
THE SHIPPING LAW REVIEW

THIRD EDITION

EDITOR

JAMES GOSLING AND TESSA JONES HUZARSKI

LAW BUSINESS RESEARCH

THE SHIPPING LAW REVIEW

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Editors

JAMES GOSLING AND TESSA JONES HUZARSKI

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EDITOR'S PREFACE

This book aims to provide those involved in handling wet and dry shipping disputes in multiple jurisdictions with an overview of the key issues relevant to each jurisdiction. We have sought contributions on the law of leading maritime nations, including both major flag states and the countries in which most shipping companies are located. We also include chapters on the law of the major shipbuilding centres and a range of other jurisdictions.

As with previous editions, we begin with cross-jurisdictional chapters looking at the latest developments in important areas for the shipping industry internationally: competition and regulatory law, marine insurance, ocean logistics, piracy, shipbuilding, ports and terminals and environmental issues. We have also included a new chapter regarding international trade sanctions, which is an increasingly important area.

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

The authors review the vessel safety regime in force in each country, along with port state control and the operation of both registration and classification locally. The applicable environmental legislation in each jurisdiction is explained, along with the local rules in respect of collisions, wreck removal, salvage and recycling.

Following the entry into force of the 2002 Protocol to the 1974 Athens Convention and the Maritime Labour Convention in 2013, passenger and seafarer rights are also examined, and contributors set out the current position in each jurisdiction. The authors have then looked forward and have commented on what they believe are likely to be the most important forthcoming developments in their jurisdictions over the coming year.

The shipping industry continues to be one of the most significant sectors worldwide, with the United Nations estimating that commercial shipping represents around

US\$380 billion in terms of global freight rates, amounting to around 5 per cent of global trade overall. More than 90 per cent of the world's freight is still transported by sea. The law of shipping remains as interesting as the sector itself and the contributions to this book reflect that.

Last year, a key issue within the shipping industry was environmental regulation, which is becoming ever more stringent. As from January 2015, the limit for sulphur content had fallen to 0.1 per cent (down from 1.0 per cent previously). Tier II limits on nitrogen oxides emissions have been in place globally since 2011. Tier III, which represents a significantly more stringent regime than Tier II limits, is being implemented in emissions control areas from 2016. Furthermore, also from 2016, the United States Clean Air Act is introducing a target of an 80 per cent reduction in nitrogen oxides emissions from vessels by 2030.

The International Maritime Organisation (IMO) has so far not introduced similar limits on the emission of greenhouse gases, such as carbon dioxide, although it is generally perceived that the IMO is in the future likely to further regulate global carbon dioxide emissions from vessels. Outside of the IMO, the EU and individual countries are focusing on greenhouse gas reduction policies. In particular, the European Commission's current proposal is that, from 2018, vessels calling at ports in the EU should be expected to monitor, report and verify carbon dioxide emissions. The strategy is intended to evolve into carbon dioxide reduction targets and market-based measures in the longer term, in line with the EU's approach to land-based greenhouse gas emissions.

Another challenge facing the shipping industry relates to the handling of ever-larger casualties. The most recent high-profile container ship casualties, such as the MSC Napoli or the Rena, involved relatively small vessels with a maximum capacity of up to 4,688 containers; however, the latest mega-containerships can carry up to 15,000 containers. It is likely that at some stage there will be a casualty involving one of these new larger vessels and this may prove a major test for the industry. It has been suggested that the current salvage industry may find it difficult to deal with the scale of any wreckage. The regulatory environment is becoming increasingly stringent, with far stricter controls on both clean-up and wreck removal, which will also make handling any mega-container ship casualty more challenging. The London underwriting community has responded to concerns about the general average implications by evolving a new insurance product, which, it is suggested, could replace the traditional approach to general average for large container ships. It remains to be seen whether this will be accepted by the market.

Piracy remains a considerable issue for the shipping industry worldwide. There has been a decline in the number of incidents off Somalia since the peak in 2010/11, but an increase in West Africa and (to an extent) elsewhere. Although the use of armed guards and increased naval policing in recent years have undoubtedly contributed to the decline, challenges remain and the shipping industry must continue to be alive to the threat.

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

James Gosling and Tessa Jones Huzarski

Holman Fenwick Willan LLP

London

June 2015

Chapter 43

UKRAINE

Vagif Mallayev, Victoria Konograi and Inga Drobinova¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

As a maritime country with direct access to the Black Sea and the Sea of Azov, Ukraine has huge potential for the development of both internal and international shipping. On 21 March 2014, Ukraine's shipping industry was dealt a severe blow by Russia's annexation of the Autonomous Republic of Crimea.² However, the forcible takeover of Crimea is not recognised by Ukraine,³ the UN General Assembly,⁴ PACE and the OSCE Parliamentary Assembly; contradicts a resolution of the Venice Commission; and is considered a temporarily occupied territory.⁵ Effective 15 July 2014, all ports in the Autonomous Republic of Crimea were closed and all vessels and their crews that violate the occupied territory regime will be held liable under Ukrainian law.

Ukraine's maritime industry is represented today by a sophisticated network of 13 active seas, 11 rivers and two fishing ports, transloading terminals, complexes and berths of various forms of ownership. In addition, Ukraine has well-trained seafaring personnel and is the world's third-largest supplier of a marine workforce.

1 Vagif Mallayev is a senior partner, Victoria Konograi is a senior associate and Inga Drobinova is an associate at Lexcellence Law Office.

2 The Federation Council of the Russian Federation ratified the interstate Treaty 'on the admission of the Republic of Crimea into the Russian Federation and creation of new sub-federal entities'.

3 Verkhovna Rada (parliament) of Ukraine, 'Declaration on the Struggle for the Liberation of the Country No. 1139-VII' of 20 March 2014.

4 www.un.org/apps/news/story.asp?NewsID=47443&Cr=Ukraine&Cr1=#.VR5Zdo5W9FN.

5 The Law on 'guaranteeing the rights and freedoms of citizens and on the legal regime on the temporarily occupied territory of Ukraine', 15 April 2014.

Shipbuilding is recognised as a priority sector in the Ukrainian economy and the sector includes nine shipbuilding and 66 ship-repair yards, 18 mechanical engineering enterprises and 30 research and development institutions (including enterprises located in the occupied territory).⁶

Almost 486 state and privately owned vessels are sailing under the Ukrainian flag. However, the fact that the Ukrainian merchant fleet is old and is inadequately provided with new vessels has resulted in the total domination of the domestic market by foreign carriers.

A great achievement of 2015 in the marine industry was the deregulation of business operation conditions in seaports and the simplification of the vessel registration procedures, which significantly speeds up the process of processing containers in seaports and considerably resembles the European practice. Such changes came about due to the work of the team of reformers led by the Head of Odessa Customs – Yulia Marushevska. Additionally, in 2015 thanks to private investors a cargo turnover has increased, the construction and the development of the port infrastructure has continued, new grain terminals have been built and equipped with the new equipment.⁷ Seaports of Ukraine processed 144.826 million tons of cargo in 2015, which is 1.4 per cent more than in 2014. The rating among seaports based on cargo turnover index is topped by Yuzhny port. Odessa, Mykolayiv, Illichivsk, Mariupol, Oktyabrsk and Izmail ports follow respectively.⁸

However, factors such as the absence of coordination of the maritime industry's development at the level of public administration, corruption, bureaucracy, obsolete technology and insufficient protection of the interests of private operators in the maritime industry prevent Ukraine from realising its full maritime potential. The reform of the marine industry in 2015 simplified control procedures, made business operation conditions more transparent, and helped new opportunities to expand business operations to arise.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The Merchant Shipping Code of Ukraine (MSC) is the country's main piece of legislation in this area, which consolidates the provisions of international laws and conventions that regulate the shipping industry. Another important statute is the Law on Seaports.

In addition to this, Ukraine, as a UN and IMO member, has ratified many international conventions and protocols thereto, the most important of which are: UNCLOS, SOLAS, MARPOL, STCW, the Arrest Convention 1952 and a number of bilateral agreements regarding marine navigation and marine transportation.

Along with specialist legal acts, the Civil Code, the Commercial Code of Ukraine, the Water Code and the regulations of the authorised bodies that mediate disputes arising from merchant shipping play an additional role and have secondary significance.

Unfortunately, the majority of state agencies are operating based on internal laws and general standards regardless of the international conventions and special norms, specifically regulating shipping matters. There are two primary reasons for this: the intentional use

6 http://fleet.sebastopol.ua/articles/SUDNOBUDUVANNYa_V_UKRAYiNI_%E2%80%94_KURS_NA_VIZhIVANNYa/printable/.

7 <http://ports.com.ua/articles/dostizhenie-goda-2015/>.

8 <http://ports.com.ua/news/nacionalnyj-morskoj-rejting-ukrainy-gruzooborot-2015/>.

of wrong acts and laws by the state agencies for the purposes of carrying out their own corruption schemes, or professional negligence and inadequate competence in the sphere of maritime law.

Since 27 April 2014 Ukraine has closed its seaports for international shipping in the occupied territory (i.e., the Crimean Peninsula), this is why the laws, rights, fundamental freedoms and lawful interests of natural persons and legal entities cannot be guaranteed in said territory. Moreover, according to amended national laws, an individual may be criminally or administratively responsible for violating the procedure of entering or departing from a temporary occupied territory of Ukraine, as well as for violating border regime. In other words, those vessels which used to enter seaports of the Crimean Peninsula may be arrested by Ukraine, and the vessel crew may be prosecuted criminally or administratively according to applicable laws of Ukraine.

III FORUM AND JURISDICTION

i Courts

Shipping disputes are within the jurisdiction of all courts of Ukraine, except the Constitutional Court. The jurisdiction is limited based on the subject matter of a dispute and the nature of existing legal relations.

Economic courts may resolve shipping disputes, if a dispute arises between economic entities (legal entities, natural persons or entrepreneurs); if a dispute involves a natural person (a seaman or sailor), it belongs to the jurisdiction of trial courts.

In case a shipping dispute results from a violation of the rights and the interests of one party by a subject of competent authority (except administrative cases), then it is necessary to appeal certain actions or non-feasance of such subjects at an administrative court.

An area of Ukraine – the Crimean Peninsula – is still occupied by the Russian Federation. Therefore, Ukraine is not responsible for those courts, which operate on the occupied territories. Such agencies are illegal according to the laws of Ukraine, and any rendered decisions are void and invalid and shall not be carried out in Ukraine or in other foreign states since they are unlawful.

The limitation period is determined for each dispute on a case-by-case basis. The general limitation period is three years, but there are a number of exceptions to this rule, for example:

- a* claims arising from contracts of carriage of goods by sea: one year;
- b* contracts of carriage for passengers and baggage, vessel chartering and marine insurance: two years; and
- c* damages caused by pollution from ships: three years.

ii Arbitration and ADR

Shipping disputes in Ukraine may be reviewed in state courts or courts of arbitration.

Maritime disputes can be resolved by the permanent specialised arbitral institution – the Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry (MAC at the UCCI).

In order to submit a claim with said court, two conditions must be met: (1) a dispute, arising out of an agreement or other civil and legal relations, related to marine trade; (2) an arbitration clause between the parties.

A state court of Ukraine (a court of general jurisdiction) cannot resolve a dispute if there is an arbitration clause signed between the parties.

Unfortunately, alternative dispute resolution is not popular in Ukraine. Sometimes, the parties attempt to resolve their disputes by means of negotiation before resorting to court, however, voluntary settlement and the performance of the requirements is quite rare. ADR such as mediation or expert determination do not have legislative foundation and are not considered to be effective. The parties to a dispute realise that such means of dispute resolution do not create consequences for a debtor, and the real protection of violated rights is possible only if the debtor will act in good faith. Due to the lack of any obligations for the parties, ADR is not promoting resolution of shipping disputes in such a manner.

iii Enforcement of foreign judgments and arbitral awards

Recognition and enforcement of foreign arbitral awards is regulated by (1) the New York Convention, which became a part of Ukrainian legislation by way of succession, (2) the Agreement on Settlement of Disputes Related to Business Activities (CIS countries, effective in Ukraine since 19 December 1992); (3) the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (effective in Ukraine since 14 April 1995); (4) bilateral agreements regarding legal assistance between Ukraine and other countries; and (5) the Code of Civil Procedure of Ukraine.

The norms and the provisions of aforementioned legal acts contain a number of discrepancies, although, disregarding the priority of generally acknowledged norms of the international law before the norms of the national law, the Ukrainian courts frequently employ the national law, specifically, the procedural codes instead of specialised legal acts of maritime law.

Generally, under the requirements of the Code of Civil Procedure as to the recognition and enforcement of arbitral awards, an involved person must submit a request made in writing to a general court located near the debtor's registration or residence address, or his property location.

The enforceability period for a foreign arbitral award in Ukraine is three years after the date of its entry into force, except for an award regarding the recovery of periodic debt payments subject to enforcement during the entire enforceability period (for the past three years).⁹

On a stage of filing a motion to recognise and execute a foreign decision, the collector may file a petition about securing a claim (interim relief) if he has grounds to believe that before the satisfaction of his motion, a debtor may act in a way which will make it impossible to carry out the decision. Thus, for example, the Russian vessel was arrested by Illichivsk city court based on a petition of the collector and not per a marine requirement, as a means of securing a claim while filing a motion for the execution of the decision of MAC at the UCCI on the territory of Ukraine.

Taking into consideration the occupation of Crimea by the Russian Federation, if a debtor resides in or is located in the territory of the Autonomous Republic of Crimea and Sevastopol city, any such decision will most likely be disregarded.

Unfortunately, the recognition of a foreign decision is always a very long process, and its real execution is a true challenge to a party.

9 Clause 391 of the Code of Civil Procedure.

IV SHIPPING CONTRACTS

i Shipbuilding

Ukraine has a well-developed ship-building industry, especially in Mykolaiv and Kherson regions. The ownership of a vessel under construction is acquired through signing of a ship-building contract, or a purchase and sale agreement and delivery of a new ship; these relationships are regulated by the Civil and Commercial Codes. The subject matter of the agreement of sale and purchase will be transfer of ship, and the subject matter of the ship-building contract is the performance of ship construction work. Under an agreement of sale and purchase, the ship builder will be the shipowner during the period of ship construction. A shipyard will provide a money-back guarantee to the buyer or shipowner in the event of the shipyard's failure to perform its obligations under the contract, but under the terms of ship-building contracts, payments made by the buyer or shipowner during the construction period will be secured by the phased transfer of ownership of ship construction deliverables. Payment for work should be arranged in such a manner that the amount of payments are approximately equal to the cost of the work performed by a certain stage, including the cost of materials. The risk of damage to or destruction of the ship under construction will be insured by the ship yard in favour of the ship owner. In case of refusal to deliver the ship under a contract, performer may be forced by court to fulfil it and even pay a fine or penalty, if such is provided by the shipbuilding contract.

ii Contracts of carriage

Carriage of goods by sea in Ukraine is regulated by, *inter alia*, the MSC, the Civil Code, the Commercial Code and the Law on Transport. On 17 April 2014 Ukraine ratified the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways, which entered into force on 1 January 2015, that cover also carriage of goods in the mixed river and sea sailing. Ukraine is not a party to the Hague Rules, Hague-Visby Rules, Hamburg Rules or Rotterdam Rules, but some provisions of the Hague-Visby Rules, for example, are incorporated into the MSC.

In addition to this, marine transportation is regulated by contracts of carriage of goods by sea that must be concluded in writing. Documents confirming the existence and content of such contracts include voyage charters, bills of lading and other written evidence. In Ukraine, there is also the concept of a multi-modal bill of lading issued by a company that is both a carrier and a forwarder; however, in the event of a multi-modal carrier's improper performance of a contract, there is a problem gathering evidence as all the shipment documents are kept by the company that issued the multi-modal bill of lading, against which all the claims will be filed.

Cabotage between the ports of Ukraine are carried out by vessels flying the flag of the state of Ukraine, as well as ships flying under foreign flag, if they obtained the permission of the Ministry of Infrastructure of Ukraine. From 25 September 2015 registration of such vessels' arrival on the normal procedure is carried out once in a calendar year during the first arrival at the Ukrainian port.¹⁰

Under Ukrainian law, shipowners are granted a right of lien over cargo carried on board their ship as security for the payment of freight or other charges. The carrier is also

10 <http://zakon2.rada.gov.ua/laws/show/z1260-15>.

entitled to sell the retained cargo through legal proceedings and satisfy his demands by the proceeds of sale with prior notification to the shipper or charterer, as well as the consignee thereof.¹¹ However, this right will be lost as soon as the cargo is delivered to the consignee or his agent. Problems arise when the owner of the cargo is not of the party of the shipping contracts. The owner of the cargo may lodge a possessory claim to the court demanding the vessel be discharged or even arrest their own property preventing it from the selling procedure. For example, in June 2015, owing to unpaid freight fees a carrier exercised his right of lien over cargo on board the *M/V Jin Zhu Hai* outside the 12nm zone Ukraine's territorial sea near the port Yuzhny, with the intention of preventing arrest by the consignees or by the owner of the cargo in the port. Ukrainian laws do not prohibit the shipowner from exercising a lien while waiting outside the port.

Cargo claims

In Ukraine most cargo disputes are settled out of court. Under Ukrainian legislation a carrier's responsibility commences at the time the goods are received for transportation and ceases at the time of its handover at destination. The carrier is liable for loss and shortage of as well as damage to the goods received for carriage under the rules of the MSC. For such damages the carrier in case of fault shall be liable for the amount of the actual value of the lost cargo and for damages, the amount by which the value of the goods decreased. The carrier is under no obligation to refund extra costs, lost profit or moral damages.

There are many situations when the consignee has not requested the goods, disposed of them, or abandoned them. In such cases, the carrier may, with notice to the shipper, deliver the goods for storage in a warehouse or in another safe place at the expense and risk of the shipper. The carriers must conclude cargo storage contracts with ports and undertake to make payments for storage thereunder. If, within two months from the date of arrival of the ship cargo is not in demand, the carrier is entitled to sell the goods. However, such cargo can be stored for years, accumulating large sums for storage, demurrage and other expenses to be paid by the shipper or consignee, which eventually have to be paid by the carrier.

According to a time charter agreement, it is the charterer who will be liable for damages caused to the cargo even if such damages or losses occurred through the shipowner failing to comply with the necessary terms of the time charter agreement. The charterer has the right to file a claim against the shipowner only after satisfaction of all the claims presented by the cargo owner. According to a bareboat charter agreement, the charterer will be considered as the shipowner during the whole term of the agreement and must take full responsibility for the cargo's transportation and integrity. Ukrainian courts primarily refer to the provisions set out in charter agreements.

Limitation of liability

The MSC and the Commercial Code contain provisions regulating the limits of shipowners' liability. Ukraine is not a party to the LLMC, but some of the MSC's provisions regarding limitation of shipowners' liability are taken from that Convention.

Shipowners' liability limits are determined by MSC¹² and set in units of account depending on vessel capacity. The higher the capacity is, the higher the shipowner's liability

11 Clause 164 of the MSC.

12 Clause 352.

limit will be. For example, the vessel owner's liability capacity not exceeding 5,000 units for pollution damage resulting from the escape or discharge of pollutants from his vessel is limited to the total amount of three million units of account, and a vessel whose capacity is greater than the above, is added to 420 units of account for each additional unit capacity.¹³

There are, however, exceptions to limitations of liability, such as in claims regarding general average contributions; by crew members and other ship employees whose duties are in relation to the vessel, as well as their heirs or other beneficiaries.

V REMEDIES

i Ship arrest

Ukraine is a signatory to the 1952 Brussels Convention since 16 May 2012. Nearly four years of practical application of the Convention has led, however, to the conclusion that vessel arrest in Ukraine is still as complicated and painstaking a process as it ever was. The main issues are as follows:

- a* violation by the courts of subject matter jurisdiction rules;
- b* some judges still do not know about existence of the Arrest Convention and do not apply its provisions at all; and
- c* judges sometimes reject requests to release arrested vessels in exchange for suitable (cash deposit) financial security, probably due to an improper understanding of the nature of the Arrest Convention.

Nevertheless, to arrest a ship, the creditor must approach the court at the location of the port at which the ship is situated or at the port of the ship's registration. Unfortunately, the legislator did not make sufficient changes in the arrest procedure, which has made implementation thereof much more complicated, especially when there is an arbitration clause; independently claimed vessel arrest cannot be grounds for reference to court without a further hearing on the merits by the same court.

A harbour master may detain a ship for three days and this is carried out through the issuance of an order upon the request of the port or the Ministry of the Environment, or a person with a maritime claim against the vessel. At the end of the three-day detention an arrest order from a court must be presented, otherwise the vessel will be immediately released as a result of the occupation of the part of Ukraine (Crimea) by Russia, a special legal regime (SLR) has been in force in that territory since 12 August 2014. Corresponding amendments have been entered into the Criminal and Administrative Codes. One vessel, the *m/v Aliot* (Moldova) has been arrested for violation of the SLR and her master has been charged with a criminal offence.¹⁴

Approximately 300 vessels have entered the closed Crimea ports in defiance of an official ban (according to the official statistics).¹⁵

13 Clause 308 of MSC.

14 www.reyestr.court.gov.ua/Review/45009503.

15 In the accordance with the data of the automatic identification system of the state department 'State Hydrographic Service of Ukraine' and according to the results of the vessel inspections

ii Court orders for sale of a vessel

Judicial sale of a vessel is realised as part of an enforcement proceeding, being a legal procedure of enforcement of a court decision. There is no specific legislative act that would regulate the judicial sale of vessel, therefore, the provisions for the sale of seized real estate are used by analogy. If the ship was pledged, her sale is to be carried out at a public auction as real estate. In other cases, the vessel should be sold at an auction (i.e., as moveable property).

Unfortunately, due to the shortcomings of the national legislation, judicial sale of a vessel guarantees the satisfaction of a creditor's demands, but causes problems for the new owner of the vessel.

Technically, the ownership right to the vessel arises from the moment of its state registration in the State Register of Vessels. As for judicial sale of vessel, the new owner can register a vessel in the Register only if the previous owner filed an application for exclusion of the vessel from the Registry. If the owner whose property was forcibly sold fails to do so, a person acquiring the vessel will not be able to register a vessel and an ownership right to the vessel will not officially arise. This practice contradicts the requirements of Article 12 of Part 5 of the International Convention on Maritime Liens and Mortgages of 1993, which came into force on 4 January 2003 for Ukraine, and is mandatory for application, with higher legal force than the domestic laws regulating registration of ownership rights after the judicial sale of vessel. Unfortunately, however, this Convention is not applied in practice by public authorities who deliberately ignore international instruments that are an integral part of the national legislation.

VI REGULATION

i Safety

Generally speaking, what concerns the sphere of shipping safety, Ukraine focuses on the international standards, norms and requirements of implemented conventions (SOLAS (1974), SAR (1979), STCW (1978)).

The system of shipping safety in Ukraine includes: human protection; environmental protection; vessels; waterways; seacoast objects.

In order to ensure effective shipping safety, a number of legal acts and executive orders have been enacted, and a number of agencies have been created, that are responsible for complying with stated laws.

On 14–18 December a Consulting Mission of the International Marine Organization (IMO) visited Ukraine. Generally, the IMO representatives positively evaluated the work of enterprises, which ensure functioning of the Marine Administration and denoted high professionalism of the officers of the Ministry, Ukrainian Marine and River Inspection and state enterprises. At the same time, the members of the mission noted that there is no uniform Marine Administration in Ukraine, which could have promoted and monitored the

at the Ukrainian ports getting by the state enterprise Ukrainian Sea Port Authority and by the non-government organisation The Maidan of Foreign Affairs https://dostup.pravda.com.ua/request/pierielik_sudien_iki_zakhodili.

international standards, as well as been responsible before other marine states and the IMO. At the moment, its functions are distributed between several organisations and are sometimes duplicated.¹⁶

It is worth mentioning that Ukraine is getting ready for a mandatory audit by the IMO scheduled for March 2018. At the present time the activity of the state-financed entity Marine Search and Rescue Service has been restored, since the performance of these functions by an unspecialised state entity, the Administration of Sea Ports of Ukraine, was ineffective (as the catastrophe with the *Ivolga* vessel on 17 October 2015 demonstrated). This optimises legislation and follows the recommendations of the consulting commission of the IMO.

The situation with the occupied territory of Ukraine, the Crimean Peninsula, remains unchanged. Since 15 July 2014 all ports in the territory have been closed and are not controlled by Ukraine, shipping in the territorial waters of the Crimean Peninsula and entering Crimean ports is dangerous and may cause uncontrolled damages to shipowners with no compensation guarantees and violates the national laws of Ukraine and the international requirements.

ii Port state control

The term port state control means the inspection of foreign vessels by the state where the vessel's port of call is located for the purposes of verifying compliance by shipowners, classification societies and vessel control administrations of the state of the vessel's flag with requirements of international maritime conventions and rectifying deficiencies before a vessel leaves the port.

Ukrmorrichinspektsiya provides the supervision of maritime safety of the water area of seaports and outside the relevant territory. The Ukrainian Seaports Authority is the state enterprise established by legislation that ensures the functioning of seaports, the maintenance and usage of port infrastructure objects under state ownership, and the performance of other tasks assigned to it directly or through its affiliates, formed in each seaport. The harbour master heads the Seaport Captain's Service at each seaport, part of the Ukrainian Seaports Authority. Also, it is the captain who has the right to detain a vessel. The primary reasons for such detention are failure to pay the applicable fees, fines and other payments, as well as the decision of authorised state agencies, and most often the decisions of ecological inspection based on the results of control of isolated ballast that is illegal. In such an unlawful manner the following vessels were detained: *Zhen Tai*, *CMB Coralie*,¹⁷ *Heilan Star*, *Alina*.¹⁸

Ukraine is not a member of the Paris MoU. Considered to be the worldwide index for flag performance, Ukraine belongs to Grey List 1 in accordance with the Paris MoU White, Grey and Black Lists.

However, Ukraine is a member of the memorandum of understanding on Port State Control in the Black Sea Region (Black Sea MoU).

At the 16th meeting of the Port State Control Committee in Batumi, Georgia, in April 2015, the memorandum of understanding on Port State Control in the Black Sea

16 <http://news.meta.ua/archive/25.12.15/cluster:46514190-Mnsterstvo-nfrastrukturi-gotutsia-d-o-auditu-Mzhnarodno-morsko-organizats>.

17 <http://mtu.gov.ua/news/22258.html?PrintVersion>.

18 <http://fru.org.ua/ua/events/v-illichivskomu-portu-cherez-protypravni-dii-ekolohiv-prodovzhuut-prostoiuvaty-dva-sudna>.

Region (BS MOU) decided to introduce a new inspection regime for selection of ships from 1 January 2016 to further harmonise its risk-based targeting and inspection system with the leading memorandums, namely the Paris MOU and Tokyo MOU, to the highest level.¹⁹

iii Registration and classification

The registration of a ship in Ukraine consists of entering data on a ship in the State Ships Register of Ukraine or the Vessel Register of Ukraine,²⁰ and obtaining a licence or a vessel's certificate. The state registration of sea vessels is carried out by harbour masters and the state registration of river vessels and vessels not supervised by a classification society is carried out by the Maritime and River Inspectorate. Upon entering of records about a permanent registration of a vessel in Ukraine, all of the previous records in registers of other states pertaining to such vessel are not recognised by Ukraine.

This registry is a traditional 'closed' registry. There are certain restrictions, in particular, limitations of the person who can exercise the right to register their ships. Pursuant to Clause 32 of the MSCU, the right of navigation under the state flag of Ukraine is given to a vessel that is the state property or in the ownership of a natural person – a citizen of Ukraine – as well as a legal person in Ukraine founded exclusively by Ukrainian owners, or a vessel belonging to these persons under a bareboat charter contract. Consequently, ships owned by a sole entrepreneur (also a business entity under Ukrainian law)²¹ or legal entities registered in accordance with Ukrainian legislation, but the founders of the entity of which is a foreign citizen or company, are not entitled to fly the national flag of Ukraine. Such restrictions, of course, are a barrier to attracting foreign investment in the development of domestic shipping. Since 2001, Ukraine has developed several versions of the draft law on the international register of ships, nevertheless, unfortunately, it has not yet been adopted.

Besides the registration of vessels, maritime mortgage records of vessels can also be entered into the aforementioned registries. The laws regulating maritime mortgages include the MSC, the Maritime Liens and Mortgages Convention and the Law on Mortgages. In Ukraine a contract of mortgage has to be notarised at the place of registration of the vessel.

The technical supervision of sea vessels and their classification is performed by the classification society chosen by the shipowner.²² The carrying out of technical supervision of vessels that have the right to fly under the flag of Ukraine, with the processing of the relevant documentation on behalf of the government of Ukraine, is entrusted to such classification societies as the Shipping Register of Ukraine,²³ the American Bureau of Shipping, Bureau

19 <https://www.parismou.org/2012-annual-report-paris-mou-psc>.

20 The Resolution of the Cabinet of Ministers of Ukraine on Approving the Procedure for the State Ships Registry of Ukraine, and the Vessel Register of Ukraine, 26 September 1997.

21 Clause 55 of the Commercial Code of Ukraine and the Clause 50 of the Civil Code of Ukraine.

22 Clause 22 of the MSC.

23 The Resolution of the Cabinet of Ministers of Ukraine on improving the technical, classification and shipping supervision on the sea and river transport, 8 June 1998.

Veritas, Germanischer Lloyd, the Hellenic Register of Shipping and Det Norske Veritas Classification.²⁴ The Cabinet of Ministers of Ukraine has identified a list of classification societies that can act on behalf of the government of Ukraine.

iv Environmental regulation

Legal regulation in the field of marine environment protection is carried out through a number of statutory instruments, among which the most important are the Water Code, the Law on Environmental Protection 1991, UNCLOS, the OILPOL Convention and MARPOL.

In Ukraine, the authority implementing state policy in the field of the marine environment is the State Environmental Inspectorate and its structural units.

For a long time Ukraine has been dealing with the problem of levying fees for dumping isolated ballast and obliging the vessel's management to produce a ship's ecological declaration at Ukrainian ports, contrary to common sense, maritime laws and international conventions.

At the end of 2014 and at the beginning of 2015 the progressive powers together with the community and the efforts of the Minister of Ecology and Natural Resources enacted a number of legal acts, which remade the national laws according to the international law. According to the changes, none of the vessels entering the ports of Ukraine were obliged to provide an ecological declaration and all vessels with a system of isolated ballast no longer have to be inspected for the chemical content of the isolated ballast.

Despite the legislative changes, the state agencies continue to inspect isolated ballast and require the ecologic declaration.²⁵ The willfulness of the state agencies has been actively protected by the corrupt courts and the upper authorities, which in any way oppose the new progressive practices and the cancellation of the corruption schemes, which for many years were the source of stable income of the representatives of the State Ecologic Inspection. Unfortunately, the Minister of Ecology and Natural Resources was removed from his position by political opponents that do not welcome changes in the country and support the corruption schemes.

On 7 July 2015 and 13 October 2015 the resolutions of the Cabinet of Ministers of Ukraine modified the Rules of Protection of Internal Sea Waters and Territorial Sea, which essentially returned the situation with the isolated ballast to the previous condition. It is stated that the inspection of the isolated ballast is possible only if visible floating parts are removed or visible oil marks oil or other polluting substances in the dump area, which resulted in the actual worsening of the water quality and a unreachable standard of cleanness for waters of isolated ballast – at a level of water quality indices of a certain area of water use. Both norms essentially create the grounds which will always be construed by inspectors not in favour of shipowners (as evidenced by practice) and on this ground the inspection of the isolated ballast is performed.

It is worth mentioning that no vessel can pass the inspection of an ecological ballast because even for drinking water the indices are 8–10 mg/l SP, whereas the indices for area

24 The Regulation of the Cabinet of Ministers of Ukraine on the technical supervision of ships entitled to fly under the flag of Ukraine, 6 March 1996.

25 <http://mtu.gov.ua/news/22258.html?PrintVersion>.

water is -2.0 mg/l SP (suspended particle), which is written by inspectors each time during the actual measurement regardless of a storm or calm conditions, so in effect this is an inspection that is impossible to pass.

In spite of this, the inspection procedure, taking of a water sample and its analysis which is determined by the Cabinet of Ministers of Ukraine, is not yet approved, which allows the captain to refuse the inspection of the isolated ballast by the inspectors. If such inspection is held, it will be impossible to prove the conformity of the isolated ballast with the norms.

v Collisions, salvage and wrecks

The MSC, the Law of Seaports, the COLREGS, the SAR and the Convention on the Protection of Underwater Cultural Heritage (2001) are the basic statutory instruments governing extreme marine events such as collisions, rescues at sea and the effects of such events in the form of raising, removal or destruction of property that has sunk at sea.

Usually in such marine events, the parties conclude settlement agreements. Nevertheless, there are still some problems, such as prolonged investigation by state agencies, a large number of parties asserting their rights and interests and the inability to determine the degree of fault of each of the parties.

According to the provisions of the MSCU, any action with a positive result relating to rescue on the sea (except people) gives the right to certain compensation. The amount of compensation is determined upon the agreement of the parties; in case there is no agreement between the parties, the amount of compensation is determined by a court, an commercial or the Maritime Arbitration Commission. The issues with the amount of compensation are common and frequent if the state agencies, that are responsible for safety on the sea, carried out the rescue operation. For example, the owner of a motor yacht *Classico* was deprived of his right to operate the yacht for six years for the duration of proceedings regarding his failure to pay a considerably high amount of compensation for the rescue of the yacht at Odessa port. Proceedings were initiated by port agencies without prior notification to the owner, who lost the case and was obligated to pay storage fees as well.²⁶

According to the provisions of the MSC, the owner of property that has sunk should inform the harbour master of the nearest Ukrainian seaport of its intention to retrieve this property and should only carry out such work with the harbour master's permission.²⁷ If, however, the property that has sunk presents a direct threat to the safety of navigation, life or health, or the environment, the port's administration is entitled to take the necessary measures for its immediate lifting or destruction of the property at the cost of the owner.²⁸ If the owner has not made a declaration of its intention to raise the sunken property within a year of the date on which it sank, or the owner has not raised the property within a certain period determined by the port, the property becomes state property.

vi Passengers' rights

The main statutory instruments in the legal regulation of the maritime transport of passengers are the Civil Code, the MSC, and the Athens Convention and its 1976 Protocol. Ukrainian

26 www.reyestr.court.gov.ua/Review/39652692.

27 Clause 122 of the MSC.

28 Clause 123 of the MSC.

legislation applies to the carriage of passengers and luggage if a ship under the flag of Ukraine, the contract of carriage was concluded in Ukraine, or the place of departure or destination is in Ukraine.

There are two types of contract that may be concluded with a passenger: a contract for carriage of passengers by sea and a sea cruise contract. Any agreements between the carrier or the organiser of the cruise and passengers that restrict the rights of passengers are invalid. Passengers have the right at any time before departure and, after beginning the voyage, at any port at which passengers will board or disembark, to withdraw from the trip and to get back the fare and the fee for baggage carriage.²⁹

Passengers are subject to compulsory insurance against accidents. The carrier is responsible in the event of death or injury to a passenger's health, as well as for the loss or damage of luggage, if the event that resulted in such incident occurred during the carriage and occurred due to the fault or negligence of the carrier, its employees or agents acting within their duties.

On 17 October 2015, the *Ivolga* passenger boat capsized and sank in the Black Sea in Odessa region due to congestion and deteriorating weather conditions. As a result, 19 people died, 20 people were hospitalised with injuries. The vessel, according to its documentation, was permitted to operate and transport 17 passengers and three crew members; however, *Ivolga* was carrying 39 people on board. The court established that the boat was not provided with a proper number of life jackets and passengers were not instructed about safety.³⁰ The criminal proceeding is currently open, the captain is under arrest and the boat has also been arrested. All victims and next of kin shall be paid compensation.

vii Seafarers' rights

The general rules of labor law are the basis of the legal regulation of seafarers' labour in Ukraine. However, due to specificity of maritime transport activity there are also special rules that governed by MSCU, statutes of marine and fishing service, general and branch tariff agreements and collective labour agreements. In addition, Ukraine is a party to a number of ILO Conventions, including the Merchant Shipping (Minimum Standards) Convention (1976), the STCW, the Repatriation of Seafarers Convention (1926) and the Medical Examination (Seafarers) Convention No. 73 (1946).

At the present time Ukraine is undergoing a number of positive changes to achieve European social standards. In particular, in 2015, Ukraine ratified the ILO Convention concerning Basic Aims and Standards of Social Policy No. 117, and on 16 March 2016 the ILO Social Security (Minimum Standards) Convention was ratified and will enter into force in Ukraine in 12 months.³¹

Currently, the ratification of the MLC, which entered into force in 2013, is a key issue for Ukraine. The problem of Ukraine's outstanding accession to the Convention was identified in the Action Plan for the Implementation of the Association Agreement between

29 Clause 190 of the MSC.

30 www.reyestr.court.gov.ua/Review/53029833.

31 This Convention will come into force in Ukraine 12 months after the date on which its ratifications were registered by the Director-General of the International Labour Office.

Ukraine and the EU, 2014–2017.³² However, despite all last year's assurances by the state authorities of the urgent ratification, a Draft Law is still not even registered by the Verkhovna Rada of Ukraine.

Although there are many conventions that have not been ratified by Ukraine, in general, the rules on seafarers' rights conform to international standards. One difference, however, is that there is no special procedure for compliance with the labour standards of seafarers in port. Also, the Labour Code of Ukraine permits work on the basis of an oral contract, does not contain any requirements for the content of the employment contract and does not oblige seafarers to have a copy of the contract on the ship.

The owner of a vessel flying under the Ukrainian flag will be liable to seafarers in the event of death, disability or other damage to health and must insure such liability in the State Social Insurance Fund against accidents. In the case of a foreign employer, the amount of compensation in the event of death, disability or other damages is based on the terms of the employment contract provided the contract does not worsen the rights of a seafarer in comparison with Ukrainian legislation, plus moral damages. However, Ukrainian courts are very demanding, tough and contradictory concerning compensation.

VII OUTLOOK

The legislation on shipping has always lagged behind existing legal practice in the sector, this is why the shipping industry has always operated according to civil, economic and customs laws instead of specialised laws. Only in recent years have a number of important laws and conventions been enacted that regulate legal relations in the sphere of shipping and are closer to international standards.

Certainly, there are a number of problems that persist – the norms of civil and economic laws are still used to regulate shipping legal relations with disregard for the specialised acts and the international conventions; flawed port reform; rampant corruption; the absence of proper legal guarantees that protect the rights and interests of business entities; the difficult economic, political and military situation in the country; a severe customs and tax climate; and total foreign exchange control.

As a result of geopolitical events (Russian–Turkish conflict), the occupation of the Crimean Peninsula and the military action on the territory of Ukraine by Russian Federation troops, many have left the Ukrainian shipping market.

Nonetheless, despite the economic, social and geopolitical factors, Ukraine is trying to reform the shipping industry, specifically, to liberate port procedures (the opportunity to begin loading or unloading straight after the mooring of a vessel (even before the start of any registration procedure)); speed up the procedure of customs filing and fight corruption through the introduction of electronic innovations that minimise human intervention (customs clearance of a vessel is done by providing electronic copies of documents without the need for state authorities to board the vessel); and to make the shipping industry more attractive for investors (with a vessel fee in favour of an owner or leaser of the mooring station).

32 <http://zakon0.rada.gov.ua/laws/show/847-2014-%D1%80/page>.

Reforms in Ukraine always follow the 'from bottom to top' scheme and the government does not always promote them, however, the public (public organisations, activists and volunteers) actively promote reforms and industry renovation.

Appendix 1

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Vagif is the head of the firm's shipping, international trade and insurance practice. Vagif has been involved in a wide range of both dry and wet shipping disputes on behalf of P&I clubs and owners. His broad experience in dry shipping includes charterparty, bill of lading, ship building, and he also has experience of handling claims on the wet side: collision, general average, personal injury or loss of life, and pollution. Vagif is an attorney at law and a member of the Ukrainian National Bar Association, the Odessa Bar Association and the International Bar Association. Before law he worked for seven years in the insurance sector. He graduated from the faculty of law (LLB) of Mechnikov's Odessa National University in Odessa, Ukraine; the faculty of psychology (LLM) of the International Academy for Psychology in Saint Petersburg, Russia, and undertook postgraduate study in taxes at the School of Business and Administration in Warsaw (Poland).

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