

INTERNATIONAL MARITIME LAW AND PRACTICE

COMPARATIVE LAW IN CONTEXT

ČASLAV PEJOVIĆ

informa law
from Routledge

CONTENTS

<i>Preface</i>	xix
<i>List of abbreviations</i>	xxi
<i>Table of cases</i>	xxiv
<i>Table of legislation</i>	xl
CHAPTER 1 INTRODUCTION AND HISTORY	1
1.1 Navigation and maritime commerce	1
1.2 Scope and definition of maritime law	2
1.2.1 Law of the sea and maritime law	3
1.3 Historical development	4
1.3.1 Ancient period	5
1.3.2 The Middle Ages	15
1.3.3 The period of creation of national law	21
1.4 The period of unification of maritime law	28
1.4.1 International organizations	29
1.4.2 New law merchant	32
1.4.3 National law	34
1.5 Distinctive features of maritime law	35
1.5.1 Historical character	35
1.5.2 International character	36
1.5.3 Uniform character	36
1.5.4 Particularism of maritime law	37
1.5.5 Hybrid character	38
1.5.6 Reactive character	40
1.6 Current tendencies and future of maritime law	41
1.6.1 Current trends in harmonization and unification	41
1.6.2 Process of evolution	42
1.6.3 Process of adaptation to technological development	42
1.6.4 Less perilous character	43
1.6.5 Adjustments to environmental hazards	43
1.6.6 New challenges	43

CHAPTER 2	LEGAL STATUS OF THE SHIP	45
2.1	Definition of ship	45
2.1.1	Relevance of the ship definition	45
2.1.2	Purpose of defining a ship	47
2.1.3	Definitions of the ship in international conventions	47
2.1.4	Definition of a ship in national laws	48
2.1.5	Comparative note: Are jet skis ships?	49
2.1.6	Ship or boat	50
2.1.7	Termination of the ship's status	51
2.2	Registration of ships	51
2.2.1	Process of ship registration	52
2.2.2	Purpose of ship registration	53
2.2.3	Registration and title	54
2.2.4	Certificate of registry	54
2.3	Comparison of a ship and a person	55
2.4	Individualization of the ship	56
2.4.1	Name	56
2.4.2	Home port	58
2.5	Nationality	58
2.5.1	Flag	60
2.5.2	Vessels without nationality	60
2.5.3	Parallel flags	61
2.5.4	The rationale for the ship's nationality	61
2.5.5	Granting nationality	62
2.5.6	Genuine link	63
2.5.7	The 1986 Convention on Conditions for Registration of Ships	65
2.5.8	Requirements for granting nationality	66
2.5.9	Lack of uniformity in the registration requirements for sea-going vessels	66
2.5.10	Flags of convenience	67
2.5.11	"Second registries"	68
2.5.12	Obligations of the flag states under international law	69
2.5.13	Relation of the nationality of a vessel and jurisdiction and applicable law	70
CHAPTER 3	SHIPBUILDING CONTRACTS	72
3.1	Introduction	72
3.2	History	73
3.3	Shipbuilding contracts	74
3.3.1	Legal nature of shipbuilding contracts	74
3.3.2	Legal regime of shipbuilding contracts	76
3.4	Content of a shipbuilding contract	78
3.4.1	Description of a ship	79
3.4.2	Classification requirements	80
3.4.3	Subcontracting	81

CONTENTS

3.4.4	Payment of the price	82
3.4.5	Performance characteristics	83
3.4.6	Modifications to the agreed specification	86
3.4.7	Trial and testing	89
3.4.8	Rejection of the vessel	90
3.5	Delivery	91
3.5.1	Time of delivery	92
3.5.2	Delays and liquidated damages	92
3.5.3	Extension of time due to <i>force majeure</i>	92
3.5.4	Construction of <i>force majeure</i> clauses	93
3.5.5	Comparative note	94
3.6	Condition of the ship upon delivery (warranty of quality)	95
3.7	Shipbuilder's default	96
3.7.1	Shipbuilder's warranty for defects	96
3.7.2	Shipbuilder's warranty for hidden defects	97
3.7.3	Exemption and limitation of liability	98
3.8	Termination of the contract	98
3.8.1	Rescission of the contract by the buyer	98
3.8.2	Termination by the shipbuilder	99
3.9	Transfer of title	101
3.9.1	Gradual transfer of property	101
3.9.2	Registration of the ship under construction	102
3.9.3	Potential risks related to the transfer of property	103
3.10	Security	104
3.10.1	Refund and payment guarantees	104
3.11	Ship mortgage	105
3.12	Transfer of risks	105
3.13	Insurance	106
CHAPTER 4 SHIP SALE CONTRACTS		107
4.1	General introduction	107
4.2	The nature of the ship's sale	107
4.3	Legal regulation of ship's sale	108
4.4	Negotiations	109
4.5	Subject to details	110
4.6	Content of contract	111
4.6.1	Name of the seller	111
4.6.2	Name of the buyer	112
4.6.3	Description of the ship	112
4.6.4	Purchase price	112
4.7	Ship inspection	114
4.7.1	Inspection of the ship	114
4.7.2	Inspection before signing MOA	114
4.7.3	Inspection after signing MOA	115
4.7.4	Actions after inspection	116

4.7.5	Underwater inspection	117
4.7.6	Dry-docking	117
4.8	Delivery	118
4.8.1	The place of delivery	119
4.8.2	The time of delivery and the cancellation date	119
4.8.3	Estimated delivery time	119
4.9	Risk	120
4.10	Condition of the ship on delivery	120
4.10.1	Without condition/recommendation	120
4.10.2	"As is"	121
4.10.3	Comparative note	122
4.10.4	Notice of readiness	124
4.11	The object of the sale	125
4.11.1	Spares and accessories	125
4.11.2	Bunkers	125
4.12	Documentation	126
4.12.1	Bill of sale	126
4.12.2	Class certificate	127
4.13	Changing the name of the ship	127
4.14	Encumbrances	128
4.15	Buyer's default	129
4.16	Seller's default	129
4.17	Governing law	130
CHAPTER 5 SHIP MORTGAGE AND MARITIME LIENS		132
5.1	Importance of security interests in shipping	132
5.1.1	Ship mortgages and maritime liens	132
5.1.2	Priority between ship mortgages and maritime liens	133
5.1.3	Conflict of security interests	133
5.2	International unification of law related to ship mortgages and maritime liens	134
5.2.1	The 1926 Convention	134
5.2.2	The 1967 Convention	135
5.2.3	The 1993 Convention	135
5.3	Prospect of uniformity	136
SHIP'S MORTGAGE		137
5.4	Concept and definition of ship's mortgage	137
5.5	Etymology	137
5.6	Mortgage as a financial transaction	137
5.7	Mortgage as a security transaction	138
5.8	History of mortgage	139
5.8.1	Bottomry	139
5.8.2	The emergence of the ship's mortgage	140

CONTENTS

5.8.3	Developments in English law	141
5.8.4	US law	142
5.8.5	Developments in civil law	143
5.8.6	Comparative note	143
5.9	Possession of a ship under mortgage	145
5.10	Object of mortgage	145
5.11	Registration and priorities of mortgages	146
5.12	Mortgagee's risks	147
5.13	Insurance	148
5.14	Redemption	149
5.15	Foreclosure	149
5.16	Taking possession of the ship	149
	MARITIME LIENS	151
5.17	Definition and concept	151
5.17.1	Purpose of maritime liens	152
5.17.2	Maritime lien and possessory lien	152
5.17.3	Maritime liens and maritime claims	152
5.17.4	Statutory liens	153
5.18	Historical development	153
5.19	The theoretical origins of maritime liens	154
5.19.1	Right <i>in rem</i>	154
5.19.2	Abandonment	155
5.19.3	Preferential rights (privileges)	155
5.20	Concept	156
5.21	The main features of maritime liens	156
5.21.1	No possession	157
5.21.2	No agreement	157
5.21.3	No formality	157
5.21.4	Hidden character	157
5.21.5	Legal nature of the right	158
5.21.6	Enforceable only through the court	159
5.22	The object of a maritime lien	159
5.23	Privileged claims – comparative note	159
5.24	Privileged claims ranking	161
5.24.1	The rank of priorities under the 1926 Convention	161
5.24.2	Second rank	164
5.24.3	Ranking in national laws	164
5.24.4	Order of priorities	165
5.24.5	Principle of inverse order	165
5.24.6	The ranking of maritime liens arising in the same voyage	166
5.25	Extinction of maritime liens	167
5.25.1	Time bar	167
5.25.2	Legal effect of termination of maritime liens	168

CHAPTER 6	JUDICIAL SALE	169
6.1	Introduction	169
6.2	Sale of the mortgaged ship	170
6.2.1	Creditor acting in own interest	170
6.3	Method of sale	170
6.3.1	Private sale	171
6.3.2	Judicial sale	171
6.4	Legal unification of judicial sales	172
6.4.1	Beijing Convention	173
6.4.2	Rationale of the Beijing Convention	173
6.4.3	Scope of the Beijing Convention	174
6.4.4	Notice requirements for judicial sale	175
6.4.5	Certificate of the judicial sale	175
6.4.6	International effects of judicial sale	176
6.4.7	Refusal to recognize the legal effects of judicial sales	176
6.4.8	Prohibition on arresting ships sold in judicial sales	177
6.4.9	Repository	178
6.4.10	Entering into force	178
CHAPTER 7	ARREST OF THE SHIP	179
7.1	Background	179
7.2	Historical development	180
7.3	Concept	182
7.4	Procedure of arrest	182
7.5	Comparative note (on interim measures)	184
7.5.1	Common law	184
7.5.2	Differences between common law jurisdictions	187
7.5.3	Civil law	189
7.6	Attempts at unification	190
7.6.1	Arrest Convention, 1952	191
7.6.2	Arrest Convention, 1999	191
7.7	Definition of arrest	192
7.7.1	Arrest by public authorities	193
7.8	Powers of arrest	193
7.9	Scope of application	194
7.9.1	Maritime claims and maritime liens	194
7.9.2	Closed list of claims	194
7.10	Exercising the right of arrest	195
7.11	Offending ship	196
7.11.1	Arrest of sister ship	197
7.11.2	Comparative note – piercing corporate veil	200
7.11.3	Action against the demise charterer	203
7.12	Release from arrest	206
7.13	Rearrest	207
7.14	Liability for wrongful arrest	207

CONTENTS

7.14.1	Comparative note	208
7.14.2	Proposals for the revision of the arrest conventions (<i>de lege ferenda</i>)	211
7.14.3	Counter-security	213
7.15	Arrest and jurisdiction	214
 CHAPTER 8 CARRIAGE OF GOODS BY SEA		215
8.1	Contract of carriage – general	215
8.2	Liner and tramp carriage	215
8.3	Historical development	216
8.3.1	Roman law	216
8.3.2	Nomos Rhodion Nautikos	217
8.3.3	Lex mercatoria	217
8.3.4	Developments in the 19th century	221
8.3.5	The Harter Act, 1893	223
8.4	Unification of the law regulating carriage by sea	223
8.4.1	The Hague Rules, 1924	224
8.4.2	The Hague-Visby Rules, 1968	226
8.4.3	The Hamburg Rules, 1978	227
8.4.4	The Rotterdam Rules, 2008	228
8.4.5	International conventions compared	230
8.4.6	Comparative note	231
8.5	Carrier's liability	233
8.6	Liability regime under the Hague-Visby Rules	234
8.6.1	Seaworthiness	234
8.6.2	Exceptions	238
8.6.3	Errors in navigation and management	239
8.6.4	Burden of proof	240
8.6.5	Limitation of liability	243
8.7	Transport documents	247
8.7.1	Definition and functions	248
8.7.2	Bill of lading as evidence of contract	249
8.7.3	Bill of lading as a document of title	251
8.7.4	Bill of lading as a receipt	256
8.8	Letters of indemnity	270
8.8.1	Legal regulation of the validity of LOI	270
8.8.2	Nullity of LOI	271
8.9	General principles relating to delivery of the goods	272
8.9.1	Comparative note (Asian jurisdictions)	275
8.10	Sea waybill	276
8.10.1	Characteristics of a sea waybill	277
8.10.2	Delivery of the goods in the case of a sea waybill	278
8.10.3	Right of control	278

8.11	Multimodal transport documents	280
8.11.1	The MTD as a document of title	281
8.11.2	Objections under English law	282
8.11.3	Criteria for determining whether an MTD is a document of title	285
8.12	Electronic transport documents	288
8.12.1	Electronic transport documents as a functional equivalent of bills of lading	288
8.12.2	Electronic transport documents as documents of title	289
8.12.3	Attempts at legal regulation of electronic transport documents	289
8.12.4	UNCITRAL Model Law on Electronic Transferable Records (MLETR)	291
8.12.5	National legislation	294
8.13	Future	300
CHAPTER 9 CHARTER PARTIES		302
9.1	Introduction	302
9.1.1	Definition and functions	302
9.1.2	Legal nature	303
9.1.3	Etymology	303
9.2	History	303
9.2.1	Ancient history	303
9.2.2	Nomos Rhodion Nauticos	304
9.2.3	Lex Mercatoria	304
9.2.4	Developments in the 19th century	305
9.3	Types of charter parties	306
9.3.1	Criteria for distinguishing different types of charter	306
9.3.2	Selecting the type of charter	307
9.4	Regulation of charter contracts	307
9.4.1	Standard charter party forms	308
9.4.2	Negotiation	309
DEMISE (BAREBOAT) CHARTER		310
9.5	Introduction	310
9.5.1	Characteristics of a demise charter	311
9.5.2	Transfer of possession and control	311
9.5.3	Shipowner's obligations	313
9.5.4	Owners' liability to third parties	313
9.6	Economic role of demise charter	314
9.6.1	Operating charters	314
9.6.2	Finance charters (hire purchase)	315
VOYAGE CHARTER		316
9.7	Introduction	316
9.8	Variations of voyage charters	316
9.8.1	The charter party for consecutive voyages	316
9.8.2	Contract of affreightment (COA)	317
9.8.3	Slot charter	319

CONTENTS

9.9	Voyage charter for a single voyage	319
9.9.1	Standard forms: GENCON	320
9.9.2	The ship	320
9.9.3	Kind of cargo	323
9.9.4	Duty to provide cargo (dead freight)	324
9.9.5	Performance of the voyage charter	324
9.9.6	Safe port and safe berth	330
9.9.7	Time factor in the voyage charter	333
9.9.8	Laytime	335
9.9.9	Performance of the voyage to the port of discharge	347
9.9.10	Freight	348
	TIME CHARTER	349
9.10	Definition	349
9.10.1	Comparison with demise charter	349
9.10.2	Differences between voyage and time charter	349
9.11	The economic rationale of time charters	351
9.12	Standard forms	352
9.13	The ship and its description	352
9.13.1	The nationality of the ship	353
9.13.2	The ship's class	353
9.13.3	Speed	354
9.13.4	Consumption of fuel	355
9.13.5	Bunkers	356
9.13.6	Ship's equipment	356
9.14	Period of the charter	356
9.15	Trading area	357
9.16	Delivery of the vessel	357
9.16.1	The place of delivery	357
9.16.2	The time of delivery	358
9.16.3	On hire survey	358
9.17	Redelivery	359
9.17.1	Time of redelivery	359
9.17.2	Late redelivery	361
9.17.3	Place of redelivery	361
9.18	Payment of hire	362
9.19	Off-hire	363
9.20	Withdrawal	364
9.21	Employment and indemnity clause	366
9.22	Signature of the bill of lading under time charter	367
	CHAPTER 10 CARRIAGE OF PASSENGERS	369
10.1	Introduction	369
10.1.1	Comparison with the contract of carriage of the goods	370

10.2	History	371
10.2.1	Consolato del Mare	371
10.2.2	Development of carriage of passengers in the 19th century	372
10.3	Legal regulation	373
10.3.1	The Athens Convention	373
10.3.2	Protocol 2002	374
10.3.3	The IMO Reservation and Guidelines 2006	375
10.4	Scope of application	375
10.5	Definitions	376
10.6	Carrier's obligations	378
10.7	Carrier's liability	379
10.7.1	Liability for death and personal injury under the Athens Convention 1974	379
10.7.2	Changes by the Protocol 2002	381
10.8	Liability for luggage	382
10.8.1	Valuables	383
10.9	Defences and limits for carriers' servants	384
10.9.1	Contributory fault	384
10.10	Limitation of liability	385
10.11	Insurance and certification requirements	387
10.12	Time bar	387
10.13	Jurisdiction	388
CHAPTER 11 MARITIME COLLISION		390
11.1	Introduction	390
11.2	Historical background	391
11.2.1	Developments in civil law	393
11.2.2	Developments in English law	394
11.2.3	Developments in the US law	395
11.2.4	The <i>Pennsylvania</i> rule	396
11.2.5	Comparative note	397
11.3	International legal regulation	397
11.3.1	Convention on Liability for Collision, 1910	397
11.4	Kinds of collision	399
11.4.1	Accidental collisions	399
11.4.2	Collision caused by fault	400
11.5	Causation and liability	401
11.5.1	Burden of proof and presumptions	401
11.5.2	Elements for establishing the fault	402
11.5.3	Shipowner's negligence	403
11.5.4	Fault based on unseaworthiness	403
11.6	Fault based on violation of navigational rules	404
11.7	Statutory and regulatory rules on navigation	404
11.7.1	The Rules of the Road – COLREGS	404
11.7.2	Structure of the COLREGS	406

CONTENTS

11.7.3	COLREGS as standard for establishing liability	406
11.7.4	Rules for vessels in restricted visibility	419
11.8	Apportionment of liability	420
11.8.1	Causative potency	422
11.9	Liability for pilot's negligence	423
11.10	Assessment of damages	424
11.11	Liability for cargo claims	426
11.11.1	"Both-to-blame" rule under US law	427
11.12	Liability for personal injury	428
11.13	Jurisdiction and applicable law	429
11.13.1	Civil jurisdiction	429
11.13.2	Penal jurisdiction	429
11.13.3	Applicable law	430
11.14	Comparative note: Liability of time charterer for collision in East Asian jurisdictions	430
11.14.1	Japan	430
11.14.2	South Korea	431
11.14.3	China	431
CHAPTER 12 OIL POLLUTION		433
12.1	Introduction	433
12.2	Legal issues related to liability for oil pollution	434
12.3	Creation of legal framework	434
12.3.1	International conventions on liability for oil pollution	436
12.4	CLC Convention	437
12.4.1	Application of CLC	438
12.4.2	Channelling liability	441
12.4.3	Comparative note	444
12.4.4	Right of recourse	444
12.4.5	Strict liability	445
12.4.6	Exemptions from liability	446
12.4.7	Limitation of liability	448
12.5	Compulsory insurance	451
12.5.1	Direct claim against the insurer	453
12.6	IFC 1971/1992	454
12.6.1	The role of the IOPC Funds	454
12.6.2	Liability for the IOPC Funds	455
12.6.3	The IOPC Funds defences	456
12.6.4	Limitation of liability for the IOPC Funds	457
12.7	Admissibility of claims	457
12.7.1	Damage to property	457
12.7.2	Economic loss	458
12.7.3	Preventive measures	466
12.7.4	Environmental damage	468

12.8	Quantification of damage	469
12.8.1	Quantification of environmental damage	470
12.9	Jurisdictional issues	472
12.10	OPA 1990	472
12.11	Other environmental liability	473
CHAPTER 13 SALVAGE		475
13.1	Introduction	475
13.2	Concept of salvage	475
13.2.1	Law of finds and the law of salvage distinguished	475
13.2.2	The public policy background of salvage	476
13.2.3	Legal origin	478
13.3	History	478
13.3.1	Roman law	478
13.3.2	<i>Nomos Rhodion Nauticos</i>	479
13.3.3	<i>Lex mercatoria</i>	480
13.3.4	Developments after the Middle Ages	483
13.4	International regulation	485
13.4.1	The 1910 Convention	485
13.4.2	The 1989 Convention	486
13.5	Object of salvage	487
13.5.1	Property subject to salvage award	487
13.6	Waters	488
13.7	The conditions for obtaining a salvage award	489
13.7.1	The salvaged property must be in danger	489
13.7.2	Salvage must be voluntary	490
13.7.3	The salvage must be successful	494
13.8	Contract salvage	496
13.8.1	Master's authority to sign a contract of salvage	498
13.8.2	Lloyd's Open Form (LOF)	499
13.9	Salvage and towage	500
13.10	Life salvage	501
13.11	Environment as subject to a salvage award	503
13.11.1	Damage to the environment	503
13.11.2	Award for protecting the environment	504
13.11.3	Special compensation	504
13.11.4	SCOPIC	506
13.12	Salvage award	506
13.12.1	The assessment of the salvage award	508
13.13	Reduction of the salvage award	511
13.14	Apportionment of the award among salvors	512
13.15	Salvors security, maritime liens and insurance cover	513
13.16	Law of wrecks	514

CONTENTS

CHAPTER 14	LIMITATION OF SHIPOWNER'S LIABILITY	516
14.1	Introduction	516
14.1.1	Concept of global limitations of liability	516
14.2	Rationale and justification of global limitation	517
14.3	History	519
14.3.1	Theories on the origin of limitation of shipowner's liability	519
14.3.2	The Middle Ages	521
14.3.3	Origin of limitation of shipowner's liability in civil law	523
14.3.4	Developments in common law	524
14.4	International legal regulation	525
14.4.1	The Limitation Convention 1924	525
14.4.2	The Limitation Convention 1957	526
14.4.3	The 1976 Limitation Convention	527
14.5	Persons entitled to limitation	528
14.5.1	Shipowners	529
14.5.2	Charterers	529
14.5.3	Managers and operators	531
14.5.4	Salvors	531
14.5.5	Liability insurers	531
14.6	Ships subject to limitation	532
14.7	Claims subject to limitation	533
14.8	Claims excepted from limitation	534
14.9	Loss of the right to limitation	534
14.10	Comparative note	537
14.11	IMO Guidelines	538
14.12	Counterclaims	539
14.13	Amount of limitation	539
14.13.1	Protocol 1996	540
14.14	Constitution and distribution of the limitation fund	541
14.15	The current legal regime: assessment	542
CHAPTER 15	MARINE INSURANCE	544
15.1	Introduction	544
15.2	Historical background	544
15.2.1	Early origins	545
15.2.2	The Middle Ages	545
15.2.3	Early insurance legislation	547
15.2.4	Introduction of insurance in England	548
15.2.5	Lloyd's	549
15.3	Legal framework of marine insurance	550
15.3.1	Lloyd's Marine Policy	551
15.3.2	The Institute Clauses	552
15.4	Principles of marine insurance	553
15.4.1	Indemnity	553
15.4.2	The insurable interest	554

CONTENTS

15.4.3	Duty of disclosure	555
15.4.4	Remedies for breach of the duty of disclosure	560
15.4.5	Duty of disclosure and good faith in civil law	560
15.4.6	Comparative note	561
15.5	Insurance warranties	563
15.5.1	Revisions of warranties under the IA 2015	563
15.6	Total loss	564
15.6.1	Actual total loss	564
15.6.2	Constructive total loss	565
15.6.3	Partial loss	567
15.7	Liability and causation	568
15.7.1	Proximate cause	568
15.7.2	Comparative note	571
15.7.3	Proximate cause: <i>de lege ferenda</i>	572
15.8	Right of subrogation	573
	<i>Bibliography</i>	577
	<i>Index</i>	582