temporarily the flag of another State unless all registered mortgages, '*hypothèques*', and charges have been previously satisfied or the written consent of the holders of the security obtained; cross-reference entries are required between the register of the State of registration of the vessel and the records of the State whose flag she is temporarily permitted to fly. The Convention thus applies the distinction between the public law and private law functions of vessel registration discussed earlier in this Chapter.[80]

[80] See Section 2.5.

3

SHIPBUILDING CONTRACTS AND TERMINATION ISSUES

Aleka Mandaraka-Sheppard

3.1 Introduction

A phenomenal increase in new buildings took place in the last two decades resulting in overcapacity. However, upon the wake of the unpredictable world economic crisis in 2008, the inevitable result was cancellations of shipbuilding contracts and an unprecedented number of cases for dispute resolution in London arbitration. Some of them reached the English courts on appeal raising interesting issues; these include the construction of performance or payment bonds and guarantees per se, the requirements of demand notices under performance bonds vs notices under letters of credit, penalties vs liquidated damages or acceleration in payment, builders accrued rights under contract, and common law on termination.

3.1.1 Purpose of this Chapter

This Chapter focuses on the parties' rights and obligations upon termination of a shipbuilding contract and highlights risk management issues and recent developments, including the issues outlined above. The basic principles of English law pertaining to shipbuilding contracts are explained focusing mainly on the most commonly used form, the Shipbuilders Association of Japan (SAJ), with examples of leading cases and compares it with provisions of the NEWBUILDCON.

3.1.2 New development in design and safety

In the last decade, we have seen remarkable developments in relation to rules for the improvement of quality of new shipbuilding. In 2002 at the eighty-ninth session of the International Maritime Organization (IMO) Council, Bahamas and Greece suggested that IMO should play a larger role in determining the standards to which new ships are built, this being traditionally the responsibility of classification societies and shipyards. The idea was that ship construction standards should

permit innovation in design but at the same time ensure that ships are constructed in such a manner that, if properly maintained, they could remain safe for their economic life.

After extensive discussions in the Maritime Safety Committee (MSC), the Council, and the IMO Assembly, the strategic plan for the 'goal-based standards' (GBS) for ship construction became a long-term work of the MSC for six years until 2010. Unlike the prescriptive approach, 'goal-based regulation' does not specify the means of achieving compliance but sets goals that allow alternative ways of achieving compliance.[1] These standards, known as the International Goal-based Ship Construction Standards for Bulk Carriers and Oil Tankers, have been developed on the basis of a five-tier system: goals (Tier I), functional requirements (Tier II), verification of conformity (Tier III), rules and regulations of design and construction (Tier IV), and industry practices and standards (Tier V).

The first three tiers constitute the GBS developed by IMO, whose intention was to set the parameters of what has to be achieved, leaving the experts in ship design to decide on how best to employ their professional skills to meet the required standards.

Tiers IV and V contain provisions and rules to be developed by the classification societies, other recognized organizations, and industry organizations. The MSC of IMO formally adopted the GBS on 20 May 2010 along with amendments to Chapter II-1 of the 1974 International Convention for the Safety of Life at Sea (SOLAS Convention) making their application mandatory with an entry into force on 1 July 2012. During the same period, the classification societies through the International Association of Classification Societies (IACS) were working on the Common Structural Rules for the building of new double hull tankers and bulk carriers, which were adopted in 2006. There has also been a tripartite dialogue between shipowners, shipbuilders, and classification societies, through IACS, to discuss their mutual interest relating to shipbuilding standards, contractual relationships, and yard capacity and to ensure that ships are fit for purpose.

3.1.3 Contractual developments

Usually, shipbuilding contracts provide for English law and jurisdiction. The contracts are on standard terms, for example the contracts of: the Association of West Europe Shipbuilders (AWES), the Shipbuilders Association of Japan (SAJ), the Maritime Subsidy Board of the US Department of Maritime Administration (MARAD), and the Association of Norwegian Marine Yards (ANMY).

[1] H Hoppe, 'Goal-Based Standards—A New Approach to the International Regulation of Ship Construction'(2005) 4(2) *WMU J Maritime Aff* 169.

Recognizing that existing standard form contracts have not been serving the interests of both parties equally, the Baltic and International Maritime Council (BIMCO) launched a new Standard Newbuilding Contract, 'NEWBUILDCON', in 2008, to be used across the industry. The objective of developing this contract was to provide builders and buyers with an alternative choice of contract to those mainly in use. It offers the parties a modern, clearly worded, balanced, and comprehensive shipbuilding contract, so that the parties can easily identify their rights and obligations and reduce the risk of disputes on matters of interpretation of contractual terms. It is divided into six sections set out conceptually and providing a solid structural basis for negotiations. The liabilities are equally apportioned between the parties. It also deals in detail with many difficult aspects of shipbuilding and fills the gaps in certain areas where there had been a lacuna or ambiguity in the terms of the old standard terms of contracts.

3.2 The Contract

3.2.1 There must be a binding contract

Like any other contract, there must be a binding agreement—an offer and an unconditional acceptance, intention to create a legal relationship, and consideration. Consideration under English law requires that each party has given something of value in return for the other party's promise. There must also be certainty of terms,[2] which define clearly the extent of the duties of each party, particularly as shipbuilding contracts are complex and contain many clauses of technical jargon. For a contract to be binding, there must be no inconsistent or uncertain terms, and matters of substance must not be left to be agreed at a later stage.[3]

The parties may agree the details of some terms to be filled in later. If they agree provisionally on a draft, which is made 'subject to contract',[4] this is understood to mean that there is no binding contract until a formal written contract is drawn up, or the specific condition is withdrawn or waived.

The contract may be subject to conditions to be fulfilled by either party before the commencement of the construction. The effect of a condition on the contract depends on the type of condition. If there is a condition precedent, there will be no contract until that condition is met.[5] If the condition, on the other

[2] e.g. *Okura & Co. Ltd v Navara Shipping Corp. SA* [1982] 2 Lloyd's Rep 537 (CA).

[3] *Fast Ferries v Ferries Australia* [2001] 1 Lloyd's Rep 534; see also *Thoresen (Bangkok) Ltd v Fathom Marine Co.* [2004] 1 Lloyd's Rep 622 (recap email provided 'otherwise basis Saleform 93 sub-details suitably amended to reflect also the above terms'; held: no binding contract).

[4] See general principles of 'subject to contract' or similar terms in *Pagan SPA v Feed Producers Ltd* [1987] 2 Lloyd's Rep 601 (CA) and A Mandaraka-Sheppard, *Modern Maritime Law* (3rd edn, Informa Law from Routledge, 2013) vol. II, ch. 7.

[5] *Haugland Tankers v RMK Marine* [2005] 1 Lloyd's Rep 573.

hand, requires one party to the contract to do something within a certain time after the commencement of the contract (known as condition subsequent), the non-fulfilment of that condition will operate to discharge the parties from an existing contract.[6]

3.2.2 Essential terms

To make a shipbuilding contract complete, it should contain the following essential provisions: ship's description and dimensions; speed and fuel consumption; price, currency, terms, and method of payment; price escalation terms; approval of plans and drawings, appointment of buyer's representatives; inspection of work in progress; modification of agreed specification, substitution of materials; nature and conditions of sea-trials; method of acceptance or rejection; time and place of delivery; transfer of title and risk with insurance arrangements; delays and extension of time, notice of delay, permissible delay; right to rescind for excessive delay; warranty of quality and rectification of defects; refund guarantee for builder's default; buyer's default and effect; buyer's performance guarantee. The contract will state that the vessel is to be built according to a specification,[7] which is an integral part of the making of the contract.

Considering that disputes frequently arise in relation to the builder's refund guarantee, or performance bond, and the buyer's performance guarantee, the particular characteristics and functions of these are seen in Sections 3.6.3 and 3.7.3, respectively.

3.2.3 The stages of the project

The project of a shipbuilding goes through three main stages.

1. The pre-contract stage during which the form, the substance of the contract, and the specification are negotiated with the assistance of technical and legal experts. After information has been obtained from various building yards about prices, timing, and specific designs, the buyer may submit his own specification and a summary of proposed terms to obtain competitive bids. In other cases, the builder proposes his own specification and, once this is accepted, the parties execute a letter of intent setting out their mutual understanding of the proposed project, which is not usually intended to be legally binding but it is an agreement to negotiate in good faith. Whether or not the parties will proceed to a binding contract, will depend on the ability of the buyer to obtain sufficient finance for the project.

[6] *Covington Marine Corp. v Xiamen Shipbuilding Industry Co. Ltd* [2006] 1 Lloyd's Rep 745.
[7] See *Petroleo Brasileiro SA (Petrobras) v Petromec Inc.* [2013] EWCA Civ 150: the general specification and annex were attached to the agreement when it was reduced to writing; the thoughts of one party as to what was said during the negotiations were immaterial.

2. The construction stage: the contract provides for approvals to be obtained by the buyer of the detailed construction, plans and drawings, modification of specification, and acceptance or rejection of the ship after the performance of sea-trials. Once the contract has been agreed, the buyer pays the first instalment for the first construction stage to begin. If there are no delays, there are normally four construction stages until the delivery of the ship with an advance payment of four instalments respectively. On failure by the buyer to pay instalments as provided by the contract, the builder has a right to elect to cancel the contract and seek recourse for payment of accrued instalments from the buyer's guarantor, or renegotiate with the buyer. There are usually delays in construction and the contract provides for permissible delays and extension of time, as well as for remedies to the buyer in the event of non-compliance by the builder with regard to the construction stages, or rectification of defects, or the delivery. If the buyer chooses to cancel the contract, for example for non-permissible delays, or non-rectified defects, he can claim the paid instalments from the builder or the refund guarantor (as will be seen later).
3. The third stage of the project concerns the delivery of the newly constructed ship and the passing of title and risk to the buyer.

3.2.4 Nature of the shipbuilding contract

Upon proper construction of the contract, particular rights of the parties are determined by the application of principles derived either from the sale of goods or construction law. The two House of Lords' decisions in *Hyundai v Papadopoulos*[8] and *Stocznia Gdańska v Latvian Shipping*[9] have settled the issue of the nature of the shipbuilding contract as being a hybrid contract of construction and sale of a ship. This has significant implications upon the parties' respective rights upon termination of the contract, for example whether the buyer has a property right over a partly constructed hull,[10] or the provided materials[11] for construction, or the parties' accrued rights upon cancellation of the contract.[12]

The preamble to the standard terms of the SAJ form states that the builder shall 'build, launch, equip and complete' the vessel and, thereafter, 'sell and deliver' her to the buyer. It is a special agreement to sell a ship by description after construction, which is regulated by the specific terms of the contract and the Sale of Goods Act (SOGA) 1979, as amended by the Sale and Supply of Goods Act (SSGA) 1994.

[8] *Hyundai Shipbuilding & Heavy Industries v Papadopoulos* [1980] 2 Lloyd's Rep 1, 5 (HL).
[9] [1995] 2 Lloyd's Rep 592, [1996] 2 Lloyd's Rep 132 (CA), [1998] 1 Lloyd's Rep 609 (HL).
[10] See *Seath v Moore* (1886) 11 App Cas 350 (HL); *Re Foster v Blyth Shipbuilding & Drydocks* [1926] Ch 494.
[11] See *Reid v Macbeth & Gray* [1904] AC 223 (HL); *Re Foster v Blyth Shipping & Drydocks* (n 10).
[12] *Hyundai v Papadopoulos* (n 8) and *Stocznia Gdańska SA v Latvian Shipping Co.* (n 9) establishing that the builder had accrued rights to claim the instalments that had fallen due prior to termination.

3.3 Issues of Termination of Contract by the Buyer

3.3.1 Specific contractual events of termination

The buyer is entitled to cancel the contract upon the happening of specific events of default or excessive delays in delivery by the builder and seek remedies for breach of contract. Article X of SAJ does not set out the events, which are stated in other Articles, but provides:

> In the event that the buyer shall exercise its right of rescission of this contract under and pursuant to any of the provisions of this contract specifically permitting the buyer to do so, then the buyer shall notify the builder in writing . . . and such rescission shall be effective as of the date notice thereof is received by the builder.

Article X further sets out the consequences of the buyer's rescission or cancellation, one of which is the refund of the paid instalments by the builder.[13]

Apart from events of default by the builder, which may amount to a repudiatory conduct which the buyer may choose to accept as terminating the contract, unless the contract provides otherwise, the usual contractual events of delay in the delivery of the ship by the builder triggering the right of cancellation by the buyer are: (a) permissible delays (which are classified as those being beyond the control of the builder, see Section 3.4) that exceed certain days specified in the contract; (b) non-permissible delays being in excess of certain days; (c) a combination of both if they accumulate 270 days and over. There are also clauses in the contract providing for excluded delays, the consequences of which are specifically stated in the contract; for example, an extension of time of delivery may be agreed or the builder is required to rectify a specific defect within a certain agreed time.

It is important to mention, at this point, an interesting recent decision of the English court, *Zhoushan Jinhiwan Shipyard Co. Ltd v Golden Exquisite Inc., Golden Eye Inc., DNB Bank ASA*[14] in which Leggatt J categorized the events of delays in delivery by the builder under a shipbuilding contact (in an amended SAJ form) into a tripartite classification:

> The scheme is one in which permissible and excluded delays can result in an extension of the time for delivery of the vessel without any reduction in the contract price, whereas non-permissible delays do not give rise to any extension of the time for delivery and, if they cause delivery to be delayed by more than 30 days beyond the Delivery Date, result first in a reduction in the price and then, after 210 days, in a right on the part of the Buyer to cancel the contract and recover the instalments of the price paid with interest. Permissible delays result in an extension of the Delivery Date but nevertheless, if they accumulate beyond a certain point (either on their own or when added to non-permissible delays), trigger a right to cancel

[13] See Section 3.6.

[14] [2014] EWHC 4050 (Comm), [2015] 1 Lloyd's Rep 283.

> the contract, though no interest is payable on the instalments of the contract price which become repayable on such a cancellation. Excluded delays are not counted as delays for the purpose of any right of cancellation.

Clause 39 of the NEWBUILDCON, unlike the other standard terms of shipbuilding contracts, offers an all-inclusive provision of the buyer's right to terminate. For the benefit of readers of this Chapter, the clause is broken down into logical parts, as is shown below.

> The buyer shall have the right to terminate this contract forthwith upon giving notice in the event of:
> 1. The deemed insolvency of the guarantor unless:
> (a) the builder provides a replacement refund guarantee acceptable to the buyer within thirty days of the buyer's notice requiring a replacement guarantee (during which period no further payments shall be made to the builder by the buyer); and
> (b) provided the notice of termination is given before an acceptable replacement refund guarantee is received by the buyer.
> 2. *The builder's failure to perform* any work of construction for a period running of at least a number of days stated in the contract, excluding permissible delays, provided:
> (a) the buyer gives the builder written notice of his intention to terminate (the number of days for the notice is specified in the contract); and
> (b) the builder fails to remedy its breach within that period; and
> (c) the notice of termination is given before the builder has remedied its breach.
> 3. The delivery of the vessel is delayed by:
> (a) more than 180 days by virtue of events that fall within permissible delays, which are enumerated under the *force majeure* events (per cl. 34(a)(i));
> (b) more than 180 days by virtue of events which do not fall within permissible delays (*force majeure* events—cl. 34(a)(i))—or other permissible delays[15] as set out in clause 34(a)(ii), (e.g. delays due to modifications in design, changes in Rules and Regulations, defective buyers' supplies, actual or total loss); or
> (c) the aggregate of the above delays to the delivery of the vessel is more than 270 days.
> 4. *The buyer's rejection of the main engine* for excessive fuel consumption, unless he elects, instead of termination as per clause 39(a)(v), to require the builder to rectify the deficiency or replace the main engine with one that conforms with the requirements of the contract (cl. 9(ii)).
> 5. *Reduction in speed* which would entitle the buyer to a reduction of the contract price greater than the maximum amount stated in the contract (cll. 8(c) and 39(a)(iv)).

[15] Put simply, this provision refers to non-permissible delays; it is, however, surprising to the writer that the required elapsed time for cancellation specified in cl. 39 is the same for both *force majeure* and non permissible delays, i.e. 'more than 180', unlike the different number of days provided for each category of delays under the SAJ form. To avoid confusion, the so-called permissible delays under cl. 34(a)(ii) of the NEWBUILDCON should be classified under the excluded delays category, as Leggatt J did in *Zhoushan Jinhiwan Shipyard* (n 14), which do not give rise to a right of cancellation.

6. *Deadweight or cubic capacity deficiencies* which would entitle the buyer to a reduction in the contract price greater than the amount stated in the contract (cll. 10(c), 11(c), and 39(a)(vi)(vii)).
7. *Other deficiencies* as agreed by the parties and inserted in the blank clause 12 of the standard form (cl. 39(a)(viii)).
8. *The builder's breach of the guarantee* provision under clause 14(b) is an event for termination by the buyer pursuant to clause 39(a)(ix).

3.3.2 A terminating event may not lead to termination

Clause 39(iii) further provides that the builder may, at any time after the right of termination has occurred, give notice requesting that the buyer either agrees to a new delivery date, which shall be a reasonable estimate by the builder of the date when the vessel will be ready for delivery, or terminates the contract (cf. Article VIII(3) SAJ).

The buyer has fifteen days of the builder's request within which to notify the builder of its decision to terminate or to accept the new date. If he does not terminate, then the new delivery date shall be deemed to be the delivery date *provided it does not occur later than thirty days prior to the expiry of the refund guarantee.*

The limitation imposed upon the new delivery date (i.e. not to be later than thirty days prior to the expiry of the refund guarantee) is very important (as will be seen later) considering the problems that had arisen in many shipbuilding contracts where buyers under other standard term contracts found themselves to be outside the refund guarantee period when they had agreed a new delivery date, which was not met. This provision, at least, alerts the buyer to check the terminal date of the refund guarantee.

3.3.3 Liquidated damages instead of termination

The buyer is given the right to claim liquidated damages for defects in speed, fuel consumption, cargo capacity, and deadweight deficiencies, or other deficiencies, and delay, by way of reduction in the purchase price. The remedy protects the buyer from the uncertainty of recovery in the event of termination, but if he elects to exercise the right to terminate, he loses the right to claim liquidated damages.

3.3.4 Rejection of the vessel by the buyer

There are broadly four occasions in which the buyer may reject the vessel which may or may not lead to cancellation of the contract.

1. After the sea-trials pursuant to clause 27 of the NEWBUILDCON, when there are delivery defects and the buyer gives notice of rejection stating the delivery defects. The builder then shall take all necessary steps to rectify such

non-conformity within the time agreed by the parties. Whether or not the buyer could still reject the vessel will depend on evidence about the conformity or not by the builder (cl. 27(d)(ii)–(v)).
2. If the permissible delays under clause 34 are caused by the error, neglect, act, or omission of the builder or its subcontractors (cl. 34(a)(iii)).
3. If the builder fails to notify the buyer within the time specified in the contract of the occurrence of a permissible delay event for an extension of time to the delivery date (cl. 34(b)); the buyer may waive the builder's failure to notify within the time limit.
4. In the event of the occurrence of the specific contractual breaches committed by the builder.

3.3.5 Occasions of repudiation of contract

A breach by the builder does not necessarily mean that the breach amounts to repudiation of the contract by him. It will depend on the magnitude of the defect and its consequences. In *McDougall v Aeromarine*,[16] it was held that, if the defect was one that could be remedied within a time which would still permit the builder to deliver within the period of delivery permitted by the contract, the buyer would not be entitled to treat the contract as repudiated. The buyer could recover damages for delay in the delivery. The standard contract forms provide for liquidated damages as a remedy for delay.

Under English law, repudiation of a shipbuilding contract may arise in the following situations.

1. If the time to rectify the defects is longer than the permissible delay, as stated in the contract, the breach may amount to a repudiatory breach entitling the buyer to terminate the contract, unless the parties agree otherwise. (That is the effect of cl. 39(a)(iii) of the NEWBUILDCON, seen above.)
2. Where there has been a serious breach of the contract by the builder. In such a situation, the buyer may accept the conduct of the seller/builder as repudiation and sue in damages.

3.4 Permissible Delays Due to *Force Majeure* and Excluded Delays

3.4.1 *Force majeure*

Events beyond the builder's control frequently occur during the construction of the contract and become a cause of delay in delivery. The builder needs protection

[16] [1958] 2 Lloyd's Rep 345.

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8

MARITIME LABOUR LAW

Douglas B Stevenson

8.1 Introduction to Seafarers' Rights

Seafarers are among the most regulated of all workers. Almost every aspect of lives aboard ship is regulated: their hiring, their dismissal, their working conditions, their sleep, their food, their health, their sickness, their recreation, and even their deaths. Seafarers face particular perils, endure substantial physical hardships, put up with strict discipline, and suffer lonesome separations from home. They have special lives and work, and they need special laws to protect them.

The courts and legislatures regard seafarers as a special category of workers requiring exceptional consideration and treatment. Seafarers are highly skilled professionals, but they are also very vulnerable to exploitation, abuse, and discrimination. Their highly mobile workplace takes them from country to country and beyond. Seafarers are often far away from the land-based institutions that provide stability, predictability, and the protections that land-based workers take for granted. They are strangers and friendless almost everywhere they go. They are usually foreigners in the ports they visit and are often treated with suspicion by local authorities.

The laws regulating seafarers and protecting their rights are contained in the general maritime law and in statutes enacted by maritime nations. The statutes are often influenced by the general maritime law and by international conventions.

The general maritime law is customary international maritime law that developed from commercial customs and practices that developed in ancient shipping. The legal doctrines and industry customs that developed often had no analogy to those for land-based occupations. Protecting seafarers was one of the principal reasons for developing maritime law.[1] The protections for seafarers were also based upon commercial interests. The maritime industry depended upon recruiting and retaining skilled seafarers. Accordingly, protecting seafarers was in the shipowners'

[1] T Schoenbaum, *Admiralty and Maritime Law* (5th edn, Thomas West, 2011) 371.

and maritime industry's self-interest. In simple terms, commercial success and national prosperity depended upon attracting and retaining skilled and reliable ships' crews. Many of the motivations that led to developing seafarers' rights continue to be relevant today.[2]

The first written maritime codes that appeared in the eleventh to thirteenth centuries provided remarkable protections for ship's crews, even by current standards. These codes followed commercial practices that were established in Mediterranean shipping in the pre-Christian era. For example, the ancient codes' provisions for seafarers' medical care are still better than modern land workers' medical care rights. The codes guaranteed that ship's crews would be repatriated to their home at the end of their voyage. The codes also required that ship's crews be provided decent sustenance (by the standards of the day).

The seventeenth- and eighteenth-century era of European exploration and colonization caused a profound change in seafarers' rights. European exploration and colonization required a large number of many sailing ships with large crews. Sailing ships of that era needed many more seafarers than were willing to go to sea. Jails were emptied, drunks were abducted, and many other deceptive methods were used to 'recruit' seafarers. The merchant ship crews in that era were tough, unruly, and unwilling workers. Shipowners and ships' officers resorted to extremely oppressive measures to maintain control over their crews. The seventeenth- and eighteenth-century maritime commerce expansion coincided with the rise in national legislative statute-making. The maritime statutes that were passed at that time were legislated mostly by maritime nations whose national interests focused on expanding trade. Therefore, the statutes tended to protect commercial shipping interests, one of which was controlling unruly seafarers involuntarily pressed into service on merchant sailing vessels.

Unlike the general maritime law protections that provided universal protections, the seafarers' rights that emerged from nineteenth-century reforms were country-specific. A patchwork of national statutes had largely replaced the general maritime law traditionally followed throughout the maritime world. The general maritime law did, however serve as a source for maritime nations' statutes, and it is still recognized by national courts on maritime law issues not covered by statute.

By the beginning of the twentieth century, workers' unrest about labour conditions grew in industrialized countries, and trade unions gained increasing influence. Their demands for social justice and higher living standards for workers were heard at the end of the First World War, where the participants in the Paris Peace Conference recognized workers' significant contributions to the war efforts, both on the battlefield and in industry. In 1919, the Treaty of Versailles created the International Labour Organization (ILO). The principal reason for creating the

[2] Ibid, 370–4.

ILO was humanitarian: international standards were needed to improve labour conditions.[3] Political and economic reasons also inspired the creation of the ILO: without improvements in working conditions, social unrest was inevitable, but without international standards, countries initiating social reforms would be at a competitive disadvantage with those that did not. Among the first international labour standards developed by the ILO were maritime standards. Since its founding, the ILO has given special attention to seafarers' working conditions.[4]

Seafarers' rights law developed out of the practical necessities of those engaged in maritime commerce. The law that was eventually codified merely reflected customs and practices that the industry developed to transport cargo by sea as efficiently and predictably as possible. In later years, the law strayed from promoting efficient and practical commercial interests by attempting to accommodate the differing interests of coastal States, flag States, exploiting the ocean's resources, and maintaining freedoms of navigation. The result is that maritime law has become extraordinarily complex.[5]

In 2006, the ILO adopted the Maritime Labour Convention, 2006 (MLC 2006). The MLC 2006 is the most significant development in the long history of seafarers' rights law. It provides in one convention a comprehensive statement of seafarers' rights that reflect both the rights that have withstood the test of time as well as modern shipping realities. The MLC 2006 includes standards for conditions of employment, hours of work and rest, accommodation, recreational facilities, food and catering, health protection, medical care, welfare and social security protection for seafarers, regulating recruitment and placement services, and flag and port State inspection systems. For the first time in any ILO Convention, the MLC 2006 includes seafarers' rights to shore leave. The Convention is easy to understand, is capable of ratification, and it is enforceable. The most important aspect of the Convention is its underlying principle of respecting and honouring seafarers.

The MLC 2006 sets international standards for seafarers' working and living conditions that are enforced by countries that have ratified it. The Convention consolidates more than sixty-five international labour conventions and recommendations that had been adopted by the ILO since 1920.

MLC 2006 came into force in August 2013. The MLC's standards are enforced on ratifying nations' ships and on foreign ships, irrespective of whether their flag

[3] On the ILO and its origins and history, see <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm>.

[4] On industries and sectors, shipping, ports, fisheries, and inland waterways, see <http://www.ilo.org/global/industries-and-sectors/shipping-ports-fisheries-inland-waterways/lang--en/index.htm>.

[5] For the history of maritime law, see Schoenbaum (n 1) 1–18, 248–50; R Grime, *Shipping Law* (2nd edn, Sweet & Maxwell, 1991) 41–65.

State has ratified the Convention, calling at ratifying nations' ports.[6] The MLC 2006 encourages nations to ratify the Convention by allowing them to implement it through laws, regulations, or other measures that are substantially equivalent to the Convention.[7]

8.2 Status of Master and Seafarers

Maritime law has provided seafarers special rights, protections, and obligations, many of which were not applicable to other workers. The definition of a seafarer is a term of art that was, and remains, very important in determining to whom maritime law could be applied. Although who is a seafarer may appear obvious, maritime nations have crafted various definitions for seafarers, depending on the context of the laws applying to them.[8] The UK Merchant Shipping Act (MSA) 1995, for example, defines 'seaman' as every person, except masters and pilots, employed or engaged in any capacity on board any ship.[9] Because of their authority and relationship with shipowners, shipmasters are not always considered seafarers, although protective labour laws generally include them.[10] Because of their vulnerability, only seafarers were considered by the courts to be entitled to special protections as wards of the admiralty. Masters, on the other hand, were considered the owners' representative on the vessel and were in a position to fend for themselves. They were not considered seafarers needing special protections of the courts as wards of the admiralty.

8.2.1 Master

No other commercial occupation is recognized in lore and law as having as much authority and responsibility as that of a ship's master. A shipmaster has legal and moral responsibility for the safety of the ship and for the well-being of every person on board. Because of this great responsibility, and because of the perils of the sea, the law affords unique authority to a ship's master. Maritime law recognizes that a ship's master is in supreme command. At sea, the master's word is law.

Surprisingly, there is very little written in court decisions, in statutes, or in international instruments that describe a shipmaster's authority. The International Maritime Organization's (IMO) International Management Code for the Safe

[6] Maritime Labour Convention (Geneva, ILC 94th Sess., 23 February 2006, entered into force 20 Aug. 2013) ILO Convention No. 186, Art. V.7 (MLC 2006).
[7] Ibid, Art. VI.3.
[8] R Force and MJ Norris, *The Law of Seamen* (5th edn, Thomson West, 2003) ss 2.1 and 2.2
[9] UK MSA 1995, s. 313(1).
[10] JAC Cartner, RP Fiske, and TL Leiter, *The International Law of the Shipmaster* (Informa Law, 2009) s. 1.0.

Operation of Ships and for Pollution Prevention (ISM Code) in section 5.2 comes closer than any other international instrument in recognizing a master's authority, but it does not define the extent of the authority. Modern laws and court decisions seem to take for granted the extraordinary authority of a ship's master relating to vessel operations.

Today's courts continue to enforce traditional concepts of a shipmaster's authority as the person who is primarily charged with the management, care, and safety of the ship, its cargo, and crew. The master's authority is not derived from land-based concepts of employment law, but rather, its source is in the commercial shipping practices first recorded in the Middle Ages. Because of long voyages and little or no communications, ships' masters needed to have as much legal authority as shipowners to act on behalf of the vessel. For this reason, maritime law, in many ways, treats shipmasters more like shipowners than like mariners.

However, shipmasters also have responsibilities commensurate with their authority. Shipmasters' responsibilities are more clearly defined in law than are their authorities. For example, shipmasters can be held personally liable for all contracts signed on behalf of the vessel, including contracts for repairs, supplies, and other necessaries. Shipmasters can be held personally responsible for paying crew wages, even though the shipowner has not paid either crew or master. Shipmasters can be held criminally liable for abandoning a crewmember in a foreign port, while a shipowner, who has abandoned master and crew, is not held criminally liable.[11] A shipmaster can be held criminally liable for not going to the rescue of persons in distress at sea, but a shipowner who orders the master not to divert to the rescue will not be held so liable. Shipmasters can be held strictly liable for pollution crimes, even when they did not commit a criminal act, and even when the pollution incident was caused by the shipowner's act or omission.

Even though the law continues to recognize a shipmaster's legal authority, modern communications and technology have enabled shoreside management to become increasingly involved in detailed decisions about a ship's operations. Today's shipmaster must be responsive to directions from shoreside management, even on minute details. At the same time, shipmasters' shipboard administrative responsibilities have increased. Today's reality is that actual authority is shifting from shipmasters to shoreside management while shipmasters' responsibility for ship operations is increasing. And, as several recent incidents have demonstrated, when something goes wrong with a ship's operations, it is the shipmaster, not the shoreside management that is often held accountable.[12]

[11] See 18 USC § 2195 (the US statute proscribing abandonment of sailors).
[12] See Cartner et al. (n 10) ch. 1.

8.2.2 MLC 2006 seafarer definition

The MLC 2006 consolidated several ILO instruments, and it also standardized definitions that were not always consistent in them. One of the most important MLC 2006 definitions is that of a 'seafarer'. The MLC 2006 seafarer definition is important because it determines who will be protected by the Convention.

The MLC 2006 seafarer definition is very broad. It is intended to include as many workers as possible in the Convention's protections. It defines seafarer as 'any person who is employed or engaged or works in any capacity on board a ship to which this Convention applies'. A shipmaster is considered a seafarer under the MLC 2006. Almost all persons working in any capacity on any ship covered by the MLC 2006 could be considered seafarers and would be accorded the Convention's protections. The seafarer definition is not limited to those persons involved in navigating or operating the ship. Bridge and engine room personnel as well as cruise ship hotel staff, waiters, musicians, hairdressers, casino workers, and bar tenders are all seafarers under the MLC 2006. *Some workers on ships are clearly MLC 2006 seafarers and some are not.* Workers who only work briefly on a ship and who normally work ashore, such as port State control inspectors and shipyard repair technicians, would not fit into the MLC 2006 definition of a seafarer.

In those cases where it is unclear whether some categories of workers are seafarers, the MLC 2006 authorizes flag States to determine whether a category of workers are to be regarded as seafarers for MLC 2006 purposes. For example, are private armed security teams, scientists, guest entertainers, surveyors, and others performing specialist functions that are not part of the ship's routine business seafarers? In such questionable cases the shipowner should seek clarification from the vessel's flag State. The flag State must consult with the shipowner and trade union organizations concerned with the question. Resolution 7 that was adopted along with the MLC 2006 provides guidance to flag States in determining whether questionable categories of workers are seafarers. Factors to be considered include: how long the persons stay on board, the frequency of their working on board, the location of their principal workplace, and the purpose of their work.

8.3 Recruitment and Placement

The need to recruit reliable and skilled persons for seagoing careers is as old as the shipping industry itself, and it remains a critical issue for ship operators. Today, both ship operators and seafarers rely on placement agencies (also called manning agencies) to connect seafarers with jobs on ships. Ship operators rely on placement agencies to identify qualified seafarers for their ships' crews, and seafarers rely on the agencies to find jobs on ships. Some countries require their citizen seafarers to use only placement agencies licensed in their country.

The placement agencies have become an accepted and essential component of the maritime industry. Recruiting seafarers was not always a legitimate undertaking. The shipping industry's requirements for large numbers of seafarers to crew sailing vessels in the eighteenth and nineteenth centuries led to widespread recruiting abuses. Recruiters, called crimps, employed exploitive, coercive, and violent methods to intimidate, trick, and even kidnap men to force them into involuntary labour on ships. The crimps' outrageous abuses led legislatures in many countries to enact laws specifically to protect seafarers from exploitative recruiters. As a result, laws regulating recruiting and placing seafarers have developed separately from those regulating recruiting shore-based labour.

When the ILO was formed in 1919, it recognized that recruiting seafarers was an international issue that required international standards. One of the ILO's earliest conventions was the 1920 Placing of Seamen Convention (No. 9).[13] That Convention reflected the persisting bad reputation of seafarers' recruiters and crimps by prohibiting commercial or fee-charging seafarers' placement enterprises. In 1996 the ILO adopted the Recruitment and Placement of Seafarers Convention (No. 179)[14] that recognized the reality that most seafarers' employment came through private recruiting or placement services and that the industry needed to be regulated. A fundamental seafarers' right enshrined in ILO Convention No. 179 and many maritime nations' laws is that seafarers should not have to pay a fee, directly or indirectly, for recruiting or providing them employment on a ship.[15] Ship operators customarily pay the recruiting and placement fees.

8.3.1 MLC 2006 recruitment and placement

The MLC 2006 contains standards for seafarers' recruiting and placement services designed to protect seafarers from abuses. In some labour-supplying countries, seafarers are vulnerable to unscrupulous employment agencies' unfair practices. The MLC 2006 levels the playing field by imposing significant responsibilities on States Parties, which are labour-supplying countries and flag States to protect seafarers in the recruiting process. The Convention also has considerable ramifications for labour-supplying countries that have not ratified the MLC 2006.

The MLC 2006 requires member labour-supplying countries to regulate private seafarer recruitment and placement services through licensing, certification, or other forms of regulation. To be certified, seafarer recruiting and placement agencies cannot blacklist seafarers,[16] or charge placement fees directly or indirectly to

[13] Convention for Establishing Facilities for Finding Employment for Seamen (Geneva, ILC 2nd Sess., 10 July 1920, entered into force 23 November 1921), ILO Convention No. 9.
[14] Convention concerning the Recruitment and Placement of Seafarers (Geneva, ILC 84th Sess., 22 October 1996, entered into force 22 Apr 2000), ILO Convention No. 179.
[15] Ibid, Art. 4.1(a).
[16] MLC 2006, Standard A1.4.5(a).

seafarers.[17] Agencies must inform seafarers of their contractual rights and obligations and provide them with a copy or their employment agreement.[18] Agencies must make sure that seafarers are qualified for and have the necessary documents for their job and they must ensure that their contracts are legal.[19] They must verify that shipowners will be able to protect seafarers from being stranded in a foreign port.[20] Agencies must investigate and respond to any complaint about their activities and advise the authorities of any unresolved complaint.[21] Agencies must have either insurance or some other equivalent guarantee to compensate seafarers for financial losses caused by the agency or by the shipowner's defaulting on its contractual obligations. For example, if a shipowner fails to pay earned wages or repatriation expenses, the recruiting and placement agency must have provisions in place to cover these obligations to seafarers.[22]

Flag States that have ratified the MLC 2006 will require the owners of ships flying their flag to use only recruitment and placement services that conform to the MLC 2006 requirements. If shipowners use recruitment and placement services in countries that have not ratified the MLC 2006, then they, the shipowners, must verify that the recruiting and placement services conform to the MLC 2006 requirements.

8.4 Contracts

The general maritime law, courts, and national legislatures have given special attention to seafarers' employment contracts. An employment contract is the most important document relating to a seafarer's life and work. Seafarers' employment contracts are also called articles. The general maritime law has for centuries required all seafarers' employment contracts to be in writing.[23] As early as 1729, English statutes have required seafarers' employment contracts to be in writing.[24]

Seafarers' employment contracts have been the subject of extensive regulation by maritime nations. Flag State law, and in some cases the law of the seafarers' country of citizenship, regulate seafarers' employment contracts. One of the earliest ILO conventions created international standards for seafarers' employment

[17] Ibid, Standard A1.4.5(b). Agencies can, however, charge seafarers for the costs of getting a national medical certificate, a national seafarers' book, a passport, or other similar personal travel documents other than visas. Shipowners must pay for seafarers' visas.
[18] Ibid, Standard A1.4.5(c)(ii).
[19] Ibid, Standard A1.4.5(c)(iii).
[20] Ibid, Standard A1.4.5(c)(iv).
[21] Ibid, Standard A1.4.5(c)(v).
[22] Ibid, Standard A1.4.5(c)(vi).
[23] SS Jados (trans. and ed.), *Consulate of the Sea and Related Documents* (University of Alabama Press edition, 1975) s. 247.
[24] Force and Norris (n 8) s. 6.3.

contracts.[25] The 1926 Seafarers' Articles of Agreement Convention (No. 22), which has been ratified by sixty countries, requires that written contracts be signed by both the seafarer and the shipowner, or shipowner's representative after providing the seafarer a reasonable opportunity to examine the contract.[26] The Convention specifies eleven particulars that must be included in seafarers' employment contracts including such things as the seafarer's name, date and place where the contract was signed, the name of the vessel, the capacity in which the seafarer is to be employed, the amount of wages, conditions for terminating the contract, the duration of the contract, and annual leave.[27]

8.4.1 Types of contracts

Modern seafarers' employment contracts vary greatly in their form and content. There is no standard employment agreement required for all seafarers. Following are some of the types of seafarers' employment contracts.

8.4.1.1 Individual contracts

Individual contracts are agreements between an individual seafarer and a shipowner. Although the contracts must comply with the appropriate statutory requirements, for many seafarers there is little or no room for negotiating the terms.

8.4.1.2 Collective bargaining agreements (CBAs)

These are contracts that are negotiated between shipowners and trade unions on behalf of seafarers represented by the unions. They are sometimes called trade union contracts. CBAs usually determine wages and conditions for all of the seafarers represented by the union on a particular ship or employed by a particular shipping company. The most common CBAs are those approved by the International Transport Workers' Federation (ITF). The ITF is a federation of approximately 700 independent transport workers' trade unions in 150 countries. As part of its campaign in the maritime industry to influence seafarers' wages and working conditions on ships registered in countries it has designated as flags of convenience (FOC),[28] the ITF has established minimum standards for seafarers working on FOC vessels.

[25] Convention concerning Seamen's Articles of Agreement (Geneva, ILC 9th Sess., 24 June 1926, entered in force 4 April 1928), ILO Convention No. 22).
[26] Ibid, Art. 3.
[27] Ibid, Art. 6.
[28] The ITF has designated the following thirty-four countries as flags of convenience: Antigua and Barbuda, Bahamas, Barbados, Belize, Bermuda (UK), Bolivia, Burma, Cambodia, Cayman Islands, Comoros, Cyprus, Equatorial Guinea, Faroe Islands (FAS), French International Ship Register (FIS), German International Ship Register (GIS), Georgia, Gibraltar (UK), Honduras, Jamaica, Lebanon, Liberia, Malta, Marshall Islands (USA), Mauritius, Moldova, Mongolia, Netherlands Antilles, North Korea, Panama, São Tomé and Príncipe, St Vincent, Sri Lanka, Tonga, and Vanuatu. See: <http://www.itfglobal.org/en/transport-sectors/seafarers/in-focus/flags-of-convenience-campaign/>.

8.4.1.3 Total crew cost agreements (TCC)

Total crew cost agreements are the most common ITF-approved CBAs. They are negotiated by ITF-affiliated unions for seafarers working on FOC vessels. Because TCCs are negotiated between shipowners and ITF-affiliated unions, their terms are often different from each other. All TCC agreements must, however, meet minimum ITF standards.[29]

8.4.1.4 ITF standard agreements

The ITF standard agreement sets standards for contracts on FOC vessels that are subject to ITF industrial actions, such as strikes, or are operated by shipping companies that have breached a previous TCC. It is not normally applied to national flag vessels, or to ships that have TCC agreements. The ITF standard agreement is the most favourable from a seafarer's perspective and the most expensive from a shipowner's perspective. Its terms are intended to encourage shipowners to negotiate TCC agreements without having to resort to industrial action.[30]

8.4.1.5 International Bargaining Forum (IBF) agreements

The International Bargaining Forum is a mechanism for negotiating CBAs between the ITF and shipowner members of the Joint Negotiating Group (JNG).[31] The IBF agreements are available to shipowner members of the associations that negotiate the agreements with the ITF in the International Bargaining Forum. IBF agreements are normally negotiated on an annual basis between shipowners and local unions. While the IBF agreements will vary in content, they all must meet minimum standards of the IBF-agreed framework.[32]

8.4.1.6 POEA contracts

The Philippines Overseas Employment Administration (POEA) has minimum standards for contracts for Filipino seafarers working on ocean-going vessels. These standards are contained in the POEA Standard Terms and Conditions Governing the Employment of Filipino Seafarers on Board Ocean Going Vessels. These standards, commonly called the POEA Standard Agreement, form the basis for most Filipino seafarers' employment contracts. The POEA requires all Filipino seafarers employed on ocean-going vessels to have contracts approved by the POEA.

[29] An example of a TCC can be found at <http://www.itfseafarers.org/files/seealsodocs/33560/ITFUniformTCCCBA20122014.pdf>.

[30] An example of the ITF standard agreement can be found at <http://www.itfseafarers.org/files/seealsodocs/33559/ITFStandardCBA2012.pdf>.

[31] The JNG consists of the International Maritime Employers' Council, the International Maritime Managers' Association of Japan, the Korean Shipowners Association, and the Taiwanese company Evergreen.

[32] An example of an IBF agreement can be found at <http://www.itfseafarers.org/files/seealsodocs/33555/20122014IBFFrameworkTCCAgreement.pdf>.

The POEA has prescribed a standard contract of employment that aims to define clearly the rights and obligations of the concerned parties. Any disputes arising under the contract are subject to the law of the Philippines and to the exclusive jurisdiction of the POEA.[33]

8.4.2 MLC 2006 contract provisions

The MLC 2006 standards for seafarers' employment agreements in Regulation 2.1 update requirements of the Seamen's Articles of Agreement Convention, 1926 (No. 22). Flag States must implement the MLC 2006 requirements for seafarers' employment agreements for seafarers working on its ships through its laws or regulation.[34] Both the seafarer and the shipowner must sign seafarers' employment agreements.[35] Measures must be provided to ensure that seafarers understand their contractual rights and obligations. They must have an opportunity to read their agreement and get advice on it before that they sign it.[36] Both the seafarer and shipowner must have an original signed copy of the agreement.[37] Where CBAs are incorporated into seafarers' employment contracts, a copy of the applicable CBA must be available on board the vessel.[38] Copies of seafarers' employment agreements in English must be available to port and flag State authorities on board vessels.[39]

8.4.2.1 Wages

Maritime law now protects seafarers' rights to wages, but this has not always been the case. Historically, seafarers' wages depended upon the success of the voyage. Wages were paid only if the vessel made a profit.[40] About 150 years ago, maritime nations began enacting statutes that codified or modified seafarers' rights to wages. Such statutes now determine seafarers' rights to wages, and the statutes can vary from country to country.

Today, almost every maritime nation has outlawed the custom of seafarers' wages being dependent on the success of the voyage. Seafarers are entitled to be paid their earned wages without regard to their vessels' earnings.

Seafarers' wage rights are highly favoured in maritime law. They have been called 'sacred claims' protected by a lien against the vessel. While the ship is primarily

[33] The current Standard Terms and Conditions Governing the Employment of Filipino Seafarers on Board Ocean Going Vessels may be found at <http://www.poea.gov.ph/docs/sec.pdf>.

[34] MLC 2006, Standard A2.1.1.

[35] Ibid, Standard A2.1.1.(a).

[36] Ibid, Standard A2.1.1.(b).

[37] Ibid, Standard A2.1.1.(c).

[38] Ibid, Standard A2.1.2.

[39] Ibid, Standards A2.1.1.(d) and A2.1.2. Ships engaged only in domestic voyages do not need to have contracts available in English.

[40] C Hill, *Maritime Law* (5th edn, LLP, 1998) 452; Schoenbaum (n 1) s. 6-4.

liable for paying seafarers' wages, the general maritime law also allows seafarers' wage claims to be made against the shipowner and the master.[41]

The amount of wages is determined by the seafarers' contract or collective bargaining agreement. Some countries have minimum wage laws, but in most cases today contractual wages exceed the legal minimums.

In most countries, seafarers' wages begin when the seafarer begins work, or on a specific date specified in the contract—whichever occurs first. Countries' laws differ as to when seafarers must be paid thereafter. Some require payment of wages every month, others require partial payments whenever cargo is discharged, and others still do not require payment until the seafarer signs off the ship. The MLC 2006 recommends that an able seafarer be paid at least as much as recommended by the Joint Maritime Commission.[42]

The MLC 2006 requires that seafarers be paid their agreed-upon wages at least once a month[43] and be provided a full accounting of their wages and deductions.[44] Shipowners must provide seafarers a way to send all or part of their wages to their families, dependants, or legal beneficiaries by allotment.[45] The MLC 2006 recommends, but does not require, that seafarers should be paid overtime pay for hours worked in excess of forty-eight hours per week.[46] It recommends overtime pay be at least 1.25 times seafarers' regular hourly wages.[47]

8.4.2.2 Hours of work and hours of rest

Today's merchant ships are operated by a small number of seafarers. Small crews create a significant challenge for both ship operators and seafarers to ensure that seafarers get adequate sleep to remain alert and well rested. When seafarers are deprived of needed rest, mistakes and accidents happen. Fatigue has been identified as a major factor in many maritime casualties. Both shipowners and seafarers have incentives for seafarers to work beyond safe human endurance limits. Ship operators can reduce costs by employing fewer seafarers who work longer hours. Seafarers can earn more money by working more hours. Therefore it is important to regulate hours of work and hours of rest to protect seafarers' health and maritime safety.

41 Force and Norris (n 8) s. 12.1.
42 MLC 2006, Guideline B2.2.4. The Joint Maritime Commission is a standing body comprised of shipowner and trade union representatives that provides advice to the ILO Governing Body. One of its functions is to establish a recommended basic wage of able seafarers in accordance with the Seafarers' Wages, Hours of Work and Manning of Ships Recommendation, 1996 (No. 187).
43 MLC 2006, Standard A2.2.1.
44 Ibid, Standard A2.2.2.
45 Ibid, Standards A2.2.3. and A2.2.4.
46 Ibid, Guideline B2.2.2.(b).
47 Ibid, Guideline B2.2.2.(c).

Ancient maritime codes did not place limitations on seafarers' hours of work. The IMO has adopted standards for seafarers' hours of rest that are based on marine safety and fatigue considerations.[48] The ILO has also set standards for seafarers' hours of work and rest. The Hours of Work and Manning (Sea) Convention, 1936 (No. 57) established an eight-hour day, allowing overtime in only very limited circumstances. The Wages, Hours of Work and Manning (Sea) Convention, 1946 (No. 76) established a minimum monthly wage for able seafarers, limited the hours that could be worked in a two-week period, and set an overtime pay rate of 125 per cent of basic pay. The Wages, Hours of Work and Manning (Sea) Convention, 1949 (No. 93) slightly changed the 1946 Convention by replacing the prohibition against consistent overtime work with a provision that consistent overtime work should be avoided. The Wages, Hours of Work and Manning (Sea) Convention, 1958 (No. 109) attempted to remove obstacles that prevented countries from ratifying the 1949 Convention. None of these conventions ever attracted sufficient ratifications for them to come into force. The Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180) was a departure from previous ILO conventions by specifically addressing seafarers' fatigue and safety implications. This Convention came into force in 2002, and it has been ratified by twenty-one States.

The MLC 2006 contains the hours of work and hours of rest standards of the 1996 Convention. When determining national standards for hours of work or hours of rest, flag States must take into account dangers posed by seafarers' fatigue.[49] Flag States can choose limits on either hours of work or hours of rest. The limits on hours of work are a maximum of fourteen hours in any twenty-four-hour period and seventy-two hours in any seven-day period. The limits on hours of rest are a minimum of ten hours in any twenty-four-hour period and seventy-seven hours in any seven-day period.[50] Rest can be divided into two periods, but one of them must be at least six hours long and the interval between rest periods cannot be more than fourteen hours.[51]

8.4.2.3 Termination/dismissal

The duration of a seafarer's service on a ship is a standard provision of employment agreements and is often regulated by statute. Many countries' laws limit employment agreements to a maximum of one year, or that seafarers be given an annual

48 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (adopted 7 July 1978, entered into force 28 April 1984, major revisions in 1995 and 2010) 1361 UNTS 190, Code Ch. VIII. All persons who are assigned duty as officer in charge of a watch or as a rating forming part of a watch and those whose duties involve designated safety, prevention of pollution, and security duties shall have a minimum of ten hours of rest in any twenty-four-hour period and seventy-seven hours in any seven-day period.
49 MLC 2006, Standard A2.3 para 4.
50 Ibid, Standard A2.3 para 5.
51 Ibid, Standard A2.3 para 6.

vacation.[52] Seafarers' employment agreements usually terminate when their vessel is shipwrecked, lost, or becomes unseaworthy. In such circumstances, seafarers are generally entitled to repatriation, compensation for lost personal effects, and some lost wages, usually one month's wages. If a seafarer's contract expires while the ship is at sea, employment continues under the same conditions and terms as the expired contract until the vessel arrives in port.

Since the earliest sea codes, maritime law has provided seafarers' protections against being unfairly dismissed.[53] While the law has recognized a shipmaster's ultimate responsibility for a ship's safe and efficient operation, including ensuring that crew are competent to perform their duties, the law also provided seafarers' protections against being unfairly dismissed.

Historically, shipmasters have had unquestioned legal authority to dismiss seafarers. Even today, few courts would interfere with a shipmaster's responsibility to ensure ship safety or with his discretion to dismiss crewmembers. However, flag State laws and contracts provide procedures that must be followed when dismissing seafarers. While it is unlikely that a court would require a shipmaster to reinstate a dismissed seafarer, laws and contracts provide other remedies to an unlawfully dismissed seafarer. Typically, seafarers who are improperly terminated from employment are entitled to repatriation and earned wages plus damages. Damages can vary from one or two month's wages to the wages that the seafarer would have earned had the contract been completed.

The ship's flag State law and the seafarers' contract must be reviewed to determine procedures that must be followed when dismissing a seafarer and the remedies that are available to a dismissed seafarer. Common contract and statutory provisions prescribe that only a shipmaster can dismiss a seafarer and that a seafarer cannot be dismissed for a trivial offence. There are usually requirements for informing the seafarer of the grounds for dismissal, an opportunity for the seafarer to respond to the charges, and for entering a record of the dismissal in the ship's log. Usual grounds for dismissal include drunkenness, going ashore without leave, disobedience, fighting, theft, and conviction of a serious crime. If the legal or contractual requirements for dismissal are not followed, the dismissal is illegal and the seafarer so dismissed may be entitled to remedies such as payment of wages that would have been earned to the end of the contract or other specified remedies. The laws and contracts sometimes also provide for compensating seafarers when their contracts are legally terminated through no fault of their own.

[52] Ibid, Reg. 2.4 para 2.
[53] Sir T Twiss (trans.), *The Laws of Oleron* (1454) Art. XIII; *The Laws of the Hanse Towns* (*c.* 1597) Art. XLII.

Dismissal for incompetence is treated very differently in various contracts and laws. For example, under US law incompetence is not considered misconduct and the master has the option to continue the seafarer's service in a lower position on the ship.[54] Liberian law allows dismissal for incompetence only in situations where the seafarer has misrepresented his qualifications. The IBF and ITF contracts do not specify incompetence as a ground for dismissal. The POEA contract, on the other hand, treats incompetence as misconduct requiring dismissal and suspension for at least two years.[55]

8.4.3 Repatriation

One of a seafarer's most fundamental rights is to be returned home or to the port of engagement after completing his contract. This right is called the right to repatriation.

Seafarers' rights to repatriation are enshrined in the general maritime law, international conventions, national statutes, and employment contracts. A common feature of the repatriation conventions and laws is the shipowners' obligation to pay transportation costs, food, lodging, and wages from the time seafarers leave the ship until they are repatriated. Shipowners must pay for seafarers' repatriation when they complete their employment agreement, when they become medically unfit, when their ship is wrecked or lost, and when their contract is terminated by the shipowner for the shipowner's convenience.

Seafarers do not have the right to repatriation if they quit their jobs without good reason. Seafarers who quit their job can expect to pay their own repatriation expenses, and they may possibly have to pay the transportation expenses of their replacement.

Seafarers who are dismissed from their employment for just cause do not necessarily lose their right to be repatriated at the shipowner's expense. Statutes often specify different standards for terminating a contract for cause and for losing their right to repatriation.[56]

National law or the seafarer's employment contract usually determine the place where the shipowner must return the seafarer. Typical places of repatriation include the place where the seafarer was employed, a port in the seafarer's home country, the port where the seafarer joined the ship, or some other port mutually agreed upon by the seafarer and the shipowner.

[54] Force and Norris (n 8) ss 13.1 and 13.2.
[55] POEA Contract, Section 33 Table of Offenses and Corresponding Administrative Penalties, Offense 10.
[56] Under Liberia Maritime Law seafarers lose their right to repatriation for desertion, for entering into a new contract with another employer within one week of discharge, by breaking the contract through their own fault, or by conviction of a serious crime under the Liberia Maritime Law. Liberia Maritime Law, ss 343, 346, 348, 349.

There are many different types of heavylift vessel in use. It was therefore thought necessary to produce a uniform contract to deal with the specific particularities and hazards of this form of towage and BIMCO set up a specialist drafting team. The result was the 'Heavycon' ('Standard Transportation Contract for Heavy and Voluminous Cargoes'). The current version is 'Heavycon 2007'. As with the other BIMCO forms discussed earlier, this form incorporates a 'knock-for-knock' approach to liability.

15.4.3.3.3 **Bargehire** Barges are commonly used for both transportation and floating storage of heavy and voluminous cargoes. Where the barge is hired in by the client and used as its own leased equipment, bareboat or demise terms are normally used. BIMCO's 'Bargehire' form (now 'Bargehire 2008') is commonly adopted for this purpose. This is largely based on BIMCO's standard bareboat charterparty, but 'Barecon' also incorporates some time charter aspects (e.g. barges are often chartered with owner's insurance).

15.4.3.3.4 **Projectcon** Offshore operators increasingly offer combined services incorporating the provision of a towage service, the provision of a barge, and the carriage of goods. This had led to the need for a further specialist form, known as 'Projectcon'. The aim is this form is to remove the need to use multiple standard forms and instead have one contractual document which covers the entire commercial operation.

16

LAW OF HARBOURS AND PILOTAGE

Osvaldo Agripino de Castro Jr and Cesar Luiz Pasold

16.1 Introduction

The harbour is considered a strategic place in the logistics of nations, and safety in its waters is essential, due to the increasing traffic of ships arriving at or departing from a harbour, and moving around inside its limits carrying out manoeuvres such as berthing and unberthing.

The high risks associated with the shipping industry[1] around the port mean that harbour authorities have a duty of care against loss or injury caused by their negligence to workers or authorized personnel operating within the harbour's limits. The master is expected to know more about his own vessel than the pilot, who is not a crew member. On the other hand, the pilot is expected have a better knowledge of the water conditions of the area where he works, conducting vessels safely into and out of the harbour.

The pilot is expected to have a good knowledge and awareness of local conditions, tides, and depths, including obstacles shown on the charts, and those not visible above the waterline.[2] Thus, ensuring navigational safety is the duty of the harbour authority, and should be under the care of qualified professionals, such as pilots or harbour masters, who have a good knowledge of the local waters, in order to maximize the protection and safety of human life in the marine environment.

The term 'pilot' is used to define a person with specialized knowledge of the local navigation conditions of a waterway region, and its navigational hazards. The pilot is usually hired by a shipping company to conduct the ship to a specific location, guiding her through a particular stretch of enclosed waters into or out of a port,

[1] See S Kristiansen, *Maritime Transportation—Safety Management and Risk Analysis* (Elsevier, 2008).
[2] TJ Schoenbaum, *Admiralty and Maritime Law* (4th edn, Thomson West, 2003) 746.

strait, channel, or river, or guiding the vessel from a berth to another terminal within a port.

The idea that the pilot works in a port, which is a 'traditional example of an asset in the public domain',[3] has recently undergone a conceptual shift, embodied in a triad in which safety and security are compulsory values that can also be used as competitive advantages for attracting clients. Harbour authorities and pilots know that safety is an added value for ports worldwide.

Traditionally, the harbour originated and was defined as a place of refuge, with three distinct elements: maritime space, harbour installations, and port services. Within a harbour, the pilotage services may be part of the port services, when the pilotage zone includes the port, but there are situations where this zone also includes, for example, stretches of river, such as the pilotage services of the Amazon Region of Brazil, and those of the United States.

Today, the harbour is being transformed into a 'crossroads', as a result of the container revolution,[4] turning it into a strategic 'inflection point' of the new port concept, in which spaces and interconnections between boats/ships, automobiles/trucks, and railway wagons are stimulated.

Finally, there is the concept of the port as the 'ideal space for the exercise of economic activity', which includes its leisure dimension.[5]

It should also be highlighted that in the competition to win market share that is taking place on every continent, the port services are an important tool for the development of foreign trade, particularly when they are good, low cost,[6] and safe. There is a growing conviction that the port activity will be more efficient and effective when:

1. it focuses its attention more on the internationalization of the economy;
2. it is be better adapted to the particular characteristics of the production factors of the globalized world;
3. its legal regulation is more legitimate; and
4. more care is given to the protection of human life and of the marine environment.

Thus, it is important to ensure that the ports are maintained in a safe condition, with modern and efficient facilities, in order to prevent accidents to the ships that use them.

Based on this scenario, this Chapter aims to contribute to increasing navigation safety in and around the ports, by presenting the main legal aspects involved in

[3] I Arroyo Martínez, *Curso de Derecho Marítimo* (2nd edn, Thomson—Civitas, 2005) 224–5.
[4] OA de Castro Jr (ed.), *Direito Marítimo: Temas Atuais* (Fórum, 2012); WA Coelho, *Contêiner: aspectos históricos e jurídicos* (Univali, 2012).
[5] Arroyo Martínez (n 3) 225.
[6] C Tavares de Oliveira, *Modernização dos Portos* (4th edn, Lex, 2006) 93.

port activities. It focuses, in particular, on the subject of civil liability, adopting a comparative law approach taking as examples two countries which follow the common law system (the United Kingdom and the United States) and two countries of the civil law system (Spain and Brazil).

16.2 The Law of Harbours and Pilotage in Common Law

The rule of law on harbours and pilotage is a very important topic worldwide, particularly in view of the amount of capital invested in maritime transportation and the large volume of legislation and officials regulating this important economic sector. This Chapter therefore presents the basic statutes applicable at the present time in the United Kingdom and the United States as examples of countries that follow the common law system.

The earliest reported British case of negligence filed against a maritime pilot appears to be that of *Re Rumney and Wood* of 1541.[7] In this case, Anthony Husse, then President of the Admiralty Court, found two pilots guilty of negligence, and they were imprisoned for one year and banned from ever practising as pilots again. By today's standards,[8] this sentence was extremely severe, and the judge's words, when condemning the pilots, border on the vituperative:

> And I dismiss, absolve, and discharge each of you as being unworthy, unfit, unskilful, inexperienced, lazy, negligent and careless men, from the charge, care, and practice of conducting, commanding, and piloting any ships whatsoever, as well from any ports whatsoever, within this famous realm of England as to ports overseas . . .[9]

In 1916, a British case was brought under the Defence of the Realm (Consolidation) Regulations 1914. According to a 'Notice to Mariners' made under these regulations, 'all ships . . . whilst navigating in the waters from Gravesend to London Bridge, or vice versa, must be conducted by pilots licensed by London Trinity House'.[10] Pronouncing judgment, Bargreave Deane J interpreted the verb 'to conduct' as follows:

> She took her pilot on board at Gravesend for the purpose of being 'conducted' by him to London. I think the word 'conducted' means that the pilot is in charge

[7] *Re Rumney and Wood*, Act Book, no. 128, 1 August, 1541. The Latin text of the case is reported in RG Marsdon (ed.), *Selected Pleas in the Court of Admiralty, Vol. I: The Court of the Admiralty of the West, AD 1309–1404, and the High Court of Admiralty, AD 1527–1545* (Selden Society, 1894) 102. The English translation appears at ibid, 213.
[8] A sentence of disrating and imprisonment, very similar in form to this, was imposed in 1805 by court martial against two pilots who lost *HMS Ramillies*. In this respect, see AL Parks, *The Law of Tug, Tow, and Pilotage* (2nd edn, Chapman & Hall, 1982) 1004.
[9] Ibid.
[10] Cited in R Douglas et al., *Douglas & Geen on the Law of Harbours, Coasts, and Pilotage* (5th edn, LLP, 1997) 264.

under the old system—that is, in full charge—and entitled to all the assistance he can get from the master and crew. He is in command.[11]

Since then, the relationship between the harbour authority and pilots has developed considerably, and has become an increasingly necessary tool for maintaining safety in the ports.

16.2.1 The United Kingdom

16.2.1.1 Pilotage

In the United Kingdom, 'the first legislative act relating to pilots was 3 Geo., Ch.13 [*sic*], in 1717, which granted to Dover Trinity House similar powers to those granted by James II by charter in 1684 to London Trinity House'.[12]

Today, the pilot is defined in section 31(1) of the Pilotage Act 1987[13] as amended by the Merchant Shipping Act (MSA) 1995 as 'any person not belonging to a ship who has the conduct thereof'.[14] The term 'direction' has been interpreted as requiring that the ship be conducted/navigated by the pilot, and not merely under his assistance.[15]

This definition re-enacted, verbatim, that contained in the MSA 1854. Prior to that Act, no statutory definition of the word 'pilot' existed, but an authoritative opinion as to its meaning was given by Baron Tenterden, an eminent eighteenth-century authority on maritime law, in a treatise on the subject,[16] in which he states:

> The name of a pilot, or steersman, is applied either to a particular officer, serving on board a ship during the course of a voyage, and having the charge of the helm and the ship's route; or to a person taken on board at a particular place for the purpose of conducting a ship through a river, road, or channel, or from or into a port.[17]

16.2.1.2 Harbour authority

The safety of navigation in British waters was formerly under the entire responsibility of Trinity House,[18] the Commissioners of Northern Lighthouses (in

[11] *The Nord* (1916) 13 Asp MLC 606, 608.
[12] Dover Harbour Act 1717 (4 Geo. 1, c. 13): Parks (n 8) 1003.
[13] UK Pilotage Act 1987 (c. 21).
[14] Australia defines a pilot in the same way, in s 6 of the Navigation Act, 1912 (Cth).
[15] *The Mickleham* [1918] P 166 (CA), 169; *Babbs v Press* [1971] 2 Lloyd's Rep 383, 387–8. See F Rose, *The Modern Law of Pilotage* (Sweet & Maxwell, 1984) 1; Douglas et al. (n 10) 263–4.
[16] Douglas et al. (n 10) 263.
[17] C Abbott, *A Treatise of the Law Rrelative to Merchant Ships and Seamen* (2nd edn, Shaw and Sons, 1804) 167.
[18] Trinity House is currently the Lighthouse Authority for England, Wales, the Channel Islands, and Gibraltar. The Pilotage Act, s. 23, gives power to the Secretary of State to authorize bodies to issue deep sea pilotage certificates. Deep sea pilotage is not compulsory although it may become so in marine protected areas. Compulsory pilotage is much more common in coastal areas and approaches to harbours where collisions and accidents are more likely to happen. In this respect,

Scotland), and the Commissioners of Irish Lights (in Northern Ireland). However, since the Ports Act 1991,[19] it has been divided between these and the relevant statutory harbour authorities.[20] The maintenance of lights, lighthouses, and buoys has now been taken over by the latter in the waters subject to their jurisdiction, while the former, now collectively referred to as general lighthouse authorities, are responsible for waters outside the jurisdiction of harbour authorities.[21] According to Mandaraka-Sheppard:[22]

> The British Government charted a new course on port marine operators—which includes accountability of port authorities, risk assessment and management, contingency plans and emergency response, management of navigation and pilotage—but parallel proposals towards a coherent policy on ports and maritime infrastructures have also been made by the European Commission.[23]

Port safety management has principles applicable to matters of safety in port operations regulated by the Port Safety Code (2005/06), following an extensive review of the law relating to harbour authorities and pilotage. Shaw and Tsimplis assert that 'This code is not written in mandatory terms, but represents a clear statement of best practice in all aspects of port operations, and is likely to be accepted by courts as the yardstick by which port authorities will be judged if civil claims are brought against them'.[24]

In the complex world of shipping, definitions are very important to understand the regulations and the logistics operations required by the economic agents. Thus, a 'harbour' is considered to be a refuge for a ship, and is defined by s 313 of the MSA 1995 as including 'estuaries, navigable rivers, piers, jetties, and other works in, or at which, ships can obtain shelter, load and unload goods, and embark or disembark passengers'.

Nevertheless, the definition of harbour adopted by the Pilotage Act 1987 and by the Ports Act 1991 is the same as in section 57(1) of the Harbours Act 1964,[25] which for the purpose of this Act is wider, including:

> any harbour, whether natural or artificial, and any port, haven, estuary, tidal or other river and inland waterway navigated by sea-going ships, and includes a dock, wharf, and in Scotland a ferry boat slip being a marine work . . . A dock is a dock used by ocean going ships and wharf is any wharf, quay, pier, jetty or

see R Shaw and M Tsimplis, 'The Liabilities of the Vessel' in Y Baatz (ed.), *Maritime Law* (2nd edn, Sweet & Maxwell, 2011) 302.

[19] Ports Act 1991 (c. 52).
[20] MSA 1995, ss 193–223.
[21] Shaw and Tsimplis (n 18) 299.
[22] A Mandaraka-Sheppard, *Modern Maritime Law and Risk Management* (2nd edn, Routledge-Cavendish, 2007) 805.
[23] Ibid.
[24] Shaw and Tsimplis (n 18) 299–300.
[25] Harbours Act 1964 (c. 40).

other place at which ocean-going ships can load or offload goods or embark or disembark passengers.

In relation to the operations usually carried out in a harbour, it is important to mention that section 57(1) of the Harbours Act 1964, under the term 'harbour operations', defines them as:

(a) the marking or lighting of a harbour or any part thereof;
(b) the berthing or dry docking of a ship;
(c) the warehousing, sorting, weighing or handling of goods on harbour land or at a wharf;
(d) the movement of goods or passengers within the limits within which the person engaged in improving, maintaining or managing a harbour has jurisdiction or on harbour land;
(e) in relation to a harbour (which expression for the purposes of this paragraph does not include a wharf)—
  (i) the towing, or moving of a ship that is in or is about to enter or has recently left the harbour;
  (ii) the loading or unloading of goods, or embarking or disembarking of passengers, in or from a ship which is in the harbour or the approaches thereto;
  (iii) the lighterage or handling of goods in the harbour; and
(f) in relation to a wharf,—
  (i) the towing or moving of a ship to or from the wharf;
  (ii) the loading or unloading of goods, or the embarking or disembarking of passengers, at the wharf in or from a ship; . . .

Harbours are strategic places that connect a country with the rest of the world. In the United Kingdom, they are under the jurisdiction of the Secretary of State, who is given powers of intervention by section 137 of the MSA 1995, as amended by section 2 of the Merchant Shipping and Maritime Security Act 1997 (MSMSA), when an accident has occurred involving, or on board, a vessel and in the opinion of the Secretary of State oil from the ship will, or could, cause significant pollution on a large scale in the UK, UK waters, or a part of the region specified by section 129(2)(b) of the MSA 1995. In this respect, Mandaraka-Sheppard mentions that:

> For the purpose of preventing, or reducing, oil pollution, he [the Secretary of State] or his representative, may give directions as respects the ship, or its cargo, or the risk of oil pollution, to the owner of the ship, master, salvor and to the harbour authority. The Secretary of State, through its representative, the SOSREP, is able to override the powers of harbourmasters and harbour authorities where this is necessary in order to prevent, or minimise, pollution.[26]

16.2.1.3 Harbour authority and pilotage

One of the most important functions performed by the harbour authority is concerned with its duties and liabilities in an era of risk management. Generally

[26] Mandaraka-Sheppard (n 22) 805.

speaking, there is no such thing as zero risk in the shipping industry, although this risk may be reduced by the good management of certain operations, including provision and maintenance of harbour facilities and pilotage services.

The statutes that apply to harbours and pilotage include, inter alia,[27] the following:

(a) The Harbours, Docks and Piers Clauses Act (HDPCA) 1847 (10 Vict c. 27), considered the 'mother statute' contains a comprehensive code of operational powers of the authorities governed by statute, and sections of it are usually incorporated into the special legislation of harbour authorities;
(b) The Harbours Act 1964 was passed after recommendations of the Rochdale Report, and was the first Act to be concerned with the central organisation of harbours . . .;
(c) The Docks and Harbours Act 1966, which conferred some new powers on the harbour authorities, including powers to carry out harbour operations;
(d) The Pilotage Act 1987, amended in 2003;
(e) The Aviation and Maritime Security Act 1990;
(f) The Pilotage (Recognition of Qualifications and Experience) Regulations 2003, amending the Pilotage Act 1987;
(g) The MSMSA 1997, which contains important provisions in relation to environmental protection and emergency situations in UK territorial waters. It governs the powers of the Secretary of State to make regulations and to appoint a his representative, the SOSREP, to perform functions of the Secretary of State under Section 293 of the MSA 1995 (s 293) in relation to marine pollution.

One of the most important results of the MSMSA 1997, after the publication of the Donaldson Report in the wake of the *Braer* incident, in 1992, was the definition of powers of detention by harbour authorities of unsafe ships under the regime of Port State Control (PSC)[28] established, in the case of the United Kingdom, by the Paris Memorandum of Understanding on Port State Control (Paris MoU).[29]

Accordingly, it was necessary to review the functions conferred on harbour authorities by the Pilotage Act 1987. The principal proposal of the Report was for the development of a Marine Operations Code for Ports, covering all port safety functions, and not just pilotage. According to the Review of Pilotage Act 1987:

> The Authority should ensure that the pilot assigned to every ship is fit and appropriately qualified for the task and that, under the PA 1987 [Pilotage Act], the pilotage services provided by a harbour authority are based on a continual process of risk assessment . . . including procedures for resolving disputes.[30]

[27] For the list of regulations, see ibid, 807–8.
[28] The concept of PSC is also important for ensuring compliance with international conventions on the protection of the marine environment from pollution from vessels. PSC has undergone many reviews, and is now part of the international regulatory framework.
[29] Shaw and Tsimplis (n 18) 300.
[30] Department for the Environment, Transport and the Regions, *Review of the Pilotage Act 1987*, Consultation Paper (27 July 1998, updated 7 March 2001) n 9, Section 9, Pilotage, cited in Mandaraka-Sheppard (n 22) 825.

The liability of the harbour authority is limited under section 22(3) of the Pilotage Act 1987 in respect of loss or damage to any other ship under pilotage and any property on it, loss or damage to any other ship or property on board such ship, as well as to any other property or rights. The applicable limits of liability are calculated by multiplying the number of authorized pilots employed by the harbour authority by the sum of £1,000.[31]

On the other hand, the civil liability of the pilot for any loss or damage caused by any act or omission of his in the performance of his duties as a pilot is limited to £1,000 plus the pilotage charges, which vary from one port to another, but may be up to several thousand pounds for larger vessels. The limit of liability available for the pilot is absolute, that is, there is no provision under which the pilot may lose the right to limit his liability.[32]

So, the duty to provide efficient and safe pilotage services is a relevant function of the UK harbour authorities which are required to have competent pilots available and properly certified boats for their use, especially following the accident involving *The Sea Empress* at Milford Haven in 1997, and the comments made by the Marine Accidents Investigation Branch (MAIB) concerning the role of the harbour authority in the handling of the accident.[33]

The Sea Empress[34] is the most significant recent decision concerning the entitlement of a harbour authority to file a claim against a shipowner for damage caused by a pilot, although in this instance the court ruled that the harbour authority were liable to pay damages. The aforementioned vessel was laden with light crude oil when she struck the mid-channel rocks in the entrance to Milford Haven Harbour, North Wales, causing a large-scale oil spill in the area, due to negligent navigation by her pilot, who had been trained and authorized by the Milford Haven Port Authority (MHPA).

Of course, the tanker should not have run aground in the first place. The MHPA stated that it was due to an error by the pilot, whose duty was to guide *The Sea Empress* into the harbour. The pilot was found guilty of incompetence as he had probably underestimated the run and stretch of the tide. In this respect, Shaw and Tsimplis state that:

> A tanker laden with 130,000 tons of crude oil, she ran aground on 15 February 1996 while entering the Port of Milford Haven with a duly licensed pilot on board.

[31] However, according to s 22(3) this right to limit is lost by the harbour authority if it is proved that the loss or damage was caused by a personal act or omission of the harbour authority committed with intent or recklessly and with knowledge that such damage would probably result. Nonetheless, it is noteworthy that there is no right to limit for loss of life or personal injury under the Pilotage Act 1987.

[32] Shaw and Tsimplis (n 18) 305.

[33] Mandaraka-Sheppard (n 22) 825.

[34] [1999] 1 Lloyd's Rep 673.

> It was admitted that the pilot but not the port authority, was negligent. She was eventually saved successfully, but only after some 70,000 tons of crude oil had been released into the sea. The [MHPA] was prosecuted under an obscure provision of the Water Resources Act 1991. They pleaded guilty to offence, which was one of strict liability, and were fined £4,000,000 in first instance, reduced on appeal to £750,000.[35]

Although the case was a criminal prosecution, it did involve detailed consideration of the role of a statutory harbour authority and its relationship with the pilotage service in its waters. In the course of his judgment, Steel J said:

> The significance of these matters is all the greater in the context of a scheme of compulsory pilotage. Shipowners and Masters must engage a pilot. They must take the training, experience and expertise of the pilot provided at face value. While the Master remains nominally in command, it has to be recognised that the pilot had the 'con' and a Master can only intervene when a situation of danger has clearly arisen. The harbour authority imposes a charge for pilotage but in the same breath has the added advantage that for the purposes of civil liability, the pilot is treated as an employee of the shipowner. All this calls for the highest possible standards on the part of the harbour authority.[36]

In this case, assisted by House of Lords' authority, the judge:[37]

> . . . had no difficulty in concluding that the port authority, being the operator of the port of compulsory inward pilotage, which trained and authorised the pilot, whose experience of this type of vessel was sketchy, did something which caused pollution, bearing also in mind that the pilot's negligence was a normal occurrence. He made no finding of fault, but on the basis of strict liability he fined the authority £4 million, reflecting the genuine and justified concern.[38]

According to Mandaraka-Sheppard,[39] *The Sea Empress* prompted the British Government, in addition to the review of the functions and accountability of harbour authorities, to take other measures as well. It accepted a proposal made by Lord Donaldson for an official representative of the Secretary of State to have powers of intervention and agree a salvage plan with the salvage master to prevent situations arising, such as in *The Sea Empress* case, where the local pilot cannot have such powers.

16.2.1.4 Compulsory and voluntary pilotage

Pilots are not only classified by the function they perform, but also by whether their employment is voluntary or compulsory by law. They are generally employed by independent associations doing business in particular ports, and their numbers

[35] The appeal is reported at [2000] JPL 943. See Shaw and Tsimplis (n 18) 307.

[36] See the dicta of Steel J in *Environment Agency v Milford Haven Port Authority (The Sea Empress)* [1999] 1 Lloyd's Rep 673.

[37] *Empress Car Co. v National Rivers Authority* [1998] 1 All ER 481.

[38] Mandaraka-Sheppard (n 22) 827.

[39] Ibid.

are limited either by law or common practice,[40] but there are pilots who are employed directly by harbour authorities.

One of the most important legal issues in respect of liability in situations of pilotage is, arguably, who pays for damages caused by the pilot's negligence when the pilot is employed under compulsory and voluntary pilotage, respectively.[41] In this respect, Hill notes that:

> Historically, the idea of compulsory pilotage was based on the need for national security and the protection of life and property in harbour and port areas. This is generally the rationale of compulsory pilotage in those countries where it exists by law. Some say though that this [is] nothing more than a possible additional reason, that compulsory pilotage is justified as a mean of raising revenue . . . Only the most illogical of persons would argue that a law that requires a compulsory pilot to be taken on board should not also take charge of and 'conduct' the ship. From this it follows that if a Master without justification interferes with the actions, orders or instructions of a compulsory pilot, he might expose himself to liability under pilotage legislation.[42]

Thus, recognizing the potential civil liability in situations of pilotage, it is possible to identify two types of liability: that assumed by shipowners, who hire pilots, and that of the harbour authority, when it places at the disposal of shipowners the pilots in its employment. Due to the importance of this subject, we shall address both possibilities in summary form.

In the United Kingdom, the shipowner was originally held liable for the negligent acts of the pilot in areas of voluntary pilotage,[43] but not in areas of compulsory pilotage. The argument used in the shipowner's defence, to avoid liability in these cases, was known as the *defence of compulsory pilotage*.[44]

The use of this defence argument caused great injustice to injured parties, who could not obtain compensation for their damages from the shipowner. In view of this, the Pilotage Act 1913 abolished this form of defence, and declared, in its section 15 that 'the shipowner who navigates in an area of compulsory pilotage shall be liable for the damages caused by the vessel, just as in voluntary pilotage'.

Since then, modern legislation has taken this position, which is now included in section 16 of the Pilotage Act 1987.[45] Other countries adopt a similar position, holding the shipowner liable for the negligent acts of the pilot. An example is Canada which, through section 41 of the Pilotage Act 1985,[46] clearly establishes

[40] Schoenbaum (n 2) 739.
[41] Shaw and Tsimplis (n 18) 303.
[42] C Hill, *Maritime Law* (6th edn, LLP, 2003) 463–4.
[43] See *The Beechgrove* [1916] 1 AC 364.
[44] See Rose (n 15) 37–9.
[45] See Douglas et al. (n 10) 278.
[46] Pilotage Act (RSC, 1985, c. P-14).

that the presence of a pilot on board the vessel does not exempt the shipowner from its responsibility.[47]

Despite the imposition of liability on the shipowner for the acts of the pilot, considering that nowadays many pilotage services are carried out by the harbour authorities, it could be reasonable to consider them as partially liable for the acts of the pilots in their employ. However, this is not the position adopted by the majority of countries.

In the United Kingdom, for example, as a rule a harbour authority is not liable for the damage caused by a pilot who it has certified; only for having issued the certification.[48]

16.2.1.5 Limitation of liability

Section 2(3) of the Pilotage Act 1987 imposes on each competent harbour authority the duty of providing such pilotage services as it deems necessary. Moreover, under section 11, this duty may be subject to arrangements for the services to be provided by the harbour authority itself, by another harbour authority, or by an agent. In fact, in the case of *Anchor Line (Henderson Bros) Ltd v Dundee Harbour Trustees*[49] it was held that an authority that failed to maintain an adequate pilotage service might incur liability to the owner of a ship that had sustained damage as a consequence of the absence of a pilot.[50] However, the modern tendency is for harbour authorities to be exonerated from liability for pilots' acts. In this respect, English courts have demonstrated that it will be very difficult to hold the harbour authorities liable, because in the case of *The Cavendish*[51] the court found that a pilot, whether or not employed by the authority in question, remains dependent on the shipowner in the navigation of the vessel.[52]

It should also be mentioned that in Australia the authorities are not held liable for damages caused by the pilot.[53] Section 80(1) of the Maritime Safety Act,[54] clearly states that 'Neither the State nor the Ministry, nor the pilotage service provider, will be held liable for any loss or damage caused by negligence of any person who has been provided, as a maritime pilot, by the pilotage services provider, while that person is acting as a maritime pilot'.

[47] For an application of the Canadian legislation in this aspect, see *The Irish Stardust* [1977] 1 Lloyd's Rep 195. Australia adopted a similar position in s. 79 of the Safety of Navigation Act and s. 410B of the Navigation Act 1912. In this respect, see C Yuen, 'Marine Pilotage in Australia: Sydney Ports Case Study' (2003) 17 *MLAANZ J* 80, 89–90.
[48] The Pilotage Act 1987, s. 22(8). Other countries adopt the same position. See the Canadian Pilotage Act 1985, s. 39 and Malta's Maritime Pilotage Regulations (SL 499.26), Art. 16A(5) .
[49] (1922) 38 TLR 299.
[50] Douglas et al. (n 10) 269.
[51] [1993] 2 Lloyd's Rep 292.
[52] See Douglas et al. (n 10) 278.
[53] See Yuen (n 47) 89 and 96.
[54] Maritime Safety Act, Act 121 of 1998 (NSW).

Notwithstanding the above, and perhaps as a further safeguard, section 22(3) of the Pilotage Act 1997 limits the liability of the harbour authority for damage caused to any vessel, to the goods on board a vessel, or the property rights of any nature, caused by a pilot certified by the authority (caused without the personal action or omission of the authority) to £1,000, multiplied by the number of pilots employed by the authority on the date on which the damage occurred.[55]

16.2.2 The United States

16.2.2.1 Pilotage

In the United States, a pilot must be licensed by some authority—either federal or state—in order to carry out his duties in a lawful manner. There are two kinds of pilots: the first, who is serving on board a ship as a crew member throughout the voyage, is licensed by the federal government (US Coast Guard); and the second is usually an 'independent' person who goes on board at a particular place to conduct a vessel through a particular stretch of water or 'pilotage grounds',[56] the latter being regulated by each state, differing greatly from one state to another.[57] Concerning this issue, Schoenbaum points out that:

> Congress has preempted state regulation only with respect to oceangoing vessels in coastwise trade, and Great Lakes vessels;[58] thus most pilotage is conducted subject to state laws. This irregular pattern of regulation leads to two problems: (1) different and conflicting standards of regulation under federal and state laws; and (2) wide variations in the scope of regulation of from one state to another. There is great need for harmonization of the regulatory rules on pilotage, and higher standards. The federal government should prescribe minimum requirements for state pilotage law in the interests of safety, as well as to eliminate protectionism[59] that is often abetted under state law.[60]

The role of pilots throughout maritime history was also mentioned by the US Supreme Court in *Ex parte McNeil*,[61] which gave a brief account of the history of pilotage, stating that:

> The obligation of the captain to take a pilot, or be liable for the damages that might ensue, was prescribed in the Roman Law. The Hanseatic Ordinances of around 1457 required the captain to take a pilot under the penalty of a mark of gold. The maritime law of Sweden of around 1500, imposed a penalty for refusing a pilot of 150 thalers, one-third to go to the informer, one-third to the pilot who offered, and the remainder to poor mariners. . . . By the maritime law of France, ordinance of Louis the XIV, 1681, corporal punishment was imposed for refusing to take a pilot,

55 The pilot's limitation of liability has been discussed elsewhere in this Chapter.
56 Parks (n 8) 1004.
57 46 USC § 8501.
58 46 USC § 8502. *Gillis v Louisiana*, 294 F3d 755, 2002 AMC 2010 (5th Cir. 2002).
59 See JI Crowley, 'In the Wake of the *Exxon Valdez*: Charting the Course of Pilotage Regulation' (1991) 22 *J Mar L & Com* 165.
60 Schoenbaum (n 2) 740.
61 80 US 236, 239 (1871).

> and the vessel was to pay 50 livres, to be applied to the use of the marine hospital and to repair damages from stranding. . . .[62]

Three years later, in *Atlee v Packet Co.*,[63] the same court defined a pilot's duty, highlighting the high standard of care to which they are held in law:

> The pilot of a river steamer . . . is selected for his personal knowledge of the topography through which he steers his vessel. . . . He must know where the navigable channel is . . . He must also be familiar with all dangers that are permanently located in the course of a river, of sand bars, snags, sunken rocks, or trees, or abandoned vessels or barges. All this he must know and remember to avoid. To do this he must be constantly informed of changes in the current of the river, of sand bars newly made, of logs and snags, or other objects newly presented against which his vessel might be injured.[64]

16.2.2.2 Harbour authority

The United States created laws for all its states with a sea border, establishing a comprehensive regulatory system for pilotage,[65] that typically requires that all vessels (with the exception of coastwise and certain smaller vessels) entering or departing the state ports or designated waters (pilotage grounds)[66] take on a state-licensed pilot. This service is regulated by ports or local administrative boards[67] that examine and license pilots, set pilotage rates, and promulgate regulations.[68]

In the absence of statutory limitations or exculpatory measures, the doctrine of *respondent superior* (where the principal or master is held responsible for the acts of his servants or employees) imposes liability upon those organizations[69] employing pilots.[70] Thus:

> Where a pilot is employed by authority, a port commission, canal company, or a private corporation, the employer is liable for pilot negligence.[71] If, however, the

62 Parks (n 8) 1003.
63 88 US (21 Wall) 389, 22 L Ed 619 (1874).
64 Ibid.
65 See generally Parks (n 8) 1012–15.
66 The portion of the waters over which a state pilot is required, usually by statute or regulations, to steer and direct the movement of a vessel. *Cooley v Board of Wardens of the Port of Philadelphia*, 12 How (US) 299; *Hobart v Drogan*, 10 Pet (US) 108, 123 (Parks (n 8) 1007). The states are free to define the 'pilotage grounds' subject to the statutory limits in 46 USC § 8501(a), which provides that '[e]xcept as otherwise provided . . ., pilots in bays, rivers, harbors and ports of the United States shall be regulated only in accordance with the laws of the States'. In the leading case of *Warner v Dunlap*, 532 F2d 767 (1st Cir. 1976), the court upheld a Rhode Island statute requiring all foreign vessels under registry which traverse Block Island Sound to take a pilot licensed in that state (Schoenbaum (n 2) 744).
67 The delegation of regulatory authority by a state to local boards is valid. *The Chase*, 14 Fed 854 (SD Fla 1882); *O'Brien v Amermanm*, 112 Tex 254, 257 SW 270 (1922).
68 Schoenbaum (n 2) 743.
69 In *The Dona Aurora*, 1961 AMC 1105, 289 F2d 586 (9th Cir. 1961) the City of Long Beach and a compulsory pilot hired by the city were held liable for the negligence of the pilot entering the harbour, resulting in grounding on a breakwater.
70 Parks (n 8) 1047.
71 *Principe Compania Naviera, SA v Board of Commissioners of the Port of New Orleans*, 333 F Supp 353, 1971 AMC 2639 (ED La. 1971); *Workman v Mayor of New York*, 179 US 552, 21S Ct 212,