MARITIME LAW AND ADMIRALTY JURISDICTION: HISTORICAL EVOLUTION AND EMERGING TRENDS

By

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1. INTRODUCTION

Maritime law has been variously described and defined in ways that reflect subjective perception as well as semantics. One view is that "maritime law provides the legal framework for maritime transport"\(^1\). Another is that maritime law comprises a "body of legal rules and concepts concerning the business of carrying goods and passengers by water"\(^2\). Both are narrow in scope but the first is more general and could be construed as embracing matters maritime which extend beyond the purely private domain of maritime business and commerce into areas of public concern.

Those who subscribe to the above characterizations would distinguish maritime law from another body of law, namely, the law of the sea, which they would identify as a branch of public international law dealing with the oceans and its multifarious uses and resources in terms of broad, fundamental principles\(^3\). Others would submit that the distinction is artificial and anomalous, and in support of their proposition would point to the etymological root of the word "maritime", which derived from the latin means "of or pertaining to the sea"\(^4\). In this broad sense the term maritime law accommodates "the entire body of laws, rules, legal concepts and processes that relate to the use of marine resources, ocean commerce, and navigation."\(^5\)

The expression "admiralty law", used in many countries with Anglo Saxon legal traditions adds to the terminology debate. Admiralty law refers to the body of law including procedural rules developed by the English Courts of Admiralty in their exercise of jurisdiction over matters pertaining to the sea. This jurisdiction was distinctively different

\(^3\) See Gordon W. Paulsen, “A Historical Overview of the Development of Uniformity in International Maritime Law”, (1983), Tulane Law Review, Vol. 57, No. 5, 1065, where at p. 1085 the author says - The phrase ‘law of the sea’ is, however, different from ‘maritime law’. The law of the sea refers to the respective rights of states over the world’s waterways.
\(^5\) Ibid, at p. 2.
from that of the common law courts. Admiralty law thus originally encompassed those subject matters over which the admiralty courts possessed inherent jurisdiction imbued through a process of evolution. Subsequently, these subject matters, which bore a maritime character, were codified and enumerated by statute. Interestingly enough, while in the English language the word "admiralty" originates in the office of the Lord Admiral, its root meaning is derived from Arabic.6

The term shipping law is used to describe the law relating to ships and shipping. It is mostly used interchangeably with the term maritime law and encompasses all aspects of ships, shipping and maritime transportation. It is both private and regulatory in scope and includes commercial maritime law, maritime safety, pollution prevention and labour law as well as admiralty law in common law jurisdictions, but does not extend to the public international law of the sea. In common law jurisdictions, admiralty law often connotes the maritime law relating to “wet” matters, i.e., those involving ships when they are at sea, as distinguished from “dry” matters also involving ships but pertaining only to commercial aspects that are essentially land-based issues.

While maritime law consists of two broad elements, dividing it into two neat compartments and labelling them "public" and "private", is rather an oversimplification. The shipping industry is involved in many matters of general law and non-maritime legal transactions which are not part of the lex maritima. It is well acknowledged that many aspects of commercial maritime law are in fact derived from the lex mercatoria. The bifurcation may be attributable to perceptions that are politically tinged. As professor Gold states-

... the new law of the sea has in the past decade addressed itself to almost all areas of ocean use except the one that since before the dawn of history, has been preeminent - the use of the ocean as a means to transport people and their goods from place to place on this planet, so much more of which is water than is land. Marine transport has been discussed in an almost abstract manner, as if it did not really fit or belong within the public domain but needed to be confined to the more "private" region of international commerce, which was considered to be outside the scope of the law of the sea.

By contrast, writing in 1930, Professor Sanborn had this to say -

The words “maritime law,” as commonly used today, denote that part of the whole law which deals chiefly with the legal relations arising from the use of ships. But in the earlier period, of which this work treats, the law maritime had a considerably wider scope. It dealt not merely with the modern Admiralty law, but also with the primitive ancestors of some branches of our modern commercial law, dealt, too,

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6 Supra, footnote 2 at p. 1 and in particular, footnotes 1 and 2 on that page.
9 Ibid.
with the germs of that public law which we today style international law\(^{10}\).

Undoubtedly, there are numerous subject matters which fall within the scope of maritime law not all of which are compatible with categorization in terms of "public" or "private".

2. HISTORICAL EVOLUTION OF MARITIME LAW

The history of maritime law is lost in antiquity. The early law evolved from custom, and maritime custom was a function of ocean use or activity upon the sea. Shipping or seaborne trade being the oldest and most predominant of ocean uses, maritime law evolved from the customs and practices of early merchants and seafarers and was largely private and commercial in character. Custom and usage as well as adjudicative decisions were codified as ratio scriptа in certain parts of the maritime world, and in several instances were subsequently transformed into positive enactments by a law making authority.

The genesis of maritime legislation or codified maritime law begins with the Code of Hammurabi of Babylon dating back to the period between 2000 and 1600 B.C. It contained rules with respect to marine collisions, the practice of bottomry and leases of ships\(^{11}\). It would appear that these rules were a codification of Sumerian customs and practices from earlier times\(^{12}\). The Egyptians first, and then the Phoenicians and Greeks, in that successive order, maintained maritime supremacy in the Mediterranean region. The Phoenicians evidently developed maritime customs which survived their fall from supremacy and is reported to be the basis of much maritime law even to this day\(^{13}\). Phoenician dominance lasted for almost a thousand years. During the millennium before Christ, they occupied Cyprus, settled in Malta and in parts of Spain and founded Carthage in North Africa. With their gradual demise, the Greek states rose to supremacy.

In as early as 400 B.C., the Greek law included many maritime provisions ranging from substantive matters such as the treatment of shipwrecked "nautodikai", i.e., seamen, and adjudication of disputes concerning maritime contracts, to procedural matters such as the jurisdiction of the maritime court\(^{14}\). Special courts had been established in Athens to deal with maritime matters. These courts, the dikai emporikai, were reportedly organized with orderly rules and procedures. The Greeks evidently engaged in such peculiar maritime practices as bottomry and respondentia and the Athenian maritime courts were known to have enforced such bonds\(^{15}\). These were contracts of foenus nauticum or marine usury, i.e., loans


\(^{12}\) Gold, ibid., Schoenbaum, supra, footnote 4.


\(^{15}\) Gold, supra, footnote 11 at p. 8.
to cover maritime risks, which was the forerunner of the marine insurance contract.\textsuperscript{16} Similar maritime practices existed in Hindu India, as far back as 900 B.C. when the Code of Manu or Manusamhita was written. Commercial law was a developed facet of the advanced civilization of that region\textsuperscript{17} which included rules relating to interest on bottomry loans for sea voyages.\textsuperscript{18}

The island of Rhodes in the eastern Mediterranean rose to prominence as a centre of maritime commerce in the latter part of the Greek era. The Rhodians were accomplished seafarers and traders. They became a dominant maritime force in the Aegean Sea and reached the peak of their prosperity and achievements around the third century B.C.\textsuperscript{19} They evidently developed and compiled the first comprehensive Maritime Code of Rhodes. Much of Greek maritime law including the Athenian laws were based on this Code\textsuperscript{20}. The city state of Alexandria, among others, was an important centre of maritime activity during this time\textsuperscript{21}. The Rhodian Maritime Code reportedly found its way into the Roman legal system in subsequent years and prevailed through to the Byzantine era\textsuperscript{22}. Evidence of the adoption of Rhodian maritime law into the laws of Rome is found in the Justinian Digests in two famous passages.

The first one addresses the principle of jettison and contribution in general average by co-adventurers. The passage is found under the heading \textit{De Lege Rhodia de Jactu} (i.e., of the Rhodian Law of Jettison). The second passage appears in the form of an anecdote. In response to a petition to the Emperor Antoninus regarding the plundering of a wrecked ship, the Emperor declares that-

\begin{quote}
\textquote{I, indeed, am lord of the world, but the law is lord of the sea. Let it be judged by the Rhodian law, prescribed concerning nautical matters, so far as no one of our laws is opposed.}\textsuperscript{23}
\end{quote}

The early maritime law of Rome as recorded in the Digests and writings of eminent contemporary lawyers such as Cicero and Servius, covered a wide spectrum of subject matters. While they were not codified, the laws, promulgated through the decisions of juri-consults and Praetorian Edicts, reflected the law of Rhodes. Eventually, it was the Emperor Augustus who gave positive legislative sanction to the maritime laws so developed, which henceforth precluded the judges from deviating from the written law in their decisions\textsuperscript{24}. In those laws, trading vessels were enumerated and described according to whether they carried cargo or passengers, and whether they traded on the high seas or in inland waters\textsuperscript{25}. There were rules relating to the acquisition of vessels by construction and subsequent conveyance or transfer by sale or bequest, rules relating to co-ownership or co-partnership, joint and several liability to third parties and joint vicarious liability for the fault of the master and

\begin{footnotes}
\footnote{17 \textit{Ibid}, at pp. 492-493.}
\footnote{18 \textit{Ibid}, at p. 493.}
\footnote{19 Gold, supra, footnote 11 at p. 7.}
\footnote{20 \textit{Ibid}, at p. 8.}
\footnote{21 Schoenbaum, supra, footnote 4 at p. 4.}
\footnote{22 Gold, supra, footnote 11 at p. 10.}
\footnote{23 Robert D. Benedict, \textquote{The Historical Position of the Rhodian Law}, (1909), 18 \textit{Yale Law Journal} 223 at p. 233.}
\footnote{24 Supra, footnote 16 at pp. 85-86.}
\footnote{25 Supra, footnote 16 at p. 89; and supra, footnote 11 at p. 14.}
\end{footnotes}
crew. The notion of what in subsequent times came to be known as the maritime lien or privilege, which prevails even today, has its origins in Roman law. The contract of affreightment was known; and ships were hired through demise, voyage or time charters. The notion of sea carriage of goods owned by different cargo owners against payment of freight was well known, and rules governing agency and the vicarious relationship between the shipowner and the master pertaining to all matters concerning the vessel and the voyage were firmly established. There were rules relating to carrier liability for cargo damage, and relief from liability if damage resulted from *damnum fatale* such as shipwreck or piratical attacks. The owner or master had a lien or privilege over the cargo for the non-payment of freight.

The law of general average had been inherited from the Rhodians. There were elaborate rules governing maritime loans including contracts of bottomry and respondentia, otherwise known as *foenus nauticum*. The law contained provisions regarding pilotage at mouths of rivers and dangerous coasts, and rules against the plundering of wrecked ships and goods. The appropriation of a wrecked ship or jettisoned goods was considered a theft, in respect of which, the perpetrator could be subject to civil liability, and in some cases, to criminal sanctions. Even the public treasury was forbidden to claim a wrecked ship or goods cast ashore for appropriation to the state revenue. There were no special maritime provisions on collisions. The Roman statute of damages, the *Lex Aquilia* was the governing law under which liability was imposed on the negligent navigator and it was unlimited.

Among the city States which flourished during this era, the most prominent maritime codes developed over several hundred years were the sea laws of Venice, Genoa and Pisa, the tablets of Amalfi, the Statutes of Marseilles, the *Consolata del Mare* of Barcelona, the laws of Wisby, the laws of the Hanseatic city States of Northern Germany and most importantly, the *Rôles d’Oleron* or Rolls of Oleron which are generally recognized as the basis of latter-day modern European maritime codes, including the maritime law of England.

The compilation known as the *Consolato del Mare* of Barcelona developed during the late 14th and early 15th centuries contained the customs and practices of maritime law referred to above and included a variety of codes and judicial decisions dating back to Roman, and even earlier, to Rhodian times. The *Consolato* is held to be the earliest general code of maritime law preserved and carried into modern Europe. The contribution of the *Consolato* in the shaping of modern maritime law is self-evident.

Since Teutonic times, Northern Europe has enjoyed a great seafaring tradition which exists even to this day. Long before Christopher Colombus supposedly "discovered" the
continent of America, nordic seafarers, then known as the Vikings, crossed the treacherous waters of the North Atlantic in their fabled long ships and landed in the north-eastern parts of present-day Canada. In their earlier history they were essentially conquerors, and not maritime traders, like the peoples of the Mediterranean region. However, during the middle ages, the seafarers of Northern Europe rose to great heights in maritime commerce and established sophisticated codes of maritime laws. The first and most prominent of these were the Laws of Wisby. The town of Wisby in the island of Gotland in the Baltic Sea was a prominent centre of maritime commerce in the 11th century. It is now a part of Sweden. The *Hogheste Water-Recht de Wisby*, is said to be the oldest maritime laws of the middle ages and is the source of the earliest part of the Rolls of Oleron. As early as in 1369, the Congress of the Hanseatic League adopted an Ordinance on private maritime law and by the early 17th century the League developed private maritime law into legislative form as a body of legal doctrine.\(^{36}\)

Oleron, a tiny island close to Bordeaux in the Bay of Biscay was a major trading centre during the 12th century. It is now a part of France, but in those days it was English territory and its importance as a centre of trade and commerce is attributed to the Crusades.\(^{37}\) The Rolls of Oleron are considered to be the most distinguished of the medieval maritime codes. They were based on the early Mediterranean maritime customs and practices and drew from the subsequently codified Italian sources of that region, in particular, the *Consolato del Mare*.\(^{38}\) The Rolls also contained judgements of the maritime court of Oleron. In Blackstone's Commentaries, it is stated that Richard I composed a body of laws at the isle of Oleron, which are of high authority.\(^{40}\) John Selden, in his learned treatise *De Dominio Maris*, maintains that Richard I, on his return from the Holy Land corrected and published anew, in the island of Oleron, a previously established set of maritime regulations. Sir Edward Coke and Sir Leoline Jenkins\(^{41}\) have supported this proposition in their respective writings. One of the manuscripts of the Rolls, still preserved, contains a collection renowned as the Black Book of the Admiralty. The Rolls were most comprehensive and articulate and profoundly influenced the development of maritime law and legislation in Europe for several centuries to come, up to the modern era.

Entrenched in the Rolls were the principles of the contract of affreightment, the charterparty, the notion of making a ship seaworthy at the commencement of a voyage, the liability of the carrier for damage to cargo, the requirement for skilful navigation and management of the vessel, the concept of transhipment of cargo, the principles of despatch and demurrage and the maritime hypotheque. There were also the laws of salvage and general average.\(^{43}\)

The English maritime law consists of the common or consuetudinary law and the statutory maritime law. The former itself has two components, the *lex mercatoria* (law

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37 *Supra*, footnote 11 at p. 19.
41 An eminent civilian judge of the English High Court of Admiralty during the reign of Charles II.
42 *Supra*, footnote 16 at p. 212.
43 *Ibid*, at p. 221.
merchant) and the *lex maritima* (law maritime). That division aside, the basic source of English maritime law is the Black Book of the Admiralty. Aside from the common law and chancery courts, which occasionally and inadequately meted out maritime justice, the only courts which dealt exclusively with maritime disputes were the courts of the seaports. Of these, the so-called "Cinque Ports" grew in fame. They were ports along the English Channel which were originally three in number, grew to five, and finally were seven. These ports provided ships to the monarch and thus enjoyed certain privileges such as exemption from taxation and wide jurisdiction to adjudicate over maritime matters. The sittings of the seaport courts were held on the seashore from tide to tide. They were presided over by merchants and local port officials who adopted the law of the Rolls of Oleron together with local customary laws to administer justice.

During this period, England experienced an expansion in navigation and commercial ventures as well as maritime expeditions occasioned by the Crusades. Piracy was on the rise; insubordination and disorderly conduct among seafarers became rampant. These eventualities led to the development of a single judiciary body conferred with appropriate jurisdiction and facilities to deal with these matters. The problem with piracy became acute and various attempts to suppress it led to the establishment of the Office of the Lord High Admiral and the beginnings of a Court of Admiralty. In 1360, Edward III granted a commission to John de Beauchamp as "Admiral of all the fleets of ships, south, north and west". The Admiral had executive and regulatory jurisdiction over all ships and seafarers under his command and over piracy and prize cases. By a commission of 1386, the Admiral was empowered to hear complaints:

..., of all and singular of such matters as belonged to the office of Admiral and to take cognizance of maritime causes and to do justice and... to do and exercise all other things which to that office appertained as of right and according to maritime laws shall have to be done.

During the reign of Charles III, Sir Leoline Jenkins, an eminent civilian skilled in maritime jurisprudence was Judge of the Court of Admiralty. At his behest, the Black Book, which was originally written in old Norman-French, was translated into English. Of the six documents in this Book, the first two dealt with the office and powers of the Admiral; the fourth carried the title "Laws of Oleron" and contained a series of thirty-five articles on private maritime law and the fifth contained eighteen articles on private maritime law which addressed matters beyond the scope of the Rolls of Oleron. Following these articles, there were sixty-three regulations dealing with inquiries and prosecutions in relation to criminal and delinquent acts committed on the high seas or coasts. The great body of maritime law in England consisting of the *lex mercatoria* and the *lex maritima*, developed organically,
independent of code or statute. It was derived, basically, from three sources; namely, foreign laws, mainly the Rolls of Oleron and the Hanseatic Ordinances, treatises of learned authors and judicial decisions of England and other jurisdictions which followed the law merchant and the law maritime\(^{50}\). In Blackstone's Commentaries it is stated that “the affairs of commerce are regulated by a law of their own, called the law merchant, or Lex Mercatoria, which all nations agree in and take notice of; and, in particular, it is held to be a part of the law of England\(^{51}\); and “... in all marine causes, relating to freight, average, demurrage, insurance, bottomry, and others of a similar nature, the law merchant, which is a branch of the law of nations, is regularly and constantly adhered to\(^{52}\). The international character of maritime law, and its recognition as such in England is evident from the above.

It is notable that significant strides in maritime law had also been made in some parts of the Asian continent. In as early as the thirteenth century, the people of the islands of Malacca had a maritime code. Indeed, the traders of Bugis and Macassar, which were nations distinctly different from the Malays, possessed a maritime code which was even older in time, but in subsequent years, they adopted the Malaccan Sea Code in much the same way as the Romans adopted the Rhodian Code\(^{53}\).

The Malaccan Code would have been compiled around 1276 during the reign of Sultan Mohammed Shah, known to be the first Malayan sovereign who adopted and established the Islamic faith within his domain. The architects of the Code were "nakhodas" or shipmasters, and according to the preamble of the Code the laws contained therein were "to be enforced in ships, junks and prahu"\(^{54}\). The Code was not simply an exposition of prevailing custom and usage, but had the status of law sanctioned by the reigning sovereign. It encompassed such matters as demurrage, troves (salvage) and jettison. In the law of jettison, there existed the contemporaneous practice followed in the western hemisphere, inherited from the Rhodian law, of the master consulting passengers with goods on board before committing the act of jettison\(^{55}\). Under the Rhodian Law, the master had to put the cargo owners to a vote; according to the Tablets of Amalfi, if the merchants refused to jettison, the master after protest, could unilaterally carry out the act. Two centuries later, under the Consolato del Mare, the captain had to deliver a set speech to all on board before he could lawfully jettison the cargo. The Rolls of Oleron contained the same rule but with a shorter speech. The laws of Wisby and Hansa did not require the speech of the master or the consent of the merchants\(^{56}\). Under the Malaccan Code, the nakhoda had to assemble all interested parties on board and hold a "general consultation" before he could proceed to jettison the cargo; otherwise he would be at fault\(^{57}\). The universality of the customary law of jettison is evident from the above accounts. Such were the ways in which maritime law evolved through the centuries from pre-historic times in different parts of the world.

### 3. OVERVIEW OF MARITIME LAW SUBJECTS

50. Ibid, at p. 426.
53. See Reddie, supra, footnote 16 at p. 483.
54. “Prahu” refers to a particular kind of watercraft.
56. Supra, footnote 11 at p. 29; supra, footnote 16 at p. 486.
57. Supra, footnote 16 at p. 486.
Against the foregoing backdrop, an overview of specific subjects of maritime law is presented here. These subject matters encompass regulatory and private law aspects as well as hybrid areas of maritime law. It will be observed that the non-private law subject matters inevitably flow from corresponding framework provisions in the United Nations Convention on the Law of the Sea, 1982 (UNCLOS), which is considered to be largely a codification of the customary international law of the sea and as such, is often referred to as the constitution of the oceans.

3.1 Acquisition and Registration of Ships

Ships are usually acquired either through private purchase or lease, better known as demise or bareboat charter. Indeed lease is a term used more in the context of ship financing. Ships can also be built to order by a prospective owner, or can be built and sold new by a shipbuilder or a person who ordered it to be built. All of these ways and means of ship acquisition are carried out under highly specialized and complex contractual arrangements which obviously fall squarely within the domain of private maritime law. Almost invariably, the contracts involved are of standard form suitably modified to suit the needs of the parties involved. A ship can also be acquired through a judicial sale following an arrest of the ship. Needless to say, there is almost always a financing aspect to ship acquisition and the financing arrangements involve not only specialized lenders but specialized contracts as well. A rather uncommon way, in contemporary terms, through which a ship can be acquired is as prize. This takes place when in times of war an enemy ship is captured and a court invested with prize jurisdiction conducts condemnation proceedings following which the claimant may acquire title to the captured vessel.

After a ship is acquired by one of the procedures described above, it needs to be registered if it is a registrable vessel. Registration serves a three-fold purpose. First, there is the public law function. Registration is the procedural device through which the flag state confers nationality on a ship. The granting of nationality makes a ship subject to the national legal regime without which, the ship including people on board would, metaphorically, float in a legal vacuum. Nationality is thus a substantive matter whereas registration is the procedural mechanism through which it is effectuated. The flag in physical terms is the symbol of the ship's nationality although in maritime jargon the word is used interchangeably with ship nationality and flag state refers to the state in which the ship is registered. By virtue of the ship's nationality the flag state exercises jurisdiction and control over the ship and fulfils its obligations under international law. Secondly, registration serves as prima facie evidence of ownership of the ship and protects other proprietary interests such as mortgages and registrable charges. This is a private law function. Thirdly, registration serves as a public record of proprietary interests. This is somewhat of a hybrid function. Also, details by which a ship can be identified such as its dimensions, tonnages and classification are recorded in the register.

The nature of the ship registry whether it is open, closed, or partially open/closed is a matter of national maritime policy. Under UNCLOS there must be a genuine link between the ship and its flag state. The absence of any definitive judicial pronouncement on what exactly is meant by genuine link has left flag states free to interpret the term according to their individual national interests and aspirations. In Article 94, paragraph 2(b) of the United

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58 National maritime legislation may provide that vessels below a specified size threshold are not registrable because they are not sea-going; or registration may be optional, or there may be a licensing regime. Ships under construction are usually not registrable because they are not ships by statutory definition.
Nations Convention on the Law of the Sea, 1982 which is generally regarded as a “Constitution for the Oceans”, it is provided that a flag state must assume jurisdiction over its ships and their masters, officers and crew in respect of “administrative, technical and social matters”. In the United Nations Convention on Conditions for Registration of Ships, 1986 (UNCCROS), there is a similar provision with the word “economic” added. The parameters mentioned provide an indication of how “genuine link” might be construed for the purposes of those conventions. Notably, the latter convention is not in force and is not likely to ever enter into force.

3.2 Proprietary Interests in Ships

The proprietary interests in a ship are of three kinds, namely, ownership, mortgages and maritime liens. Ownership has been discussed above. Ship acquisitions are usually financed through maritime mortgages where the subject ship is the principal security for the loan. Maritime mortgages exist only in respect of maritime property, a term that has been judicially defined as ship, cargo and freight. There is no compulsion in common law jurisdictions for mortgages to be registered but a commercial lender would be foolhardy not to do so. An unregistered mortgage is considered to be an equitable mortgage, and as such, ranks lower in priority to a registered mortgage. In many civil law jurisdictions, where there is no concept of an equitable mortgage, a mortgage comes into existence only through registration.

Transfers and transmissions of ships and their mortgages are registrable interests but maritime liens are not. Indeed the secrecy of its existence is a fundamental attribute of the maritime lien which distinguishes it from other species of maritime claims. A maritime lien accrues from the moment of the event which triggered the claim and is inchoate or incomplete, or rather, dormant until crystallized by arrest or proceedings in rem. It is also indelible to the extent that, similar to the mortgage, it travels with the res unconditionally regardless of change of ownership, and is extinguished only by statutory time bar or application of the equitable doctrine of laches or total loss of the res. Maritime liens enjoy the highest priority ranking ahead of possessory liens, mortgages and statutory rights in rem otherwise referred to as statutory liens, in that order. With regard to salvage claims, the ranking inter se is in inverse order.

The English law of maritime liens, particularly in the context of conflict of laws, is fraught with uncertainties and inconsistencies. Contrary to the continental civil law view, the English common law position, albeit arguably, is that the maritime lien, both in terms of the nature of the claim and its priority ranking, is a procedural matter and therefore subject exclusively to the lex fori. The International Convention on Maritime Liens and Mortgages, 1993 is the third attempt at international unification of the law of maritime liens. The convention entered into force in 2004, without the United Kingdom, which means that the English law on this subject will remain what it is today.

59 Flotsam, jetsam, lagan, derelict and wreck are also maritime property. See Sir Henry Constable’s Case, infra, footnote 123.
61 Bankers Trust International Ltd v. Todd Shipyards Corporation (The Halcyon Isle) [1980] 2 Lloyd’s Rep. 325 (P.C.). The position is different in Canadian law. See The Ioannis Daskalallis [1974] 1 Lloyd’s Rep. 174, where the Supreme Court of Canada held that the nature of a claim ex contractu is determined according to the lex loci contractus but the priority ranking is according to the lex fori.
3.3 Safe Manning of Ships, Seafarers’ Qualifications and Maritime Labour

After a ship has been acquired and matters relating to her ownership and other proprietary interests have been dealt with, the ship has to be crewed and made ready for service. The flag state’s responsibilities in this regard are set out in Article 94 of UNCLOS, albeit in general terms. The requirements for safe manning are also to be found in the Safety of Life at Sea Convention (SOLAS) and the International Labour Organization (ILO) Convention 109 on Wages, Hours of Work and Manning. The cornerstone of safe manning is sufficiency, efficiency and safety and the specific requirements are set out in an IMO Resolution pursuant to SOLAS. Seafarer’s qualifications in terms of training and certification requirements and watchkeeping arrangements on board are governed by the Standards of Training, Certification and Watchkeeping (STCW) Convention, 1978, overhauled extensively by the 1995 amendments which also include an STCW Code. Maritime labour matters are hybrid in scope as there is both a contractual element setting out the terms of employment, often according to collective agreement, and public policy considerations reflected through statutory requirements to which the contractual element is subject. The statutory elements are quite extensive and are, in many instances dictated by relevant ILO instruments pertaining to maritime labour. All of the above matters including the welfare of seafarers, occupational safety and adequate competence and proficiency are part of the human element in shipping. It is a matter of serious concern in connection with current issues such as maritime security, casualties and the subject of refuge.

In June 2010, another set of amendments to the STCW Convention and its associated Code was adopted at the end of a week-long diplomatic conference held in Manila, Philippines. These major amendments were adopted to ensure the continued relevance of global standards for the training and certification of seafarers in a rapidly changing world. It was a fitting event for the commemoration of 2010 declared as the Year of the Seafarer. Eighty-two States Parties to the STCW Convention signed the Final Act. The amendments, to be known as “The Manila amendments to the STCW Convention and Code” are aimed at bringing the instrument up to date with developments that have taken place in the intervening years since 1978 when the STCW was initially adopted and then revised in 1995 at which time the STCW Code was adopted. The Manila amendments are set to enter into force under the tacit acceptance procedure.

The rest period provisions under Section A-VIII/1 (Fitness for duty) of the STCW Code were hotly debated. A compromise text was finally adopted which increases the minimum weekly rest hours for seafarers from 70 to 77, thereby harmonizing the standards with those provided in the International Labour Organization’s Maritime Labour Convention of 2006. At the same time, however, the amended text allows owners and operators to retain some flexibility in imposing both daily and weekly exceptions to the minimum rest hour periods in support of short-term operational requirements. A set of requirements for the recording, monitoring, and verification of compliance with minimum rest provisions was added to Section A-VIII/1 to temper this flexibility.

Given the above developments, it can be said that the 1995 amendments as well as the Manila amendments of 2010 reflect the proactive stance adopted by IMO in recent times to enhance the requirements of seafarers and corresponding roles of maritime administrations for furtherance of the human element issue which has surfaced as an area of major concern in the maritime field. However, it must be recognised that aside from deficiencies in adequate training and competence of seafarers there are other human element causes that lead to marine casualties such as collisions, groundings and major oil spills. These are the physical
and socio-psychological aspects which comprise the welfare component of the human element.

3.4 Maritime Safety

There are essentially four components of maritime safety, namely, ship safety, navigational safety, cargo safety and occupational safety. Much of the law is regulatory in scope but there are also private law elements pertaining to liability for damage and injury and the attendant remedy, primarily that of compensation or damages.

Ship safety is concerned with how safe a ship is as a waterborne object that houses human beings and property including passengers and cargo. It necessarily embraces the concepts of structural soundness and watertight integrity including statical and dynamical stability considerations and safety equipment. As such, the concerns associated with ship safety are primarily of a technical nature. The standards pertaining to ship safety are contained in the technical rules of classification societies setting out scantlings and in the technical safety conventions of IMO, i.e., SOLAS, MARPOL, LOADLINE and their associated treaty instruments. The SOLAS body of instruments contains detailed provisions regarding surveys and certification systems for passenger and cargo ships. Survey and certification systems under SOLAS, MARPOL and LOADLINES have now been integrated by means of a “Harmonized system of surveys and Certification” (HSSC).

Navigational safety has to do with the safety of the ship as a maneuverable floating object including the safety of humans and property on board. This obviously entails rules of navigation as well as navigational equipment. The rules and standards are contained in the Collision Regulations (COLREGS) and SOLAS Conventions. The COLREGS are among the most universally accepted maritime rules. Apart from being regulatory law, as the name implies, the rules frequently have important implications for the judicial resolution of civil liabilities in marine collision cases. The international law of collision liability is contained in the 1910 Collision Convention\(^2\) to which most maritime states are parties. An important feature of the Convention is the express abolition of the hitherto statutory presumption of fault, under which, a ship in contravention of the COLREGS was presumed to be at fault. Among other things, the Convention sets out the rule of proportional liability according to the degree of fault in cases of collision. Where the degree of fault of each vessel cannot be determined, the liability is to be apportioned equally, and where the collision is accidental or due to force majeure, the loss lies where it falls. If a collision is caused by the fault of only one ship, then that ship only is liable to make good the damages.

The subject of freeboard is an integral part of the maritime safety regime which straddles both ship safety as well as navigational safety and is governed by the 1966 Loadline Convention. This convention also enjoys widespread universality. As freeboard relates to the watertight integrity of the ship, as well as its ability to float safely, there are provisions in the Convention relating to the carriage of deck cargo, and special loadlines are provided for timber deck cargo. The Convention makes each state party responsible for ensuring compliance with the convention by ships flying its flag. In practice, however, loadlines are

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assigned by classification societies, which are private organizations, although a flag-state may have its own classification authority within its maritime infrastructure.

Occupational safety concerns the safety of seafarers serving on board ships. Safety here is a matter of ergonomics and also welfare and well-being on board in potentially hostile maritime conditions at sea. Much depends on how well the seafarer is trained to cope with these conditions and carry out his tasks safely and efficiently. The rules and standards relating to occupational safety are contained largely in a host of conventions and treaty instruments of ILO, in particular ILO Convention 147 on Minimum Standards, as well as STCW and parts of SOLAS. Some ILO conventions that are quite archaic have now been revised to address issues such as fatigue and adequate hours of rest.

Cargo safety rules are also contained in SOLAS. Cargoes carried in bulk affect the stability of the ship. If they are ore-concentrates, they tend to make the ship stiff and prone to sinking very quickly, in the event of seawater entering the holds through a hole in the hull. Other bulk cargoes have certain inherent characteristics which can make a ship unstable. If grain becomes wet, it rapidly ferments, and increases in weight causing instability. Also, bulk grain is prone to free surface effect which can cause serious stability problems. Bulk coal without proper ventilation is liable to create an inflammable gas which may ignite or cause an explosion. Bulk carriers have the worst record in terms of maritime casualties. There are also cargoes that are classed as dangerous goods whether they are carried in bulk or in packaged form. The marking, packaging, loading, stowage, carriage and discharge of such cargo is regulated by SOLAS instruments, the Carriage of Dangerous Goods Regulations and the International Maritime Dangerous Goods (IMDG) Code.

Sinkings of ro-ro passenger ferries are also of grave concern. In the wake of disasters such as the Herald of Free Enterprise, the Estonia and the Donna Paz, SOLAS regulations pertaining to damage and intact stability have been reinforced and a safety management regime has been introduced through the International Safety Management (ISM) Code which imposes on shipowners and flag states added responsibility.

Seaworthiness is an integral part of maritime safety. It pertains largely to commercial maritime law, mainly with regard to marine insurance contracts where seaworthiness is a warranty the breach of which by the assured can deprive him of indemnification; and in carriage contracts evidenced by bills of lading, or in charterparties where specific obligations are imposed on the carrier to exercise due diligence to provide a seaworthy ship at the commencement of the voyage. There is also the notion of statutory seaworthiness. The maritime authorities in a port can prevent an unseaworthy ship from sailing until it is seaworthy. Deficiency in safe manning or in safety equipment can render a ship unseaworthy. By statute a term is implied in a seafarer’s employment contract that his vessel is seaworthy.

3.5 Wreck and Salvage

There are basically two components to the subject of wreck. One involves wreck as a navigational hazard. The other involves wreck as property. Since wrecks are found in places under state jurisdiction, it is in the public interest that the relevant maritime authority takes steps to preserve the property and prevent it from being destroyed or illegally appropriated to

63 In United Kingdom legislation there exists as well the notion of an unsafe ship and a dangerously unsafe ship. The latter expression arose out of the official enquiry on the Herald of Free Enterprise disaster.
the detriment of the owner or an assignee by subrogation or abandonment such as an insurer. This is in addition to the public interest in the raising and removal of a wreck from a navigable channel or fairway for navigational safety.

Salvage remuneration is subject to the triumvirate of customary law principles; danger, voluntariness and success. The principle of "no cure no pay" has been embodied in standard form salvage agreements such as Lloyd’s Open Form (LOF) which provides for the granting of the award by arbitration. The international law of salvage has for many years been governed by convention codifying customary law. The most recent one is the International Convention on Salvage, 1989. Its provisions are incorporated in LOF 2011, the latest version of the form. A significant aspect of the Convention is the special compensation regime applicable in cases of marine pollution which allows a salvor to recover reasonably incurred expenses plus an uplift of a maximum of cent percent of his expenses for preventing or minimizing pollution, even though the operation may not have been successful in terms of ultimate preservation under a strict application of the "no cure no pay" principle. The House of Lords decision in Semco Salvage and Marine Pte Ltd. v. Lancer Navigation Company Ltd. 64, with which the salvage industry became dissatisfied, prompted the creation of the Special Compensation P&I Clause (SCOPIC) incorporated in LOF 2000. A salvor can invoke SCOPIC as an alternative to the special compensation regime of the Salvage Convention.

3.6 Towage

Towage operations are subject to contractual arrangements, usually under standard forms. Some jurisdictions have found it necessary to legislate on towage to codify the case law that has evolved. The issues involve terms to be implied in a contract, the master's authority and duty to engage towage services if the ship is in danger, the beginning and termination of a towage service, whether the towing vessel is the servant of the tow, liability to third parties in the event of a collision and indemnity clauses. Salvage and towage often overlap where assistance is offered and rendered in a situation of danger.

3.7 Pilotage

Pilotage services whether rendered by a private entity or a public authority are usually pursuant to contract. The pilot has conduct of the vessel at the relevant time but the master remains in command. Ships' bridge log books therefore carry the notation “vessel to master’s order and pilot’s advice”. In most jurisdictions, the pilot is considered to be the servant of the shipowner whether or not pilotage is compulsory and the shipowner is thus vicariously liable in law to a third party for the pilot's fault or negligence in navigation and ship handling. In some jurisdictions, this vicarious liability extends only to instances of voluntary pilotage. In other jurisdictions, the shipowner is never liable for the fault of a pilot. This is essentially a matter of legal policy. In the United Kingdom, the so-called defence of compulsory pilotage was abolished by the Pilotage Act of 1913. Under some pilotage legislation, a pilot or a

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65 E.g., the United Kingdom, Canada.
66 E.g., Indonesia.
Pilotage Authority can be sued for a pilot's negligence, but the statutory limitations of liability in each case are so low that a potential claimant would be inclined to sue the shipowner in any event.\(^{69}\)

### 3.8 Carriage of Passengers

The carriage of passengers and their baggage by ship is particularly important in those countries which have a significant passenger trade or ferry services. The international law on this subject is contained in the Athens Convention on the Carriage of Passengers and Their Luggage on Board Ships (PAL), 1974. The Convention has recently been amended through the Protocol of 1996 which has, *inter alia*, raised the limits of liability.

### 3.9 Maritime Claims and Arrest of Ships

This subject is related in some respects to the provisions on maritime liens. The international law on ship arrest is contained in the International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships, Brussels, 1952. Most maritime countries are parties to this Convention. The Convention lists the types of maritime claims for which a ship can be arrested under the Convention. A ship may be arrested within the jurisdiction in respect of a maritime claim as defined, but not for any other type of claim. The convention contains the concept of sister ship arrest. There are detailed procedural requirements pertaining to posting of bail or other form of security that will allow the ship to be released. A new Arrest Convention was adopted in 1999 one objective of which is to harmonize the international regime of ship arrest with the International Convention on Maritime Liens and Mortgages, 1993. It is not yet in force. It must be noted that ship arrest is a civil action the fundamental objective of which is to provide a claimant with security, particularly where the shipowner is not available to answer the claim or has ceased to exist. It can only be obtained through a court order; and if granted, serves as a pre-trial remedy. In England and other common law jurisdictions, a ship is also arrested for the purpose of founding jurisdiction in connection with the claim, which, of course, must be a maritime claim.

### 3.10 Limitation and Division of Liability

Civil liability in maritime law usually arises out of contract or tort. Examples of the former are ship sale and purchase contracts, mortgage contracts, carriage and affreightment contracts including charter-parties and marine insurance contracts. Collision liability, damage from oil pollution, personal injury claims of crew members or passengers and losses of luggage and other personal property, groundings and damage to docks *etc.* fall within the scope of tortious liability. In most instances, the liability and compensation regimes, including the basis of liability, whether strict, absolute or fault based, are governed by international conventions, often codified into national legislation. There may also be liability regimes which are not covered by convention law, but may be provided for by statute, or may be governed by custom or case law jurisprudence. The limits of compensation and rules respecting the loss of entitlement to limit liability are also contained in the relevant instrument or legislation.

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\(^{69}\) In the United Kingdom the limitation is £1000 plus the amount of the pilotage charge in the case of an individual pilot. In the case of a Pilotage Authority it is £1000 times the number of authorized pilots employed by the Authority at the date of the loss or damage. In Canada, the individual pilot's limitation of liability is $1000 (See *Pilotage Act* s. 30 of Canada).
In the international sphere, there are two conventions which deal with limitation of liability for maritime claims in general, the 1957 Convention\textsuperscript{70} and the 1976 Convention (LLMC). The former deals only with the limitation of liability of a shipowner as defined in the convention, whereas in the latter, the entitlement to limit liability in respect of maritime claims extends to others. In the LLMC, the limits are substantially higher and the basis on which the right to limit is lost, is different. These so-called global limitation conventions provide regimes for claims which do not fall under specific subject-matter conventions, or where they cannot otherwise be invoked. The LLMC was amended through the Protocol of 1996 which raised the limits significantly.

Limitation of liability, traditionally a concept peculiar to maritime law, works on the principle that the quantum of the limit is tied to the size of the ship in terms of tonnage. Historically, limitation was considered a privilege because the concept was an exception to the general rule that a successful claimant was entitled to be recompensed by the wrongdoer for the full amount of the loss. The claimant carried the burden of proving his case against the defendant shipowner. Because limitation was considered a privilege rather than a right, the onus for invoking limitation to the satisfaction of the court, rested on the shipowner. The 1957 Convention, which represents the law in many jurisdictions, allows a shipowner to claim limitation only where the occurrence giving rise to the claim did not result from the actual fault or privity of the shipowner\textsuperscript{71}. In determining whether a shipowner is barred from claiming limitation because of actual fault or privity, courts apply the doctrine of the alter ego. In other words, the shipowner is limitation-barred if the "ship's husband" is found to be guilty of actual fault or privity. The application of this doctrine was aptly exemplified in cases such as The Lady Gwendolen\textsuperscript{72} and The Marion\textsuperscript{73}.

The limitation provisions in LLMC have imposed on the claimant the onus of showing that the shipowner is not entitled to limitation. The test of actual fault or privity has been replaced by the shipowner's "personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result" being in issue\textsuperscript{74}. This has arguably transformed limitation from a privilege to a right and has made it virtually unbreakable; much to the satisfaction of the marine insurance industry which ultimately has to indemnify the losses in most cases\textsuperscript{75}. Under LLMC limitation is not applicable to claims for salvage and general average contribution and claims in respect of air-cushioned vehicles and floating platforms. Limitation tonnage is defined as being equivalent to the gross tonnage of the ship. A salvor's limitation is based on a fixed tonnage of 1500 tons.

3.11 Carriage of Goods by Sea and Multimodal Transportation

\textsuperscript{70} The forerunner of this Convention was the 1924 Limitation Convention which is still the law in some States; e.g., Cyprus.
\textsuperscript{71} Notably, the "actual fault or privity principle is contained as well in the Hague, Hague-Visby Rules and the Civil Liability Convention of 1969.
\textsuperscript{72} [1965] P. 294.
\textsuperscript{73} [1984] A.C. 563.
\textsuperscript{74} Article 4 of LLMC 1976.
\textsuperscript{75} Notably the limitation regime in the 1974 Athens Convention on Shipowners' Liability for Passengers and their Luggage (PAL 1974) has an almost identical provision. The case law jurisprudence on this new "reverse onus" provision is still in its infancy, although the alter ego doctrine is likely to continue to apply.
Carriage of goods by sea is a major subject of commercial maritime law. There are three sets of international rules governing this subject, the Hague Rules, the Hague-Visby Rules and the Hamburg Rules. The choice, of course, depends on national shipping policy and is usually based on whether the country is predominantly a carrier or a shipper state. Consideration is also given to which rules prevail in the states which are its major trading partners. Carriage of goods by sea is basically a contractual matter and the contract of carriage, in essence governs the liability regime as between the carrier and the shipper.  

The contract is evidenced by the bill of lading which also serves as a document of title and a receipt for the goods.

The Hague Rules were designed in 1924 to impose on the carrier the legal obligation to provide a seaworthy ship at the commencement of the voyage and to carry the goods with due care. A number of exceptions were provided such as perils of the sea, navigational error, and fault in the management of the ship by the master or other servants of the shipowner. The carrier could also escape liability if he could prove that the loss or damage occurred without his actual fault or privity. Limitation of liability was provided on a "per package" basis. In 1968, the Rules were amended through a Protocol, mainly to deal with the "per package limitation" problem arising from the growing phenomenon of containerization. The amended version came to be known as the Hague-Visby Rules. In 1978, another set of Rules, namely, the Hamburg Rules were adopted. They represent a radical change from the Hague/Hague-Visby scheme. The most significant feature is the nature of carrier liability, which is based on carrier negligence with a reversal of onus. Live animals and deck cargo are covered and the limitation amounts are higher. The Hamburg Rules are generally viewed as being more favourable towards shippers and are therefore not popular with the traditional maritime states which view themselves largely as carrier countries. It is, however, in force; most of the parties being developing countries.

With the advent and growth of containerization, multi-modal transportation of goods is a phenomenon which is increasing in importance. The traditional form of bill of lading governed by the Hague/Hague-Visby or Hamburg Rules, is inadequate to deal with this matter, as the Rules pertain to carriage of goods by sea only, whereas multi-modal or inter-modal transport involves a multiplicity of carriers of different transportation modes. Various mechanisms such as the "through bill of lading" and the seaway bill have been introduced to deal with the multi-modal issue. The main enquiry revolves around the question of which carrier is liable in the event of loss of or damage to the goods. The problem is compounded by the fact that in segmented multimodal carriage, the shipper enters into a separate contract with each carrier, whereby each such contract is governed by the relevant liability regime applicable to that unimodal segment of the carriage. Each carrier acts as an agent of the

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76 In some jurisdictions, such as in Canada, the term "carriage of goods by water" is used as a large part of their shipping is carried on in fresh water, the Great Lakes of North America.
77 Nowadays, a non-negotiable document known as the sea waybill is also used for which uniform rules have been developed by the CMI in the absence of any international convention.
80 For the sea segment, the regime would be governed by the Hague, Hague-Visby or Hamburg Rules; in the cases of air and land segments, the regimes would usually be governed, respectively, by the Warsaw Convention on Air Transport, and the CMR Convention for Road Transport or the CIM Convention for Rail Transport.
shipper *vis a vis* the successive carrier, but each carrier remains responsible as a principal to the shipper.

Where multi-modal transportation is non-segmented the shipper hands over the goods to a Combined or Multimodal Transport Operator (CTO or MTO) who is usually a freight forwarder, and who acts as a principal *vis a vis* all the carriers under a single contract referred to as a combined transport document (CTD) or a multimodal transport document (MTD). Voluntary rules were developed by the International Chamber of Commerce (ICC) for creating uniformity with respect to combined transport documents. But these rules have no statutory force. Eventually in 1980, under the auspices of UNCTAD, the Multimodal Convention was adopted which has failed to enter into force. The Convention contemplates the non-segmented form of multimodal transport and closely resembles the Hamburg Rules in terms of its liability regime.

After some ten years of deliberations in which the CMI and the United Nations Commission on International Trade Law (UNCITRAL) collaborated, the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea was adopted in 2008 under the auspices of UNCITRAL. The signing ceremony was held in Rotterdam in October 2009 which is why the Convention is referred to as the “Rotterdam Rules”. Its ultimate aim is to instigate the collapse of all the existing Rules (Hague, Hague-Visby and Hamburg), which have caused unwarranted fragmentation of international sea carriage law, and replace it with a uniform regime that is applicable globally. The Convention is intended to operate on a door-to-door basis thus providing for multimodal transportation so long as there is a maritime segment; hence the use of the appellation “maritime plus” to describe the multimodal character of the Rules. The multimodal aspect of the regime is designed to allow the application of mandatory conventions governing other modes of transportation. Like the Hamburg Rules, the Rotterdam Rules is intended to apply to all contracts of carriage not just those evidenced by a “bill of lading or similar document of title”. But there are various restrictions; for example, the Rules are not applicable to charterparties and slot-charters. The Convention deals with many areas not presently covered under current regimes. These include, for example, freight, delivery, rights of control, transfer of rights and rights of suit against the carrier. Among its salient features, the notion of the volume contract is introduced; it provides for the use of electronic transport documents and retains the liability provisions of the Hague/Hague-Visby Rules. The so-called “catalogue of exceptions” is recast with some new wording and the “nautical fault” defence is abolished.

### 3.12 Marine Insurance

The subject of marine insurance is another important aspect of commercial maritime law. The marine insurance industry is mainly based in London, and the law and practice of marine insurance is largely based on English legislation which represents a codification of the law and practice which predates it. The English legislation, including its tenacity in terms of statutory expression, its logical flow and encompassment of the whole subject-matter has stood the test of time, but it is time for reform. Marine Insurance, like salvage and general average, has a uniquely maritime heritage and is of great antiquity. It is the progenitor of insurance law in other spheres as we know it today.

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There are a number of basic principles in the law of marine insurance. It is essentially a contract of indemnity and the assured must have an insurable interest in the property at risk so that wagering and gaming is outside its legitimacy. The doctrine of *uberrimae fidei* is germane to a marine insurance contract; so that non-disclosure of a material fact by either party can vitiate the contract. The doctrine of subrogation enables the insurer to “step into the shoes” of the assured after indemnification and assert a right of action against the perpetrator who caused the loss. In the event of an actual total loss, that is where the assured is irretrievably deprived of the property or the property suffers a loss in specie, the insurer is liable to indemnify the loss to the insured value of the property. Where there is a constructive total loss, *i.e.*, where there is unlikelihood of recovery or where the cost of retrieval far exceeds the post-retrieval value of the property, the assured issues a notice of abandonment, which the insurer may or may not formally accept. If he accepts the notice, after indemnifying the assured for a total loss, the insurer by virtue of the property being abandoned in his favour, becomes its owner. Subrogation and abandonment in marine insurance law resemble each other but are different in terms of legal effect. The former gives a right of action and the latter confers a proprietary right.

The saving acts of salvage, general average and suing and labouring all have implications regarding indemnifiability which are governed by relevant provisions of the Marine Insurance Act. Other issues, contractual as well as statutory, involve warranties express and implied, partial losses, particular average and premium. The clauses in different kinds of policies are usually derived from standard forms known as Institute Clauses produced by the Institute of London Underwriters. In shipping, besides hull and machinery insurance there is also protection and indemnity cover obtainable through a vessel being entered in a P&I Club. Third party liability such as pollution damage cover are available through P&I insurance.

### 3.13 Marine Pollution

The subject of marine pollution is of prime importance in today’s maritime world. The problems relating to pollution of the seas are on-going, as evidenced by frequent disasters of mammoth proportions; and the law appears to be continuously developing to cope with the consequences. There is, at present, a whole body of law on the subject of ship-source marine pollution governed largely by international conventions. The law stretches across a spectrum from public international law, through international regulatory law to international private law. In domestic spheres, there are penal laws as well and civil liability regimes, both statutory and otherwise, which fall outside the scope of international conventions.

The public international law framework for the regime of vessel source pollution is contained in Article 211 of UNCLOS. In essence, this Article requires flag states to adopt laws for the prevention, reduction and control of marine pollution applicable to their ships.

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and the laws must be consistent with generally accepted international rules and standards established through the relevant competent international organization or general diplomatic conference. The competent international organization in this case is the IMO\textsuperscript{84}. Another area of public international law is the Intervention Convention of 1969 together with its Protocol of 1973\textsuperscript{85}. The convention allows a coastal state to intervene on the high seas in cases of imminent threat of pollution to its coast or coastal interests. The International Convention on Prevention of Pollution from Ships, 1973 and the Protocol of 1978 (MARPOL 73/78) is the regulatory convention dealing with ship generated pollution caused by operational discharges. The measures prescribed are preventive in character. There are six Annexes that address six different kinds of pollutants, namely, oil, noxious liquid substances, packaged harmful substances, sewage, garbage and air pollution. The first two Annexes are compulsory while the remainder are optional. All the Annexes are now in force. The Oil Pollution Preparedness, Response and Co-operation Convention, 1990 (OPRC) is also a regulatory convention; it has both a preventive as well as a remedial element. It now has a protocol relating to hazardous and noxious substances referred to as the HNS Protocol. The regulation of dumping of wastes at sea is governed by the London Convention, 1972 which has been revised by the Protocol of 1996. The Basel Convention on the Transboundary Movement of Hazardous Wastes, 1989 is a UNEP Convention which regulates the subject matter indicated by the title of the Convention and also deals with "environmentally sound management" (ESM) of such wastes.

Another important marine environmental phenomenon is the accumulation of marine organisms on a ship's hull while it is traversing the world's oceans through varieties of biological and oceanographic environments. Generically known as "marine growth" or colloquially as "weed", they can cause a reduction in ship speed which in turn can have a serious commercial impact on the ship's earnings. To combat the problem of marine growth, ships have for many decades used anti-fouling paints on ships' hulls which contain organotin compounds acting as biocides that are harmful to the marine environment. Such anti-fouling systems pose a substantial risk of toxicity and other chronic impacts on marine organisms and are ecologically harmful and also detrimental to human health. The International Convention on the Control of Harmful Anti-fouling Systems on Ships (AFS), 2001 was adopted to promote the substitution of such environmentally harmful systems by ones that are less harmful or preferably harmless. The AFS Convention entered into force on 17 September 2008.

The phenomenon of alien species travelling in ballast tanks of ships has been recognised as an environmental problem since the advent of steel-hulled vessels over a century ago. While sea water used as ballast is essential for the safety, stability and efficiency of ships, ballasting also results in invasive species entering the ship in one marine environment and being discharged into the waters of another causing serious ecological, economic and health hazards. To combat this problem, scientists, mainly in certain developed countries, have been engaged in research and development on a continuing basis. The traditional method of ballast water interchange has not been entirely successful in resolving the problem. In the absence of a universal regulatory framework to address this issue several

\textsuperscript{84} All international instruments on marine pollution except the Basel Convention on Transboundary Movement of Hazardous Wastes, 1989 are IMO Conventions. The London Convention on Dumping of Wastes at Sea, 1972 amended by its Protocol of 1996 was originally not an IMO Convention, but now it is.

states have unilaterally introduced their own legal regimes. Initially a proposal was made at
IMO to add a seventh Annex to MARPOL to introduce a regulatory regime that would apply
globally, but after considerable debate it was decided that a new and separate convention was
the better approach. Thus, the International Convention for the Control and Management of
Ships’ Ballast Water and Sediments (BWM) was adopted in February 2004. It is not yet in
force. IMO initiated the “Globallast” project to provide technical assistance to developing
countries to prepare for the legal and practical implementation of the convention when it
enters into force for the state concerned.

Exhaust emissions from ships have long been viewed as a serious threat to the
atmospheric environment and also to the marine environment through their entry to the
oceans via the atmosphere. The regulation of pollution emanating from ships’ exhausts is
regulated by Annex VI of MARPOL which was adopted through a Protocol in 1997.
Originally, this Annex regulated the emissions of So₂ and NOₓ which primarily cause acid
rain but there were no provisions dealing with CO₂, a greenhouse gas which is a major
contributor to the phenomenon of global warming. Through its deliberations within the
Marine Environment Protection Committee (MEPC), the IMO has developed standards for
ships’ operational efficiency and design with the object of further minimising environmental
damage.

After considerable debate, certain control measures relating to CO₂ emissions were
agreed at the 62nd session of MEPC held in July 2011. Eventually, these will appear as
amendments to Annex VI referred to as the GHG amendments. Among other things, the
amendments will make it mandatory for new ships to adhere to the Energy Efficiency Design
Index (EEDI) and the Energy Efficiency Operation Index (EEOI) and have a Ship Energy
Efficiency Management Plan (SEEMP) which also applies to existing ships. The objective is
to adopt best practices for fuel efficiency in relation to ship operations. At MEPC 62 criteria
for EEDI and EEOI were adopted which are intended to be mandatory. However, the EEDI
formula has proven to be problematic in terms of its application to larger vessels such as
VLCCs and Ro-Ro ships because the speed factor has not been taken into account in the
current formula. At present, therefore, it will apply only on a voluntary basis to "suitable"
ships pending revision of the formula.

The EEDI is non-prescriptive; it is a performance-based mechanism which allows
industry to choose an appropriate technology consistent with a specific ship design so as to
use the most cost-efficient solution to ensure compliance with the regulations. The SEEMP is
a parallel mechanism which enables shipowners and operators to enhance the energy
efficiency of a ship. Furthermore, consideration is being given to introduce market-based
measures (MBM) to reduce GHG emissions from ships. The proposals being reviewed are
recognised to have implications for developing countries in terms of adaptation and capacity
building, which, among other issues are on the table for discussion. An expert Group has
been established for evaluating proposals submitted by various countries. It is recognised that
further in-depth examination of the impact of MBM on developing countries will be
necessary. The MBM proposals being reviewed range from the imposition of a levy on CO₂
emissions from ships operating internationally through emission trading systems to schemes
based on actual efficiency in terms of efficiency and operation, namely, by application of the
EEDI, EEOI and SEEMP mechanisms. Attempts to regulate CO₂ emissions from ships have
progressed, no doubt, but the exercise is still incomplete.
The subject of civil liability and compensation for oil pollution damage is one of serious global concern. The international regime in this field is governed by the Civil Liability Convention, 1992 (CLC) and the Fund Convention, 1992.\textsuperscript{86} The strict liability regime of the CLC is supplemented by the compensation regime of the Fund Convention. The CLC has its own limitation regime which is then topped up by the limitation provided under the Fund Convention. In recent times the limitation amounts have undergone considerable revision and a supplementary fund has now been put into place. A state cannot be a party to the Fund Convention without being a party to CLC but it can opt to join the CLC only. There is a mandatory requirement for insurance or other security up to the limit of the owner's liability. There is also provision for direct action against the insurer in respect of an owner's liability. Under the Fund Convention, the International Oil Pollution Compensation Fund (IOPC Fund or the Fund) is a legal entity which can sue, be sued in its own name, and intervene as a party in legal proceedings. The Director is the legal representative of the Fund. Parties to the Convention are required to contribute to the Fund according to the total quantity of oil imported annually. The amount and manner of contribution is subject to periodic determination by the Assembly of the Fund under the Convention. The Fund Convention provides for maximum limits of compensation which are tied to the limitation amounts under the CLC. The Fund is also liable to indemnify a shipowner in certain instances but may be exonerated under certain stipulated circumstances. The Fund may also assume the obligation of a guarantor subject to the decision of the Fund Assembly, and in such capacity would have a right of recovery against the shipowner for whom it stands as a guarantor as well as rights of subrogation in relevant cases. There are detailed prescription periods and provisions regarding the binding effect of judgements against the Fund.

In addition to the above, there are liability sharing arrangements established through binding contractual schemes following discussions between the International Group of P&I Clubs, the Fund Convention Secretariat and oil receivers represented by OCIMF (Oil Companies International Marine Forum). There are two schemes in place. The one known as STOPIA 2006 (which originally applied only to States Party to the Supplementary Fund) was extended to apply to all parties to the 1992 Fund Convention and, also, to the handful of CLC States not party to the Fund Convention. The other, known as TOPIA (Tanker Oil Pollution Indemnification Agreement) provides for the shipowner sharing half of the costs of claims involving the third tier Supplementary Fund. The schemes have built-in arrangements which provide a mechanism for monitoring payments and adjusting the agreements to maintain the long term balance of liability sharing.

The Hazardous and Noxious Substances Convention, (HNS) is designed along lines similar to the CLC/Fund regime except that all matters are addressed through one convention with a combined limitation regime including an HNS Fund.

Spills from ships’ bunkers are an environmental menace which had not previously been fully addressed. The CLC only covers bunker spills from oil tankers. It has long been recognised that bunker spills from large non-tankers such as container ships and bulk carriers can result in equally serious detrimental consequences. In 2001, the International Convention

\textsuperscript{86} International Convention on Civil Liability for Oil Pollution Damage, 1969 as amended by the Protocol of 1976; International Convention on the Establishment of an International Fund for Oil Pollution Damage, 1971. The 1984 Protocols to both these Conventions failed to go into force. New Protocols to both conventions have since been adopted in 1992 to revise the limitation regime. They are now in force.
on Civil Liability for Bunker Oil Pollution Damage, 2001, colloquially referred to as the Bunkers Convention, was adopted to fill this lacuna in the law of liability and compensation for damage resulting from vessel-source pollution. While there are similarities with CLC and HNS in relation to compulsory insurance, state-certification and direct action, in other respects it is quite different as it is a single tier instrument based entirely on shipowner liability and permits limitation but without specifying a particular limit in the instrument.

3.14 Maritime Security

Maritime Security is a topic that is in the forefront of current concerns in the maritime world. Some are of the view that security is an extension of safety and that it represents the third pillar in the IMO mandate, the first two being maritime safety and protection of the marine environment. With increasing piratical activity at sea and the threat of terrorism since the Achille Lauro incident, maritime security has assumed a distinctive dimension. While safety and security are both concerned with safety of life and property at sea, the concerns are founded on different premises. Maritime safety concerns risks and dangers associated with fortuity in a potentially hostile maritime environment and the ability of the ship and crew to counter them. Maritime security is risk and danger created by deliberate and intentional violent human intervention. The international law of piracy as codified in UNCLOS from customary law is deficient and anomalous in view of the new regimes of maritime zones. The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1998 (SUA) was considered inadequate and has been amended through its Protocol of 2005. Meanwhile, recent events of terrorist activity mobilised the international maritime community, somewhat hastily, into adopting the International Ship and Port Facilities Security (ISPS) Code which took effect in July 2004. The CMI has taken the initiative to produce model national legislation to address piracy. But meaningful progress is dependent on a revision of UNCLOS itself which is not about to happen. In summary, much work remains to be done in this field to produce a regime that is result-oriented and economically efficient and fair for the world maritime community.

Over the last couple of decades piratical acts have increased significantly in numerous waters within maritime zones of coastal states as well as on the high seas. The waters in and around the Malacca Straits were rife with incidents of petty criminal acts to major hijackings of merchant ships. These waters were particularly vulnerable because of their importance to world trade and commerce as a shipping corridor linking Europe, Africa, the Middle East and South Asia to the far eastern reaches of the Asian continent. From a legal viewpoint, however, most of these waters fell within the jurisdictions of the surrounding coastal states, and therefore, the high seas piracy provisions of UNCLOS codifying the customary international law were technically not applicable. Thus, other states were precluded from intervening in cases of such “unlawful acts” in those waters. For want of a better appellation, these acts could be described as acts of “coastal zone piracy”. By contrast, the acts committed off the waters of Somalia, which continue to be a current menace, mainly occur on the high seas, and therefore, in terms of international law, are governed by the relevant provisions of UNCLOS and the customary international law. The problem with the Somalian brand of piracy has to do with lack of adequate enforcement. While there is the will to enforce, the way to achieve it is still uncertain and unconcerted in terms of global action although efforts are underway at IMO to find an effective solution to the problem. Added to that is the allegation that the root cause of piratical lawlessness in that area is not being addressed by the international community.
4. INTERNATIONAL UNIFORMITY AND MARITIME CONVENTIONS

4.1 The Nature of International Legislation

The vast body of international law is derived from a number of sources, of which, custom and treaties are the principal ones. In general, treaty law takes priority provided it is not inconsistent with the peremptory norms of international law, known as *jus cogens*87. Treaties are basically contractual in nature and are binding only on states parties88. In contrast, customary law is binding on all states. According to Article 2 of the Vienna Convention on the Law of Treaties, a treaty may be defined as "an agreement whereby two or more states establish or seek to establish between themselves a relationship governed by international law"89. The term "treaty" may in practice be given one of a variety of titles, the most common of which is the convention. Instruments such as "Protocols" and "Final Acts" are of a primary legislative character; and "Regulations" appearing as Annexes to Conventions, e.g., the MARPOL 73/78 Convention, have a secondary legislative character. A Protocol can take different forms and is usually less formal than a convention proper. There are several other instruments generated by international law-making bodies such as IMO which are not legally binding but are persuasive. These are referred to as soft law or *para-droit* and include Resolutions, Codes, Declarations, Recommendations, Guidelines, *etc*. The legal effect of such an instrument depends on its subject matter and the manner in which it was adopted90. Codes associated with IMO conventions are increasingly becoming mandatory. Often, soft law instruments are incorporated into national maritime legislation thereby converting them into hard law.

The goals of regulatory law are different from those of private law. Regulatory conventions such as SOLAS, MARPOL, LOADLINE, and COLREGS and their related instruments purport to regulate maritime activities for the protection of the wider public interest. For that reason they are relatively more universal in scope and acceptance, which is evident from the number of state parties. When it comes to private law conventions, national and private interests with economic and other implications are more at stake with the result that international rulemaking is fragmented. In the field of carriage of goods by sea, for example, there are presently three sets of international rules which are in force, namely, Hague Rules, Hague-Visby Rules and Hamburg Rules, and a fourth, the Rotterdam Rules has recently been adopted. The lack of uniformity in the international law is obvious. There are also private law international instruments such as the York-Antwerp Rules on General Average which are not conventions and therefore states are not parties to them. The York-Antwerp Rules are incorporated as terms of private contractual instruments, mainly marine insurance policies and charter-parties.

4.2 International Maritime Law Institutions

There are basically four institutions that are involved in the rule-making process in international maritime law. By far, the most important of these is the International Maritime

88 *Ibid*, at p. 44.
90 *Ibid*, at p. 53.
Organization (IMO), a specialized agency of the United Nations. The IMO is exclusively concerned with non-military, international shipping, and is involved in the development of regulatory and private maritime law conventions. As such, it has the most predominant role to play in the unification of international maritime law which is evident from the number of state parties to its major regulatory conventions, SOLAS, MARPOL, LOADLINE and COLREGS. The theme or motto of the IMO is to promote "safer ships and cleaner seas". Even though it was international concern for maritime safety which provided the impetus for the establishment of the IMO, originally as a consultative body, it is now, in effect, a quasi-legislative body with an increasing interest in the protection of the seas from ship-source pollution, and currently in maritime security as well. The private law conventions such as the Salvage Convention and those dealing with limitation of liability, such as CLC, NUCLEAR, PAL, LLMC, etc. deal with legal rights and civil liabilities within the sphere of private law.

The technical conventions are developed within the Maritime Safety Committee or the Marine Environment Protection Committee, as appropriate, according to the subject matter of the particular convention. The private law conventions are developed within the Legal Committee. By virtue of their technical nature and content, the regulatory conventions are less prone to controversy and have thus been immensely successful in fostering uniformity in international maritime law and practice. The private law conventions of IMO have also, by and large, been instrumental in propagating uniformity. In some areas, such as the regime of liability and compensation for oil pollution damage, conflicting national interests in socio-economic concerns and their interactions with the prevailing market forces of the maritime industry have sometimes hindered the development of a cogent and internationally acceptable regime, but the efforts of the international maritime community have remained concerted and relentless.

The International Labour Organization (ILO), another specialized agency of the United Nations, with its headquarters in Geneva, also plays a prominent role in the development of uniformity in international maritime law. Founded in 1919, the ILO has the distinction of being the oldest of the specialized agencies and has been in existence as an international body even before the League of Nations. As an inter-governmental organization within the United Nations system, it is rather unique in that it has a tripartite structure. Government, industry, as well as labour are all represented on national delegations; thus, all these three sectors participate in the rule-making process. The Governing Body of the Organization is its main organ and one of its advisory bodies is the Joint Maritime Commission which is a bipartite body representing shipowners and seafarers. The implementation of ILO instruments is not only achieved through national legislative action, but in appropriate cases, is done through incorporation of the provisions into collective

93 International Convention on Civil Liability for Oil Pollution Damage; Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material; Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974; Convention on Limitation of Liability for Maritime Claims, 1976.
94 See Wiswall, supra, footnote 92 at p. 1211, and in particular, note 7 at that page.
agreements. This is not surprising since maritime labour law is of a hybrid type consisting of a regulatory law element, as it is an important part of public socio-economic policy, as well as a private law element because it is substantially contractual in nature.

It has long been alleged that ILO conventions and related treaty instruments are grossly outdated. Some of the instruments date back to the era following the establishment of ILO through to the era before and after the Second World War. ILO conventions thus did not receive much support from the world maritime community although several states enacted maritime labour legislation based on principles derived from ILO treaty instruments. The ILO, with support from the IMO and other bodies, embarked on a major law reform exercise which culminated into the adoption in 2006 of a comprehensive all-embracing instrument known as the Maritime Labour Convention. It is not in force as yet.

The activities of the United Nations Conference on Trade and Development (UNCTAD) are focused on the interests of developing countries. The former Committee on Shipping of UNCTAD was concerned with international sea-borne trade and its economic aspects. Since UNCTAD IV, that Committee has been dismantled; no maritime conventions are concluded under the sole auspices of UNCTAD anymore. The International Convention on Maritime Liens and Mortgages, 1993 was produced as a result of the joint efforts of IMO and UNCTAD and UNCTAD was closely involved in the work which led to the adoption of the Arrest Convention, 1999. Within the scope of its mandate, UNCTAD has been instrumental in the adoption of the United Nations Convention on a Code of Conduct for Liner Conferences, 1974, the International Multimodal Transport of Goods, 1980, Conditions for Registration of Ships, 1986, and Carriage of Goods by Sea, 1978, otherwise known as the Hamburg Rules. Besides these conventions, UNCTAD has been active in formulating model charterparty clauses, attempting to reform the law of general average and formulating draft model legislation for marine insurance.

The CMI is a non-governmental organization (NGO) which ardently promotes the unification of international maritime law and continues to play a pre-eminent role in the development of rule-making instruments. It is by far the most renowned NGO in the maritime law field and is also the oldest, founded in 1896. It is the international parent body of the various national maritime law associations whose memberships consist of private maritime lawyers. Prior to the establishment of the IMO, international maritime conventions were almost always initiated through the aegis of the CMI. The approach of the CMI towards uniformity has been to unify the substantive maritime law rather than to seek private international law solutions.

Following its establishment, the IMO undertook the sponsorship of regulatory maritime conventions. The private law conventions continued to be developed through the CMI. In 1967, following the Torrey Canyon disaster, the Legal Committee of the IMO was established. The CLC and the Intervention Convention were developed within the Legal Committee, but the diplomatic conference for their adoption was convened in Brussels. Gradually, the IMO through its Legal Committee took over the function of preparing draft

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96 It is noteworthy in this context that the final draft of the Hamburg Rules was prepared by the United Nations Commission on International Trade Law (UNCITRAL) whose headquarters are in Vienna.
conventions on non-regulatory maritime matters which were hitherto carried out by the CMI. The preparation of draft conventions pertaining to commercial maritime matters was partially taken over by UNCTAD. However, as in the case of the Salvage Convention of 1989, the CMI continued to take the first initiative and initial deliberations including the production of the first draft of the convention took place within the CMI. This co-operation between the CMI and the inter-governmental bodies such as the IMO and UNCTAD continues to bear fruitful results in terms of the unification of international maritime law. The York-Antwerp Rules on General Average is not an international convention but a CMI private law instrument which has attained global status. It is an outstanding example of the CMI's achievement in creating uniformity in international maritime law. In the same vein, the CMI continues to develop international rules for voluntary adoption touching matters such as laytime and demurrage, sea waybills and electronic transfer of rights to goods in transit. The contribution of the CMI towards the creation of uniformity in international maritime law and legislation is considerable and exemplary.

4.3 Implementation and Interpretation of Maritime Conventions

When a state becomes a party to a convention, by the process of ratification, accession, adoption or acceptance, the legal effect of it is that the state becomes bound by the convention and is therefore obliged to implement it by incorporation into its body of national law. If the state fails to implement the convention, it is nevertheless subject to it vis a vis other state parties, but it cannot enforce the convention against them, unless the convention becomes part of the law of the land by whatever legal process is applicable in that state. The implemented convention will likely be subjected to interpretation by national courts. In the process of implementation of a convention due regard must be had to its interpretation.

It is a fundamental premise that the application and effect of international conventions within the domestic legal order is governed by the domestic constitutional law, or other supreme law of the land. In the monistic method of implementation, where it is so provided in the constitutional law, an international convention can become part of the domestic law simply as a consequence of its ratification or accession by the state. Virtually no legislative action is required. The Constitution of the United States, provides that a treaty, once it is ratified becomes part of the "... supreme law of the land, and all judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." In Belgium, France and the Netherlands as well, a convention which has been accepted by the state and which has entered into force internationally, automatically becomes part of the law of the land without the need for any incorporation measures or legislative action. But in some countries, the convention must be promulgated by official publication. The Spanish Civil Code provides that an international treaty cannot apply directly in that jurisdiction unless it becomes part of the national law through publication in

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98 For more details on the current role of the CMI, see ibid, at pp. 4-7.
99 Ibid, at pp. 13-16.
101 Supra, footnote 1 at p. 3. However, not all treaties can be implemented by the monistic method.
the Official State Bulletin. The 1957 Convention on Limitation of Liability of Owners of Sea-Going Ships, for example, was ratified by Spain in June 1959, but was officially published in January 1971, when it became law in force in that country.  

Aside from the fact that in countries such as the United States, Belgium, France and the Netherlands, some form of approval by the Legislature is required, at least in respect of certain kinds of treaties; very often, for the monistic method to be effective, the convention must be one that is "self-executing" or of "direct effect or application". This is true of Spain, Belgium, the Netherlands and the United States. The questions of what is a self-executing convention, and how that is to be determined are full of complexities. In general terms, it is said that a convention which directly confers rights or imposes obligations on individuals to which the State party is subject, is self-executing or directly applicable. In Westmar Marine Services v. Heerema Marine Contractors, an American court held in respect of the 1910 Salvage Convention that "(T)he Treaty is self-executing; it needs no implementing legislation". The Hague Rules have also been considered to be self-executing in the United States. In any event, the determination of whether or not a convention is self-executing is a matter for judicial interpretation. In the United States, a convention that is not self-executing requires implementation by the legislature. This was confirmed in Foster v. Nielsen, the leading U.S. Supreme Court decision on the subject.

In the dualistic system some form of legislative action is required for the implementation of an international convention, following its ratification or accession. While the dualistic system prevails predominantly in the United Kingdom and other countries of the Commonwealth, particularly those that follow the common law system, there are several civil law jurisdictions, such as Italy, Germany, and the Scandinavian countries which have adopted the dualistic approach. In regard to Anglo-Canadian Law, Lord Atkin, speaking for the Privy Council in the Labour Conventions Case, held "[I]f the national executive, the government of the day, decides to incur the obligations of a treaty which involve alteration of the law, they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes".

There are, of course, variations in the way the dualistic method is applied, not only among jurisdictions which embrace this method, but also within the same jurisdiction. In Germany and in Italy, a convention may be incorporated into the domestic legal domain

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105 Supra, footnote 100 at Introduction pp. xxv-xxvi.
106 These terms are used interchangeably to mean the same thing. The term "self-executing" is used in the United States; whereas in the Netherlands, the term "directly applicable" is used. See John H. Jackson in supra, footnote 100, Ch. 8, at pp. 147-148; and Schermers, in supra, footnote 100, at p. 114.
107 See M. Maresceau, Ch. 1 at p. 16; Schermers, Ch. 6 at p. 114; and Jackson, Ch. 8 at pp. 144-148 in supra, footnote 100.
108 See supra, footnote 100 at Introduction p. xxvii and Jackson, ibid, at pp. 150-151.
110 Berlingieri, supra, footnote 102 at p. 112.
111 See ibid, at p. 110-111, where the author cites some American Cases as authorities; namely, Frolova v. U.S.S.R., 761 F. 2d 270, 373 (7th Cir. 1985) and Diggs v. Richardson, 555 F. 2d 848, 851 (D.C. Cir. 1976). He also refers to Restatement (Second) of Foreign Relations Law of the United States, 154 (1) (1965).
112 27 U.S. 253 (1829).
113 Supra, footnote 100 at p. xxvi. See also Berlingieri, supra, footnote 102 at p. 111.
simply by a legislative act; i.e., by some form of enabling legislation, following which, it becomes law in force in the jurisdiction. In Germany, federal legislation is enacted giving the legislature's consent to the Convention, after which it becomes part of the law of the land. In Italy, enabling legislation is enacted to provide that "full implementation is to be given to the treaty from the date it enters into force for Italy." The text of the treaty instrument is then reproduced in a schedule to the legislation. The practice in the United Kingdom and the Scandinavian countries is virtually identical. In these countries, a number of alternative methods are used, one of which is similar to the practice in Italy. In the United Kingdom, in some cases, an Act of Parliament may simply contain an enabling provision giving effect to the Convention, with the text of the Convention appearing as a Schedule to the Act. In The Morviken, Lord Diplock held in the context of the Hague-Visby Rules that: "... all those of them that are included in the Schedule, are to have the force of law in the United Kingdom; they are to be treated as if they were part of directly enacted statute law".

5. ADMIRALTY JURISDICTION

5.1 Evolution of Admiralty Jurisdiction in England

Mention has been made of the development of the courts of the seaport and the eventual establishment of the High Court of Admiralty. The Admiralty Court was an instrument of the office of the Lord High Admiral, to who had been delegated the Royal Prerogative in maritime affairs. The Court thus came into being for the adjudication of maritime disputes and offences which fell within the jurisdiction conferred on the Lord High Admiral by virtue of this Royal Prerogative. The co-existence of the seaport courts, the Admiralty Court and the Common Law Courts led to confusion and rivalry with respect to jurisdiction. In 1389 and 1391, two statutes were enacted effectively limiting the jurisdiction of the Admiralty Court to things "done upon the sea". This limitation, it appears, was not readily accepted in practice by the Admiralty Court which continued to exercise jurisdiction over what it perceived to be maritime matters. In 1400, another statute was passed which not only restricted in express terms the competence of the Admiralty Court to "thing(s) done upon the sea", but also provided for penalties against parties who commenced actions in the Admiralty Court which were outside the scope of its jurisdiction.

The rivalry between the common law courts and the Admiralty Court is the stuff of colourful legal history, an elaborate discussion of which is beyond the scope of this paper. Suffice it to say that even a subject matter as obviously maritime as "wreck" was judicially defined under the 1391 Act in Sir Henry Constable's Case in such a manner as to remove cases involving wrecks from the Admiralty jurisdiction into that of the common law. Professor Wiswall describes Sir Edward Coke as the "chief antagonist of the Admiralty jurisdiction", who defined "wreck" in this case as "that cast at ebb tide upon the shelf below

116 Supra, footnote 100 at p. xxvi.
117 Jochen A. Frowein, in supra, footnote 100, Ch. 4 at p. 63.
118 G. Gaja, in supra, footnote 100, Ch. 5 at p. 89.
120 Ibid, at p. 5.
122 Ibid, at p. 5.
the flood mark”. Prior to that case, the Admiralty Court had always exercised jurisdiction below the high-water mark\textsuperscript{124}.

The power of the Admiralty Court reached its peak by virtue of the ordinance of 1648 c. 112 which settled the jurisdiction of the Court, and was made perpetual by the subsequent Ordinances of 1651, c.3, 1654, c.21 and 1656, c.10. These Ordinances expired at the Restoration of 1660, following which the Admiralty Courts’ jurisdiction gradually waned into virtual oblivion until the 1800s. During this period of lull, the Court's jurisdiction was confined to torts committed on the high seas, contracts made and performed on the high seas and suits for mariners’ wages\textsuperscript{125}. In the early 1800s, the Admiralty Judge had two functions; one as judge of the prize court, and the other as judge of "civil” maritime causes, known as the instance court. Professor Wiswall notes that during the era of Lord Stowell, a most eminent Admiralty judge of the times, the instance jurisdiction of the Court was still so restricted that the civil side of the Court was virtually dormant\textsuperscript{126}.

Notably, the Admiralty Court had power to execute judgements of foreign maritime courts but had no jurisdiction over ships, mortgages made ashore and did not exercise jurisdiction over those made at sea. It appears that the Admiralty Court could not conceivably refuse to entertain suits in respect of charter-parties and freight in general average, if such suits were brought before it\textsuperscript{127}. Actions in Admiralty could be brought either \textit{in rem} or \textit{in personam}, but that the former was more frequent under the instance jurisdiction, especially in proceedings relating to seamen's wages, hypothecations, salvage, collisions and droits\textsuperscript{128}. It is noteworthy that much of the procedural elements of the Admiralty jurisdiction of those times have remained virtually unchanged to this day.

The 1854 Admiralty Court Act introduced a penalty for perjury similar to the common law\textsuperscript{129}. The 1861 Admiralty Court Act provided for various new procedural features including the Court's power to issue writs of execution of judgements similar to the common law\textsuperscript{130}. This Act also conferred jurisdiction on the Court over any claim for damage done by any ship, which was the most important feature of the Act\textsuperscript{131}. Evidently, Dr. Lushington drafted most of the provisions of the 1861 Act, and articulated a more expanded jurisdictional role for the Admiralty Court. Even so, he felt that claims in general average could not be entertained in the Admiralty Court. In fact, the 1861 Act was actually retrogressive in some respects, such as the removal of admiralty jurisdiction over cargo claims against English or Welsh shipowners; but on balance, it conferred more jurisdictional powers than it took away\textsuperscript{132}.

The above-mentioned Admiralty Court Acts together with those of 1846 and 1868 effectuated a gradual expansion of the Courts’ jurisdiction, which at some point during that era came to be known as the High Court of Admiralty. The general jurisdiction of the Court

\begin{footnotesize}
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\item[124] Supra, footnote 121 at p. 6. A detailed account of the feud between Admiralty and the Common Law, is contained in Chapter 1 of Professor Wiswall’s book.
\item[125] Supra, footnote 46 at pp. I-2 to I-3.
\item[126] Supra, footnote 121 at p. 7.
\item[127] Ibid, at p. 11.
\item[128] Ibid, at p. 12.
\item[129] See \textit{ibid}, at pp. 53 and 62-63 for further details.
\item[130] Ibid, at p. 65.
\item[131] Ibid, at p. 59.
\item[132] Ibid, at pp. 60-61. See also p. 94.
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embraced, in addition to the matters mentioned earlier, questions involving the building, equipping and repairing of ships, claims for life salvage and maritime liens over seamen's and masters' wages, as well as claims on bills of lading and for cargo damage. Over these years, the Court was presided over by such stalwart judges as Dr. Stephen Lushington and Sir Robert Phillimore, and it excelled in the maritime jurisprudence it engendered. The retirement of Dr. Lushington as Admiralty Judge in 1857 marked the virtual demise of the famous Doctors' Commons which was the bastion of the Admiralty practitioners and jurists, all of whom were trained in the civil law. Dr. Lushington's successor, Sir Robert Phillimore was the last of the civilian judges of the Admiralty Court. With his retirement, the custodianship of the English Admiralty law passed into the hands of common lawyers.

The most significant event of the Phillimore era was the passage of the Judicature Acts which were enacted pursuant to the Report of a Royal Commission whose membership included Sir Robert. In 1873, the first Judicature Act was enacted by virtue of which the central Superior Courts were consolidated into the Supreme Court of Judicature; with the previous Courts of Probate, Divorce and Matrimonial Causes and Admiralty, forming one of five Divisions. In 1874 and 1875, two other Judicature Acts were enacted mainly to streamline the unified system. In 1894, Supreme Court rules were promulgated which, in essence, assigned to the Admiralty Division all of the jurisdiction conferred on the High Court of Justice of the Supreme Court, by the newly consolidated Merchant Shipping Act of 1896.

In 1920, the first Administration of Justice Act was created which conferred jurisdiction in Admiralty, with some exceptions, over claims involving carriage of goods and charterparty contracts, and torts in connection with the carriage of cargo. In 1925, the Supreme Court of Judicature (Consolidation) Act was passed. The impact of this Act on Admiralty jurisdiction was quite significant. By virtue of the Administration of Justice Act of 1928, the Admiralty Division could entertain a claim in personam which could have been instituted in any other Division of the High Court. Under this Act, the High Court's jurisdiction was exercisable by all Divisions alike.

In 1952, the International Convention on the Arrest of Sea-going Ships was concluded at Brussels. The United Kingdom became a party to this Convention which created a uniform regime of claims for which ships could be arrested in the jurisdictions of state parties. It provided the impetus in the United Kingdom for the statutory clarification of jurisdictional questions on in rem and in personam actions in relation to maritime claims. It led to the enactment of the Administration of Justice Act, 1956 which addressed a host of new or expanded causes cognizable under Admiralty jurisdiction including the concept of sister-ship arrest. According to Professor Wiswall, the Act made “such great restoration of jurisdiction to Admiralty that it may properly be termed ‘a Coke's nightmare’.”

To complete the historical sketch of the development of the Admiralty jurisdiction statutes, in 1970, it is noteworthy that the the Supreme Court Act established the Admiralty

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133 Supra, footnote 46 at p. I-6.
134 Supra, footnote 121 at pp. 91, 96.
135 Ibid, at pp. 100-103.
136 Ibid, at p. 139.
138 For a detailed account, see ibid. at pp. 149-152.
139 Ibid, at p. 152.
Court as part of the Queen's Bench Division of the High Court. The current version of this legislation is the Supreme Court Act 1981, which is the statutory basis today for Admiralty jurisdiction in the United Kingdom. With some improvements, it largely reflects the comprehensive jurisdiction which was articulated in the Administration of Justice Act, 1956.

5.2 Attributes of Admiralty Jurisdiction

The Supreme Court Act 1981 of the United Kingdom continues to operate as the legislation incorporating and giving effect to the Arrest Convention, 1952. Even so, there are several modifications to the legislation that go beyond the convention provisions. The Arrest Convention is based on the premise that ships can be arrested under the convention only if the claim in question is a maritime claim as defined or exemplified in the convention. In the Supreme Court Act 1981, the same premise is preserved although it is characterized differently. Another point of contrast is that under the Arrest Convention, the purpose of ship arrest is to provide the claimant with an instant security for his claim in the form of the arrested asset. Article 1.2 defines “Arrest” as meaning “the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment”. The Supreme Court Act 1981, in addition to that, is the vehicle through which admiralty jurisdiction is founded although an action in rem is sufficient as well to found jurisdiction. Thus, by virtue of the Supreme Court Act, admiralty jurisdiction can be invoked by the litigant and asserted by the Court so long as the cause of action is pursuant to a claim that qualifies for jurisdiction under the Act.

The Arrest Convention, 1952 defines maritime claim as a claim that arises out of any of the causes enumerated in Article 1. They are listed as follows:

(a) damage caused by any ship in collision or otherwise;
(b) loss of life or personal injury caused by any ship or occurring in connection with the operation of any ship;
(c) salvage;
(d) agreement relating to the use or hire of any ship whether by charterparty or otherwise;
(e) agreement relating to the carriage of goods in any ship whether by charterparty or otherwise;
(f) loss of or damage to goods including baggage carried in any ship;
(g) general average;
(h) bottomry;
(i) towage;
(j) pilotage;
(k) goods or materials wherever supplied to a ship for her operation or maintenance;
(l) construction, repair or equipment of any ship or dock charges and dues;
(m) wages of Masters, Officers, or crew;
(n) Master’s disbursements, including disbursements made by shippers, charterers or agents on behalf of a ship or her owner;
(o) disputes as to title to or ownership of any ship;
(p) disputes between co-owners of any ship as to the ownership, possession employment or earnings of that ship;
(q) the mortgage or hypothecation of any ship.

By contrast, the Supreme Court Act 1981, or corresponding legislation of any other jurisdiction which mirrors the United Kingdom legislation, contains a provision along the following lines:

“The Admiralty jurisdiction of the Court shall be as follows:
(a) jurisdiction to hear and determine any of the questions and claims mentioned in subsection --;
(b) jurisdiction in relation to any proceedings mentioned in subsection ---;
(c) any other Admiralty jurisdiction which it had immediately before the commencement of this Act and the Merchant Shipping Act ---;
(d) any jurisdiction connected with ships vested in the Court apart from this section.”

The above is followed by an enumeration of the questions, claims, proceedings, etc. referred to above. It is notable that “damage received by a ship” and “damage done by a ship” are separate claims. Claims in respect of loss of life and personal injury are extended to causes emanating from shipboard defects, wrongful act or negligence of owners, charterers, master or crew in navigation, management or other shipboard operations including cargo work and movement of person from or to a ship. Salvage claims are specified as claims under the Salvage Convention or a salvage contract and extend to salvage of aircraft. Claims relating to forfeiture, condemnation and goods associated with the restoration of a seized ship and droits of Admiralty are additional claims. Proceedings in relation to collisions are elaborated in specific terms and limitation actions are included. There are express provisions in respect of claims under the CLC and Fund Convention. The Admiralty jurisdiction of the Court extends to actions in rem as well as in personam.\(^\text{141}\)

The claims that enable the founding of admiralty jurisdiction are essentially subject matter claims or ratione materiae. Admiralty jurisdiction can be restricted in terms of geographical scope, nationality of litigants and ships as well. In Canada, the jurisdiction is virtually unlimited once it is founded ratione materiae.\(^\text{142}\) In other jurisdictions, the maritime legislation may expressly provide for jurisdiction of a competent court to deal with matters such as offences committed on ships, nationality of the perpetrator or victim, or of a litigant, location of the offence or where the cause of action arose, whether within national waters or the high seas or lying off the coast, etc.\(^\text{143}\).

5.3 Admiralty Procedures

The admiralty jurisdiction of a court is a substantive matter that extends to ratione materiae and other parameters. In order to exercise the jurisdiction in an efficient and functional way, procedures are needed. These are usually promulgated as Orders under the relevant Rules of Court made under the Act providing for admiralty jurisdiction. The subordinate legislation could be quite elaborate; indeed in quantitative terms it often far

\(^{141}\) The provisions refer to those in the draft Admiralty Jurisdiction legislation of the Cayman Islands. The Federal Court Act of Canada, the corresponding Canadian legislation includes in section 22(2)(r), claims arising in connection with a marine insurance contract. This head is absent in the Arrest Convention and the United Kingdom Supreme Court Act 1981. Otherwise, the Canadian list of maritime claims is much the same as the one described above. See Edgar Gold, Aldo Chircop and Hugh Kindred, Essentials of Canadian Maritime Law, Toronto: Irwin Law, 2003, at pp. 118-120.

\(^{142}\) Ibid, Edgar Gold, et al at p. 120.

\(^{143}\) See Cayman Islands Merchant Shipping Law (2001 Revision) sections 434 to 437.
exceeds the parent Act\textsuperscript{144}. The salient features of the rules include matters relating to arrest warrants, writs \textit{in rem} and \textit{in personam}, service of writs and execution of arrest warrants, service of writ outside the jurisdiction, how arrest is to be effected, caveats against arrest and against release, preliminary acts, security and bail, the office and responsibilities of the Admiralty Marshall, interveners, orders for appraisement and sale of a ship and determination of priorities, orders for sales of maritime properties, proceedings on forfeiture, limitation actions, payment into court, \textit{etc}.

On 1 October 2009 a landmark event marked the demise of the Appellate Committee of the House of Lords as the highest court in the United Kingdom and its replacement by the Supreme Court of the United Kingdom. The transfer of judicial power described as “a defining moment” has transformed the constitutional and legal heritage of the country and indeed the common law tradition itself. The ceremonial formalities were conducted in the historic setting of the former Middlesex Guildhall on Parliament Square.

The Supreme Court is the highest court in the United Kingdom court hierarchy for all civil matters and is the highest court in England, Wales and Northern Ireland for criminal matters. In Scotland the highest court for criminal matters is the High Court of Judiciary. The purpose of designating the Supreme Court as the highest court in the land is to effectuate a clear separation between the legislature and the judiciary which is the very essence of the doctrine of separation of powers. The new arrangement fortifies the independence of the judiciary.

The new court structure is depicted in the following diagram:

\textsuperscript{144} Order 74 and Order 75 of the Grand Court Rules of the Cayman Islands which constitutes the Admiralty Procedures legislation consists of some 40 rules compared to 4 sections of corresponding principal legislation. The Cayman Islands rules are virtually identical to the corresponding United Kingdom Supreme Court Rules governing Admiralty Procedures. In the Supreme Court Rules of the United Kingdom the corresponding Order is Order 75.
6. SUMMARY AND CONCLUSION

In this paper an attempt has been made to address two components of a highly distinctive and specialized area of law. Maritime law consists of numerous facets. It is a body of law that is at once international in scope, is perpetually in motion and has a component corresponding to virtually every branch of law conceivable on land simply because a shipboard community is basically a microcosm of society ashore. The antiquity of maritime
law and its doctrines and principles that have withstood the test of time characterize its resilience.

The public and private law aspects of maritime law have been alluded to within the context of its international character. The need for uniformity of substance and application cannot therefore be overemphasized. The historical evolution of maritime law has been briefly described and its subject matters have been presented in synoptic form. International conventions and treaty instruments are at the heart of maritime law. An understanding of the manner in which maritime conventions should be implemented and construed is important, and this has been addressed in contextual detail. Finally, the subject of admiralty jurisdiction has been discussed starting with a brief description of its historical roots and chronological development. An overview of the current practice and procedure in relation to admiralty jurisdiction has been presented within the limitations of the paper which itself is no more than a synoptic bird’s eye view of a vast subject.

While maritime law is steeped in tradition and antiquity, it is, at the same time, organic and dynamic. As events unfold in the maritime world of our times, it is incumbent upon lawmakers, jurists, seafarers and captains of maritime industries to respond meaningfully to the needs and interests of contemporary shipping and maritime affairs through innovative thinking and decisive actions.