

B01 Ship's flag

B01a UNCLOS PROVISIONS RELATING TO SHIPS' FLAG AND NATIONALITY

- * Every State, whether coastal or land-locked, has the **right** to have **ships flying its flag on the high seas** (Article 90).
- * Every State must fix the conditions for the **grant of its nationality** to ships, for the **registration of ships** in its territory, and for the **right to fly its flag** (Article 91).
- * Ships have the **nationality** of the State whose flag they are entitled to fly (Article 91).
- * There must be a **genuine link** between the State and the ship (Article 91).
- * Every State must issue to ships to which it has granted the right to fly its flag **documents** to that effect (Article 91).
- * Ships must sail under the flag of **one State** only and, save in exceptional cases expressly provided for in international treaties and UNCLOS, must be subject to its **exclusive jurisdiction** on the high seas (Article 92).
- * A ship may **not change its flag** during a voyage or while in a port of call, save in the case of a **real transfer of ownership or change of registry** (Article 92).
- * A ship which sails under the flags of two or more States, using them according to convenience, **may not claim any of the nationalities** in question with respect to any other State, and may be regarded as similar to a **ship without nationality** (Article 92).

B01b TYPES OF SHIP REGISTER

B01b.1 National registers

- are registers where there is a **genuine link** between the vessel's flag State and the owner or operator (as required by UNCLOS).
- are known also as "**closed registers**" and "**first registers**".
- include the first registers of most of the "traditional" shipowning nations including the UK, Norway, France, Denmark, Germany and many others.

B01b.2 Flags of convenience (FOCs)

- are also known (by shipowners) as "flags of necessity", "open registers" and "free flags".
- are deemed by the International Transport Workers' Federation (ITF) (see C05) to exist where **beneficial ownership and control** of the vessel is found to lie elsewhere than in the country of the flag the vessel is flying¹.
- are designated by the **ITF Fair Practices Committee**, which decides which flags are FOCs and which are not. This committee maintains a list of countries offering FOC facilities and from time to time adds countries to or deletes them from the list. The criteria for entry in the list are the "Rochdale Criteria", which were laid down by a British Committee of Inquiry into Shipping in 1970. The criteria include:
 - whether the country allows non-citizens to own and control vessels;
 - whether access to and transfer from the registry is easy;
 - whether taxes on shipping income are low or non-existent;
 - whether the country of registration does not need the shipping tonnage for its own purposes but is keen to earn the tonnage fees;
 - whether manning by non-nationals is freely permitted;
 - whether the country lacks the power (or the willingness) to impose national or international regulations on the shipowners using its flag.
- * In defining an FOC register, the ITF takes as the most important factor whether the nationality of the shipowner is the same as the nationality of the flag.
- * FOC ships are **beneficially owned** mainly in the USA, Greece, Hong Kong, and Western European States.
- * The list of **ITF-designated FOCs** can be viewed at www.itf.org.uk/seafarers/foc/foc.htm In April 2002 it included the following 30 flags: **Antigua and Barbuda, Aruba (Netherlands), Bahamas, Barbados, Belize, Bermuda**

¹ UNCLOS Article 91 provides that there must be a **genuine link** between the ship and the State whose flag the ship is entitled to fly, but fails to say what this means in practice.

(UK), **Bolivia**, **Burma/Myanmar**, **Cambodia**, **Canary Islands** (Spain), **Cayman Islands** (UK), **Cook Islands** (New Zealand), **Cyprus**, **Equatorial Guinea**, **German International Ship Register** (GIS), **Gibraltar** (UK), **Honduras**, **Lebanon**, **Liberia**, **Luxembourg**, **Malta**, **Marshall Islands** (USA), **Mauritius**, **Netherlands Antilles**, **Panama**, **São Tomé and Príncipe**, **Sri Lanka**, **St Vincent**, **Tuvalu** and **Vanuatu**.

- * Ships registered in the above countries which can demonstrate that they are **genuinely owned** in that country are not treated as FOCs. Equally, ships from countries not on the list will be treated as FOCs if the ITF receives information that they are beneficially owned in another country.
- * In deciding whether a particular ship is operating under a FOC, the ITF will **additionally consider on an individual basis** ships flying the flags of Hong Kong, Philippines (foreign-owned ships bareboat-chartered to the Philippines), and Singapore (foreign-owned ships without approved crew agreements). 18 ships flying the Kerguelen flag were declared in 2001 to be flying a flag of convenience.

B01b.3 Second registers

- are also known as **offshore registers** and **international ship registers**.
- are in some cases established under **separate legislation** as a second register in the “parent” State, e.g. the Norwegian International Shipregister (NIS), which is established in Norway to run alongside the Norwegian “first” register.
- are in other cases established in an **offshore territory** with legal links to the “parent” State, e.g. Kerguelen (linked to France), Isle of Man (linked to the UK); these registers may be termed **offshore registers**.
- first appeared in June 1987 with the establishment of NIS, immediate success of which prompted other countries to follow its example.
- are different from FOCs in that, while manning, taxation and other laws may be relaxed under the second register, shipowners must still have a **genuine link** with the flag State.
- have their **status** determined by the ITF (see C05), which considers whether ownership is genuinely from the flag “parent” State and whether there are agreements acceptable to that country’s trades unions.
- include the following **registers**: **Danish International Ship Register** (DIS) (Denmark), **Isle of Man** (UK), **Kerguelen** (France), **Madeira** (Portugal) and **Norwegian International Ship Register** (NIS) (Norway).

B01b.4 Bareboat charter registers

- * Several States, including the UK, have relaxed their ship registration legislation to allow for the bareboat chartering of ships into or out of the national flag. For the duration of the bareboat charter, but usually subject to a specified maximum term, the vessel is entered on the register of the bareboat charterer’s State (the “**bareboat charter registry**”) and flies that State’s flag, whilst **retaining her primary registration**. On the termination of the bareboat charter, the bareboat charter registry is cancelled and the vessel **reverts to her primary registry**².
- * BIMCO has warned owners³ that **serious consequences** may be faced by vessels sailing under more than one registry. Both international treaties (e.g. UNCLOS) and customary international law require that ships sail under the flag of **only one State**. (For UNCLOS Article 92 provisions see B01a.) A ship which sails under the flags of two or more States may not claim any of the nationalities in question with respect to any other State and may be treated as **a ship without nationality**. Consequently, in the course of enforcement of UN sanctions by multi-national naval fleets, any merchant ship which misrepresents its flag or registry to the Maritime Interception Forces will be treated as a **stateless vessel** and will be subject to the jurisdiction of the Maritime Interception Operation vessel’s flag State.
- * Ships on bareboat charter registers are sometimes known as “**dual register ships**”.

B02 Flag States

B02a DUTIES OF FLAG STATES

- * **UNCLOS Article 94** requires the flag State to effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag (i.e. to exercise “**flag State control**” over its ships), and to:
 - maintain a register of ships;

² For notes on bareboat charter registry under UK law, see D01f.

³ BIMCO Bulletin, February 1995.

- assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship; and
- take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, *inter alia*, to:
 - the construction, equipment and seaworthiness of ships;
 - the manning of ships, labour conditions and the training of crews, taking into account the applicable international agreements (e.g. STCW and ILO conventions);
 - the use of signals, the maintenance of communications and the prevention of collisions.
- * The above measures must include those necessary to ensure the following:
 - that the ship is surveyed by a qualified surveyor of ships and has on board such charts, nautical publications and navigational equipment and instruments as are appropriate for the navigation of the ship;
 - that the ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is appropriate in qualifications and numbers for the type, size, machinery and equipment of the ship;
 - that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.
- * In taking the above measures, the State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.
- * A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State must investigate the matter and, if appropriate, take any action necessary to remedy the situation.
- * Each State must cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. The flag State and the other State must co-operate in the conduct of the inquiry.
- * **IMO resolution A.912(22)** on Self-Assessment of Flag State performance provides (in Annex 1 paragraph 4) that a **flag State should**:
 - take measures to ensure safety at sea and pollution prevention for ships entitled to fly its flag with regard to:
 - the construction, equipment and management of ships;
 - the principles and rules with respect to the limits to which ships may be loaded;
 - the prevention, reduction and control of pollution of the marine environment and the minimisation of the impact of accidental discharges of pollutants;
 - the manning of ships and the training of crews; and
 - the safety of navigation (including taking part in mandatory reporting and routing systems), maintenance of communications and prevention of collisions;
 - promulgate laws which permit effective jurisdiction and control in administrative, technical and social matters over ships flying its flag and, in particular, relating to the inspection of ships, safety and pollution-prevention laws applying to such ships and the making of associated regulations; and
 - promulgate laws providing the legal basis for the establishment of a registry and maintain a register of ships flying its flag.

B02b ENFORCEMENT BY FLAG STATES

- * **UNCLOS Article 217** makes the following provisions.
 1. States must ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards, established through the competent international organisation or general diplomatic conference, and with their laws and regulations adopted in accordance with UNCLOS for the prevention, reduction and control of pollution of the marine environment from vessels and must accordingly adopt laws and regulations and take other measures necessary for their implementation. Flag States must provide for the effective enforcement of such rules, standards, laws and regulations, irrespective of where a violation occurs.
 2. States must, in particular, take appropriate measures in order to ensure that vessels flying their flag or of their registry are prohibited from sailing, until they can proceed to sea in compliance with the requirements of the international rules and standards referred to above, including requirements in respect of design, construction, equipment and manning of vessels.
 3. States must ensure that vessels flying their flag or of their registry carry on board certificates required by and issued pursuant to international rules and standards referred to above. States must ensure that vessels flying their flag are periodically inspected in order to verify that such certificates are in conformity with the actual condition of the vessels. These certificates must be accepted by other States as evidence of the condition of the

vessels and must be regarded as having the same force as certificates issued by them, unless there are clear grounds for believing that the condition of the vessel does not correspond substantially with the particulars of the certificates.

4. If a vessel commits a violation of rules and standards established through the competent international organisation or general diplomatic conference, the flag State, without prejudice to Articles 218, 220 and 228, must provide for immediate investigation and where appropriate institute proceedings in respect of the alleged violation irrespective of where the violation occurred or where the pollution caused by such violation has occurred or has been spotted.
 5. Flag States conducting an investigation of the violation may request the assistance of any other State whose co-operation could be useful in clarifying the circumstances of the case. States must endeavour to meet appropriate requests of other States.
 6. States must, at the written request of any State, investigate any violation alleged to have been committed by vessels flying their flag. If satisfied that sufficient evidence is available to enable proceedings to be brought in respect of the alleged violation, flag States must without delay institute such proceedings in accordance with their laws.
 7. Flag States must promptly inform the requesting State and the competent international organisation of the action taken and its outcome. Such information must be available to all States.
 8. Penalties provided for by the laws and regulations for States for vessels flying their flag must be adequate in severity to discourage violations wherever they occur.
- * **IMO resolution A.912(22)** on Self-Assessment of Flag State performance provides (in Annex 1 paragraph 5) that a **flag State should**:
- provide for the enforcement of its national laws, including the associated investigative and penalty processes;
 - take appropriate action against ships flying its flag that fail to comply with applicable requirements;
 - ensure the availability of sufficient personnel with maritime and technical expertise to carry out its flag State responsibilities, including:
 - the development and enforcement of necessary national laws;
 - the establishment and maintenance of minimum safe manning levels on board ships flying its flag and the provision of effective certification of seafarers;
 - the inspection of ships flying its flag to ensure compliance with the requirements of international instruments to which the flag State is a Party;
 - the reporting of casualties and incidents as required by the respective instruments; and
 - the investigation of circumstances following any detention of ships flying its flag.

B02c FLAG STATE ADMINISTRATIONS

- * Most flag States regulate their merchant shipping and enforce international maritime treaty obligations and national laws through the agency of a **marine Administration**. This is usually a national governmental organisation, e.g. US Coast Guard (USCG) in the case of the USA, Department for Transport (DfT) (UK), Australian Maritime Safety Authority (AMSA) (Australia), Norwegian Maritime Directorate (NMD) (Norway).
- * Flag of convenience countries sometimes **delegate** their marine administrative duties to a **commercial organisation**, e.g.:
 - Liberian International Ship & Corporate Registry (LISCR) operating the **Liberian register** from Viginia, USA;
 - International Registries, Inc. (IRI), operating the **Marshall Islands register** from Renton, Washington DC, USA; and
 - Vanuatu Maritime Services Ltd (VMSL), operating the **Vanuatu register** from New York, USA.
- * The **functions of a flag State Administration** are chiefly:
 - to set, monitor and enforce standards of safety and pollution prevention on vessels flying the State's flag;
 - to enforce international standards of safety and pollution prevention on foreign ships visiting the State's ports;
 - to draw up, set and enforce statutory merchant shipping regulations for the flag State;
 - to survey and inspect vessels in accordance with domestic and international regulations;
 - to set and enforce standards of competency amongst seafarers;
 - to investigate accidents involving ships flying the State's flag and ships of other flags when in the State's waters;
 - to approve equipment types for vessels under international regulations;
 - to advise on matters such as the loading of hazardous cargoes and many other safety matters;
 - to maintain a register of ships flying the State's flag.
- * Many flag State Administrations will, in addition, take on a responsibility to work for the **raising of standards** internationally and will lead the national delegation at international committees on which the flag State is

represented, e.g. IMO's Maritime Safety Committee (MSC) and Marine Environment Protection Committee (MEPC).

B02c.1 Flag State obligations relating to ship security

- * SOLAS regulation XI-2/3.1 provides that flag State Administrations must **set security levels** and ensure the **provision of security level information** to ships entitled to fly their flag. When changes in security level occur, security level information must be **updated** as the circumstance dictates.
- * Flag State Administrations have a number of **security-related responsibilities** for ships registered under their flags. These include:
 - **setting security levels** for ships entitled to fly their flag and **notifying** ships of the current security level;
 - providing **guidance** on the development of **Ship Security Plans**;
 - providing **guidance** on **security measures** for ships to implement at each security level;
 - providing **guidance** on the **reporting of attacks** on ships;
 - **approval of Ship Security Plans**;
 - **issuing International Ship Security Certificates (ISSCs)** to ships;
 - **notifying** other governments of **ship security alerts** from ships within their jurisdiction;
 - **specifying** requirements for **Declarations of Security**;
 - agreeing to **temporary measures** to be implemented if **security equipment fails**;
 - deciding whether or not to **delegate approval** of Ship Security Plans, verification of ship security systems, and issue of International Ship Security Certificates to Recognised Security Organisations (RSOs), and overseeing such delegations.
- * Flag State Administrations are permitted to delegate some of their responsibilities to **Recognised Security Organisations (RSOs)**. A **Recognised Security Organisation** means an organisation with appropriate expertise in security matters and with appropriate knowledge of ship and port operations authorised to carry out an assessment, or a verification, or an approval or a certification activity, required by SOLAS chapter XI-2 or by part A of the ISPS Code (SOLAS regulation XI-2/1.1). In practice, RSOs will normally include those **classification societies** authorised by the flag State Administration to carry out certain surveys and issue ship certificates on its behalf.

B02d OVERSEAS REPRESENTATION OF FLAG STATE ADMINISTRATIONS

B02d.1 Diplomatic missions and officials

- * A **diplomatic mission** is the office of a country's diplomatic representatives in another country. Major States generally maintain a diplomatic mission in each foreign State capital with which they have full diplomatic relations. The diplomatic mission of one Commonwealth member country, such as the UK, in another Commonwealth member country is a **High Commission**. In non-Commonwealth countries the diplomatic mission is generally an **Embassy**. High Commissions and Embassies perform the same functions and have the same status.
- * The **head of mission** in Commonwealth countries is a **High Commissioner** and in non-Commonwealth member countries is normally an **Ambassador**.
- * A **consular mission** is the office of a country's consular representative in another country, either in the capital city or in some other significant place. **Consulates** will generally be maintained by the more prosperous countries in each foreign capital where it is represented and in the more important cities and towns with which the country maintains trade links. Many consulates are therefore located in major ports, while the nearest consulate to a minor port may be in a distant inland town.
- * Consular missions are established in accordance with the provisions of the Vienna Convention on Consular Relations, 1963 which provides four different grades of consular representatives (in descending order of importance): **Consul-General**; **Consul**; **Vice-Consul**; and **Consular Agent**. Their offices are called Consulate-General, Consulate, Vice-Consulate and Consular Agency, respectively.⁴ In many ports the consulate of a foreign country is a commercial enterprise such as a shipping agency, and may have the status of **Honorary Consulate**.
- * **Consular representatives** undertake a more restricted range of duties than diplomatic representatives, their prime duty being to protect the interests of the nationals of their country in the host country. A **consul** is defined in The

⁴ In some Commonwealth countries, the senior consular missions of other Commonwealth countries are called Deputy High Commissions and the heads of these offices are called Deputy High Commissioners. However, the trend is for such offices to be called Consulate-General, etc.

Shorter Oxford English dictionary as “an agent, commissioned by a sovereign State to reside in a foreign town or port, to protect the interests of its subjects there, and to watch over its commercial rights and privileges”.

- * Consular representatives may be career officers (i.e. full-time employees of their government) or honorary officers (i.e. officers paid only an honorarium by the country they represent). Career officers are normally nationals of the country they represent and members of that country’s diplomatic or consular service. Honorary officers are usually permanent residents of the country in which they work and may be nationals of the country in which they live or of the country that they represent.
- * It is important for the master of a ship of any flag when at a foreign port to be able to identify and locate the **nearest consular mission of the flag State**, since he may require consular assistance in a variety of circumstances (see B02d.2 and I01j.1). Port agents maintain lists of local consular missions.
- * In some situations (e.g. loss of personal national identity documents, or personal arrest), where the master is not of the same nationality as the ship’s flag, the appropriate diplomatic mission to contact will be that of his **own country**.
- * A full list of **British Diplomatic Missions** can be viewed at: www.fco.gov.uk/directory/posts.asp

B02d.2 British Consuls

- * A **British Consul** is an official appointed by the Foreign and Commonwealth Office of Her Majesty’s Government to reside in a foreign port or place in order to protect the commercial interests of British subjects locally. The British Consul in a particular place should not be confused with the **British Council**⁵.
- * A British Consul also has a **duty to protect the interests of a British ship**, regardless of the nationality of its master or crew.
- * As “**proper officers**” under Merchant Shipping Acts and regulations (see B05b.3d), British Consuls have a wide range of **statutory duties in connection with merchant shipping**, including duties concerning:
 - engagement and discharge of crew, crew agreements, list of crew, and exemption provisions;
 - seamen’s wages and wages disputes;
 - relief and repatriation of seamen left behind;
 - returns and reports of births and deaths at sea;
 - inquiries into deaths;
 - Official Log Books;
 - manning of ships;
 - health, provisions and water;
 - seamen’s documents;
 - depositions (protests) and certified log extracts; and
 - many other matters.
- * British Consuls are **the representatives of British law** at their ports. They are also often in a position to render to British shipping interests valuable services which lie outside the administration of the law.
- * British Consuls have a duty to **report to the Department for Transport (DfT)** matters of **general commercial interest** to the UK Government such as changes in port regulations, port charges or general dues on shipping, strikes affecting shipping, new trading facilities, impending developments in commerce of any kind, epidemic diseases or conditions making it unsafe for British ships to enter or stay at the port. They also have a duty to **report to the Foreign and Commonwealth Office** when a British ship is **detained** or **arrested** by any foreign authority, and to adopt all suitable means for obtaining its release and indemnity.
- * British Consuls have a duty to **warn British shipmasters** of dangers in their ports, and to help masters by advising them of all **regulations in force** at their ports.
- * Whenever the master of a British ship attends the British Consulate at a large port to transact business, it is appropriate for the **Consul himself**, or the **Vice-Consul**, to deal with him.
- * In business transactions the consul has the powers of a **notary public** and of a **commissioner for oaths**. He is thus empowered to register **protests** by masters.
- * Consuls and Vice-Consuls are referred to as **proper officers** throughout British merchant shipping legislation. Broadly, a proper officer is any official performing the duties of a DfT Marine Office superintendent.
- * The equivalent official to a Consul at a port in a **British Overseas Territory**, such as Gibraltar, Port Stanley (Falkland Islands), etc., is a **Shipping Master**. Shipping Masters are also **proper officers** and carry out the same functions as Consuls under the Merchant Shipping Acts.

⁵ The **British Council** is the UK’s international organisation for educational and cultural relations, operating from 227 towns and cities in 109 countries worldwide. It connects people in those countries with learning opportunities and creative ideas from the UK, thus helping to build lasting relationships between the UK and other countries. It is a national, non-departmental public body, sponsored by the Foreign and Commonwealth Office and registered as a charity in the UK. Foreign seafarers may sit certain UK-administered examinations, including Certificate of Equivalent Competency examinations (see E02c.19), at their local British Council office.

- * A **Consular Fees Order** prescribes the current level of **fees** to be levied by consular officers in the exercise of their duties. The Order currently in force is **The Consular Fees Order 1999** (SI 1999/655), as amended by The Consular Fees (Amendment) Order 1999 (SI 1999/3132). In connection with **ships and shipping**, fees were levied at the time of writing as follows:
- Granting or considering whether to grant a **provisional certificate of registry**, whether the owner is a private individual or body corporate: £210.00.
 - Receiving a **return of the birth or death** of any person on board a ship and endorsing the agreement with the crew accordingly: £30.00.
 - Examining or arranging for the **examination of provisions or water**, payable by the party who proves to be in default in addition to the cost, if any, of survey: £30.00.
 - **Noting a marine protest** and furnishing one certified copy if required: £25.00; and for every further copy: £25.00.
 - **Extending a marine protest**, filing the original and furnishing one certified copy if required -
 - (a) for any number of words up to 200, excluding the declaratory clause: £60.00
 - (b) for every subsequent 100 words or less, in addition to the foregoing fees where applicable: £25.00
 - Making a **request**, or issuing or arranging for the **issue of a document**, in connection with a **survey of a ship** -
 - (a) for the purposes of SOLAS 74 or of MARPOL 73/78: £40.00.
 - (b) for any other purpose in addition to fee where applicable: £72.00.
 - Issuing a **bill of health**: £25.00.
 - **Preparing or signing, or both, any document**, whether required by the Merchant Shipping Acts or by the local authorities, **relating to the master or the members of the crew** of a ship, to their numbers, names or other details, or to their engagement, discharge, desertion or death except where -
 - (a) fee 43 is taken in addition to fee 35, or
 - (b) a death inquiry is held under section 271 of the Merchant Shipping Act 1995: £40.00.
 - **Signing and, if required, sealing any documents** at the request of the master of the ship except where-
 - (a) this is required under the Merchant Shipping Acts, or
 - (b) fee 49 is taken: £40.00.
 - **Inspecting** -
 - (a) a **ship's papers** when required to enable a consular officer to do any matter or thing in respect of a ship except where fee 49 is taken in addition to fee 35: £30.00;
 - (b) the **marking of a ship**, irrespective of the number of visits, in addition to fee 35: £30.00.

B03 English law

English law has formed the model for the law of many flag States, especially Commonwealth countries. It is the preferred jurisdiction of many foreign parties to maritime contracts who wish to resolve their disputes. Aspects of English law that are relevant to shipmasters are outlined in this section. Since offences under UK merchant shipping legislation may in certain circumstances be tried in Scottish courts, the structure and procedures of Scottish courts are also outlined in this section.

B03a CLASSES OF LAW CONCERNING SHIPMASTERS

- include **common law**, **equity**, **statute law**, **case law**, **civil law**, **criminal law**, **European Community law**, and **Admiralty law**.

B03a.1 Common law

- is defined in The Shorter Oxford English Dictionary as “the unwritten law of England, administered by the King’s courts, based on ancient and universal usage, and embodied in commentaries and reported cases. (Opp. to *statute law*)”.
- comprises **ancient customs**, **judicial decisions** (or **precedents**) and **enacted laws**.
- is recorded in **law reports** and **legal textbooks**, but not in statutes.
- * A **judicial precedent** is a decision of a court (i.e. a judgement), normally recorded in a **law report**, and often in legal textbooks, and used as an authority in reaching a similar decision in a subsequent case. A decision of the House of Lords is binding on the Court of Appeal and all lower courts and a decision of the Court of Appeal is

binding on all lower courts. A decision of the High Court is binding on all lower courts, but a decision of any lower court does not create a binding precedent. By the **doctrine of precedent**, where a lower court is bound by a previous decision of a higher court, it is only bound by those parts of the judgement forming the **principle** of the decision (called by lawyers the *ratio decidendi*), and is not bound by additional comments of the judge.

- * The body of law as set out in **judicial decisions** is sometimes referred to as **case law**. A case, the decision in which establishes an important principle of the law, becomes known as a **leading case** and will usually be quoted in legal textbooks. For example, a leading case concerning the definition of an “arrived ship” was *Oldendorff (E.L.) and Co. v. Trader Export SA (1973)*, in which was established the test: “Had the ship reached a position within the port where she was at the immediate and effective disposition of the charterers?”

B03a.2 Equity

- is **law based on principles** formulated by early Chancellors **for correcting injustices** arising where the common law was strictly adhered to.
- supplements the common law.
- is applied in all civil courts where it takes precedence in the event of a conflict with common law.

B03a.3 Statute law

- is the body of UK **law contained in statutes**, i.e. Acts of Parliament and orders, rules and regulations made under statutes. (These are printed and published by the government’s stationery office, HMSO⁶ and sold at Stationery Office bookshops.)
 - is now the chief source of English law.

B03a.4 Civil law

- is law primarily concerned with the **rights and duties of individuals and companies** towards each other. It is made by judges in the civil courts and includes the **law of contract**, the **law of tort**, the **law of property**, the **law of succession**, **family law**, and **admiralty law**.
- is dealt with mostly by the **civil courts** which have a separate system and procedure from the criminal court system and procedure. Its object is not the punishment of the wrongdoer but to give a remedy to the persons wronged. There are no penalties in civil law, but the “losing” party could be ordered to pay damages, or perform a contract, or not do something that he would otherwise do, etc.

B03a.5 Criminal law

- is that part of the law which characterises certain kinds of wrongdoings as **offences against the State** which are punishable by the State. These offences do not necessarily violate the rights of any individual.
- is mostly **laid down in parliamentary statutes** (i.e. primary legislation) such as the Merchant Shipping Acts, and **secondary legislation** such as Merchant Shipping Regulations.
- is recorded for the reference of lawyers, judges and academics in textbooks such as *Archbold*.
- is mostly enforced in the UK by the police and is dealt with by the **criminal courts**.

⁶ HMSO should not be confused with **The Stationery Office Limited (tSO)** the private sector company which acquired the trading functions of HMSO following privatisation in 1996. HMSO oversees the printing and publication of all UK legislation and related official materials in traditional print formats and via the internet. It also regulates the use, licensing of re-use of all information produced by government which is protected by Crown copyright.

B03a.6 European Community legislation

- **applies in the UK** as a consequence of the UK's membership (since 1 January 1973) of the European Union⁷ (EU).
- is applied in all EU member States by the **European Court of Justice** (ECJ) in accordance with the provisions of various treaties, e.g. the Treaty of Rome, which are binding on member States. The ECJ plays an important part in the UK's judicial system, most notably in the field of employment law. Under Article 234 of the Treaty of Rome, any UK court may refer questions on points of EU law to the ECJ, and the decision of the ECJ will be binding on the national court and in other, future cases. A decision of the ECJ relating to a case in one EU member States will be binding in all other member States. The ECJ is not bound by its own previous decisions, however.
- stands alongside UK statute law, common law and equity in the UK, but **takes precedence** over them where there is any conflict.
- can be viewed on the **Eur-Lex website** at <http://europa.eu.int/eur-lex/index.html>
- * Chief instruments of EC law include **Regulations, Directives** and **Decisions**.
- * **EC Regulations** are binding in all EU member States without requiring any implementation or adoption by national parliaments. They apply directly and take precedence over national law. They may create rights which are enforceable by individuals in their national courts. An example is Council Regulation (EC) No 3051/95 of 8 December 1995 on the safety management of roll-on/roll-off passenger ferries (ro-ro ferries).
- * **EC Directives** are instructions to EU member States to adapt their national law to conform with EC requirements. EC Directives (and their forerunners, EEC Directives) are binding, but leave EU member States a choice as to the method by which the requirements of the Directive are met. In the UK this may be through an Act of Parliament or through delegated legislation, such as a Statutory Instrument. Several **EC Directives concerning merchant shipping** have been implemented in the UK by Merchant Shipping regulations, e.g. EC Directive 95/21/EC concerning the port State control of shipping in EC ports, implemented by the MS (Port State Control) Regulations 1995 and Council Directive 98/18/EC on Safety Rules and Standards for Passenger Ships, implemented by the MS (Passenger Ships on Domestic Voyages) Regulations 2000 (SI 2000/2687). For an **index of Directives** referred to in the text of this book, see B04d.
- * **EC Decisions** are binding in their entirety on those to whom they are addressed, whether they be EU member States, companies or individuals. Decisions of the European Court of Justice are binding on the highest courts of EU member States; thus the UK House of Lords must accept a European Court Decision as binding. An example is Commission Decision of 30 September 1996 on the publication of the list of recognised organisations which have been notified by member States in accordance with Council Directive 94/57/EC.

B03a.7 Admiralty law

- is the distinct body of civil law (both substantively and procedurally) that deals mainly with **navigation and shipping** matters including **collisions, salvage, damage to cargo, maritime liens** and **arrest** of ships. **Piracy** is also a matter of admiralty law.
- is dealt with in the UK by the **Admiralty Court** (see B03b.7). The word "admiralty" in this context has nothing to do with the Ministry of Defence.
- * The law of many maritime nations includes a body of admiralty law, and in some countries, e.g. South Africa and Canada, it is very similar to English admiralty law. In the admiralty law of certain other countries, e.g. China, there are marked differences from what is considered the international norm. P&I club bulletins occasionally draw the attention of club members to these differences, where relevant to members' operations.

⁷ **EU member States** are currently Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, United Kingdom (15). Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia (10) are scheduled to join the EU in June 2004. The EU is the result of a process of co-operation and integration, which began in 1951 between 6 countries. After four waves of accessions there are now 15 Member States in the EU and it is preparing for its fifth enlargement. The name "EU" came into use on 1 November 1993 when the Maastricht Treaty entered into force. The EU unites under one "roof" the three "pillars" of European co-operation: the European Community (EC) (including the single market and single currency), the Common Foreign and Security Policy, and the area of Justice and Home Affairs (JHA) co-operation. **European Community (EC) law** is applicable in all EU Member States.

B03b UK COURTS, LEGAL PROCEEDINGS AND PENALTIES

B03b.1 Criminal courts and procedures

- administer and apply the existing **criminal law** but **cannot make new criminal law**, since it can only be made by Parliament.
- use two **procedures** for dealing with criminal cases: **summary procedure** and **solemn procedure**.
- * The legislation creating a particular offence will also determine how that offence may be tried. Certain offences are triable only by lower courts, using summary procedure while other offences are triable by either higher or lower courts (these offences being known as “**either way offences**”). Many breaches of UK merchant shipping legislation are “either way offences”.

B03b.1a Summary procedure and summary conviction

- * **Summary procedure** is used for trying cases involving relatively minor offences, such as minor breaches of road traffic regulations or merchant shipping regulations. A criminal prosecution is normally begun in the name of the **Crown** (i.e. the State) through the **police** and the **Crown Prosecution Service (CPS)** or, in Scotland, the **Procurator-Fiscal**. The decision whether or not to press the prosecution is not the concern of the victim. For an offence to be summarily triable, the legislation creating the offence must provide for a penalty on **summary conviction**; most merchant shipping offences are summarily triable.
- * If it is decided by the CPS or Procurator-Fiscal that there is sufficient evidence to take the case to court, the case might cited as: *R. v. Munro*. (“R” stands for Regina, i.e. the Queen.) The Crown, signified by Regina, **prosecutes** Munro (the defendant, or, in Scotland, defender). The defendant, if not already in custody, is **summonsed** to appear before the court, which consists of magistrates (or in Scotland, usually a sheriff but in some cases magistrates) sitting without a jury. The **magistrates or sheriff decide questions of both fact and law**. Magistrates (who are Justices of the Peace or JPs) are not usually qualified in law and are mostly lay persons who may hear only minor cases and may impose lesser sentences than may judges or sheriffs. Magistrates and sheriffs may **commit** an accused for **trial at a higher court** (e.g. the Crown Court in England or Wales, or the High Court in Scotland).
- * If the defendant is found guilty of the offence there is a **summary conviction**. The defendant may then be punished by one of a range of sentences that the court is allowed by statute to impose. For most criminal offences a magistrate or sheriff may impose a maximum fine of £5,000 (the “**statutory maximum**” for many merchant shipping offences) or a maximum prison sentence of 3 months (but in some circumstances, 6 months).
- * Numerous provisions of merchant shipping legislation provide for a **fine on summary conviction**. This may be stated as a particular sum (e.g. “£1000”), or as “**fine of the statutory maximum**” (meaning the maximum allowed to be imposed for the particular offence being tried), or as a certain “**level on the standard scale**” (see B03b.3c).
- * For **two offences** a shipmaster may be fined up to **£250,000** on summary conviction (see B03b.3d).
- * For **eleven offences** a shipmaster may be fined up to **£50,000** on summary conviction (see B03b.3e).
- * For **two offences** a shipmaster may be fined up to **£25,000** on summary conviction (see B03b.3f).

B03b.1b Solemn procedure and conviction on indictment

- * **Solemn procedure** is used for trying cases involving the more serious offences. Breaches of some pieces of legislation does not carry a sentence on **conviction on indictment**, and can therefore only be dealt with by summary procedure.
- * The defendant is **indicted** to appear before the court, which consists of a **judge** sitting with a **jury** of 12 members of the public (or 15 in Scotland). The judge decides questions of law and directs the jury accordingly. The jury decides questions of fact (i.e. whether the defender is telling the truth) and whether he is guilty of the charge, or not.
- * If the jury find the defendant guilty, a **conviction on indictment** results and the judge passes a sentence. Acts of Parliament and statutory instruments (SIs) lay down the maximum sentence for most criminal offences. For breaches of merchant shipping legislation a judge may normally impose an **unlimited fine** and/or a maximum sentence of **2 years’ imprisonment** on summary conviction.
- * **Penalties** for breaches of particular regulations are prescribed in the SI, e.g. regulation 15(1) of the MS (Musters, Training and Decision Support Systems) Regulations 1999 (SI 1999/2722), which provides that “if, in respect of a ship, there is a breach of any of the requirements of these Regulations the master and the owner shall each be guilty of an offence punishable on summary conviction by a fine not exceeding the statutory maximum or, on conviction on indictment, by imprisonment for a term not exceeding two years, or an unlimited fine, or both”.
- * If the case merits a more severe penalty than the judge can impose, he can send the case to a **higher court**.

- * **Appeals** against sentence are heard in a higher court than that passing the sentence. The **appeal judges** can lower or raise the sentence, or quash it.
- * Information on the work of certain courts in England and Wales, including the High Court and Crown Courts, is provided on the **Court Service website** at www.courtservice.gov.uk
- * Information on **Scottish courts** can be viewed at www.scotcourts.gov.uk and www.district-courts.org.uk

B03b.1c Ranking of criminal courts in England and Wales

- * In ascending order of authority the ranking of criminal courts in England and Wales is:
 1. Magistrates' Court;
 2. Crown Court;
 3. Court of Appeal (court of appeal only);
 4. House of Lords (court of appeal only).

B03b.1d Ranking of criminal courts in Scotland

- * In ascending order of authority the ranking of criminal courts in Scotland is:
 1. District Court⁸;
 2. Sheriff Court;
 3. High Court of Justice;
 4. High Court of Justiciary in Edinburgh.

B03b.2 Legal proceedings in criminal cases under Merchant Shipping Act 1995

- * **Primary legislation relating to legal proceedings** against persons committing offences on or in connection with UK ships is contained in Part XII of the Merchant Shipping Act 1995, sections 274 to 291, as shown in the following table.

Section	Section title	SBC reference
274	Time limit for summary offences	B03b.2a
275	Time limit for summary orders	-
276	Summary offences: Scotland	B03b.2b
277	Offences by officers of bodies corporate	B03b.2c
278	Offences by partners, etc. in Scotland	B03b.2c
279	Jurisdiction in relation to offences	B03b.2e
280	Jurisdiction over ships lying off coasts	B03b.2f
281	Jurisdiction in case of offences on board ship	B03b.2g
282	Offences committed by British seamen	B03b.2h
283	Return of offenders	B03b.2i
284	Enforcing detention of ship	B05d.4d
285	Sums ordered to be paid leviable by distress on the ship	I02f
286	Depositions of persons abroad admissible	B05f.2
287	Admissibility in evidence and inspection of certain documents	D05d.1
288	Admissibility of documents in evidence	D05d.1
289	Inspection and admissibility in evidence of copies of certain documents	D05d.1
290	Proof, etc of exemptions	-
291	Service of documents	I02e

B03b.2a Time limit for summary offences

- * **Section 274(1) of Merchant Shipping Act 1995** provides that, subject to sections 274(2) and 274(3) no person may be convicted of an offence under the Act in **summary proceedings** unless the proceedings were commenced within **six months** beginning with the date on which the offence was committed, or in a case where the accused was out of the UK during that period, the proceedings were commenced within **two months of his first arrival in the UK** and within **three years** from the date on which the offence was committed. Section 274(2) provides that section 274(1) does not apply in relation to any **indictable offence**.
- * Under section 274(3), the time limits in section 274(1) will not prevent a conviction for an offence in summary proceedings begun within **three years** from the date on which the offence was committed and within -
 - **six months** from the day when evidence which the MCA considers is sufficient to justify a prosecution for the offence came to their knowledge; or

⁸ For a note on section 276, Merchant Shipping Act 1995 relating to the district court, see B03b.2b.

- **two months** from the day when the accused was first present in the UK after the end of the six-month period mentioned in the last sub-paragraph if throughout that period the accused was absent from the UK.

B03b.2b Summary offences in Scotland

- * **Section 276 of the Merchant Shipping Act 1995** provides that, in Scotland, all prosecutions in respect of offences under the Act in respect of which the maximum penalty which may be imposed does not exceed imprisonment for a period of three months or a fine of level 4 on the standard scale, or both, may be tried in “a summary manner” (i.e. summary proceedings) before the district court.

B03b.2c Offences by officers of bodies corporate and Scottish partners

- * **Section 277(1) of the Merchant Shipping Act 1995** provides that where a body corporate is guilty of an offence under the Act or any instrument made under it, and the offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director, manager, secretary or other similar officer of the body corporate, he as well as the body corporate will be guilty of that offence and will be liable to be proceeded against and punished accordingly. Section 277(2) provides that where the affairs of a body corporate are managed by its members, section 277(1) will apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate. These provisions are found (usually immediately after the main “Offences and Penalties” regulation) in a few modern SIs, notably Regulations giving effect to EC Directives on health and safety matters applying to ships operating in the EU⁹.
- * **Section 278** makes a similar extension of criminal liability where a partnership or unincorporated association in Scotland is guilty of an offence under the Act.

B03b.2d Offences committed due to the act or default of another person

- Some SIs¹⁰ contain a regulation (usually found immediately after the main Offences and Penalties regulation) providing that where the commission by any person of an offence is due to the act or default of **some other person**, that other person will be guilty of the offence and may be charged with and convicted of the offence whether or not proceedings are taken against the first-mentioned person.

B03b.2e Jurisdiction in relation to offences

- * **Section 279(1) of the Merchant Shipping Act 1995** provides that, for the purpose of conferring jurisdiction, any offence under the Act (e.g. an offence committed on a ship outside the UK, perhaps in waters under the jurisdiction of another State) will be deemed to have been committed in any place in the UK where the offender may be for the time being, and any matter of complaint will be deemed to have arisen where the person complained against may be for the time being.

B03b.2f Jurisdiction over ships lying off coasts

- * **Section 280(1) of the Merchant Shipping Act 1995** provides that where the area within which a court in any part of the UK has jurisdiction is situated on the coast of any sea or abuts on or projects into any bay, channel, lake, river or other navigable water the court will have jurisdiction as respects offences under the Act over any vessel being on, or lying or passing off, that coast or being in or near that bay, channel, lake, river or navigable water and over all persons on board that vessel or for the time being belonging to it.

B03b.2g Jurisdiction in case of offences on board ship

- * **Section 281 of the Merchant Shipping Act 1995** provides that where any person is charged with having committed any offence under the Act, then -
 - if he is a **British citizen** and is charged with having committed the offence **on any UK ship on the high seas, in any foreign port or harbour, or on any foreign ship to which he does not belong;** or

⁹ Examples of such SIs are the MS & FV (Manual Handling Operations) Regulations 1998 (SI 1998/2857), the MS & FV (Personal Protective Equipment) Regulations 1999 (SI 1999/2205) and the MS & FV (Safety Signs and Signals) Regulations 2001 (SI 2001/3444).

¹⁰ Examples are the MS (Prevention of Oil Pollution) Regulations 1996 (SI 1996/2154), the MS (Dangerous Goods and Marine Pollutants) Regulations 1997 (SI 1997/2367) and the MS (Carriage of Cargoes) Regulations 1999 (SI 1999/336).

- if he is **not a British citizen** and is charged with having committed the **offence on any UK ship on the high seas**,
- and he is found within the jurisdiction of any court in the UK which would have had jurisdiction if the offence had been committed on a UK ship (within the limits of its ordinary jurisdiction to try the offence), that court will have jurisdiction to try the offence.

B03b.2h Offences committed by British masters and seamen

- * Under **Section 282(1) of the Merchant Shipping Act 1995**, any act in relation to property or person done in or at any place (ashore or afloat) **outside the UK** by any master or seaman employed in a UK ship, which, if it had been done in any part of the UK, would be an offence under the law of any part of the UK, will -
 - be an offence under that law; and
 - will be treated for the purposes of jurisdiction and trial, as if it had been done within the jurisdiction of the Admiralty of England.
- * This provision also applies in relation to a person who **had been employed** as a master or seaman in a UK ship within the period of **three months** expiring with the time when the act was done. It also applies to **omissions** (e.g. omissions to perform specified duties under regulations) as they apply to acts.

B03b.2i Return of offenders

- * **Section 283 of the Merchant Shipping Act 1995** gives powers to proper officers to return to the UK masters and seamen who are alleged to have committed offences outside the UK.
- * **Section 283(1)** provides that the powers conferred on a British consular officer by subsection 282(2) are exercisable in the event of any complaint being made to him -
 - that any offence against property or persons has been committed at any place (ashore or afloat) outside the UK by any master or seaman who at the time when the offence was committed, or within three months before that time, was employed in a UK ship; or
 - that any offence on the high seas has been committed by any master or seaman belonging to any UK ship.
- * Section 283(2) gives the proper officer power to **inquire** into the case upon oath, and if the case requires it, to take **any steps in his power** for the purpose of placing the offender under the necessary **restraint** and **sending him by UK ship** as soon as practicable in safe custody **to the UK** for proceedings to be taken against him.
- * Under section 283(3) the consular officer may, subject to subsections 283(4) and (5), **order the master of any UK ship which is bound for the UK** to receive and carry **the offender and witnesses to the UK**. The proper officer must endorse any relevant particulars on the ship's **Crew Agreement** as required by the MCA.
- * Under section 283(4) a consular officer may not exercise the power conferred by subsection 283(3) unless **no more convenient means of transport** is available or it is available only at **disproportionate expense**.
- * Under section 283(5) no master of a ship may be required under subsection 283(3) to receive more than **one offender for every 100 tons of his ship's registered tonnage** (i.e. net tonnage) or **more than one witness for every 50 tons** of his ship's registered tonnage.
- * Section 283(6) provides that the master of any ship to whose charge an offender has been committed under subsection 283(3) must, on his ship's arrival in the UK, give the offender into the custody of some **police officer or constable**.
- * Section 283(8) provides that the **expense** of imprisoning an offender and of **carrying him and witnesses** to the UK otherwise than in the ship to which they respectively belong must be paid out of **money provided by Parliament**.
- * Under section 283(9) references in section 283 to carrying a person in a ship include affording him **subsistence** during the voyage.

B03b.2j Restriction on UK jurisdiction over oil pollution offences outside UK limits

- * **Regulation 38(1) of the MS (Prevention of Oil Pollution) Regulations 1996** (SI 1996/2154) provides that no proceedings for breaches of the "discharge regulations" (regulations 12, 13 or 16) by a non-UK ship, where the discharge was in the internal waters, territorial waters or **EEZ** of another State will be instituted (in the UK) unless:
 - that State, the flag State or a State damaged or threatened by the discharge requests proceedings to be taken; or
 - the discharge has caused or is likely to cause pollution in the internal waters, territorial sea or controlled waters of the UK.
- * Where proceedings as above in respect of an offence by a non-UK ship have been commenced but not concluded, and the State concerned requests their suspension, then the proceedings will be suspended and the DfT will send all the case documents, etc. to the other State (regulation 38(2)).
- * It will be a **defence** under regulation 38(3) for a person charged with an offence as above to show:

- that the ship is not a UK ship; and
- the discharge took place outside the UK, its territorial waters and the controlled waters of the UK; and
- the ship was in a port in the UK at the time of institution of proceedings due to stress of weather or other reason beyond the control of the master, owner or charterer.

B03b.2k Admissibility of depositions of persons abroad

- * **Section 286** provides that if the **evidence** of any person is required in the course of legal proceedings but that person cannot be found in the UK, any **deposition** that he may previously have made outside the UK in relation to the same matter will, subject to certain conditions, be admissible in evidence. For a deposition to be admissible in evidence it must have been taken on oath before a justice or magistrate in any colony or a British consular officer in any other place, must be authenticated by the signature of the justice, magistrate or consular officer, and must, in the case of criminal proceedings, have been taken in the presence of the accused.
- * For notes on the **use of documents in legal proceedings**, see D05d.

B03b.3 Penalties

B03b.3a Penalties provisions in Merchant Shipping legislation

- * A vast number of provisions of Merchant Shipping legislation, whether sections of Acts or regulations in statutory instruments, create offences that carry a **criminal penalty**. Where several duties are laid down in the legislation there may be different penalties for breach of different duties. Any penalty must be clearly stated before it can be enforced by the courts.
- * Any section of an Act containing duties will probably carry a penalty for breach of those duties, but the penalty will not usually be in a clearly-headed and separate section of the Act; the relevant section must therefore be carefully read to ascertain the penalty, if any.
- * In Merchant Shipping and other statutory instruments the regulation containing the penalty or penalties is usually clearly headed “**Offences and Penalties**” or in some cases “**Penalties**”, and is most often found at the end of the regulations, often preceding a further regulation allowing one or more **defences**.
 - Every offence must be **triable** in some form of court proceedings, i.e. either summary procedure (see B03b.1a) or solemn procedure (see B03b.1b). Some offences are triable only in summary proceedings in which case the penalty will refer to “**summary conviction**”. Many offences are indictable and are therefore triable “either way”, i.e. either in summary procedure or solemn procedure, and in this case the penalty provision will also lay down a penalty “**on conviction on indictment**”.

B03b.3b Fines not exceeding the statutory maximum

- The penalty on summary conviction for breach of a statutory provision may be specified in the relevant piece of legislation as “**a fine not exceeding the statutory maximum**”. The **statutory maximum** is currently **£5000**.

B03b.3c Standard scale of fines

- * For breaches of most pre-1982 UK legislation a **fixed sum penalty** on summary conviction, e.g. a maximum fine of £50, was prescribed. Whenever amendment became necessary in order to raise the specified fines to realistic sums reflecting current levels of wealth, numerous pieces of legislation required individual amendment, which was difficult, slow and costly.
- * **Section 37 of the Criminal Justice Act 1982** (CJA 1982) introduced a **standard scale of fines** consisting of **five levels**, each equating to a monetary sum which could be amended periodically to reflect changes in national income levels. Every piece of legislation providing for a fine of a specified level on the standard scale can be amended by means of one piece of legislation which amends the CJA 1982. In post-1982 legislation, fines specified as penalties on summary conviction are either a fine of the **statutory maximum** (see B03b.3b) or a fine of a specified level on the standard scale.
- * The current levels of the standard scale came into effect on 1 October 1992 and are as follows:
 - Level 1:** £200;
 - Level 2:** £500;
 - Level 3:** £1000;
 - Level 4:** £2500;
 - Level 5:** £5000.

- * The courts are required by law to have regard to the **means of the accused** when determining the level of the fine to be imposed in any particular case.

B03b.3d £250,000 offences by masters

- * Masters breaching UK merchant shipping legislation are liable to a maximum fine on summary conviction of **£250,000** for **two offences** which are both related to oil pollution, as shown in the following table.

Offence (with offender shown in bold)	Legislation contravened	Penalties provision and penalties on summary conviction (SC) & conviction on indictment (COI)
Failure by ship to comply with any requirement of regulation 12, 13 or 16 (the “discharge regulations”). (Owner and master)	Regulations 12, 13 or 16, MS (Prevention of Oil Pollution) Regulations 1996	Reg. 36(2), as amended by reg. 8, MS (Prevention of Oil Pollution) (Amendment) Regulations 1997. SC: A fine not exceeding £250,000. COI: A fine.
Oil or mixture containing oil is discharged into UK national waters which are navigable by sea-going ships. ((a) Owner or master , unless he proves that the discharge took place and was caused as in (b). (b) If the discharge is from a ship but takes place in the course of a transfer of oil to or from another ship or a place on land and is caused by the act or omission of any person in charge of any apparatus in that other ship or that place, the owner or master of that other ship or, as the case may be, the occupier of that place .)	Section 131(1), Merchant Shipping Act 1995	S.131(3), Merchant Shipping Act 1995 as amended by s.7(1), Merchant Shipping and Maritime Security Act 1997. SC: A fine not exceeding £250,000. COI: A fine.

B03b.3e £50,000 offences by masters

- * Masters breaching UK merchant shipping legislation are liable to a maximum fine on summary conviction of **£50,000** for **eleven offences**, as shown in the following table. Five of these are listed in **M.1255** as being offences under Merchant Shipping Act 1979; these have been transferred to, and added to by, the Merchant Shipping Act 1995 and the Merchant Shipping and Maritime Security Act 1997.

Offence (with offender shown in bold)	Legislation contravened	Penalties provision and penalties on summary conviction (SC) & conviction on indictment (COI)
Master or owner of a ship which is not a British ship does anything, or permits anything to be done, for the purpose of causing the ship to appear to be a British ship.	Section 3(1), Merchant Shipping Act 1995	Section 3(6). SC: A fine not exceeding £50,000. COI: Max. 2 years imprisonment or a fine or both. Ship liable to forfeiture under section 3(1).
Master or owner of a British ship does anything, or permits anything to be done, for the purpose of concealing the nationality of the ship. (Master, owner and any charterer)	Section 3(1), Merchant Shipping Act 1995	Section 3(6). SC: A fine not exceeding £50,000. COI: Max. 2 years imprisonment or a fine or both. Ship liable to forfeiture under section 3(4).
Master fails to render assistance to and stay by the other ship following a collision.	Section 92(1)(a), Merchant Shipping Act 1995	Section 92(4)(a). SC: A fine not exceeding £50,000 or max. 6 months imprisonment or both. COI: Max. 2 years imprisonment or a fine or both.
Ship in a UK port, or a UK ship in any other port, is dangerously unsafe. (Master and owner/charterer/manager)	Section 98(1), Merchant Shipping Act 1995	Section 98(3). SC: A fine not exceeding £50,000. COI: Max. 2 years imprisonment or a fine or both.
Ship enters or remains in a temporary exclusion zone or a part of such a zone in contravention of Section 100B(1) or (3). (Owner and master)	Section 100B(1) or (3), Merchant Shipping Act 1995.	Section 100B(6) ¹¹ . SC: A fine not exceeding £50,000. COI: Max. 2 years imprisonment or a fine or both.
Contravention of, or failure to comply with, a section 137 direction ¹² as respects ship or cargo given following a shipping casualty. (Person to whom direction was given)	Section 139(1), Merchant Shipping Act 1995	Section 139(4). SC: A fine not exceeding £50,000. COI: A fine.
Intentionally obstructing any person (a) acting on behalf of the Secretary of State in connection with the giving or service of a section 137 direction or (b) acting in compliance with the direction or (c) acting under section 137(4) or (5). (Any person so obstructing)	Section 139(2), Merchant Shipping Act 1995	Section 139(4). SC: A fine not exceeding £50,000. COI: A fine.

¹¹ Section 100B was added to MS Act 1995 by virtue of Section 1 of the Merchant Shipping and Maritime Security Act 1997 (c.28).

¹² This means directions given by the Secretary of State's Representative (SOSREP) in a salvage/pollution incident affecting in UK waters.

Ship enters or leaves, or attempts to enter or leave, a port or arrives at or leaves, or attempts to arrive at or leave, a terminal in the UK (or, if the ship is a UK ship, in any other country), without having a valid OPIC certificate in force. (Master or owner)	Section 163(5), Merchant Shipping Act 1995	Section 163(5). SC: A fine not exceeding £50,000. COI: A fine. Ship attempting to leave a port in the UK in contravention of section 163 may be detained.
Ship which has been detained, or as respects which notice of detention or an order for detention has been served on the master, proceeds to sea before it is released by a competent authority. (Master)	Section 284(2), Merchant Shipping Act 1995	Section 284(2). SC: A fine not exceeding £50,000. COI: A fine.
Failure to ensure that there is not on board a greater number of passengers than that stated on the ship's Passenger Ship Safety Certificate or Passenger Certificate. (Owner and master)	Regulation 23, MS (Survey and Certification) Regulations 1995	Reg. 24(5). SC: A fine not exceeding £50,000. COI: Max. 2 years imprisonment or a fine or both.
Infringement of Rule 10(b)(i) (duty to proceed with traffic flow in lanes of separation schemes). (Owner, master and any person for the time being responsible for the conduct of the vessel)	Regulation 4(1), MS (Distress Signals and Prevention of Collision Regulations 1996.	Regulation 6(1). SC: A fine not exceeding £50,000. COI: Max. 2 years imprisonment or a fine or both.

B03b.3f £25,000 offences by masters

- * Masters breaching UK Merchant Shipping legislation¹³ are liable to a maximum fine on summary conviction of **£25,000 for three offences** which are all related to pollution, as shown in the following table.

Offence (with offenders shown in bold)	Legislation contravened	Penalties provision and penalties on summary conviction (SC) & conviction on indictment (COI)
Breach of the requirements of regulations 4, 5, 6 or 7 (i.e. prohibited disposal of garbage outside Special Areas, prohibited disposal of garbage within Special Areas, prohibited disposal of garbage within 500 metres of fixed or floating installations, and breach of restriction on UK ships entering the Antarctic area). (Owner, manager, demise charterer and master)	Regulation 4, 5, 6 or 7, MS (Prevention of Pollution by Garbage) Regulations 1998	Reg. 14(2). SC: A fine not exceeding £25,000. COI: A fine.
Prohibited discharge of any noxious liquid substance, except where permitted by Schedule 2 of M.1703/NLS1. (Owner and master)	Regulation 5(a), MS (Dangerous or Noxious Liquid Substances in Bulk) Regulations 1996	Reg. 14(1), MS (Dangerous or Noxious Liquid Substances in Bulk) Regulations 1996 as amended by reg. 2, MS (Dangerous or Noxious Liquid Substances in Bulk) (Amendment) Regulations 1998. SC: A fine not exceeding £25,000. COI: A fine.
Contravention of requirement that tanks shall be washed, or prewashed, and the tank washings shall be dealt with, as prescribed in Schedule 2 of M.1703/NLS1. (Owner and master)	Regulation 5(b), MS (Dangerous or Noxious Liquid Substances in Bulk) Regulations 1996	Reg. 14(1), MS (Dangerous or Noxious Liquid Substances in Bulk) Regulations 1996 as amended by reg. 2, MS (Dangerous or Noxious Liquid Substances in Bulk) (Amendment) Regulations 1998. SC: A fine not exceeding £25,000. COI: A fine.

B03b.4 Civil courts

- deal with disputes involving **civil law**, e.g. concerning marriages, child custody, contractual breaches, copyright infringements, etc., i.e. non-criminal cases. The vast majority of cases heard are, in fact, divorce cases.
- **apply existing civil law** and, in some cases, **make new civil law**.

B03b.4a Civil court procedure

- * A **civil action** is started by a private individual or firm. They have the right to determine how far the action should continue.
- * A civil action might be cited as: *Jones v. Smith*. Jones (the plaintiff) sues Smith (defendant) for breach of contract, for example.
- * In England and Wales, civil cases are heard by circuit judges in the **county courts**. In Scotland, sheriffs and judges of the **Outer House of the Court of Session** usually sit alone, but may very occasionally sit with a jury of 12. The **plaintiff** (or pursuer in Scotland) brings an action against (i.e. sues) the **defendant** (defender in Scotland). In most cases, the remedy sued for is monetary damages.

¹³ A £25,000 fine on summary conviction is also provided for by section 5(1) of the Dangerous Vessels Act 1985 (see B04c.8) where a person (e.g. a master) contravenes or fails to comply with any directions given by a harbour master under section 1 (e.g. prohibiting entry or requiring removal of a ship).

- * A civil court cannot impose a fine or custodial sentence. If the action is successful, the result is a **judgement for the plaintiff** which may order the defendant to:
 - pay the plaintiff monetary **damages**;
 - **transfer property** to him;
 - refrain from doing something (**injunction** or, in Scotland, **interdict**); or
 - enforce the performance of a contract (**specific performance**).
- * An **appeal** against a judgement of a lower court may generally be heard by the next higher court.

B03b.4b Ranking of civil courts in England and Wales

- * In ascending order of authority the ranking is:
 - County Court;
 - High Court (of which the Admiralty Court is part);
 - Court of Appeal;
 - House of Lords.

B03b.4c Ranking of civil courts in Scotland

- * In ascending order of authority the ranking is:
 - Sheriff Court;
 - Outer House of the Court of Session;
 - Inner House of the Court of Session.

B03b.5 Differences in rules of evidence, etc. between criminal and civil systems

- * There are differences in the rules of evidence and procedure in the two systems. A criminal prosecution is more damaging to a person's character than failure in a civil action. Rules of evidence are therefore more strict in criminal cases, e.g. a confession is more carefully examined. In civil cases, by contrast, an admission is freely accepted.
- * The **standard of proof** is greater in criminal cases, but the accused must be proved **guilty beyond all reasonable doubt**. The plaintiff in a civil action will succeed **on the balance of probabilities**, i.e. if he can convince the court that he has only a marginally stronger case than that of the defendant.

B03b.6 Civil and criminal consequences of a wrong

- * The same series of events may give rise to both types of case. For example, a shipowner, as an employer, may be alleged to have left dangerous engine room machinery unguarded, causing injury to a seaman. Two types of issue arise. On one hand, failure to guard machinery, as a breach of a statutory requirement (see E08e.1), is a **criminal offence**: the employer may be prosecuted in a criminal court and if found guilty, may be punished. On the other hand, whether the employer caused loss to the injured seaman through negligence or failure to comply with his statutory duty may be determined in a separate **civil action** brought by the seaman in a civil court, where the seaman may claim damages from his employer.

B03b.7 The Admiralty Court

- * The **Admiralty Court of the Queen's Bench Division of the High Court of Justice** -
 - is a court in London with jurisdiction embracing **civil shipping matters**.
 - deals with cases concerning **collisions, salvage, navigation, loss of life or injury caused by ships, cargo loss, damage or delay, claims in rem, marine insurance, piracy**, etc.
- * The jurisdiction of the Admiralty Court does not extend to non-maritime matters.
- * A distinctive feature of the Admiralty Court's procedure is **action in rem**, i.e. against the thing, rather than action *in personam*, i.e. against a person or group of persons. For notes on **maritime liens**, see B03g.3.

B03c LAW OF CONTRACT

B03c.1 Nature of contracts

- * A **contract** is a legally binding agreement, i.e. one that will be enforced by the courts.
- * Everyday **domestic agreements** are not usually intended to be legally binding, and are therefore not contracts.
- * In a contract there must be **consensus ad idem** ("agreement on the same thing"), i.e. the contracting parties must agree to identical terms.
- * Agreement arises from **offer and acceptance**, but to be enforceable at law a number of **other elements** must be present (see B03c.3).

B03c.2 Categories of contract

- * A **voidable** contract is one that, because of misrepresentation, mistake, non-disclosure or undue influence, may be set aside by one of the parties, subject to certain restrictions (e.g. that both parties can be restored to their original positions and that the rights of a third party will not be upset if the contract is ended). A buyer of goods cannot, therefore, rescind the sale contract unless he can return the goods, and the seller cannot rescind if he has already sold the goods to a third party.
- * A **void** contract is one that has no legal force from the moment of its making, e.g. because of lack of capacity of the parties, or mistake.
- * An **illegal** contract is one that is prohibited by statute or is illegal at common law on the grounds of public policy and is automatically void since it is impossible to perform within the law.
- * An **unenforceable** contract, although valid, cannot be enforced because it is neither evidenced in writing not supported by a sufficient act of part performance. The contract might be not capable of proof, or not stamped (where stamping is required), or legal remedy may be barred by lapse of time.
- * A **valid** contract is one that does not fall into one of the above categories.

B03c.3 Elements of a contract

- * Every contract must be **entered into voluntarily** by **two or more parties** having legal **capacity** to contract and **intending** thereby to create a **legally binding relationship** between them.
- * Of the several **essential elements** in any contract, the most vital are:
 - **offer**;
 - **acceptance**; and
 - **consideration** (unless the contract is by deed).
- * The contract is concluded when one party makes an offer that is unconditionally accepted by the other party. The offer and acceptance may be made through the agency of one or more **brokers**.
- * If one party fails to keep its promise, the other is entitled to legal **remedy**.
- * Other **necessary elements** include
 - intention to create legal relations;
 - legal capacity;
 - legality;
 - possibility of performance;
 - sufficient certainty of terms; and
 - prescribed form.
- * **Intention to create legal relations**, i.e. to enter into a legally enforceable agreement, is necessary in a formal contract. (A purely social or domestic arrangement or agreement does not constitute a contract.)
- * **Legal capacity** is the legal right to enter into contracts. Under English common law some parties, including enemy aliens, convicts, infants and minors, lunatics and drunks, may not have the full legal capacity to contract, and a contract agreed by them may be unenforceable.
- * **Legality** of the contract is an important requirement. A contract that is prohibited by statute (e.g. a contract for the sale of prohibited goods, or a contract for the sale of goods to a country that is subject to an embargo) is an illegal contract. A contract that is illegal at common law on the grounds of public policy (e.g. a contract to commit a crime or a tort or to defraud the Inland Revenue, or a contract that prejudices national safety or the administration of justice) is an illegal contract. Illegal contracts are totally void, but neither party can recover any money paid or property transferred under it.

- * **Possibility of performance** If the performance of a contract is impossible when it was entered into, the whole contract becomes void.
- * **Sufficient certainty of terms** means that details of the contract must be stated (i.e. expressed) or ascertainable. There must be a precise meaning to the words, with no ambiguous clauses.
- * **Prescribed form** is necessary to make some contracts valid. In general no particular formality is required for the creation of a valid contract, and it may be oral, written, part-oral, part-written, or even implied from conduct. Some transactions are valid only if effected by deed (e.g. a transfer of shares in a British ship) or in writing (e.g. marine insurance contracts and promissory notes). Certain other contracts, although valid, can only be enforced at law if evidenced in writing.
- * The agreement must not be rendered void either by some inherent defect, such as **operative mistake**. Certain contracts, though valid, may be liable to be set aside by one of the parties on grounds such as **misrepresentation** or the exercise of **undue influence**.
- * A **misrepresentation** is an untrue statement of fact made by one party to the other in the course of negotiating a contract, that induces the other party to enter into the contract.
- * **Mistake** is a misunderstanding or erroneous belief about a matter of fact (mistake of fact) or a matter of law (mistake of law). A **mistake of law** has no effect on the validity of a contract, but a **mistake of fact** may make the contract voidable, i.e. liable to be set aside by one of the parties, subject to certain conditions.
- * **Duress** is pressure put on a person to act in a particular way, e.g. where a seafarer is ordered by the master of a ship changing articles during a voyage to sign a new crew agreement (i.e. a running agreement) before being discharged from the old one. Acts carried out under duress usually have no legal effect. A contract obtained by duress is voidable at law.
- * **Undue influence** is influence that prevents someone from exercising an independent judgement with respect to any transaction.

B03c.4 Contract terms

- * A written contract will usually set out the **rights, duties and obligations** of both parties in a set of terms dealing with matters of essential interest to the parties.
- * In carriage of goods contracts terms mainly cover the transport of the goods from one place to another and the keeping of the goods safe and undamaged during transport. For notes on **matters required to be covered by contractual provisions in crew agreements**, see E07c.1b.
- * Contract terms may usually be categorised as **conditions** (see B03c.4a) and **warranties** (see B03c.4b). A third, less important, categorisation is **innominate term** (see B03c.4c).

B03c.4a Conditions

- * A **condition** is an essential contractual term going right to the root of the contract. If a condition is breached by one party, the contract becomes void and need not be fulfilled by the other party. In principle, if a condition is breached, the contract may be revoked by the injured party and he need not complete it.
- * **Examples** of conditions are:
 - the (express) condition in a voyage charter that the vessel will be presented to the charterer at the agreed loading port during the agreed laydays; and
 - the (implied) condition in a marine insurance policy that the voyage will commence within a reasonable time of acceptance of the insurance and will be prosecuted with reasonable despatch throughout.

B03c.4b Warranties

- * Except in insurance law, where it has a different meaning, a **warranty** is a contractual term less essential than a condition, such that its breach would not have the effect of frustrating the contract and cause the whole contract to be revoked.
- * **Examples** of warranties are:
 - a charterer's warranty (to the shipowner) that the cargo loaded will not be dangerous to the ship; and
 - a shipowner's warranty (to his insurer) that the ship will be classed with a particular classification society and that class will be maintained.
- * A **breach of warranty** will, however, entitle the injured party to claim **damages** from the party breaching the warranty. If a warranty is breached, the contract remains in force but the injured party is entitled to claim damages from the party breaching the warranty. In practice, the distinction between conditions and warranties is often unclear and depends to a large extent on the contract's wording.

B03c.4c Innominate terms

- * An **innominate term** is a contractual term the identity of which as a condition or a warranty cannot be determined at the time the contract is made. Where an obligation in a contract is breached, the seriousness of that breach will determine the rights of the injured party, and only after that can it be determined whether the term was a condition or a warranty.

B03c.4d Implied terms

- * An **implied term** is a contractual term considered so obvious that it is unnecessary to express it in the contract. E.g. in (English) common law, in every contract of carriage of goods by sea there is an implied term that the carrier will provide a seaworthy ship.

B03c.4e Express terms

- * An **express term** is a contractual term which the parties consider materially affect their agreement, and is therefore expressed in the contract either **orally or in writing** (but most usually in writing). All the printed terms and conditions on a charter party form, in an employment contract document, etc. are thus express terms.

B03c.4f Standard terms and rider clauses

- * **Standard terms** of a contract are usually those of the offeror (e.g. an oil company as charterer) and are printed on a form of his choice (e.g. SHELLVOY 3). They may be amended by deletion or the addition of side clauses and rider clauses.
- * **Rider clauses** are typed clauses containing additional terms agreed by the parties. Charter parties commonly contain rider clauses covering matters not dealt with by the printed standard clauses. Where there is a conflict of terms, rider clauses supersede standard terms.

B03c.4g Side clauses, addenda and side letters

- * **Side clauses** are additional clauses or words containing amendments to clauses that are typed in the margins of the printed text of a standard contract, each having a line running to the precise point of insertion in the main text. They can radically alter the meaning of a printed clause and therefore require close scrutiny when reading any contract containing them. Charter parties commonly contain side clauses amending the printed words (see F04c.1).
- * **Addenda** to a contract, e.g. provisions of a charter party concerning the payment of freight or hire, may contain sensitive clauses that the parties do not, for reasons of security, want to be in the main charter party document.
- * A **side letter** may concern matters relating to the contract, such as a charterer's instructions to the master relating to the charter.

B03c.5 Discharge of contracts

- * **"Discharge"**, with reference to contracts (including crew agreements) means release from a legal obligation.¹⁴
- * A contract may be discharged by **performance, agreement, frustration** or **breach**.

B03c.5a Discharge by performance

- is the **carrying out** of the contractual obligations by both parties.

B03c.5b Discharge by agreement

- is where each party agrees that their obligations will be **waived**, e.g. where each party mutually agrees to cancel a future charter because of the non-availability of a ship or cargo.

¹⁴ When a seaman is discharged from a ship he is, in fact, being discharged from the contractual obligations of the crew agreement.

B03c.5c Discharge by frustration

- is where something occurs which is **not the fault of either party**, and was **not contemplated** by either of them, and **prevents the contract from being performed** as intended. It makes the contract void, since it is **impossible to perform** and therefore lacks an essential element for validity.

B03c.5d Discharge by breach

- occurs when **one party repudiates his obligation**, or disables himself from performing his part of the contract, or **fails to perform** his part of the contract on or by the agreed date.
- * A breach may be an **anticipatory breach**, i.e., occurring before the date for performance specified in the contract, or an **actual breach**.
- * An **actual breach** may occur in three ways:
 - by **non-performance**, e.g. where a ship is not at the agreed place on the agreed date to start a charter;
 - by **defective performance**, e.g. where a ship arrives late when time is important; or
 - through **untruth** as regards a term of the contract, e.g. where the true condition of a ship is concealed from a charterer.

B03c.6 Privity and assignment of contracts

B03c.6a Doctrine of privity

- * A contract is a private relationship between the parties to it, and no other party can acquire rights or incur liabilities under it. No party can acquire rights under a contract to which he is not a party, and no party can incur liabilities under a contract to which he is not a party. In other words, only the parties to a contract can sue and be sued on it. This is the common law **doctrine of privity**.

B03c.6b Transfer and assignment of contracts

- * In some cases, **rights and liabilities under a contract** may be **assigned**, i.e. transferred to a third party. Where a contract is originally between parties A and B, B may transfer the contract to party C and drop out of the contract so that it will then be between A and C. Party B will generally have no further rights or liabilities under the contract. This happens, for example, where goods are sold by an original consignee to a third party to whom the bill of lading is transferred (see F07b.7). The new consignee, as holder of an original bill of lading, has the right to claim delivery of the goods from the carrier, but may also be liable for unpaid freight, demurrage, etc.

B03c.7 Law and jurisdiction governing a contract

- * Every contract must be governed by the **law of some nation** or some set of **rules**. The governing law may be the law of the nation in which the contract was made or a nation mutually agreed by the parties to the contract. The nation or place in which disputes between the parties may be resolved is called the “**jurisdiction**”, and should also be clearly specified in the contract terms. The choice of law and jurisdiction should be clearly stated in the contract terms in a **Law and Jurisdiction Clause**. A typical Law and Jurisdiction Clause might read “*This contract shall be governed by English law and any disputes shall be determined in the United Kingdom*”.
- * The **preferred law** of parties to contracts of international carriage by sea is in many cases **English law**, and the preferred jurisdiction is often England or the UK¹⁵.
- * Contracts for the supply of goods or services in a foreign port will probably be governed by the law of the port State, and disputes may have to be referred to a local court¹⁶.
- * An agreement is often made to resolve disputes by **arbitration** in, for example, London or New York, rather than litigation in the courts; in this case an **Arbitration Clause** will be inserted in the contract and this should indicate the agreed **place** for the arbitration (see B03i.1). Some charter parties offer a choice of clauses providing, on the one

¹⁵ A Scottish ferry company's passenger ticket may provide that litigation arising out of the contract between a passenger and the company will be governed by Scottish law if the passenger brings the litigation in Scotland.

¹⁶ For example, the Law and Arbitration Clause in a contract for the sale of marine fuels at an Estonian port provides that any dispute must be submitted for resolution by the Court of Tallinn and that the laws of Estonia will govern the contract.

hand, for dispute resolution under **English law and arbitration in London** or, on the other, under **US law and arbitration in New York**.

- * Contracts of carriage evidenced by **bills of lading** usually contain a Paramount Clause (or “Clause Paramount”) providing that the contract will be governed by either the **Hague Rules** or **Hague-Visby Rules**, depending on which rules are compulsorily applicable under national law. Where national law applies neither of these rules the carrier usually inserts a clause making the Hague-Visby Rules applicable to the bill of lading contract (see F07c.2).

B03d AGENCY

B03d.1 Nature of agency

- * Any legal person (whether an individual, a firm, company, etc.) may appoint another legal person to **act on his behalf** in a particular matter, or in all his matters. The person thus appointed is an **agent**. The person on whose behalf the agent acts is his **principal**. The relationship between an agent and his principal is one of **agency**. The agency is created in most cases by **consent**, where the agent is given prior instructions to carry out a specific task or act in a certain capacity, but in some cases by later **ratification** of an act already performed (see B03d.3a).
- * An agent only needs to state that he is acting for a principal, and does not have to name the principal. An unnamed principal is called an **undisclosed principal**.

B03d.2 Agent's authority

- * The creation of an agency involves the giving of **authority** to the agent. The authority may be **actual authority** or **apparent authority** (also called **ostensible authority**).
- * **Actual authority** may be **express** or **implied**. **Express authority** is given by words (spoken or written), such as when an officer is appointed by letter to command of a ship. Authority is **implied** when it is inferred by the conduct of the parties and the circumstances of the case, such as when a shipmaster is appointed to command by a shipowner, who thereby impliedly authorises him to carry out, on the owner's behalf, all the usual things that fall within the scope of a master's position, e.g. engagement and discharge of crew, signing of bills of lading, and purchasing of provisions. An exception to this would be where the principal has expressly placed a restriction on the implied authority of the agent, e.g. where the master is expressly prohibited from signing bills of lading.
- * Where an agent's usual full authority is expressly restricted by his principal, but a third party, unaware of this restriction, is nevertheless brought by the agent into a contract with the principal, the agent has **apparent authority** (or **ostensible authority**) and the contract will (subject to the following conditions) be binding on the parties. There must be one or more representations (i.e. statements) by the principal or by the agent acting on his behalf. The representations must be of fact. They must be made to a third party, and the third party must rely on them.
- * Most agencies are created by the principal giving his agent **express instructions**, e.g. where a port agent is appointed by a shipowner to act during the forthcoming visit of a vessel, and is given certain instructions.

B03d.2a Breach of warranty of authority

- * An agent purporting to act on behalf of another party **impliedly warrants** that he has the authority to make contracts on behalf of his principal, i.e. he gives a **warranty of authority**.
- * Where an agent brings a third party into a contractual relationship with his principal, the third party is entitled to rely on the agent's apparent authority. If the agent has **acted outside his authority**, the third party, although unable to enforce the contract with the principal, can sue the agent for **breach of warranty of authority**. (The agent will have no liability to his principal, since a principal cannot be bound by an act which he has not authorised.)

B03d.3 Types of agent and agency

- * Agents are normally either **general agents** or **special agents**.
- * A **general agent** is an agent who has authority to act for his principal in **all matters** concerning a particular trade or business, or of a particular nature. Many **liner agents**, for example, act as general agent in a particular city or country for one or more carriers.

- * A **special agent** is an agent appointed for the carrying out of **particular duties** which are not part of his normal business activities. A special agent's authority is therefore limited by his actual instructions. Most **port agents** are special agents since their authority does not extend beyond their actual instructions. **Shipmasters** are similarly special agents for purposes of engaging and discharging crew, purchasing ships' stores and bunkers, and making salvage agreements in certain cases. If a special agent **acts outside his actual instructions** in some respect, his actions will not be binding on his principal.
- * Other types of agent include **brokers, auctioneers, factors, mercantile agents, and del credere agents**. A **broker**, such as a shipbroker or stockbroker, is an intermediary employed by a principal to arrange a contract with a third party in return for a commission or brokerage. He does not take possession of goods and does not deal in his own name. An **auctioneer** is the agent of the seller, with authority to sell to the highest bidder. A **factor** is an agent entrusted with a principal's goods (or documents of title representing goods) for the purpose of sale. A **mercantile agent** is similar to a factor but may also have authority to buy goods, or to raise money for his principal on the security of goods. A **del credere** agent is an agent for the sale of goods who agrees to protect his principal against the risk of the buyer's insolvency by undertaking liability for the failure of the buyer to pay the price.

B03d.3a Agency by ratification

- * A principal normally gives his agent the authority needed to act for him, and the authority thus comes before the act. Where an agent acts before obtaining the principal's authority, but the principal, on learning of the act, sanctions it, he thereby **ratifies** it and creates an **agency by ratification**. Certain conditions (which are not likely to be relevant to shipmasters) must be met for the ratification to be effective.

B03d.3b Agency of necessity

- * In certain **emergency circumstances** an agent may **act beyond his authority** without liability for actions he takes on behalf of the principal. This form of agency is called "**agency of necessity**".
- * Agency of necessity arises out of **exceptional circumstances**, e.g. fires, floods, war, imminent loss of a ship and/or cargo, etc. and **can only arise** when the following conditions are satisfied:
 1. there must be an **actual commercial necessity** for the agency (i.e. the **principal's property may be lost** if action on his behalf is not taken);
 2. there is **impossibility of communication** between agent and principal for the obtaining of instructions (e.g. cargo owners and owners of cargo containers cannot be contacted in the time available to the master of a disabled containership that is drifting towards a lee shore);
 3. the **agent acts bona fide** (i.e. in good faith) **in the best interests of the principal** (or **principals** where there is more than one, as in the case of many cargo-carrying ships).
- * Agency of necessity will only be implied in favour of a person who is **already a duly appointed agent** for a principal (as is the case with a shipmaster), but who **must exceed his authority** in an emergency situation.
- * It is for the **courts** to determine whether there was agency of necessity or not.
- * For notes on the **master as an agent of necessity**, see E04f.2 and H04a.

B03d.4 Duties of an agent to his principal

- * An **agent's duties** to his principal are:
 - to perform his duties **in person**¹⁷, using **ordinary skill** and **diligence**, and if he purports to have special skills, to use his **special skills** also;
 - to **obey lawful instructions** of his principal, and when he is not instructed on a particular matter, to act in his principal's **best interests**;
 - to **disclose all information** relevant to the agency to the principal, avoiding any conflict of interest;
 - to **maintain confidentiality** about matters communicated to him as agent, and not to disclose them to prospective third parties;
 - to keep **proper accounts** of all transactions and render them to his principal on request;
 - not to make **extra profits** from the agency without disclosing them to his principal.

¹⁷ It has been held that a person appointed as a sole agent has no authority to appoint a sub-agent. However, for normal business purposes an agent can delegate his duties to his own staff.

B03d.5 Duties of a principal to his agent

- * A **principal's duties** to his agent are:
 - to **pay the agent's commission** or remuneration in accordance with the terms of the contract.
 - to **indemnify or reimburse the agent** for any expenses, losses or liabilities properly incurred in the course of the agency.

B03d.6 Liabilities of principal and agent

- * A **principal** is generally liable for contracts arranged by his agent if within the agent's actual or apparent authority.
- * Where the agent had authority, the principal will always be bound by the agent's acts; this even includes acts involving **fraud** carried out by the agent within his actual authority. The principal will also be liable for **torts** such as misrepresentations, deceit, negligence, etc., committed by the agent within his apparent authority. In these cases, where the principal has had to compensate a third party he can claim an **indemnity** from the agent.

B03d.7 Termination of agency

- * An agency may be **terminated** -
 - when the transaction for which the agent was hired is completed or the period for which the agent was hired is ended.
 - where either party gives notice that they are terminating the agency or where they both agree to end the agency. Certain types of agency cannot be revoked, however, e.g. where the agent has begun to perform his duty and has incurred a liability, or where a statute provides that the agency is not revocable.
 - by operation of law, such as on the death or the insanity of the principal or the agent, or on the bankruptcy of the principal or of the agent if it renders him incapable of performing his duties.

B03e LAW OF TORTS

B03e.1 Torts

- * A "**tort**" is a wrongful act or omission by a person (other than a wrong that is purely a breach of contract), for which damages may be sued for in a civil court by the person wronged.
- * **Torts recognised by law** include negligence, liability of occupiers of premises, strict liability, trespass to property, false imprisonment, nuisance, defamation, and miscellaneous torts of conspiracy, deceit and injurious falsehood.
- * **Tortious liability** is quite separate from any liability under contract and generally arises from the breach of a duty under law (either common law or statute law). Where, for example, a ship causes damage to another person's property (e.g. collision damage¹⁸ or pollution damage), the liability is tortious and the owner of the property suffering the damage may commence an **action in tort** to recover **damages** (i.e. he may **sue in tort**).
- * **To succeed in an action for tort** it must usually be shown that the wrong was done intentionally or negligently, but there are some torts of **strict liability**.
- * **The person chiefly liable** is the one who committed the tort, but under the **doctrine of vicarious liability** (see B03e.5) a person may be liable for a tort committed by another person.
- * **The usual remedy** for a tort is an **action for damages**, but an **injunction** (or in Scotland, an **interdict**) can be obtained to prevent repetition of the injury, e.g. a libel by a newspaper.
- * Some torts are also **breaches of contract**. Negligent navigation causing injury to a passenger, for example, is both the tort of negligence and breach of the contract to carry the passenger safely to the port of disembarkation. The passenger may sue the carrier either **in tort**, or **in contract**, or **both**.
- * **Negligence** (see B03e.2) and **strict liability** (see B03e.6) are probably the torts of most concern to shipmasters. Collisions and damage to quays, etc. are torts. The negligent positioning of the gangway by the bosun of the *Himalaya* (for which the master was ultimately responsible) in *Adler v. Dixon* (1954) (*The Himalaya*) (see F07b.9a) was a tort. A master who wrongly uses his power of restraint may be liable in tort for **false imprisonment** (see E04h.4). Damage to cargo carried on board would not be a tort, but a pure breach of contract.
- * **Many acts are crimes as well as torts**, assault being an obvious example. Reckless navigation is a crime but may also give rise to an action in tort if it causes injury to another person. The crime would be prosecuted like any other

¹⁸ Several torts might apply to a collision between ships, the tort of negligence being by far the most important.

but it would be up to the injured person to seek compensation from the wrongdoer (i.e. the shipowner) by means of an action in tort.

- * The following table compares procedures in cases dealing with contract, tort and crime.

Contract	Tort	Crime
Rights and duties arise under the terms of a contract.	Rights and duties arise under the civil law (i.e. statute law and common law).	Rights and duties arise under the criminal law.
A duty is owed to the other party (or parties) to the contract.	A duty is owed towards persons generally.	Criminal conduct is prescribed by the criminal law. A duty is owed to the general public.
A civil action is brought by the party alleging breach of contract against the other party to the contract.	A civil action is brought by the person wronged against the alleged wrong-doer.	A prosecution is brought by the Crown Prosecution Service or Procurator-Fiscal against the alleged offender.
The case is cited as <i>Smith v. Jones</i> (1996).	The case is cited as <i>Smith v. Jones</i> (1996).	The case is cited as <i>R. v. Jones</i> (1996).
The successful party is awarded damages or other remedy sought, e.g. injunction or specific performance.	The successful party is awarded damages or other remedy sought, e.g. an injunction.	The guilty party is punished by imprisonment, fine or non-custodial sentence, e.g. community service.

B03e.2 Negligence

- * “**Negligence**” has been defined as “the omission to do something which a reasonable man....would do, or doing something which a prudent and reasonable man would not do”. It is committed whenever a person owing a legal duty of care to another person breaches his duty with the result that damage of some kind (e.g. physical or financial harm) is caused to the other person.
- * **Negligence** may also be described as “a failure to take reasonable care to avoid reasonably foreseeable risks of injury or damage to persons or property”. Liability does not, therefore, arise simply from the causation of damage, but is based on unreasonable behaviour. (Damage may be caused without liability in negligence or, indeed, without any legal liability to compensate at all.)
- * **To establish a claim for negligence** there must be:
 - a **plaintiff** who is entitled to claim;
 - a **defendant** who is responsible;
 - a **failure constituting negligence**; and
 - a **claimable damage** caused by that failure.
- * **To succeed in an action for negligence**, the plaintiff has to prove:
 - a **legal duty of care**;
 - a **breach** of this duty; and
 - the **damage suffered** in consequence of the breach.
- * In collision cases, **breach of the Collision Regulations** is likely to constitute good evidence of negligence.

B03e.3 Duty of care

- * There is no standard legal definition of a “**duty of care**”, and it has been held that “we may all be as careless (or negligent) as we wish, providing our carelessness does not cause harm, loss, injury or damage to another”. Whether a party in a particular case had a duty of care or not is a question of law that may have to be decided by a judge in a court action.
- * There are many situations where one person or party owes a duty of care to another, the most common arising on the **highways**. (All persons, whether drivers, riders or pedestrians, owe a duty of care to all other road users.) **Carriers** owe a duty of care to passengers and goods, **doctors** to their patients, **employers** to their employees, **teachers** to their students, etc. There are numerous situations where a duty of care arises, and thus **many forms of negligence**.
- * **A shipmaster owes a duty of care** -
 - to the **shipowner**, for the care of his ship;
 - to every **owner** of goods carried by the ship;
 - to the **crew members** and supernumeraries (for their health, safety and well-being);
 - to the **passengers**, for their safety;
 - to other **persons who have business on board** the ship, such as stevedores, surveyors, pilots, agents and suppliers; and
 - to the **environment** (for its protection from pollution).

B03e.4 Employers' liability

- * A UK employer owes a duty of care to his employees in that he must provide -
 - a reasonably **safe place of work**;
 - a reasonably **safe system of work**;
 - reasonably **safe machinery**; and
 - **competent fellow employees**.
- * Liability can be in **tort** for negligence, and for **breach of statutory duty** under various statutes providing for health and safety at work, e.g. the MS (Health and Safety at Work) Regulations 1997.
- * Under the **Employers' Liability (Compulsory Insurance) Act, 1969**, an employer (including a shipowner or manager) must obtain cover against liability for **bodily injury** or **disease** sustained by his employees in the course of, or arising from, their employment; this applies even where the injury is caused by defective equipment supplied by a third party¹⁹. A copy of the **insurance certificate** must be displayed at all premises where workers are employed. The employer is liable for **defective equipment** with which an employee is compelled to work in the course of his employment. Consequently a shipowner will be automatically liable to a crew member if he is injured by a defect in the ship, whether or not the shipowner has himself been negligent. For notes on the **Employers' Liability (Compulsory Insurance) Act, 1969** see C03c.4.
- * In most countries a shipowner is only liable for injuries to a **stevedore** if the shipowner or his employees have been negligent.

B03e.5 Vicarious liability

- * "**Vicarious liability**" is legal liability imposed on one person for torts or crimes committed by another, the aim of the doctrine being to ensure that employers pay the costs of damage caused by their business operations.
- * Vicarious liability is dealt with under two headings:
 - the **liability of a master for the torts of his servant** ("master" in this sense meaning "employer"; and
 - the **liability of a principal for the torts of an independent contractor**.
- * A **master-and-servant relationship** exists when one person employs another to do work for him on the basis that the servant is under the control of his employer as to the manner in which the work is to be done. Anyone employed under a "contract of service" (such as shipmasters and seamen) is a "servant", while their employers are "masters".
- * **The general rule for masters and servants** is that a master is vicariously liable for the torts of his servants committed during the course of their employment, whether the master authorised them or not. The liability applies in respect of:
 - a wrongful act or omission expressly or impliedly authorised by the master;
 - a wrongful act or omission which is an unauthorised manner of doing something authorised by the master;
 - a wrongful and unauthorised act or omission which is ratified by the master.
- * An **independent contractor** is under the control of his employer **as to what he must do**, but the employer cannot control the contractor's **method of work**. Independent contractors, e.g. stevedores, pilots, tug-owners, etc. work under a "contract for services", the principal in these examples usually being the shipowner or a charterer. The general rule here is that the principal is not liable for the torts of an independent contractor or of a servant employed by an independent contractor. (There are, however, some exceptions to this rule.)

B03e.6 Strict liability

- * "**Strict liability**" is, in criminal law, liability for a crime which is imposed **whether the defendant was at fault or not**, i.e. without the need to prove *mens rea*, or "guilty mind". ("*Mens rea*" is the state of mind which, to secure a conviction, the prosecution in a criminal case must usually prove the defendant to have had when committing the crime. *Mens rea* varies from crime to crime, and is either established by precedent or defined in the statute creating the crime.)
- * **An example of a crime of strict liability** is a breach of section 139 of the Merchant Shipping Act 1995, which provides that if a person given a Government direction under section 137 (following a shipping casualty threatening to cause harm to the environment, etc.) contravenes, or fails to comply with the direction, he shall be guilty of an offence. There are **no exceptions**, i.e. there is strict liability. Merchant shipping legislation creates numerous other offences of strict liability (sometimes called absolute liability) for such breaches of statutory duty.

¹⁹ Most UK shipowners obtain cover against their liability for **crew claims** from their **P&I club** (see G02a.3).

- * The rule of strict liability applies in certain civil cases also, where the defendant is liable for a tort or wrong regardless of whether there was any wrongful intent or negligence.
- * **An example of a tort of strict liability** is oil pollution damage caused by a ship. **M.1577** explains that the victims of oil pollution damage do not have to prove fault on the part of the shipowner to obtain compensation; the **shipowner will be strictly liable** for any damage caused by oil pollution.

B03e.7 Breach of statutory duty

- * An injured party may sue in tort for a breach of a duty imposed by legislation, i.e. a **statutory duty**. Most claims in this area concern industrial injuries arising under health and safety legislation. The employer may therefore be fined or imprisoned, as well as liable for damages.
- * Whether the injured party will succeed in his action or not may depend whether the governing legislation imposed any **strict liability**; if so, **no proof of negligence or wrongful intent** will be required.
- * Where a statute does not impose a strict liability, **negligence** will usually have to be proved by the plaintiff. He will have to prove:
 - that a statute was broken and the breach was a direct cause of the injury or damage;
 - that the plaintiff was a person from a class that the statute is intended to protect; and
 - that the injury complained of is one that the statute is intended to prevent.

B03f LAW OF CARRIAGE BY SEA

Certain aspects of general English law that are components of the law of carriage by sea (such as the laws of contract, agency, torts and liens), are covered elsewhere in Section B. Notes on aspects of English law that are particular to carriage of goods by sea, such as charter parties and bills of lading, can be found in Section F: The Ship's Employment.

B03g LIENS

B03g.1 Nature of and types of lien

- * A **"lien"** is the right to retain possession of property, either as security for the performance of an obligation or to secure satisfaction of a claim.
- * The lien may be **general**, when the property is held as security against all outstanding debts of the owner, or **particular**, when only the claims of the possessor in respect of the property held must be satisfied. Thus an unpaid seller may, in some contracts, be entitled to retain the goods until he receives the price, while a carrier may have a lien over goods he is transporting, and a repairer over goods he is repairing.
- * **Whether a lien arises or not** depends on the **contract** and the usual practice of the trade.
- * **A lien may be waived** by the holder.
- * **A lien can be lost**, e.g. when goods on which a carrier has a possessory lien are delivered to another party through a mistake of a shore terminal in whose custody the goods have been left after the ship sails.
- * If a purchaser of property is given notice of a lien, it binds him; otherwise he is not bound.
- * **Two classes of lien concern shipmasters:**
 - **possessory liens** (see B03g.2) and
 - **maritime liens** (see B03g.3).

B03g.2 Possessory lien

- * In common law **a carrier by sea has a possessory lien on goods in his possession** in three cases:
 - to recover **unpaid freight** (but not deadfreight, demurrage or damages for detention, for which a lien for recover must be specifically contracted for);
 - to recover **expenses incurred in protecting cargo** (since the master may have acted as an agent of necessity for the benefit of the cargo owner); and

- to recover a **General Average contribution due from cargo** (although in practice cargo is normally released once a General Average bond or guarantee has been signed, or security has been provided).
- * Possession of the goods may be **actual** (i.e. where the goods are on board the carrier's vessel) or **constructive** (i.e. where they are not on his ship but still under his control, e.g. in a warehouse, tank, container compound etc. awaiting delivery).
- * The common law right to exercise a possessory lien (i.e. a "**common law lien**") exists independently of contract. It is an **implied lien** and does not need to be expressly stated in the contract terms.
- * A **contractual lien** is one incorporated by a term into a contract. By means of a contractual lien a carrier by sea may and often does - extend his common law lien for freight to include unpaid **deadfreight, demurrage** and (sometimes) **damages for detention**.
- * A **Lien Clause**²⁰ is usually included in the terms of a **bill of lading** and a **charter party** (see F05e.2).

B03g.3 Maritime lien

- is a **claim against a ship**, her **cargo**, or **both**, as well as against the **freight** she will earn, in respect of a **service done to or injury caused by** any of them.
- is enforceable in the Admiralty Court (see B03b.7) by **proceedings in rem**, i.e. against the **property** involved (which is termed the *res*), and not against any person or persons who might own or manage or have possession of the property.
- can be enforced by **arrest** and **judicial sale**²¹ of the property (unless security is given).
- **travels with the ship or cargo** whenever possession of it changes, and is good against a bona fide purchaser without notice.
- **is not dependent on possession**.
- * **Examples** of maritime liens are:
 - the lien on a ship at fault in a **collision** in which property has been damaged;
 - the lien of a **salvor** on a ship and/or her cargo;
 - the lien of **seamen** on a ship for their wages;
 - the lien of a **master** on a ship for his wages and disbursements (i.e. his outgoings on behalf of the owners);
 - the lien of a **ship repairer** in respect of work done on a ship.

B03g.4 Seamen's lien for wages, etc.

- * Section 39(1) of the Merchant Shipping Act 1995 provides that a seaman's lien, his remedies for the recovery of his wages, his right to wages in case of the wreck or loss of his ship, and any right he may have or obtain in the nature of salvage will not be capable of being renounced by any agreement. This does not affect such of the terms of any agreement made with the seamen of a ship which is to be employed on salvage service as provide for remuneration to be paid to them for salvage services rendered by the ship (section 39(2)).

B03g.5 Master's lien for remuneration, disbursements and liabilities

- * The **master** of a ship will have the same lien for his **remuneration**, and all **disbursements** or **liabilities** properly made or incurred by him on account of the ship, as a seaman has for his wages (section 41, Merchant Shipping Act 1995).

B03g.6 Ranking of liens

- * There may be several claims against a ship, each giving rise to a maritime lien or possessory lien. E.g., a ship may have been in **collision** with a second vessel, and **salvage services** may have been rendered by a third vessel. The owners of the salvaged vessel may become insolvent while the vessel is at a **repair yard** in the port of refuge and may fail to pay the **master's wages and disbursements**, the **crew's wages**, the **ship repairer's bill** and **other bills** incurred from **suppliers, port authority, agent**, etc. Meanwhile, there may be undischarged **mortgages** on the ship.

²⁰ **Lien clauses** can also be found in the standard terms of car hire agreements, road carriers' delivery notes, etc.

²¹ Notices relating to "**judicial sales**" of ships, as a result of claimants exercising their liens, are sometimes carried in the back pages of *Lloyd's List*. Forthcoming sales are advertised, while some notices advertise for claimants to come forward in order to establish the priority of claims.

All these claimants may exercise **individual liens**, as outlined above, but the total of their claims may well exceed the value of the ship. In these circumstances, the vessel would probably be **arrested and sold** by order of the court.

- * Obviously there will have to be some **priority** set for the discharging of the various liens when the sale proceeds are distributed to the claimants. There is **no statutory ranking** for maritime claims, and the priority is mainly at the discretion of the court.
- * Normally, in the UK, the expenses of the **Admiralty Marshal** are paid first. **Maritime liens** will come next, before **mortgages** and **any statutory rights in rem** (i.e. against the ship or cargo, etc.) and **common law possessory liens**.
- * A **salvage claim** will normally rank higher than other maritime liens, since the salvor has preserved the property and thereby the **fund** from which other claimants are claiming.
- * **Wages liens** normally follow the salvor's lien, followed by **master's disbursements**.
- * Among **several contractual liens**, and especially where there are several contractual liens for salvage services, the **later lien ranks first**, since it is the later act that has preserved the property for earlier claimants.
- * Maritime liens arising for **damage arising from tort**, e.g. negligent navigation, normally rank equal to each other unless it can be proved that they arose at different times (e.g. where a ship has had a succession of collisions).
- * Maritime liens arising from **tort** (e.g. negligent navigation) normally have priority over liens arising from **contracts agreed before the tort**, since contracts are entered into voluntarily. However, a **salvor's lien** attaching to a ship after a collision normally ranks higher than any damage liens resulting from the collision, for reasons explained above.
- * The **ship repairer's lien**, which is a **common law possessory lien** and not a maritime lien, ranks lower than maritime liens attaching before the ship arrived at the repair yard. The repairer's lien will, however, rank before any later maritime liens arising while the ship is in his yard. His **lien will be lost** if the ship is allowed to leave the yard, but he will continue to have his statutory right *in rem*.

B03h ARREST OF SHIPS

B03h.1 Nature of arrest

- * “**Arrest**”, in relation to a ship, means “the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment” (Article 1(2), Arrest Convention 1952).
- The main **reason** for arresting a ship (or any other maritime property, such as cargo) is to obtain satisfaction of the judgement in an admiralty action *in rem*, i.e. against the property (see B03g.3).

B03h.2 Arrest Convention

- * **The International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships 1952** (the “**1952 Arrest Convention**”) was intended to smooth out the differences between the approaches to ship arrest in countries which have common law legal systems (such as the UK) and countries which have civil law legal systems (such as France)²². The Convention contains Articles (amongst others) dealing with definitions, powers of arrest, exercise of right of arrest, release from arrest, right of re-arrest and multiple arrest and protection of owners and demise charterers of arrested ships.
- * Article 2 of the 1952 Convention provides that a ship flying the flag of one of the contracting States to the Convention may be arrested in the jurisdiction of any of the contracting States in respect of any “maritime claim”, but in respect of no other claim. “Maritime claim” is defined in Article 1 as a claim arising out of one or more of the following: damage caused by any ship either in collision or otherwise; loss of life or personal injury caused by any ship or occurring in connection with the operation of any ship; salvage; agreement relating to the use or hire of any ship whether by charterparty or otherwise; agreement relating to the carriage of goods in any ship whether by charterparty or otherwise; loss of or damage to goods including baggage carried in any ship; general average; bottomry; towage; pilotage; goods or materials wherever supplied to a ship for her operation or maintenance; construction, repair or equipment of any ship or dock charges and dues; wages of masters, officers or crew; master's disbursements, including disbursements made by shippers, charterers or agents on behalf of a ship or her owner; disputes as to the title to or ownership of any ship; disputes between co-owners of any ship as to the ownership, possession, employment or earnings of that ship; the mortgage or hypothecation of that any ship.

²² While English admiralty law, for example, permits the arrest of a vessel only for a limited number of maritime claims, in civil law countries there is a *saisie conservatoire*, a discretionary right to detain all kinds of asset of the defendant until the final judgement is passed by the court.

- * Article 3 permits “sister ship arrest” except where the dispute concerns ownership, possession, employment, earnings or mortgaging of a ship.
- * Article 4 provides that a ship may only be arrested under the authority of a court or of the appropriate judicial authority of the Contracting State in which the arrest is made.
- * A new, improved, **1999 Arrest Convention** has not yet entered into force. It permits several new maritime claims including claims for:
 - special compensation under Article 14 of the 1989 Salvage Convention;
 - environmental and similar claims;
 - wreck removal;
 - insurance premiums and P&I club calls;
 - commissions and brokerage, including agency fees;
 - sale contract disputes.

B03h.3 Ship arrest procedure in the UK

- * **Arrest procedure** varies from nation to nation²³, but in many States, particularly those in which the law is based on English law, it is fairly similar to English procedure.
- * The **injured party** (the **plaintiff**, e.g. the owner of a vessel collided with), if his claim is not satisfied, may issue against the ship a **writ of summons** in the Admiralty Court in London (see B03b.7) or, for relatively modest claims, in a county court.
- * If the **defendant shipowner** fails to either satisfy the claim or to lodge an Acknowledgment of Service with the Court, the plaintiff can proceed with his court action to apply for a **warrant of arrest**. He must file an **affidavit** containing his grounds for arrest.
- * Judgement may be given without further notice to the defendant shipowner and the court may issue the **warrant for arrest**.
- * In actions for wages or possession of the ship where the ship is foreign, the **consul** representing the flag State is informed.
- * The **Admiralty Marshal** instructs a Customs officer to **arrest the ship**. (In London the arrest is made by the Marshal’s Officer in person.)
- * The mere threat of arrest will often be sufficient to prompt owners into volunteering security to satisfy a claim. This will usually be a bank or insurance company **guarantee**, or a P&I club **letter of undertaking**, paid directly to the claimant, not to the court. In the absence of a guarantee or undertaking, the claimant can request a **bail bond** to be made, which would empower the court to “call it in”. The amount of security must be reasonable.
- * Unless security is provided and service of the writ accepted by the defendant’s solicitors, so that the ship is released before receipt of the documents by Customs, the **Customs officer arrests the ship** by attaching a **Note of Action** to it, and carries out the Admiralty Marshal’s instructions for keeping the ship safely under arrest. The **Writ**, along with a **warning notice** to potential removers of the property, is not “nailed to the mast” today but is generally posted on some conspicuous part of the ship such as the wheelhouse windows. The **Warrant** from the Court simultaneously prevents the vessel from sailing or being interfered with without written notice from the Admiralty Marshal on pain of proceedings for contempt of court.
- * If the ship has not arrived, Customs will be instructed to arrest on arrival.
- * Once the ship is under arrest she is in the **custody or possession of the Admiralty Marshal** on behalf of the court. The warrant of arrest on the ship covers everything belonging to it as part of its equipment, but excluding items which do not belong to the defendant shipowner such as the crew’s property or passengers’ luggage. Any **cargo** on board will not be under arrest, and arrangements can usually be made with the Admiralty Marshal to continue any discharge operations (unless the claim was for salvage and the cargo is also to be arrested). If the ship was loading, the Marshal will probably warn the agent not to continue loading if the writ has been issued by mortgagees, in view of the likelihood of the ship being sold on order of the court.

B03h.4 Release from arrest

- * A ship under arrest can not be released unless the **plaintiff** agrees (which will normally be on the provision of adequate **security** for his claim) or the court orders the release. Release is normally granted on provision of a bank or insurance company **guarantee** or a P&I club’s **letter of undertaking**. The plaintiff may, however, insist on bail or payment into the court. A guarantee will prevent re-arrest in respect of the same claim.

²³ P&I club bulletins occasionally carry articles on arrest procedure in a particular country.

B03i ARBITRATION AND MEDIATION

B03i.1 Arbitration

- may be defined as the **resolution of a dispute between contracting parties by one or more arbitrators appointed by the parties**.
- is often resorted to by contracting parties in shipping matters (e.g. a shipowner and charterer, a shipper and carrier, or a salvor and owner of salvaged property) **in preference to litigating** in the courts.
- usually has the following **benefits over litigation**:
 - parties' choice of arbitrator(s);
 - arbitrators are usually experts in the field, e.g. where a professional shipbroker arbitrates a charter party dispute, or a professional marine engineer arbitrates a fuel quality dispute;
 - confidentiality of hearing - only the parties, their witnesses and legal advisers are entitled to be present;
 - faster settlement;
 - lower costs;
 - less formality;
 - anonymity of parties and arbitrators (in a London arbitration);
 - enforceability of arbitrators' decisions abroad (whereas court judgements are not likely to be enforceable in foreign courts).
- has the following **disadvantages** in relation to litigation:
 - difficult points of law may need to be referred to a court;
 - right of appeal may be restricted (depending on wording of the Arbitration Clause in the contract between the disputing parties).
- * The leading maritime arbitration centres are **London** and **New York**.
- * New York arbitrations are generally **published**, while it is up to the parties in London arbitrations to decide whether the arbitration decision should be published.²⁴
- * London maritime arbitrations are usually conducted by members of the London Maritime Arbitrators Association (LMAA) and are on the LMAA Terms. They are subject to the provisions of the **Arbitration Act 1996**.
- * **Appeals** from London arbitrations may usually be made to a court (in most cases the Commercial Court).
- * **LMAA website**: www.lmaa.org.uk

B03i.1a Arbitration clauses in shipping contracts

- * An **Arbitration Clause** is included in most standard charter party forms and usually provides that the parties agree, in the event of a dispute under the contract, to refer the matter to arbitration at a named place, and that a specified number of arbitrators will be appointed. The clause may provide that the arbitration shall be conducted in accordance with the terms of a recognised dispute resolution service, such as the terms of the London Maritime Arbitrators Association (LMAA).
- * BIMCO publishes a widely-used **Standard Law and Arbitration Clause**.

B03i.2 Mediation

- * **Mediation** is a voluntary, confidential, "without prejudice" process that uses a neutral third party to help the parties in dispute come to a mutually agreed solution without having to go to court. It differs from arbitration and the courts in that a binding decision is not imposed on the parties by an arbitrator or judge. The process allows disputing parties to work out their solution assisted by the mediator.
- * Mediation is, to the shipping industry, a relatively new "alternative dispute resolution" ("ADR") technique, but has gained widespread approval in other business sectors. To increase the shipping industry's awareness and use of mediation techniques in resolving disputes, BIMCO has developed a **Standard Dispute Resolution Clause** by incorporating a **Mediation Clause** into its widely used Standard Law and Arbitration Clause. Under the Mediation Clause either party may at any time, and from time to time, elect to refer the whole dispute or part of the dispute to mediation by serving on the other party a written notice calling on the other party to agree to mediation. If the other

²⁴ Summaries of London awards are published in Lloyd's Maritime Law Newsletter. Shipping journals such as *Fairplay International Shipping Weekly* and BIMCO Bulletin often feature reports of New York arbitrations, and occasionally of London arbitrations.

party does not agree to mediate, that fact may be brought to the attention of the arbitration tribunal and may be taken into account when the costs of the arbitration are allocated between the parties.

- * **Clause 53 of the International Hull Clauses (01/11/02) (Dispute resolution)** provides that if disputes between the Assured and the Underwriters are not settled amicably by negotiation, they may be referred to **mediation** or some other form of alternative dispute resolution.