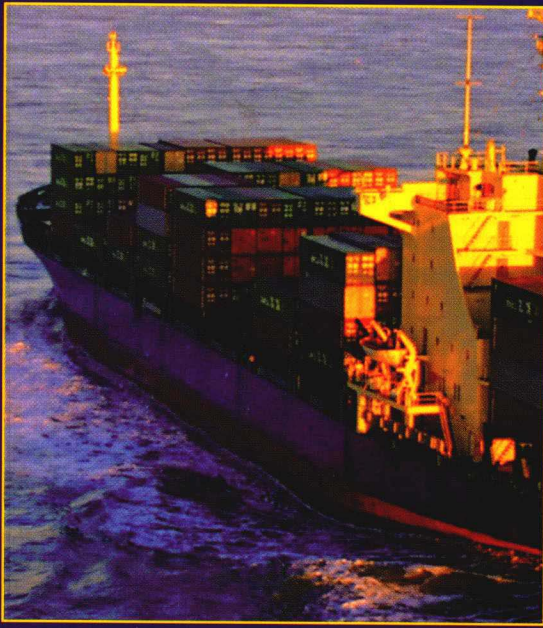


MODERN ADMIRALTY LAW



Aleka Mandaraka-Sheppard

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With Risk Management Aspects

Aleka Mandaraka-Sheppard, LLM, PhD, Solicitor

Director of the London Shipping Law Centre

University College London



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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 legal risk management is winning the war.

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

FOREWORD

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 Admiralty 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

PREFACE

This book provides a comprehensive analysis of principles as derived from important decisions, statutes, and other legislation, as well as Government consultation papers and regulations, directives and recent proposals of the European Commission, on the subject of admiralty law and marine safety. It approaches the subject from a modern perspective and includes advice on legal risk management where it is called for. It does not include contracts of affreightment used for the carriage of goods by sea, which is a subject meriting a separate volume. Although aspects of environmental pollution are looked at, as far as recent trends and developments are concerned, it is not within the scope of this book to include detailed provisions of the liability convention for damage resulting from oil pollution, which is an area of marine environmental law.

Admiralty law is not static. Technological developments in the running of ships, public concern for protection of the environment, international regulations for safety at sea, the campaign for quality shipping and insurance concerns have all influenced the development of admiralty law.

In the last decade, there were fundamental changes in the law and practice of admiralty law and marine safety, both nationally and internationally. There have been new international conventions and amendments to existing ones, as well as domestic legislation. Just to mention a few: the 1989 Salvage Convention – (brought into force internationally on 14 July 1996); the Oil Pollution Preparedness, Response and Co-operation Convention 1990 enacted by a statutory instrument in 1998; the amendment to the CLC and Fund for Oil Pollution Damage by the 1992 Protocols; the amendment to the SOLAS Convention 1974 to include the International Safety Management Code (ISM Code) being in force since 1 July 1996; further bombardment by new regulations and proposals of the European Commission, having a parallel purpose to the international regulations on safety at sea in European waters; the Convention for the Arrest of Sea-going Ships 1999; the revision of the Brussels Convention on Civil Jurisdiction and Enforcement of Judgments, following the passing of the Amsterdam Treaty 1999, by a Council regulation, which will come into force on 1 March 2002; the Bunkers Convention signed on 23 March 2001. As far as domestic legislation is concerned, apart from a number of regulations and statutory instruments with regard to safety, there have been revolutionary changes, first with regard to arbitration procedures, by the Arbitration Act 1996, and even more so with regard to the doctrine of privity of contract, by the Contracts (Rights of Third Parties) Act 1999. Finally, a fundamental reform has been brought to the Civil Procedure Rules, by the Woolf reforms 1999, which encourage alternative dispute resolution.

A detailed and comprehensive book on all topics of pure admiralty law has long been needed. I recall from my time of studying for my LL.M. degree,

at University College London in 1976, that the late Professor Cadwallader was being urged by students to develop his detailed and informative notes of teaching into a book. Time, however, has moved on and so has the development of admiralty law. The same demand for such a book has continued in the present time and I was encouraged by my students at the University of London (whom I have been teaching since 1993) to write this book. It has been developed from my teaching material, which the students enthusiastically receive, and further thoughts inspired by students' questions for which I acknowledge my deep appreciation.

Admiralty law belongs to the general subject of maritime law and includes: admiralty jurisdiction; ownership, management and mortgages of ships; shipbuilding, sale and purchase; collisions at sea; salvage of ships from danger; towage contracts; ports and pilotage; limitation of liability. Each of these topics deserves a book on its own, and there are such commendable books covering each topic separately. The purpose of this book is to bring the law of these topics together in a cohesive whole, looking beyond what may appear a rudimentary area of law. The subject matter is treated from the point of view of English common law, statutes and relevant international conventions. Since most of the international conventions have been enacted or are reflected in English admiralty law, this book should be of value to both national and international lawyers. In addition, England is the jurisdiction that is chosen by most contracting parties in their contracts concerning shipping transactions for the resolution of their disputes, either by the English courts or by arbitration. It is hoped that the procedural and the substantive law covered in this book will assist in the handling of such disputes.

The book is primarily intended for post-graduate students of shipping law, although it goes much further than what they need to know in this subject as students. It will also be useful to practitioners of shipping law, trainees, in-house lawyers, shipowners and managers, financial institutions and accountants, traders, consultants of shipping companies, claims' managers of protection and indemnity clubs and a wide range of professionals within the shipping industry.

The title of this book indicates that I shall also be dealing with risk management, which is an area that has fascinated me for some years. The phrase 'risk management' is, nowadays, frequently used in different contexts and an explanation is given in the 'Epilogue' of this book. Knowledge of how things did go wrong in previous cases with regard to the application of both the substantive and procedural law will, hopefully, increase awareness of how to avoid the same circumstances.

The reason why I consider discussion of risk management important is twofold: first, I would like students of shipping law to develop an awareness of managing legal risks, so that as shipping managers, or in-house lawyers, or insurance managers, they may be able to advise their principals or clients on

how to prevent disputes or protracted litigation. Secondly, in my view, a systematic practice of risk management is a kind of an invisible investment, which will assist in the development of a healthy culture and the economic prosperity of a business.

For reasons of volume and size, it was not possible to include the text of the relevant conventions in this book. I do, however, rest assured that readers can easily find most of the relevant conventions in the Schedules to the Merchant Shipping Act 1995.

I have approached the writing of this book by concepts. Although the law is dry, there seemed to be a glimpse of fun, on some occasions, from the facts of cases and the witty comments of learned judges and counsel. The intellectual stimulation of writing it, however, has been immense but the time constraints frustrating.

General outline of the book

Part I, 'Admiralty Jurisdiction and Procedure', deals with the principles and case law of admiralty jurisdiction' and has been divided into seven chapters. This Part is intended to complement the book on *Admiralty Jurisdiction and Practice* of my learned friend Nigel Meeson, which has now been updated, although the present book expands many admiralty concepts and offers a different perspective. Historical aspects of the admiralty jurisdiction are dealt with in Chapter 1, with an analysis of the nature of jurisdiction in Chapter 2. A workable interpretation of *The Indian Grace* and its impact on various procedural and liability issues is offered (Chapter 3). This chapter deals also with beneficial ownership in a ship and risk management with respect to corporate structures. Chapter 4 deals with procedural matters. Chapters 5 and 6 concentrate on restrictions imposed upon the Admiralty Court, by conventions and doctrines, in exercising or maintaining jurisdiction. Important issues of how the Brussels/Lugano Conventions prevent or resolve conflict of jurisdictions are examined in detail. Finally, in this Part, Chapter 7, there is an overview of anti-suit injunctions.

Part II is titled 'Acquiring Ownership in Ships' and is divided into four chapters. Chapter 8 encompasses principles under English law in relation to ownership of British ships and management. It conveniently deals with management contracts and potential liabilities of owners and managers, particularly in the light of the ISMC (including criminal liability). Chapter 9 deals with the law of mortgages. Chapter 10 covers current law and issues pertaining to shipbuilding contracts. Chapter 11 concludes with ship sale and purchase and primarily intends to raise buyers' awareness in risk management; it includes aspects of freezing injunctions, as well as potential liability of classification societies to buyers.

Part III, 'Safety Regulations in Navigation and Liabilities' comprises one large Chapter 12: it includes liabilities of owners, managers, and officers for negligence, and is divided into three sections. Section A deals with the collision regulations; Section B with criminal liability arising from breach of statutory provisions; and Section C deals with civil liability and damages arising from a collision at sea caused by breach of duty of care, or lack of good seamanship.

Part IV, 'Specialised Contracts in Admiralty Law', is divided into three chapters: Chapter 13 has condensed the law of salvage and deals with recent developments; Chapter 14 is concerned with the law of towage contracts; and Chapter 15, with the law of harbours and pilotage, which is currently undergoing fundamental changes in order to ensure safety in port operations and navigation.

Part V, 'Miscellaneous', contains 'Tonnage Limitation' in Chapter 16. This chapter is concerned with a conceptually independent subject and briefly explains the principles of limitation of liability of shipowners and others with regard to maritime claims. Issues arising from the ISMC and its impact on limitation are discussed, as well as problems surrounding the compensation of victims of ferry disasters are briefly summarised. Chapter 17, titled 'Recent Proposals by the European Commission to the European Parliament and Council' summarises the measures taken by the Commission on Maritime Safety, following the sinking of the oil tanker *The Erika*.

Part V also includes the Epilogue of the book, dealing with issues of risk management generally in the context of the infrastructures that underpin its process at a particular shipping company.

Aleka Mandaraka-Sheppard
April 2001

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I received encouragement from my publishers for the completion of this book in no little measure. I am grateful to Jo Reddy, Cara Annett and the expert team of Cavendish Publishing for their patience and appreciation of the difficulties involved in the lonely process of writing a book of this type in addition to other duties.

I am obliged to the members of the London Shipping Law Centre, whose contributions enabled UCL to engage a research assistant at the first stages of this book, although the vast amount of material needed I was able to have available in my computer through 'Context', Lawtel EU interactive and the internet, which saved me a lot of time. My thanks are also due to the Steering Committee, co-director, and executive manager of the Centre, Gerard Mathews, for their support. I owe my gratitude to the Dean and Head of the Law Faculty, Professor Jeffrey Jowell, for permitting me to take leave from teaching for a year to write this book, and to those who took part in the teaching of the LLM courses in my absence, namely: Bernard Eder QC, Nicholas Legh-Jones QC, Nigel Meeson, Jonathan Loftus, Professor Robert Grime and Jessica Killner. My reliable secretary, Deborah Harris, was able to take on administrative duties of the courses in my absence. Without the help of all, this book would have taken longer to reach print.

I am especially grateful to Alison Clarke, senior lecturer at UCL, for her valuable suggestions on the first draft of the mortgages chapter. I would also like to thank Michael Howard QC, who made useful comments to my first draft relating to the evolution of the action *in rem*, Herry Lawford of the UK Club for providing me with information about the Baltic and International Maritime Council new SHIPMAN forms and Pandi Embiricos of Andros Maritime Agencies Ltd, for providing me with a copy of the EC's report on *The Erika*. I should like to acknowledge that the work of the Centre, through its contributors, has been an extra source of information that makes some parts of this book especially market orientated. It is an honour that Lord Mustill, to whom I am most grateful, has agreed to write the foreword.

My deep appreciation and thanks are also due to Chandris Shipping for, had it not been for the scholarship granted to me in 1976 to study shipping law, I would not have been in shipping today!

Finally, this book would not have been possible without the generous encouragement offered to me and patience endured, throughout a year and a half, by my husband, Colin Sheppard, and our young son, Emmanuel-John, who were concerned with my very long working hours. Proof-reading of first drafts by Colin, in between his numerous other engagements, was immensely reassuring. In addition, his skilful home management and cooking saved me a lot of time. Emmanuel-John, who is preparing for his Common Entrance Examination, has shown a great interest in shipping, without undue fascination about regulations preventing collisions. He would prefer, however, if the book contained some naval battles and had the title he offered:

‘The Law of the Waves’, which would, undoubtedly, make a suitable title for a more interesting book than a legal text!

While my appreciation for comments made to some drafts of the manuscript has been immense, the responsibility remains mine. The text contains the law as I believed it to have been on 31 January 2001 for judgments and as at 7 March 2001 for recent developments in regulations and proposed legislation.

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