

THE SHIPPING LAW
REVIEW

FOURTH EDITION

Editors

George Eddings, Andrew Chamberlain and
Rebecca Warder

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The Shipping Law Review

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This article was first published in The Shipping Law Review, - Edition 4
(published in June 2017 – editors George Eddings, Andrew Chamberlain and
Rebecca Warder)

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
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Enquiries concerning editorial content should be directed
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ISBN 978-1-910813-65-2

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

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EDITORS' PREFACE

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

As with previous editions, we begin with cross-jurisdictional chapters looking at the latest developments in important areas for the shipping industry: competition and regulatory law, sanctions, ocean logistics, piracy, shipbuilding, ports and terminals and environmental issues. We once again feature marine insurance and examine the significant legislative changes that have come into force since our last edition was produced. A new chapter on offshore shipping is also included, which seeks to demystify the complex contractual relationships within the sector.

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 regimes 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 are also examined, and contributors set out the current position in each jurisdiction. The authors have then looked forward and 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 once again reflect that.

The current financial climate remains a challenge for the industry, but forward-looking shipping companies are innovating to get ahead. For example, companies are increasingly

using big data to maximise profit, including by making their fleets as fuel-efficient as possible and looking to new technology to reduce costs. There have been interesting developments in relation to direct freight booking with owners via online platforms and the launch of new 'green' maritime tech, which has the potential to cut fuel costs and reduce emissions.

In the past year air emissions control has continued to be significant for the industry. This is expected to continue in the coming year, with confirmation at the IMO's Marine Environment Protection Committee 70 that the new, more stringent limit for fuel sulphur content of 0.5 per cent will come into force from 2020. In June 2017, the IMO's new Working Group on Reduction of GHG Emissions from Ships meets against the background of calls from the European Commission Climate Actions Directorate (ECAD) for the IMO to set a target within 2017 for lower maritime emissions. There is also an ECAD proposal for an EU Emissions Trading Scheme for shipping to be launched by 2023.

Regulatory challenges of other kinds also continue to preoccupy the sector. The Ballast Water Management Convention is in force from 8 September 2017, and it has been estimated compliance could cost the industry in the region of US\$100 billion. In light of the change of US administration, the sanctions landscape is more complex and uncertain than ever before and the change of leadership in the US has also impacted on crewing, with issues for operators with crew members potentially affected by stricter immigration controls.

The UK's projected exit from the European Union is another key development. The UK triggered Article 50 in March 2017, beginning the process to leave the EU in March 2019. There have been concerns about enforcement of English judgments and arbitration awards. However, the majority of shipping contracts globally will almost certainly continue to be governed by English law, as Brexit will not significantly affect enforceability. Arbitration awards will continue to be enforceable under the New York Convention, and it is likely that reciprocal EU–UK enforcement of court judgments may also be agreed.

Since our last edition there have been significant changes to the English law of marine insurance. The Insurance Act 2015 came into force on 12 August 2016 and reformed areas including disclosure by policyholders and their agents, warranties and insurers' remedies for fraudulent claims. The Enterprise Act 2016, in force from May 2017, has now introduced liability for insurers if claims are not paid within reasonable time. These changes have generally been welcomed by policyholders.

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 continue to provide a useful source of information for those in the industry handling cross-jurisdictional shipping disputes.

George Eddings, Andrew Chamberlain and Rebecca Warder

HFW

London

June 2017

PHILIPPINES

*Valeriano R Del Rosario, Maria Theresa C Gonzales, Daphne Ruby B Grasparil
and Jennifer E Cerrada¹*

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

There are two sides to the Philippine shipping industry, and both can only be described in superlative terms. The Philippines is an archipelagic country of over 7,000 islands and so shipping provides a vital link throughout the country. The domestic shipping industry, however, is probably best remembered for the ill-fated collision between the passenger ferry Doña Paz and the petroleum product tanker, Vector, which happened on 20 December 1987 and resulted in over 4,000 deaths – the worst disaster at sea in peacetime. As could be expected, it spawned numerous litigations in the Philippines and the United States. In 2014, the Philippine domestic fleet consisted of 20,280² registered vessels, which moved people and cargo throughout the Philippine archipelago.

On the international side, the Philippines is the largest provider of seafarers to the world's merchant marine fleet. In fact, the Philippines provides over 30 per cent of the world's seafarers.³ In 2015, the Philippines deployed 406,531 seafarers internationally⁴ and the number is projected to grow each year. In 2016, the Philippines earned over US\$26.899 billion⁵ from overseas Filipino workers and, of that total, over US\$5.6 billion came from Filipino seafarers employed by the world's merchant marine fleet.⁶ In 2016, the remittances of overseas Filipino workers constituted 9.8 per cent of the Philippines' GDP.⁷

The largest port in the Philippines is Manila, which is located on the island of Luzon in the northern part of the country. In the central Philippines, the Philippines' second-largest city, Cebu, serves as the main hub for the distribution of goods within the central islands of the country. Davao and Cagayan de Oro are the major ports in the southern Philippines' island of Mindanao, which is largely the source of Philippine agricultural exports.

1 Valeriano R Del Rosario, Maria Theresa C Gonzales and Daphne Ruby B Grasparil are partners, and Jennifer E Cerrada is a managing associate at VeraLaw (Del Rosario Raboca Gonzales Grasparil).

2 Maritime Industry Authority data as of June 2014. www.marina.gov.ph/infosys/1st%20sem_ves2014_web.pdf.

3 Lucas, 'Seafarers' Day: PH is world's manning capital', *Philippine Daily Inquirer*, 12 April 2017, <http://globalnation.inquirer.net/125167/seafarers-day-ph-is-worlds-manning-capital>.

4 Philippine Overseas Employment Administration, 'Compendium of OFW Statistics', available at www.poea.gov.ph/ofwstat/compendium/2015.pdf.

5 Bangko Sentral ng Pilipinas statistics, available at www.bsp.gov.ph/statistics/keystat/ofw2.htm.

6 Bangko Sentral ng Pilipinas statistics, available at www.bsp.gov.ph/statistics/spei_pub/Table%2011.pdf.

7 De Vera, 'OFW remittances hit record high in 2016', *Philippine Daily Inquirer*, 12 April 2017, <http://business.inquirer.net/224635/ofw-remittances-hit-record-high-2016>.

In 2016, the Philippines imported US\$81,159 million (free on board (FOB) value) worth of goods, while at the same time exporting goods worth US\$56,232 million (FOB value).⁸ This trade is almost entirely dependent on shipping, which is the vital link between the islands of the Philippines and the rest of the world.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The Philippines is a civil law country. The New Civil Code of the Philippines,⁹ which was enacted in 1949, was based on the Spanish Civil Code, but it is written in English rather than Spanish. The Philippines is no longer a Spanish-speaking country, so all enacted laws are in English and court proceedings are also conducted in English. The Philippines also has a Code of Commerce, which is again based on the Spanish Code of Commerce 1885. The Law on Obligations and Contracts is part of the New Civil Code, while the rules on domestic carriage of goods are set out in both the New Civil Code and the Code of Commerce. The latter also provides for the law on charterparties, collision and general average. Salvage is covered under a special law.

The Philippines also follows the system of judicial precedents and therefore the decisions of the Philippine Supreme Court, written in English, interpreting the provisions of the Civil Code, Code of Commerce and other legislation, have the force of law. For the carriage of goods to and from Philippine ports in foreign trade, the Philippines adopted the United States Carriage of Goods by Sea Act of 1936¹⁰ (the Philippine COGSA), which is basically the Hague Rules.

As mentioned above, the Philippines is a major provider of seafarers to the world's merchant marine fleet. More recent shipping-related legislation has tended to be with regard to overseas Filipino workers. As a result, on the 13 March 2014, the Philippine Congress enacted the Republic Act 10635,¹¹ which established the Maritime Industry Authority (Marina) as the single maritime administration responsible for the implementation and enforcement of the STCW Convention, as amended, and the international agreements or covenants related thereto.

8 Philippine Statistics Authority, 'National Quickstat – March 2017', available at <https://psa.gov.ph/statistics/quickstat>

9 An Act to ordain and institute the Civil Code of the Philippines [Civil Code], Republic Act No. 386 (1950).

10 Carriage of Goods by the Sea Act [COGSA], Public Act No.521 (1936).

11 An Act establishing the maritime industry authority (Marina) as the single maritime administration responsible for the implementation and enforcement of the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, as amended, and international agreements or covenants related thereto, Republic Act 10635 (2014).

III FORUM AND JURISDICTION

i Courts

Jurisdiction of courts

The Philippine courts' jurisdiction over shipping disputes is determined by law. Under the Judiciary Reorganization Act of 1980 (BP 129), as amended by Act No. 7691,¹² the regional trial courts have exclusive original jurisdiction over admiralty and maritime matters.

An interesting jurisdictional issue was dealt with in *Negros Navigation Co Inc v. Court of Appeals*¹³ and *Tsuneishi Heavy Industries (Cebu) Inc (THI) v. Negros Navigation Co Inc*¹⁴. THI commenced an action to enforce a maritime lien for ship repairs with the Regional Trial Court of Cebu (Cebu RTC) against the properties of Negros Navigation Co Inc (NNC). NNC subsequently commenced rehabilitation proceedings with the Regional Trial Court of Manila (Manila RTC) and prayed for the suspension of payments. The Manila RTC issued a stay order of all claims against NNC. Meanwhile, the Cebu RTC issued an arrest for NNC's vessels in the *in rem* aspect of the case. NNC sought the suspension of the proceedings in Cebu on account of the stay order issued by the Manila RTC. The appellate court restrained the implementation of the Manila RTC stay order. The Supreme Court overruled the argument of THI that the Manila RTC divested the Cebu RTC of jurisdiction acting as an admiralty court when it issued the stay order, but affirmed that the maritime lien must be upheld notwithstanding NNC's rehabilitation proceedings. The Supreme Court ruled that:

[t]he Manila RTC acting as a rehabilitation court merely suspended the proceedings in the admiralty case in the Cebu RTC. It did not divest the Cebu RTC of its jurisdiction over the maritime claims of THI against NNC. The preferred maritime lien of THI can still be enforced upon the termination of the rehabilitation proceedings, or if such be unsuccessful, upon the dissolution of the corporation.

Limitation period

Actions based on written contracts have to be filed within 10 years of the time the cause of action occurred, and four years in a case of quasi-delict, which is similar to tort under common law.

The 10-year prescriptive period is applied to contracts of carriage of goods by sea in domestic trade, but not to cases covered by the Philippine COGSA. In particular, Section 3(6) of the Philippine COGSA provides that the carrier is discharged from liability for loss or damage of the goods unless suit is brought 'within one year after delivery of the goods or the date when the goods should have been delivered'. However, the period of time during which the goods have been discharged from the ship and given to the custody of the *arrastre*¹⁵ operator is not covered by the Carriage of Goods by Sea Act. The *arrastre* operator cannot invoke as a defence that the suit was instituted beyond the one-year limitation period.¹⁶

12 An Act expanding the jurisdiction of the metropolitan trial courts, municipal trial courts and municipal circuit trial courts, amending for the purpose Batas Pambansa, Blg 129, otherwise known as the 'Judiciary Reorganisation Act Of 1980', Act No. 7691 (1994).

13 GR No. 163156, 10 December 2008.

14 GR No. 166845, 10 December 2008.

15 'Arrastre' is a Spanish word but is defined in the Philippines as 'the operation of receiving, conveying, and loading or unloading merchandise on piers or wharves'. Merriam-Webster.com, www.merriam-webster.com/dictionary/arrastre.

16 *Insurance Company of North America v. Asian Terminals*, G.R. No. 180784, 15 February 2012.

ii Arbitration and ADR

An international commercial arbitration concerning the carriage of goods or passengers by air, sea, rail or road, where the seat of arbitration is in the Philippines, shall be governed by the Model Law, as provided in Republic Act 9285 and its Implementing Rules and Regulations. Before the constitution of an arbitral tribunal, a party may request interim or provisional relief from the court. After the constitution of an arbitral tribunal or during the arbitration proceedings, the request may be directed to the court only to the extent that the arbitral tribunal has no power to act or is unable to act effectively. The provisional relief may be granted in any of the following instances: (1) to prevent irreparable loss or injury; (2) to provide security for the performance of any obligation; (3) to produce or preserve any evidence; or (4) to compel any other appropriate act or omission.

A party to an international commercial arbitration may petition the regional trial court for the recognition and enforcement of the international commercial award in accordance with Rule 12 of the Special Rules of Court on Alternative Dispute Resolution.

A party to a foreign arbitration may likewise petition the regional trial court to recognise and enforce the foreign arbitral award, which shall be governed by the 1958 New York Convention.

A foreign corporation not licensed to do business in the Philippines may seek recognition and enforcement of the foreign arbitral award in accordance with the provisions of the Alternative Dispute Resolution Act of 2004.

IV SHIPPING CONTRACTS

i Shipbuilding

Recognising that shipping is a necessary infrastructure and that the shipping industry plays a vital role in the country's economic development, the Philippine Congress has passed a law¹⁷ granting certain incentives to domestic or foreign corporations wishing to engage in shipbuilding within the country. Among the incentives granted¹⁸ is the tax-free importation of capital equipment to be used in the construction or repair of any vessel.

As of 2014, the Philippines ranked as the fourth-largest shipbuilding nation in the world in terms of newbuild completion volume (following South Korea, China and Japan). This was mainly attributable to the presence of industry heavyweights like Tsuneishi Heavy Industry of Japan (which owns and operates a shipyard in Balamban, Cebu) and Hanjin Heavy Industries of Korea (which owns and operates a shipyard in Subic Bay, Olongapo).

With respect to shipbuilding contracts entered into with Marina-accredited Philippine shipyards, there is no specific law governing the same. As such, they are governed by the general rules on contracts under the New Civil Code, which recognises freedom of contract. Title (as well as risk) to the vessel is passed from builder to buyer upon signing of a protocol of delivery and acceptance. With respect to dispute resolution, the parties are also free to stipulate their preferred mode. Ordinarily, parties opt for arbitration.

17 An Act promoting the development of Philippine domestic shipping, shipbuilding, ship repair and ship breaking, ordaining reforms in government policies towards shipping in the Philippines and for other purposes [Domestic Shipping Development Act of 1994], Act No. 9295 (1994).

18 *Ibid.*, Chapter V, Section 14.

In practice, local counsel are able to assist foreign owners, buyers or banks (in cases where ship financing is involved) in the actual delivery of the vessel at a Philippine shipyard by having pre-agreed forms of the delivery documents and an appropriate power of attorney. Communication between a foreign owner, buyer or banks with local counsel is made easier when done through electronic means. In cases where ship financing is involved, the mortgage is usually pre-positioned at a foreign registry to be registered upon confirmation by local counsel that the protocol of delivery and acceptance has been signed.

ii Contracts of carriage

The New Civil Code, the Code of Commerce and the Philippine COGSA apply to contracts of carriage by water. The Code of Commerce and special laws apply in matters not regulated by the New Civil Code¹⁹ while the Philippine COGSA applies to the carriage of goods by sea to and from Philippine ports in foreign trade.

The Philippines has not adopted the Hague-Visby Rules, the Hamburg Rules or the Rotterdam Rules.

The New Civil Code requires extraordinary diligence in the carriage of goods by common carriers,²⁰ while in the Philippine COGSA,²¹ the carrier is only bound to exercise due diligence. For private carriers of goods by water under the Code of Commerce, the requirement is only ordinary diligence.²²

Under the Ship Mortgage Decree, maritime liens are exercised through an action *in rem*.

With regard to the shipowner's lien on the cargo for unpaid freight,²³ the lien can be exercised only as long as it has possession. Once the cargo is unconditionally delivered to the consignee at the port of destination, the shipowner is deemed to have waived the lien.

Under Republic Act No. 10668²⁴ promulgated on 28 July 2014, foreign vessels are now allowed to transport and co-load foreign cargoes for domestic transshipment. The Carriage of Goods by Sea Act and not the Civil Code applies in the determination of the liability of the foreign vessel for the loss of, or damage to the goods carried on board the vessel. Foreign vessels engaging in carriage conducted in accordance with Republic Act No. 10668 are neither considered common carriers with the duty to observe extraordinary diligence in the transportation of goods nor are they considered as offering public service as to fall under the provisions of the Domestic Shipping Development Act of 2004.

iii Cargo claims

There are two sets of rules for cargo claims in the Philippines. For cargo claims arising out of domestic carriage, meaning the carriage of cargo between the islands, the rules are stated in the Code of Commerce and the New Civil Code. For international carriage of goods, the applicable rules are set out in the Philippine COGSA.

For domestic carriage, notice of loss or damage to the goods must be provided by the cargo owner to the carrier within 24 hours of delivery of the goods. The 24-hour notice is a

19 Civil Code, Article 1766.

20 Ibid., Article 1753.

21 COGSA, Section 3(1).

22 See Code of Commerce, Article 362.

23 *Ouano v. Court of Appeals*, 211 SCRA 740 (1992).

24 An Act Allowing Foreign Vessels to Transport and Co-Load Foreign Cargoes for Domestic Transshipment.

condition precedent and provided such notice is given, the cargo owner has 10 years within which to sue for the loss and damage to cargo. The duty of care for common carriers is set out in the New Civil Code and the threshold is very high: extraordinary diligence. Through judgments of the Supreme Court over the past 20 years, the lines between private carriers and common carriers have been blurred to the point of being almost indistinguishable: all cargo claims against carriers are treated as if they are common carriers. Common carriers only have three defences available and they are force majeure, inherent fault and defects in the packaging.

For the international carriage of goods to and from the Philippines in foreign trade, the carrier's liability is based on the Philippine COGSA; however, the Philippine Supreme Court judgments have imposed a high threshold of care on common carriers, and the COGSA defences are being ignored. In the case of *Planters Products v. Court of Appeals*,²⁵ which involved a cargo of fertiliser from an overseas port to the Philippines, the Philippine Supreme Court applied the common carrier rules to the ship and that precedent has been reiterated in subsequent Supreme Court judgments. As a result of the *Planters Products* case and those that followed, the liability regime stated in the Philippine COGSA is more often disregarded by Philippine courts in favour of the common carrier regime. The only constant from the Philippine COGSA that is applied by Philippine courts is the limitation amount of US\$500 per package or customary freight unit.

As far as demise clauses are concerned, is it unlikely that such clauses would be recognised in the Philippines. In judgments that followed the Doña Paz tragedy, there is an indication of how the Philippine Supreme Court would deal with a demise clause. The product tanker Vector had been chartered by Caltex Philippines. The owner of the passenger ferry Doña Paz sought indemnity from Caltex Philippines. The Philippine Supreme Court's judgment favoured Caltex Philippines²⁶ and ruled that as the voyage charterer, Caltex was not required to indemnify the ferry owner for payments made to the loss-of-life claimants and went on to say that a voyage charterer has the right to presume that the ship was seaworthy. Based on these judgments by the Philippine Supreme Court, it is unlikely that a demise clause would be enforced by a Philippine court.

As an update, the Supreme Court's 2016 decision in *Designer Baskets Inc v. Air Sea Transport Inc and Asia Cargo Container Lines*²⁷ concerned a situation wherein the unpaid seller sued not only the buyer but also the carrier and its agent for the payment of the value of the goods, and for the release of the goods without the surrender of the bill of lading.

Although the general rule is that upon receipt of the goods, the consignee surrenders the bill of lading, Article 353 of the Code of Commerce provides for two exceptions: when the bill of lading gets lost or for other cause. In either case, the consignee must provide a receipt to the carrier for the goods delivered.

In this case, the unpaid seller's retention of the bill of lading coupled with the Indemnity Agreement entered into by the buyer and the carrier resulted in substantial compliance with Article 353 of the Code of Commerce.

In cases of the liability of *arrastre* operators in case of loss or damage of the goods, the Supreme Court decision in *Asian Terminals Inc v. Allied Guarantee Insurance Co Inc*²⁸ is on

25 *Planters Products v. Court of Appeals*, 226 SCRA 476 (1993).

26 See *Caltex Inc v. Sulpicio Lines Inc et al*, GR No. 131166, 30 September 1999.

27 G.R. No. 184513, 9 March 2016.

28 G.R. No. 182208, 14 October 2015.

point. A shipment of 72,322 lbs of kraft liner board was offloaded by the *arrastre*, Marina Port Services Inc (Marina Port Services), the predecessor of petitioner Asian Terminals Inc (ATI). Said goods were shipped on board the vessel M/V Nicole, which was operated by Transocean Marine Inc (Transocean), represented in the Philippines by Philippine Transmarine Carrier Inc (Philippine Transmarine).

After offloading, a total of 158 rolls of the goods were damaged during shipping. An additional 54 rolls were found to have been damaged while in the custody of Marina Port Services and San Miguel's broker, Dynamic Brokerage Co Inc (Dynamic). The insurer, Allied Guarantee Insurance Co Inc (Allied) paid the consignee the value of the damaged goods. Allied sued Transocean, Philippine Transmarine, Dynamic and Marina Port Services for damages.

The trial court held Transocean liable for the 158 rolls of damaged goods for failure to observe the necessary precautions and extraordinary diligence as a common carrier to prevent such damage. Marina and Dynamic were also held liable for the additional 54 rolls of the goods that were damaged while in their respective possessions. This ruling was affirmed by the Court of Appeals.

ATI, as successor of Marina Port Services, elevated the foregoing matter to the Supreme Court, and insisted that it was not liable for the damaged 54 rolls. ATI claimed that the appellate court failed to appreciate the Turn Over Survey of Bad Order Cargoes and the Requests for Bad Order Survey, which, in essence, showed that the goods were received by Dynamic 'in good order and condition without exception' and that only 158 rolls were damaged.

In ruling against ATI, the Supreme Court reiterated the hornbook doctrine that in the performance of its obligations an *arrastre* operator should observe the same degree of diligence as that required of a common carrier and a warehouseman. Accordingly, an *arrastre* operator must prove that the losses were not as a result of its negligence or of its employees, and must prove that it exercised due care in handling the goods. This burden, however, was not established by ATI and it was found that the additional damage of the 54 rolls occurred: (1) while the goods were in its custody of ATI; (2) when they were in transition from ATI to Dynamic; and (3) during Dynamic's custody.

Finally, the Supreme Court disregarded ATI's heavy reliance on the Turn Over Survey of Bad Order Cargoes and the Requests for Bad Order Survey. The Supreme Court said that the signature by a customs broker's representative of 'receipt in good order' does not preclude a consignee or subrogee from proving additional loss or damage to the goods while the same was under the custody, control and possession of the *arrastre* operator.

In relation to the nature of a charter party being determined by the intention of the party and not its nomenclature, the case of *Federal Phoenix Assurance Co Ltd v. Fortune Sea Carrier Inc*²⁹ is informative. In this time charter party agreement entered into by Fortune Sea and Northern Mindanao Transport Co Inc (Northern Transport), the former agreed to lease its vessel M/V Ricky Rey to the latter under a time charter party agreement,

During the term of the agreement, Northern Transport ordered 2,069 bales of abaca fibres to be shipped on board M/V Ricky Rey for delivery. The shipment was insured by Federal Phoenix Assurance Co Ltd (Federal Phoenix).

.29 G.R. No. 188118, 23 November 2015.

While the goods were being discharged, fire razed and damaged 60 bales of abaca, the value of which was paid for by Federal Phoenix to the consignee. Federal Phoenix then demanded damages from Fortune Sea, which the latter ignored. Accordingly, Federal Phoenix filed a complaint for sum of money against Fortune Sea.

In denying liability, Fortune Sea insisted that it was acting as a private carrier at the time the incident occurred. It alleged that the time charter party agreement executed by the parties expressly provided that M/V Ricky Rey shall be under the order and complete control of Northern Transport. The trial court ruled against Fortune Sea, but was reversed by the Court of Appeals, which held that Fortune Sea is a private carrier.

The Supreme Court affirmed the Court of Appeals' ruling and held that Fortune Sea is a private carrier. The Supreme Court declared that the time charter party agreement clearly shows that the charter includes both the vessel and its crew thereby making Northern Transport the owner *pro hac vice* of M/V Ricky Rey during the whole period of the voyage.

M/V Ricky Rey was converted into a private carrier notwithstanding the existence of the time charter party agreement with Northern Transport since said agreement was not limited to the ship, but extends even to the control of its crew. Despite the denomination of a time charter by the parties, their agreement undoubtedly reflected that their intention was to enter into a bareboat charter agreement.

iv Limitation of liability

The limitation of liability in the Philippines is based on the value of the ship and freight at risk. In collision cases, the shipowner is allowed to limit its liability for collision damage and any cargo claim that may arise. As far as cargo claims are concerned, the owner may exercise the right to abandon the ship and freight at risk to cargo interest in order to limit its liability.

The right to limit liability has been curtailed since the Doña Paz tragedy. Before the tragedy, the shipowner could limit liability provided that the owner was not at fault or negligent. Based on the judgment in *Aboitiz v. New India*,³⁰ the new rule is that as long as there is a finding of any kind of unseaworthiness against the vessel, the owner loses the right to limit liability, regardless of whether such unseaworthiness arose through the owner's fault or negligence.

V REMEDIES

i Ship arrest

The procedure equivalent to a ship arrest in the Philippines is through an application for the issuance of a preliminary attachment under Rule 57 of the 1997 Rules of Civil Procedure. For the effective enforcement of the writ of preliminary attachment, the court sheriff should have, previously or simultaneously with the implementation of the writ of attachment, served a copy of the summons upon the person of the defendant in order for the court to acquire jurisdiction upon him or her.

The party applying for a writ of preliminary attachment must provide a bond in favour of the other party to answer for damages in the event of a wrongful attachment. The party against whom the attachment was issued may lodge a counter-security to obtain the release of the levied property.

30 *Aboitiz v. New India*, 488 SCRA 563 (2006).

The improper or irregular issuance of a writ of preliminary attachment does not automatically warrant the award of damages. Evidence must be submitted to prove the nature and extent of the injury suffered by reason of the wrongful attachment.

Under the Ship Mortgage Decree, the mortgagor may apply *ex parte* for an order for the arrest of the mortgaged vessel. The applicant must submit a sworn statement that a default in the mortgage has occurred and that the applicant files a bond executed to the adverse party in an amount to be fixed by the judge, not exceeding the applicant's claim, conditioned that the latter will pay all the costs that may be adjudged to the adverse party and all damages that he may sustain by reason of such arrest, if the court shall finally adjudge that the applicant was not entitled thereto.

ii Court orders for sale of a vessel

During the pendency of the action, the vessel subject to a writ of attachment may be sold at a public auction and the proceeds deposited in court to await the judgment in the action upon proof that 'the property attached is perishable, or that the interests of all the parties to the action will be served by the sale thereof'.³¹ In *Shubei Yasuda v. Court of Appeals and Blue Cross Insurance Inc*³² the Supreme Court allowed the sale of the vessel as it had been left to rot at the pier without a crew to guard it and that it was in grave danger of losing its value.

The court may order the sale of the mortgaged vessel in any suit *in rem* in admiralty for the enforcement of a maritime lien other than a preferred maritime lien.

After judgment, the property may be sold at public auction to satisfy the judgment.

VI REGULATION

i Safety

Safety means two things to the Philippines: safety regulations, which are applied to the domestic fleet, and the qualification and certification of Filipino seafarers who work on ships throughout the world's fleet. The safety regulations of both domestic shipping and certificates for seafarers overseas-bound are regulated by two government entities, specifically Marina and the Philippine Coast Guard (PCG).

In domestic shipping, Marina is mandated to set the safety standards of all domestic vessels in accordance with government regulations and conventions,³³ including the implementation and enforcement of SOLAS and to promulgate rules and regulations to ensure compliance with these standards. To verify that the required safety standards are met, Marina is empowered to inspect vessels and all equipment on board³⁴ and to accordingly impose penalties and fines, and suspend or revoke certificates of public convenience or other licences.³⁵ In June 2008, Sulpicio's Princess of the Stars capsized and of the reported 851 passengers onboard, only 32 survived. The relatives of the victims filed an administrative

31 The Ship Mortgage Decree of 1978, Presidential Decree No. 1521 (1978), Section 11.

32 *Yashuda v. Court of Appeals*, 300 SCRA 385 (2000).

33 Act No. 9295, Section 10(6). Marina is also in charge of issuing, *inter alia*, certificates of public convenience for operation of all domestic vessels, special permits for international vessels operating in the Philippine territory and certificate of inspection. With Marina's power to issue these permits or certificates also comes the power to revoke same.

34 *Ibid.*, Section 10(8).

35 *Ibid.*, Section 10(16).

complaint with Marina, and on 23 January 2015, Sulpicio, which also owned and operated the Doña Paz, was prohibited from carrying/transporting passengers. On the international front, Marina was previously responsible only for keeping the registry of Filipino seafarers and issuance of their seaman books. Its role was recently expanded in view of the Philippine legislature's enactment of Act No. 10635,³⁶ which effectively designated Marina as the single and central maritime administration tasked with ensuring effective implementation and compliance with the STCW Convention. In line with this, Marina adopted rules in administrative investigation of Filipino seafarers holding management and operational functions for acts or omissions involving violation of the Code of Ethics of Marine Deck/Engineer Officers and rules issued by Marina.³⁷

The PCG, on the other hand, is responsible for the enforcement of regulations for both domestic and international shipping relating to all relevant maritime conventions, treaties and national laws to ensure safety of life at sea within Philippine territory. The PCG also has authority to inspect merchant ships and vessels, including but not limited to inspections before departure to verify compliance with all the rules and safety standards.³⁸

ii Port state control

The Philippine Coast Guard Law of 2009 vested the PCG with the authority, *inter alia*, to enforce regulations pertaining to maritime international convention, treaties, national laws, rules and regulations for the promotion of safety of life and property at sea within the maritime jurisdiction of the Philippines; to implement port state control; to conduct vessel inspections; and to detain ships that do not comply with safety standards.

Memorandum Circular No. 01-00³⁹ was promulgated to ensure the effective implementation of the PCG's port state control functions. This Memorandum Circular applies to all foreign-flagged vessels engaged in the international trade calling at any Philippine port. The Memorandum Circular does not apply to ships of war, troop ships, government vessels not engaged in trade, fishing vessels and pleasure yachts not engaged in trade.

iii Registration and classification

Only ships registered on the Register of Philippine Ships of Marina may fly the Philippine flag or trade within Philippine waters.⁴⁰ The rules on registration apply regardless of the size of ship or use thereof, regardless of whether the ship is with or without power, and excluding only warships and naval ships, PCG ships, rubber craft and ships of foreign registry temporarily used in Philippine waters under special permit. All ships wishing to ply Philippine waters must apply for and be granted a certificate of Philippine registration and a certificate of ownership by Marina. Ships registered with Marina may also be deleted from

36 The Implementing Rules and Regulations of RA 10635 were published in the Philippines' Official Gazette on 13 March 2014 and were deemed effective 15 days after publication.

37 STCW Circular No. 2015-11 issued by the Marina on 22 July 2015.

38 An Act establishing the Philippines Coast Guard as an armed and uniformed service attaches to the Department of Transportation and Communications, thereby repealing Republic Act No. 5173, as amended, and for other purposes [Philippines Coast Guard Law of 2009], Act No. 9993, Section 3 (2010).

39 Port State Control, Philippine Coast Guard Memorandum Circular No.1, Series of 2000 (28 September 2000).

40 Marina Circular No. 2013-02 (pursuant to Presidential Decree No. 474, Executive Order No. 125, Act No. 9295 and the Philippine Merchant Marine Rules and Regulations of 1997) (18 January 2013).

the Register by the owner voluntarily or involuntarily, as in the case where Marina, after due process, orders the deletion of the ships for having violated government rules and regulations, or in the case of dual-flagged vessels where approval of the charter or lease contract is revoked for cause.⁴¹

Currently, the International Association of Classification Society members recognised by Marina include the American Bureau of Shipping, Bureau Veritas, China Corporation Register of Shipping, Det Norske Veritas, Germanischer Lloyd, Hellenic Register of Shipping, International Register of Shipping, Korean Register of Shipping, Lloyd's Register Asia, Nippon Kaiji Kyokai, and Registro Italiano Navale. There is also a domestic classification society, the Philippine Register of Shipping, authorised to classify domestic ships for domestic trade.

iv Environmental regulation

The Philippines is a signatory to three major environmental protection conventions relating to shipping:

- a* the CLC Convention;
- b* MARPOL (73/78) (Annexes I to V); and
- c* the 1992 Protocol to the Oil Pollution Fund Convention.

On 2 June 2007, Act No. 9483, known as the Oil Compensation Act of 2007, was signed into law. This new legislation aims to give more teeth to the implementation of the provisions of the CLC Convention and the 1992 Protocol to the Oil Pollution Fund Convention. Under this law, an action for compensation because of pollution damage as a result of an incident may be filed with the regional trial courts against the owner of the polluting ship, or the insurer or person providing financial security for the owner's liability for pollution. Contributions to the Oil Pollution Compensation Fund are supposedly to be made by oil tanker operators in the country's waters, but at the time of writing, no mechanism has been propagated to establish such fund.⁴²

In August 2006, the MT Solar I sank off the coast of Guimaras Province in the central Philippines. The MT Solar I spilled over 200,000 litres of bunker fuel, damaging marine sanctuaries, the tourism industry and the livelihoods of the people of Guimaras.⁴³ The affected communities and individuals filed damage claims with the International Oil Pollution Compensation Fund (the IOPC Fund) and by October 2012, the IOPC Fund had released 987 million Philippine pesos in compensatory damages to 26,870 claimants.⁴⁴ At the time of writing, however, there remain roughly 900 uncompensated victims as the IOPC Philippine office closed and the reason has not been disclosed.⁴⁵ Civil cases for damages have also been filed by the unpaid claimants before the regional trial court against the oil company that chartered the MT Solar I as well as its owner.⁴⁶

41 Ibid., Section VI.

42 Cabacungan, 'House to summon Marina execs over oil pollution fund', *Philippine Daily Inquirer*, 21 December 2013, <http://newsinfo.inquirer.net/550205/house-to-summon-marina-execs-over-oil-pollution-fund>.

43 NCSB Factsheet, Sept. 2006 published by the National Statistical Coordination Board.

44 'Oil Spill Victims Seek Compensation', Manila Bulletin, 15 August 2013, <https://ph.news.yahoo.com/oil-spill-victims-seek-compensation-215341344.html>.

45 'Oil spill victims continue to ask for compensation', Manila Bulletin, 16 August 2015, www.mb.com.ph/oil-spill-victims-continue-to-ask-for-compensation/.

46 Ibid.

Also, in June 2015, the province of Zambales adopted an ordinance approving the installation of a provincial coast watch surveillance and environment monitoring system for purposes of keeping their waters safe, clean and secure. Apart from aiding in sea navigation, this sophisticated system also aims to monitor vessel exhaust emissions. This province, strategically situated at the entrance to Manila bay, will collect fees as charges for the use of this coastal watch system from ships approaching from the North of Manila. From a slow start after the promulgation of the Ordinance, the province of Zambales has become active on the enforcement side. Non-compliant vessels docking at any port of the province shall not be allowed to leave until clearance is received from the Office of the Governor after the appropriate fees and charges have been paid. The penalty charge will be 20 per cent of the total billing, including other surcharges as may be provided by law or ordinance.

While some question this ordinance as violative of the principle of the right to innocent passage, this ordinance is in conformity with the provisions of UNCLOS relating to innocent passage. Coastal states are allowed to adopt rules and regulations in respect of: the navigational safety and maritime traffic regulation; the protection of navigational aids and facilities and other facilities and installations; and the environment preservation and protection of the coastal state, among others.⁴⁷

This is an interesting kind of development in one of the Philippines' provinces. It will be interesting to see whether other provinces share the same vision and eventually follow suit.

v Collisions, salvage and wrecks

The Philippines collision regime is unique and is part of the Code of Commerce. Where most of the world apportions collision liability based on the proportion of blame attributed to each vessel, this is not the case in the Philippines: it is all or nothing. If both vessels are to blame, then each vessel suffers its own loss and both vessels are jointly and severally liable for the damage to cargo and passengers of both vessels. If one vessel is 100 per cent to blame then the guilty vessel will bear its own damage and loss, and the damage and loss of the innocent vessel, including the cargo damaged or lost on both vessels, and the passengers' claim for injury and death, if any.

The Philippine Salvage Law is set out in Act No. 2616.⁴⁸ In the Philippines, salvage is no different from the concept as it exists in the United Kingdom. The party who performs the salvage must be a volunteer, there must be danger, and there must be resulting success. There is no specialised salvage arbitration forum in the Philippines like that in the United Kingdom, so most commercial salvors use the LOF salvage agreement, or for a less complicated service, the salvage is negotiated for a fixed fee. The Philippines is not a signatory to the Salvage Convention 1989.

Any person who wishes to engage in the business or operation of salvaging vessels, wrecks, derelicts and other hazards to navigation, or of salvaging cargoes carried by sunken vessels, is required to secure a salvage permit from the PCG. Under Presidential Decree No. 890,⁴⁹ a salvage operation performed without a permit is a criminal offence.

⁴⁷ Article 21 (1) of the United Nations Convention on the Laws of the Sea.

⁴⁸ Enacted 4 February 1916.

⁴⁹ Penalising the unauthorised salvage of vessels, wrecks, derelicts and other hazards to navigation as well as cargoes carried by sunken vessels, Presidential Decree No. 890 (1976).

vi Passengers' rights

The Philippine government recently passed the rules and regulations concerning the Air Passengers' Bill of Rights,⁵⁰ but they have yet to pass the corresponding rules for sea passengers. Notwithstanding the absence of a comprehensive Sea Passengers' Bill of Rights, Marina rules require all ships engaged in domestic trade to secure adequate P&I insurance to cover the shipowners' or operators' liability for marine accidents including liabilities for wreck removal, pollution, loss of life or injury to passengers, third parties or seamen, collisions, damage to fixed or floating structures, and loss or damage to cargo.⁵¹

vii Seafarers' rights

Seafarers' rights is an important topic when discussing Philippine shipping law because of the sheer number of Filipino seafarers employed worldwide, which, as to date, comprises 30 per cent of the world's seafarers.⁵² The Philippine government has attempted to export Philippine law to protect its seafarers by imposing a standard seafarers' contract called the Philippine Overseas Employment Administration Standard Employment Contract (POEA SEC).

Included in the POEA SEC is a feature to ensure seafarers' rights to procedural due process. Based on this right, a seafarer who commits a wrongful act must be: (1) notified of his or her offence in writing; (2) given the right to explain him or herself, or to have a hearing; and (3) informed in writing of his or her penalty. Failure to observe procedural due process in termination cases, despite the existence of just and authorised causes under the Philippine Labour Code⁵³ or the POEA SEC, will result in an award of nominal damages to the seafarer. The Labour Code provisions, meanwhile, provide seafarers with the right to terminate their employment with their employers on specified grounds⁵⁴ as well as the implied right to file an illegal dismissal case should the employer dismiss them for causes not based on any of the valid and authorised grounds⁵⁵ stated therein. On the other hand, the POEA SEC not only provides procedural due process and grievance mechanisms to seafarers, but also enumerates seafarers' entitlements and benefits,⁵⁶ both monetary and non-monetary, the most important and controversial being the compensation and benefits for injury, illness and death.

Jurisdiction for claims filed by seafarers under the Labour Code and the POEA SEC falls with the National Labour Relations Commission. However, should there be a collective bargaining agreement (CBA) in place and the issue involves matters relating to the interpretation of the implementation of the CBA, the original and exclusive jurisdiction falls

50 DOTC-DTI Joint Administrative Order No. 1, series of 2012.

51 Marina Circular No. 2009-01, as amended (4 February 2009).

52 See Note 3.

53 A Decree instituting a Labour Code thereby revising and consolidating labour and social laws to afford protection to labour, promote employment and human resources development and ensure industrial peace based on social justice [Labour Code of the Philippines], Presidential Decree No. 442 (1974).

54 See *Ibid.*, Article 285.

55 *Ibid.*, Articles 282–284.

56 Includes seafarers' wages, leave pay, shore leave, benefits for illness, injury and death.

within the National Conciliation and Mediation Board (NCMB).^{57,58} Prescription of actions for claims based on the POEA SEC is three years reckoned from the date the cause of action accrues.⁵⁹

For seafarers working overseas, the most notable benefit provided by Philippine law is compulsory insurance coverage, which should be secured by the manning companies for the seafarers at no cost to them.⁶⁰

The Philippine Senate ratified the Maritime Labour Convention 2006 on 13 August 2012.

To further protect seafarers, as well as their employers, Republic Act No. 10706⁶¹ was enacted into law on 26 November 2015. This law aims to protect seafarers from individuals who charge excessive fees and exhort to file unfounded labour cases, and their employers with respect to excessive claims. Subsequently thereafter, the Department of Labour and Employment issued the Implementing Rules and Regulations for the above-mentioned law.⁶²

VII OUTLOOK

The outlook for the Philippine shipping industry is bright and will depend largely on how the Philippines takes advantage of its leading position as a provider of seafarers to the world fleet. There is a core of management-level officers who can be the backbone for the creation of a substantial ship-management industry in the Philippines, which could easily rival that of Hong Kong and Singapore. Unlike other business activities in the Philippines, where foreign equity is restricted, a ship-management business can be wholly owned by a foreign investor – this is one of the best-kept secrets in the shipping industry. Apart from the core of potential port captains, port engineers and designated persons ashore who are available now from the officers currently sailing, the Philippines has improved the infrastructure for conducting business. In the next few years the Philippines will be able to see whether the shipping world will take advantage of its large pool of talent.

57 The NCMB was created under Executive Order No. 126, issued on 31 January 1987.

58 *Estate of Nelson R Dulay represented by his wife Merridy Jane P Dulay v. Aboitiz Jebsen Maritime Inc and General Charterers Inc*, G.R. No. 172642, 13 June 2012.

59 The POEA SEC, Section 30.

60 Rules and Regulations Implementing the Migrant Workers and Overseas Filipinos Act of 1995, Republic Act 10022 (2010), Rule XVI.

61 An Act Protecting Seafarers Against Ambulance Chasing and Imposition of Excessive Fees, and Providing Penalties Therefor [Seafarers Protection Act], Approved on 26 November 2015.

62 Department Order No. 153-16 Implementing Rules and Regulations of RA No. 10706 otherwise known as the Seafarers Protection Act, Approved on 19 April 2016.

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Valeriano R Del Rosario, managing partner of VeraLaw, has extensive education and business experience in the United States and Europe. He was admitted to the Philippine Bar in 1982. He obtained a master's degree in maritime law from the University of Wales, followed by three years' work experience at a prestigious shipping law firm in the City of London.

He is a shipping law specialist and has acted for the 4,000 victims of the Doña Paz, which has successfully been concluded. Lately, he has been active in ship pollution claims on behalf of owners.

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Ms Gonzales was the chair of the board of trustees of the Maritime Law Association of the Philippines in 2011 and president in 2010. She was a member of the Technical Working Group of the House Transportation Committee of the Philippine Congress in drafting the Proposed Maritime Code. She is regularly invited as a speaker on ship arrest, most recently at the Lloyd's Maritime Academy in London. As a maritime litigator, she handles cargo claims, ship arrest and foreclosure of ship mortgages. She regularly advises foreign clients on a variety of wet and dry maritime matters.

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She completed her BSc in management majoring in legal management and a minor in French studies at the Ateneo de Manila University, and obtained her bachelor of laws at the Arellano School of Law.

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