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

A&L GOODBODY
ABOU ALI LAW FIRM & P&I CORRESPONDENTS
ADVOKATFIRMAET THOMMESSEN AS
ALI BUDIARDJO, NUGROHO, REKSODIPUTRO
BOSE & MITRA & CO
BOWMAN GILFILLAN
BURKE & PARSONS
CHAPMAN TRIPP
DABELSTEIN & PASSEHL
ERSOY BILGEHAN LAWYERS & CONSULTANTS
FENECH & FENECH ADVOCATES
FOUNDATION CHAMBERS
GORRISSEN FEDERSPIEL
HAVIARAS & PHILIPPOU LLC
HOLMAN FENWICK WILLAN
IN LAW OFFICE
JORQUIERA & ROZAS ABOGADOS
JOSEPH & PARTNERS
Acknowledgements

KINCAID – MENDES VIANNA ADVOGADOS ASSOCIADOS
LEXCELLENCE LAW OFFICE
MORGAN & MORGAN
PALACIOS, PRONO & TALAVERA
PRAMUANCHAI LAW OFFICE CO LTD
RAJAH & TANN SINGAPORE LLP
RUGGIERO & FERNÁNDEZ LLORENTE
SABATINO PIZZOLANTE ABOGADOS MARÍTIMOS & COMERCIALES
S FRIEDMAN & CO
SAN SIMÓN & DUCH
SEWARD & KISSEL LLP
STEWART MCKELVEY
STUDIO LEGALE MORDIGLIA
VERALAW (DEL ROSARIO RABOCA GONZALES GRASPARIL)
VGENOPOULOS & PARTNERS
YOSHIDA & PARTNERS
CONTENTS

Editors’ Preface ................................................................................................................ix
James Gosling and Tessa Huzarski

Chapter 1 COMPETITION AND REGULATORY LAW .........................1
Anthony Woolich and Daniel Martin

Chapter 2 MARINE INSURANCE ...................................................10
Jonathan Bruce and Alex Kemp

Chapter 3 OCEAN LOGISTICS .....................................................19
Catherine Emsellem-Rope and Tessa Huzarski

Chapter 4 PIRACY ....................................................................27
Michael Ritter and William MacLachlan

Chapter 5 PORTS AND TERMINALS ..........................................35
Matthew Wilmsburst

Chapter 6 SHIPBUILDING ..........................................................41
Simon Blows and Vanessa Tattersall

Chapter 7 SHIPPING AND THE ENVIRONMENT .........................49
Max Thompson and Matthew Dow

Chapter 8 ARGENTINA ...............................................................58
Gustavo Ruggiero and Alejandro Fernández Llorente

Chapter 9 AUSTRALIA .................................................................71
Gavin Vallely, Simon Shaddick and Reid Bettridge
Chapter 10  BRAZIL.................................................................................................91
Camila Mendes Vianna Cardoso, Godofredo Mendes Vianna and
Lucas Leite Marques

Chapter 11  CANADA......................................................................................102
William Moreira QC

Chapter 12  CHILE ......................................................................................116
Ricardo Rozas

Chapter 13  CHINA .....................................................................................131
Nicholas Poynder, Laura Wright and Jean Cao

Chapter 14  CYPRUS ..................................................................................144
Andreas Haviaras

Chapter 15  DENMARK ..............................................................................154
Jens V Mathiasen and Christian Benedictsen-Nislev

Chapter 16  EGYPT .....................................................................................166
Gamal A Abou Ali and Tarek Abou Ali

Chapter 17  ENGLAND & WALES ..............................................................179
James Gosling, Rebecca Warder, Max Thompson and
Tessa Huzarski

Chapter 18  FRANCE....................................................................................199
Mona Dejean

Chapter 19  GERMANY................................................................................216
Olaf Hartenstein, Marco Remiorz and Marcus Webersberger

Chapter 20  GREECE....................................................................................227
Paris Karamitsios, Richard Johnson-Brown and Dimitri Vassos
Chapter 32  NIGERIA.................................................................425
L Chidi Ilogu and Adedoyin Adeloye

Chapter 33  NORWAY ............................................................440
Stephen Knudtzon and Andreas Meidell

Chapter 34  PANAMA..............................................................451
Juan David Morgan Jr

Chapter 35  PARAGUAY.........................................................462
Juan Pablo Palacios Velázquez

Chapter 36  PHILIPPINES.......................................................473
Valeriano R Del Rosario, Maria Theresa C Gonzales,
Daphne Ruby B Grasparil and Jennifer E Cerrada

Chapter 37  RUSSIA...............................................................485
Igor Nikolaev

Chapter 38  SINGAPORE........................................................494
Dominic Johnson, Anders Wiklund, Kendall Tan and See Bin Koh

Chapter 39  SOUTH AFRICA..................................................514
Jeremy Prain

Chapter 40  SPAIN .................................................................526
Luis de San Simón

Chapter 41  SWITZERLAND.....................................................536
William Hold

Chapter 42  THAILAND..........................................................545
Pramual Chancheewa, Sken Kongkaew and Thanakrit Srirasa

Chapter 43  TURKEY..............................................................559
Zihni Bilgehan, Ekin Dünya Şabin and Emre Ersoy
## Contents

<table>
<thead>
<tr>
<th>Chapter 44</th>
<th>UKRAINE ................................................................. 567</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Vagif Mallayev, Victoria Konograi and Inga Drobinova</td>
</tr>
<tr>
<td>Chapter 45</td>
<td>UNITED STATES ................................................................ 583</td>
</tr>
<tr>
<td></td>
<td>Raymond J Burke Jr, Stephen P Kyne, Christopher H Dillon,</td>
</tr>
<tr>
<td></td>
<td>William F Dougherty, Keith W Heard and Michael J Walsh</td>
</tr>
<tr>
<td>Chapter 46</td>
<td>VENEZUELA .................................................................. 604</td>
</tr>
<tr>
<td></td>
<td>José Alfredo Sabatino Pizzolante</td>
</tr>
<tr>
<td>Appendix 1</td>
<td>ABOUT THE AUTHORS .................................................... 617</td>
</tr>
<tr>
<td>Appendix 2</td>
<td>CONTRIBUTING LAW FIRMS' CONTACT DETAILS ....................... 647</td>
</tr>
<tr>
<td>Appendix 3</td>
<td>GLOSSARY OF TERMS ..................................................... 655</td>
</tr>
</tbody>
</table>
This book aims to provide those involved in handling wet and dry shipping disputes in multiple jurisdictions with an overview of the key issues relevant to each jurisdiction. We have sought contributions on the law of leading maritime nations, including both major flag states and the countries in which most shipping companies are located. We also include chapters on the law of the major shipbuilding centres and a range of other jurisdictions.

Building on our first edition last year, we begin with cross-jurisdictional chapters looking at the latest developments in important areas for the shipping industry internationally: competition and regulatory law, marine insurance, ocean logistics, piracy, ports and terminals, shipbuilding and environmental issues.

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

The authors review the vessel safety regime in force in each country, along with port state control and the operation of both registration and classification locally. The applicable environmental legislation in each jurisdiction is explained, along with the local rules in respect of collisions, wreck removal, salvage and recycling.

Following the entry into force of the 2002 Protocol to the 1974 Athens Convention last year and the Maritime Labour Convention in 2013, passenger and seafarer rights are also examined and contributors set out the current position in each jurisdiction. The authors have then looked forward and have commented on what they believe are likely
Editors’ Preface

to be the most important forthcoming developments in their jurisdictions over the coming year.

The shipping industry continues to be one of the most significant sectors worldwide, with the United Nations estimating that commercial shipping represents around US$380 billion in terms of global freight rates, amounting to around 5 per cent of global trade overall. More than 90 per cent of the world’s freight is still transported by sea. The law of shipping remains as interesting as the sector itself and the contributions to this book reflect that.

This past year, a key issue within the shipping industry has been environmental regulation, which is becoming ever more stringent. From January 2015, the limit for sulphur content within emissions control areas has fallen from 1 per cent to 0.1 per cent. Tier II limits on nitrogen oxides emissions have been in place globally since 2011. Tier III, which represents a significantly more stringent regime than Tier II limits, will be implemented in emissions control areas from 2016. Further, also from 2016, the United States Clean Air Act will introduce a target of an 80 per cent reduction in nitrogen oxides emissions from vessels by 2030.

The International Maritime Organisation (IMO) has so far not introduced similar limits on the emission of greenhouse gases, such as carbon dioxide (CO$_2$), although it is generally perceived that the IMO is in the future likely to further regulate global CO$_2$ emissions from vessels. Outside of the IMO, the EU and individual countries are focusing on greenhouse gas-reduction policies. In particular, the European Commission’s current proposal is that, from 2018, vessels calling at ports in the EU should be expected to monitor, report and verify CO$_2$ emissions. The strategy is intended to evolve into CO$_2$ reduction targets and market-based measures in the longer term, in line with the EU’s approach to land-based greenhouse gas emissions.

Another challenge facing the shipping industry relates to the handling of ever-larger casualties. The most recent high-profile container ship casualties, such as the MSC Napoli or the Rena, involved relatively small vessels with a maximum capacity of up to 4,688 containers; however, the latest mega-containerships can carry up to 15,000 containers. It is likely that at some stage there will be a casualty involving one of these new larger vessels and this may prove a major test for the industry. It has been suggested that the current salvage industry may find it difficult to deal with the scale of any wreckage. The regulatory environment is becoming increasingly stringent, with far stricter controls on both clean-up and wreck removal, which will also make handling any mega-container ship casualty more challenging. The London underwriting community has responded to concerns about the general average implications by evolving a new insurance product, which, it is suggested, could replace the traditional approach to general average for large container ships. It remains to be seen whether this will be accepted by the market.

Piracy remains a considerable issue for the shipping industry worldwide. There has been a decline in the number of incidents off Somalia since the peak in 2010/11, but an increase in West Africa and (to an extent) elsewhere. Although the use of armed guards and increased naval policing in recent years have undoubtedly contributed to the decline, challenges remain and the shipping industry must continue to be alive to the threat.
We would like to thank all the contributors for their assistance with producing this second edition of The Shipping Law Review. We hope that this volume will provide a useful source of information for those in the industry handling cross-jurisdictional shipping disputes.

James Gosling and Tessa Huzarski
Holman Fenwick Willan LLP
London
June 2015
I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Malta is truly a maritime nation that has, over the years, provided the international maritime industry with a variety of maritime services. Its position in the centre of the Mediterranean, equidistant from Suez and Gibraltar and the shores of North Africa and continental Europe, make it an ideal location for trans-shipment, bunkering, ship repair, yacht repair, marinas, services associated with the offshore oil and gas industry and a host of other services.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Maltese law is based on Roman law; however, from 1801, when Malta became a British colony, to 1964, when it gained independence, all the new laws promulgated in England during this period became part and parcel of the law of Malta. Thus, most of the shipping law is based on English shipping laws promulgated in England during that period. This has led to Maltese law itself being a unique system of law: predominantly Roman-based with very heavy doses of English statute law as far as ‘modern’ shipping law and mercantile law are concerned. Thus, most shipping laws today are rooted in English statutes, including the Maltese Merchant Shipping Act of 1974 as amended, as well as international conventions to which Malta is either a signatory or that have been incorporated into Maltese law.

1 Ann Fenech is the managing partner at Fenech and Fenech Advocates.
III FORUM AND JURISDICTION

i Courts

Shipping disputes with a value of over €11,646.86 are heard by the First Hall of the Civil Court with smaller claims being heard by the Court of Magistrates. There is no further official subdivision of the First Hall and therefore technically each of the 18 judges sitting in the First Hall of the Civil Court can hear a variety of cases as they appear before them, ranging from shipping to bankruptcy to property issues. In practice, however, shipping cases are assigned to one judge. Appeals are heard by the Court of Appeal, composed of three judges.

Shipping cases are the subject of both in personam and in rem claims before Maltese courts.

There are a number of limitation periods but generally speaking, claims arising from contract attract a five-year time bar and claims arising from tort attract a two-year time bar.

In personam

The grounds upon which Maltese courts have jurisdiction to hear in personam claims are listed in Section 742 of the Code of Organisation and Civil Procedure (COCP), which is the Code that effectively regulates court procedure. In Finaval SpA v. Scorpio Ship Management,2 the Civil Court affirmed that since the case was about the failure of Scorpio (Monaco) to transfer to Finaval (Italy) the shares of one of two Maltese ship-owning companies, and since shares in a company are considered property situated in Malta, the Maltese courts had jurisdiction. The Court also decided that the fact that by the time the case was decided the company had been struck off did not affect its jurisdiction because when the action was instituted, the company was still registered. In this case, the plaintiffs were awarded what was then a record amount of damages awarded by a Maltese court.

Apart from Section 742 of the COCP Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters must also be considered.

In rem

Until 2005, the grounds upon which the Maltese courts could exercise jurisdiction in rem were governed by the English Admiralty Court Acts of 1840 and 1861. These grounds were extremely limited. With Malta’s presence in the international maritime world increasing exponentially, it was vital that the law relating to jurisdiction in rem was totally overhauled. In addition, the series of cases in 1995 that became known as the ‘Poker’ cases,3 highlighted the existence of a lacuna in the law related to whether suppliers

2 Case number 90/04/TM (COA 2 July 2010).
3 Abergomara DUE Srl v. MV ‘Poker’ 291/95/PS (withdrawn); TechnoSpares Trading Ltd v. MV ‘Poker’ 131/95/NG (withdrawn); Metaltrade Srl v. MV ‘Poker’ 107/95/JF (COA 30 November 2007); Grangco Metalock GmbH v. MV ‘Poker’ 150/95/GS (11 July 2001);
of a vessel could sue a vessel in rem for debts incurred by the bareboat charterer. The courts decided these cases on the basis of equity and held against the plaintiffs, but it was clear that the matter had to be regulated by law.

The result was that 2005 saw the introduction of a very extensive list of maritime claims that was based on Section 20 of the UK Supreme Court Act and the list of maritime claims found in the Arrest Conventions 1952 and 1999. Furthermore, the ‘Poker’ lacuna was solved by adopting the English approach. An action in rem can only be instituted against a vessel if the person who would be liable for a claim in an action in personam when the cause of action arose is the owner or bareboat charterer of the vessel at the time the action is instituted.

ii Arbitration and ADR

Arbitration in Malta is regulated by the Arbitration Act 1991, which incorporates the UNCITRAL Model Law, the Geneva Protocol on Arbitration Clauses, the Geneva Convention on the Execution of Foreign Arbitral Awards, the UN Convention on the recognition and Enforcement of Foreign Arbitral Awards and the Convention on the Settlement of Investment Disputes between states and nationals of other states. The Act provides parties to international commercial arbitration a degree of flexibility in that the parties may choose to exclude the operation of the Model law and apply their own rules or alternatively to adopt the procedure set out in the Arbitration Act for domestic arbitration.

With regard to other forms of dispute resolution, Maltese law allows for mediation in disputes involving civil, family, social commercial and industrial matters.

Apart from the foregoing, no other forms of ADR are used frequently in Malta.

iii Enforcement of foreign judgments and arbitral awards

A Maltese court would recognise a judgment given in another European state by virtue of the release of a declaration of enforceability in line with EU Regulation 44/2001, which is being superseded in stages by Regulation 1215/2012. A judgment will not be recognised if the judgment is manifestly contrary to Maltese public policy, if the defendant was not served with the document instituting proceedings in the foreign court so as to enable a defence, if the judgment is irreconcilable with a judgment given in a dispute between the same parties in Malta, or if it is irreconcilable with an earlier judgment given in another EU or non-EU Member State involving the same cause of action and the same parties.

When a European judgment relates to an uncontested claim, the judgment creditor may simply request that the court hand down the judgment for a European enforcement order, which would enable that judgment to be enforced directly in Malta without having to undergo the process of recognition.

Tommaso Montano Srl v. MV ‘Poker’ 130/95/JSP (withdrawn); International Paint Italia SpA 288/95/GCD (withdrawn); and SO.GE CO.MAR v. MV ‘Poker’ 170/95/PS (withdrawn).
In respect of judgments delivered by non-EU courts, the judgment creditor would need to file an application before the courts requesting the court to enforce said judgment.

The recognition and enforcement of arbitral awards follow the Geneva and New York Conventions. Once the award is registered at the Malta Arbitration Centre the award constitutes an executive title and can then be directly enforced through numerous executive warrants such as the warrant of seizure, garnishee and arrest.

IV Shipping Contracts

i Shipbuilding and ship repair

From 1600 through to the mid-1800s, there were a number of Maltese families involved in the shipbuilding trade. This trade, however, came to a fairly abrupt end with the advent of steel. On the other hand, with the arrival of the British in Malta in 1801 and the building of the Admiralty docks, ship repair flourished. These dry docks were and still are located in Grand Harbour, the deepest natural harbour in the Mediterranean and therefore, until after World War II, ship repair and associated trades also thrived. These shipyards were run by the Admiralty and then, following independence in 1964, by the Maltese government. In their heyday they employed thousands of men and were referred to as the Malta Drydocks. The Malta Drydocks were in fact turned into a public corporation and totally regulated by Act of Parliament in 1967.

Over the years and running parallel with what was taking place all over Europe, shipbuilding and ship repair started to migrate eastward and work at the Malta Drydocks diminished substantially and major restructuring was required. The Malta Drydocks were terminated and Malta Shipyards Ltd was created. Even then, however, the very survival of the Malta Shipyards Ltd depended heavily on government subsidy, which had to come to an end following Malta’s membership of the EU. This led to the privatisation process of the Malta Shipyards Ltd, which was effectively split into four sites, all owned by separate private entities. Today there are no state-owned shipyards left but several privately owned repair yards. All these yards operate on the basis of their own standard terms and conditions regulated by Maltese law.

ii Contracts of carriage

Malta is not a signatory to either the Hague Rules, the Hague-Visby Rules, the Hamburg Rules or the Rotterdam Rules. Nevertheless, the Carriage of Goods by Sea Act 1954 incorporates the text of the Hague Rules. The Rules, however, apply only in relation to vessels carrying goods from Malta to any other port and therefore the law excludes contracts of carriage in which goods are being imported into Malta, which is the norm, Malta being an importing rather than an exporting country.

The only other Maltese law that would typically govern contracts of carriage would be the Commercial Code, which contains sections dealing with contracts of carriage. These sections are, however, totally outdated and very rarely used. In practice, the vast majority of disputes that arise and get to court concern disputes arising out of bills of lading, which invariably contain a clause paramount. The courts in Malta have stringently upheld and applied the law indicated in the clause paramount, which, in
nine cases out of 10, follow the Hague Rules or the Hague-Visby Rules. With regard to disputes arising out of charterparties, very frequently these contracts provide for English law and the courts are very happy to apply English law under these circumstances. In the occasional cases where there is no reference to proper law, Maltese courts are ready to apply English law principles if Maltese law is totally silent on the matter. One such area is, for instance, demurrage. There are no sections in the Commercial Code that deal with demurrage and therefore the courts are ready to use English case law and precedent as guidance.

iii Cargo claims

As in most jurisdictions, the vast majority of claims are brought by consignees or endorsees of bills of lading against the carrier. There are a number of claims also brought by charterers against owners, however, these are becoming few and far between. Most disputes are quite repetitive in nature and deal with typical shortage claims, damages on discharge, etc. Every so often important issues of principle are decided upon. In *The 'Northeastern Breeze'*\(^4\), it was held that a general clause on the front of a bill of lading incorporating all the clauses in the charterparty did not incorporate the arbitration clause, and in *The 'Hope I'*\(^5\) the Court delved into the issue of the identity of the carrier. It referred to *The 'Starsin'*\(^6\) and held that the identity of carrier clause identifying the owner as the carrier should be overruled if, on the face of the bill of lading, the signature box was signed off by agents at the port of loading expressly as agents of the charterers who were described as ‘the carrier’.

iv Limitation of liability

The limitation of liability regime applicable in Malta is the LLMC Convention 1976 as amended by the 1996 Protocol. In fact, Malta was the 10th member state of the IMO to accede to the 1996 Protocol, triggering its coming into force internationally. This took place by virtue of the deposit of an instrument of accession by Malta on 13 February 2004.

V REMEDIES

i Ship arrest

The subject of arrest of ships is inextricably linked to jurisdiction. Once a vessel is arrested the arrestor must commence an action on the merits in Malta within 20 days. Thus, it is only possible to arrest a vessel for reasons that would establish the jurisdiction of the Maltese courts, as described above.

In the context of *in rem* claims, a vessel can only be arrested for any one of the maritime claims granting the courts jurisdiction *in rem*. The arrest of sister ships is permitted, but not of associated ships.

---

4 Case number 30/90/MB (COA 10 October 2005).
5 Case number 212/99/AM (COA 26 June 2009).
6 2003 1 Lloyd's Rep 571.
The actual arrest is effected by means of a warrant of arrest. If the arrest is required to obtain security, one would need to issue a precautionary warrant of arrest. If the arrest is to be effected for the purposes of enforcing a judgment, one would file an executive warrant of arrest.

The warrants are filed *ex parte* by the arresting party and can be issued for any claim in excess of €7,000. The warrants themselves are standard forms calling upon the judge to order the arrest of the vessel. The arrestor needs to list four identifying features of the vessel and indicate where the vessel is located. Once filed, the warrants are sent to the duty judge and are issued immediately. The warrant is then served by the court marshal on the vessel itself, on the Commissioner of Police and on Transport Malta. All expenses incurred in the preservation of the vessel from the moment that the warrant of arrest is served on Transport Malta are borne by the arresting party without prejudice to its right to recover such expenses along with the claim.

A vessel may be arrested provided it is within Maltese territorial waters but not necessarily in the harbour. The warrant is served on the vessel at which time the court marshal seizes all the important documentation of the vessel. No counter-security need be put up by the arresting party.

A warrant of arrest can only be lifted by means of a counter-warrant of arrest issued by the court. A court will issue a counter-warrant if the arrest is replaced by a guarantee filed by the vessel. Historically, the courts have only accepted cash deposits or bank guarantees drawn on a Maltese bank. Any other form of guarantee needs to be agreed to between the parties. It is customary to agree to guarantees put up by a P&I club member of the International Group of P&I Clubs.

An arresting party can, on the application of the defendant, be found liable for damages if it is proven that the arrest was malicious, frivolous or vexatious. In such a case, the arresting party would also be liable for the payment of a penalty to the court.

As stated earlier, once a vessel is arrested in Malta the arresting party needs to commence an action on the merits within 20 days. There are two exceptions: (1) when a contract under which the dispute arises provides for arbitration, or (2) if Article 31 of Regulation 44/2001 applies, since it is possible, by virtue of that regulation, to arrest a vessel in Malta even if the court that has jurisdiction over the merits in accordance with the Regulation is not the Maltese court but the court of another EU Member State.

## ii Court orders for the sale of a vessel

Court orders for the sale of a vessel normally follow either an action on the merits in Malta or are resorted to by mortgagees of a vessel who want to enforce their mortgage in the face of a defaulting owner.

A judgment and a mortgage are two examples of ‘executive title’. The holder of an executive title may proceed directly with enforcement. The most common and effective methods of enforcement are the judicial sale by auction and the court-approved private sale.

**Judicial sale by auction**

The holder of the executive title would file an application in court requesting the court to order the judicial sale of a vessel. The plaintiff would also ask the court to appoint an
auctioneer, as well as a date for the auction and would request that the court appoint a person empowered by the court to sign off a bill of sale following the judicial sale by auction. The auction is held at the law courts. There is no reserve price or minimum sale price and the vessel is sold to the highest bidder. It has become the practice for potential bidders to be in possession of a bank guarantee showing that the bidder is vouched for up to a maximum figure.

It is possible for the execution creditor to bid for the vessel *animo compensandi* – in other words, as a form of set off for what it is owed. When that occurs, however, the execution creditor would have to file an application in court within seven days requesting that the court approve a set off. A court is likely to agree to such set off only if there is no opposition from other creditors who would clearly rank higher in the order of ranking of creditors in the eventuality that there is more than one creditor. If there are in fact other creditors who make themselves known to the court, the court will not allow the set off, and the next step would be for any of the creditors to commence the ranking of creditors procedure at which point the court would decide on the order of ranking in accordance with Section 50 of the Merchant Shipping Act.

When a vessel is sold in a judicial sale by auction, the vessel is sold free and unencumbered and any previous claim against the vessel *in rem* can only continue or be recovered from the proceeds of the sale.

**Court-approved private sale**

The court-approved private sale was only introduced into the COCP in 2006 and it was entirely market and industry driven. It is the answer to the uncertainty related to the price that can be achieved in a judicial sale by auction and the answer to the problem of a vessel not being sold free and unencumbered when a mortgagee exercises its rights of a private sale in the context of a defaulting owner.

In this form of sale, the holder of an executive title, say a mortgagee, sources the market for the best offer for the vessel; in the meantime it obtains two valuations for the vessel. A memorandum of agreement is entered into for a price that must exceed the higher of the two valuations. An application is then filed in court giving all the necessary details requesting that the court approve the private sale of the vessel. The court is obliged to appoint the case for hearing within 10 days. Once the hearing is held, and there is no reason for any further delay, it is usual for the court to adjourn the hearing for judgement. In the judgment the court would approve the private sale of the vessel at the price and to the buyer indicated in the memorandum of agreement. The vessel is sold free and unencumbered.

This procedure has been used extensively over the past few years. Last year, the Maltese courts featured prominently in approving the private sales of a number of vessels belonging to the bankrupt TMT group. There were three court-approved sales in all involving the TMT Group.7

---

7 *Bank of America NA v. MV ’D Ladybug’* (8 October 2014); *Macquarie Bank Limited v. MV ’A Ladybug’* (28 April 2014); and *Hyundai Heavy Industries Co Ltd and Hyundai Samho Heavy Industries Co Ltd v. MV ’B Ladybug’* (8 April 2014).
VI REGULATION

i Safety
Malta ratified SOLAS in 1986 and the Load Lines Convention in 2003. Maltese law contains other regulations dealing with safety requirements for particular sectors such as the Merchant Shipping (Fishing Vessels) Minimum Safety and Health Requirements Regulations 2004, Merchant Shipping Fishing Vessel Safety rules,9 Merchant Shipping (Safe Operation of Regular Ro-Ro Ferry and High Speed Passenger Craft Services) Regulations 2004 and the Merchant Shipping (Certification of Commercial Yachts and Commercial Cruising Vessels) Regulation 2006. Further, the Merchant Shipping Flag State Requirements Regulations 20019 place a number of auditing and supervisory obligations on Transport Malta emanating from Directive 2009/21 EC that relate to ensuring compliance by ships with flag state requirements.

ii Port state control
Transport Malta, through its Merchant Shipping Directorate, together with other Mediterranean maritime administrations and with the assistance of the IMO, the ILO and the European Commission concluded a memorandum of understanding for the Mediterranean region that was eventually signed in Malta in 1997 (Mediterranean MoU). Malta also continues its active participation in the Paris MoU and the Tokyo MoU. Furthermore, the Merchant Shipping (Port State Control) Regulations10 implement the measures contained in Directive 2009/16 EC with regard to inspection and detention procedures and obligations.

iii Registration and classification
The Maltese flag is currently the largest flag in Europe and being in the EU has meant that the flag is highly sought after by owners wanting to fly an EU flag. It is on the Paris MoU White List and its strength and success is down to a number of factors:

- there are no trading restrictions on Maltese-registered vessels;
- there are straightforward and quick company and vessel registration procedures;
- there are no restrictions on the nationality of the shareholders and directors of Maltese owning companies; and
- it has a tonnage tax regime with no tax on income derived from shipping activities, and very competitive administrative fees and charges for the registration of vessels and the incorporation of owning companies.

English is also an official language in Malta, which removes the need for documents that are usually in English to be translated and authenticated. The registry is open on a 24-hour, seven-days-a-week basis, which is extremely useful in the case of owners or financiers operating in different time zones.

8 SL234.36.
9 SL234.48.
10 SL234.38.
Ownership of a Maltese-registered vessel is not limited to Maltese companies. A foreign person may own a Maltese-registered vessel provided that the foreign company appoints and operates through a resident agent, who is considered the connecting factor between the regulator in Malta and the foreign owner. Through the resident agent, the foreign company owning a Maltese-registered vessel is deemed to have submitted to the jurisdiction of the Maltese courts.

One of the most important factors associated with the strength of the Malta flag is the reassurance that the flag gives to financiers who register their mortgages against vessels registered under the Maltese flag, who derive a huge degree of comfort in the knowledge that their rights are protected.

Under Maltese law ships form separate and distinct assets within the estates of their owners for the security of actions and claims to which the vessel is subject. In the event of the bankruptcy of the owner of a ship, all actions and claims to which the ship may be subject have preference on the said ship over all other debts of the estate.

In the event of a default of any term or condition of a registered mortgage, the mortgagee has the right to take possession of the ship, has absolute power to sell the ship and has the right to apply for any extension, pay fees, receive certificates, and generally do all such things in the name of the owner as may be required in order to maintain the status and validity of the registration of the ship.

Most importantly, a registered mortgage is deemed an executive title under our law and as referred to above, this would entitle the mortgagee to proceed directly to a judicial sale by auction or a court-approved private sale without the need to commence an action on the merits and obtain a judgment.

In the eventuality that the mortgage is indeed enforced through a judicial sale or a court-approved private sale, and the price for the vessel is insufficient to pay all the creditors necessitating a ranking-of-creditors procedure, the order in which various creditors rank is regulated by Section 50 or the Merchant Shipping Act, which lists a number of claims from (a) to (p) that are privileged and that rank one after the other in order of preference. In terms of Article 54(A) of the same act, a mortgage is positioned between (k) and (l) and therefore ranks 11th in order of priority after important claims including salvage claims, crews’ wages, expenses for the preservation of the ship and damages to seamen for personal injury.

Only classification societies that are members of IACS are accepted by the regulator. To date, there has not been a case in Malta on the liability or otherwise of classification societies.

**Environmental regulation**

Malta is bound by a number of international, regional and EU instruments that have either been ratified or that directly form part of domestic law. These include MARPOL, the Convention for the Protection of the Mediterranean Sea Against Pollution and its 2002 and 2004 Protocols, the UNEP Convention on Biological Diversity 1993, the OPRC, the OPRC-HNA Protocol, the Anti-Fouling Convention, the Bunker Convention, Directive 2005/35/EC as subsequently amended by Directive 2009/123/EC on ship-source pollution and on the introduction of penalties, including criminal penalties, for polluting offences, Directive 2000/59/EC on port reception facilities for
ship generated waste and cargo residues, Directive 2002/59/EC as subsequently amended concerning dangerous and polluting goods and Directive 2010/65/EU on reporting formalities for ships arriving in and or departing from ports of the Member States.

v Collisions, salvage and wrecks

Collisions

Malta is a signatory to the Colregs. That said, in the running of any case before the Maltese courts, there would be two other important laws that would play a very prominent role: the first would be the sections regulating tort in the Civil Code and the second would be Section 347 of the Merchant Shipping Act.

The law of tort provides for fault-based liability with all persons being liable for damages that they cause as a result of their own fault. In addition, Section 347 of the Merchant Shipping Act is particularly useful as it provides that the owner of a ship will be liable for any damages caused by acts or omissions in the navigation or management of the ship. This section therefore enables the injured party to commence an action in personam against the owners of the vessels for navigational errors committed by the crew.

Salvage

Malta is not yet a signatory to the Salvage Convention 1989; the law of salvage is contained in the Merchant Shipping Act, which provides for the payment of a salvage award to any person that renders services to a vessel that is wrecked, stranded or in distress in Maltese territorial waters ‘limited to the amount of the property saved’. Further, the liability of the owner to pay salvage extends to persons having an interest that has been saved by the property being brought into a position of safety. Maltese law is therefore based on the principal of ‘no cure, no pay’.

The criteria that courts should use in determining the amount of salvage to be awarded are found in Section 345 of the Merchant Shipping Act. These include the measure of success obtained and the efforts of the salvor, the danger run by the vessel saved, by its passengers, crew and cargo, the danger run by the salvor and the salving vessel, the time expended, the expenses incurred and the losses suffered and the risks of liability and other risks run by the salvors, and also the value of the property exposed to such risks.

Wrecks

Malta is not a signatory to the Nairobi WRC 2007. The subject of wrecks is dealt with in Sections 330–341 of the Merchant Shipping Act, which provide that where a vessel is wrecked, stranded or in distress on the coast of Malta or in Maltese territorial waters, the Minister of Transport may appoint a receiver of wrecks who would be authorised to take such steps as he or she deems fit for the preservation of the vessel, of the lives on board and of cargo carried. There are a number of provisions dealing with what the receiver or wreck or third parties can or cannot do with property associated with the wreck.

In practice, the Minister of Transport would normally delegate these powers to the Ports Directorate within Transport Malta, the maritime regulatory body, which then embarks on a very wide consultative process with owners, insurers, salvors and tug operators as to the procedure and steps of the wreck removal.
vi  Passengers’ rights
Malta is bound by Regulation (EC) No 392/2009 on the liability of carriers of passengers in the event of accidents, which came into effect on 31 December 2012. It incorporates certain provisions of the Athens Convention as amended by the 2002 Protocol, and constitutes the main legislation dealing with the carriage of passengers and their luggage by sea. The Merchant Shipping (Carriage of Passengers by Sea) Regulations 2004 provide for the issuance by the Registrar of Ships of certificates attesting that an insurance cover or other financial security is in force in respect of ships entering or leaving Maltese ports.

vii  Seafarers’ rights
Malta ratified the Maritime Labour Convention 2006 on 18 January 2013, which entered into force on 20 August 2013 and has acceded to the STCW Convention.

Maltese ships are subject to the provisions of the Merchant Shipping Act and ancillary regulations concerning the competence of officers and seamen. There are no restrictions imposed on the nationality of the master, officers or crew engaged on Maltese ships.

As far as the certification of seafarers is concerned, this is the responsibility of the Registrar-General of Shipping and Seamen. Certificates of competence are issued by Transport Malta after the candidate has successfully completed the approved training courses and examinations, all of which are of a high standard. In addition to and with the coming into force of the STCW, Transport Malta has entered into bilateral agreements with over 46 foreign maritime administrations for the recognition of certificates of competence issued to seafarers after having ascertained that such certificates are issued in full compliance with the STCW Convention.

VII  OUTLOOK
It is likely that more and more unpaid financiers and shipyards will continue to enforce their mortgages against defaulting owners through court-approved private sales. Nearly 10 years experience of putting into action Section 742 of the COCP dealing with jurisdiction in rem means that Malta is likely approaching the stage where this section needs to be fine-tuned to take into account possible imperfections or flaws. Fortunately, and as stated, maritime lawyers, the regulator and the legislator enjoy a very good working relationship as well as very effective cooperation with each other, which normally leads to the prompt amendment of law.

In 1992 she returned to Malta and created the marine litigation department of Fenech and Fenech Advocates, and in 2008 she was elected the managing partner of the firm. She deals exclusively with maritime issues but handles a cross-section of shipping disputes ranging from collisions to ship repair contracts, from salvage and explosions on board vessels to arrest, judicial sales and court approved private sales.

She has been involved in a number of the more important cases during the past 25 years including the ‘Poker’ cases, *Finaval SpA v. Scorpio Ship Management*, *The Northeastern Breeze* and *The Hope 1*.

She is the president of the Malta Maritime Law Association, a member of the executive committee of the Yachting Trade Section of the Chamber of Commerce and a Council Member of the European Maritime Law Organisation.

She lectures extensively on her subjects both in Malta and abroad, and lectures on shipping law at the University of Malta and the International Maritime Law Institute.

In 2012 she was awarded ‘Best in Shipping and Maritime’ at the Euromoney ‘European Women in Business Law Awards 2012’. For the past three years she has been identified as the only ‘Star Individual’ in the shipping section for Malta in *Chambers Europe*. In the *Legal 500*, 2015 edition she is listed as ‘the number-one expert in maritime matters in Malta’.
FENECH & FENECH ADVOCATES
198 Old Bakery Street
Valletta 1455
Malta
Tel: +356 2124 1232
Fax: +356 2599 0640
ann.fenech@fenlex.com
www.fenechlaw.com