

Modern Maritime Law and Risk Management

Second Edition

Aleka Mandaraka-Sheppard

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*Knowing the law is the beginning of a battle; knowing how to apply it is winning the battle;
and knowing how to practise risk management is winning the war.*

*To the young generation of shipping law and practice
And to my son Emmanuel-John*

FOREWORD TO THE FIRST EDITION

Anyone with knowledge of the boundless enthusiasm and apparently inexhaustible energy displayed by Dr Aleka Mandaraka-Sheppard in the conception and evolution of the London Shipping Law Centre is unlikely to be surprised at her successful achievement of another daunting goal, namely to publish a new and comprehensive work on shipping law.

There is of course nothing radical in itself about the idea of a modern work in this field. As the author rightly acknowledges, several valuable works on individual aspects of the general topic have been published in recent years, but there has long been the need for a comprehensive work from which both the student (at various levels) and the practitioner can gain a general perspective as well as concrete and detailed information. Perhaps the late Professor Cadwallader, to whom the author pays tribute, could if spared have tackled the task, but his former student has produced a volume of which he would have been proud, the more so given the striking expansion in volume of the law relating to ships and the sea which has occurred since his day. Even a glance at the table of contents will show the extent of the author's grasp of contemporary legal issues, and the thoroughness with which they have been explored.

In addition to the general merits of this book there is one particular theme which calls for particular mention. That is, the emphasis laid on risk management. In recent years this has become a commonplace of business law and practice in many areas, but with a few notable exceptions it has been an absentee from study and practice in the maritime world. Fortunately this is now changing, and Dr Mandaraka-Sheppard's focus on the subject will, it may be hoped, stimulate interest and promote a wider appreciation of its cardinal importance.

Shelves now groan under the weight of legal textbooks, and inches of shelf-room are at a discount, but place must be made for *Modern Maritime Law*, whose dimensions belie its approachability whilst evidencing its scope. This is a book for the library, the study and the office. I welcome it, and am sure that readers will do the same.

MJ Mustill
June 2001

FOREWORD TO THE SECOND EDITION

This is by any standards a magnum opus. Seven years have passed since Michael Mustill wrote the foreword to the first edition of 'Modern Maritime Law'. He paid tribute to the boundless enthusiasm and apparently inexhaustible energy displayed by Dr Aleka Mandaraka-Sheppard in the preparation of the first edition.

Both the enthusiasm and the energy are evident again in the preparation of the second edition. I cannot pretend that I have read every word of its 1000 pages. It would have been impossible to do so in the time available. However, those parts which I have been able to absorb have persuaded me, and am sure will persuade students and practitioners in maritime law in the future that this is a vital work for everyone interested in shipping law to have on their shelves. It has a breathtaking range. Try as I might, I have not been able to think of anything like it. Having spent some five years as the Admiralty judge and having before that practised for many years at the Admiralty and Commercial Bar, I am delighted that Aleka has had the time and energy to produce a second edition of her great work.

Like Michael Mustill, I am particularly struck by her focus on risk management, especially in the context of the management of ships and the ISM Code. The importance of risk management was brought home to me when I had the privilege of conducting the Thames Safety Inquiry and then the Formal Investigation into the collision between the MARCHIONESS and the BOWBELLE with its consequent loss of life. I hope that this book will help to underline this aspect of the legal responsibilities of shipowners, managers and charterers alike.

Finally, I especially appreciate the section on Admiralty Jurisdiction and Procedure because it brings back many happy days in front of the then Admiralty judge, Mr Justice Brandon, in the 1970s when the likes of the present Admiralty judge, Mr Justice David Steel, and I were kept on our metal by the intellectual rigour of the judge.

Future practitioners will have the great benefit of Dr Mandaraka-Sheppard's book with which to educate future Admiralty judges.

Sir Anthony Clarke
August 2007

PREFACE TO THE SECOND EDITION

Since the first edition, 2001, there have been major developments in most areas of Admiralty and Maritime law, both at international and European levels as well as in English law.

There has been extensive revision of the first edition and, taking note of the advice of Professor Rhidian Thomas, three further chapters have been added, namely, The Athens Convention 1974 and the Protocol 2002, Pollution damage legislation, and General Average law. Considering the extended breadth of this edition, the previous title of the book, 'Modern Admiralty law', is changed to 'Modern Maritime Law', better to reflect the dimensions and scope of the book.

The book provides a comprehensive analysis of principles and precedents in maritime law and related aspects of law. The sources include important decisions, statutes, international conventions, as well as government consultation papers, EU directives and regulations, recent proposals of the European Commission and the IMO on marine safety and policy. The book approaches the subject from a modern perspective, focusing the mind on the importance of risk management in maritime operations and the law, and is the first of this kind. Its extent and depth ranges from basic principles of the law of contract and tort, including statutory controls, causation and remoteness of damages, to specialised maritime contracts, incorporating some cases and principles relating to carriage of goods by sea, insurance, agency, criminal law, as well as regulations pertaining to safety at sea and the protection of the environment. The book also encompasses international conventions regulating liabilities for maritime claims, complex jurisdictional issues in relation to multiple proceedings, forum shopping, arbitration, including injunctions, obtaining security for claims, and conflict of laws. Befitting to a modern era of the practice of maritime law and policy, it expands beyond what was, in the past, the remit of Admiralty law as taught by the late Professor Cadwallader who inspired many international students of maritime law.

The 2nd edition is re-structured into four Parts.

Part I covers Admiralty jurisdiction in depth (7 chapters) including an overview of wrongful arrest and the possibility of a further arrest of a ship for a maritime claim. Most importantly, there is discussion on the effect upon English jurisdiction and previous decisions of the English courts of the recent decisions of the European Court of Justice in *Gasser v Misat*, *Turner v Grovit* and *Owusu v Jackson* relating to *lis pendens*, forbiddance of anti-suit injunctions and the inapplicability of *forum non-conveniens*, when the Brussels Regulation 2001 applies. *The Front Comor*, concerning the question of anti-suit injunctions in the context of arbitration agreements, is also considered but, at the time of writing, a reference has just been made to the European Court of Justice on this issue by the House of Lords (chapters 6 and 7).

Part II deals with the substantive maritime law comprising 9 chapters. The book has been regarded as the first legal text to deal with risk management generally and, in particular, with safety regulations and the legal implications of the International Safety Management Code (ISM) upon liabilities of ship owners and ship managers. In chapter 8, titled: ownership and management of ships, the regulatory regimes and the 'Quality Shipping Campaign' are examined; issues of seaworthiness under contracts of carriage of goods by sea and contracts of marine insurance

as well as issues of limitation of liability and criminal liability, including the proposed Bill on Corporate Manslaughter 2006, are considered in the context of the additional obligations of owners and managers under the ISMC. The rules of attribution of liability are examined generally.

This Part reviews shipbuilding contracts in chapter 10 and includes recent decisions, such as: *Covington Marine v Xiamen Shipbuilding* (has there been a contract?); *Balmoral v Borealis* (validity of exclusion clauses in relation to fitness for purpose); *Haugland Tankers v RMK Marine Gemi Yapim Sanayii ve Deniz*, and *Ravennavi v New Century Shipbuilding* (option agreements); *Gold Coast v Naval Gijo* (premature cancellation of a contract); *Cenargo v Izar Construcciones Navale* (trifling breaches and penalty clauses). Chapter 11 examines the law of sale and purchase of ships: see the significance of *The Kriti Palm* in relation to what could amount to a false representation in negotiations or could just be mere fallibility. In *Fourie v Le Roux* it is confirmed that an accrued cause of action is needed before an application for a freezing order against the seller can be made, and as regards the risk of dissipation of assets the principles are reviewed in *Harrison Partners v Jevena* and *Laemthong International v ARTIS*. There are no major developments in ship mortgages (chapter 9) but confirmation is noted that the duty of a mortgagee to third parties lies in equity not in tort: *The Tropical Reefer*. The tort of wrongful interference with third parties' contracts is also discussed in the light of recent developments.

Furthermore, Part II examines collisions at sea in chapter 12. This chapter reviews criminal liability arising from breach of statutory duties; civil liability due to negligence of owners' servants, including a review of employer's liability for wrongful, deliberate acts of employees: *Attorney General of the British Virgin Islands v. Hartwell* (PC), *The Ocean Frost* (HL), *Mattis v. Pollock* (CA); expert evidence: *Bow Spring and Manzanillo II*; causation and remoteness of damages: *Lagden v O'Connor* (HL), which overruled its previous decision in *The Edison*; pure economic loss: *The Sea Empress* (CA), *The Braer*. There are some developments in the law of salvage, chapter 13, (e.g. *The Star Maria*, where the harbour master was awarded a salvage award; *The Great Peace* concerning what constitutes an operative mistake in sub-contracting a tug; *The Key Singapore* relating to negligence of salvors; *The Sea Angel* reviewing the foreseeability issue in frustration of contracts and in context of the SCOPIC). Places of refuge are considered and a new initiative for environmental salvage is briefly mentioned. Towage contracts are examined in chapter 14 in which there are some interesting recent decisions (e.g. *The Key Singapore*, *The Borvigilant* and *Romina*). The obligations of port authorities in a risk management era, particularly after *The Sea Empress*, are also reviewed in chapter 16 and a brief account of the Wreck Removal Convention 2007 is given. A new chapter 15 laying out the basic principles of General Average is added.

In Part III, this edition deals with International Conventions on maritime liabilities, limitation and compensation. Chapter 17 explores the law concerning limitation of liability for maritime claims under the London Convention 1976, as amended by the 1996 Protocol. There have been some interesting recent decisions, such as *The Tasman Pioneer*, *The CMA Djakarta*, *The Darfur*, *Thompson v. Masterton*, *The Robert Whitmore*, *The MSC Rosa M*, *Saint Jacques II* and *Gudermes*, *The Leerort*, *The Western Regent*, *ICL Vikraman*. This Part includes two new chapters: Liability to passengers of ships and compensation under the Athens Convention 1974, as amended by the

2002 Protocol, in chapter 18; liability and compensation for marine pollution damage, including hazardous/ noxious substances and nuclear damage, in chapter 19, which is contributed to this edition by Elizabeth Blackburn QC.

Part IV concerns, mainly, developments with regard to safety at sea that have taken place since the first edition, in chapter 20, which reviews European legislation and proposals for new directives and regulations, as compared with the parallel steps taken by the IMO. Technological developments in the running of ships, public concern for protection of the environment and criminalisation, international regulations for safety at sea, the campaign for quality shipping, insurance concerns and policy issues have all influenced the development of maritime law in recent years. The Epilogue in this Part gives an overview on the approach to risk management and highlights its significance by bringing the parts of this book together. Knowledge of how things did go wrong in previous cases and accidents will, hopefully, increase awareness of how to avoid the same or similar incidents.

Although the book was, originally, intended, primarily, for post-graduate students of shipping law and academics, it has found a useful purpose amongst practitioners of shipping law (world-wide), trainees, in-house lawyers, ship owners, ship managers, mortgagees, salvors, P & I Clubs, insurers, shipbrokers, traders, consultants, average adjusters, shipbuilders, classification societies, port authorities, and regulators.

It is a great reward for me to witness that the first edition did stimulate interest in the subject of risk management in the maritime world and promoted a wider appreciation of its importance, as Lord Mustill had expressed that hope in the foreword to the first edition.

Students of maritime law, practitioners and others studied the first edition with immense appreciation for being able to find the principles and important decisions of all aspects of Admiralty law in one volume and, in particular, for becoming aware of the importance of risk management in 21st century shipping. I am indebted to my LLM students of University of London for their comments which helped me to review the first edition.

I wish to express my gratitude, particularly, to my research assistant, Darren Wall, barrister, currently re-training as a solicitor with Mays Brown Solicitors, for his cheerful encouragement, help with research, footnote referencing, and ground work in the Athens Convention and General Average chapters. I am most grateful to Elizabeth Blackburn QC for her valuable contribution to the 2nd edition by writing the chapter on marine pollution law.

In addition, I would like to acknowledge my thanks to: Andrew Mitchell, formerly manager of marine management systems, Lloyd's Register, for his valuable comments on technical matters relating to the ISM Code, risk assessment issues and classification societies; John MacDonald, an experienced average adjuster, for his useful observations and suggestions on the GA chapter; Herry Lawford, formerly director of Thomas Miller, managers of the UK P & I Club, for his valuable observations on the Epilogue of this edition. Last, but not least, I owe my gratitude to my husband, Colin Sheppard, and our son Emmanuel, to many friends, and to Gerard Matthews, manager of the London Shipping Law Centre, for their support and patience while I was immersed in writing this edition.

I am particularly grateful to The Rt. Hon Sir Anthony Clarke, Master of the Rolls, for his generosity in writing the foreword to this edition.

Only important decisions published during the first part of 2007 are included in this edition.

*Dr Aleka Mandaraka-Sheppard, solicitor,
Visiting Professor, University College London,
Founding Director, London Shipping Law Centre,
Risk Management Advisor
June 2007*

ABBREVIATIONS

AA 1975/1996	Arbitration Act 1975/1996
AIS	Automatic Identification System
BIMCO	Baltic and International Maritime Council
C(RTP)A 1999	Contracts (Rights of Third Parties) Act 1999
CJJA 1982	Civil Jurisdiction and Judgments Act 1982
CLC 1969/1992	International Convention for Civil Liability arising from Pollution Damage 1969/1992
CMCIS	Community monitoring, control and information system
CMI	Comité Maritime International
Colregs	International Regulations for Preventing Collisions at Sea
COSS	Committee on Safe Seas and the Prevention of Pollution from Ships
CPR 1998	Civil Procedure Rules 1998
CRISTAL	Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution
DOC	Document of Compliance
DPA	Designated Person Ashore
DVA 1985	Dangerous Vessels Act 1985
dwt	dead weight
ECJ	European Court of Justice
EEZ	Exclusive Economic Zone
EL(DE)A 1969	Employers' Liability (Defective Equipment) Act 1969
EMSA	European Maritime Safety Agency
EU	European Union
FAAs	Fatal Accident Acts
H&M	Hull and Machinery
HA 1964	Harbours Act 1964
HDPCA 1847	Harbours, Docks and Piers Clauses Act 1847
HNS	Hazardous and Noxious Substances
HVR	Hague-Visby Rules
IACS	International Association of Classification Societies
IAEA	International Atomic Energy Authority
IMF	International Monetary Fund
IMO	International Maritime Organisation
ISM Code/ISMC	International Safety Management Code
ISPS Code	International Ship and Port Security Code
ISSC	International Ship Security Certificate
LLMC Convention	Limitation of Liability Convention for Maritime Claims
LOU	Letter of Understanding
LR(CN)A 1945	Law Reform (Contributory Negligence) Act 1945
MAIB	Marine Accidents Investigation Branch
MARPOL	International Convention for the Prevention of Pollution from Ships 1973/1978
MS(Reg)A 1993	Merchant Shipping (Regulation etc) Act 1993

MCA	Maritime Coastguard Agency
MCA 1911	Maritime Conventions Act 1911
MEHRA	Marine Environment High Risk Areas
MEPC	Marine Environment Protection Committee
MIA 1906	Marine Insurance Act 1906
MOA	Memorandum of Agreement
MOU	Memorandum of Understanding
MS(LSO)A 1958	Merchant Shipping (Liability of Shipowners and Others) Act 1958
MSA 1894/1958/1979/1995	Merchant Shipping Act 1894/1958/1979/1995
MSC	Maritime Safety Committee
MSMSA 1997	Merchant Shipping and Maritime Security Act 1997
MS(SP)A 1994	Merchant Shipping (Salvage and Pollution) Act 1994
NUCLEAR 71	1971 Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material
OCIMF	Oil Companies International Marine Forum
OECD	Organisation for Economic Co-operation and Development
OPPRC Convention	Oil Pollution, Preparedness, Response and Co-operation Convention 1990
P&I	Protection and Indemnity
PA 1987	Pilotage Act 1987
PSC	Port State Control
PTR 1992	Package Travel Regulations 1992
SCA 1981	Supreme Court Act 1981
SCJ(Con)A 1925	Supreme Court of Judicature (Consolidation) Act 1925
SCOPIC	Special Compensation of Protection and Indemnity Clause
SDR	Special Drawing Rights
SGSA 1982	Supply of Goods and Services Act 1982
SHIPMAN	Ship management form
SMM	Safety Management Manual
SMS	Safety Management System
SOLAS	International Convention for Safety of Life at Sea
SOSREP	Secretary of State's Representative for Maritime Salvage and Intervention
STCW Convention	Standard of Training Certification and Watch-keeping 1978 as amended
STOPIA	Small Tanker Oil Pollution Indemnification Agreement
TDA 1968	Trade Descriptions Act 1968
TMSA	Tanker Management Self Assessment
TOPIA	Tanker Oil Pollution Indemnification Agreement 2006
TOVALOP	Tanker Owners' Voluntary Agreement concerning Liability for Oil Pollution
UCTA 1977	Unfair Contract Terms Act 1977

Abbreviations

UKSTC	United Kingdom Standard Towage Conditions of 1986
UNCLOS	United Nations Convention on the Law of the Sea 1982
VDR	Voyage Data Recorder
YAR	York Antwerp Rules

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