

market intelligence

GETTING THE
DEAL THROUGH 

Shipping

Anti-globalisation:
what's in store for the
shipping industry?

*Kevin Cooper of
MFB Solicitors leads
the global interview panel*

2018

The Americas • Asia-Pacific • Europe • Middle East
Industry snapshot • Compliance • Finance • 2018/19 outlook

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market intelligence

Welcome to GTDT: *Market Intelligence*.

This is the 2018 edition of Shipping.

Getting the Deal Through invites leading practitioners to reflect on evolving legal and regulatory landscapes. Through engaging and analytical interviews, featuring a uniform set of questions to aid in jurisdictional comparison, *Market Intelligence* offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most interesting cases and deals.

Market Intelligence is available in print and online at
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GLOBAL TRENDS

KEVIN COOPER OF MFB SOLICITORS

With a broad commercial shipping practice, Kevin's clients include major international shipowners and builders, charterers, cargo owners, salvors and shipyards, and their respective insurers. After Oxford University, Kevin served in the British Navy for 10 years. Having previously worked at another firm in its London, Shanghai and Monaco offices, he joined MFB in June 2018, where he continues to have a broad shipping and marine insurance practice.

Kevin's admiralty practice involves high-value multi-jurisdictional cases such as the collision between the container vessel *MSC Joanna* and the hopper dredger *W D Fairway* in Tianjin in 2007, the grounding and subsequent collision of the *Khalijia 3* in Mumbai in 2010, the *Altantik*

Confidence sinking in 2013 and the *Norman Atlantic* ferry fire in 2014. He also handles a wide range of charter party, cargo claim and shipbuilding matters.

Kevin's earlier experience as a criminal court advocate in the navy is now employed acting as an advocate in arbitration and mediation proceedings. He also advises on corporate ethics, crime and regulatory matters, especially anti-corruption policies and procedures.

Kevin is dual-qualified as a solicitor and a barrister, regularly chairs and speaks at shipping sector events and has particular industry contacts in the passenger vessel sector and, regionally, in Norway, Italy, Spain, Portugal and the Americas. He speaks French, German, Swedish and Mandarin Chinese.

“The GDPR changed the way shipping industry handles data as shipping companies, like businesses in other commercial sectors, must account for their handling of personal data.”

Regulatory and compliance regimes

A key global trend across all business sectors in recent years has been the increasingly stringent regulatory and compliance landscape with which they have to comply, both domestically and internationally, and the shipping sector is no exception. This trend reflects the increasing global shift towards, among other things, tackling corrupt practices in business; addressing climate change; and taking proactive measures against states that breach international law, sponsor global terrorism and possess weapons of mass destruction.

The impact of international sanctions on the global maritime industry has remained a hot topic into 2018. Most prominently, the contrasting stances between the UN, EU and the US towards the international sanctions against Iran under the Joint Comprehensive Plan of Action (JCPOA) have had a considerable impact on the shipping market. In January 2016, the UN and EU lifted certain sanctions against Iran, which allowed EU entities to recommence trading with Iran. On the flip side, with its recent decision to withdraw from the JCPOA, the Trump administration has reinstated the US' former hard-line attitude towards Iran. Consequently, larger container lines have announced their intention to 'wind down' their operations in Iran.

Other countries that have been subject to international economic and trade sanctions in recent years include Syria, Russia and North Korea. Economic and trade sanctions have had a significant impact on the amount of business done in the shipping market, and indeed the way in which business is done, because they place serious restrictions on the scope of transactions that can take place with sanctioned countries or entities, even limiting business that is indirectly related to them. The impact has been felt by shipowners and charterers, as well as the marine insurance market and financial institutions. The recent thawing of relations between North Korea and the international community, however, may see an easing of sanctions over time.

Recent years have also seen a global initiative to tackle economic crimes, corruption and bribery, with many countries implementing legislation directed at eliminating corruption, bribery, money laundering and other types of fraud. At a global level, the Organisation for Economic Co-

operation and Development (OECD) Anti-Bribery Convention 1997 (1997 Convention) established legally binding standards to criminalise bribery of foreign public officials in international business transactions. The 35 OECD countries, as well as eight non-OECD countries, have adopted the 1997 Convention. The OECD also has a Working Group on Bribery in International Business Transactions that monitors the implementation and enforcement of the 1997 Convention.

Even before the 1997 Convention, however, the US Foreign Corrupt Practices Act 1977 led the way in tackling corporate liability, responsibility for third parties, including agents, consultants and distributors, and extraterritoriality for corruption offences. The UK's Bribery Act, which came into force in 2011, is another notable example of domestic anti-corruption legislation that has extraterritorial reach. Other countries that have been proactive in introducing anti-corruption and anti-bribery legislation, and actively pursuing investigations into incidents of high-level corruption, include China, Brazil, Switzerland, France and Germany. Shipping companies must ensure that they have adequate procedures in place so that they do not fall foul of either domestic or foreign anti-corruption laws that may apply to them when doing business internationally. The risk is particularly significant when third parties abroad are instructed to act on a company's behalf as local agents or intermediaries, and also when business is done in jurisdictions with different standards of acceptable activities.

Data protection laws and cybersecurity practices have also gained prominence in recent years, most notably with the General Data Protection Regulation (GDPR), which came into force in May 2018. The GDPR changed the way shipping industry handles data as shipping companies, like businesses in other commercial sectors, must account for their handling of personal data, have data protection policies, data protection impact assessments and appropriate policies as to how data is processed. This means that they must consider the locations in which they do business, the types of data they gather and store, how it can be accessed, and by whom, and how they use that data.

The increased digitalisation of systems has also meant that businesses face an increasing risk of cyberattacks that can lead to business disruption and financial loss. The importance of ensuring cybersecurity is reflected in both laws being enacted (eg, the EU Network and Information Security Directive), as well as guidelines from various industry bodies (eg, the Baltic and International Maritime Council and the UK Chamber of Shipping) on how to protect against cyberattacks.

Global climate change concern has also had implications for the shipping industry, with various international, EU and domestic legislation aimed at reducing ship emissions and other pollution generated by ships and the shipping industry. Specifically, the International Maritime Organization (IMO) has set a global sulphur cap for 2020, reaffirmed at the IMO Conference in April 2018. The cap requires all ships to use fuels with a maximum of 0.5 per cent sulphur content as of 1 January 2020. Despite concerns over implementation issues such as transitional costs and sufficient availability of compliant fuels, taking the preparatory steps to ensure compliance has become a core focus for many shipping operators and oil refiners. Indeed, a recent survey reported that approximately 60 per cent of the shipping industry have said that compliance with emissions regulations such as the 2020 Sulphur Cap is a high priority for their business; this rose to 88 per cent among operators and 90 per cent among owners.

Among other notable areas of international legislation is the IMO's Ship Recycling Convention, which has not yet come into force but is aimed at ensuring that ships, when being recycled after reaching the end of their operational lives, do not pose any unnecessary risks to human health, safety or the environment. The early implementation of its principles by the EU has thrown up a number of practical issues that are still being resolved, such as the availability of suitable recycling yards.

Challenging market conditions

The financial crash in 2008 has had a long-term effect on the health of the global economy and

the shipping market has seen its share of the fallout. There has been a significant increase in the number of shipping contract defaults and the inability of charterers to pay hire punctually, leading to a knock-on effect for shipowners and other parties in the contractual chain. The shipping market has witnessed a number of high-profile insolvencies, whose consequences have reverberated across the global industry. Some of these insolvencies have led to domestic rehabilitation proceedings, for example, in Korea, and have raised various cross-border insolvency issues. These include difficulties that relate to enforcement of court judgments and arbitration awards against the insolvent party, which have had to be considered by the courts.

Challenging market conditions have also been cited, along with a surplus in market capacity and the insolvencies referred to above, as one of the factors that has led to market consolidation in the container liner service sector.

Anti-globalisation

The trend towards globalisation, which has dominated economics and trade for decades, has arguably peaked. Major political shifts, including Brexit and President Trump's declared nationalistic policies, suggest that there may be a gradual future unwinding of globalisation, with more countries and states looking inwards, embracing protectionism and, notably, secession. Last year saw the Catalan independence vote, but similar issues of autonomy remain possibly unresolved in Scotland, Iraqi Kurdistan and elsewhere.

President Trump's aggressive import tariff policies on major trading partners such as China, Canada and the EU, and the UK leaving Europe's single market will both have consequences for global trade, which fuels the shipping market. Elections in other large economies such as the recent rise to power of populist parties in the Italian government may accelerate the trend. Time will tell whether this apparent backlash against globalisation will continue apace and, if it does, what long-term impact it will have.

One thing is without doubt: the coming years will not be boring for the shipping industry.



SHIPPING IN AUSTRALIA

Joe Hurley is head of HWL Ebsworth's shipping and trade practice, and primarily advises in all aspects of international and domestic shipping disputes, both wet and dry. He has acted in most of Australia's leading admiralty cases, as well as advising on 'front-end' shipping and trade commercial matters. He is also involved in numerous foreign seats of arbitration. Joe has been recognised as a leading Australian shipping lawyer in a range of industry publications including *Chambers and Partners*, *The Legal 500* and *Who's Who Legal*.

Jesper Martens is an internationally recognised shipping and commercial lawyer with over 25 years' professional experience. Jesper has expertise in

maritime law, trade law, Danish law, marine insurance and reinsurance. *Doyle's Guide* names Jesper as a recommended lawyer for shipping and maritime law in Australia. *Who's Who Legal 2017* lists Jesper as a leader in the field of shipping in Australia.

Chris Sacré has over 15 years' experience as a maritime and trade lawyer, and is admitted as a solicitor in both Australia and England. Chris regularly handles protection and indemnity, charter party and carriage disputes as well as advising commodity traders on international sale of goods. Chris also represents Australia's leading marine insurers of cargo. Chris has been named as an 'Australian Transport Law Rising Star' in *Doyle's Guide 2017*.



GTDT: What is the current state of the shipping industry in your country?

Joe Hurley, Jesper Martens and Chris Sacré: Australia is a nation of shippers not shipowners. As an island continent, our livelihood is dependent on the shipping industry and maritime trade to stimulate our economy. With over 10 per cent of the world's maritime trade, by volume, passing through Australia, the shipping industry is integral to the success of our national economy.

Australia has an export-oriented economy. Critical to its profitability is iron ore, coal, liquefied natural gas (LNG) and agricultural trade. Australia exports over 700 million tonnes of iron ore per year which accounts for approximately a third of global production. The iron ore market value is therefore an essential consideration for the Australian shipping industry.

Maritime trade would not be effective if it were not for the continued growth and success of Australia's ports and infrastructure system. With over A\$1.2 billion worth of trade passing through Australian ports daily, Australian ports are vital to the development of Australian trade and national prosperity. Investment and development into Australian ports over the past decade has continually grown. The recent privatisation of the Port of Melbourne through a 50-year lease set to raise billions of dollars to fund transport projects across Victoria, the development of automated ports by Patrick's in Port Botany seeing a reduction in jobs and the development of an inland terminal by DP World, 'Somerton Rail Terminal', in Victoria to be connected to the Port of Melbourne by rail are examples of this.

The efficiency and functioning of the Australian shipping industry, however, can be affected by the strong arm of the Maritime Union

of Australia (MUA), who represent seafarers and waterfront workers. By way of example, in late 2015 and early 2016, the MUA engaged in action on behalf of Australian crew members against Alcoa and the federal government over the loss of their jobs aboard the bulk carrier MV *Portland*. The vessel was to be sold and leave Australian coastal trade. The Australian crew refused to sail the vessel to Singapore for sale and conducted a sit-in protest causing delays for over two months. Our employment team assisted in breaking this deadlock.

Shipping trade in Australia is strictly monitored and regulated by the Australian Maritime Safety Authority (AMSA). Established under the Australian Maritime Safety Authority Act 1990 (Cth), AMSA is invested with responsibility and governance of ensuring the safety of Australian-flagged and foreign-flagged vessels in Australian ports. The AMSA inspectors are considered alongside US port state control as some of the most thorough in the world.

GTDT: What are the prevailing shipping market trends affecting your country?

JH, JM & CS: The shipping industry worldwide continues to face reduced revenues driven by over capacity. That is not a bad thing for the Australian economy because it enhances international trade for the benefit of Australian importers and exporters alike.

The response by container lines and tug operators in Australia has been to drive costs down, and where that does not work, seek a merger or acquisition. In June 2016, CMA CGM assumed control of NOL/APL. On 30 November 2017, the purchase of Hamburg Sud by Maersk was



Chris Sacré

“Australia’s cruise industry continues to thrive, with increased numbers of vessels based in or visiting Australia in 2016–17.”

approved by the relevant regulators worldwide including Australia.

With freight rates still low, bunker prices play a big part in profitability. Bunker prices hit a high of over A\$450 per metric tonne in June 2018, forcing shipping lines in Australia to apply an emergency bunker adjustment factor and general rate increases to recover the costs.

With little profit to be made in traditional shipping the major lines are looking to add logistic services to their portfolios. July 2018 saw regulatory approval for CMA CGM’s purchase of 24.99 per cent stake in Ceva Logistics.

The tug industry in Australia is dominated by Svitzer. In 2015, Boskalis subsidiary Smit Lamnalco purchased Svitzer’s main competitor PB Towage Australia. Later that year, Smit bareboat chartered Smit’s harbour tugs at Newcastle, bringing increased efficiencies at one of Australia’s busiest bulk ports and reducing competition.

On a happier note, Australia’s cruise industry continues to thrive, with increased numbers of vessels based in or visiting Australia in 2016–17. The Australian public’s appetite for cruise holidays (4.5 per cent cruising each year) continues to grow and international visitors bring much needed revenue to ports such as Sydney with its iconic Circular Quay berth just down the road from our offices.

Recent years have seen an increased focus on LNG production and supply to the Australian domestic market.

The Gorgon project off the west coast of Australia is one of the largest and costliest energy projects in the world, costing over A\$69 billion. It employed around 10,000 people during the construction of the processing facility at Barrow Island, west of Karratha. In April 2018, Chevron

announced that it would proceed with stage two of the project.

Shell Prelude (FLNG) arrived in Australian waters in late 2017 and is currently undergoing final stages of commissioning before production commences.

Located about 220 kilometres offshore Western Australia, Ichthys LNG Project is currently in construction and represents the largest discovery of hydrocarbon liquids in Australia in 40 years.

These projects and the many others extracting LNG off Western Australia bring opportunities for commercial vessel operators and marine services industries in Western Australia.

On the Australian east coast, the challenges are different as the major cities on the eastern seaboard are dependent on gas imports. The pressure to secure gas supply to the Australian domestic market has given rise to new projects for import and regasification such as AGL’s planned Crib Point facility in Victoria and a proposal to build an LNG import terminal at Port Kembla, New South Wales.

GTDT: Are there any recent domestic or international political or legislative developments that may have an impact on your country’s shipping market?

JH, JM & CS: There are a number of domestic legislative developments that have, or could have, an impact on the Australian shipping market. The development by DP World of an inland terminal in South Australia may have implications on carriage liability and the applicability of the Hague-Visby Rules in Australia (which apply in Australia from port-to-port rather than rail-to-rail as is usual elsewhere in the world).

The Biosecurity Amendment (Ballast Water and Other Measures) Act 2017 was introduced to strengthen Australia's biosecurity system and implement the International Convention for the Control and Management of Ships Ballast Water and Sediments. The Act amends the Biosecurity Act 2015 (Cth) by introducing stricter regulations and requirements for the discharge of ballast water and the disposing of sediment for Australian vessels and for foreign-flagged vessels in Australian waters. Australian vessels will be required to have ballast water management plans and record systems at all times, whether or not they are in Australian waters.

The Competition and Consumer Act 2010 (CCA) and the Australian Competition and Consumer Commission (ACCC) regulate anticompetitive conduct in Australia. In recent times, the shipping industry and more particularly the car carrier sector has come under scrutiny.

The liner shipping trade in Australia benefits from Part X of the CCS, which provides broad immunities to facilitate coordination between shipping companies to provide liner shipping services in consortia. These include exemptions to cartel conduct prohibitions, including price-fixing, rigging bids and constraining supply.

The CCA was amended in late 2017 following the Harper Review. Despite a recommendation to repeal Part X, Part X remained in place allowing consortia to provide services around the Australian Coast and beyond. Further, Shipping Australia Limited commenced negotiations with the ACCC in May 2018 for a potential block exemption for liner shipping.

Despite the retention of Part X, in January 2018, shipping lines terminated two discussion agreements that had been in place pursuant to which the lines would negotiate their bunker base rates, indices and surcharges with the peak shipper body. The decision to terminate appears to arise out of the consolidation of the industry and caution over the ACCC's interest in the shipping industry.

In April 2018, the Security of Critical Infrastructure Act 2018 (Cth) introduced new powers for the Australian federal government to protect national infrastructure assets including ports. The act establishes a Register of Critical Infrastructure Assets and providing the minister with a power to direct a reporting entity or operator of a critical infrastructure asset to do, or refrain from doing, an act or thing within a specified period of time. The risk of government intervention created by the act may deter some foreign investors from investing in Australian ports and infrastructure.

GTDT: What are the key regulatory and compliance issues for your country's shipping market?

JH, JM & CS: Vessels that are not Australian-flagged but wish to carry out Australian coastal

trading (cabotage) generally must apply for a licence to carry cargo between Australian ports in different states. Generally, in order to carry cargoes between Australian states and territories, the operator of the ship has to obtain a licence under the Coastal Trading (Revitalising Australian Shipping) Act 2012 (Cth). It is an offence for ships covered by the act to trade without a licence. The act has a three-tier licensing system for coastal trading:

- general licence (only available to Australian-flagged ships);
- temporary licence; and
- emergency licence.

The legislation is under review but the expected changes are likely to be minimal.

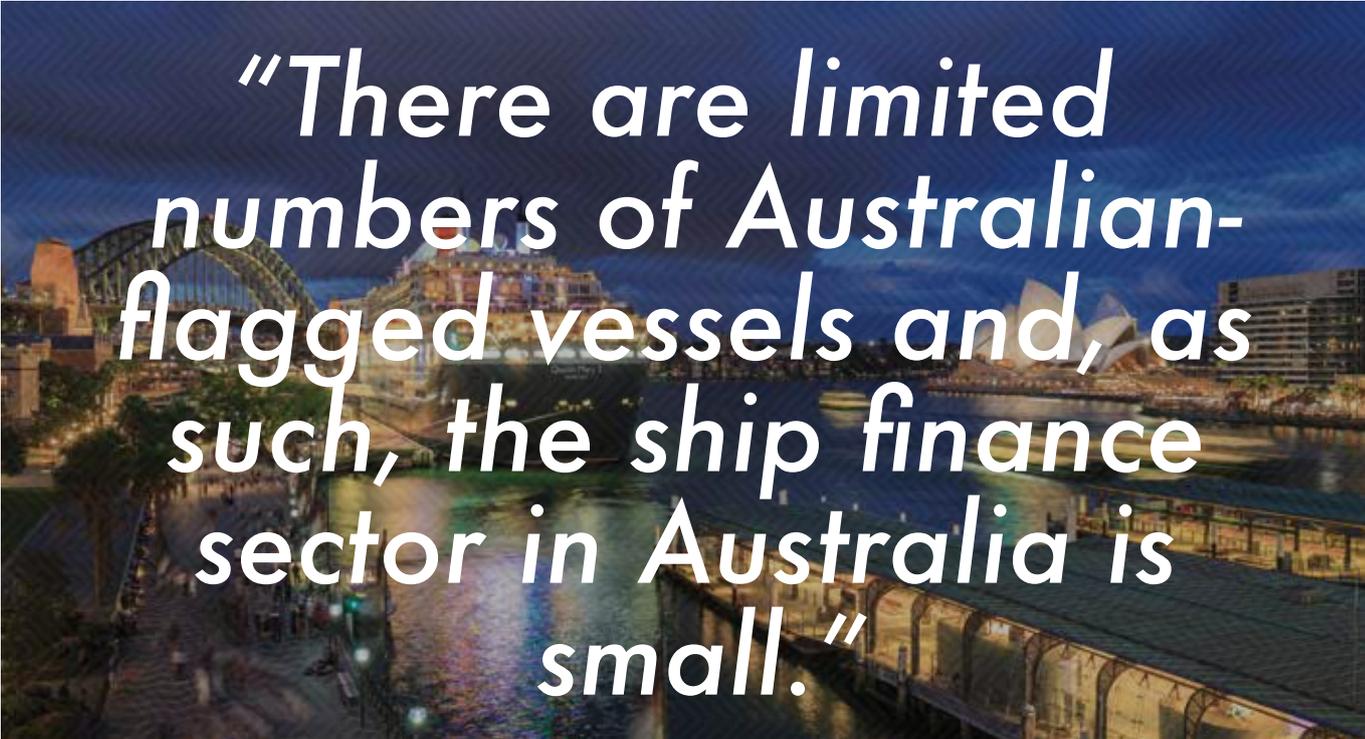
For any foreign-flagged or Australian vessel looking to engage in Australia's shipping market, it is important that they are aware that all vessels need to meet a number of strict requirements set by AMSA. AMSA has broad powers to ensure safety, including the power to detain a vessel pursuant to Section 248 of the Navigation Act 2012 (Cth). Common grounds of detention relate to the operation of the safety management systems required by the International Safety Management Code.

All vessels also need to ensure they comply with the international standards set by the International Maritime Organization and other international conventions and obligations which are enforced in Australia through the issue of Marine Orders. AMSA has two series of orders – those that reflect international obligations and standards (Marine Orders 1–98) and those applying only to domestic commercial vessels (Marine Orders 500–507).

In addition to maritime safety, AMSA's primary functions are to protect the marine environment through preventing and combating pollution, to provide infrastructure to support safe navigation of Australian waters and to provide effective national search and rescue services to the aviation sector. There is a strict liability regime in place in Australia for oil spills on both state and federal levels; with maximum maritime fines increased in July 2018 to A\$21 million.

All vessels need to ensure that they are aware of and comply with the Maritime Labour Convention 2006 (in force in Australia since 2013) and any relevant Work Health and Safety laws. Commonwealth Occupational Health and Safety (Maritime Industry) Act 1993 provides for a number of OHS obligations and standards for the shipping industry. It applies to Australian registered ships, ships with general coastal trading licence and ships that have a majority of Australian residents on board.

Other regulatory and compliance issues that need to be considered include Australia's biosecurity as well as regulations set by the Australian Border Force (an operational arm



“There are limited numbers of Australian-flagged vessels and, as such, the ship finance sector in Australia is small.”

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of the Department of Immigration and Border Protection). Non-compliance with cargo or container limits under the Customs Act may result in delays to gaining access to cargo as well as storage and related costs from the container terminal operators.

It is worth noting that many port corporations have been privatised. All ports in Australia have their own Regulations and Rules that apply to all vessels using that particular port.

Overall, all vessels should keep in mind the broad and wide admiralty jurisdiction of the Federal and Supreme Court under the Commonwealth Admiralty Act 1988 (Cth). If a ship is present in Australian waters, the court has power to arrest it to hear and decide any maritime disputes regardless of whether the ship is Australian or foreign-flagged.

GTDT: What are the shipping industry’s current sources of finance? How do you predict they will develop, and what are the advantages and challenges to financing a vessel in your country?

JH, JM & CS: There are limited numbers of Australian-flagged vessels and, as such, the ship finance sector in Australia is small. Australia is a difficult place for vessel owners to operate. Australian ships must have Australian crews and with Australian crews comes Australian wages and the involvement of the MUA.

By way of example, in May 2016 it was announced that Australian company Great Southern Shipping and the Rizhao Port Group would establish a new liner service between Australia and China as well as Australian coastal trade. The intent was to operate up to five Australian-flagged container vessels and for

the fleet to grow. The announcement came as a surprise to the established lines already struggling in a depressed market. The venture was slow to get started and although vessels were chartered and cargo booked it appears that no service was successfully performed with charter parties terminated and cargo interest being forced to pay freight to unpaid owners. By December 2016, liquidators were appointed.

GTDT: Have there been any recent significant domestic or foreign court decisions or arbitration awards that impact on your country’s shipping market?

JH, JM & CS: Cases on general average are rare, especially in Australia. The Federal Court of Australia recently considered a novel issue relating to the law of general average. In *Offshore Marine Services Alliance Pty Ltd v Leighton Contractors Pty Ltd* [2017] FCA 333, the court had to decide whether a party that is not the owner of cargo on board a vessel, but is responsible for the care, custody, control and safekeeping and preservation of the cargo, had an interest in the cargo that attract liability to contribute in general average. The court found that the liability to contribute in general average does not extend beyond the actual owner of the relevant cargo. The party in this case who was not the owner of the cargo had no obligation to contribute in general average.

The Federal Court has continued to recognise foreign bankruptcy proceedings under the UNCITRAL Model Law on Cross-Border Insolvency. In June 2018, liquidators for an Italian shipowner obtained recognition and stay orders (*Alari (Trustee) in the matter of Rizzo-Bottiglieri-de Carlini Armatori SpA (Trustees in Bankruptcy appointed) v Rizzo-Bottiglieri-de Carlini Armatori*

THE INSIDE TRACK

What are the particular skills that clients are looking for in an effective shipping lawyer?

First and foremost, in our experience clients are looking for lawyers with proven track records; experts in their fields, with a clear knowledge of the law and being able to apply their knowledge to produce cost-effective, good commercial outcomes. This is helped by the fact that, in Australia, legal fees in the maritime sector tend to be less than other civil or common law countries.

What are the key considerations for clients and their lawyers when arranging finance for a shipping transaction?

As Australia is a country of shippers not shipowners, and as there are few Australian ships on the shipping register, ship-financing is not a common consideration for Australian clients and lawyers. The four major banks will, however, be prepared to finance fishing, pleasure craft or small coastal traders. They may also be prepared to finance any vessel capable of being registered in Australia. Traditionally however, the cost of borrowing money in Australia has been higher than many other jurisdictions although interest rates are currently low.

What are the most interesting and challenging cases you have dealt with in the past year?

The firm acted in the proceeding mentioned below for Leighton Contractors Pty Ltd,

which successfully submitted that they had no obligation to contribute in general average because they were not owners of the relevant cargo.

The firm also acted in a proceeding for the liquidators who obtained final recognition and stay orders in respect of a fleet of ships owned by the insolvent Italian shipowner for the purposes of an orderly sale of the ships.

The firm provided advice to Animals Australia in relation to, among other things, the Australian Maritime Safety Authority's powers to act against vessel owners and operators for likely breaches of Marine Orders 43 and the minister's powers to make a decision to prevent livestock export vessels from operating from Australian ports.

Finally, the firm has advised various stakeholders on regulation and disputes arising out of LNG projects on the west and east coasts of Australia. The export and import of LNG gives rise to a large number of technical and legal challenges.

Joe Hurley, Jesper Martens and Chris Sacré
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SpA (No 2) [2018] FCA 1067). Stays granted by Australian courts following recognition do not necessarily mirror the stay that applies in the main foreign proceeding. The stay that will apply depends on what is available under the Corporations Act 2001 (Cth). Also, Australian courts do not grant blanket stays that prevent outright the arrest of ships. A creditor who wishes to arrest a ship that is subject to a stay must apply to a judge who will evaluate whether there is sufficiently arguable foundation to arrest the ship despite the stay, perhaps because the claim has maritime lien status.

Australia exports over 3 million live animals every year. Regrettably, some exports by sea result in the deaths of some of the animals carried. In April 2018, public attention was drawn to a particular voyage where more than 2,400 sheep died due to heat exhaustion when the vessel entered Middle Eastern waters during a summer month. Although no court proceedings have yet resulted, in April 2018, the Australian Maritime

Safety Authority temporarily banned the ship *Awassi Express* from leaving port with an expected 65,000 sheep due to be loaded. In June 2018, the Federal Agriculture Department suspended three licences held by Australia's largest live sheep exporter.

GTDT: What is the outlook for your country's shipping market?

JH, JM & CS: The outlook is positive for Australian shippers and the service providers that support them as competition is relatively low for tug and terminal operators. Australia has an inherently strong export cargo, oil and gas industry which, will continue to grow and support the shipping market. Ongoing investment into Australian ports and infrastructure increase the shipping market capacity with research indicating that port freight is forecast to double over the next 14 years.

SHIPPING IN BRAZIL

Bernardo Mendes Vianna is a partner and head of the shipping practice at Vieira Rezende Advogados, recognised by his great expertise in shipping litigation, notably by acting in casualties and major cargo claims. His clients include shipowners, carriers, traders, financial agents and insurers. Bernardo is the current chair of the Brazilian chapter of the Ibero-American Institute of Maritime Law.

Daniela Ribeiro is the head of the oil and gas practice and is a managing partner at Vieira Rezende Advogados. She is a pioneer in oil and gas regulation in Brazil, with remarkable expertise in operational leasing transactions under the form of

project finance and the use of rigs and multipurpose vessels. Her main clients are oil companies, financial institutions and service providers to the offshore oil and gas industry, notably shipowners and charterers.

Flavia Melo is an experienced senior associate, well known for her work in both dry and wet shipping. She focuses her practice in marine casualties, incidents and cargo claims, but also deals with industry typical contracts, complex insurance claims and provides consulting in regulatory affairs. She is a founding member and also a board member of Women's International Shipping and Trading Association Brazil.

istock.com/Nikada





Bernardo Mendes Vianna



Daniela Ribeiro

GTDT: What is the current state of the shipping industry in your country?

Bernardo Mendes Vianna, Daniela Ribeiro and Flavia Melo: The shipping industry in Brazil is still struggling with the reduction of oil and gas (O&G) exploration activities by Petrobras (the Brazilian state-owned oil company), and the consequent revision of the orders to local shipbuilding industry.

In regard to international navigation, Brazil is a large producer and exporter of commodities (products include soy, iron ore, crude oil, cars, sugar, poultry meat, cellulose, coffee, aircrafts, bovine meat, among others), but highly dependent on foreign ocean carriers to distribute its products overseas. In 2017, Brazilian currency devaluation led to a reduction in commodities prices, which proved positive for export trade and directly influenced the charter market, which remains very attractive to foreign vessels. The main giant traders are established in Brazil and we have seen the north and north-eastern ports substantially raise their participation in the export trade, with a consequential increase in foreign shipowners operating cargo available in that region.

Due to historic governmental protection policies, coastal navigation is primarily reserved for Brazil-flagged vessels, which are prioritised in relation to foreign-flagged vessels in cabotage, inland, port support and offshore support navigation activities. In cabotage and inland transportation we have seen a steady growth over the past 10 years primarily caused by infrastructure investments made to facilitate the agribusiness products outflow. Expectations for

2019 are that cabotage and inland navigation will continue to expand.

Further, for more than a decade, the shipping industry in Brazil benefited from the governmental incentives to the offshore O&G sector. The Brazilian government used Petrobras and Transpetro, Petrobras' shipping company subsidiary, to artificially foster the development of a local shipping industry. The Brazilian government has also made available to interested parties credit lines with low interest rates with funds obtained from the Merchant Marine Fund (FMM) through state-owned banks such as the Brazilian Development Bank (BNDES), and the possibility of obtaining guarantees through the Naval Construction Guaranteeing Fund (FGCN).

However, the deterioration of the Brazilian economy and the public accounts, the steep fall of the oil prices worldwide and the reduction of Petrobras's financial capacity led the Brazilian government to push Petrobras for a reduction of O&G exploration activities prioritising O&G production activities with a direct impact on the offshore support and the shipbuilding sectors. Because of that, the Brazilian offshore shipping industry, highly dependent on Petrobras investments, has in the past couple of years witnessed a flood of idle vessels for the lowest hires and the interruption of construction projects in local shipyards.

Petrobras announced in 2015–2016 a drastic reduction of its non-core investments, with cancellation and divestment of projects, termination of charter contracts and revision of shipbuilding contracts, and a sizable assets sale programme. All those actions carried out



Flavia Melo

“The boom in the oil and gas and shipbuilding industries from 2007 to 2014, led the Brazilian shipping market to witness a high demand for offshore support vessels mainly by Petrobras.”

by Petrobras have already resulted in a better financial position for the company, and this is confirmed by looking into Petrobras’s numbers in 2017 and the first quarter of 2018.

Alongside Petrobras’s financial recovery, the Brazilian government sees the recovery of the O&G sector as being vital to the country’s economic development in the long run. Hence, the government has already taken several measures to foster the recovery of the O&G sector, including the successful bids for relevant new oil fields in 2018, as we will further explain on this interview.

Therefore, in 2017–2018 the Brazilian economy has been experiencing a timid positive reaction to the measures taken by the Brazilian government. However, due to instability caused by the unpredictable upcoming 2018 presidential elections, any impact on the offshore shipping industry is only expected to happen in 2019, when Brazil has a new government.

GTDT: What are the prevailing shipping market trends affecting your country?

BMV, DR & FM: The boom in the O&G and shipbuilding industries from 2007 to 2014 led the Brazilian shipping market to witness a high demand for offshore support vessels mainly by Petrobras. As a consequence of said demand, Brazilian shipowners invested to increase their fleets by either contracting new vessels with local shipyards or establishing joint ventures with foreign shipowners who were interested in hiring their vessels to Petrobras. Likewise, some foreign shipowners decided to make a bigger impact and entered the Brazilian market by establishing a

branch and contracting a local yard to build vessels in Brazil, while bringing in similar foreign vessels under charter agreement. These investments in shipbuilding were quite high and the plan at that time was to have the vessels employed by Petrobras immediately after the termination of construction.

However, as explained in our answer to the question above, with the economic crisis and the decline in Petrobras’ demand for vessels, the scenario drastically changed. Nowadays, there are more service providers and vessels available than contractors and services to be rendered, and part of the Brazilian fleet is currently unemployed. Consequently, Brazil-flagged vessels are more than ever being prioritised in relation to foreign-flagged vessels. This happens due to the protective policy in force, which demands that, if a contractor decides to hire a foreign-flagged vessel, it must inform the market the main characteristics of the intended vessel and the service to be provided prior to contracting a foreign one. According to the applicable law, a Brazil-flagged vessel with similar specifications may block the envisaged chartering of a foreign-flagged vessel in case it is capable of providing the same services. This continues to be the main trend in Brazil due to the excess of vessels.

Foreign players continue to seek mechanisms to put vessels under the Brazilian flag to avoid blocks and remain in the game, either through partnerships with Brazilian owners or other business structures, to bareboat charter those vessels and register same under the Brazilian Special Registry, enabling the temporary

suspension of the original flag and the flying of the Brazilian flag.

GTDT: Are there any recent domestic or international political or legislative developments that may have an impact on your country's shipping market?

BMV, DR & FM: As previously mentioned, the recovery of the local O&G offshore industry is a government priority in Brazil. An understanding was solidified that to strengthen the O&G industry and as a consequence the offshore shipping industry, Petrobras could not be the sole client and to change that situation other oil companies must develop more relevant positions in Brazil. Therefore, at the end of 2016, the Brazilian government issued Law No. 13.365/2016, softening the rules for the mandatory participation of Petrobras in the exploration and development of the pre-salt areas (gigantic ultra deep-water light oil reserves). According to this new rule, Petrobras has priority but is no longer obligated to participate in all projects.

This measure, together with the Brazilian National Agency of Petroleum, Natural Gas and Biofuels' successful bid rounds in 2017 and 2018, offering new O&G offshore exploration areas, which included fields in the pre-salt of Campos and Santos basin, had already attracted new players: giant companies such as Exxon Mobil, Statoil, Shell, Total and Chevron. A revitalisation of the market is expected from 2019, through new projects and contracts in connection with these new acquisitions, which shall necessarily include the employ of vessels, either through charter, construction or acquisition.

GTDT: What are the key regulatory and compliance issues for your country's shipping market?

BMV, DR & FM: Part of the key regulatory issues regarding the offshore shipping market have been successfully addressed by the Brazilian government. Repetro, which is a special tax regime created to lower costs and ease the importation of equipment used in O&G activities, which also applies to foreign vessels entering the Brazilian market, had its list of contents extended and its application permitted until 2040.

After long discussions between the Brazilian industry and the Brazilian government, the latter agreed to increase flexibility in its requirements on compliance with local content, ie, O&G companies' obligations to buy services and goods from local providers. In certain cases, the requirements were significantly reduced, with new regulations applying retroactively to contracts executed from 2013 onwards.

However, the chartering of vessels remains Brazil's Achilles' heel. Under the existing rules, only a Brazilian shipping company can charter

a vessel to be employed in coastal navigation activities, which include the offshore support services. It has never been a problem for Petrobras, as it is authorised to act as a Brazilian shipping company, but this is not the same for other oil companies. The issue has been taken to the Brazilian Agency on Waterway Transportation, which acknowledged it as 'complex to resolve' and did not take any further measures to solve the problem.

GTDT: What are the shipping industry's current sources of finance? How do you predict they will develop, and what are the advantages and challenges to financing a vessel in your country?

BMV, DR & FM: The Brazilian government has established fostering funds to develop the local shipbuilding industry. Since 1958, the FMM has been the primary source of finance to shipbuilding projects in Brazil. Later in 2008, after the discovery of the pre-salt O&G reserves (gigantic ultra deepwater light oil reserves), the government also established the FGCN to provide guarantees and foster the upcoming related projects.

With an underdeveloped shipowners' market, Brazil lacks alternative forms of fundraising, as opposed to more mature markets such as the Norwegian bond market for the shipping and offshore industries. Typically, the ship-financing sources in Brazil are BNDES, with lines of credit provided by the FMM, and the Federal Savings Bank (CAIXA), a state-owned financing institution, with guarantees offered by the FGCN.

The FMM is managed by the Merchant Marine Fund Directing Council within the Brazilian Ministry of Transport, aiming to provide resources to the development of the Brazilian shipping industry. The resources come from the Freight Additional for the Renewal of the Merchant Marine, a tax instituted by Decree-Law 2.404/87 and collected over freight rates. Decree 5543/05 established BNDES as the financial agent responsible for managing the operations. The FMM is active and announced 3.8 billion reais in funds to develop the Brazilian shipping industry in 2018.

The FGCN was created by Law No. 11.786/08 and is managed by CAIXA, using funds raised by the Brazilian Federal Entity. It aims to assist the development of the Brazilian naval market by guaranteeing financial operations related to the construction of vessels and the performance risks attached. It is available to Brazilian shipyards for the construction of vessels to the Brazilian shipping industry and maritime units to be employed in O&G offshore activities.

GTDT: *Have there been any recent significant domestic or foreign court decisions or arbitration awards that impact on your country's shipping market?*

BMV, DR & FM: Recently, a very important precedent was established in relation to foreign mortgages.

First, it is important to highlight that the great majority of the shipping conventions have not been signed or adopted in Brazil. Therefore, shipping matters are usually treated according to domestic law when addressed to the Brazilian courts. However, in regard to mortgages, Brazil has adopted the 1926 Brussels Convention on Liens and Mortgages and the Bustamante Code.

In 2015, when the OGX Group was declared insolvent, creditors commenced countless lawsuits against its subsidiaries to try to recover the funds lent. BTG Pactual, a Brazilian bank, filed an enforcement lawsuit in Brazil against OSX 3 for a debt of US\$27.3 million, requesting the seizure of a floating production storage and offloading installation (FPSO). Nordic Trustee, as mortgage creditor of the FPSO, alleged priority in receiving the funds raised by its eventual sale, based on the existence of a mortgage registered in Liberia, where the FPSO was registered.

Both the first instance judge and the São Paulo Appellate Court denied Nordic Trustee's request based (in sum) on the fact that Liberia is not a signatory jurisdiction of either the 1926 Brussels Convention on Liens and Mortgages, or the Bustamante Code. According to the Rapporteur Justice Nelson Jorge Junior, Nordic Trustee was aware of the risks of employing the FPSO in Brazil, especially in relation to the enforcement of the mortgage guarantee.

However, a special appeal was then filed before the Brazilian Superior Court of Justice (STJ), which modified the São Paulo Appellate Court ruling by applying the Bustamante Code, as to finally decide that mortgages have extraterritorial effects and are therefore valid in any country. The decision was received with great relief by the Brazilian shipping community, as most of the platform and vessels financed and employed in Brazil (and worldwide) are registered under convenience flags, whose nations have not adopted many of the international conventions on shipping matters.

GTDT: *What is the outlook for your country's shipping market?*

BMV, DR & FM: The Brazilian economy is slowly recovering from the recession of 2015–2017. However, considering the upcoming presidential elections, great developments are not expected in 2018, but rather in 2019 through a wave of new contracts following the 2017–2018 bids. At first, we can envisage an increase in need for



“The Brazilian economy is slowly recovering from the recession of 2016–2017.”

THE INSIDE TRACK

What are the particular skills that clients are looking for in an effective shipping lawyer?

Due to the diversification of the shipping industry in Brazil, we believe clients have started to look for one-stop shop firms with specific shipping expertise instead of having to manage various firms (ie, one for a regulatory shipping matter, another for shipping finance matters and another for taxes related to shipping activities) or engaging individuals with small practices. As the shipping businesses got more dynamic, sophisticated and even more international, clients doing business in Brazil prefer to rely on receiving efficient assistance at competitive costs from shipping lawyers who are part of a larger team available 24/7 with international experience, deep involvement in the industry and availability to be present where clients need whenever necessary. Also, due to increasing global compliance requirements shipping lawyers have increasingly been required to build sophisticated internal structures to be able to comply with clients' policies and requirements for service providers.

What are the key considerations for clients and their lawyers when arranging finance for a shipping transaction?

As a starting point, it will be crucial to identify the source of the funds, which, as explained, in Brazil, will most likely involve the Merchant Marine Fund. Subsidised financing from the

Merchant Marine Fund is subject to the specific rules set out in Law No. 10.893/2004 and related decrees from both the perspective of eligibility, destination of the available funds and guarantees to be provide to secure the debt. Elements of major concerns shall vary on a case-by-case basis, but the assessment on the primary and collateral securities as well as on a possible limited recourse structure will always be of crucial relevance, both in the creditor and debtor's point of view.

What are the most interesting and challenging cases you have dealt with in the past year?

For experienced marine lawyers, 2018 was a very busy year, remarkable for marine incidents. Our firm was involved in the emergency response and subsequent investigations and procedures related to two explosions on board vessels with fatalities, one flooding, two allisions with large claims on loss of profits and a very complicated grounding case, almost all of them involving foreign vessels. The biggest challenge was to be at different places simultaneously dealing with complicated matters, remaining available to personally attend clients with their daily needs.

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research vessels and oil rigs, naturally followed by construction vessels, FPSOs and supply vessels.

Petrobras and other major oil companies are getting ready to operate alone or through joint ventures, which, as described above, is the main driver to increase the levels of occupancy in the Brazilian offshore shipping industry.

Therefore, considering the recovery perspectives of the Brazilian economy, we still envisage opportunities for those wishing to establish themselves in Brazil by acquiring assets at lower costs, taking advantage of the currency devaluation and the financial difficulties of local players.

SHIPPING IN GREECE

George Iatridis at Ince & Co has over 29 years of experience in advising all industry participants, including leading Greek and international ship-owning groups, P&I Clubs, banks, and insurers and reinsurers. George is the head of the Greek law team. He has an impressive track record of acting in complex and high-value litigation cases, including several of the most significant and prominent shipping disputes to have taken place in Greece over the past two decades. George is also highly experienced in enforcements and foreclosures, marine pollution and casualty cases, and has substantial expertise in disputes arising from ship sale and purchase agreements, and shipbuilding contracts.

Dimitris Giomelakis has extensive experience advising major local and international shipping companies, insurers and reinsurers in litigation before the Greek courts; his main area of expertise is maritime law, and he has acted on behalf of P&I Clubs and classification societies in litigation arising from major casualties.

Dimitris Kapsis advises major domestic and non-domestic shipping companies, charterers, operators, P&I Clubs and underwriters on a wide range of wet and dry disputes, corporate and compliance matters. Dimitris also advises extensively on the establishment of foreign companies in Greece, and the incorporation, structuring and organisation of Greek companies.

Nikolaos Mathiopoulos advises P&I Clubs, ship-owning companies and charterers on a wide range of wet and dry shipping disputes arising in relation to charter parties, bills of lading, cargoes, shipbuilding contracts, sale and purchase agreements and labour disputes, as well as maritime casualties. Nikolaos also advises clients on insurance and reinsurance matters and their entry into commercial contracts including sale, lease and services agreements.





George Iatridis



Dimitris Giomelakis

GTDT: What is the current state of the shipping industry in your country?

George Iatridis, Dimitris Giomelakis, Dimitris Kapsis and Nikolaos Mathiopoulos: Greek shipowners remain by far the leaders in the global shipping industry. While they have slightly slowed down in the newbuilding sector, major Greek shipowners are investing in high sophisticated vessels (liquefied natural gas ships) or innovative technologies, thus leading the way not only in the commercial sector. At the same time they have become more active in second-hand tonnage, both in the dry bulk market, which has improved since last year, as well as in the tankers sector, where the freight market is poor.

The local ro-ro ferry sector has attracted publicity thanks to a buyout that has seen the rise of one of the biggest operators in the Mediterranean.

The cruise sector also had a very good year and it appears that the current season will be even better.

Piraeus port's race to the top of the most busy European ports is continuing and the Thessaloniki port is expected to follow after the privatisation and sale of a 67 per cent stake to a foreign investors' joint venture.

The privatisation of other major Greek ports is also expected to follow.

GTDT: What are the prevailing shipping market trends affecting your country?

GI, DG, DK & NM: In 2020, under the new global cap, ships will have to use fuel with a sulphur content of no more than 0.5 per cent against the current limit of 3.5 per cent in an effort to reduce greenhouse gases. Owners will have to decide if they want to continue using high sulphur fuel oil, in conjunction with scrubbers; or switch to low sulphur fuel oil (LSFO) options. Time charterers are worried in regard to these developments, as LSFO is some 60 per cent more expensive than existing heavy fuel oil. The container liner industry is also particularly worried, given that carriers charter in a high percentage of their fleet.

“In 2020, under the new global cap, ships will have to use fuel with a sulphur content of no more than 0.5 per cent against the current limit of 3.5 per cent in an effort to reduce greenhouse gases.”

“The Greek legal framework aims to support efforts which safeguard safety at sea and promote a sustainable future for both the environment and the shipping sector.”



GTDT: *Are there any recent domestic or international political or legislative developments that may have an impact on your country’s shipping market?*

GI, DG, DK & NM: Rumours say that the conflict between the European Commission and the Union of Greek Shipowners regarding the local shipping taxation regime seems to have come to an end.

One of the hot topics of the day is the impact of Brexit, although it is still too early to comment on this.

GTDT: *What are the key regulatory and compliance issues for your country’s shipping market?*

GI, DG, DK & NM: The Greek legal framework aims to support efforts that safeguard safety at sea and promote a sustainable future for both the environment and the shipping sector. The ratification of EU’s Shipping Recycling Regulation by Greece, which will be in force by the end of 2018, falls within this context – although no Greek shipyards and facilities are yet on the EU approved list.

GTDT: *What are the shipping industry’s current sources of finance? How do you predict they will develop, and what are the advantages and challenges to financing a vessel in your country?*

GI, DG, DK & NM: Developing local banks are gradually gaining bigger stake in the shipping market, while foreign banks seem to prefer financing major players. Private equity funds and leasing companies continue to increase their Greek portfolios. In a nutshell, one could say that as freights go up, the funding options are increasing for shipowners.

GTDT: *Have there been any recent significant domestic or foreign court decisions or arbitration awards that impact on your country’s shipping market?*

GI, DG, DK & NM: We cannot think of a recent significant domestic court decision or arbitration

THE INSIDE TRACK

What are the particular skills that clients are looking for in an effective shipping lawyer?

Commercial sensitivity and speed of response; understanding the clients' needs and always trying to find new ways to assist, protect and promote clients' interest.

What are the key considerations for clients and their lawyers when arranging finance for a shipping transaction?

The main considerations for shipowners are usually specifically transaction focused – ie, how much can they borrow, what is the interest rate or fees and when do they need to repay. Owners would look at what security the bank asks for – personal guarantees and shares pledges would be less attractive. Owners might also expect their financing banks to provide up to date and efficient banking facilities to facilitate operation of vessels.

More generally, lenders with a good track record and commitment to shipping are to be preferred. Those with experienced account

officers, and a reputation for supporting owners in tough times are valued. The shipping industry is one of personal relationships, and bank officers and owners would need to get along on a personal level.

What are the most interesting and challenging cases you have dealt with in the past year?

A ro-ro ferry casualty (grounding) off a touristic island. Thanks to our expertise in similar matters, we were instructed by the vessel's protection and indemnity club to deal with pollution issues and the casualty-related claims.

Also, acting for claimants who suffered losses due to a major oil spill in the Saronic Gulf (including notification of claims to the IOPC Fund).

**George Iatridis, Dimitris Giomelakis,
Dimitris Kapsis and Nikolaos Mathiopoulos**
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Piraeus
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award having an impact in the local shipping market. It is worth noting, though, that the Greek courts have reconfirmed their tendency not to break the limitation of liability provided for by International Conventions.

An interesting development (albeit not a decision or an award) is the establishment of the International Oil Pollution Compensation Fund for the first time in Piraeus, following a major oil spill caused by the total loss of a tanker at Piraeus Roads.

GTDT: What is the outlook for your country's shipping market?

GI, DG, DK & NM: The contribution of shipping is particularly important for the Greek economy.

The foreign currency inflow from maritime services in the past two years was reduced by 29.4 per cent in comparison to 2013–2014, due to the effect of the capital controls introduced in mid-2015. However shipping, along with tourism, continues to be one of the pillars of Greek economy: the Greek shipping community controls approximately 19.2 per cent of the world fleet, with a 365.45 million dead weight tonnage (DWT) fleet on the water and a further 24.47 million DWT on order, being the world's largest cross-trading fleet.

For global shipping, 2018 is expected to be another challenging year; the dry bulk market is improving, but there is not much optimism for the tanker sector to follow soon.

SHIPPING IN HONG KONG

Damien Laracy heads up the Hong Kong office of Hill Dickinson. He qualified as a lawyer in Auckland, New Zealand in 1990. He has practised law in Hong Kong since 1995 and his caseload involves litigation, arbitration, and advisory work in both the commercial and the maritime fields.

Damien has extensive experience acting for shipowners and banks in relation to ship mortgage enforcement and insolvency issues, as well as acting for shipowners, charterers and P&I underwriters in respect of P&I (including casualty, General Average and personal injury issues) and freight, demurrage and defence insurance claims. His team also acts for commodities traders and for commercial insurers in respect of cargo loss and damage claims, and in relation to claims concerning shipyards and ports and terminals.

Damien is a fellow of the Hong Kong Institute of Arbitrators, a fellow of the Chartered Institute of

Arbitrators, a member of the panel of arbitrators of the Law Society of Hong Kong, and he is admitted to the Hong Kong International Arbitration Centre's panel of arbitrators. He sits as an arbitrator and receives both institutional and party appointments.

Damien is an active member of the maritime law committee of the Inter Pacific Bar Association.

Pansy Tsang was admitted as a solicitor in Hong Kong in 2011. Prior to joining Hill Dickinson, Pansy was a partner in a local Hong Kong law firm.

Pansy has extensive personal injury and medical negligence experience representing insurers. She was one of the case handlers in the leading case *Chan Pak Ting HCPI 235* of 2011, which changed the discount rate in quantification of damages in personal injury litigation in Hong Kong.



“Hong Kong shipowners are dealing – as are their counterparts globally – with the International Maritime Organization’s impending deadline regarding reduced sulphur emissions from heavy bunker fuel.”

GTDT: What is the current state of the shipping industry in your country?

Damien Laracy and Pansy Tsang: As was reported by the contributors to the Hong Kong chapter in this *Market Intelligence* last year, the global shipping industry has been facing severe macro-economic and regulatory challenges.

The macro-economic challenges have arisen due to the overzealous ordering of cargo ships up until 2011, coupled with a drop-off in Chinese demand for raw materials. According to a recent research note by Stansberry Churchouse, even with numerous new build order cancellations, an average of 400 new dry bulk cargo ships were delivered in to the market each year over the past five years. Even allowing for scrapping of vessels, global shipping capacity expanded by approximately 2.5 per cent each year. Research by the World Bank shows that at the same time global trade in goods and services steadily declined from 2011 to 2016, as commodity prices collapsed.

There is, however, room for optimism for Hong Kong traders, charterers and shipowners; the Baltic Dry Index (BDI) has risen approximately 58 per cent since April 2018. It has more than quadrupled from its record low in February 2016.

China is also now exhibiting a resurgent demand for commodities, which should continue to support the BDI.

Further, while the Greater Bay Development project in Southern China, and the Belt and Road Initiative (BRI), may not require involvement of Hong Kong as a transshipment port (due to competition from China’s own ports) there are grounds for optimism that demand for ancillary shipping services will be enhanced by these large infrastructure projects. That is to say, demand for brokering and chartering services, ship management and legal services, banking and finance services.

So, on balance the shipping industry in Hong Kong is in a much healthier and happier state than it was one year ago. That is good news for Hongkongers generally, given that it has been estimated by the Hong Kong government that the trade and logistics industries in Hong Kong account for approximately 20 per cent of its GDP and total employment.

Of course, the prospect of a trade war with the United States will continue to be a source of volatility. In a *TradeWinds* article on 3 July 2018, the Baltic and International Maritime Council was reported as likening the tariff ‘spat’ to a speeding train and saying that ‘the long-term’ effect provides uncertainty and could possibly derail current global growth if the measures are kept or further escalated’.

GTDT: What are the prevailing shipping market trends affecting your country?

DL: Aside from global macro-economic trends, Hong Kong shipowners are also dealing – as are their counterparts globally – with the International Maritime Organization’s (IMO) impending deadline regarding reduced sulphur emissions from heavy bunker fuel. These fuel restrictions are due to come into force on 1 January 2020 – less than 18 months away – and are directed at reducing airborne impurities generated from vessels burning heavy fuel oil.

The capital cost of fitting purifying exhaust gas cleaning systems (known as ‘scrubbers’) on ships – whether on a new build or as a retro-fit to an existing vessel – has been cited in the maritime press as being anywhere between US\$3 million and US\$10 million per vessel. Such costs may be manageable for a shipowner with a new vessel on long-term charter to, say, a liner operator. But on any analysis an owner with an older dry bulk fleet trading on the spot market can be expected to balk at this capital expenditure.

There are also still significant uncertainties regarding the alternatives to exhaust scrubbers.

These uncertainties relate to:

- the integrity of the low sulphur marine gas oil (LSMGO) supply chain as a viable alternative to fitting scrubbers. The global availability of safe and compliant LSMGO, and its anticipated price, continue to be vexed issues; and
- the economic calculus around owners installing power plants capable of burning liquid natural gas.

In April 2018, the shipping magazine *Fairplay* reported that these issues may mean that owners



Damien Laracy

of older tonnage will choose to scrap vessels over the coming 18 or so months before the IMO's January 2020 deadline.

Conversely, there are now reports in the maritime press that ships with scrubbers installed (and therefore still consuming cheaper heavy fuel oil) will have lower operating costs as compared to ships running on more expensive compliant low sulphur fuel oil, but without scrubbers. This may make ships fitted with scrubbers more attractive to both potential owners and charterers.

However, there has also been a school of thought reported to the effect that many owners simply will not fit scrubbers on the basis that sourcing and paying for fuel is simply a 'charterers' problem'.

To further complicate the calculus around sulphur emissions, the Chinese government has very recently announced (as reported by *TradeWinds* on 4 July 2018) restrictions on imports of older commercial vessels (effective as from 1 September 2018). These 'Tier II' restrictions are in line with the Chinese government's general support for the IMO's low sulphur emission regulations.

We at Hill Dickinson Hong Kong have seen a spike in ship sale and purchase activity recently, in part due to optimism that the industry is returning to better times, but also (in the case of the sale and purchase of older vessels) consistent with a hesitancy on the part of some owners to invest in scrubbers.

This hesitancy is driven by both cost concerns and by a fear that the IMO regulations may yet be revised or amended.

On the topic of maritime arbitration, Hong Kong continues to be an attractive place to arbitrate maritime disputes – in terms of physical

location, experience of its lawyers and related service providers including the Hong Kong International Arbitration Centre (HKIAC), and reliable and impartial support from the courts when necessary.

The HKIAC has now been established for 33 years and is recognised as a first class institution globally. Since 2012, other world-recognised international arbitration institutions have also set up in Hong Kong; the China International Economic and Trade Arbitration Commission; the China Maritime Arbitration Commission; the International Chamber of Commerce.

Hong Kong is a party to the 1958 New York Convention and Hong Kong Arbitration Awards are regularly enforced in China (and vice versa) pursuant to a bespoke arrangement in place between Hong Kong and China.

The infrastructure and trading activity that will inevitably be created from the Greater Bay Development project and the BRI should mean further demand for Hong Kong legal services, including for arbitration and mediation services.

GTDT: Are there any recent domestic or international political or legislative developments that may have an impact on your country's shipping market?

DL: The Greater Bay Development project and the BRI should greatly enhance demand for ancillary maritime services in both Hong Kong and Southern China (including bunkering, chartering, finance, ship-management and legal services).

At a June 'Belt And Road Summit', Hong Kong's chief executive, Carrie Lam was reported by the *South China Morning Post* as saying that Hong Kong is poised to 'become part of a tech



corridor of 11 cities in the Greater Bay Area'. As such, it will become a 'powerful connection point' to the larger BRI.

Asia Money magazine has described the Greater Bay Development project as having the potential to replicate Silicon Valley. It is home to more people than the United Kingdom and has an economy larger than Australia's. Its combined GDP – including Hong Kong and Macau – has been estimated to triple to US\$4.6 trillion by 2030, overtaking Germany, *Asia Money* reported.

Hong Kong's maritime community is actively seeking to position itself to maximise benefit from these projects and established the Hong Kong Maritime and Port Board in 2016. The board promotes Hong Kong as an international maritime hub and a centre for high-quality added-value services.

On 4 December 2017, Hong Kong also adopted into local law – via an amendment to Schedule 2 of the Merchant Shipping (Limitation of Shipowners Liability) Ordinance (Cap. 434) – updated IMO liability limits for maritime collisions and incidents. Hong Kong now applies the 1996 Protocol limits to the 1976 Convention on Limitation of Liability for Maritime Claims (the London Convention). By adopting the 1996 Protocol, applicable limits were increased by approximately 50 per cent to more closely mirror the situation in the United Kingdom. This was a long-awaited development of significant importance to any potential claimants against a ship or its owners, as well as to the wider shipping community (including shipowners, charterers and their insurers).

As alluded to earlier, the 'green credentials' of the global shipping community is currently a regular topic of discussion in the maritime press. The Environmental Affairs Protection Department of Hong Kong has been cooperating

with its Beijing and Guangdong counterparts to ensure that, as from 1 January 2019, vessels plying Chinese waters of the Pearl River Delta Domestic Emission Control Areas (DECA) run on low-sulphur fuel not exceeding a 0.5 per cent sulphur content. The Mainland's Ministry of Transport reports that before December 2019 it will also evaluate whether to tighten the sulphur content to 0.1 per cent, extend the geographical scope of DECAs or introduce further control measures.

Similarly, the Hong Kong legislature has been working with the Environmental Affairs Protection Department on a proposal to enact new legislation regarding low sulphur fuel emissions (on marine vessels operating in Hong Kong waters) – possibly with effect from as early as 1 January 2019.

These aligned and coordinated efforts are directed towards reducing sulphur emissions in and around Hong Kong a full year before the IMO's 'parent' regulations come into more widespread force on 1 January 2020.

GTDT: What are the key regulatory and compliance issues for your country's shipping market?

DL & PT: International, regional and domestic sulphur emissions regulations have been mentioned by me already.

In relation to competition law issues, the most significant recent development remains the expiry of the grace period in relation to vessel discussion agreements (VDAs) on 8 February 2018.

In short, the Hong Kong Liner Shipping Association (HKLSA) in December 2015 applied for exemptions to two common types of agreements in the shipping industry – vessel sharing agreements (VSAs) and VDAs – in order to further enhance Hong Kong's competitiveness. In August 2017, the Hong Kong Competition Commission

“Hong Kong has a very experienced and well-run register of ships, a highly regarded legal regime, and business-friendly approach.”

(the Commission) allowed a conditional block exemption for VSAs for a five year period to avoid contravention of Hong Kong’s Competition Ordinance (Cap. 619). However, the position taken was far stricter in relation to VDAs, including due to the Commission’s view that, contrary to what had been suggested in the application, there was a lack of evidence to demonstrate the service stability flowing from VDAs. There was also a finding that rate transparency from guidelines pursuant to VDAs was questionable. The Commission also said that, even if there were increased efficiencies, this would have little to no impact on customers.

Despite the exclusion of VDAs from the Block Exemption Order (BEO), the Commission allowed a grace period for liner operators party to a VDA to make changes to commercial arrangements. That grace period expired on 8 February 2018.

The Commission has issued a Guidance Note for those in the liner shipping industry to better understand the application of the BEO and its parameters.

While some Hong Kong lawyers have expressed frustration over the Commission’s strict position on VDAs (they remain valid in China), it is one that appears to overlap with international trends; in India and Israel, VDAs are not exempted from competition laws. Similarly, VDA exemptions in the European Union were removed in 2008.

Finally, on this topic, Hong Kong is a party to the 2006 Maritime Labour Convention. It has also (as from January 2017) adopted the 2014 Amendments in relation to provision of financial security by owners of Hong Kong registered ships:

- in respect of seafarers who have been abandoned; and
- in respect of a shipowner’s liability for other compensation payable to a seafarer.

GTDT: What are the shipping industry’s current sources of finance? How do you predict they will develop, and what are the advantages and challenges to financing a vessel in your country?

DL: Given recent optimism in the industry following the uptick in the BDI, we are seeing more sale and purchase activity. Some of this is inevitably driven by private equity firms with a renewed interest in exploring the industry.

With interest rates being so low there is also an enthusiasm for existing shipowners to once

again borrow funds, place orders and expand their fleets. Caution must be exercised, however, to ensure that this does not lead to a repeat of the oversupply issues that have recently plagued the market.

The ‘Bond Connect’ scheme implemented a year ago allows Hong Kong and foreign investors to buy Chinese corporate and government bonds – ie, debt. As the *South China Morning Post* reported on 3 July 2018, it is also hoped that the southbound leg of this arrangement – which will allow Chinese investors to buy Hong Kong-issued bonds – will be operational shortly.

This should further enhance the ability of Hong Kong shipowners to source funds from mainland investors.

Chinese leasing companies associated with large Chinese shipyards (and that operate as specialist lenders that also participate more actively than banks in the post-delivery life of a new build) and sale and leaseback arrangements continue to be very active. The maritime press has reported that some of these activities may have been assisted by subsidies from the Chinese government.

On the equity side, there have not been any recent initial public offerings (IPOs) of shipping companies in Hong Kong. However, according to a *South China Morning Post* article on 3 July 2018, in the first half of 2018, funds raised from IPOs rose by 78 per cent to a three-year high. *Asia Money* also reports that, in the decade ending in May 2018, only the New York Stock Exchange completed a greater volume of IPOs.

We would also endorse what last year’s contributors said: Hong Kong has a very experienced and well-run register of ships (ranking fourth globally in terms of gross tonnage entered), a highly regarded legal regime and business-friendly approach. Hong Kong is well known for low tax rates and ‘tax connectivity’ via double taxation arrangements. These characteristics continues to make it an attractive forum for shipowners to obtain ship finance (whether debt or equity) and to establish shipping operations and structures.

For some more granular detail:

- Hong Kong is a jurisdiction with a predictable and stable tax and legal environment, enshrined in our ‘mini constitution’, the Basic Law;
- according to Nicholas Tang, Hong Kong’s Secretary for Innovation and Technology



“Our Admiralty Court broke new ground in confirming that a foreign arbitration award can – in appropriate circumstances – be enforced by way of an arrest of a vessel.”

(quoted in an article in *Asia Money*), approximately 80 of the world’s 100 largest banks operate in Hong Kong;

- there is no value-added tax or goods or services tax, no withholding tax on interest payments to overseas lenders or dividends to shareholders;
- Hong Kong is the fourth largest shipping register, or flag, state in the world with a total of approximately 117 million gross tonnage;
- despite being the fifth busiest container port in the world, Hong Kong has a track record of being a good ‘global corporate citizen’ in terms of labour and environmental compliance;
- McKinsey Global Institute predicts that the Greater Bay area will contain the world’s largest banking cluster by 2025, generating total annual revenues of US\$185 billion, ahead at Beijing, Shanghai, Tokyo and São Paulo; and
- high-speed light rail will cut travel time between Hong Kong and Guangzhou (where COSCO Bulk Shipping is now based) to one hour.

GTDT: *Have there been any recent significant domestic or foreign court decisions or arbitration awards that impact on your country’s shipping market?*

DL: There have indeed been recent court decisions confirming and enhancing the procedural efficiency of Hong Kong’s Admiralty Court. For example, following the Hanjin collapse there were various Hanjin vessels arrested and sold in Hong Kong. International shipbrokers were instructed to confirm that the Hong Kong Admiralty Court’s reserve prices were correct and the aggregate of subsequent total sales values exceeded US\$600 million.

Similarly, in *Alas*, our Admiralty Court broke new ground in confirming that a foreign arbitration award can – in appropriate circumstances – be enforced by way of an arrest of a vessel. That important case was handled by my firm.

There have been numerous other examples of our High Court enforcing foreign arbitration awards and judgments (whether by way of the New York Convention, statutory reciprocal enforcement arrangements or by way of Common Law). Hong Kong remains an extremely arbitration-friendly jurisdiction.

The Hong Kong courts take a strong view that arbitral awards should only be set aside for very compelling reasons. The exhaustive grounds in section 86 of the Arbitration Ordinance are to be narrowly construed. As was stated in the 2015 decision of *K B v S and Others*, enforcement of arbitral awards should be ‘almost a matter of administrative procedure’ and the courts should be ‘as mechanistic as possible’.

Endorsement of Hong Kong as a reliable and mature venue for resolution of shipping disputes

THE INSIDE TRACK

What are the particular skills that clients are looking for in an effective shipping lawyer?

Clients value availability and promptness of attention to their instructions and queries, which itself demands a degree of skill from the lawyer in regard to time management and prioritisation. While these attributes may seem applicable to all lawyers, with shipping lawyers there is regularly a time-sensitive fact pattern evolving in real time that often creates genuine urgency not found in other areas of legal practice.

It is assumed that lawyers in established firms have the necessary technical skills, so clients therefore look for an efficient deployment of personnel on their matters. A further vital skill is the ability to be disciplined about achieving a commercial outcome with proportionate legal fees. It is very rare that a client these days provides an open chequebook, so balancing the substantive merits of a matter with the client's appetite for risk and expense is a vital commercial skill.

What are the key considerations for clients and their lawyers when arranging finance for a shipping transaction?

There are two main types of vessel finance, in the form of traditional securities-backed loans and more commonly now the sale and leaseback transactions from leasing companies. Common considerations of owners and banks and leasing companies tend to focus on commercial issues such as loan tenure, repayment schedule, interest rates, repayment methods (including index-linked charter-hire and repayments), securities (mortgages, charter-hire, assignment of earnings and insurances, and currency swaps under the ISDA Master Agreement) and potential for restructuring of

loans. The identity of counterparties plus perceived experience in the market and creditworthiness remain important considerations for banks owners and charterers, in what has been a difficult shipping market fraught with defaults and insolvencies.

What are the most interesting and challenging cases you have dealt with in the past year?

We are currently acting for a large European company that has been the victim of a multimillion euro internet fraud. We have frozen funds in Hong Kong banks and are now in the process of extracting them. I am happy to report that we have already been successful in extracting significant sums.

We were involved in two casualty matters following the super typhoon 'Hato' that hit Hong Kong in August 2017. In one case the crew of a tug boat that had been sheltering in Hong Kong waters was shipwrecked on a neighbouring Chinese island after they chased their barge, which had been dragging its anchor. During the chase the tugboat lost power in very heavy exposed seas and ran onto rocks. The crew were airlifted from the Chinese island to Hong Kong by the Hong Kong coastguard and we then took witness statements on behalf of the hull and machinery underwriter. Dealing with the language issues was extremely challenging (Indonesian and Myanmar crew) as well as liaising with the immigration authorities.

Damien Laracy and Pansy Tsang
Hill Dickinson
Hong Kong
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has also come from the United Kingdom, including in the well known decision of Mr Justice Hamblen in *Shagang v Daewoo Logistics*: 'Hong Kong . . . is also a well known and respected arbitration forum with a reputation for neutrality, not least because of its supervising courts.'

Giving emphatic empirical validity to that sentiment is the fact that, according to the HKIAC, the number of cases it handled involving parties from Belt and Road nations jumped 77 per cent, to 124, in 2017.

GTDT: What is the outlook for your country's shipping market?

DL & PT: The outlook for the Hong Kong shipping market, and industry generally, appears very good. Conventional commercial shipping activities will benefit from a general improvement of global economic indicators as well as the regional impact of the BRI and the Greater Bay Development project.

The significant increase in interest shown by major international arbitration institutions

setting up offices in Hong Kong indicates a great deal of optimism on their part. The presence of these arbitration institutions, alongside the highly regarded and already well established HKIAC, will only serve to further increase the already high level of competency found in the arbitration and legal communities in Hong Kong.

On a 'travel and leisure' note, it is also encouraging to see the surge in interest from cruise operators following the establishment of the new cruise terminal at the old Kai Tak Airport.

As reported by the *Hong Kong Standard* newspaper, major cruise lines such as Genting Cruise Lines have selected Hong Kong as the home port for vessels, reflecting the confidence international investors have in Hong Kong's cruise industry.

The cruise business in Hong Kong has been growing strongly in recent years. According to statistics released by Tourism Hong Kong, the Kai Tak Cruise Terminal's capacity for customs and immigration and health and quarantine operations can serve 3,000 passengers per hour. It processed over 760,000 passengers in 2017, a 96

per cent surge from the previous year. Evidenced by its HK\$42 million allocation to the cruise industry (reported in the Hong Kong government's 2018-2019 Strategic Plan and Initiative), it is clear that the Hong Kong government is committed to developing Hong Kong into a cruise hub.

There has also been an increase in demand for pre-owned luxury yachts in Hong Kong. This interest has been met by a corresponding increase in the number of specialist yacht service providers in Hong Kong, ranging from sale and purchase and chartering brokers, to specialist managers, lawyers, bankers and insurance brokers.

- Campers & Nicholson, an international brokerage, set up in Hong Kong in 2017 with sale and purchase, chartering and management functions. Campers & Nicholson sits alongside other established brokers in Hong Kong such as Simpson Marine and Burgess that offer similar sale and purchase and management functions.
- Anglo-Eastern, a reputable manager of commercial ships, also recently introduced a new division for yacht management services.

- Expat Marine, a set of homegrown insurance brokers, continues to remain active in the market in arranging insurance for these expensive toys.
- Southern China has also seen a large increase in the number of yacht builders in recent years.

Neighbouring cities to Hong Kong in mainland China have ramped up production of pleasure craft, which can be custom-built to individual tastes in competition with traditional European yacht builders. With this active market, it is unsurprising that the Hong Kong Boating Industry Association – of which Hill Dickinson was a founding member – was established in 2017 to service and be a part of this growth.

Events to look out for include the Hong Kong International Boat Show, the Hainan Rendez-Vous and the China Macau International Yacht Import & Export Fair. Enthusiasts continue to hold out hope that there will be an increase in the number of berthing spaces for yachts that could – for some people – also offer an alternative to the high-rise living spaces of Hong Kong.

SHIPPING IN INDIA

Mr Shardul Thacker heads the shipping, oil and gas and banking practice group at Mulla & Mulla & Craigie Blunt & Caroe.

Lloyd's List ranked him third in their top 10 lawyers stating: "Highly regarded for his work in the liquefied natural gas sector, particularly for interesting and highly geared finance deals in relation to infrastructure projects, energy, ports and ships."

Thacker handles all types of structured ship and asset finance. He acts for overseas lenders in most India-related ship financings including liquefied natural gas vessels flying foreign flags and chartered by Indian companies. Thacker advises on regulatory issues including Indian flagging, cabotage, tonnage tax, applicable

taxes, licensing, assessment of legal risk, including pollution liability.

He advises on ship-building contracts, charter parties, long-term cargo handling agreements, offshore construction contracts.

Thacker is ranked in Band 1 by *Chambers and Partners* for Shipping and Maritime and for Banking and Insurance for several years.

His publications include the India sections in *Maritime Law Handbook*, *Kluwer* and *The Transport Finance Law Review*.

Who's Who Legal says Shardul Thacker is an "excellent shipping lawyer" with a particularly strong reputation for international ship finance transactions.



GTDT: What is the current state of the shipping industry in your country?

Shardul Thacker: The shipping industry is one of the most globalised industries and operates in a highly competitive business environment. This industry is far more liberalised than most other industries and is, thus, intricately linked to the world economy and trade. As on 31 December 2017, India had a fleet strength of 1,374 ships with dead weight tonnage (DWT) of 18.80 million (12.36 million gross tonnage (GT)) including Indian-controlled tonnage, with the Shipping Corporation of India having the largest share of around 34 per cent. Of this, around 443 ships of 17.19 million DWT (10.88 million GT) cater to India's overseas trade and the rest to coastal trade. To encourage the growth of Indian tonnage and the higher participation of Indian ships in Indian trade, the government has implemented several measures that, inter alia, include the following.

- Permitted Indian shipping companies to own foreign-flagged ships registered overseas, on condition that the tonnage flagged outside India does not exceed the owned tonnage in India and that 50 per cent of the crew of such foreign-flagged ships is Indian. This Indian-controlled tonnage will be eligible to operate in cabotage regulated Indian waters (ie, cargo movement between two Indian domestic ports). Therefore, with the relaxation on foreign-flagged vessels, Indian shipping companies can own 50 per cent of the new tonnage under a foreign flag as foreign-controlled tonnage.

In May 2018, the Union Shipping Ministry issued orders that permitted foreign-flagged container ships to carry export-import laden containers for transshipment and empty containers for repositioning on local routes, ie, from one Indian port to another Indian port without obtaining a licence from the Directorate General of Shipping (DGS). This was essential for India's efforts to set up transshipment hubs and reduce dependence on neighbouring foreign hubs to send and receive containers. Global container lines such as Maersk Line, MSC and CMA-CGM will benefit from the decision. The container transshipment terminals run by DP World at Cochin Port Trust; Mundra Port run by Adani Ports and Special Economic Zone Ltd (APSEZ); Krishnapatnam Port run by the CVR Group; and the container transshipment facility being built by APSEZ at Vizhinjam in Kerala, among others, will gain from the new policy. It will help reduce the cost of repositioning of empty containers within India. It will bring competition within the EXIM feeding trade around the Indian coast and encourage use of Indian ports and terminals for aggregation and transshipment as well.

- A foreign-flagged ship is not required to obtain a licence from the DGS for engaging in coasting trade of India, for carriage by sea of agricultural, fisheries, animal husbandry and horticultural commodities as prescribed by the DGS, as adopted by the Director General of Foreign Trade.
- The Goods and Service Tax on bunker fuels used in Indian flagged vessels has been reduced from 18 per cent to 5 per cent.
- Parity has been brought in the tax regime of Indian seafarers employed on Indian-flagged ships vis-à-vis those on foreign-flagged ships.
- In public private partnership projects in the port sector, 100 per cent foreign direct investment is being allowed.
- To develop cruise shipping and tourism in the country, the government has constructed new cruise terminals at Mormugao port and Chennai Port. Also, the capability for foreign-flagged passenger vessels to call at Indian ports without obtaining licence from DGS has been extended from February 2019 to February 2024.
- There are ongoing discussions in relation to scrapping of the right of first refusal that is given to domestic fleet-owners that ensures a supply of local export-import oil and bulk cargo to them at the lowest bid price. This move is sure to benefit foreign shipping lines and foreign-flagged vessels. The intention of the government is to build volumes and see a large-scale shift of cargo movement to waterways from railways and roadways that foreign lines can provide, and eventually reduce the logistics cost.
- India was re-elected as a member of the International Maritime Organization (IMO) Council under Category B, by getting the second highest number of votes during the IMO Council election held at IMO on 1 December 2017.

GTDT: What are the prevailing shipping market trends affecting your country?

ST: India's coastal shipping sector is set to improve in 2018 owing to features such as being environmentally friendly, cabotage relaxation, fuel efficient, and for being a cheap mode of transport for moving cargo from road-and-rail routes along India's 7,500-kilometre coastline.

The Sagarmala Programme is the flagship programme of the Ministry of Shipping to promote port-led development in the country through harnessing India's long coastline, 14,500 kilometres of potentially navigable waterways and strategic location on key international maritime trade routes. It envisages over 508 projects at an estimated investment of more than 8 trillion rupees for implementation over the next 20 years. The Ministry of Shipping, released 2.5 million rupees as grants-in-aid to Jawaharlal Nehru Port



Shardul Thacker

Trust and 500 million rupees to the government of Karnataka for Karwar port, for infrastructure development under the Coastal Berth Scheme of the Sagarmala Programme. These resulting projects would see the development of manufacturing hubs, supported by port modernisation projects.

Recently Indian and global players are joining hands in establishing joint venture companies undertaking floating storage and regasification unit (FSRU) and liquefied natural gas (LNG) projects supported by GAIL, Reliance and others who have constructed gas pipelines across India. This activity has largely supported the offshore industry, increasing the activity for tug owners and anchor handling companies.

Project UNNATI has been started by the government of India to identify the opportunity areas for improvement in the operations of major ports. The aims and objectives of Project UNNATI are as follows:

- benchmark operational and financial performance of the 12 major ports with selected Indian private ports and best-in-class international ports for identifying improvement areas;
- undertake a capability maturity assessment for key processes and functional capabilities (eg, IT, HR, environment, health) and identify gaps and areas for further strengthening;

- detailed deep-dive diagnosis and root cause analysis for the identified opportunity areas in each of the 12 major ports to understand underlying reasons for performance bottlenecks; and
- develop practical and actionable solutions on the basis of root cause findings, and develop a comprehensive improvement roadmap for each of the 12 major ports.

Under Project UNNATI, the global benchmarks were adopted to improve the efficiency and productivity key performance indicators for 12 major ports. A clear roadmap for improvement for each port has been laid out covering changes in the areas of core business processes, equipment, organisation structure, people skills, information technology and infrastructure. Around 116 initiatives were identified across 12 major ports to unlock more than 100 metric tonnes per annum (MTPA) capacity just through efficiency improvement. Out of this, 86 initiatives have been implemented to unlock around 80 MTPA capacity.

The Jal Marg Vikas Project on National Waterways-I in the River Ganga, a large integrated inland water transport project, has been launched between Varanasi and Haldia, covering a distance of 1,380 kilometres at an estimated cost of 53 billion rupees. On completion, the project would enable commercial navigation of 1,500–2,000

“There are a number of regulatory and compliance requirements in the Indian shipping market.”

tonne vessels. The major activities under the project are construction of multi-modal terminals, jetties, river information system, channel marking, navigational lock, river training and conservancy works.

GTDT: Are there any recent domestic or international political or legislative developments that may have an impact on your country’s shipping market?

ST: The Admiralty (Jurisdiction and Settlement of Maritime Claims) Act 2017 (the Admiralty Act) came into force on 1 April 2018. It consolidates the existing laws relating to admiralty jurisdiction of courts, admiralty proceedings on maritime claims, arrest of vessels, stipulates the order of priorities for maritime claims and liens inter se, as well as against other claims and related issues. It also repeals five obsolete British statutes on admiralty jurisdiction in civil matters, namely:

- the Admiralty Court Act 1840;
- the Admiralty Court Act 1861;
- the Colonial Courts of Admiralty Act 1890;
- the Colonial Courts of Admiralty (India) Act 1891; and
- the provisions of the Letters Patent 1865 applicable to the admiralty jurisdiction of the Bombay, Calcutta and Madras High Courts.

The Admiralty Act makes the statute retrospective in application and therefore all admiralty proceedings in the concerned High Courts pending before commencement of the statute, as well as all actions initiated, by laws, rules framed and notices issued under the repealed enactments, will be now be adjudicated by the provisions of the Admiralty Act 2017, as long as they are not inconsistent with the provisions of the same.

The Admiralty Act confers admiralty jurisdiction on High Courts to order the arrest of any vessel that is within its jurisdiction for the purpose of providing security against a maritime claim.

The National Waterways Act 2016 also came into force on 12 April 2016. It designates 101 waterways as national for a fuel-efficient, cost

effective and environment friendly mode of transport.

Additionally, the government has proposed the following bills.

- The Merchant Shipping Bill 2016, which enables Indian-controlled tonnage to be registered on foreign registers. Registration of rigs and other coastal vessels, substantially owned vessels (more than 50 per cent) and vessels on bareboat-cum-demise charters by Indians, are to be registered under the new Merchant Shipping Act, which enables mortgagees on rigs to be registered with the Mercantile Marine Department. This act would issue licences to Indian-flagged vessels for coastal operations and for clearance by the Custom Authority.
- Major Port Authorities Bill 2016, which allows for autonomy and flexibility in all major ports. The board of trustees will be replaced by board members representing various stakeholders to ensure a transparent and decentralised decision-making process, to aid expansion of port infrastructure. The emphasis on the professional approach is governance. The Tariff Authority for Major Ports would be dissolved and tariff fixation would be carried out by the board in compliance with the Competition Act 2002. There is a provision for public private partnership enabling the concessionaires to fix tariffs based on market conditions.

GTDT: What are the key regulatory and compliance issues for your country’s shipping market?

ST: There are a number of regulatory and compliance requirements in the Indian shipping market, such as corporate and tax compliances by the shipping company, in addition to the registration of the vessels with the registry maintaining several class and security registrations and licences, intimations, approvals as well as reporting required to be undertaken with the Reserve Bank of India and also the authorised dealer bank of the company for overseas finance borrowed for the vessels, etc. However, as part



“There is a need for simplification of the customs procedure relating to the shipping industry.”

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of promoting ‘Ease of Doing Business in India’, a number of proactive steps are being undertaken by the government that include elimination of the requirement to submit manual forms and documentation, direct port delivery, installation of container scanners at ports, and an automation system based on radio frequency identification systems (RFIDs). A RFID system has already been put in place at nine major ports.

Most of the compliances can now be undertaken on an online platform instead of physical submissions. The chartering licence from DGS can also be applied for and obtained online. Further, 100 per cent cashless transactions have been achieved at all major ports, land records have been digitised and all ports pensioners linked with Aadhaar Biometric system. Direct port delivery and direct port entry has been initiated at major ports for EXIM containers.

The Accredited Client Programme was introduced for mega importers that meet the criteria of a clean compliance record, a specified volume of annual imports and payment of duty. If their bills of entry are filed in advance, cargo can be cleared from their containers without assessment or inspection. Duty payment is charged on an annual basis for cargo imported in containers. All government cargo is mandated to have a ‘FASTag’ for automatic deduction of toll charges and smooth movement of cargo at toll plazas, thereby saving time and logistics costs.

The much needed regulatory change is to reduce the tax burden on Indian shipowners to make the Indian flag more competitive. While tonnage tax is 1–2 per cent of Indian shipping companies’ incomes, taxes on the sale of vessels, corporate tax on interest earned on tonnage tax reserve funds and dividend distribution tax, etc, need to be abolished for Indian tonnage to increase in proportion to India’s EXIM trade. Also, there is a need for simplification of the customs procedure relating to the shipping industry.

GTDT: *What are the shipping industry’s current sources of finance? How do you predict they will develop, and what are the advantages and challenges to financing a vessel in your country?*

ST: Shipping is a global industry, which has cyclical ups and downs. Indian entrepreneurs, in the context of other industries, have not considered it a ‘safe haven’ for their investments. It is also dollar-based, and global banks tend to focus on large fleet-owners, which is rare in India. Indian banks are unable to commit to long-term foreign currency financing for a cyclical industry, even if there is a natural hedge by earnings from freight. In addition to this, the financing costs of the Indian banks are not competitive in terms of global financing, as interest rates are high. In view of the stress on banks due to the risk involved in

THE INSIDE TRACK

What are the particular skills that clients are looking for in an effective shipping lawyer?

Particular skills that clients look for in an effective shipping lawyer are accessibility, quality of work with clear responses on the issues for which the maritime lawyer is engaged and, most importantly, a quick turnaround of what is required. Since this industry has sensitive moving targets, proactive action is a must.

What are the key considerations for clients and their lawyers when arranging finance for a shipping transaction?

Having predominantly worked for lenders, the key consideration, when arranging for finance for a shipping transaction, is the risk attached to the borrower shipping company effectively servicing the loan facility. Gainful employment of the vessel at rates that sufficiently cover operating expenses as also servicing the loan would be a key consideration. To safeguard the lender's interest, the facility must be adequately secured by assignment of insurance and earnings.

In case of multiple ship finances, 'cross-collateralisation' of security and acceleration in the event of default are crucial for the lender. Finance documentation must contain provisions obligating the owner or borrower to furnish additional security, in the event the value of the security falls below the margin.

What are the most interesting and challenging cases you have dealt with in the past year?

I was involved in a litigation for one of our Singaporean clients, a wholly owned subsidiary of an Indian conglomerate in their claims against a Zurich-based bank, Credit Suisse AG, for arresting the vessel *MV Maverick Gunner* in Singapore for enforcement of their mortgage, when the said vessel was carrying cargo belonging to the subsidiary. I advised clients in their pursuit against the bank for a tort committed by them on the basis of the decision of *The Myrto* [1977 2 Lloyds Rep 243]. There were interesting aspects in the matter as the bank's right to arrest the vessel as mortgagee only arose under the two exceptions listed out in *The Myrto*, namely, when the security of the bank is impaired or when the owner is unwilling or unable to perform, the contract is clearly not for the bank to rely on. It also involved multi-jurisdictional aspects as the mortgagee was a Greek and an expert opinion was sought on the same.

I also acted for Mitsui & Co's Indian subsidiary, which is, inter alia, engaged in the business of setting up India's FSRU on the west coast of India for import of LNG. We reviewed, negotiated and finalised various documentation in relation to Mitsui's role as an operations and maintenance contractor for the FSRU project.

Shardul J Thacker
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Mumbai

shipping, only shipping companies with a good credit rating are able to raise bank finance for the replacement of old tonnage and meeting the IMO requirements on emission of zero-sulphur fuels.

This had an impact on small- and mid-size players in the Indian market. Indian shipping companies such as Great Eastern Shipping Co Ltd and the Shipping Corporation of India have been able to withstand the changes. In view of this, shipping companies in India are looking for alternate sources of finance, namely, private equity funds, venture capital, etc.

Owing to the vast difference in the costs of domestic borrowing and external commercial borrowing, Indian companies have long obtained finance for the acquisition of ships from foreign banks. For most lenders, the Indian flag is not an 'approved' flag for financing because of a host of procedural issues. Also, registration of mortgage with the Mercantile Marine Department takes 15-20 days.

Indian shipping companies establish their subsidiaries overseas and take advantage of substantial fiscal incentives. Such subsidiaries seek support from their Indian parent for financing the Indian-controlled tonnage and also raise the revenue stream in the form of a charter or a drilling contract, thereby accessing India's booming cargo base but retaining its earnings overseas. The Indian flag, although considered expensive, is still bankable with several international lenders.

GTDT: Have there been any recent significant domestic or foreign court decisions or arbitration awards that impact on your country's shipping market?

ST: On 3 January 2018, the Madras High Court, while hearing a batch of applications filed by various maritime claimants, passed a landmark judgment on a significant question of law. The query that arose for consideration was whether

the leave of the Company Court under section 446(2) of the Company's Act 1956 was mandatory prior to hearing the various applications of the claimants while exercising its special admiralty jurisdiction. The court upheld the principle of *Generalia Specialibus Non Derogant* and held that, for deciding any maritime claim in India, it is imperative that the courts adopt the provisions of the Merchant Shipping Act 1958, and the Companies Act, being a general and prior legislation, will have to make way to the special enactment. This judgment, however, has been appealed before the division bench of the Madras High Court (*Shanmugam Rajasekar v Owners and Parties Interested in the vessel MT Pratibha Cauvery*).

Further, arrest of bunkers is not permissible in India. As per Indian law, bunkers are not considered to be maritime property. Therefore the courts exercising admiralty jurisdiction do not permit the arrest of bunkers (*Peninsula Petroleum Ltd v Bunkers on Board the Vessel, MV Geowave Commander* 2015(3) Bom CR 693). This decision was confirmed by the division bench of the Bombay High Court, and was recently reaffirmed in the case of *Mansel v MV Giovanna Iuliano* (5 May 2017).

Similarly, arrest of cargo is not permissible under Indian law by virtue of a recent order passed on 1 September 2017 by the Bombay High Court in the matter of *Pacific Gulf Shipping (Singapore) Pte Ltd v SRK Chemicals Ltd & Anr.*

GTDT: What is the outlook for your country's shipping market?

ST: There are clear signs that the Indian maritime sector is set for steady growth in view of burgeoning EXIM trade. The progress could be faster if the issue of unburdening taxes in the shipping sector is dealt with. Early completion of various projects in the logistics chain is crucial to meet the heavy traffic projections for the future. An efficient intermodal system is vital for the success of a port as it supports seamless movement of cargo across all modes (ship, rail and truck). The 'Make in India' initiative offers tremendous opportunities in the maritime sector, particularly in the shipbuilding and ship repair

industry. The government's shipbuilding financial assistance policy provides a boost by encouraging Indian shipyards to bag foreign orders in a more aggressive manner and meet the requirements of Indian ship owners. The government has formulated a policy of financial assistance for shipbuilding for a period of 10 years for contracts signed between 1 April 2016 and 31 March 2026. The financial assistance, at the rate of 20 per cent of the contractual price of a vessel, fair price or actual payments received by the shipyard, is payable after delivery of the vessel and as per the guidelines issued by the Ministry of Shipping. The Indian maritime sector needs to look for new technologies and advancements to help save costs and deliver more for less.

Increasing investments and cargo traffic points towards a healthy outlook for the Indian ports sector. Providers of services such as operation and maintenance, pilotage and harbouring and marine assets, such as barges and dredgers, are benefiting from these investments. The capacity addition at ports is expected to grow at a compound annual growth rate of 5–6 per cent till 2022, thereby adding 275–325 metric tonnes of capacity.

Under the Sagarmala Programme, the government has envisioned a total of 189 projects for modernisation of ports involving an investment of 1.42 trillion rupees by 2035.

The Ministry of Shipping has set a target capacity of over 3,130 million metric tonnes by 2020, which would be driven by participation from the private sector. Non-major ports are expected to generate over 50 per cent of this capacity.

India's cargo traffic handled by ports is expected to reach 1,695 million metric tonnes by 2021–22, according to a report of the National Transport Development Policy Committee.

Within the ports sector, projects worth an investment of US\$10 billion have been identified and will be awarded over the coming five years.

It is anticipated that in 2018, demand in the three main segments of the global shipping industry (dry bulk, tankers and containers) will outstrip supply for the first time in several years.

SHIPPING IN ITALY

Marco Morace is a partner and head of the insurance team at E.Morace & Co. He graduated in law from the University of Naples 'Federico II' and joined E.Morace & Co in 2003. Prior to this, he worked for the legal department of P&G in Rome, was a visiting lawyer with leading London insurers and international law firms in London.

Marco's areas of expertise are: accident and personal injury, insurance counter-fraud, reinsurance, insurance and commercial litigation and dispute resolution, intellectual property, marine insurance, professional liability, shipping and offshore, yachts and superyachts.

Guido Greco is a partner at E.Morace & Co. He graduated in law from the University of Naples 'Federico II', got an LLM in international business law from the University La Sapienza in Rome and joined E.Morace & Co in 2006. Prior to this, Guido had work experience with the Office of Legal Affairs of the United Nations General Secretariat in New York.

Guido's areas of expertise are: accident and personal injury, banking and finance, professional liability, litigation and dispute resolution, shipping and offshore, insurance and reinsurance, marine insurance.

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GTDT: What is the current state of the shipping industry in your country?

Marco Morace and Guido Greco: The Italian shipping industry is showing signs of recovery thanks also to the globalisation and the acquisition of local companies from foreign operators and investors, as well as the adjustments of shipping operators to the new market standards as a consequence of the long-lasting crisis in the sector.

During the 2018 general meeting of FederAgenti, the Italian agents' federation, it was reported that the total investment value of international groups in the shipping industry (including marine, port and logistic operators) was about €3.5 billion.

The passenger and ro-ro market is also very strong, with local operators starting new routes and international cabotage services, thanks to the good state of the local market as well as the stabilisation of east Mediterranean countries.

According to market data, Italian operators are the most active in the short sea shipping sector in the Mediterranean and the Black Sea areas.

GTDT: What are the prevailing shipping market trends affecting your country?

MM & GG: The consolidation of debt positions and the restructuring and adjustment of the organisational structures, and, thanks to the availability of Italian banks to support local operators in the restructuring of their loans and the investment of foreign operators or stakeholders, the imposition of independent management standards on companies whose operations are, in some cases, still anchored to family boutique cultural heritage.

The cabotage sector is in an excellent phase of market vitality with mergers and joint ventures, and it is also favoured by new regulations on management and investments in port infrastructures that can have a positive impact on the shipping industry in its broad sense.

GTDT: Are there any recent domestic or international political or legislative developments that may have an impact on your country's shipping market?

MM & GG: In January 2018, a new law came into force amending the original Law No. 84 of 1984 regulating the rights and powers of the Italian Port Authorities. Among the new features introduced, is the possibility for the Port Authorities to use up to 15 per cent of the income from embarkation and disembarkation tax, to finance operational intervention plans aimed at professional training for the redevelopment or reconversion and relocation of harbour workers. The implementation of the new Law No.



Marco Morace



Guido Greco

“According to market data, Italian operators are the most active in the short sea shipping sector in the Mediterranean and the Black Sea areas.”

84/94, which includes the possibility to call for tenders pursuant to EU public tender principles, is expected to have an improvement on port infrastructures and consequently positive effects on the shipping and logistic market.

In February 2018, a new law came into force amending the ‘Nautical Code’, the law regulating the use of pleasure yachts. The new law basically simplifies many rules, making the use of yachts easier and introducing the definition of ‘commercial yachts’ – being yachts used only for commercial purpose that are entitled to be registered in the Italian international registry with the benefit of the relevant tax regime.

THE INSIDE TRACK

What are the particular skills that clients are looking for in an effective shipping lawyer?

Our clients love our:

- care – we work hard to advise our clients as soon as possible on the day of our instruction or within one business day at latest with a preliminary advice;
- flexibility – we are keen to discuss with our clients fees as our aim is always to achieve the best result for the client, not the best opportunity for the firm;
- transparency – any client wants to keep legal costs and budgets in check especially in litigation; we always keep our clients up to date on case developments and cost so that they can check their budget is followed; and
- update – working with clients based around the world we are aware of the absolute importance of comprehensively keeping the client updated as soon as there is a development on its case or file.

What are the key considerations for clients and their lawyers when arranging finance for a shipping transaction?

A number of different considerations are made depending on whether we are assisting the lender or borrower.

The lender's key target is to safeguard its interests in the best possible way in terms of security over the vessel as well as in her operation.

Basic security would be an ordinary first priority mortgage over the vessel; in this regard, it would be fundamental to obtain the advice of expert lawyer in the country where the mortgage is to be registered to understand whether security

would be full valid and enforceable under the local law and jurisdiction.

Depending on the structure of the transaction and the quality of the borrower, lenders should also consider whether additional security should be obtained from the borrower such as parent company guarantee, charge over shares of the borrowing company, management and charge of a deposit account.

As said, the lender should also consider further types of security related to the operation of the vessel, particularly assignment of insurance in case of damage to the vessel and earnings and requisition compensation.

What are the most interesting and challenging cases you have dealt with in the past year?

One of the most interesting and challenging cases last year was the casualty of the high-speed vessel *Cris M*, 8 September 2017, which was stranded off the Lipari coast while on route between Eolian Islands with the 41 passengers on board. Our firm was instructed by the vessel's owners and the P&I Club, and our marine casualty emergency response team assisted the clients in the aftermath of the event in relation to salvage and antipollution operations and afterwards with the administrative, criminal and civil proceedings. Our firm has a wide experience in similar major marine casualties around Italy.

Marco Morace and Guido Greco
E.Morace & Co
Milan, Naples and London
www.morace.com

GTDT: What are the key regulatory and compliance issues for your country's shipping market?

MM & GG: Italian legislation basically follows EU directives and regulations. Basic EU principles of free movements of persons, capital and services have been implemented in the Italian laws including the 'Tenders Code' regulating any public tender process. This code applies to many sectors in the shipping industry, including public subsidies to shipping routes connecting small Italian islands to the main land, tenders issued by national state companies in the energy and oil field, works to ports' infrastructures, and the granting of maritime fields and lands.

GTDT: What are the shipping industry's current sources of finance? How do you predict they will develop, and what are the advantages and challenges to financing a vessel in your country?

MM & GG: The Italian shipping finance market is expected to restart, having absorbed

and overcome the necessary restructuring. The passenger and ro-ro sector is expanding and the Italian fleet in this field needs a renovation and therefore new sources of financing, either by using the traditional methods of ship financing or alternative structure or private equity investments.

The main advantages to financing a vessel in Italy are the possibility of identifying the owners and the taking control over the operation of the vessel, as well as the possibility of obtaining the judicial sale of the vessel based on the mortgage title.

GTDT: Have there been any recent significant domestic or foreign court decisions or arbitration awards that impact on your country's shipping market?

MM & GG: On 30 May 2018, the Italian Constitutional Court issued a judgment against the Friuli-Venezia Giulia region in relation to a law regulating marine concessions. The judgment effectively clarifies that marine concessions should respect the ordinary rules on competition, thus

falling within the competence of the state rather than that of the Italian regions.

It is hoped this decision will give rise to a national regulation for the entire sector of marine concessions with the fixing of EU competition principles to be followed by each region, and regulation on the applicability of public tender procedures. In our opinion the way the Italian government and port authorities will deal with the marine concessions issue will have a direct impact on the progress of shipping industry in the next few years.

GTD: *What is the outlook for your country's shipping market?*

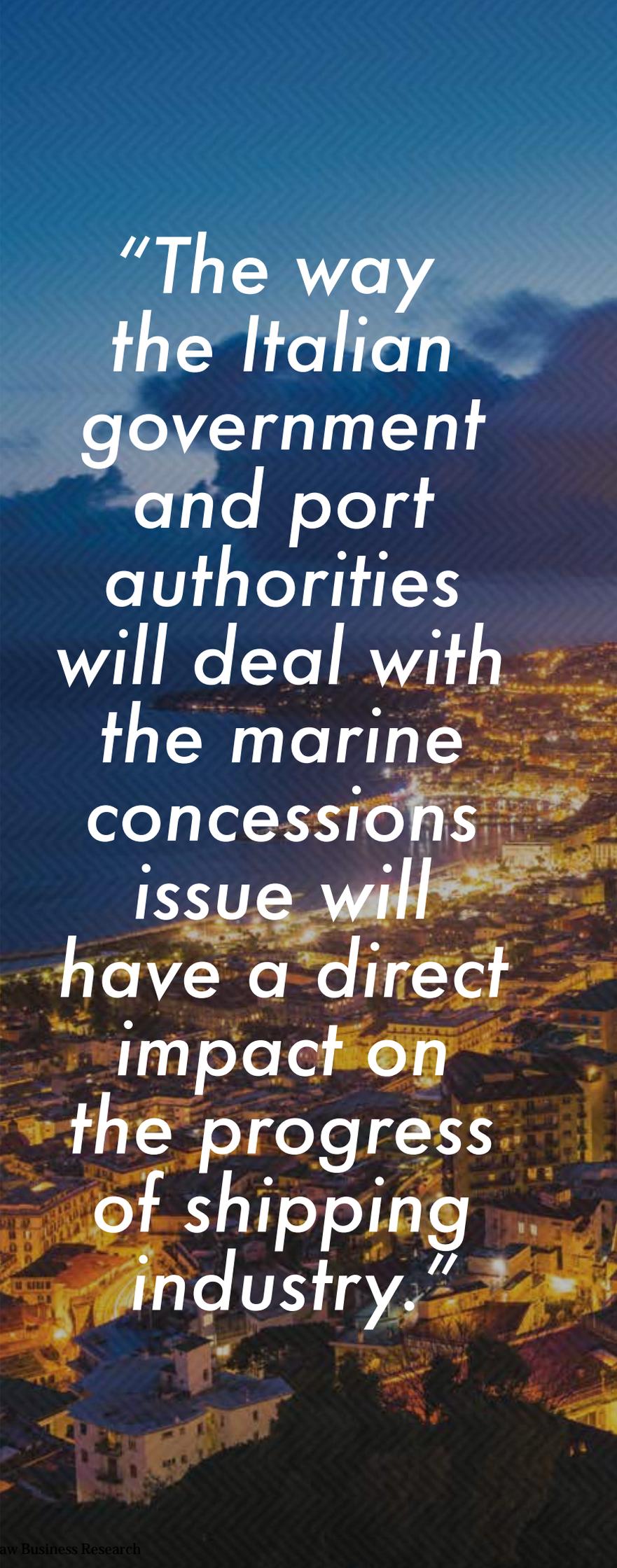
MM & GG: The Italian marine import-export sector amounts to approximately €220 billion and 500 million tonnes of goods per year.

Short sea shipping represents a point of excellence for Italy with approximately 36 per cent of the market share in the Mediterranean area.

Ro-ro traffic in Italy (50 per cent of which is carried out in the south) is a major strength for the country.

All the above sectors are very much linked to ports facilities.

If the port authorities and the new government will really start with the investments in ports' infrastructures and facilities, intermodal structures and procedures, the entire industry will benefit and continue to grow with the possibility to take advantage of Italy geographical position as a bridge to the North African regions.



“The way the Italian government and port authorities will deal with the marine concessions issue will have a direct impact on the progress of shipping industry.”

SHIPPING IN JAPAN

Makoto (Mak) Hiratsuka is the senior partner of Hiratsuka & Co.

After obtaining a diploma in shipping law from University College London, at Ince & Co (Donald O'May's office), Thomas Miller (Terence Coglein's office) and Tindal Riley (Mike William's office), Mak started his own firm in 1976.

Mak and his partners deal with full range of marine casualties: collisions, groundings, fires, salvage incidents and personal injuries. He and his team also have extensive experience of shipping disputes (charterparty problems and cargo claims), together with insurance, reinsurance and insolvency matters, and have dealt with, and are presently dealing with, serious litigation cases for non-Japanese clients.

He and his partners are known to be very prompt in answering any questions about Japanese law and Japanese court and arbitration proceedings clearly and accurately.

Mak is a member of the arbitration committee at the Japan Shipping Exchange Inc and the Private International Law Association of Japan. He is also a member of the Maritime Law Association of Japan where he serves on its board of directors, and one of the few Japanese fellows of the International Academy of Trial Lawyers.

Yuji Miyazaki has been a partner at Hiratsuka & Co since 2014.

He specialises in litigation, arbitration and negotiation of all maritime matters including charterparties, contract of affreightment, shipbuilding contracts and disputes, sale and purchase of ships, collisions, fire, grounding, pollution, arrest and release of ships, cargo claims and personal injury defence. He also undertakes international insolvency, product liability, insurance and reinsurance and general corporate matters.

Prior to joining Hiratsuka & Co in 2011, he worked as a general civil and criminal litigator in Tokyo.

His education is: Faculty of Letters, Tokyo University (BA, aesthetics); Waseda Law School (JD); University of Southampton (maritime law short course, 2013).

Prior to entering university, he spent 12-and-a-half years in New York.

Yuji is a member of the Tokyo Bar Association, and plays piano and guitar in his spare time.



GTDT: What is the current state of the shipping industry in your country?

Makoto Hiratsuka and Yuji Miyazaki: The Japanese shipping industry has a relatively high reliance on the dry bulk market, and its gradual recovery in 2017 has had a positive effect on the industry as a whole. Although the recovery is not yet full-scale, the devaluation of the yen since 2013 has allowed shipping companies to undergo multi-year structural reforms to counter the market conditions. Such reforms seem to have begun to pay off, with the 'big three' Japanese operators reporting improved numbers in fiscal year 2017, where:

- NYK reported a net profit of about US\$184 million (from a net loss of about US\$2.4 billion the previous year);
- "K" Line reported a net profit of about US\$95 million (from a net loss of about US\$1.25 billion the previous year); and
- MOL reported losses of about US\$431 million but with improved revenue, operating profit and ordinary profit (the net loss being mostly due to a one-off loss of about US\$670 million for costs relating to the establishment of Ocean Network Express Pte Ltd (ONE)).

The establishment of ONE on 1 April 2018 was one of the largest restructuring projects within the Japanese shipping industry in recent years. Formed as a joint venture between the container ship businesses of NYK, MOL and "K" Line, ONE commenced operations with a fleet size of 1.4 million 20-foot equivalent units, making it the sixth largest container shipping line in the world. NYK has a 38 per cent share, while MOL and "K" Line have 31 per cent each. Although the holding company is located in Japan, the operating company was incorporated in Singapore, with regional headquarters in Hong Kong, Singapore, the United Kingdom, the United States and Brazil. Although their container line businesses have been consolidated, NYK, MOL and "K" Line continue to operate their other businesses independently.

One sector that has been affected by the formation of ONE is non-vessel operating common carriers (NVOCCs). Major domestic cargo interests that had previously spread their contracts between the three domestic container carriers are said to have begun contracting with NVOCCs, in addition to ONE. The 'big three' are also aiming to expand their NVOCC businesses, and MOL plans to establish a new company in Hong Kong this year to consolidate the businesses of MOL Logistics (Japan) Ltd and MOL Consolidation Service Ltd.

In the shipbuilding sector, Japanese shipyards received orders for 195 new builds (9.45 million gross tonnage (GT)) in 2017. Although this was a two-and-a-half-fold increase from the previous year on a GT basis, the figures are still low

compared to 22.22 million GT ordered as recently as 2015. Of the 195 orders, 156 were bulk carriers and 27 were tankers. The total order book for Japanese shipyards at the end of December 2017 was 516 ships (12.89 million compensated gross tonnage), which translates to about two-and-a-half years of work according to building capacity.

GTDT: What are the prevailing shipping market trends affecting your country?

MH & YM: As mentioned at the outset, the bulk market has shown gradual improvement. The number of newly built ships entering the market are expected to stay low due to uncertainties regarding environmental regulations, while the supply of cargo is expected to remain steady. As such, the Japanese shipping industry is hopeful that 2018 will see continued improvement in the bulk shipping market.

Meanwhile, for oil tankers, VLCCs saw a decline in the spot market in 2017 and 2018 is not expected to be profitable either. The market for chemical tankers on the other hand are expected to benefit from new chemical plants being built in Saudi Arabia and the US gulf coast, and there is hope that the market will improve despite the ongoing delivery of upcoming new builds.

With regard to container ships, the yearly synergy produced by the formation of ONE is expected to be over US\$1 billion, expected to be fully realised by fiscal year 2020. ONE has projected net profits of 110 million for fiscal year 2018, 313 million for 2019 and 648 million for 2020, on the basis of bunker prices at US\$383 per metric tonne and an exchange rate of ¥107 to the dollar. However, a continued rise in bunker prices or fluctuations in the exchange rate could cause decreased profits.

In the shipbuilding industry, Japanese shipbuilders opened 2018 with a flurry of changes, with Mitsubishi Heavy Industries and Mitsui Engineering & Shipbuilding splitting off their shipbuilding divisions as separate companies, while Imabari Shipbuilding took control of Minaminippon Shipbuilding Co from Mitsui Engineering & Shipbuilding and MOL. Such changes were made in consideration of the slow market and ongoing competition from Chinese and Korean yards, and more could be coming.

GTDT: Are there any recent domestic or international political or legislative developments that may have an impact on your country's shipping market?

MH & YM: Following the inauguration of the new US president, the value of the Japanese yen has seen wide fluctuation. As the profitability of the Japanese shipping industry is strongly dependent on the value of the yen, sharp variations may have a critical effect on their earnings regardless of other developments in the market.



The new US tariffs on steel and aluminium, developments in negotiations with North Korea, the effective withdrawal of the US from the Iran nuclear deal etc, are some of the recent political developments that may have an impact on Japan's shipping market.

In regard to legislative developments, on 18 May 2018, the Japanese diet enacted a bill amending the sections of the Japanese Commercial Code concerning shipping, etc, which had gone unchanged from its initial promulgation in 1899. International conventions and specialised laws have more or less superseded the general provisions within the Commercial Code in many aspects of international shipping, but this will be a significant change for lawyers, if not so much for the market. One of the notable amendments is the newly instated obligation of the shipper to notify the carrier with regard to certain information when contracting for the carriage of dangerous goods.

GTDT: What are the key regulatory and compliance issues for your country's shipping market?

MH & YM: Environmental regulations, such as the International Maritime Organization Ballast Water Management Convention entering force in September 2017, and MARPOL requirements, such as the NOx Emission Tier III standard, which took effect from 1 January 2016 and the SOx requirement to be implemented in January 2020, continue to be the key regulatory issues, which will all affect compliance costs for owners and shipbuilders by the millions of dollars, but are also hoped to accelerate the pace of scrapping and

fleet renewal. Japanese shipping companies are expected to begin negotiate increased freight rates to absorb compliance costs within this fiscal year.

GTDT: What are the shipping industry's current sources of finance? How do you predict they will develop, and what are the advantages and challenges to financing a vessel in your country?

MH & YM: Bank loans have traditionally been the Japanese shipping industry's primary source of finance. Japanese megabanks, regional banks, and credit unions offer ship finance, while public financial institutions such as the Development Bank of Japan and Japan Bank for International Cooperation also provide export loans to overseas importers to help finance the export of ships built by Japanese yards.

With the exception of export loans, Japanese banks have traditionally provided finance to Japanese owners, with the megabanks focusing on the reliability and profitability of the charterers and operators while the local banks focused on relations with local owners and shipyards. However, there has been a recent trend of overseas shipping companies seeking finance from Japanese banks, caused by the decrease in lending by European banks. An increasing number of Japanese banks have reportedly decided to answer this demand, due in part to the lack of financing opportunities in the domestic market.

The advantage for overseas owners to finance a vessel through Japanese banks in the Japanese market would be the general availability of loans.

As an alternative to direct bank loans, Japanese trading houses are starting to act as intermediaries

“The Japanese shipping industry has been undergoing various internal reforms in recent years to reduce exposure and improve efficiency.”

for domestic bank loans to foreign owners, whereby the trading houses obtain loans from banks, and pass on the loan to the end borrowers with a surcharge. There have also been reports of Japanese trading houses acting as guarantors for overseas borrowers for Japanese bank loans. The difficulties of a stringent credit check by Japanese banks may be alleviated through these methods, but in return the borrower will have to pay a commission to the trading houses.

One further development in Japanese ship financing is the rise of shipping funds. In 2007, Mizuho Securities and Dai-ichi Life Insurance established Anchor Ship Investment Co, Ltd, which managed Japan’s first domestic ship investment fund with an investment of ¥130 billion. A second fund managed by Anchor Ship Partners Co, Ltd was put together with an investment of not less than ¥200 billion in 2011, and a third was put together in 2014, concentrating on larger scale projects. Unlike some speculative funds who have entered and left the market during the early 2010s, the Anchor Ship group has focused on gaining stable long-term returns for its investments, and has become increasingly visible in the Japanese shipping market.

GTDT: Have there been any recent significant domestic or foreign court decisions or arbitration awards that impact on your country’s shipping market?

MH & YM: In very general terms, there are few Japanese court decisions and arbitration awards on shipping matters rendered in a given year, in part due to the tendency towards amicable settlement.

That said, the Tokyo District Court judgment of 15 June 2015 and the subsequent Tokyo Court of Appeal Decision (*Japanese Westlaw* 2015WLJPCA06158003), which was a case where we succeeded in having the court admit a time charterer’s claim for loss of earnings in a collision, may be of interest to shipowners, charterers and insurers. This was the first judgment in Japan that specifically admitted a time charterer’s claim for loss of earnings, which in our understanding

would not have been admissible under English law.

Another recent decision that may be of interest is the Tokyo Court of Appeal decision of 30 June 2017 (*Japanese Westlaw* 2017WLJPCA06306013), which concerned a ship collision in Japanese waters, where an owner exercised a statutory lien over the opposing owner’s right to claim insurance payment in order to secure its damage claim, and the opposing owner filed an objection. Although the first instance decision determined that a statutory lien is governed solely by *lex fori* and dismissed the objection on the basis that the lien would be admitted under Japanese law, the Court of Appeal:

- ruled that a statutory lien should be governed by the cumulative application of the law of the secured claim and the law of the place where the subject matter of the lien is situated (and in the case the subject matter is a claim, then the governing law of that claim);
- that the secured claim (collision claim for damage) was governed by both Korean and Japanese law (the flag states of the colliding vessels), while the subject matter of the lien (the insurance claim) was governed by English law; and
- accepted the objection on the basis that the statutory lien, while admissible under Japanese law, was not admissible under English and Korean law.

Because maritime liens also fall under statutory liens, this Tokyo Court of Appeal decision is expected to affect Japanese ship arrest practice.

GTDT: What is the outlook for your country’s shipping market?

MH & YM: The Japanese shipping industry has been undergoing various internal reforms in recent years to reduce exposure and improve efficiency. Such efforts continue, as NYK announced a new five-year plan beginning in fiscal year 2018 with emphasis on reorganising its dry bulk fleet and “K” Line shifted the focus of its dry bulk fleet reform to panamax and smaller vessels, while MOL has begun to renew its mid-small

THE INSIDE TRACK

What are the particular skills that clients are looking for in an effective shipping lawyer?

Expertise in the local law (especially regarding jurisdiction and conflict of laws) being a given, the most sought after skills in a Japanese shipping lawyer are command of the English language, commercial awareness, multi-jurisdictional connections and experience.

English is a must because most, if not all, shipping documents are written in the language, and because maritime law continues to revolve around English law. Commercial awareness is also important to give proper advice in a business context. Multi-jurisdictional connections are essential too because international shipping disputes often branch across numerous jurisdictions, in which case a foreign lawyer's opinion is necessary to assess the client's position. Experience, while always helpful, is of particular importance for a shipping lawyer, who is often required to give advice in a short time frame.

What are the key considerations for clients and their lawyers when arranging finance for a shipping transaction?

There are various considerations in arranging shipping finance, such as the type and structure of financing, the financing entity, assessment and management of risks, security, insurance, and plans for the future operation of the vessel.

From a lawyer's standpoint, however, the most crucial issue is how such considerations are reflected in the contractual documents. Content-wise, the most important part of the contract

would be the jurisdiction and governing law clause, because these are the bases upon which the contract will be interpreted. Clients should also be aware that finance documents require a certain amount of time to properly review, and that lawyers should always be provided ample time to go over them. Although some clients may prefer providing their lawyers with documentation at the last minute, perhaps to save time and costs, it should be kept in mind that preventive law is always less expensive than litigation.

What are the most interesting and challenging cases you have dealt with in the past year?

Claims for damage to fixed or floating objects is a type of claim that has not decreased in volume amidst the slow market. During the past year, we have seen claims regarding damage to berth fenders, gantry cranes, fishing nets, underwater cables, etc. Although they pop up routinely, the cases often involve obscure local regulations and may be deceptively complex. Further, the claim amounts may be very high, especially if claimants attempt to claim loss of use. The authorities, including the coastguard, becomes involved in many instances too. Because these claims give rise to maritime liens under which a ship could be arrested, it would be advisable for these cases to be referred to Japanese lawyers as soon as possible.

Makoto Hiratsuka and Yuji Miyazaki
Hiratsuka & Co
Tokyo

bulker fleet with new orders, having completed its structural reform by the end of fiscal year 2016. Such reforms have proved beneficial, and the major Japanese operators appear to be in a stable financial condition.

The consolidation of the container ship businesses of the 'big three' into ONE is another development affecting the future of the Japanese shipping market. Having just commenced operations in April 2018, it remains to be seen whether its expectations will be met. However, initial signs seem to be positive, with early booking volumes in Japan matching or exceeding the previous totals of the 'big three' combined.

The Japanese shipbuilding industry in the meanwhile has also long recognised the need for reorganisation, and the separation of the

shipbuilding divisions of Mitsubishi Heavy Industries and Mitsui Engineering & Shipbuilding are further developments in this shifting sector. Previous business associations are also being cemented as business alliance agreements, with the Mitsubishi entities concluding agreements with Imabari Shipbuilding, Namura Shipbuilding and Oshima Shipbuilding and the Mitsui entity concluding an agreement with Tsuneishi Shipbuilding. M&As of smaller yards are also active, with mid-tier yard Fukuoka Shipbuilding recently purchasing Watanabe Shipbuilding and Imabari Shipbuilding taking over Minaminippon Shipbuilding already this year. If the slow market continues, we may see further restructuring of the Japanese shipbuilding market in the near future.

SHIPPING IN MALTA

Jotham Scerri-Diacono is partner and co-head of Ganado Advocates' ship registration team. He regularly advises clients on ship registration and shipping litigation matters as well as matters relating to maritime law generally. He also leads the firm's environmental law practice and assists clients on matters concerning shipping, corporate law and general dispute resolution matters. Jotham sits on a number of committees and boards involved in either maritime or environmental law, and is a lecturer and examiner at the University of Malta on topics dealing with shipping, advocacy and environmental law. He

regularly writes and contributes articles on maritime law in various local and international journals.

Jan Rossi is an associate and member of Ganado Advocates' ship registration team. Dr Rossi specialises in maritime and commercial law. He regularly assists clients on matters relating to ship registration, sale and purchases, company law, yachting, ship management and maritime and commercial law generally.

Julian Caruana is an advocate currently practising within Ganado Advocates' ship registration team.

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“Owing to its strategically placed geographical position and its natural harbours, Malta has always been at the heart of the Mediterranean’s commercial and mercantile activity.”



Jotham Scerri-Diacono

GTDT: *What is the current state of the shipping industry in your country?*

Jotham Scerri-Diacono, Jan Rossi and Julian Caruana: The current state of the shipping industry in Malta is good and has been consistently so for a number of years. According to a recent government paper titled ‘Integrated Maritime Policy – Making Malta a Centre for Maritime Excellence’, it is estimated that Malta’s maritime cluster contributes to the employment of more than 20,000 people, with a value added benefit to the national GDP of Malta of approximately 11 per cent. The growth projections for this sector are very positive and it is expected that the maritime sector will soon make up in excess of 14 per cent of Malta’s total GDP. The traditional sectors, namely tourism, fishing and ship-register activities, will continue to flourish; however, it is also expected that new areas, such as research and development, and biotechnology, will persist in rapid growth over the coming years. Clearly, the maritime and shipping industries play a key role in Malta’s economy.

The shipping industry is not new to the Maltese archipelago. Owing to its strategically placed geographical position and its natural harbours, Malta has always been at the heart of the Mediterranean’s commercial and mercantile activity. Providing a point of convergence between the European and African continents, Malta has developed a strong maritime tradition that has evolved into an international centre for the maritime and shipping industries.

Malta’s shipping and maritime industry is spread across various sectors that vary in size, competitiveness and growth potential. Malta Marittima, a government agency created in 2016, has divided Malta’s maritime industry into the following principal ‘clusters’:

- maritime commercial cluster – legal, financial, insurance, broking, chartering, shipowners, surveyors, adjusters, crew management;

- logistics cluster – freight forwarders, terminal operators, ship agents, warehouse operators, bunkering;
- marine engineering cluster – marine engineering, IT, ship repair, technical services mechanical and electrical, sailing and motorboat clubs, marinas, boat sales and chartering;
- fisheries and aquaculture cluster – fishing boat owners, fishing coops, fish farming, aquaculture, fish processing, fisheries management and biotechnology; and
- energy cluster – oil and gas exploitation and servicing, offshore renewable and emissions.

The above categorisations give a broad outline of the diverse sectors of the industry, and illustrate Malta’s attempts to offer a diverse range of maritime services.

While the current state of the aforementioned sectors can only be described as healthy, success is particularly evident in the flag-related services that are offered by Malta. In a world where there is an increasing number of available flags for ship registration, Malta has sought to become one of the world’s largest ship registries. According to recent statistics, Malta is now Europe’s largest merchant flag and the sixth-largest in the world. There is no doubt that the growth of Malta’s maritime industry, specifically the growth of the Maltese merchant shipping register, has resulted in a host of legal professionals capitalising on the boom. The need for legal expertise in this sector has led to the proliferation of legal professionals specialising in the maritime and shipping law fields. The maritime legal industry is now mature and highly competitive. The reality today is that Malta boasts a number of highly specialised law firms and other professionals whose practice has grown around international shipping and the maritime industry in general.

Other specialised sectors forming part of the Maltese shipping industry that are currently doing particularly well are the yachting (marinas), offshore bunkering and container transshipment



(freeport) sectors that have all seen tremendous steady growth in the past few years, encouraging the government to continue focusing both its attention and resources on these areas.

Additionally, Malta also hosts a number of international maritime institutions including the International Maritime Organization's International Maritime Law Institute located within the grounds of the University of Malta, the International Ocean Institute and the Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea.

GTDT: What are the prevailing shipping market trends affecting your country?

JS-D, JR & JC: Prevailing shipping trends undoubtedly have an impact on Malta. Considering international shipping trends, it is fair to state that the increase in volume of the container trade routes to Europe (buoyed in part by cheap oil and petroleum products) has had a positive impact on the activity at the Malta Freeport, the container hub that operates in the southern part of the main island. The prevailing reluctance of international banks to provide traditional finance to shipowners, on the other hand, has had a negative impact on ship mortgage activity.

Domestic shipping trends have likewise left their mark on Malta. Indeed, the past few years have seen a general willingness by local maritime industry stakeholders and the government to strengthen Malta's existing maritime industry and to advance it further. The intention is for this industry to grow into one of the major pillars of Malta's economy.

Malta's maritime industry has faced tough competition from other sectors within the Maltese economy. It may be argued that while in previous generations a career path in one of the maritime sectors was considered to be one of the more natural, accessible and advantageous career paths to follow, this has now changed with the advent of

many IT and 'desk-based' jobs in other economic areas.

Fortunately, this is not the case for all of the maritime sectors comprising Malta's maritime industry. The service-oriented sectors have grown considerably in recent years. As previously mentioned, Malta is now Europe's largest merchant flag and is the sixth-largest in the world. In December 2017, Malta's shipping register announced that the registered gross tonnage stood at 73.1 million. Moreover, the number of yachts registering in Malta keeps increasing year-on-year, with more than 500 yachts over 24 metres in length now registered in the Maltese ship registry.

Malta's comprehensive legislation on shipping and maritime matters has greatly contributed to the expansion and success of Malta's merchant flag. The legal industry has now developed into a mature sector of the economy assisting shipowners, ship operators, financiers, port operators, yacht owners, insurers, carriers and many other players within the maritime industry.

GTDT: Are there any recent domestic or international political or legislative developments that may have an impact on your country's shipping market?

JS-D, JR & JC: Following lengthy discussions, spanning back to 2011–2012, the European Commission (the Commission) has conditionally endorsed the Maltese tonnage tax scheme under EU State Aid rules for a period of 10 years.

In observance of the Commission's decision, Malta has by virtue of Legal Notices 127 and 128 of 2018 (effective 1 May 2018) revisited and amended its tonnage tax law. The new law published on the 13 April 2018 is being regarded as a positive development by the European Union, Malta and the industry. The said legal notices strive to ensure compatibility between the Maltese tonnage tax scheme and EU State Aid rules, which will in turn serve to create certainty in the market and ensure the attractiveness of the Maltese flag to the shipping industry.

“The Maltese flag administration has largely succeeded in striking a balance between the requirements of the international maritime law conventions and the demands of the market.”

As one of the leading maritime nations in Europe and as Europe’s largest maritime flag, Malta is acutely aware of the essential role the maritime industry plays in its own domestic economy as well as in the economy of the EU as a whole. Maintaining competitiveness in the industry, including through the offering of beneficial fiscal legislation to shipowners and operators, is key for the European Union’s maritime industry.

GTDT: What are the key regulatory and compliance issues for your country’s shipping market?

JS-D, JR & JC: Malta’s legal and regulatory framework for all maritime-related activities is now well established. Perhaps even more important are the constant initiatives to amend and update Malta’s existing maritime legislation as well as to create new legislative and regulatory instruments that reflect and accommodate the industry’s developments. It is essential that Maltese law does not remain stagnant and is amended where necessary, in line with the needs and requirements of the international shipping community, and the maritime industry at large.

Indeed, the enactment of the proper legislative instruments has been fundamental for Malta to establish itself as a hub of maritime services, including for ship registration activities. In this area of law, Malta has looked towards the common law legislative legacy and towards the various regional and international conventions, in order to be able to draft into its statute book the proper tools for its success. The policy decision taken to adhere to all major international maritime conventions ensures that Malta remains an attractive flag to shipowners, managers and other operators.

Additionally, the presence of provisions in Maltese domestic legislation that enable financiers to register their security interests (namely mortgages) and to enforce such security rights, has greatly contributed to the popularity of the Maltese flag. Financiers are comfortable when the undertakings they finance own or operate vessels that are registered in Malta. The Maltese

statutory mortgage has repeatedly proven to be a very effective tool in the hands of banks and other financiers. Moreover, Maltese courts have not hesitated in applying the full brunt of the law against defaulting mortgagors.

In seeking to enact the appropriate legislation, the legislature has always understood that any legislation enacted must consider the realistic needs of the industry. In an extremely competitive trade, where large sums of money are transacted across the globe on a daily basis and where multiple factors continuously come into play to create a dynamic and complex environment, it is essential that legislation is user-friendly and addresses the commercial needs of the industry operators it seeks to regulate. It must act as a tool, and not an obstacle, to industry operators.

The aim was, and still is, for Malta to offer comprehensive but not necessarily complex legislation and regulations that permit the carrying out of swift and practical solutions on the ground.

This being said, the intent to provide a comfortable legislative environment should not be mistaken for a lack of scrutiny. The legislation in force today has resulted in the Maltese flag being recognised and respected as a serious flag that encompasses a wide variety of regulations ranging from technical management and seafarers’ rights, to matters concerning the environment and maritime pollution, and matters dealing with the financing of vessels and their operators.

Malta’s flag administration provides the technical, organisational and administrative support required for the running of Malta’s ship registry. The Maltese flag administration has largely succeeded in striking a balance between the requirements of the international maritime law conventions and the demands of the market. The attainment of such balance is considered essential for maintaining the amount of tonnage registered under the Maltese flag.

Other administrative and governmental authorities, such as the local Registry of Companies, have also played a significant part in the growth of the international shipping services industry in Malta. The Registry of Companies handles the incorporation of Maltese corporate vehicles that are often used to own and operate

THE INSIDE TRACK

What are the particular skills that clients are looking for in an effective shipping lawyer?

Clients require and expect shipping lawyers to have good working knowledge of the industry itself. Often, this will mean that lawyers will be required to be familiar, in the case where advice is being rendered in respect of ship registration for instance, with technical aspects (and this will include knowledge of the main international conventions such as the International Convention for the Safety of Life at Sea). Likewise, in the case where advice is being rendered in respect to cargo claims, the client will expect lawyers to have insight into the logistics of international sale of goods by sea including payment mechanisms.

The ability to react swiftly and effectively to requests from clients, while being committed to all practice areas, is heightened in the shipping practice given the nature of the industry, with high costs (of the ship) being incurred for delays and typically tight deadlines.

Finally, given that the shipping industry operates on a 24-hour basis, seven days a week, it is important that a shipping lawyer is, likewise, always available to his or her shipping clients.

What are the key considerations for clients and their lawyers when arranging finance for a shipping transaction?

In the current climate, where ship finance is very hard to come by, the key consideration for ship-owning clients is ensuring that projects are presented in a manner that guarantees the availability of finance without an overly cumbersome burden being imposed upon the owner. We are seeing financiers

requiring additional cash or real estate collateral from owners before advancing finance, which in most cases is a non-starter to shipowners, as a result of which, traditional means of finance have invariably remained available to the bigger players.

The key consideration for lawyers working in this sector is keeping the related finance documentation effective (ie, concise and free of complications), ensuring that it is devoid of unnecessary complications that do not have value for, and in no way benefit, the parties.

What are the most interesting and challenging cases you have dealt with in the past year?

We have had a number of interesting cases during the past months, including, numerous legal issues concerning the international status of Crimea, and its impact on Maltese flagged vessels visiting ports in that region; cases concerning the recovery of a wreck in international waters, and its transportation and importation into Malta; various queries on the legal issues concerning the marine environment; various employment law issues relating to claims concerning crew's wages surviving after a judicial sale by auction of a ship; fractional ownership, co-management and time-sharing of a luxury yacht; assisting banks' takeover of whole fleets from their defunct clients; and attempting to injunct a vessel as security for non-payment of fees for professional services.

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ships. The local courts provide an efficient forum in which players within the maritime industry, notably enforcing financiers and owners, find recourse.

GTDT: What are the shipping industry's current sources of finance? How do you predict they will develop, and what are the advantages and challenges to financing a vessel in your country?

JS-D, JR & JC: Bank loans are still considered to be the primary source of finance. Nevertheless, the shipping finance landscape has changed over the past decade or so. Two such changes are concerned with the geographical location of the sources of ship finance and the increase in popularity of alternative means of raising finance. It is now common knowledge that many traditional European banks have either exited the shipping finance market or have downsized their shipping finance operations. Asian banks and export credit agencies in Asian shipbuilding nations have stepped in to fill in the financing gap with many shipping enterprises consequently

looking east for financing. Some players within the industry have and still are resorting to the capital markets, notably through the issue of bonds, while others have sought financing from private equity interests.

From a local perspective, Maltese banks do not finance large merchant vessel acquisitions or operations. However, some foreign financial institutions and financiers of the international shipping industry are present in Malta.

The enthusiasm for alternative means of ship finance has led to an increased interest in the set up and use of Maltese collective investment vehicles (funds) in the shipping finance arena. Fund structures provide a vehicle for investing in equity and debt instruments issued by shipping enterprises. For the smaller operators, such fund structures may be used to gather the required amount of private equity that is now being sought as an alternative means of financing shipping activities.

There are advantages to financing a vessel registered in Malta and its creditor-friendly shipping legislation has proved to be popular with financiers.

GTD: Have there been any recent significant domestic or foreign court decisions or arbitration awards that impact on your country's shipping market?

JS-D, JR & JC: We cannot recall any one specific judgment delivered recently that has had a significant impact on Malta's shipping market. However, decisions on court-approved private sales of vessels are turning Malta into a major international venue for the carrying out of such sales of distressed vessels.

Briefly, this is a mechanism that combines the best elements of the private sale and the traditional judicial sale by auction. The court is directly involved in approving a privately prearranged sale between the enforcing creditor having an executive title (mortgage) and the prospective buyer while the vessel is within Malta's jurisdiction.

The creditor retains full control of the court proceedings and can see them concluded within a short time frame. The buyer is also protected as the vessel is acquired free and unencumbered. Any unsatisfied claims against the secured asset after the conclusion of the sale can only be enforced against the proceeds. Proceedings are swift and expedient, since the application is appointed for hearing within 10 days of its filing. Court intervention is minimal.

The enforcing creditor may request court authorisation enabling the creditor to acquire the secured asset itself in set-off of its debt over the asset.

Moreover, mortgages burdening vessels that are not registered in Malta may be enforced, as long as the foreign mortgage is recognised under Maltese law.

GTD: What is the outlook for your country's shipping market?

JS-D, JR & JC: According to a policy paper, recently published by the government of Malta, the maritime sector is set to grow in excess of 14 per cent of Malta's total GDP. Moreover, there seems to be political consensus on maintaining, expanding and developing Malta's maritime industry.

As previously mentioned, Malta's shipping and maritime industry is composed of a number of various sectors including a legal sector that is largely concerned with the provision of legal products by local service providers to local and

international operators within the maritime industry, including shipowners, ship managers, ship agents, freight forwarders, ship and yacht repairers, port operators, and operators in the fisheries and aquaculture industry. All of these sectors contribute to Malta's aspirations to become a leading regional and international maritime hub.

Malta Marittima plays a key role in Malta's implementation of the EU's Integrated Maritime Policy. One of the agency's main objectives is to bring industry and government stakeholders together to focus on and promote the continued development of the marine and maritime industries in Malta.

The creation of Malta Marittima in 2016 was preceded by the setting up of the Malta Maritime Forum in 2015. The main objective of the latter is to provide a common platform for the local maritime industry to promote existing maritime services and to assist in the development of new maritime activities. The forum also aims to promote research, education, standards and training within the Maltese maritime industry, acting as a constituted body to consult and be consulted by government in the development of public policies that can have a bearing on the Maltese maritime industry.

These objectives have been broadly established to ensure that the forum is as inclusive as possible. Even though this initiative is largely industry-based, the governments, as well as the other public authorities involved in the maritime sector, have supported this initiative, which bodes well for the future.

The industry players and the government are now looking to adopt a holistic policy and coordinated efforts to maintain and continue developing Malta's maritime industry, in and through official forums.

From the perspective of a firm within the maritime legal sector of the industry, the outlook for this sector seems positive with certain segments of the international shipping market, as well as that of yachting, steadily growing and prospering. Nonetheless, as service providers to the international shipping industry, we are exposed to the same inherent risks, volatility and market trends of the industry we serve. It is therefore essential for us to keep a close eye on developments in the industry and the direction towards which it is heading. This will allow us to serve traditional sectors that are presently doing well, and tap into the innovative areas of the industry.

SHIPPING IN PANAMA

Jazmina Rovi is a partner in Morgan & Morgan's ship finance and registration group. Mrs Rovi obtained an LLB from the School of Law of the University of Panama (1989). She also has a PhD in private international law of the Autonomous University of Madrid (1994).

Mrs Rovi has a wide expertise on all types of registration schemes under Panama flag and ship finance structures, including ship mortgages and pledge of shares. She has played an active role in drafting various pieces of maritime legislation. Mrs Rovi was president of the Maritime Law Association of Panama from 2011 to 2013.

Francisco Linares is a partner in Morgan & Morgan's admiralty litigation group. Mr Linares obtained a BA in philosophy and economics from Notre Dame University (1992), a JD (cum laude) from Tulane University, specialising in maritime law (1996), and a diploma from Panama's Maritime University (2010).

Mr Linares has 20 years' experience in all types of maritime claims. Clients include shipowners, P&I Clubs and underwriters. Mr Linares has taught maritime law at the Santa Maria La Antigua University and was part of its board of advisers. He is the current president of the Maritime Law Association of Panama.





GTDT: What is the current state of the shipping industry in your country?

Jazmina Rovi and Francisco Linares: There was a noticeable rebound in the shipping industry in 2017. With world and regional economic conditions improving throughout the year, and a fully operational expanded Panama Canal, the local shipping industry posted positive results. Latin America is coming back from a contraction in 2016 – of minus 1 per cent – but turned around in 2017 with 1.3 per cent growth, according to the UN Economic Commission for Latin America and the Caribbean (ECLAC). The region is expected to grow by about 2 per cent in the next few years, according to ECLAC, thanks to improvements in Brazil and Argentina. Panama remains the most dynamic economy in the region, with 5.4 per cent growth in 2017 and an average of about 7 per cent growth during the past 10 years. The maritime sector, however, continues to face intense competition. This, coupled with the prospect of a full-blown trade war among the Panama Canal's biggest users may pose significant challenges for 2018 and beyond.

GTDT: What are the prevailing shipping market trends affecting your country?

JR & FL: Panama remains the region's top logistical hub. Panama has the highest Liner Shipping Connectivity Index rating in the Latin America (almost 52), as per UNCTAD, as well as the highest Logistics Performance Index ranking according to the World Bank (3.34). The maritime and logistics segment of the economy amounts to large portion of the county's export services. To take full advantage of Panama's increasing role as a logistical hub, last September the government unveiled a master plan called the National Logistical Strategy (ELNP). This roadmap was elaborated by industry and Inter-American

Development Bank experts. Among other things, the plan calls for massive infrastructure investments – especially in roads and railways – to separate cargo movement from the urban transport system (a weakness that traditionally has pulled Panama's LPI scores downward). If properly implemented, experts estimate that the ELNP could impact Panama's overall GDP growth by as much as 30 per cent by 2030.

The Panama Canal expansion has proven a tremendous success, and some even believe a further expansion may be in the horizon much sooner than expected. The Neopanamax seem to be coming faster than initially expected, even when the economy of scale benefits to be realised with larger vessels transiting were quite obvious from the beginning. June 2018 marked the second anniversary of the new locks' inauguration. The new set of locks is, of course, fully operational, although some minor works are still pending completion by subcontractors (Sacyr/Jan De Nul/Impregilo). The continuing dispute between subcontractors and the Panama Canal Authority (ACP) is likely to drag into 2022. The former are claiming some US\$6 billion of additional construction costs. Recently, the ACP obtained a favourable ruling in one of the several arbitration proceedings filed by subcontractors, for almost US\$200 million. Yet, there are still a number of proceedings pending, for an aggregate of about US\$5.5 billion.

In these almost two years of operations, the new locks have seen over 3,500 Neopanamax vessel transits. Toll revenues in 2017 were US\$2.23 billion – well above the US\$1.93 billion for 2016 and US\$1.99 billion for 2015. In fiscal year 2017, the ACP posted record overall revenues of US\$2.88 billion, as well as a record dividend payment to the Panama government of US\$1.65 billion. This one year payment alone is nearly as much as the total US\$1.87 billion Panama received during the 85 years of US



administration. In 18 years of Panamanian administration, the Panama Canal has produced US\$13.33 billion in dividends to the National Treasury.

About 50 per cent of the Neopanamax vessel transits were container carriers. Liquefied petroleum gas (LPG) and liquefied natural gas (LNG) vessel transits also contributed to the robust results for 2017. Indeed, the LNG segment is a completely new business for the Panama Canal, and quite a promising one. In 2017, the United States quadrupled its LNG exports. About 49 per cent of these go through the Panama Canal to various markets, mostly in Asia. An excess of 5 million tons of LNG passed through the Panama Canal in fiscal year 2017, about 80 per cent of which shipped from the United States. The ACP projects that by 2020, some 30 million tonnes of LNG will transit through the Panama Canal. An ever increasing chunk of US LNG exports is being swallowed up by China, which recently surpassed Japan as the world's largest importer of that commodity. In light of this, it comes as no surprise that US LNG imports were spared by China in the retaliatory response to the United States' tariffs that may take effect in 2018. Currently, an average of about four LNG vessel transit the new locks – which, incidentally, can accommodate about 90 per cent of the total LNG fleet – but this is expected to double by 2020. The ACP expects LNG vessel transits to grow by 50 per cent by the end of fiscal 2018. Given this, the ACP has recently made available an additional daily transit slot for LNG vessels, and will allow night transit of these vessels starting this year. The LPG market, likewise, showed a strong performance in 2017. LPG vessels accounted for 29 per cent of the transits through the new locks, second only to container carriers. US LPG exports to Asian markets, again, stand out. Since 2015, US shipments to Japan, China, South Korea and Singapore have nearly doubled. About 90 per cent

of these exports are shipped from Persian Gulf ports, most of which pass through the Panama Canal.

Despite the uncertainties about the possible adverse impact of the canal expansion, 2017 was definitely a good year for the bunkering industry. The quantity of vessels served and volumes sold increased in 2017. A total of 4.6 million metric tonnes of fuel were dispatched locally last year – only the second time in history that over 4 million metric tonnes of fuel have been sold in Panama. Sales of fuel oil went up in 2017 by 14.38 per cent compared to 2016, and 23.3 per cent as compared with 2015, while sales of diesel oil increased by 32.43 per cent with respect to 2016 and 42.9 per cent versus 2015, according to data from the Maritime Authority of Panama (MAP). According to the MAP, 5,792 vessels took fuels in Panama in 2017, as compared to 5,336 in 2016 and 5,627 in 2015. First quarter results for 2018 suggest an 8 per cent increase in sales and, at current pace, the number of vessels served may surpass 6,000 for the first time in history.

Panama's port system regained its regional dominant position in 2017. According to ECLAC, Panama's port system throughput grew by 10 per cent, essentially regaining the level it had in 2015 of over 6.8 million 20-foot equivalent unit (TEUs) moved. This volume had fallen dramatically in 2016. Official figures show that 6.8 million TEUs were processed in 2017 – a historic high. This strong performance was fuelled by the ports in the Atlantic, particularly Cristobal (operated by Hutchinson). Hutchinson's Cristobal port moved some 1.3 million TEUs in 2017 – the first time ever this facility has had a throughput in excess of 1 million TEUs in a year. Panama has five major container ports – three in the Atlantic and two in the Pacific – with a total aggregate capacity of approximately 10 million TEUs (though the system has never surpassed 7 million TEUs in throughput per year). There is currently a new facility under

“As the drumbeats of an impending trade war grow louder, with the United States escalating its rhetoric against the institutional underpinnings of the global commercial system, Panama finds itself right in the middle of a gathering economic storm.”

construction at Margarita Island, in the Atlantic, that should add a further 2.5 million TEUs to the system. Severe weather in the Caribbean in the past few years seems to account for the consistent throughput increase in the Atlantic ports. Panamanian ports, however, continue to face stiff regional competition (Cartagena in Colombia, Manzanillo in Mexico and Callao in Peru, to name a few). Plus, increased industry consolidation continues to create downward pressure on the rates port operators are able to charge. These are the challenges facing the local port industry in 2018, which has had a lacklustre first quarter – down some 4.3 per cent, driven primarily by a 13.7 per cent drop in the port of Balboa, on the Pacific side.

The Panamanian ship registry continues to perform well. It remains, by far, the largest flag registry in the world. It had an overall good Port State Control performance in 2017. The implementation of new technologies to facilitate issuance of certificates, improving efficiency and quality, while reducing the environmental footprint continues at full throttle. That said, the biggest development in 2017 for the Panamanian flag registry has been the opening of formal diplomatic relations with the China. Prior to 2017, Panama recognised Taiwan as a legitimate state. This changed in 2017, as Panama diplomatically recognised the government of Beijing and closed down its embassy in Taipei. This change alone will facilitate the development of an immense market for the Panamanian flag. Moreover, Panama and China signed a maritime transport agreement whereby each party grants each other most favoured nation status. Now, Panamanian vessels can enjoy great savings (in excess of 28 per cent) and reduce wait time when calling at Chinese ports, allowing the registry to compete on a level playing field with other registries that have most favoured nation status with China. This, along with continuing efforts to increase quality and efficiency, is expected to increase Panama’s leading position as the number one open registry in the world.

About 68 per cent of all the cargo that goes through Panama’s logistical platform either originates in or is destined to the United States. The United States is, by far, Panama’s main export

market, as well as its principal source of imports. The US economy is doing quite well, and Panama’s recent inauguration of official diplomatic relations with China opens the door for a cascade of foreign direct investment and unimaginable new opportunities for Panamanian exports. Panama has a free-trade agreement (FTA) with the United States, and it is currently negotiating one with China. The International Monetary Fund has revised down Panama’s expected GDP growth for 2018 by nearly a full point (to about 4.6 per cent, due, mainly, to an unexpectedly long construction workers’ strike), but it forecasts that the country will be back to a more seemingly growth rate of 6 per cent in 2019. Panama’s port system and ship registry maintain their leading positions. All of this bodes well for the future, giving grounds for realistic optimism. Yet, there are risks lurking in the background. As the drumbeats of an impending trade war grow louder, with the United States escalating its rhetoric against the institutional underpinnings of the global commercial system, Panama – one of the world’s key logistical hubs – finds itself right in the middle of a gathering economic storm.

GTDT: Are there any recent domestic or international political or legislative developments that may have an impact on your country’s shipping market?

JR & FL: Panama now has full diplomatic relations with China. In November 2017, the President of Panama made an official visit to China, and opened Panama’s embassy in Beijing. Panamanian consulates are now operating in Shanghai and Hong Kong. A further consulate in Dalian may also come along in the foreseeable future. In the context of this official visit, some 19 bilateral agreements were signed between Panama and China, dealing with maritime transport, immigration, project finance, investment promotion, tourism, among others. A maritime transport agreement was signed between the two countries in November 2017, which was officially approved by Congress in Panama on 27 March 2018. This agreement will allow Panamanian-flagged vessels to enjoy all the benefits of the most favoured nation status when calling at Chinese

ports. Finally, Panama and China are negotiating a FTA. When signed, Panama will become just the fourth country in Latin America to have an FTA with China.

GTDT: *What are the key regulatory and compliance issues for your country's shipping market?*

JR & FL: Panama is a party to all the International Maritime Organization (IMO) Conventions, and is a category A member of the IMO Council. Standards are high, as evidenced by the flag's port state control performance in recent years. But beyond this, the country is as committed as ever to ensure that international law and peaceful relations among nations prevail. Hence, the Panamanian registry continues to fully enforce the measures adopted by the UN to sanction countries hostile to nuclear non-proliferation. Accordingly, screening systems have been enhanced to make sure that violators of the UN sanction's regime are unable to enter or remain in the Panamanian registry. Authorities are keen to take swift and decisive action to prevent the abuse of the Panamanian registry system by rogue operators.

GTDT: *What are the shipping industry's current sources of finance? How do you predict they will develop, and what are the advantages and challenges to financing a vessel in your country?*

JR & FL: Traditionally, ship financing has come from Asia and Europe. That did not change in 2017. After a catastrophic 2016, markets appear to have normalised in 2017. Necessary consolidations and corrections continue, but it seems that we are past the worse part of the storm. In spite of risks, improved economic conditions worldwide and increased capacity in the industry could herald a good year for ship financing in 2018. Panama remains a preferred jurisdiction for major maritime lenders. Panama's mortgage legislation is flexible, modern and convenient throughout. It is easy to record a ship mortgage in Panama, and said security will enjoy a preferred ranking – ahead of most other maritime liens (including supply liens) – at enforcement time. This lender-friendly legal regime is one of the reasons why Panama has the world's largest merchant navy.

GTDT: *Have there been any recent significant domestic or foreign court decisions or arbitration awards that impact on your country's shipping market?*

JR & FL: The 2009 amendments to Panama's Code of Maritime Procedure (CMP) made a significant change in the section dealing with stay of proceedings. Before the 2009 amendments, the section allowing a stay of proceedings read: 'when the parties have agreed by written contract



"In spite of risks, improved economic conditions worldwide and increased capacity in the industry could herald a good year for ship financing in 2018."

GTDT: Market Intelligence – Shipping

THE INSIDE TRACK

What are the particular skills that clients are looking for in an effective shipping lawyer?

Always of supreme importance are analytical, negotiation and communication skills. Clients highly appreciate the ability to identify risks – especially hidden ones – to assess the likelihood of them materialising, and to place a price on them. Experience-based creativity is absolutely indispensable, in order to be able to design and implement the best approach to advance clients' interest in any given situation. All of this, without sacrificing the need to provide the immediate response that clients demand of maritime practitioners. The ability to timely deliver top-quality service, around the clock, is also something clients always look for and value in a shipping lawyer.

What are the key considerations for clients and their lawyers when arranging finance for a shipping transaction?

No doubt, a reliable repayment source and sound security schemes are always of paramount importance. Usually, the primary form of security in ship financing is the vessel mortgage. Hence, lawyers should always carefully consider the legislation of potential flag states, and then recommend one that better suits clients' interests. Panama's mortgage legislation offers very significant advantages for lenders, which is one of the main reasons behind the ship registry's popularity with international financial institutions.

Though often security is limited to a ship mortgage, quite frequently it also involves assignments (of insurance payments, earnings, compensations, etc), parent company guarantees and pledge of shares of the ship-owning company. It is always important to consider tax and other compliance issues, for many times it will be preferable for lenders to avoid having a security interest on the shares of the ship-owning company, absent an event of default. To avoid

potential problems, an option of pledge of shares would be a viable alternative.

What are the most interesting and challenging cases you have dealt with in the past year?

We had an interesting case that recently came out from the MAT, dealing with arrest proceedings. While there is no associate ship per se in Panama, often plaintiffs file against a multitude of in personam defendants, including the company owning the vessel targeted for arrest in Panama. Quite often, the vessel-owning defendant had, at most, a remote connection with the underlying dispute. Our Code of Maritime Procedure requires plaintiffs to present prima facie evidence in support of the claim, in order for the judge to be able to grant the arrest order. That said, the judge has wide discretion as to how this evidence is evaluated. In the past, precedent tended to be quite deferential to the judge's assessment of the prima facie evidence, even in cases where the vessel arrested was owned by a defendant with no direct connection with the dispute (see, for instance, *Sea Anchor Shipping Co Ltd v Evelina Marine Limited et al* [S.Ct./1C/28 November 12]). However, in the recent case of *Allseas Marine, SA v Sumec Marine, Co Ltd et al* (MAT/28 May 2018), the MAT dismissed an arrest against a vessel owned by a co-defendant, because plaintiffs had failed to provide clear prima facie evidence proving that the former had a direct connection with the claim. This precedent is important, we think, because it shows that the MAT is willing to apply strict scrutiny on the trier of fact very early on into the proceedings, if plaintiffs fail to demonstrate – beyond elaborate allegations – a tangible, basic connection between a ship-owning defendant and the dispute in which recovery is being sought.

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to submit their controversies to arbitration, or to a tribunal in a foreign country'. After the amendments, it read as follows: 'when the parties have negotiated, previously and expressly, to submit their controversies to a tribunal in a foreign country, and they had so agreed to in writing. Pro forma and adhesion contracts will not be considered as negotiated previously and expressly.' The amendment, thus, placed the burden on those moving for a stay, based on a forum selection clause, of showing that a reasonable opportunity to negotiate said clause had been afforded. Predictably, the net result of this change in the CMP has been to make it much more difficult to stay proceedings, simply based on forum selection clause inserted in standard format. The matter, however, has not stayed there, as jurisprudence has in some cases extended this pro forma rule into other aspects of maritime contracts, beyond forum selection clauses. The

Maritime Appeals Tribunal (MAT), in the case of *Jose Luis Parra Jaen v M/V Curimagua* [MAT/24 November 2015], expanded the pro forma rule to undertakings not to arrest, included in seamen employment contracts, reversing a prior Supreme Court precedent that stood for the exact opposite proposition (see *Maximino Torres vs M/V Judibana* [S.Ct./1C/24 November 2009]). With *Curimagua* the question lingered whether the MAT would restrain the pro forma rule to cases involving a wide disparity of bargaining power between the parties involved, or whether it would continue to expand the doctrine. In 2017, the MAT issued a few precedents that point towards a reasonably clear answer to this question.

On the one hand, the MAT further confirmed its ruling in *Curimagua*. In the case of *Pablo Antonio Rodriguez v M/V La Rosa Mistica* (MAT/24 August 2017), the MAT once again invalidated an undertaking not to arrest, contained in a

contract between a seaman and owners. The MAT's reasoning basically followed *Curimagua*. In our view, the decision in *La Rosa Mistica* clearly rested on the position of relative weakness the seaman had vis-à-vis owners, when entering into the contract. By way of contrast, in the case of Sea Debt Management, *SA v M/V Grace One* (MAT/29 June 2017), the MAT took a much less sympathetic approach when dealing with somewhat contradictory terms contained in an adhesion contract involving commercial actors. The issue in *Grace One* was whether English or US law would govern the in rem claim filed by plaintiffs, pursuant to a contract to provide necessities to a vessel whose terms were contained almost entirely in the supplier's general terms and conditions of sale. According to the standard terms in question, English law governed the contract, yet there was a sub clause with an option for US law to apply 'with respect to the existence of a maritime lien'. Defendants argued that this was contradictory, or ambiguous at best, and that according to the contra proferentem doctrine terms in an adhesion contract should be interpreted unfavourably to the drafter (which in this case would result in the application of English law). The TAM, however, refused to deploy the pro forma rule to the detriment of the contract drafter, finding rather that it was plain that the parties to the contract had agreed on US law. The TAM would honour the parties contractual agreement, despite the fact that they were included in a pro forma or adhesion contract. These two different approaches suggest – with sufficient clarity, in our view – that

the pro forma rule cuts differently, depending on who the parties to the dispute are. Commercial enterprises, with seemingly comparable bargaining positions, cannot expect the MAT to cross out leonine terms contained in standardised contracts, simply because the contract in question was not intensively negotiated. Based on the precedents issued by the MAT so far, it seems that, practically speaking, parties with roughly equivalent bargaining power may – at best – only be able to invalidate forum selection clauses in adhesion contracts (as it happened in *Mund & Fester Versicherungen et al v M/V Nagoya Bay et al* [S.Ct./1C/30 May 2012]).

GTDT: What is the outlook for your country's shipping market?

JR & FL: Coming out of a difficult 2016, and despite concerns about policy changes in the United States, 2017 was on the whole a successful year for Panama. The Panama Canal, the ports and the flag registry all had an outstanding year. A stronger world economy and the inauguration of diplomatic relations with China are good reasons to feel quite optimistic for 2018. Yet that optimism could easily vanish, if the United States continues on a path that could deal a deathblow to the globalised world order that, for the most part, has allowed partnering countries – large and small – to enjoy stability and prosperity. Panama sits at the crossroads of globalised commerce, and will certainly be impacted if it is swamped by a tidal wave of protectionism.

SHIPPING IN SINGAPORE

Edgar Chin is joint managing director of Incisive Law LLC, which is the local alliance partner of international law firm, Ince & Co. Edgar is the head of Incisive's shipping team and he handles a broad range of shipping and admiralty matters as well as international trade matters. He regularly appears as lead counsel before all levels of courts in Singapore, as well as in arbitrations both ad hoc and institutional, including under the SIAC, LCIA and ICDR. Edgar also has extensive and practical experience in the protection and indemnity (P&I) industry, having been a claims director at an International Group P&I Club, where he spent five years working closely with owners and operators, brokers and underwriters globally with a focus on Asia.

Moses Lin is a director of Incisive Law LLC who handles a broad spectrum of commercial shipping and trade disputes including charter party disputes, cargo loss and damage claims, demurrage, despatch and cargo off-specification matters.

Justin Seet is an associate in the shipping team advising clients on charter parties, bills of lading collisions, cargo claims, and ship building and sale and purchase disputes. He is also regularly involved in insurance-related disputes, both on issues of coverage and subrogated recoveries.

Samantha Ch'ng is also an associate in the team and who has been involved in a wide variety of contentious shipping matters including, collisions, vessel arrests and releases and claims of technical natures.

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GTDT: What is the current state of the shipping industry in your country?

Edgar Chin, Moses Lin, Justin Seet and Samantha Ch'ng: Singapore, home to one of the busiest transshipment ports in the world, hosts some 140 international shipping groups and around 5,000 maritime establishments are based here. This sector accounts for over 170,000 jobs and around 7 per cent of Singapore's GDP. The current state of the ever-present industry has seen an overall uptick in 2017 and the first half of 2018.

Singapore saw the overall tanker vessel arrival rate, which includes oil tankers, chemical tankers and liquefied natural gas (LNG) and liquefied petroleum gas tankers, at 24,411 in 2017. This was an increase of 2.93 per cent from 2016. Specifically however, chemical tankers saw a dip in tanker vessel arrivals by 8.56 per cent in 2017. Thus far, as of March 2018, the tanker vessel arrival rate was at 6,050. If arrivals continue at this pace, we should see relatively similar results for 2018.

By the end of 2017, the total number of vessels registered with the Singapore Registry of Ships was 4,578. There was a decrease in vessel registration by 139 from 2016. As of March 2018, there has been a lower number of vessel registrations per month; however, the gross tonnage has seen an increase.

Bunkering has always been a critical component of Singapore's maritime ecosystem. Even in the face of a challenging business environment, bunker supply volume in Singapore, according to the Port of Singapore Authority (PSA) Statistics, reached 50.6 million metric tonnes in 2017, which is a year-on-year increase of 3.99 per cent from 2016.

From January to April 2018, PSA has handled a volume of 11.69 million 20-foot equivalent units (TEUs), which is an increase of 14.2 per cent over the same period in 2017. The flagship PSA Singapore Terminals contributed 33.66 million TEUs in 2017, a 9 per cent increase from 2016 and PSA terminals outside of Singapore handled 40.89 million TEUs, which amounted to a 10.4 per cent increase from 2016. Since the beginning of 2018, the monthly figures of container throughput have continued to rise at a steady rate, already showing a slight increase from the figures in 2017. PSA International Pte Ltd (PSA Int) handled 74.24 million TEUs at their port projects around the world by the end of 2017. The group's volume increased by 9.8 per cent from 2016.

It can be seen from the figures that, on the whole, the shipping industry is experiencing some growth despite the challenging environment.

GTDT: What are the prevailing shipping market trends affecting your country?

EC, ML, JS & SC: One key trend that we see affecting the Singaporean shipping market is the increasing interest in the field of marine

fuels. Singapore has identified LNG and offshore renewables as two new growth areas. The global expenditure on LNG is projected to exceed S\$369 million by 2021. Further, tightening environmental, fiscal and financial regulations are translating into higher compliance costs for business.

The accelerating pace of technological change across the globe, which has resulted in ongoing disruption to existing business models has also affected the shipping market in Singapore. To combat this, the government and the Maritime and Port Authority (MPA) have been encouraging companies to invest in innovation and drive productivity improvement. Under Singapore's Next Generation Port 2030 roadmap, the Tuas terminal development will be completed in four phases over a span of some 30 years. Upon completion, the terminal will have total capacity of up to 65 million TEUs.

The MPA is developing platforms to facilitate the sharing of vessel and cargo-related information with the wider trading community. It is also looking at digitalising trade and maritime documentation. The Singapore Maritime Institute will invest S\$12 million to set up the Centre of Excellence in Modelling and Simulation for Next Generation Ports that will enhance Singapore ability to handle increasingly complex port operations.

However, the Singapore ports face risks: namely, direct calls, which bypass the need for transshipment. Alliances formed can better allocate slot capacity, freeing up some vessels that would otherwise be under-deployed. Instead of laying up these vessels, they may be used to string direct services without the need for international transshipment. The expansion of gateway ports in the region – including Kalibaru Port in Jakarta, Laem Chabang in Thailand, Manila in the Philippines and Hai Phong in Vietnam – means they are now better equipped to serve direct calls. With a pick-up in trade between these Association of Southeast Asian Nations countries and the rest of the world, it may be more commercially viable to make direct calls at these ports. There is, evidently, intensifying competition among regional ports and international maritime centres.

GTDT: Are there any recent domestic or international political or legislative developments that may have an impact on your country's shipping market?

EC, ML, JS & SC: There have been two recent global regulatory developments put forward by the International Maritime Organization (IMO): IMO's Global Sulphur Cap for 2020 and IMO Ballast Water Management (IMOBWM), which was implemented in 2017.

IMOBWM is meant to address the issue of invasive marine organisms which may damage local ecosystems if inadvertently transported



in ships' ballast water tanks. This regime has a profound economic impact on the industry. Not only does this involve an implementation cost of approximately US\$1.5 million per ship, ship operators still face a serious challenge in the lack of shipyard and manufacturing capacity needed to retrofit the ships with the new treatment systems. However, with the adjusted implementation dates of 8 September 2019, existing ships now have a little more breathing space to implement the new systems according to standards imposed by the IMO. It is important to note, now that the IMO BWME has entered into force, the shipping companies should not anticipate any further relaxation of the implementation of the Ballast Water Management Regime.

IMO Global Sulphur Cap is aimed at cutting emissions of sulphur dioxide, one of the greenhouse gases, in marine fuels by 2020. The IMO announced in October 2016 that there will be a 0.5 per cent cap on sulphur content in marine fuels from 1 January 2020 onwards.

The MPA invested almost S\$17 million last year to help the shipping industry implement the mandatory use of mass flow meters (MFMs) for delivery of distillates. Switching from marine fuel oil (MFO), the current de facto marine fuel choice, to distillates bunker is one option for ship-owners to comply with the IMO 2020 global sulphur cap.

In April 2018, the MPA further set aside S\$9 million to impose the use MFMs for delivering cleaner-burning distillates bunker to international ships from July 2019. This means that all existing bunker tankers that are registered with the MPA as being used for distillates delivery would be eligible for a co-funding incentive of S\$60,000 per vessel.

The use of distillates bunkers assists shipowners in complying with the IMO's global sulphur cap. The use of MFMs reduces human intervention in measuring marine fuel being transferred between buyers and sellers, and this in turn helps to reduce disputes between sellers and buyers, and bolsters the efficiency of MFO bunkering operations at the port of Singapore.

GTDT: What are the key regulatory and compliance issues for your country's shipping market?

EC, ML, JS & SC: Generally, there is a reduction in the use of both capital markets funding and bank financing in the ship financing industry. Banks, which were traditionally the industry's main source of funding, have become more selective in their lending to shipping companies following the global financial crisis and in light of the increased regulations under Basel III and the upcoming implementation of Basel IV.

Since 2014, tough trading conditions in the shipping industry have stemmed the flow of capital markets transactions. The oversupply of ships, depressed freight rates, unsustainable debt and negative macroeconomic environment have led to a slowdown in capital markets activity. There has been a dramatic reduction in the use of capital markets funding by the industry from US\$23.2 billion in 2014 to US\$10.3 billion in 2015 and to approximately US\$1.8 billion in the first eight months of 2016.

The shipping industry has been exploring alternative funding, and export credit agency (ECA) financing has become one of the most popular sources of alternative funding in recent times. While ECAs accounted for a mere 10 per cent of shipping and offshore-related debt finance before 2008, their contribution increased to over 33 per cent in 2016.

While there has been a lot of European banks exiting the market, a growing number of Asian banks that are entering the market. In particular, there is an emergence of Chinese leasing companies in shipping. They have been gaining popularity in recent years and are said to be exploring setting up offices in Singapore.

Singapore's finance, legal and accounting expertise as well as a position as a clearing house for maritime finance transactional information enables shipowners and shipbuilders to respond effectively to the current market. Not only are



Justin Seet



Samantha Ch'ng

they able to obtain financial advice, they can also obtain advice on the latest analytical techniques for financing structures, credit assessment and risk mitigation.

GTDT: What are the shipping industry's current sources of finance? How do you predict they will develop, and what are the advantages and challenges to financing a vessel in your country?

EC, ML, JS & SC: Reduction of sulphur by 2020

As mentioned above, the 2016 the IMO announced that it aims to reduce marine fuel sulphur by 2020. Under the new global cap, ships will have to use marine fuels with a sulphur content that is no more than 0.5 per cent by 1 January 2020 – this is a marked reduction from the current limit of 3.5 per cent. Necessarily, this would lead to a significant increase in cost to shipowners, refiners and bunker suppliers. Shipowners will have to be ready for the increased cost of compliant low sulphur fuel oil, or higher priced marine gas oil, unless they are prepared to retrofit their vessels to run on alternative clean fuel such as LNG fuel or methanol, or install exhaust gas cleaning systems.

International Convention for the Control and Management of Ships' Ballast Water and Sediments

Also, as a result of the Ballast Water Management Convention, which was implemented in Singapore in September 2017, unmanaged ballast water is not to be discharged within Singapore port waters unless it is necessary for the purpose of ensuring the safety of a ship in emergency situations or saving life at sea. The master of the ship is to ensure that the relevant conditions under the BWM.2/Circ.62 are complied with.

GTDT: Have there been any recent significant domestic or foreign court decisions or arbitration awards that impact on your country's shipping market?

EC, ML, JS & SC: Singapore's highest court, the Court of Appeal issued its decision in May 2018 confirming that a lien over sub-freight and sub-hire (lien) is a registerable charge under the Companies Act (Cap 50) (CA).

A Singapore-incorporated company had entered into a bareboat charter party (BBC), as the charterers, with the defendant Greek ship-owners. Pursuant to clause 18 of the BBC, the Owners would have a 'lien upon all cargoes, sub-hires and sub-freights belonging or due to [the charterers], or any sub-charterers and any Bill of Lading freight for all claims under this Charter . . .'. The charterers then entered into a pooling arrangement with a sub-charterer, and earned revenue from chartering the vessel to the sub-charterer, which in turn employed the vessel in the pooling arrangement.

The charterers subsequently filed for winding up in Singapore. The owners sent their first lien notice to the sub-charterer purporting to exercise a lien over their unpaid sub-hire to the charterers. The charterers were eventually wound up, following which the owners sent a second lien notice to exercise a lien over bill of lading freight, payable by the consignee of the cargo on board the vessel to the charterers. The charterers' liquidators sought a declaration that the owners' lien was a registerable charge under section 131 of the CA, which should now be void against the liquidators as it had not been registered in Singapore within 30 days after its creation. The owners argued that the lien should not be deemed to be a registerable charge.

The High Court held that a contractual lien is a registerable charge under section 131 of the CA. The court reasoned that a contractual lien is a form of security interest that amounts to a floating charge and that it can also amount to a charge on

THE INSIDE TRACK

What are the particular skills that clients are looking for in an effective shipping lawyer?

An effective shipping lawyer must be able to explain what may be otherwise be considered as complicated aspects of maritime law in a straightforward manner so that the essential points are distilled and easily understood.

Apart from a high level of technical skill, a comprehensive understanding of the industry is a must to recognise the intricacies of the practice, the challenges that may be faced at each juncture, and the benefits that may be gained from taking certain steps. In this regard what may arguably be the most important is the ability to see the big picture and not get bogged down by small issues that may arise.

It is also imperative that a shipping lawyer is adaptable to the fluidity of each situation, so advice may be given in a practical and innovative manner, and strategic advantages can be captured in each situation.

What are the key considerations for clients and their lawyers when arranging finance for a shipping transaction?

Key considerations for a transaction and what security would be appropriate depends on the type of financing or refinancing, eg, whether the transaction relates to the building of new ships or the purchase of existing ships, whether it involves a single ship or multiple ships, etc.

These factors consequently have an impact on, inter alia, the identity of the borrower, what type of security would be sought (eg, whether a guarantee is to be issued by the holding company or shipowner), and whether financing is provided by way of secured lending or leasing.

Separate to considerations of the type of security, since it is almost always the case that the revenue generated by the charter would be used as interest payment or repayment of the loan to the lender, another important aspect is the charter party contract, which varies depending on which party is to retain possession and control over the ships.

What are the most interesting and challenging cases you have dealt with in the past year?

Together with Ince & Co Singapore LLP, we advised the owners of the tanker, ALNIC MC, which was involved in a collision with the US Navy destroyer, the USS *John S. McCain* on 21 August 2017.

Interestingly, both Singapore and Malaysia claimed the collision occurred in their national waters. This stems from a dispute over the sovereignty of the Pedro Branch Island (4.6 nautical miles from the collision). In 2003, both countries submitted the issue of sovereignty to the International Court of Justice (ICJ). In 2008, the ICJ ruled in Singapore's favour. In 2017, Malaysia applied for a revision of the 2008 ruling (the Application). There is now more certainty as Malaysia applied in May 2018 to withdraw the Application and the window for revision has now lapsed.

What is heartening is that Singapore and Malaysia have not let the dispute hamper humanitarian efforts in respect of the collision.

Edgar Chin, Moses Lin, Justin Seet and Samantha Ch'ng
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a book debt. In this regard, the owners' lien falls within the meaning of a 'charge' under section 131 of the CA, either as a floating charge under Section 131(3)(g) or as a charge on book debts under section 131(3)(f).

The Court of Appeal upheld the High Court's decision and held that the lien is registerable (in line with the position in England, see *Western Bulk Ship owning III A/S v Carbone Maritime Trading APS and others* [2012] 2 Lloyd's Rep 163) and that it should be characterised as a floating charge and hence registerable under section 131(3)(g) of the CA.

The Court of Appeal acknowledged the commercial inconvenience and impracticality of requiring registration of the lien, especially if the charter is for a short duration or for a single voyage, and if registration may even be required after the charter has come to an end (when there are further sub-freights yet to fall due). The Court of Appeal also acknowledged that companies and their officers are exposed to fines and penalties under section 132 of the CA if the duty to register charges is not complied with. Notwithstanding this, the Court of Appeal stated that commercial

consequences of requiring registration cannot change the nature of the security (ie, that it is a floating charge and hence registerable).

Interestingly, the Court of Appeal opined that in the event of default by the charterer, which is when the issue of the lien arises, the shipowner can usually avail itself of remedies other than the lien (eg, to suspend performance or to exercise a lien over the cargo) as it would often be more difficult to ascertain the identity and contact details of the sub-charterers, and '[I]n most cases, the reality is that by the time the shipowner is looking to exercise the lien on sub-freights, it would probably be too late to do so because by then the sub-freights would have been paid over to the charterer. Hence, in most cases, the consequences of non-registration are likely to be muted.'

The Court of Appeal concluded that, nonetheless, it remains an uncontroversial fact that the requirement of registration of liens is hugely inconvenient and impractical, and may have a negative impact on the local shipping industry. In light of this, the Court of Appeal suggested that it may be appropriate for the

legislature to examine suitable reform to carve such liens out of the reach of section 131 of the Companies Act so as to maintain Singapore's competitive edge as a leading maritime hub. This position is in line with the position of Hong Kong where liens have been expressly excluded from the registration regime by section 334(4) of the Companies Ordinance (Cap 622) (HK). It remains to be seen whether the legislature will heed this call but until then, it is clear that liens involving Singapore incorporated companies are registerable under Singapore law.

GTDT: What is the outlook for your country's shipping market?

EC, ML, JS & SC: The remainder of 2018 is looking steady, to put it in the simplest terms. There is an expectation that the factors that supported the freight rate increases of 2017 will continue in 2018 – a return of higher trade volume growth and a further increase in fuel prices, triggering higher fuel surcharges, among others. A long-awaited recovery is indeed in place, albeit more sluggish than expected. In terms of profitability, 2018 will be somewhat comparable to 2017, instead of being the banner year that was anticipated.

Marine and offshore related companies will be seeing a better year in 2018 as orders slowly return due to improving demand for oil. Global crude oil price increased since the start of the year to finish 2017 on a high note, and the advance continuing into 2018 may see demand for crude oil finally gathering steam.

On the technology front, the MPA has also put in place an MOU with NUS Enterprise for the Maritime Technology Acceleration Programme. The key challenge is to convince the large corporates to embrace the open innovation approach, which involves sharing information and committing resources to work with external innovators, especially young tech start-ups. It is yet to be seen how successful these initiatives will be and their impact on the large shipping market in Singapore.

In a conservative industry, with the maritime people having continued to do what they want because they could, it has now been realised that this is no longer viable. If market participants do not ride along with the changes, they will lose relevance. Still, there is an expected and forecasted recovery in the shipping market that will occur between 2018 and 2019, followed by an upturn in the oil and gas industry between 2020 and 2021 that would give the maritime industry a further lift. By then, it is crucial that Singapore is poised to ride the wave of changes.



“Marine and offshore related companies will be seeing a better year in 2018 as orders slowly return due to improving demand for oil.”

SHIPPING IN SPAIN

Pedro Maura holds a law degree from the University of Deusto (1972) and an LLM in law from the University of Southampton, England (1975–76). Pedro was an arbitrator for the Commerce Arbitration Tribunal within the Chamber of Commerce, Industry and Navigation of Bilbao (1990) and an arbitrator for the European Network for Dispute Resolution in the area of Euro Arbitration (2000). He is a member of the Spanish Maritime Law Association.

Between 1973 and 1975, Pedro worked for Maura & Aresti Ltd, ship agents and insurance brokers, in the vessel dispatch, canvassing, freight closing and claims departments. In 1976, Pedro joined the Bar Association and in the same year joined Fernando Meana Green & Co. He became a partner in 1978.

Pedro has more than 40 years of professional experience and has worked on numerous cases of maritime law, maritime employment law, international negotiations, litigation and arbitration, both nationally and internationally.

F Javier Zabala is head and legal director of the Meana Green Maura & Co office in Bilbao. He has a wide experience in shipping and transport matters. He is specialised in wet and dry shipping as well as in road transport. His clients include shipowners, P&I Clubs, freight forwarders, marine underwriters and contactors and service companies in the offshore energy industry. His practice covers all the firm's main contentious practice areas such as shipping, energy and offshore, international trade and insurance and reinsurance.

He also has a particular in-depth experience in the law and practice of pollution from ships having been involved in some of the most relevant oil spill cases in Spain. Javier is a frequent speaker on shipping and transport law seminars both in Spain and abroad and he is a professor in shipping and international law at University of Deusto (Bilbao) and ISDE (Madrid).

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GTDT: What is the current state of the shipping industry in your country?

Pedro Maura and F Javier Zabala: It is undeniable that Spain has a privileged geographical position in the world. Being located at the gates of the Mediterranean Sea, with access to the Atlantic Ocean, the Bay of Biscay, having a frontier port at the Strait of Gibraltar, and one of the last ports on the way to the Americas (Canary Islands), has undoubtedly benefited Spain in terms of both the shipping trade and the fishing market.

These, along with other relevant reasons – Spain has one of the longest sea coasts of the world (7,268 kilometres according to the World Resources Institute) – has ensured an ancient marine tradition and a great interest by Spaniards in the sea and the benefits that can be obtained from it.

With 2,300 vessels registered at the Spanish Ship Registry (200 more than in 2015), in 2017 – according to Spanish State Ports – Spanish seaborne trade grew by 6.4 per cent, up to 361.8 million tonnes (MT), while for general cargo it increased by 4.8 per cent, up to 122.6 MT. It is remarkable that these figures do not take into account international transit, which totalled 51.7 MT (11 per cent more than the previous year).

As far as the container trade is concerned, according to the EuroMediterranean World Container Map 2018, Spain has six ports ranking within the 50 more important ports of the Mediterranean by containers, having transported over 117.51 million 20-foot equivalent units (TEUs) in 2017. Together, ports of Algeciras and Valencia received almost 50 million TEUs in 2017. In 2018, these figures are expected to increase considerably.

Not only is the transport of goods' market in Spain thriving, but shipbuilding also keeps increasing. A good example of how Spanish shipyards are improving their production and benefits is the semi-private shipbuilding company Navantia. After having suffered great losses during the 2008 economic crisis, the company has been able to turn its luck, and is currently building army ships for the Spanish Navy as well as for foreign countries' navies (such as Saudi Arabia and Australia). The company has introduced in its production some modern tools (ie, 3D printers for complementary elements of the vessel) and is developing a new concept called Shipyard 4.0.

Another key sector of the shipping trade in Spain is the transport of passengers, which is directly affected by tourism and the peninsula-islands transport. In 2017, Spain surpassed the United States to become the world's second most visited country – behind France – being visited by almost 82 million tourists, who spent almost €87 billion in the country, according to the UN World Tourism Organization.

It is also worth mentioning that Spain – as a member of the EU – is the country that most

benefits from the EU's aid and investments. Between 2000 and 2013, Spain alone received almost 40 per cent of the total funds invested by the EU in member states' ports (€6,800 million).

For a country with only 46 million inhabitants and a GDP of US\$1.3 trillion in 2017 (2.12 per cent of the world economy), it is safe to say that the above-mentioned data shows the Spanish shipping market is clearly thriving.

GTDT: What are the prevailing shipping market trends affecting your country?

PM & FJZ: For the maritime industry in Spain, 2017 was a successful year and the prospects for 2018 are also encouraging. Apart from the general increase of container-trade in Spain, another sector that has grown exponentially is the cruise sector. For the first time in its history Spain surpassed 9 million visitors coming on board cruise vessels in 2017. If we talk about the number of Spanish cruise passengers, Spain has become the fourth most important market in Europe, overtaking countries like France. In general, the turnover generated by the cruise sector in Spain is over €1.48 million.

Moreover, the number of contracts for the construction of specialised vessels has also increased in Spain. In terms of compensated gross tonnage, Spain is the first country in the European Union, third in the world, in construction of vessels for the fishing industry, the second country in the world in the construction of oceanographic research vessels and second country in the EU in tugboats. Of the total of vessels being constructed in Spanish shipyards, among others, 39 per cent are for the fishing industry, 26 per cent are tugboats, 9 per cent are passenger vessels and 6 per cent are tankers. In addition, Spanish shipyards focus on vessel maintenance and repairs increased their turnover by more than 5 per cent.

While it is true that there is an oversupply in the construction, maintenance and repairs of vessels worldwide, the strict environmental regulations that are coming into force in European, North America and Asian ports will serve as an incentive for the scrapping and renewal of the most pollutant and obsolete vessels, which could help in balancing the market situation. Spanish shipyards are an example of constant innovation and ongoing adaptation to the market and have constructed the first three big tugs in Europe driven by liquefied natural gas and diesel.

Furthermore, Spanish companies are developing and helping to investigate other technological and innovative projects that will have a great impact in the industry. This is the case of the projects to improve the operational safety of maritime transport using satellite navigation technology. Another example is the research centre that will be installed in Spain to help develop the hyperloop project. The hyperloop will



Pedro Maura

allow to transport containers that have arrived at the port of Valencia to Madrid in 30 minutes, where today this transport is normally done by rail and takes around five hours.

GTDT: *Are there any recent domestic or international political or legislative developments that may have an impact on your country's shipping market?*

PM & FJZ: The escalating trade dispute between the United States and the European Union is a significant international political development. We have already seen how the US administration has imposed tariffs on certain products and how the EU has retaliated with trade barriers. Nonetheless, the real fear is not the impact of these first measures, but the possibility that this spiral of protectionism is the beginning of a trade war on a global scale, which will have a damaging impact on the global shipping market and not just Spain.

In parallel, as the US is taking a step back, China is occupying these spaces. The Mediterranean Sea is an area of special interest for Chinese companies. A few years ago, Chinese companies acquired Greek ports so that once they entered through the Suez Canal they could better transport their products to Eastern Europe. Recently, the Chinese company COSCO Shipping Ports bought 51 per cent of Noatum, the leading operator of port terminals in Spain, including the ports of Valencia, Bilbao and Las Palmas and the dry ports of Madrid and Zaragoza, with the idea of entering Europe from the south. This Chinese strategic plan of investing in Spanish ports and infrastructure will be to the detriment of northern European ports such as Rotterdam or Hamburg.

Furthermore, as the withdrawal date of the United Kingdom's exit from the EU approaches (March 2019, unless a ratified withdrawal agreement establishes another date), it is important to understand the legal repercussions

this will have once the UK becomes a 'third country'.

Unless a transitional arrangement is agreed, as of the withdrawal date, EU laws will cease to apply to the United Kingdom. The consequences in the shipping market will be considerable. For example, all scheduled services falling within the scope of article 6 of Regulation (EC) No. 725/2004 of the European Parliament and of the Council of 31 March 2004, on enhancing ship and port facility security, such as ferry links between the United Kingdom and Spain, will be subjected to the mandatory provision of security information set out therein. Other examples of Brexit's effects include the end of non-discriminatory access to provision of public maritime services and port services, and the end of mutual recognition of seafarers' certificates and marine equipment approvals.

Elsewhere, following Commission Regulation (EU) No. 651/2014, of 17 June 2014, the Spanish government issued several royal decrees with the aim of officially supporting the maritime construction industry in respect of research, development and innovation and the access to export credits for the construction of vessels.

GTDT: *What are the key regulatory and compliance issues for your country's shipping market?*

PM & FJZ: The primary source of innovation in respect of regulatory and compliance issues continues to be the Spanish Navigation Act 2014 (SNA). The SNA was the product of years of negotiation and debate between the Spanish parliamentary draftsmen, interested committees and vested private maritime interests and it is widely regarded as having brought Spain's maritime legislation from the 19th to 21st century.

Regulatory developments have been marked not only by domestic change but also



F Javier Zabala

by international developments. Stevedoring arrangements in Spain have received much attention from the European Commission (EC), creating significant tension between the traditional suppliers of stevedoring services and port authorities. Spain has, in recent years, been an active signatory of international instruments of maritime law including, most recently the Rotterdam Rules having been joined only recently by Holland as one of the few European nations to have ratified the same.

In respect of carriage of goods, therefore, article 277 (2) of the SNA provides that, in respect of contracts for the carriage of goods by sea, whether domestic or international, the rights under the bill of lading and the liability of the carrier continues to be governed by the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed in Brussels on 25 August 1924. But once the Rotterdam Rules come into force, then the legal framework will change, including provisions relating to, most importantly, the liability regime in multimodal (involving a phase of sea carriage) transport.

In addition to the obligations assumed by virtue of its ratification of the Athens Convention, the Athens 2002 protocol has become widely applicable to the carriage of passengers in Spain since 31 December 2012 by reason of the operation of EU Council Regulation 392/2009. This EU regulation, intended by Europe to dynamise the protocol of 2002 on the carriage of passengers and the International Maritime Organization guidelines for implementation of the Athens Convention adopted in 2006, is now fully applicable in Spain and further applies to ships of classes A and B pursuant to Council Directive No. 98/18/EC of 17 March 1998 on safety rules and standards for passenger ships.

A significant element of regulatory change (and source of uncertainty and tension) has

been the reform of the system of stevedores in Spanish ports. Spain was reluctantly drawn into reform of the stevedoring sector by reason of enforcement proceedings brought by the EC destined to achieve the liberalisation of the port services. Prior to the reform, there existed a monopoly over the supply of stevedoring services, and the hiring of stevedores, a monopoly that was finally addressed by way of Royal Decree 8/2017 and which provokes continued threats of and actual industrial by the established stevedoring companies and the stevedoring unions. In a market where transport by sea is a vital part of the national infrastructure, and which has seen a significant growth in container traffic, the legal insecurity caused is to be deprecated and will hopefully be resolved as a priority.

The Ballast Water Management Convention, which was ratified by Spain by means of Instrument of Ratification dated 20 July 2005, entered into force on 8 September 2017 by virtue of its publication in the Spanish Official State Gazette on 22 November 2016. Not quite a year from its entry into force, no significant enforcement activity by the Spanish authorities can be reported.

Further international developments in container traffic have been introduced by the Resolution of the Directorate of the Merchant Marine of 16 June 2016, which introduced the new SOLAS container mass verification requirements although again, no significant regulatory impact can be reported from the same.

In the area of port state control, a function reserved to the Directorate of the Merchant Marine, and specifically their agents in this respect, the Harbour Masters, while historically there have been complaints of overzealous and unnecessary attention being directed to merchant vessels by the accredited inspectors, this has diminished, although there has been an increase in the inspection and sectioning of vessels for



"Spain has a well-developed and detailed legal registral infrastructure."

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non-compliance with emissions controls and specification of sulphur content in hydrocarbons burned on board.

In spite of the broadness of the language used in the Maritime Labour Convention, and its potential effect on the maritime employment relationships, no particular regulatory disturbance can be reported to date, although it may be noted that for vessels flying the Spanish flag, the Directorate of the Merchant Marine issued a clarification, on 18 April 2013, that the categories of persons who are not to be considered 'seafarers' for the purpose of the convention, which has done much to promote legal certainty in respect of this instrument.

GTDT: *What are the shipping industry's current sources of finance? How do you predict they will develop, and what are the advantages and challenges to financing a vessel in your country?*

PM & FJZ: Traditionally, the Spanish shipping industry's main source of credit have been Spanish banks. Despite some uncertainty flowing from previous tax lease scheme, and the challenges thereto under European legislation, this had been largely addressed by the 'new' scheme launched in 2012. Uncertainty has once again arisen, however, by the recent decision of European Court of Justice (ECJ) overturned a decision of the General Court of the European Union (GC), which had itself annulled the decision of the EC on December 17 2015 (Joined Case T-515/13 and T-719/13, *Spain*

and Others v Commission). The EC decision had determined that certain tax measures associated with the Spanish tax lease system constituted illegal state aid and were partially incompatible with the internal market. The matter has been referred back to the general court. The Spanish tax lease system, which was seen as very favourable to the tax shipbuilding industry, will doubtless suffer from this uncertainty, as will the ship sector.

The regulatory frame for the financing of new builds has certainly improved with the modernisation of the applicable legislation in the SNA.

Spain has a well-developed and detailed legal registral infrastructure for the protection of the interests of those financing ship purchase and ship-building. It has two merchant registries, the ordinary registry and a second registry based in the Canaries that offers significant tax benefits but that require specific corporate structures in order to have the benefit of the same. Further, flexibility is introduced by article 94 of the SNA, which permits, in certain circumstances, a Spanish vessel to be temporarily flagged in the place of residence of the charterer for the duration of the charter and for any other type of chartering contract that temporarily transfers possession of the vessel.

An advantage to those seeking ship finance in Spain is the degree to which Spain can be said to have a transparent framework as regards the rights of priorities of the financiers of ships. Spain is a signatory of and has implemented the Geneva Convention on Maritime Liens and Mortgages 1993, which some regard as offering greater

THE INSIDE TRACK

What are the particular skills that clients are looking for in an effective shipping lawyer?

Effective shipping lawyers must have a sound knowledge of the applicable substantive and procedural law that will help to guide clients along the best potential course of action, together with a general knowledge and understanding of foreign laws that may assist to evaluate other available and more favourable options in other jurisdictions.

Due to the international nature of the shipping business, working on a 24/7 basis is also required, together with the capability to lead teams and work from different backgrounds and locations.

A last, but still truly relevant, skill is imagination. An effective shipping lawyer must be able to provide solutions and think out of the box, to provide clients with innovative solutions that, despite being grounded on the applicable law, may set the path to new case law.

What are the key considerations for clients and their lawyers when arranging finance for a shipping transaction?

A safe and sound jurisdiction will undoubtedly create an adequate environment for profitable financial operations.

Despite some degree of uncertainty due to the recent decision of Grand Chamber of EU on the Joined Case T-515/13 and T-719/13, the outcome of this should only affect previous finance operations, whereas the new tax lease scheme, launched in 2012, received a decisive endorsement from the EU Court of Justice, which dismissed the case brought by Netherlands Maritime Technology against the European Commission's decision of 20 November 2012, approving such tax lease system.

On top of that, players in the finance sector must perceive a flexible, safe and active system that allows players to interact

and provides efficient and ad hoc solutions to the different scope of situations (ie, defaults, insolvencies, etc).

What are the most interesting and challenging cases you have dealt with in the past year?

We have been involved in some very interesting cases (some are still ongoing) in the past year. A court in Spain had the opportunity to render a judgment on a multi-million liability coverage case, involving the owners of a floating production storage and offloading vessel and their insurers against the liability insurer of a Spanish manufacturer of one of its key elements.

Another court has condemned, after more than four years of proceedings (due to the intervention of witnesses and experts from many different jurisdictions) a major freight forwarder for the relevant demurrages incurred by nearly 70 containers at port of destination in Iran. Although this judgment has already been appealed, it sets a clear and accurate view on the interpretation of the time bar regime, applicable to actions related to demurrages, calculation of these and, more importantly, liability of the involved freight forwarder independently of its inclusion – or not – in the bills of lading.

Last but not least, there was the matter of a fire on board a ferry vessel, which resulted in the constructive total loss of said vessel. The fire exemption of the Hague Visby rules, against the claims instigated by different cargo interests, will be tested by the court in Palma de Mallorca in the following months.

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certainty and definition to the marine financier. Spain is also one of the few states to have ratified and implemented the Arrest Convention 1999.

By way of overall comment, it seems undeniable that the most recent decision of the ECJ will have a negative effect on Spanish ship finance, due to its dependence on the aforementioned tax lease system.

GTDT: Have there been any recent significant domestic or foreign court decisions or arbitration awards that impact on your country's shipping market?

PM & FJZ: The following are the most significant decisions issued by either European and Spanish courts that have caught our attention recently.

- In connection with the recent SNA, the Commercial Court of Palma de Mallorca issued on 14 July 2016 (Stc 234/2016) a resolution of great relevance, as the court expressly confirmed the availability for claimants to

exercise a direct action against P&I insurers, either alongside an action exercised against the policyholder or individually. While this possibility existed before the enactment of the SNA – as it was covered under the generic Spanish Insurance Act – it referred only to third-party liability insurers and not to P&Is. The decision issued by the Court of Appeal of Valencia (secc 9th) [Rec 450/2016, Rec] on 27 July 2016, expressly made reference to the fact that notwithstanding Spanish and EU regulations, providing that the parties to a contract can negotiate the law and jurisdiction governing that contract, this option will only be available while the UK remains in the EU.

- The court followed the application of article 468 of the SNA, which provides that clauses of submission to a foreign jurisdiction or arbitration abroad shall be null and void and considered not to be included when they have not been negotiated individually and separately. Our new law further provides that

the insertion of a jurisdiction or arbitration clause in the printed conditions of any of the contracts referred to in the previous paragraph shall not provide evidence, by itself, of fulfilment of the requisites established therein. This is of course without prejudice to the terms foreseen in the international conventions in force in Spain and the provisions of the European Union. Spain is a signatory country of the New York Convention and the courts will guarantee its full applicability. The same will apply to jurisdiction clauses in favour of a EU court but not to non-EU courts.

- More recently, the ECJ issued a decision of great importance for Spanish shipbuilding and its tax benefits [Case C-128/16 P, *Commission v Spain and others*, 25 July 2018]. From May 2006, the EC received complaints against the Spanish tax lease system, which – allegedly – allowed shipping companies to benefit from a 20–30 per cent price reduction when purchasing ships constructed by Spanish shipyards. On 17 July 2013, the EC decided that these Spanish fiscal measures constituted illegal state aid to companies economically interested in the purchase, ordering the recovery of the aid received by investors. The decision was later appealed by Spain (and some companies that benefited from the tax lease) to the General Court (GC). The GC’s decision, which annulled the European Commission’s (EC) previous decision, issued on 17 December, 2015. The EC appealed this decision to the ECJ and now (two and a half years later), the ECJ has finally reached a decision that overturns the decision of the GC and remits the matter back to the GC for the lower court to reconsider the matter in line with its judgment. Although this decision will not affect the ‘modified tax lease system’ introduced by Spain to palliate the effects of the 2013 EC’s decision, it will definitely affect the shipbuilding industry in Spain and its shipyards.

GTD: What is the outlook for your country’s shipping market?

PM & FJZ: As Spain is a member state of the European Union, any consideration that we make in relation to what the future of the shipping market might look like must be approached from a double point of view. Firstly, considering Spain individually, and secondly, considering Spain as a part of the European Union.

There are some key features that make Spain’s shipping market a potential winning area to bet for its future.

Firstly, following the recent legislation, Spanish stevedores will undoubtedly affect positively the quality of stowage services, while reducing transport prices for shippers and consignees.

Notwithstanding the above, Spain’s ports should keep a wary eye on Tanger-Med and the difficult competition that this non-EU port poses for any Mediterranean port.

Moreover, Spain is one of the six EU countries (along with France, Italy, Slovenia, Croatia and Hungary) that will benefit from the Mediterranean Corridor Development Plan 2020 (now moved to 2030), which is approximately 3,500 kilometres long, and will provide a multimodal transport connection between Western Mediterranean ports and the heart of the EU. According to the Spanish lobby pushing to fulfil this EU project, it will positively affect over 54 per cent of EU citizens as well as 66 per cent of EU’s GDP. This project will reduce prices on goods being transported between EU countries, and will undoubtedly increase tourism in the regions benefiting from it.

The Mediterranean Project is being developed within the trans-European transport network, which is directed to unify Europe’s coastline boosting growth and competitiveness in Europe’s single market.

Finally, in a market where there is an increasing awareness of the potential of LNG as marine fuel in a regulatory environment with ever more stringent emissions controls, progress is being made in the development of this energy source. Balearia is the first Spanish shipowner to adapt one of its passenger vessels to this fuel although given that Spain is a member state of the EU, there are relevant rules with which any EU shipowner must comply when converting to LNG and which regulate such a conversion. In addition to this, the former Spanish company Naturgy is one of the leading suppliers of LNG.

SHIPPING IN THE UNITED ARAB EMIRATES

Rania Tadros is the managing partner of Ince & Co's Dubai office. Rania qualified as an English solicitor with Ince & Co in London in 2000 and relocated from London to Dubai in 2013 with her family. Rania has over 19 years' experience in international commercial arbitration and maritime litigation. She is currently advising in numerous disputes varying from simple charter disputes to complex multiparty cross-jurisdictional disputes.

Rania has advised on a number of shipping disputes concerning the Middle East, which have included casualty investigations. She has particular experience dealing with groundings in the Suez Canal and the UAE, and was part of the team that handled the Tropic Brilliance grounding as well as the Ever Smart collision in Jebel Ali in 2015.

Her practice focuses on shipping and offshore energy disputes as well commercial support to companies in the shipping and offshore sectors. She regularly advises her

clients on matters arising from utilisation of vessels and offshore structures, limiting and excluding liability, contractual disputes and providing general legal support to companies operating in the offshore arena.

Pavlo Samothrakis is a partner at Ince & Co Dubai and qualified as a solicitor with Ince & Co in 2008. Pavlo specialises in shipping, international trade and energy, and offshore sectors, dealing with a range of matters including charter party and bill of lading disputes, and casualty work. He advises on matters, including drafting of charter parties.

Mohamed El Hawawy is a partner at Ince & Co Dubai. He joined the firm in 2013, and specialises in litigation and dispute resolution. Mohamed advises on contentious and transactional shipping matters, including ship arrest and salvage. He also advises clients in the insurance and aviation sector on reinsurance disputes and air carriage disputes.





Rania Tadros



Pavlo Samothrakis

GTDT: What is the current state of the shipping industry in your country?

Rania Tadros, Pavlo Samothrakis and Mohamed El Hawawy: The plunge in oil prices and the general slowdown in the container market has had a significant impact on the shipping industry in recent years. While the shipping industry in the country has been affected by this in much the same way as other maritime centres, the UAE's strength lies in its strategic position as a logistics centre in the Middle East and its leading port companies continue to see year-on-year growth. The UAE comprises of seven emirates – Dubai remains the major maritime centre, but other emirates also make their own important contribution to the shipping industry. The UAE benefits from its vital geographic location connecting the Red Sea, East Africa and the Indian subcontinent.

Dubai is the third-largest centre for port operators in the world. The Jebel Ali port operated by DP World is the largest port in the Middle East and world's ninth-largest container port. It is reported that more than 5,500 companies work in the maritime sector in Dubai, supporting the economy with 76,000 jobs. In 2017, Dubai's GDP increased by 2.8 per cent compared to the year before and the transportation and storage sector are reported as the biggest contributors to the GDP at 18.5 per cent. Transport and logistics sectors are key to the UAE's economic growth.

Abu Dhabi ports have also shown continuous growth as the UAE's maritime trade hub covering general and bulk cargo, container and increasing roll-on and roll-off traffic. There is an influx of

investment into the new container terminal at Khalifa Port. Fujairah is another maritime hub in the UAE and its infrastructure will be subject to further development by Abu Dhabi Ports including deepening of berths and expanded storage facilities, which reportedly involves investment of 500 million dirhams.

The UAE hosts a number of large shipowners including branches of international owners. The offshore industry in the UAE is weathering the storm relatively better than in some other parts of the world, with vessel utilisation rates in the region being higher than the global average. The UAE remains an important base for a number of offshore shipowners.

The UAE government has maintained its efforts and goals to create conditions for the growth of the industry and increasing importance of the UAE as a major maritime centre.

GTDT: What are the prevailing shipping market trends affecting your country?

RT, PS & MH: The country's unique position in the market can be attributed primarily to the UAE's geopolitical position and the vision of the UAE government. The government has recognised the need for diversification in light of global economic crises and, more recently, the declining oil price and the strategic vision of the country is to build on the strength of the country by focusing on technology, innovation and continuous growth of Dubai as a logistics centre.

The country is preparing to EXPO 2020, which drives substantial investments in the transport



Mohamed El Hawawy

“It is hoped that the introduction of the new Arbitration Law, together with the recent set up of the specialised maritime arbitration centre in the Emirates Maritime Arbitration Centre, will attract more parties willing to resolve their maritime disputes in the UAE.”

and logistics sectors. The UAE is also set to benefit from China’s ‘One Belt One Road’ initiative.

GTDT: *Are there any recent domestic or international political or legislative developments that may have an impact on your country’s shipping market?*

RT, PS & MH: After almost a decade in the making, the UAE has introduced the new Arbitration Law in May 2018. The new law replaces articles 203–218 of the UAE Civil Procedures Code, which have previously governed domestic arbitration proceedings. While the new law did not bring about a dramatic change, it did improve on certain provisions adding certainty and clarity to the UAE onshore arbitration process. The most significant changes are the improvements to the process for enforcement and challenge of domestic arbitral awards. It is worth noting that the UAE has two free zones (Dubai International Financial Centre (DIFC) and Abu Dhabi Global Market), which have their own arbitration regulations and they remain unaffected by the new Arbitration Law, which will only apply to onshore proceedings. It is hoped that the introduction of the new Arbitration Law, together with the recent set up of the specialised maritime arbitration centre in the UAE (Emirates Maritime Arbitration Centre), will attract more parties willing to resolve their maritime disputes in the UAE.

The UAE remains in need of a new maritime law, with the current Maritime Code dating back to 1981 and lacking in a number of areas to properly cater for the country’s growing importance as an international shipping centre.

The government has started working on a new draft law. Input is being provided by civil law and common law lawyers to identify best practices and solutions. There is no set date for when the law will be introduced but the maritime community is watching this space with great interest. It is hoped that the new law will address a number of issues including making changes that would transform the UAE into an attractive flag state.

A further development is the introduction of value added tax (VAT) in the UAE in January 2018. The standard VAT rate is set at 5 per cent. The international transportation industry is one of the few industries subject to zero rate VAT. However, the full implications on the shipping industry remain to be seen. Notwithstanding this development, the UAE remains an attractive place for the shipping industry because of its largely tax-free policies.

GTDT: *What are the key regulatory and compliance issues for your country’s shipping market?*

RT, PS & MH: The sanctions against Iran remain a relevant issue in the UAE, as has been the case for a number of years. Despite the suspension of the US and the EU sanctions regimes in January 2016, the majority of UAE banks remain reluctant to do any business involving Iran for the fear of repercussions from their American banking partners, which made it difficult for businesses to pursue their legitimate trade with Iran. The reimposition of sanctions by the United States announced in May 2018 will now impact the trade between Iran and the UAE. The sanctions

landscape is set to be difficult to navigate in the year ahead, as at the time of writing the European Union remains committed to the suspension of sanctions and is suggesting that it will introduce blocking regulations to counteract the effect of the US sanctions.

The UAE introduced an embargo against Qatar in June 2017 and it remains in place at the time of writing. The embargo affects the ability of Qatari vessels to call in the UAE (and embargoing states) ports and restricts transportation of cargo originating in the Qatar between Qatar and embargoing states.

In May 2018, the UAE government announced the decision to allow 100 per cent foreign ownership of local companies in certain sectors the UAE. Until now, the UAE law requires 51 per cent local ownership for onshore companies. Although full foreign ownership has been permitted in the numerous free zones across the country, the trading activity of such free zone companies is subject to significant restrictions. Therefore, this change, once implemented, will represent an important step towards encouraging foreign investments in the UAE market, including the shipping industry.

The UAE is also preparing to ratify the Maritime Labour Convention and as part of that process the Federal Transport Authority has introduced the mandatory insurance requirement. The FTA's Circular No. 1 of 2018, which entered into force on 20 February 2018, requires all UAE flagships and all foreign flagships operating in the UAE water of 200 gross tonnage and more to have insurance in place with identified insurance providers to cover certain financial liabilities to seafarers.

GTDT: What are the shipping industry's current sources of finance? How do you predict they will develop, and what are the advantages and challenges to financing a vessel in your country?

RT, PS & MH: Traditional ship financing in the UAE has been fairly quiet in the past year. There is some availability of local capital, which sets it apart from many other jurisdictions, but with that the activity remains limited. The international banks remain cautious and have not established dedicated shipping desks in the UAE. This has presented an opportunity for local UAE banks to build stronger relationships with local shipowners.

Difficulties remain for owners and operators to get consistent financial support. The lending requirements and cost of funding from traditional finance sources continue to increase. There are indications that the government is considering the challenges faced by the local market and is working on the solutions to address them. With that, Islamic finance has proven itself to be a competitive method of funding for the shipping industry in the UAE.

GTDT: Have there been any recent significant domestic or foreign court decisions or arbitration awards that impact on your country's shipping market?

RT, PS & MH: Ince & Co has recently acted for the successful claimants in an important case before the Dubai World Tribunal (DWT), which is the first reported case in the UAE that acknowledges a party's ability to start pre-emptive limitation proceedings and establish a limitation fund under the Convention on Limitation of Liability for Maritime Claims 1976 (the Convention). The DWT is the tribunal established by Decree 57 of 2009 to deal with proceedings relating to Dubai World and its subsidiaries. It remains to be seen how the DWT's decision will affect the onshore courts but the judgment allows owners to seek to limit their liability in accordance with the Convention and rely on the lower limits in the UAE as opposed to those jurisdictions that have ratified the amendments to the Convention and therefore have higher limits.

Another development is that the approach of the UAE courts to enforcement of foreign arbitral awards pursuant to the 1958 New York Convention is improving. However, enforcing a foreign judgment in absence of a treaty remains a challenge. It was thought that the DIFC courts can provide an alternative avenue for enforcement of foreign arbitral awards and judgments in the UAE. However, recent decisions of the Joint Judicial Committee established by Decree 19 of 2016 demonstrated that this route to onshore enforcement of foreign arbitral awards and judgments is fraught with difficulties and in many cases can be frustrated by the defendants' starting parallel proceedings in local courts.

GTDT: What is the outlook for your country's shipping market?

RT, PS & MH: The outlook for the UAE shipping market is relatively positive. There is little doubt that the UAE, as a maritime centre, has a lot of potential.

In a recent survey conducted by Menon Business Economics Group and DNV-GL, Dubai was ranked as the 10th shipping centre out of 15 for 2017, and over 10 per cent of experts ranked it as number one of top five cities. It was also ranked in sixth place for port and logistics services highlighting its growing importance as a logistics hub for both shipping and aviation industries. Most interestingly, it was also placed in the top five for attractiveness and competitiveness, and only second in the experts' assessments of the policy framework of their own city (based on overall assessment of taxes, subsidies and regulations) and the government support of the maritime sector as perceived by the experts. All these factors point to Dubai's potential ability to climb

THE INSIDE TRACK

What are the particular skills that clients are looking for in an effective shipping lawyer?

RT: Clients in the maritime world rightly expect their lawyer to have a thorough understanding of their business as well as the legal framework in which it operates. Shipping is an international business and so a lawyer who has international exposure is essential. Like clients in many sectors, shipping lawyers also need to be responsive to their clients and be able to give definitive and clear answers in a timely fashion.

What are the key considerations for clients and their lawyers when arranging finance for a shipping transaction?

RT: In our opinion the key consideration are:

- **Availability:** this may sound obvious, but there are differences geographically and between the sectors as to what type of lender will be willing to lend at a particular time in a particular market.
- **Price:** most owners will accept more restrictive covenants and provide greater security if the price is right. This does not mean the margin alone but duration of the loan balanced with the repayment schedule.
- **Flexibility:** where underlying employment contracts are highly sought after, it is vital that owners enjoy a degree of freedom to enter into a variety of contracts, change flags or trade in some more difficult areas.

- **Trust:** finally, and most importantly, there is the personal element. Most finance documentation will be relatively lender-friendly, meaning that any obligor, not just the primary debtor but any security provider, can rely on the lender to work with them, not against them when matters are difficult.

What are the most interesting and challenging cases you have dealt with in the past year?

RT: It is difficult to choose, and interesting cases are often the most challenging too. I have had a number of cases pursuing debts for clients under the new Bankruptcy Law and those have presented a number of legal as well as practical challenges that we have had to overcome to get our clients paid. In my opinion the most interesting cases handled by our office last year relate to the right to limit liability. The question has come before both the Dubai World Tribunal as well as the local courts and it has been very interesting for all those involved to consider how international conventions operate within the UAE legal framework.

Rania Tadros, Pavlo Samothrakis and Mohamed El Hawawy
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up the rating of the major shipping hubs in the years to come.

The government is implementing a number of initiatives to ensure that Dubai's potential comes to fruition.

Dubai government has recently launched the Dubai Industrial Strategy 2030, which identifies the maritime sector as one of the six priority sectors. The strategy forecasts that Dubai's total GDP will increase by 160 billion dirhams. In the

maritime sector, the strategy aims to capitalise on the status of DP World as one of the largest port operators in the world.

Dubai is also implementing the Maritime Sector Strategy to develop, regulate and promote Dubai's maritime sector with a vision to create a leading global maritime centre. The Dubai Maritime City Authority is implementing the strategy and is leading the initiatives in the maritime sector.

SHIPPING IN THE UNITED KINGDOM

With a broad commercial shipping practice, Kevin Cooper's clients include major international shipowners and builders, charterers, cargo owners, salvors and shipyards, and their respective insurers. After Oxford University, Kevin served in the British Navy for 10 years. Having previously worked at another firm in its London, Shanghai and Monaco offices, he joined MFB in June 2018, where he continues to have a broad shipping and marine insurance practice.

Kevin's admiralty practice involves high-value multi-jurisdictional cases such as the collision between the container vessel *MSC Joanna* and the hopper dredger *W D Fairway* in Tianjin in 2007, the grounding and subsequent collision of the *Khalijia 3* in Mumbai in 2010, the *Altantik*

Confidence sinking in 2013 and the *Norman Atlantic* ferry fire in 2014. He also handles a wide range of charter party, cargo claim and shipbuilding matters.

Kevin's earlier experience as a criminal court advocate in the navy is now employed acting as an advocate in arbitration and mediation proceedings. He also advises on corporate ethics, crime and regulatory matters, especially anti-corruption policies and procedures.

Kevin is dual-qualified as a solicitor and a barrister, regularly chairs and speaks at shipping sector events and has particular industry contacts in the passenger vessel sector and, regionally, in Norway, Italy, Spain, Portugal and the Americas. He speaks French, German, Swedish and Mandarin Chinese.

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GTDT: What is the current state of the shipping industry in your country?

Kevin Cooper: The UK is one of the leading maritime centres in the world. Its shipping industry contributes approximately £10 billion to UK GDP and directly supports about 180,000 jobs. Many international shipping companies choose to manage some or all of their fleet from the UK, while a number of shipowners are based in the country. UK companies directly own about 13.4 million tonnes deadweight of trading tonnage, while UK companies have a controlling interest in 39.4 million deadweight tonnes.

In addition, the UK maritime industry extends beyond the pure shipping sector to include ports, marine equipment and business services (eg, brokers, financiers, insurers, lawyers and consultants). As a whole, the UK maritime industry contributes about £37.4 billion to the UK's economy and supports around 950,000 employees.

Specifically, the UK ports industry is the second largest in Europe, handling more than 480 million tonnes of freight in 2016 (the most recent published figures). There are about 120 commercial ports in the UK, including major all-purpose ports, ferry ports, specialised container ports and ports catering for specialised bulk traffic, such as coal or oil. There are also a large number of smaller ports catering for local traffic or specialising in particular sectors, such as fishing and leisure boating. The UK ports industry handles 95 per cent of UK import and export by volume and directly employs approximately 100,000 people.

The UK marine industry's key market sectors include leisure, military, commercial and offshore renewable energy. Marine systems and equipment form an important element of the UK's exports. While the military equipment sector is important, the global merchant shipping industry provides a massive potential market for commercial systems and equipment. The UK also has a growing super-yacht industry, which in 2017 posted its fifth consecutive year of growth, with a turnover of around £615 million a year and over 4,000 employees. Many leading international yacht designers are based in the UK. The leisure marine sector mixes service and manufacturing, from surveyors and charterers to specialist equipment manufacturers. There is also a fast-growing cruise industry.

The UK leads the world in respect of marine insurance, with a 35 per cent share of global marine insurance premiums, and 60 per cent of protection and indemnity insurance. Furthermore, 26 per cent of global ship-broking is undertaken in the UK.

The UK government is committed to the training of seafarers. The UK's maritime education and training infrastructure is important in producing the next generation of maritime

professionals. It is estimated that just over 23,000 UK seafarers were active at sea during 2017.

The UK is home to leading maritime regulatory bodies, such as the International Maritime Organization (IMO) and the International Association of Classification Societies (IACS). The Baltic Exchange, an independent source of maritime market information for the trading and settlement of physical and derivative contracts, is also based here. The following influential maritime business service provider bodies are also located in the UK: the UK Chamber of Shipping, Maritime London, UK Major Ports Group, British Ports Association, British Marine, the Society of Maritime Industries, the Admiralty Solicitors Group, and the Shipbuilders and Shiprepairers Association. These all help to support and promote the UK marine industry.

London is a leading centre for maritime financing. It also provides leading arbitration and mediation services to the global industry, from the London Maritime Arbitrators Association, the London Court of International Arbitration and the International Dispute Resolution Centre.

The figures stated above are taken from the UK government's own statistics and a CEBR report commissioned by Maritime UK, published in September 2017. Maritime UK is an association of shipping, ports and maritime business services sectors in the UK.

GTDT: What are the prevailing shipping market trends affecting your country?

KC: The global shipping market has experienced challenging times in recent years, following the 2008 financial crash. A slump in the shipping market, with deflated oil and commodity prices, together with overcapacity in some sectors, has affected shipping worldwide, not just the UK. The effects have been seen in the reduced amount of ship finance transactions that are taking place and the amount of finance available to the shipping market, but also in the amount of business being placed in the London insurance market. That said, UK lawyers, courts, and arbitration and mediation bodies have been involved in a large amount of disputes that have arisen as a result of adverse market conditions, either because UK-based parties are involved or because the relevant contracts are governed by English law or submission to the jurisdiction of the English courts or arbitration in London, as the common jurisdiction of choice for companies in the shipping sector. There have been a number of major insolvencies among international shipping companies, which have often led to domestic rehabilitation proceedings, the impacts of which have been felt worldwide.

The increasing digitalisation of the shipping market has also played a significant part in changing the way the market does business. The digital revolution that has taken place across many



sectors has revolutionised shipping processes and has brought with it benefits in security, efficiency and energy savings.

GPS navigation, real-time weather data feeds and smart containers are just some of the technologies redefining the movement of goods. The IMO has actively supported the implementation of automated electronic data exchange from ship-to-ship and ship-to-shore to increase the efficiency, safety and security of navigation and communications. Ship operation and maintenance have also been affected by these technological advances. On-board machinery and equipment has become highly advanced. Digitalisation have opened up a huge market and brought with it many new business opportunities, but the use of digital navigation systems and interconnected data leaves ships potentially exposed to cyberattacks and accidental data leakage. These can also lead to potential issues of legal liability, business interruption and extortion.

Major shipping organisations continue to raise awareness of cybersecurity risks. For example, the IMO has sought to address concerns surrounding cyberattacks on ships and, indeed, the International Safety Management Code and the International Ship and Port Security Code address cybersecurity vulnerabilities. In the meantime, the Baltic and International Maritime Council (BIMCO) produced its own guidelines on cybersecurity on board ships in February 2016 to assist the shipping market in protecting itself against these risks. BIMCO also published a statement in November 2016 supporting the IMO's work to develop voluntary cybersecurity guidelines with further recommendations.

Subsequently, in June 2017, the IMO Maritime Safety Committee approved various measures intended to enhance maritime security, including adopting a resolution that cyber risk management form part of ships' safety management systems going forward.

The UK government, as part of its national cybersecurity strategy, published a Cyber Security Regulation and Incentives Review in 2016. The UK's strategy included a five-year plan estimated to cost £1.9 billion and is aimed at making the United Kingdom a safe place to live and do business online. More recently, the UK implemented the EU Network and Information Security Directive into domestic law on 10 May 2018. Also, the recent implementation of the General Data Protection Regulation (GDPR) has cybersecurity implications, increasing pressure on shipping companies to tighten their cybersecurity and to adopt improved practices.

The international refugee crisis has posed many challenges for the maritime sector for some years, including the practical difficulties of dealing with the rescue of distressed persons at sea. For example, the Italian government's recent decision to close its ports to migrants rescued by vessels operated by humanitarian non-government organisations (NGOs) raised concerns as to how this could affect the Mediterranean trade traffic, as well as potentially having serious implications for the safety of life at sea. As merchant vessels are required to come to the rescue of any person in distress at sea under the IMO's Safety of Life at Sea Convention, the withdrawal of NGO vessels could result in greater pressure for merchant vessels to commit to more rescue missions.

“Irrespective of the outcome of the UK’s trade discussions with both EU and non-EU countries, English law is likely to continue to be chosen to govern international contracts and transactions.”

Maritime piracy, which posed a significant threat to the shipping market for many years, including taking a significant financial toll, is generally in decline. The number of piracy incidents is at its lowest level since the late 1990s, according to the IMO. Modern maritime piracy reached its peak around 2011, with Somali pirates attacking hundreds of ships off the coast of Africa. Since then, counter-piracy operations, including military intervention, have largely successfully suppressed these incidents. According to Oceans Beyond Piracy, the total economic costs of Somali piracy in 2017 was US\$1.4 billion, compared to US\$7 billion in 2010. Nonetheless, a spike in piracy events in the Horn of Africa in the spring of 2017, including the hijacking of *Aris-13*, indicates that Somali criminal networks are still capable of sophisticated attacks. Piracy also remains a threat in other areas, such as the Gulf of Guinea and the Malacca Straits.

GTDT: Are there any recent domestic or international political or legislative developments that may have an impact on your country’s shipping market?

KC: Brexit is the key political development of recent years for the UK shipping market. Although the UK and EU agreed, in March 2018, provisional terms for a 21-month Brexit transition period to run until the end of 2020, political uncertainty remains as negotiations on the question of Customs Union membership, particularly the arrangements on the Irish border, continue. Until the UK’s future trade relationships with EU and non-EU countries have been decided, there may be a temporary slowdown in UK maritime traffic and more muted growth, at least in the short term.

In the long term, however, Brexit is not expected to have a dramatic effect on total UK maritime volume, particularly once new trade agreements between the UK and other EU and non-EU countries have been concluded.

London’s prominence as a major insurance, legal, broking and general shipping services hub means that many businesses that are currently based in the UK, or that do significant business with the UK, will not move or take their business

elsewhere. Indeed, some businesses that currently operate abroad may choose to move to the UK once EU laws cease to be applicable.

The UK tonnage tax regime is not derived from EU law, but rather it is governed by domestic legislation. The UK is currently required to comply with EU state aid law but, as and when it no longer needs to do so, there may be a relaxation of the rules, which could encourage more UK tonnage.

There are potential employment law implications for the UK following Brexit. The laws that govern employment on board ships are predominantly found in the Maritime Labour Convention 2006, an international convention, rather than being derived from EU law, but a number of EU employment regulations have been incorporated into domestic law and will likely continue to be in force after the UK leaves the EU. Similarly, environmental and safety regimes affecting the shipping market are primarily embodied in international conventions rather than being limited to EU regulations, and it is expected that key EU environmental regulations will continue to be incorporated into UK domestic law following Brexit.

Irrespective of the outcome of the UK’s trade discussions with both EU and non-EU countries, English law is likely to continue to be chosen to govern international contracts and transactions. The Lord Chief Justice supported this view in a speech at Beijing in 2017, in which he offered the opinion that Brexit will have no significant adverse impact on English law and on London’s thriving arbitration and litigation services. English court jurisdiction and London arbitration institutions are also likely to remain the preferred choices for dispute resolution among international contracting parties: there are more arbitration proceedings seated in London each year than in Singapore, Paris, Stockholm, Geneva, Dubai and Hong Kong combined.

The Trump presidency is another potentially significant international political development. However, while the United States is the largest economy in the world, it is only the sixth-largest shipping nation and owns less than 7 per cent of the world merchant fleet. Nonetheless, increased protectionism on the part of the US and more



“The risk of increased protectionism in Europe remains uncertain, with contrasting elections in the EU resulting in stark momentum swings between populism and liberalism.”

trade barriers, as proposed by President Trump, may impact on global trade generally.

A hardening of US sanctions against countries such as Iran in particular, as indicated by its withdrawal from the Joint Comprehensive Plan of Action may also have an adverse effect on the shipping market. Conversely, however, the recent summit between Trump and Kim Jong-Un may see a loosening of the sanctions on North Korean-owned vessels. Any effect from the sanctions will be felt on the global shipping market, and not just by the UK.

The risk of increased protectionism in Europe remains uncertain, with contrasting elections in the EU resulting in stark momentum swings between populism and liberalism. For instance, the Dutch election in March 2017 resulted in the defeat of the far right, who are anti-immigration and anti-EU, labelled as ‘the Dutch Trump’. Some commentators also described the French elections, which took place in May 2017, as ‘pitting liberalism against protectionism’, which liberalism appears to have won with the election of Emmanuel Macron. However, the rise to power of the anti-establishment parties in Italy, Europe’s fourth-largest economy, at the election in March 2018, tells a different story.

GTDT: What are the key regulatory and compliance issues for your country’s shipping market?

KC: The UK is subject to a wide range of regulatory legislation under domestic, regional (at least until the implications of Brexit become clear) and international law. The latter includes resolutions and conventions sponsored by various UN agencies, such as the IMO.

In recent years, the IMO and the EU have been particularly active on environmental regulation, reflecting the global initiative to reduce ship emissions and pollution of the marine environment. From an international point of view, the IMO periodically proposes and adopts amendments to revise the key convention in this area – the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78). In relation to ship emissions, it has done so with revisions to MARPOL Annex VI, which came into force on 1 July 2010. The EU has also become increasingly active when regulating maritime safety and the marine environment. Indeed, the EU regime is, in some cases, more stringent than the international framework. Among the more significant regulations in this area are the international and regional restrictions on sulphur emissions, which have a considerable impact for owners and operators, particularly affecting operating costs and their contractual arrangements. In addition, the Ballast Water Management Convention came into force in September 2017. This convention addresses the problem of unwanted marine organisms having

damaging impacts on local ecosystems through their unintended transportation in ships' ballast tanks. Under the convention, ships are required to manage their ballast water to remove, render harmless or avoid the uptake or discharge of, aquatic organisms and pathogens in ballast water and sediments.

The Maritime Labour Convention 2006 (MLC) was ratified by the UK on 7 August 2013 and came into force, for the UK, on 7 August 2014. The MLC aims to ensure minimum standards for seafarers' employment at sea; it is often referred to as the seafarer's 'bill of rights'. It is important for shipowners and ship operators to understand the impact of their obligations under the MLC. Its scope is very wide: it aims to achieve protection for all seafarers. This is reflected in the broad definition of 'seafarer' as being 'any person who is employed or engaged or works in any capacity on board a ship to which this Convention applies'. The intention is to cover all persons employed or working on board the ship, in any capacity whatsoever, including the self-employed. Enforcement is through a combination of 'compliance awareness' at all levels, flag state control and port state control.

The UK's Modern Slavery Act 2015 came into force on 31 July 2015 and addresses the rise of new forms of slavery. These include imposing an obligation on companies with a turnover of over £36 million or greater to disclose what they are doing to eradicate slavery within their supply chains. Shipowners, particularly those with links to the UK, need to ensure that they have adequate anti-slavery and anti-trafficking policies in place. They may be particularly affected as an industry because, in some circumstances, the legislation provides for the forfeiture of vessels that have been used (or were intended to be used) for such trafficking. The act consolidates the UK's existing anti-slavery legislation and is a response to the increased public awareness of these issues. It makes it an offence to knowingly hold another person 'in slavery or servitude', to make them 'perform forced or compulsory labour' or, importantly for shipowners, to 'arrange or facilitate the travel of another person' with a view to their being exploited. Shipowners maintaining a part of their business in the UK with a turnover of £36 million or greater should invest resources in investigating their supply chains in order to publish annual statements, as required by the Act. Those to whom the Act does not apply directly are well advised to investigate their supply chains anyway, to enable their contractual counterparties in the UK to satisfy their own obligations under the Act. Further, shipowners need to be aware of and address the risk of ship forfeiture. There may be a significant risk of the complete loss of vessels because conventional insurance taken out by most shipowners may not cover the forfeiture of a vessel in these circumstances. In October 2017, the UK government released updated guidance on, among

other things, section 54 (the Transparency in supply chains and reporting obligations). It is not meant to change the law but serves as important guidance and encourages organisations with turnovers below the £36 million mark to produce a section 54 statement voluntarily. The Act may also have future additional compliance implications; there is proposed legislation currently under consideration by Parliament to amend the Act that includes requiring commercial organisations and public bodies to (mandatorily) include a statement on slavery and human trafficking in their annual report and accounts.

The UK's Bribery Act 2010 (the Bribery Act) came into force on 1 July 2011 and replaced previous UK anti-bribery and corruption laws that comprised a mix of common law and various old statutes. The Bribery Act has extraterritorial reach, in that any UK subject or company can be liable in the UK under the act for their business practices abroad. In addition, non-UK companies will potentially be affected if they have a UK office or presence, even if the offences complained of were not approved or financed by the UK branch or subsidiary. The new offence created by the Bribery Act that remains of most concern to international companies is a corporate offence of failing to prevent bribery that, broadly, creates liability where a company benefits from bribery committed by an 'associated person', even when the company did not know the bribery was taking place. The only defence to a substantiated allegation that a company has failed to prevent bribery is that it had adequate procedures in place to prevent the conduct complained of. Penalties that may be imposed for breach include unlimited fines for the corporate offence and fines or imprisonment (or both) for other breaches.

In addition, on 27 April 2017, the Criminal Finances Act 2017 (CFA 2017) received royal assent, meaning that it is now law. The act introduces a new offence of failing to prevent the facilitation of tax evasion, as well as changes to certain aspects of the current anti-money laundering and counterterrorism financing regimes. There was speculation that, as part of this financial crime reform, the government would take the opportunity to apply the principles of the corporate offence of failing to prevent bribery to include a failure by an organisation to prevent other economic crimes (such as fraud and false accounting). This has not, however, been included in the CFA 2017, although such an amendment might be introduced in the future.

In August 2016, the UK Insurance Act 2015 (the Insurance Act) came into force. It introduced the most significant changes to commercial insurance law in the UK for at least 100 years. The changes have a significant impact on both insurers and insureds, creating new obligations for both. One important feature of the Insurance Act is that a breach of an insurance warranty no longer automatically discharges insurers from further

liability under the insurance contract. Instead, the contract is suspended until the breach of warranty is remedied. In addition, an insurer is not liable to pay any part of a fraudulent claim and may recover any money paid in respect of that claim prior to discovery of that fraud. There is also a greater emphasis on the insurer to ask questions about the risk and to make clear what information it requires (a positive duty of inquiry). It is possible to contract out of certain provisions of the Insurance Act in non-consumer insurance.

From May 2018, the GDPR came into effect throughout the EU (including the UK). This regulation applies throughout the EU and is aimed to ensure adequate security measures are in place in handling, processing and storing of data of all individuals. Failure to comply with this regulation could see companies facing fines in the range of €20 million or 4 per cent of the companies' annual global turnover (whichever is the greater). This regulation impacts on the shipping industry as a whole, particularly where a large volume of sensitive and personal data may be held or where it is likely, for operational purposes, used beyond international borders.

GTDT: What are the shipping industry's current sources of finance? How do you predict they will develop, and what are the advantages and challenges to financing a vessel in your country?

KC: Traditionally, sources of lending were spread throughout European, pan-Asian and, to some extent, Australasian banks, with occasional involvement from US hedge funds, venture capital (VC) investors and the Scandinavian bond market as opportunities in vessel values and charter rates varied during the usual course of the shipping industry's economic cycle.

As successive financial crises struck, a number of long-standing traditional financiers that historically dominated the shipping market, particularly the European banks, began to withdraw from shipping, either closing their books to new business or, in some cases, running down their portfolios and exiting the industry altogether (eg, The Royal Bank of Scotland and Commerzbank). The Scandinavian bond market closed its doors, and the speculative short-term investors comprised of hedge funds and VC trusts found their immediate losses to be at odds with their short-term investment strategies, and so they too began to withdraw from the industry. Although this has been triggered by the financial crisis, other factors include the increasing regulation and scrutiny faced by the European banks, particularly as a result of the Basel Regulations and following the significant losses in recent years by these banks in the shipping industry.

The retreat of European banks provided an opportune market gap for East Asian players, particularly the Chinese banks and their

abundance of capital, to step in and build new shipping portfolios or expand existing ones. At the time of the financial crisis, the top 15 global shipping lenders did not include a single East Asian bank. Skip to 2016 and the Bank of China, China Eximbank and Korea Eximabank not only made it into the top 15, but also occupy the global second, third and fifth places respectively. While, historically, opportunistic investors have exited the market in the face of large losses, there are now potential opportunities to acquire cheap vessels as the various sub-industries (tankers, chemical carriers, oil carriers, bulkers, containers) dip and rise on the market, providing 'prospectors' with opportunities to bet on vessel values and charter rates. Traditionally, relationship banking was key but, as economic pressures mount, the need for finance by owners, and the reduction in the appetite of banks (through sub-participation or otherwise), has seen an increase in alternative sources of funding. In particular, the small- to medium-sized owners are becoming increasingly interested in alternative sources of funding such as high-yield bonds, convertible debt, capital and operating leases, as well as preferred equity structures.

In light of current issues with the global economy, those financial institutions that are still engaged with the industry, such as Credit Suisse, ING, BNP Paribas, ABN Amro and DVB, seek to limit their exposure by dealing only with the largest and strongest of owners (the credit standing of the borrower and the 'name' is key, with asset values and potential earnings seeming to play a secondary role).

The result of these pressures is likely to be greater consolidation among smaller owners to create larger fleets and thus a safer bet for the banks. If the Chinese economy is able to ride out the current storm, then we anticipate that Chinese banks and Chinese leasing companies will retain the centre stage, and it is likely that the bond market and US hedge fund model will try to compete at some level (particularly if vessel values fall in certain sub-sectors), with such entities still keen to speculate on an eventual upturn for cheaply acquired assets.

The UK is well placed in its continued service of this industry, with a wealth of experience and advisers with well-established international offices headquartered in London. English law is particularly well suited to ship finance, being one of the oldest and most stable of legal systems; it is predictable, being based upon precedent, much of which is rooted in the country's maritime tradition and supported by specialist law firms that have grown around the industry. While traditional Western shipping banks are withdrawing from the sector, in light of the international nature of the service providers that have fostered this industry, London still remains a core hub for the facilitation of transactions, even though the source of the finance may originate from more easterly shores.



“London also continues to be one of the most popular international arbitration centres in the world – if not the most popular.”

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GTDT: *Have there been any recent significant domestic or foreign court decisions or arbitration awards that impact on your country’s shipping market?*

KC: Parties to international shipping contracts commonly choose English law to govern their contracts because it is predictable and commercial. Similarly, they often choose to have their disputes resolved in the English courts because the English courts and judges have a reputation for offering quality and experience. As a result, many significant shipping decisions are heard in the English courts, and the past year has been no exception. London also continues to be one of the most popular international arbitration centres in the world – if not the most popular. While, in the UK, arbitration awards are confidential to the parties, any English arbitration award that goes to appeal will be heard by the English courts, and that judgment will be made public. There is, therefore, an impressive body of English shipping case law to guide the market in its day-to-day commercial and contractual activities.

It is not possible to do justice to all the significant case law that has been generated by the English courts in recent years, but it is worth highlighting the following.

- *The New Flamenco*. This case deals with the complex area of assessing damages for breach of a charter party where there is no available

market and what actions by the owners will be taken into account to reduce the damages they are claiming.

- *The Maersk Tangier*. A Court of Appeal decision concerning the compulsory application of the Hague Visby Rules where no bill of lading is issued, and application of the package limitation provision.
- *The Aconcagua Bay*. Determined the meaning of the warranty ‘always accessible’ often found in voyage charter parties. The court held that the warranty applies both when attempting to reach the berth and when departing from it.
- *The RENOS*. The Court of Appeal ruled that SCOPIC expenditure could be included in ascertaining whether a casualty was a constructive total loss.
- *Transgrain Shipping (Singapore) Pte Ltd v Yangtze Navigation (Hong Kong) Ltd*. The Court of Appeal provided an important clarification as regards to the apportionment of liability for cargo claims under the New York Produce Exchange Form Inter-Club Agreement.
- *The Longchamp*. The Supreme Court handed down its judgment, which was the first case the English courts have had to interpret the meaning of Rule F of the York-Antwerp Rules 1974.
- *Ocean Victory*. A Supreme Court decision in an unsafe port dispute.

- *Atlantik Confidence*. Breaking limits under the Limitation Convention 1976.

Outlined below are some highly noteworthy decisions stemming back to 2016–2017, which still remain highly noteworthy, two of which are decisions of the UK Supreme Court. The first, *The DC Merwestone*, has caused much controversy and is very important for marine insurers. Overturning the two lower court decisions, the majority of the Supreme Court upheld the insurance claim of the owners of a damaged dredging vessel, who had lied to the underwriters when presenting their claim. This ‘collateral’ lie told by the owners was held to be irrelevant to the claim being valid and, unlike a fraudulent claim, it did not provide the underwriters with a good reason not to pay out under the policy. It is expected that some insurers may decide to amend the wording of their policies as a result.

The other Supreme Court decision of note is *The Res Cogitans*. This was litigation arising out of the much-publicised collapse of the Danish-based OW Bunker Group. The Supreme Court confirmed that bunker suppliers that were unable to transfer property in bunkers supplied to a ship were nonetheless entitled to the price of the bunkers from the shipowners. This decision came as a disappointment to the shipping market and was an unwelcome outcome for those regularly entering into bunker supply contracts. It meant that many standard bunker industry forms would have to be revised to protect the position of those purchasing bunkers from bunker traders in the future.

An important charter party dispute was *Spar Shipping v Grand China Logistics*, heard by the Court of Appeal. The court confirmed that a failure to pay time charter party hire punctually will not automatically allow a shipowner to claim damages in addition to withdrawing the vessel. However, if the shipowner can show a repeated failure by the time charterer to pay hire punctually or at all, then the charterer’s breach of contract may be sufficiently serious so as to allow the shipowner to terminate the charter party and claim its losses. The prompt and full payment of hire in advance is a critical one for owners and there have been many instances of charterers defaulting on hire payments in the current market conditions, leaving owners unsure as to whether they can validly terminate the charter party. This appeal decision has hopefully resolved uncertainty arising from conflicting lower court decisions.

GTDT: What is the outlook for your country’s shipping market?

KC: The UK government is highly committed to maintaining the UK as a leading maritime centre and promoting its growth. In recognition of the UK maritime industry’s significant contribution both to the UK economy and to the global shipping market, the UK Department of

Transport published a comprehensive Maritime Growth Study in September 2015. This report was followed in January 2017 by a debate in the House of Commons on the future of the UK maritime industry. A range of actions, for both the industry and the government, were recommended. The key recommendations at the time included:

- establishing a Ministerial Working Group for Maritime Growth to coordinate interest in maritime activities across government;
- establishing a Maritime Skills Investment Fund and developing a skills strategy for the UK maritime sector;
- extending the programme of maritime apprenticeships; and
- raising the awareness of financial institutions about investment opportunities across the maritime sector.

More specifically, the Maritime Growth Study recommended reform of the UK Ship Register (UKSR) and the UK Maritime Coastguard Agency (MCA). In response, the government has been taking action to put the UKSR on a more commercial footing. In January 2017, the government appointed the MCA’s first non-executive chairman. The MCA has also appointed a new director of the UKSR, who took up his post in April 2017. Both these appointees played a leading role in shaping the future transformation of the UKSR and championing the UK flag.

Simultaneously, the MCA is working on a number of reforms to improve the quality of its services as part of a wider commitment to generate growth in the maritime sector, encourage greater investment in the UK and promote the UK flag as a world-class register that attracts quality ship-owners. A further Maritime Growth Study review was published in January 2018 and highlights the progress achieved to date and identifies further specific progress areas on which it will focus going forward. The 10 main areas identified to be addressed in the short to medium term are:

- Brexit maritime planning;
- maritime trade, export promotion and inward investment;
- championing the ports contribution to growth;
- increasing maritime growth communication and promotion;
- evolving government and industry structures; evolution of the UK ship register and MCA commercialisation;
- maritime skills, employment and education;
- a maritime industrial strategy sector deal;
- supporting and encouraging maritime innovation; and
- maritime 2050 – a long-term strategy for the maritime sector.

No doubt the focus will develop and change over the coming years, as and when key milestones are achieved.

THE INSIDE TRACK

What are the particular skills that clients are looking for in an effective shipping lawyer?

An effective shipping lawyer needs to combine solid knowledge of the law with a grasp of technical issues and sound commercial judgment. Commercial acumen is particularly important in the challenging market conditions we have been witnessing in recent years, because a value judgment often has to be made as to whether a case is worth pursuing, balancing how much it will cost with what recovery is likely to be made. The work is truly international in nature and a shipping lawyer must be fully aware of global market and other relevant developments. The lawyer must be available around the clock and must also be able to communicate advice clearly and simply: adaptability and innovativeness are essential, as well as a recognition that the law is to be used as a tool to achieve the client's commercial aims.

What are the key considerations for clients and their lawyers when arranging finance for a shipping transaction?

One key consideration for the borrower and the lender is flexibility, but their respective approaches will likely be opposing. Borrowers look for supportive, long-term relationship-driven financial partners, and expect to be supported when times are tough. However, financiers are no longer able to weather every storm and need flexibility to exit transactions through sub-participations or sales.

Borrowers require the flexibility to run their businesses as they see fit, taking decisions quickly and changing tack as

necessary to exploit an advantage, whereas lenders are often averse to risk, and seek to manage it by preserving the nature of the borrower, restricting its ability to take decisions or change how it operates.

As a result of this, the parties and their advisers must strike a balance between robust protection for a lender and freedom to operate in a commercially viable manner by the borrower. This requires industry experts, familiar with the nature of the assets and the industry in which they operate, and a spirit of cooperative, relationship-driven transaction management.

What are the most interesting and challenging cases you have dealt with in the past year?

The Atlantik Confidence has continued to keep me busy. It is a case that led to the Court of Appeal ruling on whether it is possible to establish a tonnage limitation fund by means of a P&I Club Letter of Undertaking (it is possible). This is also the first case, since the introduction of the 1976 tonnage Limitation Convention into UK law, in which the right to limit has been denied, the judge having found that the bulk carrier was intentionally scuttled. Another interesting case resulted from the fire on board the Norman Atlantic ferry in December 2014. I represented the owners and their P&I insurers and the case involved both civil and criminal proceedings in multiple jurisdictions.

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In November 2016, the UK government produced an independent report on UK National Shipbuilding Strategy. The Strategy is a reappraisal of how the UK undertakes shipbuilding, with the aim of delivering a modern strategy and making UK naval shipbuilding sustainable in the long term. With the UK government having accepted all of Sir John Parker's recommendations it proceeded to publish the report in September 2017. The Shipbuilding Strategy lays out an aggressive timetable for the Type 31e frigate and provides a means by which the Royal Navy will procure and build its new fleet of general purpose frigates. The UK has committed to a fleet of eight Type 26 frigates, the first of which is due to enter service in mid-2020. Furthermore, the UK remains committed to building Navy warships in the UK but the design and build will be open to competition rather than via a non-competitive single source contract with BAE Systems.

To a certain extent, the future of the UK's shipping market will depend on the new trade

deals that the UK government concludes with both EU and non-EU countries, post-Brexit. There is good reason for optimism, however, as the government has expressed its intention to take a global and commercial view of UK trade going forward. The government is likely to try to conclude new or improved bilateral trade agreements between the UK and countries such as the US, Canada, India and Latin American countries. It may indeed be easier for the UK to conclude advantageous trade agreements without having to obtain the approval of the other EU countries.

Statistics for the first half of 2016 showed that the UK imported more containers from Asia than any other North European country and that 15 out of the 17 Asia-northern Europe loops called at British ports. It is predicted that container lines will continue to call at UK ports at the same high volume as has been the case in the past.

SHIPPING IN THE UNITED STATES

Dan Paige has been in practice since 1995, principally in the field of international and maritime litigation. He has extensive experience in complex commercial litigation, as well as personal injury, wrongful death and insurance litigation, charter party arbitration and class actions, and maritime transactional matters. He also has a strong background in classification society litigation (representing American Bureau of Shipping for 19 years, including in the *Prestige* litigation), vessel operations, asset transactions, asset finance, equipment leasing, internet privacy, civil RICO and criminal law.

Dan is a member of the Maritime Law Association of the United States, the

Connecticut Maritime Association, the Association of Corporate Counsel and the American Bar Association. Dan currently serves as primary outside counsel to an ocean transportation company, a food import and distribution company, and is general counsel to an international members' services company. He has been counsel to an energy development corporation and was associated with the law firm of Kirlin, Campbell & Keating.

Dan is admitted to practise in New York, New Jersey, Connecticut and Maryland and numerous federal jurisdictions.



GTDT: What is the current state of the shipping industry in your country?

Dan Paige: The United States has historically been a critical player in the global shipping industry, and shipping remains a significant piece of the US economy. According to the US Bureau of Transportation Statistics, the shipping sector has contributed US\$36 billion and 65,000 jobs to the US economy. The shipping industry in the United States consists of vessel owners and operators, shipbrokers, shipbuilders, ports, equipment suppliers and manufacturers, insurers, banks and other sources of marine finance, and marine consultants (including legal, financial and technical services).

Shipping accounts for the most significant mode of transporting US imports and exports. Approximately 53 per cent of US imports are transported by water, the remainder split almost equally by air and by land. Approximately 38 per cent of US exports are transported by water, and, again, the remainder split almost equally by air and by land.

According to the US Bureau of Transportation Statistics, on average 62,000 vessels call at US ports each year, or 170 vessels per day. In 2015, the Federal Maritime Administration (MARAD) reported total calls to US ports of vessels over 10,000 deadweight tonnage at 82,044. Of those calls, 18,711 were container vessels, 13,666 were dry bulk vessels, 1,703 were gas carriers, 7,793 were general cargo vessels, 7,065 were ro-ro vessels and 33,106 were tankers. All of these movements accounted for a total of over 3 billion gross tonnes of cargo.

Containerisation, a product of US innovation, remains a major force in US cargo movements despite years of mixed economic results in the sector. Containerised cargo generally account for more than half the US cargo moved when measured as a percentage of vessel value.

The most significant imports and exports in the US are fuel and oil, accounting for approximately 22 per cent of trade cargo as measured by percentage of vessel value. In 2013, as reported by HQEconomy.com, the United States consumed approximately 19 million barrels of oil on a daily basis, or 6.9 billion barrels per year. US ‘... consumption is almost double that of the next highest user of crude, and is more than second, third and fourth place combined. We import just under half of our oil, producing the rest within our own borders.’ According to the US Bureau of Transportation Statistics, fuel and oil accounted for 32 and 22 per cent of US imports and exports by vessel value, respectively, in 2011. By value, the top five exports to the United States by vessel were:

- mineral fuel and oil;
- nuclear reactors, boilers, machinery, and parts;
- vehicles, except railway or tramway, and parts;
- organic chemicals; and
- plastics and articles thereof.

The top five imports to the United States by vessel were:

- mineral fuel and oil;
- nuclear reactors, boilers, machinery, and parts;
- vehicles, except railway or tramway, and parts;
- electric machinery, sound equipment, TV equipment and parts; and
- apparel.

During the global recession in and around 2008, US imports as measured by vessel value experienced a steep decline, in the neighbourhood of 25 per cent of pre-recession values. However, by 2011, US imports had recovered to pre-recession levels. During the same period, US exports experienced a far less severe decline, and by 2011, US exports as measured by vessel value had exceeded their pre-recession numbers.

The US maritime economy relies heavily on global trading partners and relatively low barriers to trade. China and Japan respectively have been the largest waterborne trading partners with the United States, both as sources for imports and for exports by vessel, followed by Germany, Mexico and Saudi Arabia for imports, and Mexico, Brazil and South Korea for exports. In a 2016 study, as of 2014, according to the National Transportation Statistics database, US imports by water were at approximately 760.9 millimetre short tonnes – down from 2008 levels – and US exports by water were approximately 647.8 millimetre short tonnes – significantly up from 2008 levels. Domestic transportation by water saw the movement of 937.1 millimetre short tonnes, with inland and coastal transportation accounting for 771.4 millimetre of those short tonnes.

According to MARAD, in 2011, there were over 38,700 US flag privately owned vessels available for operation in US foreign and domestic trade, predominantly comprised of dry and tank barges.

There are nearly 200 seaports in the United States. According to the American Association of Port Authorities, cargo activities at seaports contribute 23 million jobs to the US economy. Those jobs create US\$1.2 billion in income and consumption, and for every billion dollars in exports from US seaports, 15,000 jobs are created. The AAPA reports that cargo activity at US seaports account for 26 per cent of the US economy, generate US\$4.6 trillion in total economic activity, and create US\$321 billion in total tax revenues.

Cruise and Ferry transportation also contribute significantly to the US maritime economy. In the past decade, ferry transportation provided nearly 400 million passenger miles annually. In 2010, it was reported that there were 233 ferry operators serving 520 terminals employing almost 640 active vessels. Those numbers represented a significant increase over prior reporting, and the numbers are growing with new services having been recently introduced in New York City and elsewhere. Public ferry transportation operators historically



Dan Paige

employed over 4,500 people and those numbers continue to grow.

In 2010, according to the US Bureau of Transportation Statistics, the cruise ship industry contributed US\$37.8 billion to the US economy. The industry also accounted for over 300,000 jobs and US\$15.2 billion in wages. The latest statistics from MARAD show 102 cruises serving almost 11 million passengers in the last quarter of 2011.

According to a 2015 MARAD study, in 2013 there were 124 US shipyards spread over 26 states classified as active ship builders. There were more than 200 shipyards performing ship repairs. According to the study: 'In 2013, the US private shipbuilding and repairing industry directly provided 110,390 jobs, US\$9.2 billion in labour income and US\$10.7 billion in gross domestic product, or GDP, to the national economy. Including direct, indirect and induced impacts, on a nationwide basis, total economic activity associated with the industry reached 399,420 jobs, US\$25.1 billion of labour income, and US\$37.3 billion in GDP in 2013.'

Other robust US maritime-related industries include offshore and related services, ship recycling, yacht building, refit, repair and servicing, and recreational boating.

The US is also a leader in the training of seafarers. There are seven maritime academies in the United States, the US Merchant Marine Academy at Kings Point, New York and the six State Maritime Academies (SMAs): California Maritime Academy, Maine Maritime Academy, Massachusetts Maritime Academy, Great Lakes Maritime Academy, Texas A&M Maritime Academy, and the State University of New York Maritime College. MARAD, recognising the

economic and national security import of the US merchant marines, provides funding to the US Merchant Marine academy, and partial funding to the SMAs. Graduates of the maritime academies serve at sea and ashore in a variety of professions such as shipbuilding, steamship company operations and port operations.

Finally, the United States remains a critical centre for shipping dispute resolution. The US courts are a preferred venue for litigation as they are charged with the uniform application of maritime law throughout the country, and courts located in maritime centres such as New York, Texas and California are deeply familiar with the issues concerning maritime transportation. Additionally, New York is the home to the Society of Maritime Arbitrators, an organisation formed in 1963 that is recognised internationally as a leading forum for arbitration and mediation concerning maritime and commercial disputes. New York is also home to the American Arbitration Association International Center for Dispute Resolution, providing an alternative forum for arbitration and mediation services. The Maritime Law Association of the United States, formed in 1899, is a membership organisation concerned with the improvement of maritime law both domestically and internationally. Its membership includes lawyers, judges, professors and non-lawyers with significant activity and interest in the field of maritime law.

GTDT: What are the prevailing shipping market trends affecting your country?

Dan Paige: Shipping is a global industry and as such it was deeply affected by the 2008 financial

“The escalation of a trade war with US trade allies, as well as with China has created uncertainty in US markets.”

crisis. As the housing market suffered, the stock markets lost value and commodity and oil prices dropped, charter rates dropped, shipyard orders went unfulfilled, and shipping markets saw overcapacity of tonnage. This is best illustrated by reference to the Baltic Dry Index (BDI), which reflects the average raw materials over specified shipping routes on ships of a certain tonnage. During its most volatile years, 2005–2009, the BDI saw what some call a ‘bubble’ reflecting the surge in oil prices. In that time, the index went from relatively consistent levels of below 2,000 to spikes approaching 12,000. Once the financial crisis set in during 2008 and 2009, the BDI, reflecting the precipitous drop in oil and commodities prices, readjusted over the following seven years to more historical levels. The BDI’s worst year since 1985 came in 2016, coinciding with West Texas Intermediate crude priced at US\$29.41 per barrel. There were great gains in the BDI in 2017, with the 2016 low of 291.00 rising to a 2017 high of 1702.00, consistent with an uptick in crude prices and optimism in the financial markets. However, the index lost nearly half its value in April 2018, possibly coincident with trade war fears, only to nearly regain its 2017-high three months later. Bulk carrier order books remained high following the 2008 crisis, but the drop in charter rates and overcapacity (along with the time-lag between order and completion of build) finally caught up in 2013, with order books reported to be at their lowest levels since 2007–2008. The trend was up in 2014–2015, but still only about half 2009–2011 levels, and with concerns of overcapacity looming. For the first six months of 2018, iron ore freight rates are on a slight upward trend, with coal rates remaining stagnant.

Oil tanker rates were trending upward reflecting the upward trend of crude prices. During periods where futures prices are higher than spot prices, producers may use tankers for storage to wait out the markets. This can create a demand for tonnage for storage rather than transportation. The success of the US shale production has created additional demand for tanker capacity, and analysts have reported that owners have negotiated with shipyards to convert bulk carrier orders to tankers. Some analysts see higher crude demand in 2018, but an oversupply of vessels coming on line in 2018 may keep tanker

rates low. The oversupply may be mitigated by higher scrapping rates. Clarksons reported 11 very large crude carrier scrappings in 2017, the majority of those coming in late 2017.

Container trends tend to be a bit more complex and difficult to pin down. Container rates tend to reflect shifts in demand for manufactured goods, and as reported in *The Economist*, container rates were hit the hardest by the 2008 financial crisis. Since then, rate trends have been uneven, but Maersk reported a 2017 profit of \$356 million, with its carrier operator, Maersk Line, being the largest contributor to its profits. Large owners are building higher capacity ships which lead to greater efficiencies, however trends toward large-scale consolidation and container shipping alliances also affect container rates and competition in the market. According to Drewrys assessment of the World Container Index, container rates in July 2018 were down (below US\$15,00) from their January 2017 high (approximately US\$1,850).

GTDT: Are there any recent domestic or international political or legislative developments that may have an impact on your country’s shipping market?

Dan Paige: The most important, and likely most obvious, political development affecting the US shipping industry is the Trump presidency. The goals of the Trump administration to increase US manufacturing, domestic oil production and US exports are worthy. The appointment of Elaine Chao, a member of a prominent shipping family, as Secretary of the Department of Transportation was well-received by the maritime industry. While financial markets were initially buoyant and enthusiastic about the Trump administration’s domestic agenda, financial markets are recently relatively flat on concerns that the various investigations into the conduct of the Trump campaign during and after the elections will overshadow and stall the administration’s economic agenda. Additionally, the escalation of a trade war with US trade allies, as well as with China has created uncertainty in US markets.

There are a variety of political factors tied to the Trump administration’s agenda having the potential to directly affect the US shipping

economy. Increasing political hostility with Iran, including the United States walking away from the Iran Nuclear Deal and reinstatement of sanctions has led to uncertainty in the oil markets and left vessels out of work. Political hostility toward other Gulf nations, including Qatar, may lead to further trade restrictions in the region. Rollbacks of Obama-era policy toward Cuba have the potential to curtail economic gain from tourism and trade. Sanctions against Russia passed by the US House of Representatives, and charges brought against Russian operatives working to influence the 2016 US elections may widen the rift between the United States and Russia, placing more barriers to trade. However, Trump administration statements following the recent NATO and G7 gatherings may suggest otherwise. The US withdrawal from the Paris Accords has the potential to stifle US clean energy production. US clean energy exports were projected to reach 5.6 per cent of the global market by 2017, nearly double the projections for 2016. Whether this growth trend continues will depend largely on policy. Trump administration protectionist policies will likely affect US shipping. Relationships with trading partners are already strained with the US withdrawal from the Paris Accords and the Trans-Pacific Partnership, and pending threats to renegotiate the North American Free Trade Agreement and the imposition of higher tariffs on imports have the potential to chill trade.

Finally, while Trump administration rhetoric against Germany, anti-immigration policies and support for nationalist sentiment both in the United States and in Europe may serve the domestic political message of the administration, isolationism is not well received abroad, and the potential for trade to suffer as a result looms large.

GTDT: What are the key regulatory and compliance issues for your country's shipping market?

Dan Paige: The US regulatory framework applicable to shipping is extensive, and includes both domestic and international regulatory regimes. Most recognisable to any US business interest, both shipping and non-shipping related companies engaged in global trade, is the Foreign Corrupt Practices Act (FCPA). The FCPA is a US federal law that addresses both accounting transparency under the Securities Exchange Act of 1934, and, more recognisably, the bribery of foreign officials in exchange for business advantage. The FCPA applies to any individual who is a citizen, national or resident of the United States and any corporation and other business entity organised under the laws of the United States or of any individual US state, or having its principal place of business in the United States, and applies to foreign persons or companies who violate the act in the United States. Enforcement was stepped up in 2010 with the creation of a

special enforcement unit within the Securities and Exchange Commission, and as a result, a cottage industry of FCPA consultants has flourished.

Specific to US shipping, likely the most influential legislation is the Merchant Shipping Act of 1920, also known as the Jones Act. The Jones Act is a protectionist measure with a stated policy '... to encourage and aid the development and maintenance of a merchant marine satisfying the objectives ...' of the act. One of the most restrictive provisions of the Jones Act is that a vessel may not provide any part of the transportation of merchandise by water, or by land and water, between points in the United States to which the coastwise laws apply, either directly or via a foreign port, unless the vessel:

- is wholly owned by citizens of the United States for purposes of engaging in the coastwise trade; and
- has been issued a certificate of documentation with a coastwise endorsement or is exempt from documentation but would otherwise be eligible for such a certificate and endorsement.

Violation of these 'cabotage' provisions of the Jones Act are enforceable by substantial fines, or forfeiture or seizure of the cargo.

Nita Ghei, director of policy editing at the Mercatus Center of George Mason University, argues that the Jones Act falls short of its goals. 'Instead, the growing thicket of regulations increases costs for American consumers and American businesses, and it results in lost opportunities for American businesses.' Likewise, Senator John McCain, in supporting legislation to repeal the Jones Act, called the act 'an antiquated law that has for too long hindered free trade, made US industry less competitive and raised prices for American consumers'. Repeal of the Jones Act is opposed by maritime unions (supporters of Secretary Chao), and will likely not be supported by the Trump administration, which has been known to favour protectionist measures. However, there are complexities in the implementation of the Jones Act, particularly concerning offshore equipment supply, that could tilt the Trump administration either way. So far, there is no policy position concerning the Jones Act from the Trump administration.

GTDT: What are the shipping industry's current sources of finance? How do you predict they will develop, and what are the advantages and challenges to financing a vessel in your country?

Dan Paige: Over the past two decades, the sources of ship finance have shifted from predominantly debt financing to larger and larger percentages of equity financing. In 2000, equity finance made up only a tiny fraction of total global shipbuilding finance, whereas by 2015, shipbuilding finance was nearly equally split

between debt and equity. As a result of the 2008 financial crisis, banks all but stopped lending in the industry, and many banks left the industry suffering heavy losses in the process. Several shipowners credit large growth over the last few years with increased access to capital markets, while some in the industry caution that many new suppliers of ship finance are unfamiliar with the industry. That, coupled with a potential lack of transparency in smaller operators, may create a risky scenario. The result is an attraction to larger fleets with lower credit risk and the potential for smaller operators to be overlooked by financing sources. As reported in the *Financial Times*, some credit the growing sophistication of operators and investors with growth of equity finance, while others feel the growth of equity finance coincided with the overcapacity issues following the financial crisis. However it ultimately plays out, the United States is and will likely remain a major source of both bank and capital market financing for the shipping industry.

GTDT: *Have there been any recent significant domestic or foreign court decisions or arbitration awards that impact on your country's shipping market?*

Dan Paige: US and English lawyers will debate the relative merits of their arbitration regimes to the end of time, but from this lawyer's perspective, maritime arbitration in the United States remains robust, and brings with it the advantages of lower fees and more transparency and predictability with reporting of arbitration awards. The US courts, particularly the federal courts situated in maritime centres, are well versed in the body of US maritime law, and thus are a favoured jurisdiction internationally. There is constant development of US law related to shipping, but probably the most prominent are the recent bankruptcy proceedings related to OW Bunkers and Hanjin Shipping.

The OW Bunkers bankruptcy created a flow of litigation, wending its way through courts in many US jurisdictions. The main issues raised by the litigation are who, if anyone, is entitled to maritime liens as suppliers of vessel necessities (bunkers) under the US Commercial Instruments and Maritime Liens Act. The litigation has resulted in conflicting rulings from the various jurisdictions as to whether, if any, the physical suppliers of the vessel fuel, OW Bunker (the trader, but in contractual privity with the vessels), or ING Bank (the assignee) are entitled to maritime liens against the vessels for fuel supplied to the vessels. According to IHS Fairplay, as of February 2017, there were '... nine OW-related district court rulings that have been appealed to the appellate court level in four circuits: six cases in the Second Circuit, and one each in the Fifth, Ninth, and Eleventh Circuits ...' The case has great importance to the US and global shipping



"Maritime arbitration in the United States remains robust, and brings with it the advantages of lower fees and more transparency and predictability with reporting of arbitration awards."

THE INSIDE TRACK

What are the particular skills that clients are looking for in an effective shipping lawyer?

A shipping lawyer, like any lawyer, must be carefully attuned to the needs of the individual client. Shipping clients are each unique in their goals, and a good shipping lawyer recognises that there is no one-size-fits-all approach to serving its clients. Technical knowledge, understanding global trade and trading routes, and familiarity with the various domestic and international regulatory regimes, as they apply to the vessels and their cargo, are essential. Finally, a balance between transactional experience and litigation experience allows the lawyer to see around the corner in terms of transactional risk avoidance in structuring a deal.

What are the key considerations for clients and their lawyers when arranging finance for a shipping transaction?

There are so many approaches to vessel finance that it is key that the client and the lawyer have a meeting of the minds as to the short- and long-term goals of the transaction. While a client may have relied on a single structure, method or financier in the past, that same model may not fit the present needs of the client. A client must pursue the short term needs of obtaining financing while being cognisant of the short-term lender or investor's goals of maximising security and

minimising risk, goals that are inherently at odds with one another.

What are the most interesting and challenging cases you have dealt with in the past year?

On the sale and purchase side, we were recently engaged on a scrapping deal that posed great challenges. An owner entered into a scrapping deal with Indian buyers at a very favourable price per tonne for the vessel. It appeared too good to be true, and in fact, was. While the vessel was at anchorage, the buyer informed our client that the port authorities found discrepancies and would not allow the vessel into port. They apparently also became aware that the vessel's class certificates were near expiration on arrival at the anchorage. Opportunistically, the buyers engaged in renegotiation of the sale price, knowing that the vessel was not being allowed to enter the port and that the vessel could not sail from the anchorage without valid class certificates. After long hours of negotiation over great distances, we were in the end able to force the buyers to complete the transaction with little concession from our client.

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community in terms of security for suppliers of vital vessel fuel.

The Hanjin Shipping bankruptcy had its roots in the 2008 financial crisis, when the container industry suffered US\$15 billion in losses, according to the Journal of Commerce. Hanjin's own financial statements reported a loss of \$1.1 billion in 2009. But the end came suddenly when Hanjin's creditors, including the Republic of Korea, pulled their support for restructuring in August of 2016. Two days later, with over 100 ships on the water, Hanjin filed for bankruptcy. While the Korean bankruptcy court issued a worldwide stay preventing creditors from seizing Hanjin assets, US creditors with federal maritime liens were threatening the arrest and attachment of Hanjin assets, including vessels, as they entered US ports. Hanjin petitioned the US Bankruptcy Court, under Chapter 15 of the Bankruptcy Code, to recognise the Korean bankruptcy proceeding as a main foreign proceeding. This had the effect of invoking the US bankruptcy law automatic stay. Practically speaking, the US bankruptcy court, hearing the claims of a wave of creditors, was able to block the enforcement of maritime liens so that the vessels could enter US ports without fear of arrest or attachment, and billions of dollars of

goods in transit could then be landed in the US and delivered to their consignees.

GTDT: What is the outlook for your country's shipping market?

Dan Paige: At the end of 2017, Moody's presented a stable general outlook for the shipping industry, taking into account a continuing, but not worsening oversupply in the container sector, excess supply in the tanker sector keeping profits low and slow improvement in the dry bulk sector. However, it appears the US government and the current administration are committed to the continued growth of US industry. The US economy is strong, unemployment is low and confidence is high. The Trump administration, however, is faced with the need to balance its idealistic goals with the United States' position in the global economy. Alienating our trading partners, exiting trade agreements and pursuing protectionist policies arguably weaken trade and growth, which may ultimately weaken the US shipping industry. So far, however, trade over water remains strong in the United States, with Panjiva reporting December 2017 seaborne shipments up 3.8 per cent, and up a total of 4.1 per cent for 2017.

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