2024 Review of maritime transport

Chapter V

Making the legal and regulatory environment fit for purpose

It is essential that legal and regulatory frameworks in the maritime industry remain fit for purpose in the face of changing circumstances and growing challenges. This chapter draws inspiration from the theme of World Maritime Day 2024, "Navigating the future: Safety first!" and examines legal considerations regarding two distinct sets of risks for maritime transport: a) the safety of ship and port operations in the light of changing weather- and climate-related risks, and b) fraudulent ship registration and registries.

More specifically, the chapter analyses some of the commercial law implications arising from weather- and climate-related risks for different types of contracts that work in tandem with each other and offers considerations for policymakers and traders on addressing related challenges. The analysis is based on English law, the law that most commonly applies to international contracts by agreement of the parties.

Additionally, this chapter also provides an analytical overview of developments at the IMO Legal Committee to tackle fraudulent ship registration and ship registries. It highlights the findings of a recent IMO study group report on this subject prepared by the World Maritime University, the IMO International Maritime Law Institute and UNCTAD. The chapter also presents key related outcomes of the 111th IMO Legal Committee, together with relevant considerations for policymakers.

A. Commercial law implications of weather- and climate-related risks

Recent trends and projections suggest that extreme weather events are expected to increase in frequency or severity due to climate change (IPCC, 2023; WMO, 2023). Ports and shipping will increasingly be exposed to extreme sea levels, coastal floods and storms (UNCTAD, 2020a; UNCTAD 2020b; UNCTAD, 2021a; UNCTAD, 2022). Other hazards, such as extreme heatwaves, fog, changes in wave energy and direction, long waves and swell, and changes to estuarine water levels during flash floods and droughts, also pose increased risks for ports and the safety of ship operations.

Failure to take action to avert and mitigate impacts is likely to result in extensive damage, operational disruptions and delays, with significant implications for transport and trade, global supply chains, contractual obligations and liabilities, as well as insurance matters such as coverage, premiums and risk disclosure obligations. This section explores some of the issues arising for key commercial contracts in international seaborne trade. It highlights relevant considerations for commercial parties and examines how maritime law might evolve in the light of growing weather-related risks.

Potential implications for contractual rights and obligations

Increased climate- and weather-related risks may lead to the greater incidence of cargo loss or damage and heightened risks for the carriage of deck cargo and pose challenges for the safety of berthing, loading and discharge operations. Climate risks may increase the possibility of maritime accidents and related general average incidents, as well as environmental pollution (Tsimplis, 2021), groundings and bunker oil spills.[1] Bunker oil spills can give rise to extensive losses, as illustrated by the *Wakashio* oil spill off the coast of Mauritius in 2020 (UNCTAD, 2020c). These risks will have implications for commercial contracts, including in terms of performance, liability, compensation and related disputes.

The impacts of climate change may give rise to significant commercial risks and these need to be borne by commercial parties. Examples of commercial rights and obligations that may be affected by weather- and climate-related delays and disruptions differ, depending on the type and terms of the contract[2] and its governing law. Relevant risks are not new in nature, but their significance amplifies with the increased likelihood and frequency of climate-related weather events. As these risks increase, the established commercial risk allocation between the parties under a range of contracts that work in tandem—including carriage of goods by sea under charterparties and bills of lading and international sale of goods on shipment terms—may become inadequate and need to be revised. A brief analysis of some of the potential contractual implications is provided below, based on English law. English law is frequently applicable (by agreement of the parties) to contracts for the international carriage of goods by sea and the sale of goods on shipment terms CIF and FOB.

Recent trends and projections suggest that **extreme weather events are expected to increase in frequency or severity** due to climate change

[1] Bunker oil spills by ships other than oil tankers are covered by the Bunker Pollution Convention 2001, but liability may be limited in accordance with the Convention on Limitation of Liability for Maritime Claims (LLMC), 1976, or the 1996 LLMC Protocol or a national limitation regime. On some of the related problems, including in the light of recent developments, see Gaskell, 2022, and UNCTAD, 2023a.

[2] For details regarding legal rights and obligations under different types of commercial contracts reference is made to standard practitioner texts, such as Coghlin et al., 2014; Cooke et al., 2022; Foxton et al., 2024; Gaskell et al., 2000; Lorenzon and Baatz, 2020; Reynolds and Rose, 2022; and Baughen, 2023.

Charterparties

In the context of charterparties, the risk of weather- and climate-related delays can among others affect the duration of voyages and the time of the vessel's arrival, the tender of notice of readiness and the start, duration and safety of key operations at the beginning and end of a voyage.

For time charters (contracts for hire of a vessel for a period of time), the commercial risk of delays affecting the duration and number of voyages under the charterparty typically lies with the charterer. Extreme weather (such as intensity and direction of wind and waves) may also have implications for the shipowner's key obligations regarding vessel speed and fuel consumption. Weather-related delays may affect the vessel's final voyage under the charter and the charterer's ability to redeliver the vessel by the "final terminal date".[3] This has knock-on effects for the use of the vessel under subsequent charters and potential liability for damages.

In the context of voyage charters (contracts for hire of a vessel for a specific voyage or series of voyages), the commercial risks associated with longer voyages and delay in the vessel's arrival typically fall on the carrier, i.e. the shipowner. However, subsequent delays following the tender of a valid notice of readiness, and affecting the start and duration of loading and discharge operations, as well as laytime (the period contractually allowed for loading and unloading) and demurrage (agreed liquidated damages for exceeding the laytime), falls on the charterer, and/or potentially on any holder of a charterparty bill of lading who may have inherited the charterer's related liabilities through contractual incorporation of charterparty terms.

In the context of charterparties, the risk of weather- and climate-related delays can among others **affect the duration of voyages and the time of the vessel's arrival**

Bills of lading and related cargo claims

In the context of bills of lading (which are used in the liner trade and for the sale of manufactured cargo and good shipped in bulk) and related cargo claims, growing climate- and weather-related risks may impact the carrier's liability, including under international cargo liability regimes.[4] In many cases, a carrier may for instance be exempt from liability for losses that could be attributed to "perils of the sea"; "act of God"; "any reasonable deviation"; or "any other cause… without the actual fault and privity" of the carrier or their servants and agents; or for losses that arise in the course of saving or attempting to "save life or property at sea" (Hague-Visby Rules, arts. IV r. 2(c), (d), (l), (q) and IV r. 4). Relevant losses would often have to be borne by cargo interests and their insurers.

Growing climate- and weather-related risks may also have implications for seaworthiness— the vessel's fitness for carriage and its ability to withstand the voyage—and related obligations, such as actions needed for the exercise of due diligence (see Hague-Visby Rules, arts. III r. 1 and IV r. 1); including in the context of losses due to a combination of causes, where unseaworthiness may be a contributory factor, e.g. bad stowage amounting to unseaworthiness and dangerous cargo. Under English law, as well as under current United States law, in cases where unseaworthiness for which the carrier is responsible has contributed to a loss, the carrier will be liable, except to the extent that they can establish another cause for which they are not responsible. The burden of proof is firmly on the carrier.

[3] Although this may be qualified by contractual wording, such as "weather permitting" or "unforeseen circumstances always excepted", see, for example, https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/redelivery-clause-for-time-charter-parties_2017.

[4] These regimes include the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924 (Hague Rules), as amended by the Visby and SDR (Special Drawing Right) protocols 1968 and 1979 (Hague–Visby Rules), and the United Nations Conventions on Contracts for the Carriage of Goods by Sea, 1978 (Hamburg Rules).

In the absence of evidence on the proportion of loss due to the different causes, the carrier is liable for the entire loss.[5] In many cases, the related liability exposure of the carrier may increase. Climate-related extreme weather events may also potentially lead to an increase in deviations and associated disputes, for instance about whether a deviation was necessary to "save life or property at sea" or was otherwise "reasonable" (Hague-Visby Rules, art. IV r. 4), or contractually permissible,[6] in which case the carrier may be exempt from liability for any resulting losses.

International sale of goods on shipment terms

Rights, obligations and commercial risks under contracts that entail the carriage of goods by sea, such as the international sale of goods on CIF and FOB terms, may also be affected by changing climate and weather conditions. Under English law, time stipulations in commercial contracts are "conditions". A breach of these, however slight, entitles the innocent party to terminate the contract, and—in cases where a loss has been sustained—claim damages. Similarly, the contractual port of discharge under CIF terms or the port of loading under FOB terms is a "condition" of the contract. If the charterer is (also) a CIF seller, delays in starting and completing loading within the contractual shipment period under the sales contract may make the shipment in question unsuitable for tender to the intended buyer and/or lead to the goods or documents being rejected and the contract terminated. This leaves the seller exposed to a potential claim for damages (by the buyer) and having to make alternative arrangements for the disposal of the cargo and/or pursuing a cargo claim against the carrier. At the same time, a potential increase in the incidence of cargo loss or damage would be of particular concern to a final consignee, such as a CIF or FOB buyer, who bears the risk of loss or damage of the goods in transit.[7] They would have to pay the seller in full, while being left to pursue a claim against the carrier (or cargo insurer). In cases where the carrier could rely on an exemption from liability, or where the loss was not covered by insurance, the final consignee would have to bear the additional risks to the cargo arising from extreme weather events and bear the related losses. Costs associated with disruptions to or delays in loading and unloading, such as demurrage, may also fall on the final consignee under a "merchant's responsibility clause" in the bill of lading (Gaskell et al., 2000, chapter 15).

Rights, obligations and commercial risks under contracts for the international sale of goods on CIF and FOB terms **may also be affected by changing climate and weather conditions**

Contractual approaches to commercial risk allocation of weather-related risks

While the above considerations make a case for developing bespoke contractual clauses to deal with commercial risk allocation between e.g. charterers and owners, to date, only a few standard form clauses (pre-drafted provisions for incorporation into contracts) appear to deal with weather-related risks. None of these contain any reference to climate risk assessments by ports or to climate risk disclosure requirements (Task Force on Climate Related Financial Disclosures, 2017; United States Security and Exchange Commission, 2024) as material. Examples include the BIMCO[8] weather routing clause for time charter

[5] The Kapitan Sakharov [2000] 2 Lloyd's Rep. 255 [Court of Appeal, England and Wales]; Schnell and Co. v. The Vallescura, 293 U.S. 296 (1934); (1934) AMC 1573 [United States, Supreme Court]; The OOCL Inspiration [1998] AMC 1327 (United States Court of Appeals Second Circuit). For analysis of the case law, see Asariotis, 2009, and Gaskell et al., 2000.

[6] Where goods are shipped on board a chartered vessel, some redirection may be possible based on a contractual clause that qualifies the discharge port nominated in the charter with the words "or so near thereto as she may safely get and lie always afloat".

[7] In international sales on shipment terms CIF or FOB, both under English common law and under INCOTERMS, the widely used set of international commercial terms published and revised periodically by the International Chamber of Commerce, the risk of loss or damage of the goods in transit is always on the buyer.

[8] Baltic International Maritime Council.

parties (2006)[9] and the INTERTANKO[10] open sea berth clause (2011).[11]

Contracting parties and industry organizations may wish to give some thought to the further development of relevant clauses or consider whether adjustments to the wording of existing clauses would be warranted, to ensure a balanced and commercially sensible risk allocation in the light of future weather- and climate-related risks. Related risks and implications for contractual rights and obligations should be addressed explicitly as part of the contract and associated costs should be apportioned in a balanced manner, in order that performance disruptions may be kept to a minimum and contracting parties can factor relevant risk exposure into their overall commercial decision-making.

Standard form clauses developed by industry associations for use in individually negotiated contracts, such as charterparties and contracts for the international sale of goods on shipment terms, can play an important role in devising and facilitating the use of appropriately tailored contractual provisions. However, all stakeholders need to be actively involved in this process, in order that the legitimate commercial expectations of different parties may be appropriately reflected. This is particularly important for small entities from developing countries, whose bargaining power and specialist expertise may be limited.

In the context of bills of lading, which are used for container transport and play a key role in the sale of manufactured goods and commodities shipped in bulk, the situation is more complex. Bills of lading are not individually negotiated but are "contracts of adhesion", meaning that terms are unilaterally set by the contracting carrier and typically favour the carrier. In the case of charterparty bills of lading, incorporated charterparty terms and conditions may become material in the context of a cargo claim by a third-party consignee, such as a CIF buyer. The mandatory application of one of the international cargo liability conventions—the Hague Rules, Hague–Visby Rules or Hamburg Rules—often ensures some protection for cargo claimants against potentially unfair contract terms, but their substantive scope of application is limited. Moreover, under each of these conventions, the carrier is exempt from liability in cases of force majeure type events that are beyond the carrier's control and, as noted above, would in many cases be free from liability for cargo loss or damage due to extreme weather. Thus, relevant commercial risks would often be borne by cargo interests and their insurers—again, of particular concern for small traders, especially in developing countries.

Dialogue should be encouraged between shippers' associations and carrier industry associations such as the World Shipping Council, which represents global liner carriers. However, in the absence of regulatory action, buyers may seek to protect their interests by ensuring that tender of bills of lading that contain unduly owner- or carrier-friendly (charterparty) clauses is expressly prohibited under the sale contract.

To inform the development of contractual approaches to risk allocation, it is important to ensure a better understanding among all contracting parties—as well as insurers and banks facilitating transactions by way of letter of credit—of both the specific risks associated with weather- and climate-related impacts on shipping and ports and related contractual implications. This requires further research, training and capacity-building, in particular for small traders in developing countries. Insights gained from understanding the commercial law implications of disruptions caused by the pandemic and the response measures it triggered can offer valuable lessons.

[9] See https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/weather_routeing_clause_for_time_charter_parties_2006.
[10] International Association of Independent Tanker Owners.
[11] See https://intertanko.com/info-centre/model-clauses-library.

Relevant considerations, reflected in analytical reports and training materials developed by UNCTAD,[12] can be useful when developing appropriate contractual risk allocation clauses (UNCTAD, 2023b).

Safe port warranty

Weather- and climate-related operational disruptions, delays and risks to cargo may give rise to considerable losses that affect the commercial risk allocation between two contracting parties. However, the losses arising in cases of a vessel being damaged or lost as a result of extreme weather events may be even greater, amounting to tens of millions of dollars. In this context, the interpretation and application of a charterer's contractual safe port undertaking is of particular relevance and merits special consideration, particularly in the light of recent jurisprudence at the highest level.

Whenever a charterer has the right to nominate a port, whether under a time or voyage charterparty, it is typically under express obligation to nominate a "safe port". The classic definition of a "safe port" under English law was provided in the Court of Appeal decision *The Eastern City*, a landmark case.[13] According to this definition, "a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship".

Whether or not a port is "safe" is a question of fact and depends on the circumstances of each case,[14] but the criteria used to determine whether a port is a safe port are matters of law.[15] Risks that can be avoided by "good navigation and competent seamanship" will not normally render a port unsafe. Thus, a port will not necessarily be deemed "unsafe" if it is liable to the occasional storm, even though vessels may be required to leave it in the event of bad weather. Temporary hazards, such as high winds, neap tides or silting do not make a port unsafe if the master can wait a reasonable time until the danger has passed, unless the delay was inordinate, such as to frustrate the object of the charterparty.[16] However, adequate weather forecasts must be available,[17] as well as pilots, tugs and adequate sea room to manoeuvre, and conditions in the port must enable a competent master to take necessary action to avoid danger.[18]

Regarding the scope and nature of the "safe port" undertaking, the established view is that the obligation is "limited to a warranty that the nominated port… is safe at the time of nomination and may be expected to remain safe from the moment of a vessel's arrival until her departure".[19] This approach links the undertaking to the inherent characteristics of the port at the time of nomination, applying an objective test, irrespective of the charterer's knowledge. However, the undertaking does not extend to "abnormal occurrences" that were not within the reasonable expectations of the parties at the relevant time.

Thus, while the undertaking is considered to be strict (i.e. independent of the charterer's fault), it is neither absolute, nor continuing. The charterer will not be in breach of obligation if the port, at the time of its nomination, is prospectively safe and expected to remain so, "in the absence of an abnormal occurrence", during the time of

Contracting parties should review their contracts and consider adjustments, **to ensure a balanced and commercially sensible risk allocation in the light of future weather- and climate-related risks**

[12] See https://unttc.org/stream/key-international-commercial-law-implications.
[13] [1958] 2 Lloyd's Rep 127, 131, per Lord Justice Sellers.
[14] *The Apiliotis* [1985] 1 Lloyd's Rep. 255.
[15] *The Polyglory* [1977] 2 Lloyd's Rep. 353.
[16] *The Hermine* [1979] 1 Lloyd's Rep. 212.
[17] *The Universal Monarch* [1988] 2 Lloyd's Rep. 483.
[18] *The Khian Sea* [1979] 1 Lloyd's Rep. 545 at 547.
[19] *The Evaggelos Th* [1971] 2 Lloyd's Rep. 200, at 205, per Judge Donaldson. See also the House of Lords decision in *The Evia (No.2)* [1982] 2 Lloyd's Rep. 307.

Extreme weather events posing **a danger to vessels in port** are increasingly likely to become more frequent or severe due to climate change than they have been in the past

its intended use.[20] If the port subsequently becomes unsafe due to an abnormal occurrence and the vessel sustains damage or is lost as a result, the shipowner cannot recover the loss from the charterer, as there is no causality between a breach of the charterer's obligation and the loss sustained. The relevant commercial risk associated with an abnormal occurrence, therefore, falls on the shipowner and their insurers.

A key question in the current context is what constitutes an abnormal occurrence in the case of weather- and climate-related hazards and risks, which are expected to increase significantly unless ports can adapt quickly and effectively. That is, under which circumstances are losses incurred by a vessel in approaching, entering, using or leaving a port as a result of extreme weather events and other climate-driven factors[21] attributable to the owner or need to be borne by the charterer? Which of the two contracting parties is to bear the relevant risk and costs?

The issue of what constitutes an abnormal occurrence in the context of a loss due to a combination of extreme weather events was considered in some detail in the recent *Ocean Victory* litigation, including by the Supreme Court of the United Kingdom.[22]

The litigation concerned a capesize bulk carrier that grounded while attempting to leave the port of Kashima, Japan, during a storm in October 2006. The casualty, resulting in a claim of close to $140 million,[23] was caused by two factors: long waves and severe swell in the port—which made it unsafe for the vessel to stay at the berth—together with a northerly gale that rendered the vessel's only exit route unsafe. The port had not conducted a risk assessment for these combined conditions. The vessel eventually broke in two and became a wreck.

Litigation ensued between those in the charterparty chain. The claim for damages against the time charterer succeeded at first instance but the decision was overturned by the Court of Appeal and a further appeal on specific issues was subsequently dismissed by the Supreme Court of the United Kingdom.

The central reasoning of the judge's decision at first instance was that "the danger facing Ocean Victory was one which was related to the prevailing characteristics of Kashima. The danger flowed from two characteristics of the port, the vulnerability of the raw materials quay to long swell and the vulnerability of the Kashima fairway to northerly gales caused by a local depression... Neither long waves nor northerly gales can be described as rare. Even if the concurrent occurrence of those events is a rare event in the history of the port, such an event flows from characteristics or features of the port".[24]

This approach was rejected by the Court of Appeal, which overturned the decision.[25]

In contrast to the judgement at first instance, the Court of Appeal considered the "past frequency" of the critical combination of extreme weather events leading to the loss in question material and "the likelihood of it occurring again". Considering the

[20] The shipowner is entitled to refuse a nomination if they are aware that the port is inherently unsafe. However, if the port is prospectively safe at the time of nomination, the shipowner must comply with the charterer's orders. If the circumstances change and the port becomes actually or prospectively unsafe to the knowledge of the charterer, a secondary obligation may arise for a time charterer to cancel the original nomination and order the vessel out of danger (provided this is still possible), but the question of how diligent the charterer is required to be in discovering any subsequent unexpected threat to the safety of the nominated port is not clear (Wilson, 2004).

[21] Such as long waves and associated swell, high winds, storm surges, fog, flash floods and drought.

[22] *Gard Marine and Energy Limited v. China National Chartering Company Limited and others (The Ocean Victory)* [2017] UKSC [United Kingdom, Supreme Court] 35.

[23] In addition to the market value of the vessel ($88.5 million), this included the cost of salvage services, wreck removal and loss of earnings.

[24] *The Ocean Victory* [2013] EWHC [High Court of Justice in London] 2199 (Comm), paras. 127 and 128.

[25] *The Ocean Victory* [2015] EWCA [Court of Appeal, England and Wales] Civ 16, see particularly para. 63 per Lord Justice Longmore.

"exceptional nature of the storm" in terms of its rapid development, duration and severity and given that "the concurrent occurrence" of the storm and long waves was "rare", the critical combination was to be regarded as an "abnormal occurrence".

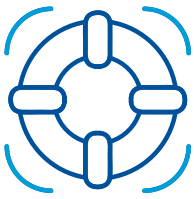
The issue of whether there was a breach of the safe port undertaking finally came up for decision before the Supreme Court. In particular, the following questions were agreed: "(1) was the port unsafe within the meaning of the safe port undertaking, so that the charterers were in breach; or (2) was there an 'abnormal occurrence' within the context of the safe port undertaking, which was no breach of the undertaking?"[26]

The Supreme Court expressly agreed with the conclusion of the Court of Appeal and held that the key was whether the "critical combination" was abnormal, even if both its constituent elements were, separately, characteristics of the port. The failure of the port to conduct a risk assessment and put in place a proper safety system to deal with the risk of that combination did not affect the answer to that question.[27] While not necessarily unforeseeable, the "critical combination" of long waves (and swell) and gale force winds in the case in question was "rare and unexpected", i.e. abnormal for the particular port and for the particular ship at the relevant time. Accordingly, the charterers were not in breach of the safe port warranty and the loss sustained was not recoverable from the charterers.

The decision will be welcomed by charterers and may make commercial sense in terms of confirming the established risk allocation between charterers and shipowners; charterers will not be held responsible for potentially extensive damage or loss of a vessel due to "rare and unexpected" extreme weather events, as these are considered abnormal. Relevant risks will instead have to be borne by shipowners and their mutual insurers, the protection and indemnity clubs.

At the same time, the decision's approach to the relevancy of risk assessment and the absence of any clear (legal) expectation in this respect[28] appear out of step with the changing risk landscape and seem to promote a collective "wait and see" approach that is not desirable in the light of significantly growing climate- and weather-related risks. As highlighted above, extreme weather events posing a danger to vessels in port, on their own or in combination, are increasingly likely to become more frequent or severe due to climate change than they have been in the past. Therefore, past experience (such as the baseline 1-in-100 extreme sea level event)[29] no longer serves to predict future exposure and risk. The reasoning of the judge at first instance reflects this consideration, whereas that of the Court of Appeal and Supreme Court does not.

While future exposure is subject to uncertainty, it is in everyone's interest to assess relevant risks and mitigate future dangers, and associated losses (as well as related disputes), which may be extensive and could eventually become uninsurable. Rather than waiting for future risks and losses to materialize before being considered the new "normal" (ex post facto), commercial parties—and commercial law—should be proactive in trying to guard against such risks and losses. Multi-hazard risk assessments at the port level, informed by the best available science and in line



Past experience no longer serves to **predict future exposure and risk**

[26] *The Ocean Victory* [2017] UKSC [United Kingdom, Supreme Court] 35, para. 8.

[27] Ibid, para. 43 and 44, per Lord Clarke.

[28] Charterers appear to be under no particular obligation to exercise due diligence, that is, reasonable care in respect of the basis upon which to form a view about the prospective safety of a port. While known weather-related risks that have led to danger in the past are clearly material, the question of whether a port has carried out an assessment to determine the future risk of previously rare or unprecedented weather events occurring is not considered particularly relevant. Therefore, the decision does not provide an incentive that would help promote comprehensive risk assessments and adaptation action by ports.

[29] See UNCTAD, 2021a, figure 1, which illustrates that even at 1.5°C global warming, expected as soon as in the 2030s, ports in some regions may face, as often as every 1 to 10 years, extreme sea levels of a magnitude to date expected to occur once per century.

with the latest best practice and guidance, along with targeted adaptation measures, play a crucial role in reducing uncertainty and preventing or mitigating future losses (UNCTAD, 2020a; UNCTAD, 2020b). As highlighted in a previous edition of *Review of Maritime Transport* (UNCTAD, 2022), relevant legal requirements for climate-proofing in accordance with technical guidance are already in place for port infrastructure projects in the European Union and in European Union-funded projects in other countries. Reporting requirements on climate risk and vulnerability assessments, as well as adaptation, also apply to ports in some countries, such as the United Kingdom.[30]

The Supreme Court decision in *The Ocean Victory* is binding under English law and relevant for all contracts of carriage governed by English law globally. According to current law, only extreme weather events which are "normal" and "not rare" for the port in question (considering the relevant time of year and the vessel concerned), that is, occurrences that could be expected based on past experience as posing a danger, will be considered "characteristics" of the port, making it potentially unsafe. Thus, in many instances, the growing risks of weather-related physical damage or loss of a vessel are likely to fall on shipowners and hull insurers. To avoid or mitigate relevant losses arising, and to ensure a fair and balanced distribution of related commercial risks, industry associations and contracting parties should consider ways to promote the conduct of port risk assessments and effective adaptation action. This could include developing contractual clauses that require nominated ports to have carried out multi-hazard risk assessments, thereby helping to ensure the best possible knowledge base upon which decisions about fast-growing weather-related risks may be made.

[30] See https://www.gov.uk/government/collections/climate-change-adaptation-reporting-third-round-reports#harbour-authorities.

Fraudulent ship registration and fraudulent ship registries are a matter of global concern given their far-reaching implications for maritime safety and security, pollution, seafarer welfare and ocean governance

B. Combating fraudulent ship registration and registries: State of play and a way forward

Background and overview of discussions at the International Maritime Organization Legal Committee

Fraudulent ship registration and fraudulent ship registries are a matter of global concern given their far-reaching implications for maritime safety and security, pollution, seafarer welfare and ocean governance. Concerns have grown in recent years, with recorded incidents rising, the emergence of a "dark fleet" or "shadow fleet"[31] and "an increase in the frequency of ship-to-ship crude oil transfers in international waters by ships using "dark operations" to circumvent sanctions and high insurance costs" (IMO, 2023a).[32] A number of recommended measures are outlined in the report of the 110th session of the IMO Legal Committee (IMO, 2023b). In December 2023, the IMO Assembly also considered information about such ships and adopted a resolution urging "Member States and all relevant stakeholders to promote actions to prevent illegal operations in the maritime sector by the dark fleet or shadow fleet" (IMO, 2023c).

[31] Described as "a fleet of between 300 to 600 tankers, primarily comprised of older ships, including some not inspected recently, having substandard maintenance, unclear ownership and a severe lack of insurance, operating "as a 'dark fleet' or 'shadow fleet' to circumvent sanctions and high insurance costs" (IMO, 2023b, para. 5.10).

[32] As noted at the 110th session of the IMO Legal Committee (IMO, 2023b), tankers in a dark fleet posed a real and high risk of incidents, particularly when engaged in ship-to-ship transfers, as they disguised the cargo destinations or origins, or avoided oversight or regulation by flag or coastal States. This practice, in many cases, transferred the risk of oil pollution damage to coastal States that were not involved in, or benefiting from, the oil being transferred, and could increase the risk of shipowners evading liability under the 1992 Civil Liability Convention and the 2001 Bunkers Convention, with implications for affected coastal States and the exposure of the International Oil Pollution Compensation (IOPC) funds.

There is currently **no binding international framework to regulate the ship registration process** itself

Given this context and the work that the IMO Legal Committee has been doing since 2018 to combat fraudulent ship registration and fraudulent ship registries (UNCTAD, 2019; UNCTAD 2022; UNCTAD 2023a), at its 111th session in 2024, the Legal Committee examined reports of recent incidents and developments by delegations and the IMO secretariat. This included data that 36 member States and one associate member had provided to the secretariat information regarding their registries of ships, pursuant to the resolution on measures to prevent the fraudulent registration and fraudulent registries of ships (IMO, 2019). A dedicated function on ship registry in the "contact points" module of the Global Integrated Shipping Information System (GISIS) had been created pursuant to the resolution. This is kept up to date by the secretariat and is available to the public.

The Committee also considered the report of a correspondence group on due diligence and IMO identification number schemes that, as part of its ongoing work, had highlighted the importance of information exchange in relation to the registration process of ships and companies (IMO, 2024a). While the correspondence group needed more time to complete its work, the report noted that, based on a limited number of responses to a questionnaire, the main source of information used to verify the registration and identity of a ship was through IMO resources available in GISIS. Likewise, GISIS provided the point of contact for the authority responsible for the flag State registry, which can be consulted in the event of any doubts regarding a ship's registration.

Relevant discussions of the Committee focused in some detail on the final report of the study group on fraudulent registration and fraudulent registries of ships, prepared by the World Maritime University, the IMO International Maritime Law Institute and UNCTAD (IMO, 2024b).[33] The report presented the final results of a questionnaire, together with some statistical analysis, a section on the impacts of fraudulent ship registration and a detailed overview of the relevant international legal framework, as well as related conclusions and recommendations.[34]

Key issues highlighted in the report summary include the following:

- There is currently no single dedicated international instrument or treaty that contains a standardized and universally accepted definition of "fraudulent ship registration". Instead, the concept is addressed through a combination of multiple international maritime conventions focused on disparate subject matter and other legal instruments, domestic laws and industry best practices. Importantly, there is currently no binding international framework to regulate the ship registration process itself. There is no well-developed jurisprudence in this area.
- Various international conventions and agreements (including those adopted under the auspices of the United Nations, IMO and International Labour Organization (ILO)) could be considered as indirectly addressing fraudulent ship registration.
- Flag States play a central role in ensuring that ships registered under their flags comply with international standards and regulations. Under international instruments, they are responsible for ship registration and the monitoring of training and certification. Ensuring that flag States adequately assume jurisdiction and control over shipowners and ships flying their flags and holding flag States accountable for failure to enforce proper ship registration and certification are

[33] The agreed terms of reference of the study group are set out in annex 1 of the report. An interim report of the study group (IMO, 2023d) had previously been considered by the Legal Committee at its 110th session (IMO, 2023b, paras. 6.4 to 6.12).

[34] At the request of the Committee, the report has also been made available on the public IMO website. See https://www.imo.org/en/MediaCentre/MeetingSummaries/Pages/LEG-111th-session.aspx.

important steps in ensuring that they take their responsibilities seriously. At the same time, port State authorities can make an important contribution to identifying instances of fraudulent ship registrations, including by increasing relevant inspections.

- Encouraging transparency in ship registration and ownership records is essential for verifying ship legitimacy and detecting fraudulent activities. Implementing stricter penalties, including financial fines, and other legal consequences may be a deterrent against fraudulent ship registration practices. The use of technology, databases and data analysis is key to identifying patterns and trends associated with fraudulent ship registration and enhancing detection and prevention.
- Collaboration among countries and relevant agencies is vital in addressing fraudulent ship registration. This involves sharing information, conducting joint inspections and establishing effective enforcement mechanisms. The situation is dynamic – international regulations and agreements need regular reviews and updates to address evolving challenges associated with fraudulent ship registration effectively. Collaborating and exchanging information with relevant private sector and industry stakeholders can also play an important role in identifying and preventing fraudulent ship registration and should be encouraged.
- The overwhelming consensus among those responding to the questionnaire was that an investigation was necessary into loopholes in the existing system of international ship registration, which are currently exploited by perpetrators of fraudulent acts.

A range of measures was highlighted in the report for further consideration, along with suggested improvements to the GISIS module related to the fraudulent registration of ships (IMO, 2024b, annex 4). In addition, the Legal Committee was invited to "take steps for the development of guidelines or best practices on registration of ships, which could eventually be the basis for the development of a treaty on registration of ships to ensure the effective implementation of IMO treaties, taking into consideration, as appropriate, the provisions of the United Nations Convention on Conditions for Registration of Ships, 1986" (IMO, 2024b, para. 4.2).

As noted in the report, the United Nations Convention on Conditions for Registration of Ships, adopted in 1986, under the auspices of UNCTAD,[35] aimed at "strengthening the genuine link between a State and ships flying its flag, and in order to exercise effectively its jurisdiction and control over such ships with regard to identification and accountability of shipowners and operators as well as with regard to administrative, technical, economic and social matters" (article 1). Although the Convention did not attract the number of ratifications required for its entry into force (40), its provisions have nevertheless significantly influenced a number of national laws on ship registration.

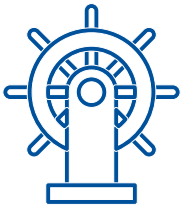
Encouraging transparency in ship registration and ownership records is essential for verifying ship legitimacy and detecting fraudulent activities

Legal Committee decisions and a way forward

Following discussions, with 45 IMO Member States and observers highlighting relevant experiences and expressing support for the report and some of its key recommendations, the Committee reiterated that the proliferation of fraudulent registration practices posed a serious threat. These practices not only endanger maritime safety and security and the marine environment but also the well-being of seafarers. Seafarers are particularly vulnerable if they are working on a fraudulently registered ship, as they risk being abandoned.

In line with one of the study group's recommendations, the Committee "strongly

[35] In accordance with resolution 37/209 of the General Assembly of the United Nations dated 20 December 1982; see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XII-7&chapter=12&clang=_en.



Fraudulent registration practices not only endanger maritime safety and security and the marine environment but also the **well-being of seafarers**

encouraged Member States to act on their commitments as reflected in Assembly resolution A.1162(32) [IMO, 2021] and, in collaboration with all relevant stakeholders, take the necessary measures, individually and collectively, to promote effective actions for the prevention and suppression of fraudulent registration and fraudulent registries and other fraudulent acts in the maritime sector" (IMO, 2024c, para. 6.17). The Committee also agreed to give further consideration to proposed measures identified in the study group report (IMO, 2024b, para. 4.3, and annex, para. 100) and other recommendations suggested by several delegations, including the following (IMO, 2024c, para. 6.18):

1. Utilization or the enhancement of the existing tools developed by IMO, such as port State control, continuous synopsis record, and long-range identification and tracking system;
2. Need to continue to communicate and report to IMO cases of fraudulent registration and fraudulent registries of ships and of ships no longer on a flag State registry, for dissemination of such data;
3. Development of harmonized procedures, including to address challenges with provisional registration;
4. Need to reinforce port State control measures;
5. Need to define the element of due diligence for the registration of ships and for their deletion from a registry, as well as the consideration of changes in ownership;
6. Need for further research into current registration loopholes that facilitate fraudulent registration;
7. Need to collaborate and share information and for Member States to act on their commitments as reflected in IMO Assembly resolution A.1162(32);
8. Need to enhance capacity on identifying maritime fraud with respect to human resources and technological skills, which may be further considered by the Technical Cooperation Committee;
9. Need to carry out awareness campaigns on the impact of fraudulent registration on the shipping industry and seafarers;
10. Need for the information on GISIS to be more easily searchable by port State control regimes;
11. Port State control memorandums of understanding could develop a common list of flags used by fraudulent actors and enhance inspections for these ships;
12. Publication of the study report on the IMO website to draw further attention to the problem of fraudulent registration;
13. Improvements to GISIS (IMO, 2024b, para. 4.4).

Regarding the last issue, the Committee requested that the IMO secretariat study the suggested improvements to GISIS, assess their feasibility and report at a future session (IMO, 2024c, para. 6.24).

In an important development, the Committee also agreed to take steps to develop guidelines or best practices on ship registration. Referring to the broad support for the proposal by the United Kingdom,

that guidelines or best practices on ship registration should be developed and include safety, security, environmental protection and the well-being of seafarers, the Committee agreed that work on a proposal for a new output should be undertaken intersessionally by the correspondence group on matters of due diligence. To this end, the correspondence group was re-established, coordinated by the United Kingdom. It was tasked with continuing to define and develop the elements of "due diligence" to be exercised in the process of registration of vessels in the IMO unique company and registered owner identification number scheme; considering additional factors with regard to the abuse of IMO identification number schemes, how widespread the issue is and possible loopholes in the system; and developing a draft proposal for a new output on guidelines or best practices on the registration of ships for consideration by the Committee at its next session in 2025 (IMO, 2024c, paras. 6.20 and 6.29).

However, the Committee also noted "views expressed that since the United Nations Convention on Conditions for Registration of Ships had been adopted in 1986, the business world had progressed and that the requirement of a genuine link between the ship and the flag State or the requirement for the owner to have a residence in the flag State served no practical purpose, also given the advances in banking, insurance and the shipping business in general in the past 40 years. Therefore, the Committee also noted that the guidelines to be developed should take these factors into account, including the comments on the genuine link" (IMO, 2024c, para. 6.21).

It is therefore not clear to what extent work towards the development of guidelines or best practices for ship registration will take into account provisions in the 1986 United Nations Convention on Conditions for Registration of Ships[36] or the need for "a genuine link between the State and the ship", as required under article 91 of the United Nations Convention on the Law of the Sea (UNCLOS), 1982, the overarching international legal framework for maritime activities.

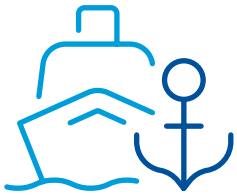
While there is widespread consensus that an internationally agreed framework for ship registration is desirable, including as part of efforts to combat the growing risks of fraudulent ship registration, it appears there is at present little support for an approach based on the provisions of the 1986 Convention on Conditions for Registration of Ships. This was evident from the latest discussion at the Legal Committee and may be due to the fact that the need for a "genuine link", as enshrined in UN Convention on the Law of the Sea, has proved to be problematic to implement. At its core, the need for a genuine link entails some restrictions on the choice of flag for global shipowners and relevant business opportunities related to establishing and operating major ship registries, including in developing countries. Whether the future work on guidelines or best practices on ship registration will be able to reconcile potentially diverging views on the need for a genuine link and result in an outcome that is commercially acceptable, fit for purpose and in line with the provisions of UN Convention on the Law of the Sea remains to be seen.

All United Nations Member States are encouraged to actively participate in this work, under the auspices of the IMO Legal Committee, towards the development of guidelines on ship registration and of measures to combat fraudulent ship registrations and registries.

Seafarers are particularly vulnerable if they are working on a fraudulently registered ship, as they risk being abandoned

[36] At the 110th session of the Committee, the delegation of the United Kingdom "informed the Committee that the United Kingdom planned to submit a request for a new planned output to review [the 1986 Convention on Conditions for Registration of Ships] and to determine what changes were required for it to best reflect global ship registry today – including topics about links between a vessel and the State in which they are registered" (IMO, 2023b, paras. 6.33 and 34). Such a request was, however, not submitted at the 111th session.

C. Policy considerations



Timely and effective adaptation **action for ports should be an urgent priority** for Governments and for all public and private entities with a stake in international transport and trade

Commercial parties, law and contracts need to adapt to better prepare for the future under climate change

Ports are key hubs in global supply chains and essential for global trade and sustainable development. They face a high and growing level of risk of climate- and weather-related impacts. In the absence of effective action on port adaptation, the associated risks will increasingly materialize and jeopardize the integrity of transport networks across supply chains. Relevant impacts may lead to significant damage, disruption and delay, extensive economic losses, business failures and costly and protracted legal disputes. This has implications for the performance of commercial contracts, as well as the rights, obligations and liabilities of contracting parties engaged in international transport and trade, and for insurance coverage and premiums and the insurability of losses.

Considerations for contractual parties and policymakers include the following:

- The risks of climate-related damage, disruption and delay to port infrastructure, port and ship-operations and their safety, as well as the implications for contractual rights and obligations, need to be fully understood to be effectively addressed before such risks and losses materialize. Related issues should be given increased attention and require further research to minimize losses and legal disputes, keep trade flowing, keep insurance affordable and ensure the development of appropriate and balanced contractual approaches to risk allocation.
- Judicial approaches to established legal concepts and their interpretation may need to develop further, to reflect the "new normal" brought about by a changing climate and weather conditions.
- To mitigate their exposure to potentially extensive commercial losses arising from climate- and weather-related damage, delay and disruption, and to avoid lengthy and costly disputes and litigation, contracting parties should review their contracts and, as appropriate, consider carefully worded specialist clauses that accommodate future risks and provide for a balanced commercial risk allocation given changing circumstances. Similar considerations may arise in connection with other issues causing disruptions and delays, such as the pandemic and related response measures. Relevant analytical reports and training materials developed by UNCTAD can provide useful insights and guidance in this regard.
- When developing relevant standard form clauses, the involvement of all stakeholders is important to ensure that their respective legitimate interests are appropriately reflected. This is vital for small traders in developing countries, whose bargaining power and specialist legal expertise may be limited. As part of its mandated work in support of the development and implementation of appropriate legal and regulatory frameworks that reduce trade transaction costs (UNCTAD, 2021b, para. 127(n)), UNCTAD can play a role in this context by providing related analysis and advice, as well as training and capacity-building.
- Addressing and mitigating risks to ship and port operations is in the interests of both private and public stakeholders across global supply chains that

depend on safe and reliable maritime transport, and should be promoted by all. Contractual clauses can play an important role in this context, beyond apportioning relevant risks. When drafting charterparty clauses that require the nomination of a safe port, consideration should also be given to express wording that could improve the knowledge base upon which decisions on escalating weather-related risks are made. This would help promote effective action on port climate risk assessment and adaptation.

- Given long infrastructure planning horizons and lifespans, worsening climate projections and the cost of inaction, timely and effective adaptation action for ports should be an urgent priority for Governments and for all public and private entities with a stake in international transport and trade. To this end, more targeted policy action, together with legal requirements and effective technical guidance, is needed to enhance the climate resilience of ports across supply chains, reduce risks for port and ship operations and mitigate losses.

Combating fraudulent ship registration and registries

As a matter of public policy, developing and enforcing measures to prevent and combat crime, including all forms of fraudulent practices, is in the interests of the global community as a whole. This is reflected in some of the Sustainable Development Goals of the 2030 Agenda for Sustainable Development, which are "integrated and indivisible, global in nature and universally applicable", notably Goal 16 (promote peaceful and inclusive societies) and Goal 14 (conserve and sustainably use the oceans, seas and marine resources for sustainable development), of particular relevance in the context of maritime transport, ship-source pollution control and ship safety. Target 14.c is aimed at enhancing "the conservation and sustainable use of oceans and their resources by implementing international law as reflected in the United Nations Convention on the Law of the Sea, which provides the legal framework for the conservation and sustainable use of oceans and their resources".

Considerations for policymakers and industry stakeholders include the following:

- Fraudulent ship registration poses a growing threat to maritime safety and security and the marine environment, as well as the well-being of seafarers, who are particularly vulnerable if they are working on a fraudulently registered ship and risk being abandoned. Against this background, recent and ongoing efforts under the auspices of the IMO Legal Committee to take measures to combat fraudulent practices should be given active support from all United Nations Member States and industry stakeholders. Relevant IMO initiatives also include working towards developing guidance or best practices on ship registration, which can play an important role in this context, provided the guidance is well designed, fit for purpose, commercially acceptable and in line with UN Convention on the Law of the Sea and customary international law. Although an international legal instrument (potentially drawing on the provisions of the 1986 Convention on Conditions for Registration of Ships) would be the most effective tool to ensure internationally uniform rules on the registration of ships, this approach has not been favoured by the IMO Legal Committee. Ultimately, the success of any measures and their enforcement depends on the commitment and political will of flag States, port States and industry actors.
- In the short term, to increase transparency and assist authorities and industry stakeholders in identifying the fraudulent registration of vessels, all United Nations member States are urged, through their representatives

The success of any measures and their enforcement depends on the **commitment and political will of flag States, port States and industry actors**

at IMO, to regularly provide updated information on relevant national contact points and on fraudulent ship registration, to be included as part of the dedicated GISIS module.

- Further improvements to GISIS could play an important role in facilitating sharing and access to relevant information. For additional recommendations, United Nations member States and industry stakeholders may consult the final report of the IMO study group on fraudulent ship registration and fraudulent ship registries (IMO, 2024b).

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