
THE SHIPPING LAW REVIEW

EDITORS
JAMES GOSLING AND REBECCA WARDER

LAW BUSINESS RESEARCH

THE SHIPPING LAW REVIEW

The Shipping Law Review

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THE
SHIPPING LAW
REVIEW

Editors

JAMES GOSLING AND REBECCA WARDER

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EDITORS' 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.

We begin with cross-jurisdictional chapters looking at the latest developments in important areas for the shipping industry internationally: piracy, marine insurance, shipbuilding, logistics, and competition and regulatory law.

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.

Passenger and seafarer rights have both recently been enhanced with the entry into force in 2014 of the 2002 Protocol to the 1974 Athens Convention and the Maritime Labour Convention in 2013, 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.

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 transported by sea. The law of shipping remains as interesting as the sector itself and the contributions to this book reflect that.

This past year has, of course, been a challenging one for the international shipping industry, as it continues to feel the effects of the global financial recession. At the same time, the shipping industry has witnessed increased regulation and environmental scrutiny. There has been a recent plethora of increasingly stringent emissions regulation measures focused on sulphur oxides and nitrogen oxides emissions.

Within emissions control areas, the current limit is 1.0 per cent sulphur content, falling to a tougher 0.1 per cent from 1 January 2015 (although California has accelerated its sulphur emissions limits to the new standard already). 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, will be implemented in emissions control areas from 2016. Furthermore, also from 2016, the United States Clean Air Act will introduce 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. Steps have already been taken in this regard in France where, since October 2013, vessels calling at French ports have been required to record and report their carbon dioxide emissions. Any EU market-based measures are expected to include tradeable emissions permits for the shipping industry.

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 wreck. 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 inaugural 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.

Finally, we would like to thank our colleague, Tessa Huzarski, for all her hard work in compiling this book.

James Gosling and Rebecca Warder

Holman Fenwick Willan LLP

London

July 2014

Chapter 44

UKRAINE

Vagif Mallayev, Victoria Konograi and Inga Drobinova¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Ukraine, as a maritime state, has a strong geographical, geopolitical and resource position for the development of both domestic and international shipping, but this still needs further effective implementation.

The modern maritime fleet of Ukraine is almost not suitable for commercial use because of its significant physical wear: most commercial sea vessels in Ukraine are low-tonnage vessels (with a capacity of up to 5,000 tons) for mixed navigation and are aged from 25 to 35 years. Each year in recent years, for technical reasons, approximately 30 vessels are discarded.² Very few Ukrainian vessels sail under the flag of Ukraine.

As for freight traffic, in 2013 cargo processing of all domestic ports amounted to 148.1 million tons (2.6 million tons, or 1.7 per cent lower than in 2012). This fall in cargo turnover occurred due the reduction of transit cargo quantity. There are various reasons, mostly – according to experts – the reorientation of shipowners to other ports. The state ports of the Ministry of Infrastructure processed 53 million tons (35.8 per cent of the total), private stevedoring companies, 95.1 million tons (64.2 per cent), including 51.6 millions tons (34.8 per cent) through the docksides of Ukrainian state sea ports. Domestic seaports have increased their processing of imported cargo to 17.9 million tons (an increase of 11.8 per cent) and cabotage by 2.9 million tons (an increase of 22.8 per cent). The processing of exports amounted to 100.1 million tons (an increase of 3.2 per cent). Transit cargo accounted for only 77 per cent of the total

1 Vagif Mallayev is a senior partner, and Victoria Konograi and Inga Drobinova are associates at Lexcellence Law Firm.

2 <http://novostiua.net/stati/17155-sudohodstvo-ukrainy-luchshee-vremya-uzhe-pozadi.html>.

for 2012, and container turnover increased by 8.5 per cent (786,675 TEUs) compared with 2013.³

In Ukraine, the shipbuilding industry is well developed, and its needs are serviced by nine shipyards fulfilling orders for the construction of modern ships, both civilian and military, as well as providing a full range of services and repair.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

A codified legal act, the Merchant Shipping Code of Ukraine (MSC), adopted in 1995, based on international merchant shipping standards, was an important step forward in Ukraine's development as a maritime country. At the present time, it is the main law regulating the legal status of a crew, marine navigation, vessel chartering, arrest of vessels, marine transportation, marine insurance, shipowner's liability, etc. The main feature of this code is that it has consolidated the rules of the various international legal acts that regulate the shipping industry. In addition to this, Ukraine, as a UN and IMO member, has ratified many international conventions and protocols thereto, such as UNCLOS, SOLAS, MARPOL and the STCW Convention, and a number of bilateral agreements regarding marine navigation and marine transportation. Should there be any conflict between a domestic act and an international agreement, the provisions of the international agreement will prevail.⁴ Adoption of the Law on the Sea Ports of Ukraine was also important for Ukraine, which took effect on 14 June 2013. This Act provides for a fundamental reform of the entire port sector: a change of the legal nature of the sea ports, reorganisation of sea port management structure, approval of variable rates for stevedoring services, rearrangement of the key types of business entities and business mechanisms in the port industry, improvement of the protection of investors' rights and interests, and regulation of the issues regarding artificial land creation and use.

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

III FORUM AND JURISDICTION

i Courts

The courts of general jurisdiction in Ukraine – the general, administrative and commercial courts – are competent to settle shipping-related disputes. The key distribution criteria for such disputes are the parties thereto and subject matter thereof (the legal relationships from which the dispute arose).

3 www.uspa.gov.ua/ua/pres-tsentr/analitika/analitika-2014/1230-portovaya-reforma-otkrovennyj-razgovor-ob-uspekakh-i-probelakh-ee-realizatsii.

4 Clause 19 of the Law of Ukraine on International Agreements.

The majority of shipping disputes are settled by the commercial courts, where the parties to the disputes are legal entities or sole proprietors, and the disputes are commercial in nature (e.g., disputes arising from commercial contracts, bankruptcy-related proceedings and disputes regarding property claims against debtors).

Other disputes may be settled by the general courts, including passenger disputes arising from contracts of carriage, protection of seafarers' property and non-property rights, and compensation for damages. The mandatory conditions for the general courts' jurisdiction over disputes are that one of the parties thereto must be a natural person and that the dispute arose from the infringement of the property or non-property rights of this person.

In the event of shipping disputes arising from the violation of the rights and interests of a party by government authorities, agencies or public officers (except for cases of redressing any existing administrative liability of the party), claims against such authorities', agencies' or public officers' actions or omissions must be filed with the administrative courts.

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

In Ukraine, shipping disputes may be settled by the state courts or by the courts of arbitration. There are two types of courts of arbitration in Ukraine: the courts of arbitration themselves (domestic) and the international commercial arbitration courts. In terms of the party to and subject matter of a dispute, the major part of shipping disputes falls within the jurisdiction of the international arbitration courts.

There are two mandatory requirements to be met when filing a lawsuit to an international commercial arbitration court:

- a* there must be a dispute regarding contractual or other civil law relationships between commercial enterprises, at least one of which is located abroad, has foreign investments, or international associations and relationships established in the territory of Ukraine; and
- b* there must be an arbitration agreement either as an arbitration clause in the contract or as a separate agreement.

Legal regulation of arbitration is performed under the Law of Ukraine on International Commercial Arbitration of 24 February 1994. In accordance with the aforementioned law the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC at the UCCI) was established in Kiev.

Maritime disputes can be resolved either by courts specially established for the consideration of a certain action or by a permanent arbitral tribunal, particularly the Maritime Arbitration Commission (MAC) at the UCCI. This Commission is a

permanent specialised arbitral institution that, according to the aforementioned law, settles disputes arising from contractual and other civil law relationships in the area of merchant shipping, irrespective of whether the parties to the relationships are Ukrainian or foreign entities. Under the Rules of the MAC at the UCCI, the Commission has jurisdiction over a wide range of disputes arising from shipping.

It is important to note that a state court of Ukraine (a court of general jurisdiction) cannot resolve a dispute if there is an arbitration clause signed between the parties.

As to alternative dispute resolution (ADR), the best-known method of pre-trial dispute resolution in Ukraine is the claim presentation procedure (presentation of a statement of claim to a party in breach of property rights) based on the principles of good faith of a guilty party and voluntary performance of obligations. Unfortunately, this method is used as a pretrial stage rather than an independent means of dispute settlement.

Another ADR method is mediation, which has been gaining more and more popularity in recent years, but at the present time is still at a development stage. Although the expediency of its implementation was determined as far back as 2006 by a Decree of the President on the Concept of the Improvement of the Justice System to Ensure Fair Trial in Ukraine in Compliance with European Standards, it has not gained much traction among shipping participants.

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. Recognition and enforcement of foreign arbitral awards is also performed under the principle of reciprocity.

There are a number of discrepancies in the provisions of the aforementioned legal acts, in particular as recognition and enforcement of awards the Code of Civil Procedure of Ukraine and Agreement on Settlement of Disputes Related to Business Activities, in contrast with the New York Convention, require the submission of additional documents certifying that a party in respect of which an foreign arbitral award was issued but which fails to appear before court was duly notified of the time and place of the proceedings.

Generally, under the requirements of the Code of Civil Procedure as to recognition and enforcement of arbitral awards, an involved person must submit a request in writing for the issue of an enforcement order, along with the required documentation attached.

This request should be submitted to a general court located near the debtor's registration or residence address. According to Clause 391 of the Code of Civil Procedure, 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).

In 2009, Conres Shipping Aktiengesellschaft (Switzerland) applied for the issue of an enforcement order in respect of an award of the MAC at the Chamber of Commerce and Industry of the Russian Federation. This request was satisfied by the appeal court of the city of Sevastopol.⁵ Moreover, the Odessa Commercial Sea Port's request for recognition and enforcement of an award of the MAC at the UCCI regarding the recovery of debt from Silverknot Shipping Ltd was satisfied under a ruling of the Prymorskyi District Court in the city on Odessa of 24 February 2010.⁶

IV SHIPPING CONTRACTS

i Shipbuilding

Ukraine has a well-developed shipbuilding industry. The ownership of a vessel under construction is acquired through signing of a shipbuilding contract, or a purchase and sale agreement and delivery of new ship; these relationships are regulated by the Civil and Commercial Codes. The subject matter of the agreement of sale and purchase will be the transfer of ship, and the subject matter of the shipbuilding contract is the performance of ship construction work. Under an agreement of sale and purchase, the shipbuilder will be the ship 'owner' during the period of ship construction. A shipyard will provide a money-back guarantee to the buyer-shipowner in the event of the shipyard's failure to perform its obligations under the contract, but under the terms of shipbuilding contracts, payments made by the buyer-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 shipyard in favour of the shipowner.

In the event of a breach of the terms of an agreement, the customer is entitled to seek protection of its rights in court.

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 of Ukraine on Transport. Ukraine is not a party to Hague Rules, the Hague-Visby Rules, the Hamburg Rules or the Rotterdam Rules, but some provisions of the Hague-Visby Rules, for example, are incorporated in the MSC.

In addition to this, marine transportation is regulated by contracts of carriage of goods by sea that have to be concluded in writing. Documents confirming the existence and content of such contracts include voyage charters, bills of lading and

5 www.reyestr.court.gov.ua/Review/3690492.

6 www.reyestr.court.gov.ua/Review/8476817.

other written evidence. In Ukraine, there is also the concept of a multimodal bill of lading issued by a company that is both a carrier and a forwarder; however, in the event of a multimodal 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 multimodal bill of lading, against which all the claims will be filed.

Carriers sometimes have to deal with cargo abandonment due to financial hardship of consignees or for other reasons. In such situations, the carriers must conclude cargo storage contracts with ports and undertake to make payments for storage thereunder. Such cargo can be stored for years, accumulating large sums for storage, demurrage and other expenses against the shipper or consignee, which eventually have to be paid by the carrier. A situation of this kind was faced when a Chinese container line, as far back as 2008, left Potain cranes in 14 containers for storage at the Odessa seaport.⁷ The line has not taken its own containers back, and therefore it suffered losses from their demurrage, is in debt to the port for their storage, and has incurred significant court fees.

In order to prevent carriers from suffering as a result of aforementioned problems, and to protect their rights, the MSC provides for cargo liens, which give carriers the right to retain possession of the cargo until all charges are paid by the consignee or, in the event of abandonment, to sell the cargo. There have still, however, been incidents that this did not prevent, for example, when a Chinese container line failed to sell abandoned perishable cargo (garlic) that arrived on the *MV Humber Bridge* in 2011 before it went bad. The containers were stored at Illichivsk Port before, in 2013, the line had to dispose of the garlic at its own expense in order to empty the containers, and pay the port for storage services.

iii Cargo claims

Under Ukrainian legislation a carrier's responsibility commences at the time the goods are received for transportation and ceases at the time of their 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 Clauses 176 to 181 of the MSC.

The carrier can also be subject to claims for damages related to late delivery or delay in the cargo handover, the refund of overpaid transportation fees, non-provision of vessel or delay in the provision of vessel, etc. The carrier is under no obligation to refund extra costs, lost profits or moral damages. In March 2013, Waterlux AG (Panama) breached a shipping contract under which it should have delivered 597 cars on the *MV Faina* from Aqaba (Jordan) to Benghazi (Libya);⁸ however, the *Faina's* master changed course and took the cars to the commercial sea port of Illichivsk in Ukraine, as part of an attempted scam. Within the framework of criminal proceedings the victim party (shipper) filed a civil action for damages compensation and a refund for the freight paid to the carrier.

7 www.reyestr.court.gov.ua/Review/21681955.

8 www.news.odin.tc/index.php?page=view/article/701/Seizure-of-ro-ro-Etel-in-Bengazi-When-breaking-the-law-is-the-only-way-to-restore-the-law.

A shipper or consignee is liable for vessel demurrage due to default or delay in the provision of cargo for carriage, delay in loading operations, etc., through its fault. In Ukraine most cargo disputes are settled out of court.

According to a time charter agreement, it is the charterer who is 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 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.

iv Limitation of liability

The MSC and Commercial Code contain provisions regulating the limits of shipowners' liability. Ukraine is not a party to the LLMC Convention 1976, but some of the MSC's provisions regarding limitation of shipowners' liabilities are taken from this very convention.

In Ukraine, any claim that may limit a shipowner's liability should be filed directly against the person whose actions and omissions are the subject matter of the shipowner's liability; such person shall be entitled to exercise all the provisions regarding liability limitation set for the shipowner unless the damage is proven to have been caused intentionally.

Shipowners' liability limits are determined by Clause 352 of the MSC and set in units of account depending on vessel capacity. The higher the capacity is, the higher the shipowner's liability limit will be; there are, however, exceptions to when liability limits apply, such as claims regarding general average contributions, or 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

In 2011 Ukraine finally ratified the 1952 Brussels Convention, which took effect on 16 May 2012. Based on this convention, certain amendments were made to the procedural codes under the law of Ukraine on Amendments to Certain Legislative Acts of Ukraine on Determining Jurisdiction over Ship Arrest Cases, which legalised ship arrest in Ukraine under maritime claims, and had, it seemed, 'cut the Gordian knot' forever. Nearly two years of practical application of this law has led, however, to the conclusion that vessel arrest in Ukraine is still as complicated and painstaking a process as it ever was, but the problems are now rooted in different causes, for example:

a violation by the courts of subject matter jurisdiction rules;⁹

9 www.reyestr.court.gov.ua/Review/36054350.

- b* disregard of the rules of substantive law to be applied to existing legal relationships;¹⁰ and
- c* application of rules that do not cover such legal relationships.¹¹

Nevertheless, in order to arrest a ship, the creditor must approach the court at the location of the sea port at which the ship is situated or at the place of ship's registration port. Unfortunately, the legislator did not make sufficient procedural legislative 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 further hearings on the merits by the same court.

The detention of ships in Ukraine falls within the competence of the harbour master (see below) and is carried out through the issuance of an order upon the request of the person, the port or the Ministry of Environment, with the maritime claim. An order of the captain of the sea port on the detention of the ship or cargo on maritime claims is valid for three days. If, within a specified period, the judgment or a decision of the MAC to impose an arrest on a ship or cargo is not issued, the vessel is subject to an immediate release.

The ship is considered property of a debtor and can be arrested to secure any claim, regardless of its nature. Sister ship arrest is therefore permissible.

ii Court orders for sale of a vessel

In Ukrainian jurisdiction judicial sale of vessel is performed by the state executive service of Ukraine. This procedure is regulated by the Law of Ukraine on Enforcement Proceedings of 21 April 1999 No. 606-XIV, the Regulation on Ensuring the Enforcement of Court Rulings approved by the Order of the Ministry of Justice of Ukraine, 2 April 2012 No. 512/5, Provisional Regulations on Public Auction Procedures for the Sale of Seized Real Estate of 1999 and the Seized Real Estate Sale Procedure of 1999.

According to Part 181, Clause 1 of the Civil Code, a vessel can be treated as moveable property. Under the law, however, the immoveable property regime can be applied to aircraft and sea vessels, inland vessels, spacecraft and other items that require state registration of the rights thereto. In addition to this, Ukraine's Mortgage Law of 2003 states: 'The pledge of aircraft and sea vessels, inland vessels, spacecraft, property rights to real estate under construction will be regulated by the rules prescribed by this Law.' Under Ukrainian legislation – as well as the legislation of most countries – a vessel is treated as moveable property, and the immoveable property regime is applied in respect of a mortgage only.

In practice, however, the judicial sale of a vessel takes place more often as the sale of immoveable property, even if there are no mortgage relationships. For this

10 www.reyestr.court.gov.ua/Review/33451039.

11 www.reyestr.court.gov.ua/Review/33044637.

procedure, the creditor must obtain a writ of execution from the court that issued the decision that is the basis for commencement of the enforcement proceeding.

There is no specific legislative Act that would regulate the judicial sale of a vessel, therefore, the provisions for the sale of seized real estate are used by analogy. In this case, the sale of a vessel is carried out through a public bidding process. Some enforcement officers, however, hold the opinion that the vessel should be sold through an auction (i.e., as moveable property).

Lack of clear regulation creates ambiguous practice but, irrespective of the practice (procedure) used by the state enforcement officer – bids (public auction) for immoveable property or an auction for moveable property – the imperative will always be the same: the satisfaction of the creditor's claims.

VI REGULATION

i Safety

Safety of navigation is an essential part of merchant shipping and an important condition for the protection of human life and the environment. Therefore, SOLAS, in its successive forms, is generally regarded as the most important of all international treaties concerning the safety of merchant ships.¹² It was ratified as long ago as 1974 and entered into force on 25 May 1980, as were the SAR and the STCW Conventions.

The following are the national laws and regulations that govern the safety of navigation:

- a* the MSC;
- b* the Law of Ukraine on Sea Ports of Ukraine;
- c* the Sectoral Programme of Navigation Safety in 2014–2018, approved by the Order of Ministry of Infrastructure on 26 June 2013; and
- d* the secondary legislation of the Ministry of Infrastructure and the State Inspection of Ukraine concerning security of maritime and river transport.

Ukrmorrichinspektsiya is the authority providing the implementation of state policy in the field of safety concerning maritime and river transport. The Ukrainian Sea Ports Authority, the captains of the various sea ports and port security are the authorities enforcing the safety of navigation at sea ports. The Sectoral Programme of Navigation Safety implements the international conventions.

In terms of statistics, in 2012 the total number of emergency events in maritime and river transport (including small fleet) fell by one-third, from 72 emergency events in 2011 to 50 in 2012, and a drop in 2013 in the number of emergency events to 40 was also observed (i.e., to 20 per cent). This fall was also observed (i.e. in the first quarter of

12 [www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-\(SOLAS\),-1974.aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS),-1974.aspx).

this year (five emergency events in 2014 as opposed to six in the corresponding quarter of the previous year).¹³

ii Port state control

There was a significant reform of the port state control system in the connection with the introduction of the Law of Ukraine on the Sea Ports of Ukraine in 2013. As a result, the organisation of navigation in water areas of the seaport is based on the separation of functions to ensure safe navigation and supervision (monitoring) of navigation safety.

Ukrmorrichinspektsiya provides the supervision of maritime safety of the water area of sea ports and outside the relevant territory. The Ukrainian Sea Ports Authority is the state enterprise established by legislation that ensures the functioning of sea ports, the maintenance and usage of port infrastructure under state ownership, and the performance of other tasks assigned to it directly or through its affiliates, formed in each sea port. The harbour master heads the Seaport Captain's Service at each sea port, part of the Ukrainian Sea Port Authority.

Ukraine is not a member of the Paris MoU, but its removal from the black list to the grey list¹⁴ was an important event for the country. Ukraine is, however, a member of the Black Sea MoU.

iii Registration and classification

The MSC and 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 (1997) are the main national statutory instruments governing the registration of merchant ships in Ukraine. The registration of a ship in Ukraine entails entering data on a ship into the State Ships Registry of Ukraine or the Vessel Register of Ukraine, and then obtaining a licence or a vessel's certificate. The state registration of sea vessels is carried out by the harbour master, and the state registration of river vessels and the vessels not supervised by a classification society is carried out by Ukrmorrichinspektsiya. Also, based on a written statement from the shipper, a vessel chartered by bareboat charter contract may be temporarily registered.

Besides the registration of vessels, maritime mortgage records of vessels can also be entered into the aforementioned registries. The legal regulations of the contracts of maritime mortgages are the MSC, the Maritime Liens and Mortgages Convention, the Law of Ukraine on Mortgages, etc. In accordance with the MSC, a contract of mortgage has to be notarised at the place of registration of the vessel.¹⁵

The technical supervision of sea vessels and their classification is performed by the classification society chosen by the shipowner.¹⁶ The carrying out of the technical

13 <http://sismit.gov.ua/do-tretjoji-richnytsi-utvorenniya-derzhavnoji-inspektsiji-ukrajiny-z-bezpeky-na-morsjkomu-ta-richkovomu-transporti.aspx>.

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

15 www.reyestr.court.gov.ua/Review/12458147.

16 Clause 22 of the MSC.

supervision of vessels that have the right to fly the flag of Ukraine, with the processing of the relevant documentation on behalf of the government, is entrusted to such classification societies as the Shipping Register of Ukraine,¹⁷ the American Bureau of Shipping, Bureau Veritas, Bureau Veritas, the Hellenic Register of Shipping, Det Norske Veritas and Germanischer Lloyd.^{18,19} 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 of Ukraine 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. Due to widespread abuse, however, some companies choose to avoid, when chartering vessels, putting into the ports of Ukraine after such incidents as the company Maersk Tankers recently underwent.²⁰ Transship LLC faced a similar problem, but appealed to the court, which successfully defended their interests.²¹

This long-standing problem was very nearly resolved recently when the State Administration of Ukraine for Regulatory Policy and Entrepreneurship Development (State Entrepreneurship) established the illegality of some orders in the field of marine environmental protection, for example, ballast water discharge practices. This decision was appealed by the Ministry of Ecology and Natural Resources to the Ministry of Economic Development and Trade, which, unfortunately, upheld the appeal,²² and so the situation returned to its original state. At the end of April 2014, however, the State Entrepreneurship held a meeting with business associations and economic entities in the field of the transportation by sea, law firms, institutions of civil society and the media. During this meeting the authority decided to insist on the abolition of illegal subordinate legislation of the State Environmental Inspectorate. As things stand, therefore, the problem hangs in the air and requires further regulation.

17 The resolution of the Cabinet of Ministry of Ukraine on Improving the Technical, Classification and Shipping Supervision on Sea and River Transport, 8 June 1998.

18 The regulation of the Cabinet of Ministry of Ukraine on the Technical Supervision of Ships Entitled to Fly the Flag of Ukraine, 6 March 1996.

19 DNV GL was formed in September 2013 by the merger between Det Norske Veritas and Germanischer Lloyd.

20 http://polpred.com/?ns=1&ns_id=822386.

21 www.reyestr.court.gov.ua/Review/28210435.

22 www.dkrp.gov.ua/info/3367.

v Collisions, salvage and wrecks

The MSC, the Law of Ukraine on Sea Ports of Ukraine, the Colregs, the Search and Rescue Convention 1979 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.

In the event of a collision between vessels, only real (direct) losses are subject to reimbursement.²³ When a collision occurred in Port Yuzhnyi between the vessels *Laconic* and *Panagia Stenion* on 6 December 2013,²⁴ Phaeton International Company SA, the charterer of the latter vessel, filed a lawsuit with the court for damages for lost profits in connection with the inability to use the vessel under the remaining terms of the charter contract; there was, however, no evidence provided that the collision occurred due to the fault of the vessel *Laconic*, so the court rejected the claim and dismissed the case.²⁵

According to the provisions of the MSC, the owner of the property that has sunk should inform the master of the nearest sea port of Ukraine of its intention to retrieve this property, and to carry out such work only with his or her permission. If, however, the property that has sunk presents a direct threat to the safety of navigation, life or health, or the environment, the sea port's administration is entitled to take the necessary measures for its immediate lifting or destruction at the cost of the owner. 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. The Commercial Court of the Crimea, however, in its decision of 12 December 2013 in the case of the flooding of the fishing vessel *Rybak Donbassa* belonging to LLC Batista (Georgia), found that as the owner was not properly notified of the event, the property had become state property unreasonably and the court ruled that the Kerch sea port of Kamysh-Burun should compensate the owner up to the residual value of the property evaluated by experts.²⁶

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 legislation applies to the carriage of passengers and luggage if a ship is flying 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 of carriage of passengers

23 Article 297 of the MSC

24 www.rooselaw.co.uk/Roose+Partners%20Casualty%20Newsletter%20-%20Edition%2039%20-%202011%20December%202013.pdf.

25 <http://reyestr.court.gov.ua/Review/36225290>.

26 <http://reyestr.court.gov.ua/Review/36092298>.

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 to carry with them free of charge one child under six years of age, to buy tickets at a reduced price for children aged between six and 14 years, to carry cabin luggage within the established norms free of charge, etc. The passenger also has 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 contract of carriage by sea or the sea cruise contract and to get back the fare and the fee for baggage carriage.²⁷

The passenger is the subject of compulsory insurance against accidents in accordance with the laws of Ukraine. 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.

vii Seafarers' rights

The Labour Code of Ukraine, the Law of Ukraine on Labour Protection, etc. form the basis of the legal regulation of seafarers' labour in Ukraine. Also, the rights of seafarers are governed by the MSC. In addition, Ukraine is a party to a number of ILO Conventions including the Merchant Shipping (Minimum Standards) Convention (1976), the STCW Convention, the Repatriation of Seafarers Convention (1926) and the Medical Examination (Seafarers) Convention No. 73 (1946).

Currently, the issue of the ratification of the Maritime Labour Convention 2006, which entered into force in 2013, is a key issue for Ukraine. The Ministry of Infrastructure of Ukraine is preparing a package of documents for the ratification of this convention by Ukraine, and the relevant draft has been prepared by the Cabinet Ministers of Ukraine.²⁸ Although the convention has not been ratified by Ukraine, a large number of provisions of Ukrainian legislation meet its requirements and standards.

In Ukraine there is no special procedure for compliance with the labour standards of seafarers in port. Further, the Labour Code of Ukraine does not contain any requirements for the content of the employment contract and nor does it obligate 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 according to the Ukrainian legislation that obliges shipowners to insure such liability in the State Social Insurance Fund against accidents. There are, however, exceptions when state insurance does not cover the liability of shipowners, a prominent example of this was the case connected with the collision of the vessel *Naftogaz-67*, belonging to SJSC Chornomornaftohaz (Ukraine), with the bulk carrier *Yaokhai* (China) in the South China Sea in 2008, which

27 Article 190 of the MSC.

28 www.mtu.gov.ua/uk/news/39685.html.

resulted in the death of 18 Ukrainian seafarers.²⁹ Eventually, in 2013, the claims of the families were settled by the P&I club of the shipowner by paying them compensation in accordance with the international standard of the International Transport Workers' Federation, which is much lower compared with the Chinese legislation, but higher than which they would have been granted by the Ukrainian courts.

VII OUTLOOK

The shipping industry has developed in Ukraine since its independence with varying levels of success, but in recent years it has undergone profound changes, particularly the adoption of the Law on the Sea Ports of Ukraine, and a number of pieces of subordinate legislation for the carriage of the statutory provisions finally being adopted at legislative level; also the ratification of the Brussels Convention made it possible to arrest foreign vessels in Ukrainian jurisdiction.

Port reform has created favourable conditions for operators and shippers in order to attract private investors and it has reorganised the port state control system. Many problems, however, remain unresolved: a number of shortcomings in carrying out port reform, the dominance of bureaucracy, supervising authorities and corruption, the lack of adequate legal guarantees to protect the rights and interests of investors, the difficult economic situation in the country, and the strict customs and tax climate.

To improve the international standing of Ukraine as a maritime state, various mechanisms are planned for, *inter alia*, the effective implementation of port reform, the development of concession documents to transfer ownership of terminals legally to private investors, an improvement in the performance of the Ukrainian Sea Ports Authority, development of an International Register of Shipping of Ukraine, and the creation of favourable conditions for the registration of ships under the Ukrainian flag.

29 www.mtu.gov.ua/ru/news/6334.html.

Appendix 1

ABOUT THE AUTHORS

VAGIF MALLAYEV

Lexcellence Law Firm

Vagif Mallayev is head of the firm's shipping, international trade and insurance arm. He has been involved in a wide range of both dry and wet shipping disputes on the side of P&I clubs and owners. His broad experience in dry shipping includes charterparties, bills of lading, shipbuilding, and he also has experience of handling claims in the wet side: collision, general average, personal injury and loss of life and pollution. Mr Mallayev is an attorney at law, a member of the Ukrainian National Bar Association, the Odessa Bar Association and the International Bar Association. Before practising law his career included seven years in the insurance sector. He graduated from the faculty of law (LLB) of the Odessa Mechnikov National University, the faculty of psychology (LLM) of the International Academy for Psychology in St Petersburg and postgraduate study in taxation at the School of Business and Administration in Warsaw.

VICTORIA KONOGRAI

Lexcellence Law Firm

Victoria Konograi is an associate at Lexcellence, where she is a member of the firm's shipping practice. She studied for her master of laws at the Odessa National Academy of Law in 2010 and has also passed one-year international business and management training courses at Hanze University of Applied Sciences (Netherlands) in 2012. Her practice encompasses a wide variety of shipping matters, including personal injury and loss-of-life claims, cargo claims and ship arrest. Ms Konograi is fluent in Ukrainian, Russian and English.

INGA DROBINOVA

Lexcellence Law Firm

Inga Drobinova is an associate at Lexcellence, where she is a member of the firm's shipping and litigation practices. Her practice encompasses a wide variety of shipping and litigation matters, including personal injury and loss of life claims, ship arrest and pollution.

Ms Drobinova studied for her master of laws at the Odessa National Academy of Law in 2013. She has had more than 40 articles published in various Ukrainian law magazines, and is fluent in Ukrainian, Russian and English.

LEXCELLENCE LAW FIRM

Business Center Morskoy-2

11 Polskiy spusk, 9th Floor, office #5

Odessa 65026

Ukraine

Tel: +38 48 737 7931

Fax: +38 48 737 7932

v.mallayev@lexcellence.com.ua

www.lexcellence.com.ua