

Important legal issues affecting international maritime transport and trade include regulatory developments to facilitate the use of electronic bills of lading and regulatory responses to environmental challenges - notably air pollution from shipping, plastic pollution, marine litter, protecting the marine environment, and biodiversity. In addition, regulatory developments also include adopting a new international convention on the judicial sale of ships and an agreement on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction. Also relevant are some developments and considerations relating to liability and compensation for bunker oil pollution from ships. Key ongoing developments under the auspices of IMO and the European Union regarding measures to reduce greenhouse gas emissions from ships, are covered in chapter 3.

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LEGAL ISSUES AND REGULATORY DEVELOPMENTS



A. REGULATORY DEVELOPMENTS MAY FACILITATE THE FUTURE USE OF ELECTRONIC BILLS OF LADING

The use of electronic trade documents, including electronic bills of lading, is increasing and expected to bring a number of benefits. These include faster transactions, lower costs, better financing, cargo holding and document processing, as well as potentially reduced fraud risks due to digital authentication. At the same time, with greater reliance on electronic interactions, stakeholders will also have to manage any associated cyber-risks, an important set of issues which is likely to demand greater attention by policymakers and trade and industry alike, given the increasingly rapid pace at which technology is evolving (see e.g. Thetius, 2022).

The advantages of using electronic equivalents to traditional paper-based documents were highlighted during the COVID-19 pandemic, when traders across jurisdictions experienced extensive legal problems due to delays in the transmission and presentation of paper documents (UNCTAD, 2023a; 2022a; 2022b). To address this issue and avoid the incidence and costly resolution of related legal disputes, the widespread use of electronic alternatives to paper documentation could play a major role. However, any remaining legal and regulatory obstacles to the use of electronic documents in international trade need to be removed.

While progress has been made with the recognition of electronic documentation used for the carriage of goods by air and road (UNCTAD, 2022c), more work remains to be done in the area of electronic alternatives to sea transport documents, particularly the negotiable bill of lading. This key document in international trade is used for the carriage of goods by sea, in particular by containerships (liner transportation), as well as for the international sale of commodities and of containerized goods on CIF (cost, insurance, freight) and FOB (free on board) terms (UNCTAD, 2023a).

Unlike other transport documents, the marine negotiable bill of lading is universally recognized as a *document of title* which provides any lawful holder of the document with the exclusive right to demand delivery of the goods from the carrier in exchange for the original document. As such, it provides traders and banks with independent documentary security and can be traded along a chain of contracts (string sales), enabling the sale of goods in transit (see further UNCTAD, 2003a). Although electronic equivalents to the negotiable bill of lading are increasingly being developed to facilitate paperless trading (UNCTAD, 2023a),¹ in many jurisdictions these do not yet benefit from full legal recognition as equivalent to traditional paper-based documents.²

In a major recent development, in July 2023, an important piece of legislation was adopted in the United Kingdom to ensure that electronic trade documents, including electronic equivalents to negotiable bills of lading, are *possessable* and enjoy the same legal status as traditional paper-based documents. With international contracts often subject to English law, by agreement of the parties, the new Electronic Trade Documents Act, 2023 (United Kingdom Parliament, 2023), which received royal assent on 20 July 2023, is expected to significantly boost the use of electronic bills of lading in global trade and reduce delays across global trading networks. In some other jurisdictions (e.g., Singapore, 2021)³, relevant laws have also been passed based on the UNCITRAL Model Law on Electronic Transferable Records (MLETR), 2017⁴ and national policymakers are encouraged to consider relevant adjustments to national legislation, where necessary.

In the meantime, industry associations have been collaborating on developing and adopting relevant standards to facilitate the use of electronic bills of lading. Of interest is also the recent commitment by some of the leading container lines to the exclusive use of electronic bills of lading by 2030 (DCSA, 2023a, 2023b, and 2023c). Electronic bills of lading currently account for only 1.2 per cent of the 45 million bills of lading issued each year by ocean carriers (DCSA, 2023c). Among the reasons for the low usage to date are both legal uncertainties as well as potentially other factors, such as additional costs, concerns by some stakeholders about data confidentiality and limited benefits for some data providers. Switching from the transfer of paper bills of lading has been estimated to potentially save up to \$6.5 billion in direct costs for stakeholders and enable \$30–40 billion in annual global trade growth (McKinsey, 2022).⁵ Depending on the system used, it could also improve environmental sustainability and assist in efforts to reduce greenhouse gas (GHG) emissions, primarily by eliminating the use of paper and avoid delays at ports associated with the late arrival of documents (see chapter 4).

In a related legal development, starting in 2022, work has commenced under the auspices of UNCITRAL Working Group VI on the preparation of a new legal instrument on 'Negotiable Multimodal Transport Documents'. The instrument aims to address the expanding needs of financing in international trade by

establishing the legal recognition of negotiable multimodal transport documents (and relevant electronic records) as documents of title, similar to marine negotiable bills of lading. To achieve that goal, such a document should (a) allow a third party in good faith to rely on all information contained therein, (b) grant the right of control over goods in transit to the holder of such document, and (c) function as the key document for delivery at destination. As to the form of the instrument, the Working Group noted a prevailing preference in favour of an international convention so as to ensure a high degree of uniformity. It was, however, emphasized that a new instrument would need to avoid conflicts with existing international conventions governing carriage of goods (UNCITRAL, 2022). For an overview of the latest discussions in May 2023, see UNCITRAL, 2023.

As part of the preparatory work, concerns were raised by UNCTAD about the need to address any potential implications that may arise in relation to liability issues, given that no international mandatory liability regime is in force for multimodal transport to protect the rights of cargo claimants (see UNCTAD, 2003b). If, as intended, the new legal instrument would ensure full legal recognition of multimodal transport documents (and any electronic equivalents) as negotiable documents of title, these documents could be traded and used for sale of goods in transit under a string of contracts, similar to negotiable bills of lading, with the buyer bearing the risk of loss of or damage to the goods in transit and left to seek redress, if any, from the carrier. Against this background, it will be important to ensure that a final consignee in any cargo claim against the multimodal transport operator would be protected by mandatory minimum standards of carrier liability, as is already the case for claims under negotiable bills of lading that are covered by one of the mandatory sea-carriage conventions which are in force internationally (Hague Rules 1924, Hague-Visby Rules 1968/1979, and Hamburg Rules 1978). However, at present, it is not envisaged that liability issues will be addressed as part of the new legal instrument. Organizations representing shippers, consignees and other cargo interests, particularly small and medium-sized enterprises (SMEs) in developing countries, are encouraged to take an active role in the deliberations of UNCITRAL Working Group to make sure their legitimate interests are appropriately reflected and taken into consideration.

B. GROWING IMPORTANCE OF REGULATORY MEASURES UNDER THE AUSPICES OF THE INTERNATIONAL MARITIME ORGANISATION TO COMBAT POLLUTION FROM SHIPS IN THE CONTEXT OF THE 2030 AGENDA

1. MARPOL 1973/1978 – the International Convention for the Prevention of Pollution from Ships is in the spotlight

A robust regulatory framework to protect the environment from the impact of shipping is critical for the effective implementation of the 2030 Agenda for Sustainable Development and its 17 interconnected Sustainable Development Goals, in particular affordable and clean energy (Goal 7); industry, innovation and infrastructure (Goal 9); climate action (Goal 13); sustainable use of the oceans, seas and marine resources (Goal 14); and related partnerships (Goal 17). This is reflected in the theme of the International Maritime Organization's 2023 World Maritime Day, *MARPOL at 50 – Our commitment goes on*. It spotlights the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), which covers prevention of pollution of the marine environment by ships from operational or accidental causes.

MARPOL is considered one of the most important legal instruments relating to international shipping, complementing SOLAS 1974, STCW 1978 and MLC 2006. MARPOL Technical Annexes I and II, which address pollution by oil and noxious liquid substances in bulk are mandatory for all Contracting States to MARPOL, covering 98.89 per cent of the global fleet. Four further technical Annexes to MARPOL addressing pollution by harmful substances in packaged form carried by sea (Annex III), sewage (Annex IV), garbage (Annex V) and air pollution from ships (Annex VI) also apply to the vast majority of the world's fleet (respectively 98.54, 96.66, 98.6 and 96.81 per cent of the global fleet, as of 31 July 2023).⁶ Given the growing urgency of the climate crisis, key ongoing developments under the auspices of IMO include measures to reduce GHG emissions from ships and increase energy efficiency, a set of issues which is also at the heart of some regulatory developments at the European Union level, that may have implications for extra-European trade. Relevant regulatory developments are covered in chapter 3.

2. International Maritime Organisation adopts additional measures to reduce air pollution from ships – MARPOL Annex VI

a) Sulphur oxides (SO_x) – Regulation 14

Limiting SO_x emissions from ships is important for improving air quality and protecting human health and life as well as the environment. In December 2022, amendments to MARPOL Annex VI were adopted, which designate the whole of the Mediterranean Sea as a new Emission Control Area for Sulphur Oxides (SO_x-ECA) and particulate matter (IMO, 2022a, Annex 3). The other four designated SO_x-ECAs are: the Baltic Sea area; the North Sea area; the North American area (covering designated coastal areas off Canada and the United States); and the Caribbean Sea area around Puerto Rico and the United States Virgin Islands. The latest amendments will enter into force on 1 May 2024, with the new sulphur limit taking effect from 1 May 2025. As from that date, ships entering the Mediterranean will have to comply with more stringent controls on SO_x emissions – with a limit for sulphur in fuel oil used on board ships of 0.10 per cent, while outside these areas the limit is 0.50 per cent (see also Safety4Sea, 2023).

To conform with the regulation, three major options are available: a) Switching to fuels with low or no sulphur content, such as low sulphur fuel oil (LSFO) and liquefied natural gas (LNG); b) Installing exhaust gas treatment systems (scrubbers) and continuing to use conventional high sulphur fuel; and c) Consuming less fuel, for example by improved energy efficiency, and consequently, emitting less SO_x. For information on the implementation of the global 0.50 per cent sulphur limit, see IMO, 2023a.

b) Nitrogen oxides (NO_x) – Regulation 13

Nitrogen oxides are produced from fuel combustion and can be harmful to human health, in particular the respiratory system. The NO_x emissions control requirements under MARPOL Annex VI have become steadily stricter over the last two decades (IMO, 2021a). Different levels (Tiers) of control apply based on the ship construction date. The strictest regulation, Tier III entered into force in 2016, but only applies for designated emission control areas. Outside such areas, the Tier II controls apply.

Proposals have been recently considered at IMO regarding the use of biofuels and biofuel blends and compliance with NOx regulations. Following approval in June 2022 of a unified interpretation of regulation 18.3 of MARPOL Annex VI facilitating a NOx compliance process for blends up to 30 per cent of biofuels, in December 2022 the Marine Environment Protection Committee (MEPC) agreed to expand this approach to synthetic drop-in fuels (e.g. e-methanol, e-ammonia, etc.), thus facilitating their use as low and zero carbon fuels (IMO, 2022a).

3. Other measures to protect the marine environment and biodiversity focus on marine litter and plastics, ballast water and anti-fouling paints

a) Marine litter and plastic pollution

Other amendments to MARPOL Annex V adopted in December 2022 make the Garbage Record Book a mandatory requirement for ships of 100 gross tonnage (GT) and above but less than 400 GT (IMO, 2022a, Annex 2). This supports the achievement of Goal 14 on the oceans, by facilitating enforcement, and the IMO strategy to address marine plastic litter from ships (IMO 2021b, Annex 2), which sets out a number of outcomes as key goals: reduction of marine plastic litter generated from, and retrieved by, fishing vessels; reduction of shipping's contribution to marine plastic litter; and improvement of the effectiveness of port reception and facilities and treatment in reducing marine plastic litter. In July 2023, MEPC also considered options for reducing the environmental risk associated with the maritime transport of plastic pellets, with a view to developing amendments to appropriate mandatory instruments at future sessions. This risk has been highlighted by incidents, including that of the container ship, *X-Press Pearl* in 2021, during which 11,000 tons of plastic pellets were spilled off the shore of Sri Lanka, when the ship caught fire. MEPC also considered draft amendments to MARPOL Annex V to facilitate and enhance reporting of the accidental loss or discharge of fishing gear (IMO, 2023b).

b) Ballast water management

Among the greatest threats to the world's oceans is the discharge of untreated ballast water by ships. This is associated with the introduction of invasive species, with important repercussions for public health, marine ecosystems, biodiversity, fisheries and the conservation and sustainable use of marine genetic resources. In December 2022, MEPC considered various proposals for amendments, unified interpretations of, and operational measures affecting the implementation of the International Convention for the Control and Management of Ships' Ballast Water and Sediments 2004,⁷ as well as approval of ballast water management systems (IMO, 2022a, Annex 6 and 7). Draft amendments to Appendix II of the Ballast Water Management Convention concerning the form of the Ballast Water Record Book, which are expected to enter into force on 1 February 2025 were also adopted (IMO, 2023b, Annex 2). It also discussed a number of matters relating to the implementation of the Convention, with the main outcomes reflected in IMO, 2023b, Annex 3–7.

c) Revision of the Anti-fouling Systems Convention

To support the implementation of the International Convention on the Control of Harmful Anti-fouling Systems on Ships 2001,⁸ which prohibits the use of harmful organotins in anti-fouling paints used on ships and establishes a mechanism to prevent the potential future use of other harmful substances in anti-fouling systems, in June 2022, revised guidelines were adopted that relate to brief sampling, inspection, survey and certification of anti-fouling systems on ships (IMO, 2022b, Annex 19–21). This follows earlier amendments in June 2022, to include controls on the biocide cybutryne, which entered into force on 1 January 2023. In July 2023, MEPC adopted the revised Guidelines for the control and management of ships' biofouling to minimize the transfer of invasive aquatic species (IMO, 2023b, Annex 17). This followed a comprehensive review of the existing guidelines initially adopted in 2011, with the aim of expanding and updating the previous version, taking into account best practices and experience as well as the latest research.

C. OTHER LEGAL AND REGULATORY DEVELOPMENTS AFFECTING TRANSPORTATION IN 2023 AND BEYOND

1. Liability and compensation for bunker oil pollution from ships – new claims manual omits information which is critical for claimants

The availability of adequate liability and compensation for oil pollution from ships' bunkers (i.e. fuel oil) is important from a public policy perspective and critical for those affected by the devastating environmental and economic impacts of bunker oil pollution, in particular vulnerable small island developing States (SIDS) (see UNCTAD, 2020a; Maritime Executive, 2022). With a growing number of ship-to-ship oil transfers, a practice which increases the risk of maritime accidents and was raised as a matter of concern at the IMO Legal Committee and MEPC (IMO, 2023c, 2023d), and with ever larger vessel sizes, global risks of bunker oil pollution are on the rise. However, liability and compensation under the main international legal regime, the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001,⁹ may be limited in accordance with "any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims (LLMC), 1976, as amended" (art. 6). Liability limits under the latest and most modern international limitation of liability regime - the 1996 LLMC Protocol - were last revised more than a decade ago, in 2012. As a result, the overall amount of liability and compensation available for bunker oil pollution damage is low,¹⁰ varies depending on the limitation regime in question, ship size, and competing claims, and is difficult to ascertain for claimants (see UNCTAD, 2022c).

In 2023, the IMO Legal Committee approved a 'Claims Manual for the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001' (IMO, 2023e; IMO, 2023f), which primarily focuses on the settlement of claims outside a formal legal process, as well as a short informational pamphlet on the Bunkers Convention (IMO, 2023e, Annex 2). Unfortunately, neither the pamphlet nor the 27-page Claims Manual include any references to the Articles of the Convention. These are authoritative in respect of the parties' substantive rights and obligations, with interpretation and application of provisions a matter for the competent national courts. This may give rise to misconceptions regarding key issues which are not detailed in the Manual, such as the various parties covered by the definition of 'shipowner' (art. 1(2)) and their joint and several liability. Moreover, the Claims Manual fails to provide information on a number of critical issues for claimants, some of which had been highlighted earlier by UNCTAD (IMO, 2022c, Annex 5), but were not included. Concerns about the Claims Manual were also expressed by some delegations (IMO, 2023e, at para. 8.7) as well as by a distinguished academic expert, who noted that the Claims Manual "reads like a document saying what insurers and shipowners are prepared to pay".¹¹

Critical issues that are not mentioned include the time limits for the institution of legal proceedings (art. 8) and exclusions (art. 4), notably the fact that bunker oil spills from a range of ships constructed or adapted for the carriage of oil as cargo (see IOPC Funds, 2016) are not governed by the Bunkers Convention, but by the much more substantive two-tier liability and compensation regime in the International Convention on Civil Liability for Oil Pollution Damage (CLC) 1992 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND) 1992 (with claims administered by a statutory body, the IOPC Funds).¹² Of major importance in this context are both the text of the relevant provisions in the different Conventions, as well as highly pertinent case-law, such as the important *Bow Jubail* litigation in the Kingdom of the Netherlands, which is particularly favourable to the rights of claimants,¹³ neither of which is reflected in the Claims Manual. Also missing is relevant information about limitation of liability under the LLMC 1976 as amended by its 1996 Protocol, such as the operation of a limitation fund, competing claims, and available limitation amounts, as well as the possibility for Contracting States to the LLMC Protocol 1996 to enter a reservation regarding claims under art. 2(1) (d) and (e) of the LLMC 1976, *at any time* (art. 7), an issue highly pertinent to the final amount of compensation available to claimants.¹⁴

Significant omissions in the two documents approved by the IMO Legal Committee may potentially result in an incomplete and/or inaccurate understanding by stakeholders with limited specialist legal expertise, particularly as the IMO Conventions texts are not publicly accessible on the IMO website, an issue that is under active consideration by the IMO Council, in its Working Group on Council Reform (IMO, 2023e, para. 17.6 and Annex 10). Against this background, claimants and their legal advisers, as well as judges, should exercise caution in relying on the Claims Manual and are strongly advised to always consult the authoritative text of the Convention¹⁵ as well as any pertinent case-law and academic

writing, as appropriate. Policymakers from coastal developing countries and SIDS, which are at growing risk of bunker oil pollution and particularly vulnerable to its wide-ranging environmental and economic consequences, are encouraged to actively engage in further work on related legal issues at IMO to ensure that compensation for oil pollution damage remains adequate.

2. Combating fraudulent registration and registries of ships is an increasingly urgent issue for the global community

Fraudulent registration and fraudulent registries of ships undermine the very foundation of the overall regulatory regime for shipping and pose major risks in terms of marine pollution, maritime safety, security and claims. A study group including UNCTAD, the World Maritime University (WМУ) and the International Marine Law Institute (IMLI) was established by the IMO Legal Committee in March 2022 (for terms of reference, see IMO, 2022c, Annex 2), to prepare a study considering related issues and possible measures to prevent them. An interim report by the study group was considered in March 2023 (IMO, 2023g), and the final findings are expected to be presented in 2024. Given the low rate of participation in a survey as part of the study to date (only 31 registries, accounting for 22.75 per cent of the world fleet, responded), the relevant questionnaire will be recirculated with a number of additional questions and member States are encouraged to take part in the study.

In addition, there was broad support to create a database for flag States and port States to share information on fraudulent registration and fraudulent registries of ships, as well as to develop methods for validating the authenticity of ship certificates. It was also agreed that more information on the fraudulent use of the IMO number scheme, including how widespread the problem was and whether there were loopholes in the system, should be provided (IMO, 2023e).

3. The Beijing Convention on the International Effects of Judicial Sales of Ships – set to enhance legal certainty

The United Nations Convention on the International Effects of Judicial Sales of Ships (United Nations, 2022), negotiated under the auspices of UNCITRAL, was formally adopted by the United Nations General Assembly on 7 December 2022. The Convention will enhance legal certainty by creating a uniform regime for the international effects of judicial sales of ships. Its entry into force is expected to provide legal protection for purchasers of ships sold by judicial sale, while safeguarding the interests of shipowners and creditors. Unlike the International Convention on Maritime Liens and Mortgages, 1993, which deals with judicial sale of ships in its art. 11 and 12,¹⁶ the Convention does not address the question as to whether a judicial sale confers clean title, which is left to the law of the State of judicial sale. However, a key provision is contained in art. 6 of the new Convention, which states: “A judicial sale for which a certificate of judicial sale... has been issued shall have the effect in every other State Party of conferring clean title to the ship on the purchaser.” Thus, a clean title acquired by the purchaser in the ship will be recognized internationally, while a certificate of judicial sale is only to be issued if certain safeguards are met, including notification of the shipowner, creditors, and other interested parties (art. 5).

IMO will serve as the repository for notices and certificates of judicial sales under the Convention (art. 11), using the Global Integrated Shipping Information System (GISIS). The Convention will be opened for signature in Beijing in September 2023 and will enter into force 180 days after the date of the deposit of the third instrument of ratification, acceptance, approval or accession. The Secretary-General of the United Nations is designated as its depositary (art. 16 and 21). All UNCTAD Member States are encouraged to consider early ratification of the Convention to ensure its speedy entry into force.

4. Landmark agreement reached on a legally binding instrument on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction

The resumed fifth session of the Intergovernmental Conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, met from 20 February to 3 March 2023. While a draft was agreed at the session, the Agreement was formally adopted by consensus at a further resumed session, on 19 June 2023, and will be open for signature from September 2023 (United Nations, 2023). It will enter into force 120 days after the date of deposit of the sixtieth instrument of ratification, approval, acceptance or accession.

The Agreement covers and has implications for the following key areas: access and use of marine genetic resources, including benefit sharing aspects (art. 11–16); establishment and implementation of area-based management tools, including marine protected areas (art. 17–26); environmental impact assessments which will allow the identification and evaluation of potential impacts of planned activities (art. 27–39); and capacity-building to develop scientific knowledge and the transfer and sharing of marine technology (art. 40–46).

If and when the Agreement enters into force, it is expected to close an important gap in ocean governance by providing a legal framework to enhance the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, and encourage related international cooperation. While shipping is not the main focus of the Agreement, which is primarily aimed at strengthening the regulation of access and use of marine genetic resources, the treaty will bolster efforts to make maritime transport more sustainable, as international shipping is one of the main economic activities on the high seas. Effective implementation and enforcement of the existing international legal framework for controlling pollution from shipping will potentially become more important. Implementation of the Agreement is likely to lead to the establishment of new area-based management tools, including marine protected areas on the high seas and the potential opening of new shipping routes, and may require further regulatory measures to give effect to environmental considerations affecting such routes (UNCTAD, 2023b). Given the large number of ratifications (60) needed to bring the Agreement into force internationally, speedy ratification by all UNCTAD member States is strongly encouraged.

5. Regulation of Maritime Autonomous Surface Ships underway

Building and operating fully autonomous oceangoing ships, which could offer higher levels of safety and efficiency for the maritime sector, are still facing technical, security, cybersecurity, and infrastructure challenges, and have a long way to go. However, increased levels of automation are gradually being achieved by commercial vessels of all sizes. At the international level, work has commenced on the development of a non-mandatory Code, regulating the operation of maritime autonomous surface ships (MASS) to be adopted in the second half of 2024, and to be potentially followed by a mandatory code (IMO, 2022d). The joint IMO Maritime Safety, Legal and Facilitation Committees Working Group, established as a cross-cutting body to address common high-priority issues identified by the regulatory scoping exercises for the use of MASS conducted by the three Committees, held its first two sessions in September 2022 (IMO, 2022e), and April 2023 (IMO, 2023h). The Joint Working Group has developed a table, to be continuously updated, which identifies preferred options for addressing common issues, including: the role, responsibilities and competencies required for MASS master and crew as well as the identification and meaning of the term “remote operator” and their responsibilities (IMO, 2023h). Another session of the Joint Working Group is set to be held later in 2023.

D. STATUS OF CONVENTIONS

A number of international conventions in the field of maritime transport were developed and/or adopted under the auspices of UNCTAD. During the current reporting period, the status of the International Convention on Maritime Liens and Mortgages, 1993 has changed, with two additional accessions (Barbados and Côte d'Ivoire) in February 2023.¹⁷

E. OUTLOOK AND POLICY RECOMMENDATIONS

Regulatory developments to facilitate the use of electronic bills of lading

Following some jurisdictions where laws have already been passed based on the UNCITRAL Model Law on Electronic Transferable Records (MLETR), legislation has been adopted in the United Kingdom to ensure that electronic trade documents, including electronic equivalents to negotiable bills of lading, are 'possessable' and enjoy the same legal recognition status as traditional paper-based documents. This development is of considerable practical interest, as contracts for the international sale of goods are often subject to English law by agreement of the parties. The legislation could provide a significant boost to the use of electronic equivalents to traditional paper bills of lading and reduce problems related to delay in transmission of documents and associated delays in ports.

- Policymakers are encouraged to take note of recent regulatory developments that ensure the full legal recognition of electronic bill of lading equivalents and, as appropriate, consider relevant changes to their national legislation.
- With greater reliance on electronic interactions, stakeholders will also have to effectively manage any associated cyber-risks, an important set of issues which is likely to demand greater attention by policymakers and trade and industry stakeholders alike, given the increasingly rapid pace at which technology is evolving.

Development of a new legal instrument on 'Negotiable Multimodal Transport Documents' underway under the auspices of UNCITRAL

Work is underway under the auspices of UNCITRAL Working Group VI on the preparation of a new legal instrument on 'Negotiable Multimodal Transport Documents' which aims to address the expanding needs for financing in international trade by establishing the legal recognition of negotiable multimodal transport documents (and electronic records) as documents of title, similar to marine negotiable bills of lading. In this context it will be important to ensure that a final consignee in any cargo claim against the multimodal transport operator would be protected by mandatory minimum standards of carrier liability, as is already the case for claims under negotiable bills of lading that are covered by the mandatory sea-carriage conventions which are in force internationally. However, at present, it is not envisaged that liability issues will be addressed as part of the new legal instrument.

- All stakeholders are encouraged to take an active interest in the work under the auspices of UNCITRAL WG VI to ensure the legal instrument currently being developed will be fit for purpose and commercially acceptable.

Liability and compensation for oil pollution damage from bunker oil spills - an issue of particular importance for vulnerable developing coastal States and SIDS

The availability of adequate liability and compensation for ship-source oil pollution is important from a public policy perspective and critical for those affected by the devastating environmental and economic impacts that oil spills can have, including those from a ship's bunkers (i.e. ship fuel). This includes claimants in vulnerable coastal developing States and SIDS. However, limits of liability for bunker oil pollution damage under the LLMC 1976 as amended in 1996 were last revised in 2012 and are much lower than the limits applicable in cases of oil spills from tankers. In 2023, the Legal Committee of IMO adopted a Claims Manual on the Bunkers Convention 2001, the international legal instrument governing liability and compensation for bunker oil pollution, which has been issued as a Circular. However, in the light of concerns highlighted in this chapter, claimants and their legal advisers should exercise caution in relying on the Manual alone and should always consult the authoritative text of the Convention as well as potentially relevant case-law and academic writing.

- Policymakers from coastal developing countries and SIDS, which are at growing risk of bunker oil pollution and particularly vulnerable to its wide-ranging environmental and economic consequences, are encouraged to actively engage in further work on related legal issues at IMO with a view to strengthening the position of claimants and ensuring that these receive adequate compensation for any losses sustained.

- Contracting States to the LLMC Protocol 1996 are encouraged to exercise their right under art. 7 to enter a reservation, at any time, regarding claims under art. 2(1) (d) and (e) of the LLMC 1976, as this may significantly affect the final amount of compensation available to claimants.
- As part of regulatory efforts to implement the internationally agreed policy commitment reflected in Goal 14, policymakers are encouraged to consider the need for a review of the international legal framework for liability and compensation in cases of bunker oil pollution from ships, so as to reduce the incidence of accidental and operational spills and ensure that adequate levels of compensation are available to claimants.

Adoption of the Beijing Convention on the International Effects of Judicial Sales of Ships – set to enhance legal certainty

The United Nations Convention on the International Effects of Judicial Sales of Ships was adopted by the General Assembly in December 2022, and will be opened for signature in September 2023. It is expected to provide legal protection for purchasers of ships sold by judicial sale, while safeguarding the interests of shipowners and creditors. Three ratifications are required for the entry into force of the Convention.

- All UNCTAD member States are encouraged to consider early ratification of the Convention to ensure its speedy entry into force.

Adoption of a landmark agreement on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction

Following many years of negotiations, on 19 June 2023, the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction was adopted by consensus. The Agreement will be open for signature from September 2023 and requires 60 ratifications to enter into force. If and when the Agreement enters into force, it is expected to close an important gap in ocean governance by providing a legal framework to enhance the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction and encourage related international cooperation. While shipping is not the main focus of the Agreement, the treaty will bolster efforts to make maritime transport more sustainable, as international shipping is one of the main economic activities on the high seas. The implementation of this Agreement is likely to lead to the establishment of new area-based management tools, including marine protected areas on the high seas with potential implications for shipping routes and may require further regulatory measures to give effect to environmental considerations affecting such routes.

- Early and widespread ratification of the new treaty will be critical. Given the large number of ratifications (60) needed to bring the Agreement into force internationally, speedy ratification by all UNCTAD Member States is strongly encouraged.

Work underway to address fraudulent ship registers/registration and regulate maritime autonomous surface ships

Among other relevant developments, work is underway by a study group established by the IMO Legal Committee to help address fraudulent registration and registries of ships, including increasing relevant communications and transparency, which has become a matter of growing urgency and priority.

As regards Maritime Autonomous Surface Ships (MASS), work is ongoing by a Joint IMO Working Group to identify and update preferred regulatory options for addressing common issues, including role, responsibilities and competencies required for MASS master and crew; identification and meaning of term “remote operator” and their responsibilities. A non-mandatory Code, regulating the operation of maritime autonomous surface ships (MASS) is expected to be adopted in the second half of 2024, to be potentially followed by a mandatory code.

- The regulatory work under the auspices of IMO on MASS is important to ensure that for all levels of ship automation security, safety of navigation and environmental protection objectives are effectively implemented. All public and private stakeholders are encouraged to play an active part in this work.
- Against a background of increasing ship-automation, appropriate consideration should also be given to the development of effective measures to protect against related cyber-risks.

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END NOTES

- ¹ Electronic trading systems approved by the International Group of P&I Clubs (IG) include Bolero and the EssDOCS systems in 2010, the e-titleTM system in 2015, the Global Share S.A. edoxOnline, WAVE-BL98 and CargoX99 in 2020. Three further systems were recently added: IQAX Ltd and Secro were approved in 2022. TradeLens eBL was approved in 2021, but the TradeLens platform has since been discontinued, as it had “not reached the level of commercial viability necessary to continue work and meet the financial expectations as an independent business” (see Maersk, 2022).
- ² In this context it is worth highlighting that traditional paper-based negotiable bills of lading – which unlike other transport documents need to be presented to the carrier in exchange for the goods – should only be used when a document of title is required, i.e. when sale of goods in transit is envisaged or independent documentary security is a material consideration. In other cases, contracting parties should consider opting for non-negotiable alternatives, such as sea waybills in paper or electronic form, which do not need to be presented (UNCTAD, 2003a).
- ³ For an overview of developments in other jurisdictions, see Global Trade Review, 2022a, 2022b; Insurance Marine News, 2023.
- ⁴ UNCITRAL Model Law on Electronic Transferable Records. Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mletr_ebook_e.pdf. According to UNCITRAL, legislation based on or influenced by the Model Law has been adopted in 7 States and a total of 7 jurisdictions, see https://uncitral.un.org/en/texts/e-commerce/modellaw/electronic_transferable_records/status.
- ⁵ The change introduced by the adoption of the new Electronic Trade Documents Act, 2023 in the United Kingdom has been estimated to add over £1 billion to the United Kingdom economy over the next decade by making trade more straightforward, efficient and sustainable (United Kingdom Government, 2023).
- ⁶ For the latest status of ratifications, see <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>, or <https://gis.imo.org/Public/ST/Treaties.aspx>. For an Index of MEPC Resolutions and Guidelines related to MARPOL Annex VI, see <https://www.imo.org/en/OurWork/Environment/Pages/Index-of-MEPC-Resolutions-and-Guidelines-related-to-MARPOL-Annex-VI.aspx#1>.
- ⁷ The Convention entered into force on 8 September 2017, and as of 31 July 2023 had 95 Contracting States covering 92.41 per cent of the global fleet.
- ⁸ The Convention entered into force on 17 September 2008, and as of 31 July 2023, had 95 Contracting States covering 96.12 per cent of the global fleet.

- ⁹ The Convention entered into force on 21 November 2008 and as of 31 July 2023 has 105 Contracting States covering 95.20 per cent of the global fleet. See <https://wwwcdn.imo.org/localresources/en/About/Conventions/StatusOfConventions/Status%202023.pdf>. For the text of the Convention, see for instance <https://www.gov.uk/government/publications/international-convention-on-civil-liability-for-bunker-oil-pollution-damage-2001>.
- ¹⁰ In some cases by more than an order of magnitude than liability and compensation available under a specialist legal regime which governs liability and compensation in cases of (bunker) oil pollution damage from ships ‘constructed or adapted for the carriage of oil in bulk as cargo’, see fn. 11 and 12. See also UNCTAD, 2012; UNCTAD, 2020b.
- ¹¹ See Gaskell, N. (2022) at p. 14, commenting on the final draft as adopted at LEG 110: “Interestingly, the Claims Manual has a section on limitation, but seemingly from a shipowner’s perspective. The draft presented reads like a document saying what insurers and shipowners are prepared to pay. There is no attempt to highlight how low the limits might be in some cases, e.g. by way of examples of different types of ship under e.g. LLMC 1976 or 1996, or how vulnerable States may be with a limitation fund that may have to be shared with claimants (e.g. collision claimants, or cargo owners). Although member States have been able to comment on the Manual, there is no doubt that the proposal is being driven by shipowners and insurers in IMO; by contrast, the IOPC Claims Manual is produced by the separate IOPC Fund—a body that was specifically set up by States to pay claims, unlike the approach of most insurers which is to minimise payments. The draft highlights none of the nuances or difficulties of bunker claims, nor does it give practical advice to claimants about being caught by time bars. It seems as if parts of this draft are a ‘uniform interpretation’ in disguise and may be rushed through in 2023 with relatively little critical oversight from the perspective of victims, or commitment to revision”.
- ¹² See <https://www.iopcfunds.org/>. The International Convention on Civil Liability for Oil Pollution Damage (CLC), 1992; International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND), 1992; and Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992. See also art. 4 (1) of the Bunkers Convention which states: “This Convention shall not apply to pollution damage as defined in the Civil Liability Convention, whether or not compensation is payable in respect of it under that Convention”. Regarding the types of ships covered, see art. 1.1 of the CLC and art. 1.2 of the FUND Convention; for related guidance, see IOPC Funds, 2016.
- ¹³ The litigation concerned a dispute about the applicable liability regime in a case involving a bunker oil spill from an oil and chemical carrier, *The Bow Jubail* (23 196 GT), that was in ballast (i.e. unladen) at the time of the incident. In March 2023, the Dutch Supreme Court confirmed the earlier decisions of the court of first instance and Court of Appeal and found that liability was to be determined under the 1992 CLC and FUND Conventions (and the 2003 Supplementary Fund Protocol, to which the Netherlands is a Party, with an overall liability limit of 750 million SDR), rather than under the Bunkers Convention and LLMC 1976 as amended by the 1996 Protocol, according to which liability for a ship of the relevant size is capped at just over 14,3 million SDR. (IOPC Funds, 2023).
- ¹⁴ See art. 2(1): “(d) claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship”; “(e) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship”.
- ¹⁵ For the full text of the Bunkers Convention, see, for instance <https://www.gov.uk/government/publications/international-convention-on-civil-liability-for-bunker-oil-pollution-damage-2001>.
- ¹⁶ The International Maritime Liens and Mortgages Convention 1993, adopted under the joint auspices of UNCTAD and IMO, entered into force internationally on 5 September 2004, and currently has 21 Contracting States. The text is available at https://unctad.org/system/files/official-document/aconf162d7_en.pdf. For official status information, see <https://treaties.un.org>.
- ¹⁷ For additional information, see <https://unctad.org/topic/transport-and-trade-logistics/policy-and-legislation/international-maritime-transport-law>. For official status information, see <https://treaties.un.org>.