was under a demise charter to Mambisa who let the ship on a sub-charter to another Cuban state enterprise and finally she was let on a voyage charter to the seller. Following the change of government in Chile, given the concern of safety to vessels, the first ship which had been under discharge operations in a port in Chile was ordered by the Cuban government to leave the port and the second ship was instructed to deviate. Subsequently, Mambisa acquired The I Congreso, which was then a newly-built ship. It was established that Mambisa engaged in the ship sale and purchase contract 'on behalf of the Republic of Cuba' and subsequent to that, the ship 'was entered in the Cuban Registry in the name of the Republic

[79] Ibid 8.

[80] A flag of convenience is a flag flown by a vessel registered in one state, with which the vessel has few or no connections, while in reality the vessel is owned in or operated from another state. William Tetley Q.C., 'The Law of the Flag, "Flag Shopping", and Choice of Law', (1992–1993) 17(2) Tulane Maritime Law Journal 139, 173.

[81] The 'open registry system' may be explained as 'signifying the ability of a shipowner to register a vessel in a particular flag State regardless of his own nationality as a determining factor in the grounds of his qualification or entitlement to do so. These flag States permit registration for reasons of commercial expediency rather than requiring patriotic or naturally domiciled allegiance.' Richard Coles and Edward Watt, Ship registration: law and practice (2nd ed, 2009) 3.1.

[82] Ibid.

[83] A statutory action in rem is sometimes known as a 'statutory lien'. This is essentially an extension of the jurisdiction of the courts in Admiralty by statutes. See D.C. Jackson, Enforcement of Maritime Claims (4th ed, 2005) 2.102.

[84] Section 3(4) of the Administration of Justice Act 1956 (UK). In the case of any such claim as is mentioned in paragraphs (d) to (r) of subsection (1) of section one of this Act, being a claim arising in connection with a ship, where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, the Admiralty jurisdiction of the High Court and (where there is such jurisdiction) the Admiralty Jurisdiction of the Liverpool Court of Passage or any county court may (whether the claim gives rise to a maritime lien on the ship or not be invoked by an action in rem against – (a) that ship; or, at the time when the action is brought it is beneficially owned as respects all the shares therein by that person; or (b) any other ship which, at the time when the action is brought, is beneficially owned as aforesaid.

[85] [1977] 1 Lloyd's Rep 536.

[86] Ibid 539.

[87] Ibid 540–541.
of Cuba as owners’. The ship *I Congreso* was arrested by the cargo owners on board the two ships alleging that Mambisa was the beneficial owner. This was rejected by Robert Goff J in interpreting the relevant provision of the statute, he explained:

...the words "beneficially owned as respects all the shares therein" refer only to cases of equitable ownership, whether or not accompanied by legal ownership, and are not wide enough to include cases of possession and control without ownership, however full and complete such possession and control may be...

...I start with the statute, and the words...are "beneficially owned at respects all the shares therein". In my judgment, the natural and ordinary meaning of these words is that they refer only to such ownership as is vested in a person who, whether or not he is the legal owner of the vessel, is in any case the equitable owner...Furthermore, on the natural and ordinary meaning of the words, I do not consider them apt to apply to the case of the demise charterer or indeed any other person who has only possession of the ship, however full and complete such possession may be, and however much control over the ship may have.

This interpretation was followed by modern authorities which sought to construe the equivalent provision in the *Senior Courts Act 1981* (UK). An example of such authority is that of the Court of Appeal in *The Evpo Agnic*. The facts of the case were relatively simple. It followed the sinking of a ship *Skipper I*. The cargo owners on board then came to arrest *Evpo Agnic* alleging that the ship-owning company of *Skipper I* and that the ship-owning company of *Evpo Agnic* belonged to the same ship-owning group with the same company officers. Lord Donaldson M.R emphasised the significance of the ship registration. These registers are of fundamental importance as establishing the flag of the vessel, thereby making it for some purposes part of the floating territory of that country and subjecting it to the laws of that country. I would therefore regard the concept of a registered owner as being a nominal owner as a contradiction. With respect, the author is rather disturbed with what Lord Donaldson MR subsequently opined:

The plaintiff's real case is that Mr. Evangelos Pothitos, who describes himself as a Greek shipowner, or his company...is the real owner of both ships and indeed of all the ships in the Pothitos fleet. This involves the proposition that the registrations are shams. I am as realistic as most Judges who has served in the Commercial Court, but I really do not see the commercial advantage of the creation of sham registered ownerships. Mr. Pothitos no doubt has a legitimate interest in running these ships...but he can do this by running a series of genuine one-ship shipping companies as a group. He does not need a structure involving a holding company and subsidiaries, and still less sham companies. As governing shareholder in each shipping company, he can cause them to use their individual assets to the mutual advantage of the members of the group and of Mr. Pothitos.

What the judge opined here is somewhat lopsided in the sense that Mr. Pothitos could take advantage of the corporate structure while likewise he can evade legal liabilities by ‘sitting comfortably behind the veil’ in Greece. On the other hand, the cargo owners on board *Skipper I* could not avail themselves of raising a claim in rem. The ship in question, *Skipper I*, sank. It was owned by a one-ship company. Even in reality both *Skipper I* and *Evpo Agnic* were employed under the instruction of the same person, ie., Mr. Pothitos, there was no way the cargo owners could go beyond the ship registration and the corporate structure so to make Mr. Pothitos liable.

In Hong Kong, the Court of Final Appeal followed the English authorities closely in *Re Resource I*. The case arose out of a claim by the cargo interests following a deviation of the ship, previously named *Tian Sheng No.8*. At the relevant time, the registered owners of *Tian Sheng No.8* was ‘Tiansheng Shipping Inc’. However, the claim by the cargo interests was based on the bills of lading issued by the carrier, ‘Tiansheng Ocean Shipping Co. Ltd’. *Tian Sheng No.8* was sold to the present owners in the case after the issuance of the writ and had its name changed. However, this should not affect the claim which had been raised. However, the present ship-owners argued that Tiansheng Ocean Shipping Co. Ltd had never been the ship-owners and hence the requirement under

---

88 Ibid 544.
89 Ibid 544 and 545.
90 Ibid 560.
92 Ibid 412.
93 Ibid 414.
94 Ibid 415.
95 [2000] 3 HKLRD 49.
96 Ibid, 60.
97 Ibid, 54.
98 Ibid, 55.
99 Ibid, 60.
s.12B(4) of the *High Court Ordinance (HK)* that the person who would be liable in personam had to be the owner at the relevant time was not met.\(^{100}\) Bokhary NPJ explained.\(^{101}\)

In the internal, linguistic context of s.12B(4)(b) "owners" means legal owner (as opposed to beneficial owner) where a registered ship is concerned. And in the wider, real world context of the subsection, the registered owner of a registered ship is her legal owner. Both way of putting it come to the same thing in the end where a ship is a registered ship...If a registration is fraudulent, there would be room for an argument that the fraudulent registration should be ignored and that the person registered as owner by fraud should not be regarded as the registered owner.

As with *The Expo Agnic*, the Court of Final Appeal left open the possibility of looking beyond the ship registration. However, as it can be observed, the exception is extremely narrow. Further, it is one which raises a difficult question of proof.

The judgment in *Re Resource I* was relied upon by Ng J in the recent consolidated judgment of *The Almojil 61*.\(^{102}\) The situation in this case originated in 2012 when the vessel was sold to Mohammed Al Mojil Group (MMG), a Saudi Arabian company.\(^{103}\) For the purpose of purchasing, MMG sought help from Al Mojil Investments Ltd (AMI) to pay the final instalment.\(^{104}\) As one can observe from the name, both MMG and AMI belong to the business interests of the Al Mojil family.\(^{105}\) For AMI to pay the final instalment, MMG and AMI entered into agreements, as summarised by Ng J:\(^{106}\)

1. AMI would pay the final instalment "on behalf of MMG to the vendor in consideration for [AMI] being part owner of the Vessel with it being understood that on payment of the [final instalment] the ownership of the Vessel is to be transferred in the name of MMG".

2. AMI "shall at all times be entitled to the proceeds of any sale of the Vessel, the proceeds of which will be used to repay [the final instalment]"

3. this Agreement shall be governed by the laws of the Kingdom of Saudi Arabia.

In both actions, the plaintiffs who chartered vessels to MMG sought to arrest *Almojil 61*. In both actions, AMI acknowledged service as a co-owner.\(^{107}\) In both actions, AMI sought to challenge the jurisdiction of the court on the ground that s.12B(4)(b)(ii) of the *High Court Ordinance (HK)* was not met.\(^{108}\) AMI argued that by paying the final instalment, AMI effectively held 22% of 'beneficial interest' in the ship by trust.\(^{109}\) Ng J gave two reasons why he rejected AMI’s arguments. First, relying on the terms of the agreement between MMG and AMI, he found that AMI had demonstrated its status as a lender, instead of a beneficial owner.\(^{110}\) Ng J found support from AMI’s acts in claiming in full its final instalment amounts from the proceeds of sale following the judicial sale of the ship, instead of taking into account the actual value of the ship which had since depreciated.\(^{111}\)

Secondly, yet more importantly (for the purpose of this paper), Ng J echoed *Re Resource I* in denying to look beyond the ship registration.\(^{112}\)

The view of the law [to not look beyond the ship registration] also has the advantage of striking a fine balance between the interests of a claimant in being able to invoke the in rem jurisdiction of this Court to arrest a ship by relying on the particulars of ownership shown in the register and the interests of a co-owner in being able to protect a co-owned ship from arrest in respect of a maritime claim for which it is not responsible – all it has to do is to register its part ownership of the ship.

Affirming Ng J’s finding that AMI was acting as the lender,\(^{113}\) the Court of Appeal differed from Ng J on the relevance of the ship registration. Nevertheless, the Court of Appeal’s comment on this point should be perceived as merely an obiter. Of interest was Kwan JA’s suggestion: ‘It is a question of looking at the facts and drawing proper conclusions. There is no rule of law that fraud or some similarly compelling circumstances must be proved

\(^{100}\) Ibid, 61–62.
\(^{101}\) Ibid, 70.
\(^{102}\) [2014] 4 HKLRD 313.
\(^{103}\) Ibid, [1].
\(^{104}\) Ibid, [16].
\(^{105}\) Ibid, [5].
\(^{106}\) Ibid, [6].
\(^{107}\) Ibid, [1] and [5].
\(^{108}\) Ibid, [7].
\(^{109}\) Ibid, [17].
\(^{110}\) Ibid, [22]–[24].
\(^{111}\) Ibid, [25]–[26].
\(^{112}\) Ibid, [48].
\(^{113}\) [2015] 3 HKLRD 598 [44]–[45].
in order to go behind the registration of the ship for the purpose of identifying the “beneficial owner” for the purpose of s.12B(4)(ii). Of course, the Court of Appeal cannot evade the binding effect of Re Resource I. The proposed ground of distinction was that the Court of Final Appeal in that case dealt neither with sub-section (i) nor sub-section (ii) of s.12B(4). This distinction is doubtful to the extent that Re Resource I followed The Expo Agnic while The Expo Agnic in turn referred with approval to the judgment in The I Congreso. It would be recalled that in The I Congreso, the Court construed the term ‘beneficially owned at respect all the shares therein’ – the exact language adopted in s.12B(4)(b)(i) and (ii). Did the Court of Appeal indicate its readiness to break free from the fictitious corporate veil?

Just slightly before the judgment of the Court of Appeal in The Almojil 61 was handed down, Ng J insisted on his reasoning in The Bo Shi Ji 393. The case arose following the loss of Bo Shi Ji 393 along with her cargo. This prompted the cargo interests to arrest Bo Shi Ji 838 in Hong Kong. The arrest was made on the belief, based on the ‘Certificate of Vessel’s Nationality’, that both vessels were owned by the same company, ‘Bohuo Water Transport Corporation (BWTC)’. Subsequent to the arrest, the solicitors for the defendants revealed that from the ‘Vessel Ownership Registration Certificate’, Bo Shi Ji 393 was owned at the time of loss 51% by BWTC and 49% by an individual named Mr. Liang Ping. On the other hand, the ‘Vessel Registration Ownership Certificate’ of Bo Shi Ji 838 revealed that it had been solely owned by BWTC. Nonetheless, at the time when the writ was issued, she was owned 51% by BWTC and 49% by an individual called Mr. Cheng Wanli. It should be noted that the said ‘Vessel Registration Ownership Certificate’ was not regarded as the official document but the judge was prepared to accept it as the best evidence. The scheme of arrangements with respect to both vessels, as the judge gleaned from witness statements was that both vessels had originally been purchased by the relevant individuals. They entered into the management agreement for BWTC to deal with all papers and documents. To comply with certain requirements of the laws of the People’s Republic of China, they put BWTC in the Certificate as having 51% and each individual at 49%. The plaintiff amended the claim alleging that both BWTC and the said Mr. Liang Ping were relevant persons for the purpose of s.12B(4). However, based on the scheme of the arrangements, the defendants argued that BWTC cannot be considered the ‘relevant person’. Ng J rejected the point advanced by the defendants’ counsel on the basis that accepting such argument would amount to giving effect to the management agreement while ignoring the ‘Vessel Registration Ownership Certificate’. It remains to be seen whether there will be an appeal from The Bo Shi Ji 393 in light of the Court of Appeal’s indication in The Almojil 61.

Judges in Hong Kong, like their English counterparts, have been conservative and mistrustful in disregarding the corporate veil. At this point, a short note should be made to the case before Mr. Justice Reyes (as he then was) in The Decurion. The facts concerned a company, Chimbusco, which invoked the Admiralty jurisdiction to arrest the vessel Decurion owned by an Argentine company, known shortly as Maruba SCA, for the supply of bunkers. However, Chimbusco further purported to put the claims it had for the supply of bunkers against the other ten vessels and brought them into this action. They did so even at the relevant time each of these ten vessels was owned by a separate registered ownership company. These ten vessels were on time charter to Clan, which as found by the judge, ‘Clan is related to Maruba SCA, but is a different legal entity’. Chimbusco relied on various factual evidence in an attempt to establish a link between Maruba SCA and these ten other vessels. These included the presentation by the Maruba Group (which Maruba SCA formed part) that they traded with the name ‘Clan’, the description of Maruba SCA in the ‘Sea-Web Ship Overviews’ as the operator of six out of these ten ships, the guarantee by Maruba SCA to pay charter hire for Clan, name cards of people from the Maruba Group

114 Ibid, [50].
115 Ibid, [52].
117 Ibid, [4].
118 Ibid, [1].
119 See ibid [6] and [8].
121 Ibid, [12].
122 Ibid, [13].
123 Ibid, [14].
124 Ibid, [23].
125 Ibid, [23]–[26].
127 Ibid, [1]–[3]. Chimbusco relied on s. 12A(2)(l) of the High Court Ordinance: ‘Any claim in respect of goods or materials supplied to a ship for her operation or maintenance.’
128 [2013] HCA 180; [2013] 2 Lloyd's Rep 107, [77].
130 Ibid, [13].
131 Ibid, [15].
132 Ibid, [16].

(2016) 30 ANZ Mar LJ 143
and held therefore that the control of the vessel was vested in Clan. Despite all these factual evidence, Reyes J declined to find that Maruba SCA was ‘in possession or control’ of the ten vessels such that it can be regarded as the ‘relevant person’ for the purpose of s.12B(4).

A natural person…can be in possession of a ship by being on board and in control of her navigation. A company can be in possession of the ship if it employs the master and crew in the navigation of the vessel. Something else must be involved when determining whether a person is in control, despite not being in possession…The most obvious scope for that “something else” must be the ability to tell the person in possession of a vessel…what is to be done in relation to the vessel.

Relying in particular on the New York Produce Exchange Form (NYPE) 1946 that Clan entered into for the time charter of these ten vessels, the judge focused on Clause 8 which provided ‘[t]he Captain (although appointed by the owners), shall be under the orders and directions of the Charterers…as regards employment and agency’ and held therefore that the control of the vessel was vested in Clan. He found documents which described Maruba SCA as the ‘operator’ of some of the vessels to be unhelpful as the term ‘operator’ has many meanings.

The Court of Appeal agreed with Reye J’s interpretation as the Hon Fok JA explained:

In my view, it is giving the words “in control of” the ship their natural and ordinary meaning to look to see if the party said to be in control of the ship is in the position of a charterer…with a contractual power of control over that ship. Such a power of control would involve having the right to direct the master as to how the ship was to be employed and its existence would not be consistent with some other party having a superior contractual power of control. Thus, where a ship is on time charter under the NYPE form of contract, clause 8 of which gives the named charterer a contractual right to determine how the ship is to be controlled, there is no warrant, unless the charterparty is a sham or the corporate veil is lifted so that some other party is held to be the contracting charterer, to hold that another party is in control of the vessel. To do so would be to ignore the fact that there is already a party (the charterer) who is contractually in control by virtue of the charterparty.

The Full Court of the Federal Court of Australia endorsed with precision The Decurion judgment in determining the control by reference to the NYPE form.

There is much to be said on the restricted view based on the English notion of corporate veil. The idea that one cannot look beyond those companies which can be bought ‘off the shelf’ to trace key personnel who are sitting in another part of the world is plainly unrealistic. As the author argued elsewhere, it is doubtful how the practice of ship registration interacts with the United Nations Convention on the Law of the Sea 1982 (UNCLOS), especially Article 91.1 which sets out the concept of ‘genuine link’:

Every State shall fix the condition for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship. Upon examining background materials of the UNCLOS, Churchill recorded the possibility of understanding the ‘genuine link’ as something more than a mere registration. It follows from the ordinary meaning of the words…that a “genuine link” is more than just a link. There must be a relationship between the ship and the flag state which makes the link of nationality genuine. Nevertheless, the International Tribunal on the Law of the Sea (ITLOS) in its decision in 1999 reached a different conclusion in The M/V Saiga (No.2). The case involved a ship Saiga containing the logos of both Clan and Maruba SCA, the fact that both Maruba SCA and Clan were referred to in the press, and the Maruba’s guarantee of obligations of the company called South Atlantic, who was in agreement to supply bunkers to Clan. Despite all these factual evidence, Reyes J declined to find that Maruba SCA was ‘in possession or control’ of the ten vessels such that it can be regarded as the ‘relevant person’ for the purpose of s.12B(4).

[133] Ibid, [17].
[134] Ibid, [18].
[135] Ibid, [19].
[136] Ibid, [29]–[30].
[138] Ibid, [30].
[139] Ibid, [35].
[140] [2013] HCA 180; [2013] 2 Lloyd's Rep 107, [61].
[144] The M/V Saiga (No.2) (Saint Vincent and The Grenadines v Guinea) (ITLOS Case No.2, 1 July 1999).
owned by a company in Cyprus and managed by a company in Scotland. She was chartered to a company in Switzerland. At the relevant time, all crew employed on board were Ukrainian with the exception of three Senegalese painters. She was registered in Saint Vincent and the Grenadines.\(^{146}\) While she was 'south of the southern limit of the exclusive economic zone of Guinea', she was attacked by Guinean authorities for the alleged violation of the Guinean custom laws.\(^{147}\) One of the grounds raised by Guinea before the ITLOS was that at the relevant time when the action was taken by Guinea, the ship was not legally registered with Saint Vincent and the Grenadines.\(^{147}\) Guinea based its point on the ground that the provisional registration expired on 12 September 1997 while the permanent registration certificate was not issued until 28 November 1997. During the time gap, the ship had no nationality.\(^{148}\) Despite *prima facie* no 'connecting factor' (to use the private international law parlance), the ITLOS, in considering Article 91 of the UNCLOS, accepted that this Article 'leaves to each State exclusive jurisdiction over the granting of its nationality to ships' and that 'it is for Saint Vincent and the Grenadines to fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory and for the right to fly its flag'.\(^{149}\) As for the purpose of the genuine link requirement, the ITLOS concluded that 'the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag state is to secure more effective implementation of the duties of the flag state, and not to establish criterial by reference to which the validity of the registration...may be challenged by other States'.\(^{150}\) This interpretation was reinforced by the European Court of Justice in *Peter Michael Poulsen v Diva Navigation Corp.*\(^{151}\) This case involved an alleged catching of salmon in breach of the relevant European Regulation.\(^{152}\) The ship involved was registered in Panama and was owned at the relevant time by a Panamanian company, which was in fact operated by a Danish national. The master and the crew were Danish.\(^{153}\) In the course of answering the question on the applicability of the Regulation to non-Member State ship with crew being nationals of a Member State,\(^{154}\) the European Court of Justice proclaimed that '[t]he fact that the sole link between a vessel and the State of which it holds the nationality is the administrative formality of registration cannot prevent the application of that rule [genuine link].'\(^{155}\) Each State has 'discretion' in setting rules on granting nationality.\(^{156}\) Acknowledging what the ITLOS maintained in *The Saiga (No.2)*, Churchill considered such conclusion to be 'untenable'.\(^{157}\) He forcefully argued that Article 91 would be meaningless if a mere registration satisfies the genuine link requirement.\(^{158}\) Cogliati-Bantz traced developments of the concept of 'genuine link' both prior to and subsequent to *The Saiga (No.2)* decision in his work. He came to the conclusion that this was closely connected with the duties of a flag State.\(^{159}\) The absence of a genuine link between the flag State and the ship would reflect in the ineffectiveness of the flag State to perform its functions.\(^{160}\) He concluded that at one end of the spectrum the weakest link between the flag State and the ship is 'when the only territorial link is that established when the ship calls at home port' while at the other end of the spectrum the strongest link is 'when there are residence requirements for owners, operators and main crew members'.\(^{161}\) He came to the conclusion that the genuine link lies somewhere between that weakest link and the strongest link. 'The bottom line is that the flag State should establish such link both with those who are entitled to register the ship (owners) and those who will subsequently control it (owners and operators).'\(^{162}\) Hence, it is submitted that the genuine link is more than a mere registration.

While the concept of genuine link exists in the UNCLOS to define the relation between the flag State, the ship, and the ship-owners, Admiralty courts should not be reluctant to borrow this concept to find that a 'one ship' company does not have sufficient links with the ship for the purpose of satisfying maritime claims. Of course, countries such as the United Kingdom and Hong Kong will be constrained somewhat by the language of Article 3 of the Arrest Convention 1952 which provides '...claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the

\(^{145}\) Ibid, [31].  
\(^{146}\) Ibid, [33]–[34].  
\(^{147}\) Ibid, [55].  
\(^{148}\) Ibid, [57]–[58].  
\(^{149}\) Ibid, [63].  
\(^{150}\) Ibid, [83].  
\(^{151}\) Case C–286:90.  
\(^{152}\) Ibid, [1].  
\(^{153}\) Ibid, [3].  
\(^{154}\) Ibid, [6].  
\(^{155}\) Ibid, [15].  
\(^{156}\) Ibid.  
\(^{157}\) Churchill, above n 143, 69.  
\(^{158}\) Ibid.  
\(^{159}\) Vincent P. Cogliati-Bantz, 'Disentangling the "Genuine Link": Enquiries in Sea, Air and Space Law' (2012) 79 Nordic Journal of International Law 383, 411. The duties of a flag State are provided in Article 94 of UNCLOS.  
\(^{160}\) Ibid.  
\(^{161}\) Ibid, 415.  
\(^{162}\) Ibid.
maritime claim arose, the owner of the particular ship..."163 and 'ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons'.164 However, the Arrest Convention 1952 left the term 'owner' undefined and there is nothing to restrict the interpretation of this term to the registered owner.165 Therefore, it is submitted here that it is only commercially sensible for Admiralty courts to construe the terms 'owner' widely, taking into account the implicit genuine link. This can be done by judges taking bold steps to depart from the line of English authorities in The I Congreso and The Evpo Agnic.

4 Conclusion

To adopt Lord Steyn's scaffolding metaphor, the English concepts of Admiralty law have indeed taken the role of the scaffolding used in structuring Admiralty laws and solving maritime disputes in countries in the Asia-Pacific Region considered in this work - Hong Kong, Australia, New Zealand, and Singapore. English authorities will continue to provide fountain of knowledge in Admiralty matters for Admiralty lawyers around the world in the years to come viewing London as a popular place to solve maritime disputes. However, any part of the scaffolding which has become shaky over time should also be replaced by a newer material. Likewise, any English legal concepts which cannot keep pace with commercial reality should also be discarded and judges in the Asia-Pacific Region are encouraged to take the bold approach. Perhaps judges in New Zealand, Australia, Hong Kong, and Singapore already took the courageous attitude in denying to follow the authority from the House of Lords in The Indian Grace (No.2). Similarly, the Court of Appeal in Hong Kong provided a hint of departing from the restricted view of the ship registration in its obiter in The Almojil 61. Judges in these countries are encouraged to not hesitate to depart from English legal authorities, where appropriate.

164 Ibid, art 3(2).
BOOK REVIEW

Damien J Cremeau, Admiralty Jurisdiction Law and Practice
ISBN: 9781862879973

Nigel Meeson

Damien Cremeau is to be commended for the latest edition of his ever expanding Asia Pacific focused account of Admiralty law. In 7 years he has has enlarged his original Australian work (the first edition) to include the laws of neighbouring New Zealand (the second edition) and thence to Hong Kong and Singapore (the third edition) and now in the Fourth edition to take in Malaysia. By so doing he has created a very useful account of the various statutory provisions of this region, together with an examination of the local case-law. Although the Admiralty law in these jurisdictions stem from the same English law rootstock, the courts in this region they have not hesitated to depart from English case law where they consider it is necessary to do so. For this reason it is necessary to have a work such as this to highlight these differences not only as there may be from English law, but also as between the different jurisdictions. Although the advent of the internet has made access to case law in different jurisdictions easier, it is of no use simply to pluck a decision from one jurisdiction without understanding the context in which it has been given. This context may include subtle differences in the statutory provisions or some divergence in the case law. It is these features which Cremeau is able to highlight in this very useful book.

The structure of the book follows a conventional approach and is divided into four chapters. Chapter 1 is an Introduction covering the nature and origin of Admiralty Jurisdiction and then providing an overview of the five jurisdictions. Chapter 2 covers Courts and jurisdiction before turning the meat of the subject in Chapter 3 Admiralty Claims and Chapter 4 Practice and Procedure. It is perhaps an interesting observation that each Chapter gets progressively longer which highlights just how important practice and procedure are to this area of the law, arguably more so than in any other are of the law.

In Chapter 1 section 3 “Local Development” explains how these 5 jurisdictions obtained their current jurisdiction, and how their respective Admiralty jurisdictions had developed through their differing colonial history. However of more relevance are the following sections which deal respectively with the present day and provide a jurisdictional overview of Australia and New Zealand (section 4) and Singapore, Hong Kong and Malaysia (section 5). Thus in section 4 there is a discussion of the principles of statutory construction which have been applied by courts in Australia to the construction of the Admiralty Act 1988 (Cth) as well as noting that the Australian Act distinguishes “proprietary” maritime claims from “general” maritime claims. In section 5 it is observed that Malaysia is unique in that it defines its Admiralty jurisdiction by reference to the English 1981 Act. Finally section 6 covers the constitutional issues which may arise in Australia, which will of course be of particular importance to Australian practitioners.

Chapter 2 entitled “Courts and Jurisdiction” delves into greater detail of the themes established in sections 4 and 5 of Chapter 1. There is an interesting discussion of the problems thrown up by the English House of Lords decision in Republic of India v India Steamship Co. Ltd. (no.2) [1988] AC 878 regarding the nature of an Admiralty action in rem and how courts in Australia, New Zealand and Singapore have not felt obliged to follow that decision.

The book really comes into its own in Chapters 3 and 4. Chapter 3, “Admiralty Claims”, identifies in each of the 5 jurisdictions being considered the various heads of claim which give rise to claims within the Admiralty jurisdiction. In relation to each one it provides the statutory head of jurisdiction and compares the wording of each across the different jurisdictions. It notes that the position in Australia is different to the other jurisdictions which more closely follow the English heads of jurisdiction. Thus in Australia alone there is Admiralty jurisdiction in respect of the following claims:

(i) Mortgage of a ship’s freight;
(ii) A claim for the satisfaction or enforcement of a judgment given by a court (including the court of a foreign country) against a ship or other property in a proceeding in rem in the nature of a proceeding in Admiralty;1

---

1 Nigel Meeson Q.C. FCI Arb, Conyers Dill & Pearman, Hong Kong
2 Although a similar jurisdiction exists under the inherent jurisdiction in the others: The “City of Mecca” (1897) 5 P.D. 28
(iii) A claim for interest;
(iv) Oil pollution under Part II or IV the Protection of the Sea (Civil Liability) Act 1981 or equivalent State of Territory legislation;
(v) A levy in relation to a ship including under the Protection of the Sea (Shipping Levy) Act 1981, being a levy in relation to which a power to detain the ship is conferred by a law in force in Australia or in a part of Australia;
(vi) A claim for insurance or for a mutual insurance call in relation to a ship;
(vii) A claim for the enforcement of a claim arising out of an arbitral award made in respect of a claim otherwise within the Admiralty jurisdiction.

There is then a discussion of other matters such as claims for wrongful arrest. In this regard Australia has a statutory remedy where there has been an arrest or demand for excessive security “unreasonably and without good cause” whereas in the other jurisdiction the English test of “mala fides or crassa negligentia” still applies.

Chapter 4 is the largest Chapter and provides comprehensive cover of the procedural aspects in the various jurisdictions and highlights some of the differences in approach to matters such as forum non conveniens.

Finally, at the end of the book are few precedents which is really the least useful part of the book.

Overall this is very welcome new edition of a work which has become an essential point of reference for Admiralty law in the Asia-Pacific region and which I am sure will prove as popular as the previous editions. Its key features are its readable style and comprehensive yet concise coverage of the subject matter.

---

2 Again a similar jurisdiction exists under the inherent jurisdiction in the others: The “Northumbria” (1869) L.R. 3 A. & E. 6
3 Although it would fall within the broad “damage done by a ship” jurisdiction in the other jurisdictions.