

THE SHIPPING LAW
REVIEW

EIGHTH EDITION

Editors

Andrew Chamberlain, Holly Colaço and Richard Neylon

THE LAWREVIEWS

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REVIEW

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PREFACE

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

As with previous editions of *The Shipping Law Review*, we begin with cross-jurisdictional chapters looking at the latest developments in important areas for the shipping industry: competition and regulatory law, sanctions, ocean logistics, piracy, shipbuilding, ports and terminals, offshore shipping, marine insurance, environmental issues, decommissioning and ship finance.

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

The authors review the vessel safety regimes in force in their respective countries, along with port state control and the operation of both registration and classification locally. The applicable environmental legislation in each jurisdiction is explained, as are the local rules in respect of collisions, wreck removal, salvage and recycling. Passenger and seafarer rights are examined, and contributors set out the current position in their jurisdiction. The authors have then looked ahead and commented on what they believe are likely to be the most important developments in their jurisdiction during the coming year. This year, we welcome Costa, Albino & Lasalvia Sociedade de Advogados as the new contributors of the chapter focusing on maritime law within Brazil. There are also two new jurisdictions in this edition – Israel (Harris & Co) and Mexico (Adame Gonzalez De Castilla Besil) – and Portugal makes a return, with Andrade Dias & Associados as the new contributors.

The shipping industry continues to be one of the most significant sectors worldwide, with the United Nations Conference on Trade and Development (UNCTAD) estimating that the operation of merchant ships contributes about US\$380 billion in freight rates within the global economy, amounting to about 5 per cent of global trade overall. Between 80 per cent and 90 per cent of the world's trade is still transported by sea (the percentage is even higher for most developing countries) and, as of 2019, the total value of annual world shipping

trade had reached more than US\$14 trillion. Although the covid-19 pandemic has had a significant effect on the shipping industry and global maritime trade (which plunged by an estimated 4.1 per cent in 2020), swift recovery is anticipated. The pandemic truly brought to the fore the importance of the maritime industry and our dependence on ships to transport supplies. The law of shipping remains as interesting as the sector itself and the contributions to this book continue to reflect that.

Finally, mention should be made of the environmental regulation of the shipping industry, which has been gathering pace this year. At the International Maritime Organization's (IMO) Marine Environment Protection Committee, 72nd session (MEPC 72) in April 2018, it was agreed that international shipping carbon emissions should be cut by 50 per cent (compared with 2008 levels) by 2050. This agreement will now lead to some of the most significant regulatory changes in the industry in recent years, as well as much greater investment in the development of low-carbon and zero-carbon dioxide fuels. The IMO's agreed target is intended to pave the way for phasing out carbon emissions from the sector entirely. The IMO Initial Strategy, and the stricter sulphur limit of 0.5 per cent mass/mass introduced in 2020, has generated significant increased interest in alternative fuels, alternative propulsion and green vessel technologies. Decarbonisation of the shipping industry is, and will remain, the most important and significant environmental challenge facing the industry in the coming years. Unprecedented investment and international cooperation will be required if the industry is to meet the IMO's targets on carbon emissions. The 'Shipping and the Environment' chapter delves further into these developments.

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

Andrew Chamberlain, Holly Colaço and Richard Neylon

HFW

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PHILIPPINES

*Valeriano R Del Rosario, Maria Theresa C Gonzales, Daphne Ruby B Grasparil and Jennifer E Cerrada*¹

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

There are two sides to the Philippine shipping industry, and both can be described only in superlative terms. First, the Philippines, an archipelagic country of more than 7,000 islands, has a flourishing domestic shipping industry. In 2019, the domestic operating fleet consisted of 28,210 registered vessels, which moved people and cargo throughout the archipelago.² The domestic industry, however, is probably most remembered for the ill-fated collision between the passenger ferry *Doña Paz* and the petroleum product tanker, *Vector*, on 20 December 1987, which resulted in more than 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.

Second, the Philippines is one of the largest providers of seafarers to the world's merchant marine fleet. In fact, it provides more than 30 per cent of the world's seafarers.³ The Philippines is the biggest supplier of ratings, and is bettered as a supplier of officers only by China.⁴ In 2017, the Philippines deployed 449,463 seafarers internationally.⁵ Although this number has dwindled slightly, the latest statistics show that in the first half of 2018 alone, the Philippines deployed 99,812 sea-based workers abroad.⁶

Like the rest of the world, however, the covid-19 pandemic greatly affected the deployment of seafarers in 2020. At the peak of the Philippine lockdown, instead of being able to deploy an average of 45,000 seafarers each month, reports show only approximately

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- 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 [MARINA], 'MARINA Statistical Report 2015–2019', <https://marina.gov.ph/wp-content/uploads/2020/10/2019-MARINA-Statistical-Report.pdf>.
 - 3 Daphne Galvez, 'PH gov't aims to remain world's top source of seafarers', *Philippine Daily Inquirer*, 5 June 2019, <https://globalnation.inquirer.net/175987/ph-govt-aims-to-remain-worlds-top-source-of-seafarers#ixzz6FWLTyHzC>.
 - 4 International Chamber of Shipping, 'Shipping and World Trade: Global Supply and Demand of Seafarers', <https://www.ics-shipping.org/shipping-fact/shipping-and-world-trade-global-supply-and-demand-for-seafarers/>.
 - 5 Philippine Overseas Employment Administration, 'Deployed Overseas Filipino Workers by Country/ Destination, 2017 vs 2016', www.poea.gov.ph/ofwstat/compendium/2016-2017%20deployment%20by%20country.pdf.
 - 6 Philippine Overseas Employment Administration, Overseas Deployment Statistics, 'Deployed Overseas Filipino Workers – By Type of Hiring 2006–2018 (1st SEM)', www.poea.gov.ph/ofwstat/compendium/deployment%202006-2018S1.pdf.

20,000 were deployed in total between March and June 2020.⁷ Figures were at their lowest on April 2020, with only 597 deployed because of lockdowns and travel restrictions, both in the Philippines and abroad.⁸ Considering the very low figures of deployment and the government realising and prioritising the plight of seafarers, various government agencies, including the Department of Foreign Affairs, the Department of Transportation and the Department of Health, issued Joint Circular No. 1, Series of 2020 on the 'Guidelines for the Establishment of the Philippine Green Lane to Facilitate the Speedy and Safe Travel of Seafarers Including their Safe and Swift Disembarkation, and Crew Change During the COVID-19 Pandemic'.⁹ The industry slowly started to pick up from the third quarter of 2020.¹⁰

In 2019, the Philippines earned more than US\$30.133 billion from overseas Filipino workers and, of that total, more than US\$6.5 billion came from Filipino seafarers.¹¹ The remittances of overseas Filipino workers constituted 9.3 per cent of the Philippines' gross domestic product in 2019.¹² However, because of the pandemic, by the end of 2020, total remittances of overseas foreign workers amounted to US\$29.903 billion (a 0.8 per cent decline compared to 2019). Of this amount, US\$6.353 billion was remitted by sea-based workers (a 2.8 per cent decline compared to 2019).

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

In November 2020, the Philippines imported goods worth US\$7,521.76 billion (free-on-board value), and exported goods worth US\$5,791.40 billion.¹³ 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.

7 Betheena Unite, 'PH eyes employing more seafarers after sending only 20,000 for 4 months', *Manila Bulletin*, 17 December 2020, <https://mb.com.ph/2020/12/17/ph-eyes-employing-more-seafarers-after-sending-only-20000-for-4-months/>.

8 Samuel Medenilla, '136,000 Filipino seafarers deployed aboard international vessels overseas since July', *Business Mirror*, 1 October 2020, <https://businessmirror.com.ph/2020/10/01/136000-filipino-seafarers-deployed-aboard-international-vessels-overseas-since-july/>.

9 Philippine Overseas Employment Administration, 'Green Lane for Seafarers Joint Circular 1-2020', <https://www.poea.gov.ph/advisories/2020/Green%20Lane%20for%20Seafarers%20Joint%20Circular%201-2020.pdf>.

10 Ferdinand Patinio, '49K Pinoy seafarers deployed in September', *Philippine News Agency*, 2 October 2020, <https://www.pna.gov.ph/articles/1117341>.

11 Bangko Sentral ng Pilipinas statistics, 'Overseas Filipinos' Cash Remittances, By Country, By Source', <https://www.bsp.gov.ph/statistics/external/Table%2011.pdf>.

12 Ralf Rivas, 'OFW remittances hit record high of \$33.5 billion in 2019', *Rappler*, 17 February 2020, www.rappler.com/business/252043-overseas-filipino-workers-remittances-2019.

13 Philippine Statistics Authority, 'Highlights of the Philippine Export and Import Statistics: November 2020 (Preliminary)', <https://psa.gov.ph/content/highlights-philippine-export-and-import-statistics-november-2020-preliminary>.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The Philippines is a civil law country. The New Civil Code of the Philippines,¹⁴ which was enacted in 1949, was based on the Spanish Civil Code. The Philippines is no longer a Spanish-speaking country, so all enacted laws are in English and court proceedings are conducted in English. The Philippines also has a Code of Commerce, which is based on the Spanish Code of Commerce 1885. The Law on Obligations and Contracts is part of the Civil Code, while the rules on domestic carriage of goods are set out in both the Civil Code and the Code of Commerce. The latter also provides for the law on charter parties, collisions and general average. Salvage is covered under a special law.

The Philippines also follows the system of judicial precedents and, therefore, the decisions of the Philippine Supreme Court, written in English, interpreting the provisions of the Civil Code, the Code of Commerce and other legislation, have the force of law. For carriage of goods to and from Philippine ports in foreign trade, the Philippines adopted the United States Carriage of Goods by Sea Act of 1936 (the Philippine COGSA),¹⁵ which is basically the Hague Rules.

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. On 13 March 2014, the Philippine Congress enacted Republic Act No. 10635,¹⁶ establishing the Maritime Industry Authority (MARINA), a single maritime administration responsible for the implementation and enforcement of the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1995 (the STCW Convention), as amended, and the international agreements or covenants related thereto.

In August 2012, the Philippines became the 30th member country of the International Labour Organization to adopt the Maritime Labour Convention of 2006 (MLC), the 'seafarer's bill of rights'. This was a concrete effort to protect the rights of Filipino seafarers at home and overseas. By doing so, the government recognised the significant contribution of Filipino seafarers to the growth of the country's economy.¹⁷

III FORUM AND JURISDICTION

i Courts

Jurisdiction of courts

The Philippine courts' jurisdiction over shipping disputes is determined by law. Under the Judiciary Reorganisation Act of 1980 (BP 129), as amended by Act No. 7691,¹⁸ the regional trial courts have exclusive original jurisdiction over admiralty and maritime matters. Prior

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

15 Carriage of Goods by Sea Act, Public Act No. 521 (1936).

16 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 No. 10635 (2014).

17 International Labour Organization, Manila Philippines, Press Release, 21 August 2012, www.ilo.org/manila/public/pr/WCMS_187754/lang--en/index.htm.

18 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).

to 2019, there were no special courts designated as admiralty courts. Only very recently has the Philippines, through its Supreme Court, adopted new rules to designate existing trial courts as admiralty courts.¹⁹ Effective since 1 January 2020, the aim of a Supreme Court order entitled the Rules of Procedure for Admiralty Cases (the Rules for Admiralty Cases)²⁰ is to provide ‘fast, reliable, and efficient means of recourse to Philippine courts’ to parties in admiralty and maritime jurisdiction.

To date, the Supreme Court has designated 10 courts with jurisdiction over maritime claims under the Rules of Admiralty Cases. Two courts have been designated in each of the following: Manila, San Fernando, Subic Bay, Cebu and Davao.

The Rules of Admiralty Cases further provide for their interpretation in accordance with international standards and norms used in the international shipping industry that may be found in international conventions and instruments, such as:

- a* the United Nations Convention on the Law of the Sea 1982 (UNCLOS);
- b* the International Convention for the Safety of Life at Sea 1974 (SOLAS);
- c* the STCW Convention;
- d* the International Convention for the Prevention of Pollution from Ships 1973 (as modified by the Protocol of 1978) (MARPOL (73/78));
- e* the International Convention relating to the Arrest of Sea-going Ships 1952 (the Brussels Convention);
- f* International Regulations for Preventing Collisions at Sea 1972 (COLREGs); and
- g* other conventions of the International Maritime Organization to which the Philippines is a party or signatory.

Limitation period

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

The 10-year prescriptive period is applied to contracts of carriage of goods by sea in domestic trade, but not to cases covered by the Philippine COGSA. In particular, Section 3(6) of the Philippine COGSA provides that the carrier is discharged from liability for loss or damage of the goods unless suit is brought ‘within one year of delivery of the goods or the date when the goods should have been delivered’. However, the period during which the goods have been discharged from the ship and given to the custody of the *arrastre*²¹ operator is not covered by the Philippines COGSA. The *arrastre* operator cannot invoke as a defence that the suit was instituted beyond the one-year limitation period.²²

19 Pursuant to the 1987 Philippine Constitution, the Philippine Supreme Court has the power to promulgate rules concerning procedure in all courts and exercises administrative supervision over all courts (Article VIII, Sections 5(5) and 6).

20 AM No. 19-08-14-SC.

21 ‘*Arrastre*’ is a Spanish word (meaning dragging, pulling) but is defined in the Philippines as ‘the operation of receiving, conveying and loading or unloading merchandise on piers or wharves’, www.merriam-webster.com/dictionary/arrastre.

22 *Insurance Company of North America v. Asian Terminals*, GR No. 180784, 15 February 2012.

ii Arbitration and ADR

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

iii Enforcement of foreign judgments and arbitral awards

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

A party to a foreign arbitration may likewise petition the regional trial court to recognise and enforce a foreign arbitral award, which shall be governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention).

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

Under the Rules for Admiralty Cases, the enforcement of an arbitral award or judgment against a ship is regarded as an *in rem* action, upon which an application for a warrant of arrest may be made.

Foreign arbitral awards are easier to enforce in the Philippines than foreign judgments owing to the summary enforcement procedure adopted in the ADR Act of 2004 and Rule 12 of the Special Rules of Court on ADR. On the other hand, seeking to enforce a foreign judgment is difficult compared to an arbitration award because the foreign judgment is treated as presumptive evidence of a right against a person or a thing, such as a ship. Fresh proceedings will need to be commenced in court for the enforcement of the judgment and live witnesses will be required. A foreign arbitration award from a contracting state to the New York Convention can be enforced within about two years, which is comparatively quicker than the five to seven years needed to enforce a foreign judgment. The big difference lies in the judicial appeal process because an appeal from a judgment enforcing a foreign arbitration award will not prevent the execution of the judgment, which is not the case with foreign judgments.

IV SHIPPING CONTRACTS

i Shipbuilding

Recognising that shipping is a necessary infrastructure and that the shipping industry is vital to the country's economic development, the Philippine Congress has passed a law²³ granting certain incentives to domestic or foreign corporations wishing to engage in shipbuilding within the country. Among the incentives granted²⁴ is the tax-free importation of capital equipment to be used in the construction or repair of any vessel.

In 2017, the Philippines was ranked as the fourth-largest shipbuilding nation in the world in terms of newbuild completion volume, following South Korea, China and Japan.²⁵ This was mainly attributable to the presence of industry heavyweights such as Tsuneishi Heavy Industry of Japan, which owns and operates a shipyard in Balamban, Cebu, and Hanjin Heavy Industries of Korea, which formerly owned and operated a shipyard in Subic Bay, Olongapo. Unfortunately, Hanjin Heavy Industries filed for bankruptcy in 2019. As at the first quarter of 2020, Hanjin Heavy was still searching for a white knight to bail out the US\$400 million owed to Philippine banks and the US\$900 million owed to Korean lenders.²⁶ As a result, it is unlikely that the Philippines will maintain its standing as a global leader in shipbuilding.

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

ii Contracts of carriage

The New Civil Code, the Code of Commerce and the Philippine COGSA apply to contracts of carriage by water. The Code of Commerce and special laws apply in matters not regulated by the New Civil Code,²⁷ and 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 Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules), the UN Convention on the Carriage of Goods by Sea 1978 (the Hamburg Rules) or the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (the Rotterdam Rules).

23 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 (the Domestic Shipping Development Act of 1994), Act No. 9295 (1994).

24 *ibid.*, Chapter V, Section 14.

25 United Nations Conference on Trade and Development, 'Review of Maritime Transport 2018', https://unctad.org/en/PublicationsLibrary/rmt2018_en.pdf.

26 Henry Empeño, 'Hanjin, A Year After', *Business Mirror*, 19 January 2020, <https://businessmirror.com.ph/2020/01/19/hanjin-a-year-after>.

27 Civil Code, Article 1766.

The New Civil Code requires extraordinary diligence in the carriage of goods by common carriers,²⁸ whereas in the Philippine COGSA,²⁹ the carrier is bound only to exercise due diligence. For private carriers of goods by water under the Code of Commerce, the requirement is only ordinary diligence.³⁰

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

With regard to a shipowner's lien on cargo for unpaid freight,³¹ 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. 10668³² promulgated on 28 July 2014, foreign vessels are now allowed to transport and co-load foreign cargoes for domestic trans-shipment. The Philippine COGSA, not the Civil Code, applies in the determination of the liability of the foreign vessel for the loss of, or damage to, the goods carried on board the vessel. Foreign vessels engaging in carriage conducted in accordance with Republic Act No. 10668 are neither considered common carriers with the duty to observe extraordinary diligence in the transportation of goods nor are they considered to be offering a public service so as to fall under the provisions of the Domestic Shipping Development Act of 2004.

iii Cargo claims

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

For domestic carriage, notice of loss or damage to the goods must be provided by the cargo owner to the carrier within 24 hours of delivery of the goods. The 24-hour notice is a condition precedent, and provided notice is given, the cargo owner has 10 years within which to sue for the loss or damage to cargo. However, the 10-year time bar can be reduced by contract. The duty of care for common carriers is set out in the New Civil Code, and the threshold is very high: extraordinary diligence. Under the New Civil Code, in the event of cargo loss or damage, the carrier is presumed to be at fault, and the burden of proof shifts to the carrier, which must show that it had discharged its duty to exercise extraordinary diligence. Through judgments of the Supreme Court since the turn of the century, the lines between private carriers and common carriers have been blurred to the point of being almost indistinguishable: all cargo claims against carriers are treated as if they are common carriers. Common carriers have only three defences available under the New Civil Code: (1) *force majeure*; (2) inherent fault in the goods; and (3) defects in the packaging.

For the international carriage of goods to and from the Philippines in foreign trade, the carrier's liability is based on the Philippine COGSA. However, the Supreme Court judgments in COGSA cases have applied the high threshold of care as found in the New Civil Code, and the COGSA defences are being ignored. In *Planters Products v. Court of Appeals (Sun Plum)*,³³ which involved a cargo of fertiliser from an overseas port to the Philippines, the Supreme Court applied the common carrier rules to the ship, and that precedent has been reiterated

28 *ibid.*, Article 1753.

29 Philippine Carriage of Goods by Sea Act of 1936 [COGSA], Section 3(1).

30 Code of Commerce, Article 362.

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

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

33 GR No. 101503, 15 September 1993.

in subsequent Supreme Court judgments. The cargo of fertiliser was carried by the ship *Sun Plum*, and there was cargo shortage and damage. The ship was on time charter and the question arose whether the shipowner was a common carrier or a private carrier. If the *Sun Plum* was a common carrier, then the ship would be presumed to be at fault, and the burden would be on the shipowner to prove that he discharged his duty of care. However, if the *Sun Plum* was a private carrier, then the consignee would have the burden of proving the ship's fault or negligence in order to recover. The Supreme Court ruled that a shipowner who had time-chartered its vessel should be considered a common carrier, and therefore *Sun Plum* had the burden of proving that it had exercised extraordinary diligence in the care of the cargo. As a result of this case and others since, the liability regime stated in the Philippine COGSA is more often disregarded by Philippine courts in favour of the common carrier regime, which is set out in the New Civil Code. The only constant from the Philippine COGSA that is applied by Philippine courts is the limitation amount of US\$500 per package or customary freight unit.

The Supreme Court noted in the *Sun Plum* case, as an *obiter*, that in instances when the charter gives control of both the vessel and its crew, as in a bareboat or demise charter, the shipowner is converted into a private carrier by virtue of the charter. The definitive answer was provided by the Supreme Court in a 2015 case.³⁴ The shipowner, Fortune Sea Carriers, Inc (Fortune Sea), time-chartered its ship *Ricky Rey* to Northern Mindanao Transport Co Inc (Northern Transport). The time-charter party included provisions that gave control of both the ship and the crew to Northern Transport.

While the *Ricky Rey* was on charter, Northern Transport transported 2,069 bales of abaca fibres, which caught fire. The cargo was insured by Federal Phoenix Assurance Co Ltd (Federal Phoenix), which commenced proceedings against the shipowner, Fortune Sea, alone, after paying the insured. Fortune Sea denied liability and insisted it was acting as a private carrier at the time the incident occurred.

The Supreme Court rendered judgment in favour of Fortune Sea and held that it was a private carrier. The Supreme Court also held that the time-charter party agreement and the evidence demonstrated that the control of the ship and its crew had been given to the charterer. The issue that remained unanswered was whether the charterer, having full control of the ship and the crew, would be treated as the common carrier. The issue never came up because Federal Phoenix did not implead the charterer, Northern Transport. As a matter of practice, Federal Phoenix should have named the ship, its owners, the charterers and the ostensible carrier in the proceedings. Federal Phoenix failed to do so and, as a result, was unable to recover for the damaged cargo.

As far as demise clauses are concerned, the judgment in *Federal Phoenix Assurance Co Ltd v. Fortune Sea Carriers Inc* seems to indicate that the Philippines Supreme Court will be willing to distinguish between the owners and the charterers as to which should carry the heavy burden of being identified as a 'common carrier'.

There is a party in the logistics claim that is peculiar to the Philippines. That party is the *arrastre* operator, a term that harks back to the Spanish colonial era. The Spanish word *arrastre* refers to the act of dragging a dead bull from the ring. In the Philippines, the term has been adopted and refers to a cargo handler who loads and unloads cargo between the ship and the pier side. In the modern world, an *arrastre* operator can be equated with a terminal operator.

34 *Federal Phoenix Assurance Co Ltd v. Fortune Sea Carriers, Inc*, GR No. 188118, 23 November 2015.

The duty of care of the *arrastre* operator in the event of loss or damage to the goods was the subject of the judgment in *Asian Terminals Inc v. Allied Guarantee Insurance Co Inc.*³⁵ A shipment of 72,322lb of kraft liner board was offloaded by the *arrastre*, Marina Port Services Inc (Marina Port Services), from the vessel M/V *Nicole*. Fifty-four rolls were found to have been damaged while in the custody of Marina Port Services. The lower court found Marina Port Services liable for the damaged cargo, and the matter was eventually elevated to the Supreme Court. The *arrastre* insisted that it was not liable for the 54 damaged rolls.

The Supreme Court judgment declared that the *arrastre* operator, in the performance of its function, should observe the same degree of care as that required of a common carrier. As a consequence, the *arrastre* operator is presumed to be at fault for the damage and carries the burden of proof to disprove liability. In this case, Marina Port Services failed to discharge the burden of proof and was found liable.

As an update, the Supreme Court's 2016 decision in *Designer Baskets Inc v. Air Sea Transport Inc and Asia Cargo Container Lines*³⁶ concerned the usual practice of carriers releasing cargo against an indemnity letter in instances where the consignee did not have possession of the original bill of lading. The judgment clarified that the carrier cannot be held responsible to the unpaid seller for the value of the goods by delivering the cargo without presentation of the original bill of lading.

iv Limitation of liability

The limitation of liability in the Philippines is based on the value of the ship and freight at risk. The Rules for Admiralty Cases provide the mechanism for a limitation action, which did not exist before. The limitation action is available only in the following cases: collisions; injuries to a third party; and acts of the captain or master of a ship. A limitation action is not available in cases of death of or injury to passengers.³⁷

The right to limit liability has been curtailed since the *Doña Paz* tragedy. Before that event, a shipowner could limit liability provided that it was not at fault or negligent. Based on the judgment in *Aboitiz v. New India*,³⁸ the new rule is that as long as there is a finding of any kind of unseaworthiness against the vessel, the owner loses the right to limit liability, regardless of whether the unseaworthiness arose through the owner's fault or negligence.

V REMEDIES

i Ship arrest

Prior to September 2019, the Philippines did not have a genuine procedure for the arrest of ships. The procedure equivalent to a ship arrest in the Philippines was through an application for the issuance of a preliminary attachment under Rule 57 of the 1997 Rules of Civil Procedure. A preliminary attachment is akin to a *Mareva* injunction under English law.

At present, the Rules for Admiralty Cases now sets out the procedure for the application of a warrant of arrest of a vessel, cargo or freight.³⁹

35 GR No. 182208, 14 October 2015.

36 GR No. 184513, 9 March 2016.

37 AM No. 19-08-14-SC, Part IV, Rule 8, Section 2.

38 GR No. 156978, 2 May 2006.

39 AM No. 19-08-14-SC, Part III, Rule 6.

The party applying for a warrant of arrest must provide a bond equivalent to 30 per cent of the claim in favour of the other party to answer for damages in the event of a wrongful arrest.⁴⁰ The party against whom the warrant is issued may lodge a bail bond sufficient to answer the arresting party's claim to obtain the release of the arrested property.⁴¹ Discharge of the cargo is likewise allowed while the ship is under arrest.⁴²

Under the Ship Mortgage Decree, the mortgagor may apply for a warrant of arrest of the mortgaged vessel. The procedure to be followed is as described above pursuant to the Rules for Admiralty Cases.

ii Court orders for sale of a vessel

The Rules for Admiralty Cases was intended to provide an expeditious process for the sale of ships under arrest, for which a bail bond had not been posted. However, the vessel can only be sold after a final judgment. Nonetheless, there may be situations when a quick sale is not possible.

It may still be possible to sell a ship that remains under arrest prior to a final judgment. In *Shubei Yasuda v. Court of Appeals and Blue Cross Insurance Inc*,⁴³ the Supreme Court allowed the sale of the vessel as it had been left unmaintained at the pier without a crew to guard it and was in grave danger of losing its value.

VI REGULATION

i Safety

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

In domestic shipping, MARINA is mandated to set the safety standards of all domestic vessels in accordance with government regulations and conventions,⁴⁴ 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 board⁴⁵ and, accordingly, to impose penalties and fines, and suspend or revoke certificates of public convenience or other licences.⁴⁶ In June 2008, Sulpicio's *Princess of the Stars* capsized, and of the reported 851 passengers on board, only 32 survived. The relatives of the victims filed an administrative complaint with MARINA and, on 23 January 2015, Sulpicio, which also owned and

40 *ibid.*, Part III, Rule 6, Section 3.

41 *ibid.*, Part IV, Rule 8, Section 7.

42 *ibid.*, Part IV, Rule 6, Section 5.

43 300 SCRA 385 (2000).

44 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 the same.

45 *ibid.*, Section 10(8).

46 *ibid.*, Section 10(16).

operated the *Doña Paz*, was prohibited from carrying or transporting passengers. Criminal proceedings for reckless imprudence resulting in multiple homicide, serious physical injuries and damage to property were also commenced against Mr Edgar Go, the team leader of the Crisis Management Committee of Sulpicio, for allowing the vessel to sail during a typhoon. In December 2018, the Philippine Supreme Court upheld the criminal indictment.⁴⁷

MARINA was previously responsible only for keeping the register of Filipino seafarers and issuing their seaman books. Its role was expanded in view of the Philippine legislature's enactment of Act No. 10635,⁴⁸ which effectively designated MARINA as the single and central maritime administration tasked with ensuring effective implementation and compliance with the STCW Convention. In line with this, MARINA adopted rules for the administrative investigation of Filipino seafarers holding management and operational functions for acts or omissions involving violation of the Code of Ethics of Marine Deck/Engineer Officers and rules issued by MARINA.⁴⁹

The PCG, on the other hand, is responsible for the enforcement of regulations for both domestic and international shipping relating to all relevant maritime conventions, treaties and national laws to ensure safety of life at sea within the Philippine territory. The PCG also has authority to inspect merchant ships and vessels, including but not limited to inspections before departure to verify compliance with all the rules and safety standards.⁵⁰

ii Port state control

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

Memorandum Circular No. 01-00⁵¹ was promulgated to ensure the effective implementation of the PCG's port state control functions. This Memorandum Circular applies to all foreign-flagged vessels engaged in international trade calling at any Philippine port. It does not apply to ships of war, troop ships, government vessels not engaged in trade, fishing vessels or pleasure yachts not engaged in trade.

iii Registration and classification

In general, ships need to be listed on the Register of Philippine Ships of MARINA to fly the Philippine flag or to trade within Philippine waters.⁵² The rules for registration apply regardless of the size of ship or use thereof, regardless of whether the ship is with or without

47 *People v. Go*, GR No. 2018816, 10 December 2018.

48 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.

49 STCW Circular No. 2015-11 issued by MARINA on 22 July 2015.

50 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 (the Philippines Coast Guard Law of 2009), Act No. 9993, Section 3 (2010).

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

52 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).

power, and excluding warships and naval ships, PCG ships, rubber craft, and ships of foreign registry temporarily used in Philippine waters under special permit. Ships wishing to ply Philippine waters must obtain a certificate of Philippine registration and a certificate of ownership by MARINA as well as a certificate of public convenience. Ships already registered may also be deleted from the Register by the owner, voluntarily or involuntarily, as in the case when MARINA, after due process, orders deletion 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.⁵³ Currently, the International Association of Classification Society members recognised by MARINA include the following:

- a* American Bureau of Shipping;
- b* Bureau Veritas;
- c* China Classification Society;
- d* DNV;
- e* Hellenic Register of Shipping;
- f* International Register of Shipping;
- g* Korean Register of Shipping;
- h* Lloyd's Register Asia;
- i* Nippon Kaiji Kyokai; and
- j* Registro Italiano Navale.

There are also domestic classification societies that are authorised to classify domestic ships for domestic trade, namely:

- a* Filipino Vessels Classification System Association, Inc;
- b* Ocean Register of Shipping, Inc;
- c* Orient Register of Shipping, Inc;
- d* Philippine Classification Register, Inc;
- e* Philippine Register of Shipping, Inc; and
- f* Shipping Classification Standards of the Philippines, Inc.

iv Environmental regulation

The Philippines is a signatory to three major environmental protection conventions relating to shipping: the International Convention on Civil Liability for Oil Pollution Damage 1969 (the CLC Convention); MARPOL (73/78) (Annexes I to V); and the 1992 Protocol to the Oil Pollution Fund Convention.

On 2 June 2007, Republic Act No. 9483, known as the Oil Pollution Compensation Act of 2007, was signed into law. This 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 for pollution damage as a result of an incident may be filed with the regional trial court 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 to date, no mechanism has been propagated

53 *ibid.*, Section VI.

to establish such a fund.⁵⁴ The implementing rules of the Oil Compensation Act, which was adopted in 2016, authorised MARINA to establish or open a trust fund for the Oil Pollution Management Fund (OPMF).⁵⁵ The OPMF will comprise contributions from owners and operators of tankers, fines imposed by the OPMF committee and donations and grants from domestic and foreign sources. The fund can be used for expenses of any oil pollution-related incident.

Under the Philippine Clean Water Act (Republic Act No. 9275), enacted on 22 March 2004, and its implementing rules and regulations, the pollution of a body of water – including oil spills – is a prohibited act that is subject to fines, payment of damages and penalties. Pollution of a body of water is defined as ‘discharging, depositing or causing to be deposited material of any kind directly or indirectly into the water bodies or along the margins of any surface water, where the same shall be liable to be washed into such surface water, either by tide action or by storm, floods or otherwise, which could cause water pollution or impede natural flow in the water body’.

In August 2006, the MT *Solar I* sank off the coast of the Province of Guimaras in the central Philippines. The tanker spilled more than 200,000 litres of bunker fuel, damaging marine sanctuaries, the tourism industry and the livelihoods of the people of Guimaras.⁵⁶ The affected communities and individuals filed damages 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.⁵⁷

v Collisions, salvage and wrecks

The Philippines collision regime is unique and is part of the Code of Commerce. Whereas most of the world apportions collision liability based on the proportion of blame attributed to each vessel, in the Philippines it is all or nothing. If both vessels are to blame, each vessel suffers its own loss, and both vessels are jointly and severally liable for the damage to cargo and passengers of both vessels. If one vessel is wholly to blame, the guilty vessel will bear both its own damage and loss and that of the innocent vessel, including the cargo damaged or lost on both vessels, and passengers’ claims for injury and death, if any.

The Philippine Salvage Law is set out in Act No. 2616.⁵⁸ Salvage is no different from the concept as it exists in the United Kingdom. The party that performs the salvage must be a volunteer, there must be danger and there must be resulting success. There is no specialist salvage arbitration forum similar to that in the United Kingdom, so most commercial salvors use the Lloyd’s Open Form salvage agreement or, for a less complicated service, the salvage is negotiated for a fixed fee. The Philippines is not a signatory to the International Convention on Salvage 1989 (the 1989 Salvage Convention).

54 Gil C 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>.

55 In *Department of Transportation, MARINA, and PCG v. Philippine Petroleum Sea Transport Association, et al.*, the Supreme Court upheld the constitutionality of the Oil Pollution Management Fund (GR No. 230107, 24 July 2018).

56 NCSB Factsheet, September 2006 published by the National Statistical Coordination Board.

57 ‘Oil spill victims seek compensation’, *Manila Bulletin*, 15 August 2013, <https://ph.news.yahoo.com/oil-spill-victims-seek-compensation-215341344.html>.

58 Enacted 4 February 1916.

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. 890,⁵⁹ a salvage operation performed without a permit is a criminal offence.

vi Passengers' rights

The Philippine government has passed rules and regulations concerning the Air Passengers' Bill of Rights⁶⁰ but has yet to pass the corresponding rules for sea passengers. Notwithstanding the absence of a comprehensive Sea Passengers' Bill of Rights, MARINA rules require all ships engaged in domestic trade to secure adequate protection and indemnity insurance to cover shipowners' or operators' liability for marine accidents, including liability for wreck removal, pollution, loss of life or injury to passengers, third parties or seafarers, collisions, damage to fixed or floating structures, and loss or damage to cargo.⁶¹

vii Seafarers' rights

Seafarers' rights is an important topic when discussing Philippine shipping law because of the sheer number of Filipinos employed worldwide, who account for 30 per cent of the world's seafarers.⁶² The 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 (the POEA SEC).

Included in the POEA SEC is a feature to ensure seafarers' rights to procedural due process. A seafarer who commits a wrongful act must be (1) notified of his or her offence in writing, (2) given the right to explain himself or herself, or to have a hearing, and (3) informed in writing of the penalty. Failure to observe procedural due process in termination cases, despite the existence of just and authorised causes under the Philippine Labour Code⁶³ or the POEA SEC, will result in an award of nominal damages to the seafarer. The Labour Code provisions, meanwhile, provide seafarers with the right to terminate employment with their employer on specified grounds⁶⁴ and the implied right to file an illegal dismissal case should they be dismissed for causes not based on any of the valid and authorised grounds⁶⁵ stated therein.

The POEA SEC not only provides procedural due process and grievance mechanisms to seafarers but also enumerates seafarers' entitlements and benefits,⁶⁶ both monetary and non-monetary, the most important and controversial being the compensation and benefits for injury, illness and death. The Supreme Court clarifies that due process (in the context of

59 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).

60 Department of Transportation and Communications and Department of Trade and Industry (DOTC-DTI), Joint Administrative Order No. 1, Series of 2012.

61 MARINA Circular No. 2009-01, as amended (4 February 2009).

62 See footnote 3.

63 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).

64 *ibid.*, Article 285.

65 *ibid.*, Articles 282 to 284.

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

illness and injury) means that notice of a seafarer's final illness or injury assessment must be personally handed to the seafarer, or served through lawful means by the company-designated physician, and the contents of the assessment must be explained to him or her.⁶⁷

Jurisdiction for claims by seafarers under the Labour Code and the POEA SEC lies with the National Labour Relations Commission. However, should there be a collective bargaining agreement (CBA) in place and the issue at hand involves matters concerning the interpretation of the implementation of the CBA, the original and exclusive jurisdiction lies with the National Conciliation and Mediation Board.⁶⁸ Prescription of actions for claims based on the POEA SEC is three years from the date the cause of action accrues.⁶⁹

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.⁷⁰

The Philippines ratified the MLC in 2012. In view of this and to further protect seafarers and their employers, the Seafarers Protection Act was enacted into law on 26 November 2015.⁷¹ This Law, which is implemented through the Department of Labour and Employment,⁷² aims to protect seafarers from individuals who charge excessive fees and exhort the filing of unfounded labour cases, and their employers with respect to excessive claims.

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 that could easily rival that of Hong Kong or Singapore. Unlike other business activities in the Philippines, in which foreign equity is restricted, a ship-management business can be wholly owned by a foreign investor – this is one of the best-kept secrets in the shipping industry. Apart from the core of potential port captains, port engineers and designated persons ashore who are available now from the officers currently sailing, the Philippines has improved the infrastructure for conducting business. In the next few years, the Philippines will be able to observe whether the shipping world will take advantage of its large pool of talent.

The Philippines has also relaxed its cabotage restrictions to allow foreign ships to carry goods between domestic ports. In 2015, a law was passed granting foreign vessels limited rights to transport or trans-ship foreign goods and goods bound for export between different Philippine ports.

67 *Gere v. Anglo-eastern Crew Management Phils*, GR Nos. 226656 and 226713, 23 April 2018.

68 The National Conciliation and Mediation Board was created under Executive Order No. 126, issued on 31 January 1987; *Estate of Nelson R Dulay represented by his wife Merridy Jane P Dulay v. Aboitiz Jepsen Maritime Inc and General Charterers Inc*, GR No. 172642, 13 June 2012.

69 Philippine Overseas Employment Administration Standard Employment Contract, Section 30.

70 Rules and Regulations Implementing the Migrant Workers and Overseas Filipinos Act of 1995, Republic Act No. 10022 (2010), Rule XVI.

71 Act Protecting Seafarers Against Ambulance Chasing and Imposition of Excessive Fees, and Providing Penalties Therefor (Republic Act No. 10706), approved on 26 November 2015.

72 Department Order No. 153-16 Implementing Rules and Regulations of Republic Act No. 10706, approved on 19 April 2016.

Republic Act No. 10668 granted foreign vessels the right to engage in limited cabotage under the following circumstances:

- a* a foreign vessel, arriving from a foreign port, shall be allowed to carry the foreign cargo to its Philippine port of final destination, after being cleared at its port of entry;
- b* a foreign vessel, arriving from a foreign port, shall be allowed to carry foreign cargo by another foreign vessel calling at the same port of entry to the Philippine port of final destination of the foreign cargo;
- c* a foreign vessel, departing from a Philippine port of origin through another Philippine port to its foreign port of final destination, shall be allowed to carry foreign cargo intended for export; and
- d* a foreign vessel, departing from a Philippine port of origin, shall be allowed to carry foreign cargo by another foreign vessel through a domestic trans-shipment port and transferred at that domestic trans-shipment port to its foreign port of final destination.⁷³

With the passage of this Law, foreign vessels may, in these limited circumstances, engage in trade without securing MARINA registration or a certificate of public convenience. The Philippines is changing and with change comes more opportunity.

73 Republic Act No. 10668, Section 4.

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