2
The Governance of the International Shipping Traffic by Maritime Law

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2.1. Introduction

Applied to human activities at sea, governance, in the sense of "getting governance right", is meant to regulate the human and social behavior in their relationship – whether positive or negative – with the oceans. In this sense, the international shipping traffic, which involves a very large number of operators and enormous amounts of money, is undoubtedly the most symbolic activity of human ocean exploitation.

Ninety percent of worldwide commerce is travel by ship, which justifies the institution of rules, both mandatory and optional, in order to ensure the sustainability of this shipping traffic from a social, economic and environmental point of view.

Such is the subject of maritime law: "getting governance right" of the ocean industry in accordance with maritime security.

Equally, the meaning of maritime law (section 2.1.1) is determined by the necessity to take into account both the vulnerability of human communities to the dangerous nature of marine environment and the ocean vulnerability to antropogenic pressures (section 2.1.2). To assert and organize this search for balance, maritime law relies on a corpus of novel rules developed mainly at the international level (section 2.1.3).

2.1.1. *Meaning and definition of maritime law*

Because of the wide variety of legal issues having to do with marine matters, defining maritime law is not an easy task. "There are three sorts of Men", wrote Plato, "The Dead, the Living, and Those that go to Sea". For the latter, specific legal rules that have no purpose on land but are necessary at sea in order to regulate human presence there. In order to protect man from the dangers of the sea as much as the sea from the human pressures, maritime law is an original system governed by its own rules, methods and institutions. Marine law designates all legal situations (of private law) exposed to the hazards of maritime navigation, thus it is designed to answer questions whose uniqueness stems from the adversity of the marine environment.

As attested to by the recognition of ecological harm in terms of reparable damages (the "Erika" affair), maritime law has always been confirmed as precursory law. The solutions of maritime law have often been reproduced in terrestrial law. Notably, maritime transport law has given rise to legal concepts that are now reliable, such as the making paperless of transport documents, or the emergence of environmental law resulting from the black tides caused by shipwrecks. In the same vein, some noteworthy institutions of marine law that have long been

ignored by common law are progressively emerging into prominence such as the limitation of responsibility, which is widespread in maritime law and now becoming known in terrestrial law. This is an example of "the sea as the mother of the law" [SCH 81]. Moreover, "in unforeseen and unsurmountable circumstances, in which general law yields and capitulates, it is the very function of maritime law to anticipate the worst" [REM 98].

2.1.2. *Fundamental principles of maritime law*

The most ancient fundamental principle of maritime law has to do with the "risk of the sea", the natural or anthropogenic risk around which the discipline was founded; "the perils of the sea pervade and shape the entire discipline of maritime law" [VIA 97]. Whether we call it danger or peril of the sea, marine hazard or fortunes of the sea, risk at sea is a reality at all times, and the evolution of maritime law has been based on the necessity of anticipating these risks and on limiting their consequences. The objective of maritime security is aimed, in this sense, at ensuring the security of the people exposing themselves to these risks, of the vessels facing them, of the environment threatened by them and, finally, the trade surrounded by them.

In general law, legal vocabulary tells us that risk is "a prejudicial event of which the occurrence is uncertain, both in terms of its happening and of the date of its happening" [COR 11]. Applied to maritime law, the concept of "risk of the sea" has motivated the emergence of a specific responsibility based in part on fault (unlike the trends in general law) and in part on the sharing and restriction of reparations in the event of damages consecutive to its occurrence. Based on the feeling of mutual dependence that has always existed among adventurers on the seas, these special rules have made maritime law into a "solidarist" discipline [VIA 97]. It is now a means of protecting both the physical selves and the heritage of those who expose themselves to risk, while also defending maritime security via better governance of conduct. This "maritime responsibility" is presented as a privilege granted to actors on an expedition; however, depending on the nature of the event, this advantage will be maintained only with regard to risks posed by the sea, and will collapse if the damages sustained are caused by human fault.

2.1.3. *General sources of maritime law*

The history of maritime law has been a rich one since the beginnings of its history. Its noteworthy sources include the Rolls of Oléron adopted by Eleanor of Aquitaine in around 1150, which inspired numerous texts. Later, the Consulate of the Sea, drafted in the 13th or 14th Century, dealt with the construction of seagoing vessels, the transport of merchandise and incidents at sea. In the 17th Century, the 704-article-long Great Marine Ordinance of August 1681, also called the Colbert Ordinance, had a decisive influence on the development of modern maritime law and even survived the French Revolution intact to such an extent that in 1807, volume II of the code of commerce reused the basic principles of maritime law developed during the reign of Louis XIV. Though it has now become obsolete, the Colbert Ordinance was only revoked by ordinance 2006-46 of April 22, 2006 relative to the legislative part of the general code of public sector property. Book II of the code of commerce would be modified often to take into account the evolution of maritime law and emancipation

from international rules. Between 1966 and 1969, the Rodière laws[1] sanctioned the freeing of maritime law from the code of commerce. In late 2010, the coming into force of the legislative part of the transport code rationalized and standardized maritime law. Linked by a double relationship of authority and symbiosis, both international and domestic regulations serve as modern sources of maritime law.

2.1.3.1. *International sources of maritime law*

2.1.3.1.1. International conventions

International institutions play a pre-eminent role in the production of maritime law and participate actively in the internationalization of the discipline. Numerous international conventions contribute to maritime law but, while some of them constitute pillars of the legal discipline (such as the Safety of Life at Sea (SOLAS), MARPOL and STCW conventions), others are more modest in terms of their objectives or the legal system for which they supply structure. In any case, it would be unreasonable to attempt an exhaustive list of these conventions here, and we will emphasize only those concerning maritime transport activities in the following sub-chapters.

2.1.3.1.2. European Union (EU) law

First instituted as a safeguard, normative action by the EU in maritime affairs has been very widely developed and is now a driving force in a true integrated European maritime policy. European control is becoming increasingly directive in ever-widening circles, requiring Member States to apply EU regulations and to transpose these directives onto domestic law. Formerly concentrated mainly on the regulation of fishing and competition, and more precisely on the application to maritime transport of exemptions on the principle of freedom to provide services, free competition and free market access through liner conferences, the EU's actions today have grown increasingly focused on maritime security, to the extent that the Union now has its own maritime security and navigation policy as part of its transport policy. This is attested to by the adoption of numerous texts among the multiple regulatory instruments used.

Following the Erika disaster in December 1999, the European Commission grouped a number of measures designed to improve maritime security into three "packages", called "Erika I, II and III". Several directives were adopted in application of these legislative packages, among them the directive of June 27, 2002 on the monitoring system for the shipping traffic, the directive of April 23, 2009 concerning the port state control and mandatory insurance for shipowners for maritime claims, and the directive of October 21, 2009 relative to pollution caused by vessels and to the introduction of penalties for infringements of international law.

2.1.3.2. *Domestic sources of maritime law*

Despite the international quality inherent in maritime law, the teachings of comparative law have always shown the pluralism of maritime legal cultures. In particular, despite having experienced its golden age in the second half of the 19th Century, the contribution of English Common Law to maritime law remains significant today. Long divided up within several codes

and other scattered laws, French maritime law was the object in 2010 of a double operation to rationalize and standardize it within the transport code, which is certainly not a true maritime code. Consequently, ordinance no. 2010-1307 of October 28, 2010[2], used in application of article 92 of law no. 2009-526 of May 12, 2009, relative to the simplification and clarification of the law and the streamlining of procedures, resulted in the creation of the legislative part of the transport code, which became effective on December 1, 2010. More recently, ordinance no. 2011-635 of June 9, 2011[3] rendered French law compliant with the maritime security objectives of the EU, by adapting the legislative part of the code to the directives stated in the package Erika III. These provisions are particularly concerned with the strengthening of port state controls, the standardization of investigation procedures after accidents, increased monitoring of marine classification companies and the prevention of maritime disasters.

The transport code includes more than 2,200 articles and is composed of six parts[4], the fifth and longest part is devoted to "Maritime transport and navigation[5]". This part is made up of seven books: Book 1: Vessels; Book II: Maritime navigation; Book III: Maritime ports; Book IV: Maritime transport; Book V: seafarers; Book VI: French international registry; Book VII: Provisions relative to overseas territories.

Though part five incorporates a number of scattered maritime laws, notably the Lois Rodière of 1966, 1967 and 1969, it does not cover all maritime issues, some of which are still addressed by other codes. For example, maritime mortgages and the nationality of vessels are regulated by the customs code except in specific cases. Marital status and wills on board vessels remain under the civil code. Maritime insurance still falls principally within the remit of the insurance code, and to a lesser extent of the environmental code. The suppression of acts of maritime piracy, recently updated, is contained in the criminal code, the code of criminal procedure, and the defence code. Some questions relative to the local organization of maritime transport and to nautical leisure activities are addressed by the general code of territorial governments and the sports code. Since 2007, laws relative to both professional and recreational sea fishing have been part of the rural code. Provisions having to do with the marine environment, protection of the coastline and responsibility for pollution by hydrocarbons are contained mainly in the environmental code. Finally, submarine archaeological wrecks are part of the heritage code. As it now stands, the transport code, though incomplete, constitutes a significant advance in maritime law through the standardization and defragmentation of maritime laws it enacts.

In substance, part five, which is principally standardized to established law, does contain some new facets of varying scope and range. In particular, article L.5000-2 of the transport code contributes to French law, which did not previously include it, a legal definition of a vessel: "1. Any floating craft built and equipped for maritime navigation for the purposes of trade, fishing or recreational activities, and appointed for these purposes; 2. Floating vehicles built and equipped for maritime navigation, appointed for public service of an administrative or industrial and commercial nature". This generic definition, which does not answer questions concerning the qualification of certain floating crafts, is a cross-sectoral definition that contrasts with the circumstantial definitions belonging to international conventions which

define vessels precisely according to their object and the conditions of navigation proposed for each.

Upstream, the governance of maritime shipping traffic, a major part of maritime law, relies on a number of legal instruments contained in the institutions and sources that determine it (section 2.2).

Downstream, using these instruments for the regulation of conducts, maritime practices have put in motion a large number of contracts participating, at their own levels, in the governance of maritime transport by law (section 2.3).

2.2. Legal instruments of governance: institutions and sources of maritime transport law

The development of maritime transport law is part of the governance of the seas, as maritime transport is a vital economic activity in the international merchandise trade. The necessity of connecting continents and the power of merchant vessels has made maritime transport pre-eminent in this trade. Compared to planes, which can fulfill the same purpose, it has been observed that for the transport of half a million tons of oil to Europe from the Persian Gulf, a seagoing vessel would require 2 months while it would take the largest airplane available 2 years. Maritime transport, then, is relatively rapid [VIG 87]. The major event in this activity in the past 20 years has been the rapid growth in the transport of various types of merchandise by container ships. In 2012, traffic in container shipping worldwide increased by 5.9%, reaching 572.8 million 20 foot equivalent units (TEU)[6], and maritime traffic overall reached 8.7 billion tons[7].

The preponderance of maritime transport in the international merchandise trade explains the fact that maritime law is instituted in large part on an international scale, and that economic organizations for regional integration, such as the EU, have made it one of the areas in which they are competent to act. The main legal instruments of governance are these international institutions created to develop rules common to the states that wish it (see section 2.2.1). However, from the European point of view, belonging to the Union, which adopts its own regulations, also generates a framework for this activity (see section 2.2.2).

2.2.1. *Development of international regulations*

There are several international organizations within which the maritime transport regulations that make up international law are conceived and debated and then adopted, where applicable.

2.2.1.1. *Origins of international rules*

International organizations have their origins in a multilateral treaty that may be referred to as a convention, pact, set of statutes or constitution. This constitutive act establishes the legal character of the organization and its capacity to act in a certain domain with certain means and according to a certain mode of operation.

Organizations whose remit involves acting in matters of maritime transport include the International Maritime Organization[8] (IMO) and the International Labor Organization[9] (ILO). There are also organizations which, because they contribute more broadly to the governance of global trade, may influence maritime commerce. This is true for the World Trade Organization (WTO)[10]. Other institutions, such as the United Nations Conference on Trade and Development[11] (UNCTAD) and the United Nations Commission on International Trade Law[12] (UNCTIL), develop material regulations that govern the relationships between maritime transport operators (mainly shipowners, carriers and shippers[13]).

2.2.1.1.1. International Maritime Organization

The convention creating this United Nations organization was adopted in Geneva on March 6, 1948. At the time, it was called the Intergovernmental Maritime Consultative Organization (IMCO), but subsequently changed its name to become the International Maritime Organization (IMO).

The IMO includes 170 member states, three of which have been associated members since June 2013. It is headquartered in London, England, with its governing body, the Assembly, meeting every 2 years. Between sessions of the Assembly, a Council composed of 40 governments elected by the Assembly acts as the governing body. In December 2013, during the 28th session of the Assembly, the 40 member states of the Council were elected for the 2014–2015 period, divided into three categories: A, B and C.

Category A is made up of the 10 countries with “the greatest interest in supplying international maritime navigation services”. These are China, Greece, Italy, Japan, Norway, Panama, the Republic of Korea, Russia, the United Kingdom and the United States. Category B is composed of countries “with the greatest interest in international maritime trade”. Finally, category C includes “countries with a particular interest in maritime transport or navigation and whose election to the Council will ensure that all the world’s major geographical regions will be represented”. In the most recent election, Egypt left the Council, which consequently no longer includes a representative for the countries of the Middle East.

Aside from these two principal bodies, the IMO carries out its work through several committees and subcommittees. These include the Maritime Safety Committee (MSC), which deals with all issues relative to the security of maritime transport, and the Marine Environment Protection Committee (MEPC), which coordinates actions in the field of prevention and control of environmental pollution caused by ships.

2.2.1.1.2. International Labor Organization

The origins of the act creating the ILO lie in the 1919 Treaty of Versailles, of which it formed Part XIII. It was subsequently separated to become the Constitution of this international organization, which now includes 185 member states. In 1944, a declaration of the fundamental goals and objectives of the ILO was adopted. This document, called the Philadelphia Declaration, sets out the founding principles on which the policies of member states are based, and was subsequently incorporated into the Constitution. The fundamental principles of the ILO

are as follows: (1) labor is not merchandise; (2) freedom of expression and association is a vital condition for sustained progress; (3) poverty, wherever it exists, poses a danger to the prosperity of all; and (4) the fight against want must be conducted with unremitting energy within each nation and via ongoing and concerted international effort, in which representatives of workers and employers cooperate on an equal footing with those of governments and participate in free discussion and decision-making of a democratic nature with a view to promoting the common good. The ILO is headquartered in Geneva, Switzerland.

The permanent organization includes three governing bodies; a general conference of representatives of member states; a board of directors and the International Labor Office, which is under the leadership of the board of directors (article 2 of the Constitution). This board of directors is composed of 56 individuals, 28 of whom are representatives of member governments, 14 of whom represent employers and 14 of whom represent workers. For this reason, the ILO is said to include tripartite representation.

2.2.1.1.3. World Trade Organization

The World Trade Organization differs from the organizations discussed before; it is intended as a space for multilateral negotiations on questions of trade. It was conceived as part of the GATT[14] during the international negotiations of the Uruguay Round, begun in Punta del Este in September 1986 and completed in Marrakesh in 1994 (the Uruguay Cycle).

The World Trade Organization does not possess decision-making bodies such as a Council and a Board of Directors, like the two organizations above do. It is overseen by the governments that are its members, of which there were 159 in 2014. Decisions are made by all members, either by Ministers within the ministerial conference, which meet every 2 years, or by the ambassadors and delegates who meet regularly in Geneva. Decisions are made by consensus within the organization, meaning there are no voting procedures. A majority vote is possible by agreement among members, but this does not occur in practice.

The accord establishing the WTO provides for a general Council that carries out three functions; that of a board of supervisors acting on behalf of the ministerial conference for all matters falling within the scope of competence of the WTO; that of a body for the settling of disputes which oversees the implementation of procedures to settle trade disputes between countries; and that of an examining body for the commercial policies of member states.

This general Council, which is made up in principle of the ambassadors of its member states and the heads of their delegations, includes three subcouncils, which oversee trade in services, trade in merchandise and the aspects of intellectual property law that touches on trade (Trade-related Aspects of intellectual Property Rights (TRIPs)). Only the first of these deals with maritime transport, which is a service activity. This specialized subcouncil is particularly concerned with the General Agreement on Trade in Services (GATSs). In addition to these bodies, various committees, work groups and experts contribute to the work of the WTO. Finally, a secretariat located in Geneva supplies technical support to the councils and other committees and to the ministerial conferences. It also supplies legal assistance in the settling of disputes and advises governments wishing to become members of the WTO.

2.2.1.1.4. United Nations Conference for Trade and Development

The United Nations Conference for Trade and Development (UNCTAD) is a subsidiary body of the United Nations created to handle claims made by developing countries in the early 1960s. The first conference was held in Geneva in 1964, and became an institution shortly thereafter. It is headquartered in Geneva and includes 194 member states. It is responsible for dealing with questions relative to trade and economic development within the United Nations system.

The "conference" is its governing body, held every 4 years. The Trade and Development Council meets between two conferences. The institution also includes three commissions: Trade and Development; Investment, Enterprise and Development; and Science and Technologies for Development. The secretariat provides operational and technical services to intergovernmental bodies and is overseen by a secretary-general.

UNCTAD has produced a summary and analysis of maritime transport activity worldwide every year since 1968. These economic and legal observations are contained in a publication entitled "Review of Maritime Transport", which contains a wealth of information on the evolution of international maritime traffic, its structure, the system of ownership and registration of the global fleet, the state of supply and demand in maritime transport worldwide, the shipping market, the status of ports, and legal questions; that is the evolution of legislation in maritime transport activity.

2.2.1.1.5. United Nations Commission on International Trade Law

The United Nations Commission on International Trade Law (UNCITRAL) was created in 1966 via a UN General Assembly resolution authorizing it to foster the harmonization and modernization of international trade law.

The members of UNCITRAL are chosen from among UN member states representing various legal traditions and levels of economic development. In 2002, the number of Commission members was raised to 60: 14 African nations, 14 Asian nations, 8 nations from Eastern Europe, 10 from Latin America and the Caribbean, and 14 nations from Western Europe and other regions. Members are elected for a term of 6 years, and the mandate for half of them expires every 3 years.

The work of UNCITRAL is carried out at three levels. The first level is that of the Commission itself, which holds a yearly plenary session alternating between Vienna and New York. The second level includes intergovernmental work groups which are responsible for developing the topics included in the Commission's work programme. The third level is that of the secretariat, located in Vienna, which provides operational assistance to the Commission and work groups.

The Commission is endowed with a "bureau" at the start of each of its sessions; this bureau is elected from among the 60 members for a term lasting until the start of the next annual session. It is composed of a president, three vice-presidents and a rapporteur, representing each of the five regions from which the members of the Commission originate.

During its first session in 1968, the Commission chose nine subjects as the basis of its work program; these include transport and, as we will see below, instruments able to be used for the benefit of international governance of maritime transport were created in this context.

Along with UNCTAD, the WTO, the ILO and the IMO contribute to the development of international regulations; these do not all have the same scope and they are not all of the same type, but all play a role in the formation of a system of international maritime transport law.

2.2.1.2. *International maritime transport law*

International maritime transport law participates, obviously, in the governance of the seas. Taken as a set of regulations that are international in origin and are not contained within the legislation of a single country, but rather in a text adopted by several of them, it is manifested through the work of various institutions that have developed regulations applicable to it. These rules form a framework for maritime transport activity, with their object being maritime transport markets. They may also be material regulations applicable to ships and their navigation, the work of marine operators, or contracts concluded for the conveyance of individuals or merchandise. As the second part of this study is entirely dedicated to maritime contracts, we will not address the regulations concerning these contracts here; this leaves us with the regulation of the markets in which ships carrying out transport activities operate, and regulations applicable to ships and their navigation, as well as labor that takes place on board.

2.2.1.2.1. Regulation of maritime transport markets

There are multiple maritime transport markets, due to the specialization of ships for the transport of various specific types of merchandise, there exist multiple maritime transport markets. These specialized ships (tankers, grain carriers, gas transport vessels and other freighters) carry out transport on demand (tramping). They are chartered by traders in raw materials. Freight costs, that is the costs of chartering[15] ships agreed upon in order to carry out the transport of merchandise, fluctuate mainly due to economic conditions and are subject to the law of supply and demand. In 1998, a memo from the Trade Services Council of the WTO made this revealing observation on the functioning of these markets: “for the most part, the transport of freight (crude and refined oil, iron ore, grain, coal, and bauxite), which represents 67.7% of the total traffic volume, is not subject to any restriction except in the case of one or two countries. It is organized like a cash market (there is also a forward market), and markets are allocated in a highly competitive manner, on the basis of the lowest freight costs” (S/C/W/62, November 16, 1998, p. 2).

Regulated markets are those of regular shipping services, which currently include a large number of container ships. Regulations have been established, notably in order to avoid negative effects on free competition, as in these markets, shipowners and other ship operators sometimes form groups to offer their transport services[16].

Aside from these market regulations, international maritime transport is affected by multilateral negotiations held under the aegis of the WTO. The cycle of negotiations having to do with services trade began in 2000. Subsequent to a ministerial declaration adopted at the Hong

Kong Conference in 2005, requests have been made by some members in the domain of maritime transport. These requests concern the elimination of reserved portions of cargo and restrictions relative to foreign participation in shareholding and the right to establish a commercial presence for the international transport of merchandise, and for services secondary to maritime transport, such as those related to the handling of merchandise.

In this context, a general accord on services trade based on three pillars was adopted. The first of these pillars is a framework agreement containing fundamental obligations applicable to all member states. The second concerns lists of commitments established by countries, which proclaim other specific national commitments requiring an ongoing process of liberalization. The third pillar is composed of a number of appendices which address situations proper to this or that sector of services. Maritime transport is not the subject of an appendix, which shows a certain difficulty for member states in accepting the liberalization of maritime transport; however, the sector is concerned by the appendix relative to financial services (banking and insurance services). A memorandum of agreement on commitments relative to financial services specifies that each member state will allow non-resident suppliers of financial services to provide, under the conditions granted to residents (national treatment), insurance services against risks related to maritime transport. In other words, and in the manner of the free provision of services, it is specified that the host state will allow foreign suppliers of insurance services for maritime transport to benefit from the same conditions of execution of their activity as its nationals.

2.2.1.2.2. Regulation of ships and maritime navigation

The International Maritime Organization establishes international regulations principally in matters of maritime security and the protection of the marine environment. These include a remarkable number of regulations pertaining to ships and maritime navigation. To cite just the principal conventions, we would note three major international conventions: SOLAS, MARPOL and STCW.

The first of these conventions, SOLAS, was established in 1974 in its current version, and has been extensively augmented and amended since then. It followed two previous conventions; the first, in 1914, was established by an international community grieving the 1912 sinking of the Titanic. Adopted shortly before the 1st World War, it remained in abeyance and a new SOLAS convention was adopted in 1948. This was followed by a third convention in 1960. Today, SOLAS stands as a monument in maritime law. It includes regulations pertaining to the safety of ships and navigation, as well as international regulations intended to prevent collisions at sea (COLREG, for Collision Regulation), as well as the International Safety Management (ISM) code and the International Ship and Port Facility Security (ISPS) code. The latter was debated and subsequently adopted following the attacks on New York of September 11, 2001. Protection against external threats to ships (safety), had become a major concern for the United States, and the ISPS code was adopted in response to these concerns.

The International Convention for the Prevention of Pollution from Ships, called MARPOL, is fully as important as the preceding convention, and has been the subject of numerous

developments, the principal objective of which is to protect the sea and marine environment from harm that may be caused by ships (see *infra*, Chapter 3, on marine pollution).

The last IMO convention that can be cited for its importance in matters of maritime security – though these three conventions do not constitute the whole of the IMO's regulatory work – concerns training standards for seafarers; the issuance of certifications; and watchkeeping of ship's crews; it is known as the STCW[17]. It includes a double set of regulations; one pertaining to the minimal requirement states must fulfill in order to be granted professional certifications for sailors, and deck watch, the other pertaining to watchkeeping on board ships (engineering watch etc.). This convention has to do partly with work on board ship (watcheeping) which is also the subject of regulations adopted by the ILO.

2.2.1.2.3. Regulation of labor on board ships

Since its creation, the ILO has adopted 396 legal instruments that can be grouped as follows: 189 conventions, five protocols and 202 recommendations[18]. Some of these instruments have to do with maritime labor, including the 2006 Maritime Labor Convention (MLC)[19], which incorporates the standards contained in previous MLCs as well as the fundamental principles set forth in other international labor conventions (see the convention's Preamble). Article X of the MLC concerns the 37 previous conventions adopted between 1920 and 1996.

The MLC, which went into effect in August of 2013, is part of a codification of international maritime law. Its structure is complex to such an extent that it includes an explicative note which is not part of the convention itself, but is intended to facilitate its reading. This structure is composed of articles and regulations that set forth its fundamental rights and principles as well as the basic obligations of states ratifying the convention, which can be modified only by a conference of member states (Article XIV of the convention). It also includes a code, which indicates how regulations must be applied. This code itself is composed of two parts: Part A, which includes the required standards, and Part B, which lists optional guiding principles. This code can be modified more simply than the rules and articles (article XV of the Convention), but these modifications cannot alter the general impact of the articles and rules.

The provisions of the regulations and the code are grouped into five categories, as follows:

– category 1: minimal conditions required for labor by seafarers aboard ships;

– category 2: conditions of employment;

– category 3: accommodation, free time, meals and table service;

– category 4: health protection, medical care, well-being and protection in matters of social security;

– category 5: compliance and application of provisions.

Each of these categories contains the rule, the mandatory standard (A) and the guiding principle (B). Thus, the first regulation in category 1, rule 1.1, is read with mandatory standard A1.1 and guiding principle B1.1 (minimum age for work on board a ship).

This complex construction is the result of the authors' desire to encourage compromise around the text so that it would be ratified by as many states as possible. The various prior conventions had seemed too rigid, and did not win a great deal of confidence on the part of nations, which did not rush to ratify them. The flexibility introduced by the new text, particularly with its non-mandatory guiding principles, as well as the ability to revise required standards more rapidly, compensates for the apparent complexity of the convention's structure.

As with all international conventions, its effectiveness is dependent on the states that must ratify it and comply with its terms. This convention became effective on August 20, 2013, after at least 30 member states of the ILO, representing a total of 33% of the world fleet had ratified it (this was a condition of its becoming effective). Of the 30 states that necessarily ratified the treaty, 15 are members of the EU[20], a proportion that shows the influence the EU can have on governance in the field of maritime transport. Furthermore, shortly after the convention became effective, two directives of the European Council and Parliament were adopted[21] in favor of the incorporation of this new convention into the EU's rules of law.

2.2.2. *European maritime transport regulations*[22]

The EU is a singular international organization[23]. It belongs to the category of regional economic integration organizations, of which it is a unique example, having been particularly and highly perfected in comparison to its counterparts[24]. However, according to the so-called Principle of conferral, and like any international organization, it has no competence other than what is attributed to it by its member states. These competences are evolving not only in material terms, but also with regard to their implementation, under the effects of successive modifications of the EU's constitutive treaties. These determine the EU's field of action, and the details of how it may act. This justifies a prior examination of the Union's competences in matters of maritime transport before we present its actions in the matter.

2.2.2.1. *Statement of UE*[25] *competence in the area of maritime transport*

If we consider the subject from the law determined by the Treaty of Lisbon, the extent of the Union's competences must be measured only in comparison to those of its member states. The Treaty on the Functioning of the European Union (TFEU) sets general rules on this point in article 3 to 5 (the distribution of competences between the EU and its member states). Thus, there are:

– exclusive competences, meaning that the EU is the only body with the power to codify and adopt binding acts in these areas. The role of the member states is thus limited to the application of these acts, unless the Union authorizes them to adopt certain acts themselves (art. 3, TFEU);

– shared competences, when the EU and its member states are authorized to adopt binding acts in other areas. However, in these cases, the member states cannot exercise their competence except insofar as the EU has not or has decided not to exercise its own (art. 4, TFEU);

– supporting competences, when the EU can intervene only in order to support, coordinate or complete the action of its member states. It, therefore, has no legislative power in these areas, and cannot interfere in the exercise of these competences, which is reserved for member states (art. 6, TFEU).

In matters of maritime transport, shared competences were initially timidly pronounced. Indeed, the derogatory system to which maritime and aerial navigation were subject in the original treaty (the 1957 Treaty of Rome) – because the Council, composed of heads of state and governments, was the sole legislator and had a monopoly of action in the initial version of the treaty – granted the European Economic Community (EEC) limited competence in matters of maritime transport. This limitation was a condition of adoption of the treaty establishing the EEC in 1957. During their negotiations, in fact, the states were highly reluctant to agree to the transfer of their competence in matters of maritime and aerial transport; maritime authority and air authority were, therefore, considered – and still are, but to a different extent – prerogatives of state power. It should be noted that these activities, which are carried out mainly in international spaces, are conducted outside the territories of member states.

Under the terms of the treaty establishing the EEC, maritime transport was first considered as a specific service activity. Likewise the current treaty, the TFEU, is aimed at the free provision of services but differentiates the case of transport. Maritime and aerial navigation are considered separately from other modes of transport (art. 84, then 81, then 85, then 100, §2). This gives rise to a double special treatment of maritime transport: first, the special treatment of its legal situation as a service activity, and then the special treatment of it as a mode of transport.

The power of the Council (that is of heads of state and governments) to adopt measures proper to maritime navigation was not exercised during the creation of the EEC; it was not until 1986 that significant texts integrating maritime transport in the European Community were adopted, and the EU's actions in matters of maritime transport became part of this process of evolution.

2.2.2.2. *European Union actions in matters of maritime transport*

The reasons for which maritime transport occupies the place we have just described in the establishing document of the EU (the EEC treaty) lie with the European Court of Justice, which established rules in interpretation of the treaty. The EEC began its activities by adapting the rules of the Treaty of Rome to the maritime transport sector. This was followed by actions that can be considered as making up a maritime transport policy.

2.2.2.2.1. Submission of maritime transport to the general rules of the EEC treaty

Though the treaty had referred to appropriate acts that should be adopted by the Council, in matters of transport and for maritime (and aerial) navigation, in 1974 the Court of Justice, interpreting the original provisions, specified that: "Maritime transport belongs in the same category as other modes of transport, subject to the general regulations of the EEC treaty[26]". In this case, it was a matter, known as the French Seamen's Case, of determining whether the free

movement of laborers applied to seamen. France reserved employment on board ships flying the French flag to French nationals at that time, but given the terms of the EEC treaty, which prohibited discrimination based on nationality and set forth a rule decreeing the free movement of individuals, was this type of restriction of employment to French nationals (and not EEC nationals) in compliance with the treaty? The Court of Justice ruled that it was not, and specified that maritime transport was not excluded from the field of application of the general rules of the EEC treaty. By this, it meant that maritime transport, despite its singular status in the treaty, was subject to the rule of non-discrimination based on nationality, to the free movement of workers, and to open competition.

2.2.2.2.2. Adoption of rules appropriate to maritime navigation

The rules appropriate to maritime navigation required by article 84 §2 of the EEC treaty (currently art. 100 §2 of the TFEU) were adopted in 1986 in what was called the Brussels package. The principal contribution of this package of four regulations was the application to the maritime transport sector of the treaty's rules of competition and the principle of the free provision of maritime transport services among member states and between member states and third-party countries (international traffic).

The application of rules of competition was then subject to a specific system with Council regulation (EEC) no. 4056/86, which was repealed in 2006. The sector is now subject to general rules of competition and is not affected by specific rules except in matters concerning *consortia*, or agreements between shipowners on regular lines. These cooperation agreements for the operation of maritime transport lines are defined by the European Commission as an "agreement or a series of separate but connected agreements between line maritime companies having to do with the operation of a joint service by the parties. The legal form of these agreements is less important than the underlying economic reality; that is, the provision of a joint service by the parties[27]". This provision is aimed at preventing anti-competitive agreements in the sector.

The rule relative to the application of the principle of the free provision of international maritime transport service[28] is still in effect. It orders the application of the free provision of this service and prohibits certain restrictions of this freedom that existed at the time of its adoption. These restrictions can notably be found in the legislation of member states reserving maritime shipments or traffic to vessels flying their flag. The rule was initially applicable only to international transport, and it was not until 1992 that the rule was adopted which decreed the free provision of services within a member state[29]. This text, like the preceding one, ordained that member states must not restrict access to internal maritime traffic and coastal maritime navigation to the detriment of nationals of other member states or vessels flying the flags of these states.

2.2.2.2.3. Developments of European Community actions and subsequently the European Union as part of a maritime transport policy

Developments in actions by the EU in matters of maritime transport can be distinguished

according to whether these matters are considered as transport activities, in which case they belong to transport policy, or whether they are considered to be maritime activities, in which case they are part of integrated maritime policy. This is an approach introduced by the European Commission in 2007[30]. However, initially and fundamentally, maritime transport is an element of transport policy. European governance of this sector is discernable in the Commission's communication defining the strategic objectives and recommendations concerning the EU's maritime transport policy through 2018[31].

This act, issued by the European Commission, presents maritime transport as having been one of the principal elements in European economic growth and prosperity throughout its history. In it, maritime transport services are considered vital to the economy and to businesses participating in global competition. In this communication, the Commission lists the areas in which resources may be deployed; these include markets, human resources, environmental protection, safety, security, surveillance and watchkeeping, short sea shipping, and technological innovation. This vast program is also ambitious because it purports to "promote safe, secure, and efficient intra-European and international maritime transport on the seas and oceans, the long-term competitiveness of maritime transport and its related sectors in global markets, and the adaptation of the maritime transport system as a whole to the challenges of the 21st Century[32]".

2.3. Legal results of governance: maritime contracts

A proper governance of the seas means a good management of maritime relationships among individuals. From this perspective, as a formidable pathway for trade of all kinds, the sea is a privileged vector for human activities, given that 90% of global trade is conducted via ship. It is clear, then, that the economic importance of the oceans justifies the implementation of legal regulations designed to govern human activities that take place at sea, and to provide legal support for maritime contracts.

Very broadly speaking, maritime transport activity involves two principal contractual forms. The first form is the maritime chartering contract, which involves a ship made available to a shipper by a shipowner for use at sea; the other form is the transport contract, involving merchandise entrusted to a transporter by a loader for conveyance by ship. If a maritime chartering contract is mainly the result of contractual decisions made by the parties to it, a contract for the transport of merchandise or people by ship is governed by mandatory provisions, the content of which is not determined by the decisions of the parties to the contract. Finally, as the legal figure ensuring the assumption of the consequences of risks posed by sea travel, a specific place must be reserved for maritime insurance, which is considered a privileged vector of the governance of oceans.

2.3.1. *Maritime chartering contracts*

Maritime chartering is the contract by which a lessor agrees to make a ship available to a charterer in return for payment (C. transp., art. L.5423-1). The owner of the ship does not use

this ship as a means of transport, therefore, but rather puts it at the disposal of a charterer in return for monetary compensation.

There are three main types of chartering: voyage chartering, in which a shipowner makes a ship available to a charterer for the transport of a given type of merchandise from one port to another; time chartering, in which a shipowner makes a ship available to a charterer for a predetermined period of several months or years; and finally bareboat chartering, in which the shipowner makes the ship available to a charterer for a predetermined period, but in this case the ship is not fitted out and lacks equipment, or is incompletely fitted out or has incomplete equipment.

In these matters, legal provisions are secondary to the will of the contracting parties (C. transp., art. L.5423-1, pgh. 2); therefore, it is only when these parties' wishes have not been expressed, or have been imprecisely expressed, that the law is applied. This is why the majority of maritime chartering law is contained within contractual relationships between parties.

A formalized chartering contract is properly called a charter-party. Though this charter-party must include a certain number of precise indications (components of individualization of the ship, names of the lessor and charterer, type of cargo, sites and timelines for loading and unloading, and freight cost), its content is mostly free and depends on the type of chartering contracted. In practice, charter-parties use boilerplate printed contracts supplied by shipping companies, which the parties to the contract are then free to modify and amend.

In the same sense, in compliance with article 3 of the Convention of Rome of June 19, 1980 on law applicable to contractual obligations, the law applicable to a chartering contract is that chosen by the parties. Likewise, the community regulation "Rome I" confirms the primacy of the law of autonomy. If the parties do not specify a choice, the contract is governed by the law of the country in which the shipper's usual residence is located, unless there are closer ties to another country, in which case the law of the latter is applied.

The actions specified by the chartering contract are effective for 1 year. The end point of this effectiveness varies according to the type of chartering; it may occur at the time the unloading of merchandise is completed, or at the time of the event ending the voyage in the case of voyage chartering; or it may occur when the contracted duration of the charter has expired, or at the time of the definitive stopping-point of its execution for time and bareboat chartering.

In determining the respective prerogatives and obligations of the shipowner and the charterer, a distinction is generally made between the nautical and commercial management of the ship leased.

While nautical management has to do mainly with the direction of the ship and its maritime fitness (costs of fitting out and maintenance of the ship, crew wages and hull insurance contract), commercial management has to do more specifically with the cargo transported as well as costs related to travel (hold management, piloting costs, and payment of taxes and entitlement to stopover in ports of call). From this point of view, the three categories of chartering evoked by the law are distinguished by whether these powers of management and

nautical and commercial responsibilities lie with the shipowner or the charterer; in matters of voyage chartering the shipowner exercises and assumes nautical and commercial management simultaneously, while in time chartering the shipowner is responsible for nautical management and the charterer is responsible for commercial management, and in bareboat chartering the charterer is wholly responsible for both nautical and commercial management.

2.3.2. *Maritime transport contracts*

While chartering contracts have to do with a ship that will be used to move merchandise, maritime transport contracts are concerned with merchandise that will be moved by ship. Under the terms of these contracts, a loader agrees to pay freight costs and a transporter agrees to transport a given amount and type of merchandise from one port to another. In reality, this type of contract involves three parties: the loader who is sending the merchandise, the transporter who moves it and finally the recipient, who – even though a third party in the contract – will take delivery of it and thus benefit from legal action taken against the transporter in the event of damage to or loss of the merchandise.

After having been part of the *Ordonnance de la Marine* of August 1681 and then the code of commerce of 1807, governance of maritime contracts now falls within a remit strictly delineated by several obligatory and directly applicable international conventions. Though these conventions set forth rules that are substituted for domestic rules when transport is international, the weakness of the system arises from the heterogeneity of these sources, which constitute a mosaic of texts instituting a large number of regimes that differ subtly from another, and with no clear connections.

However, the international community has attempted to unify maritime contract law through several international conventions:

– Widely ratified, the Brussels Convention of August 25, 1924 provided for the unification of certain regulations having to do with freight bills (called La Haye-Visby rules), with the particular intention of settling conflicts between the laws of contracting states. Excluding the transport of living animals and regular carriage on deck (which includes all merchandise loaded onto the deck of a ship), it brought about compromise between the respective interests of loaders and shipowners. Considered as common international maritime transport law, it places a presumption of public responsibility on the transporter. In counterpart to this system, which is aimed at avoiding probationary difficulties, transporters may free themselves from responsibility by proving one of the 17 reasons for exoneration enumerated by the text, and benefit particularly from a legal limitation of responsibility in terms of reparation for damages for which they are accountable.

– The Hamburg Convention of March 30, 1978, having to do with the transport of merchandise by ship (called the Hamburg rules), was developed under the aegis of UNCTAD, under the influence of developing countries (loading countries). This text maintains and reinforces the system of responsibility of the transporter, which is not entitled here to cases of exemption. The Hamburg rules specify that the transporter is presumed to be at fault for damages resulting from losses or damages sustained while the

merchandise was under its care, unless it can prove that every measure that could reasonably have been required for the avoidance of losses or damages was taken. It is estimated that around 5% of maritime trade worldwide is subject to the Hamburg rules.

– The Rotterdam convention on contracts for the international transport of merchandise partly or entirely by ship (called the Rotterdam rules) was adopted by UNCTAD and then by the General Assembly of the United Nations on September 23, 2009 but has not yet become effective. Its main contribution lies in the field of application of the new rules. As a multimodal convention, it is applicable to all transport preceding or succeeding maritime transport, whatever its type (road, rail or air transport). Governing international transport at the starting point or destination of a contracting country, its provisions are intended to make the legal system of merchandise transport including an international maritime phase uniform, as well as to modernize maritime transport by taking into account recent developments in the sector (electronic transport documents and containerization). At its core, the convention is quite heavily dominated by contractual freedom, which calls into question the historically imperative tendencies of regulations applicable to maritime transport contracts. Loaders must hand over merchandise in an appropriate manner, provide transporters with the information, instructions and documentation necessary for its delivery, supply transporters with the information necessary for the drafting of contractual data; and, where applicable, make the required declarations pertaining to dangerous merchandise. The loader is responsible with regard to the transporter if the latter can prove that any losses or damages sustained are the result of a failure by the loader to fulfill its obligations. Unless otherwise provided the transporter is required to transport the merchandise to its destination and deliver it to the recipient. In addition to these general obligations, in matters of maritime travel, there is an ongoing responsibility to ensure the nautical and commercial fitness of the ship. The transporter also has specific obligations: taking delivery, loading, handling, docking, safeguarding, caring for and unloading. From the receipt to the delivery of the merchandise, the transporter's responsibility is based on a presumption of responsibility, but it may exonerate itself from this by proving one of the cases of exemption provided for by the text. The loader may still refute the transporter's defense, however, by proving that the damages are imputable to it or by establishing that this damage is not the result of a case of exemption.

– Most of the French law is contained within the transport code. This text concerns all types of maritime transport contracts, and is applicable from the time the merchandise is taken in hand until its delivery.

As an instrument of governance, the bill of lading is the principal supporting document of a maritime transport contract. The fruit of longstanding historic tradition, a bill of lading can be made to the order of or to the bearer. Issued at the request of the loader, who is no longer required to sign it, it is filled out by him/her, by the transporter or by the transporter's representative based on the information provided by the loader, who is then responsible for the accuracy of the indications relative to merchandise, with any inaccuracies engaging the loader's responsibility to the transporter. The bill of lading is issued in at least two original copies; one for the loader and the other for the master. The law specifies the information that

this document must contain: proper names to identify the parties, merchandise to be transported, facts about the voyage to be undertaken and freight cost to be paid. It must also indicate adequate brand information to identify the merchandise; the quantity of this merchandise (in numbers of packages or in weight) according to the information given by the loader; and finally the apparent state and storage of the merchandise.

2.3.2.1. *Obligations of maritime carriers*

Aside from its central obligation "to delivery a given type and amount of merchandise from one port to another", conventions and the law impose a series of obligations on the transporter. According to the 1924 convention, "the transporter [is] required before and at the start of the voyage to exercise due diligence in order to a) ensure that the ship is seaworthy; b) fit out, equip, and stock the ship adequately; and c) ensure the good condition of [all parts of] the ship where merchandise is loaded, for its reception, transport, and conservation". Unloading operations, which are the responsibility of the transporter, must take place in conditions analogous to those of loading.

Stowage on deck, which consists of arranging merchandise on the deck of a ship rather than in the hold, is a risky technical and commercial operation that has given rise to debate. From this point of view, positive law distinguishes between regular on-deck loading – that is carried out in accordance with legal specifications – and irregular on-deck loading, which does not comply with these specifications. According to the La Haye-Visby rules, stowage on deck is regular if it has been declared thus on the freight bill with the agreement of the loader and then loaded in the agreed-upon way; if it fulfills this double condition, it will be exempt from its field of application. If this condition is not fulfilled, the transporter will be at fault; depending on the circumstances proper to each case. Similarly to those of French law, the Hamburg rules do not exclude on-deck transport from their field of application, specifying that it will be considered regular if the loader has given its consent or if this mode of transport is required by regulations or if it is carried out in accordance with the customs of the trade concerned. According to this text, on-deck transport that does not meet these conditions may constitute an inexcusable transgression on the part of the transporter, thus depriving it of the right to limit the consequences of its responsibility. The Rotterdam rules set forth hypothetical cases in which on-deck transport is permitted and non-transgressive; if the deck is required by the law; if it is in compliance with the customs, usages and practices of the trade concerned; if it is in compliance with the transport contract (that is if it is undertaken with the consent of the loader); and, finally, if the loading of containers or vehicles takes place on decks that are specifically equipped to transport them. In these cases of regular on-deck transport, the transporter's responsibility will be engaged in accordance with the terms of the convention, except in the event of loss, damage or delay (resulting) from the specific risks involved in this type of transport. If the on-deck transport does not fulfill the conditions of the text, the transporter cannot claim exemption from responsibility or invoke limitation of responsibility if the transport was undertaken even though the transporter had expressly agreed with the loader that the merchandise would be transported in the hold.

2.3.2.2. *Obligations of loaders*

Loaders are required, like all beneficiaries of merchandise, to present this merchandise in accordance with the conditions of time and place specified by the contract. If this is not the case, the loader will owe the transporter a compensatory sum corresponding to the damage sustained, within the limit of the sum of the freight cost. Likewise, the costs of shipment and freight due in order to complete transport of the merchandise are the responsibility of the loader provided that the interruption of the voyage is not due to the fault of the transporter; otherwise, these costs are its responsibility. In both scenarios, the transporter keeps the freight cost specified for the whole voyage.

The loader must also compensate the transporter for damages caused to the ship or to other merchandise due to its error or by the defects of its own merchandise. Finally, it must take delivery of this merchandise; barring a claim on the merchandise or in the event of contestation relative to delivery or to payment of freight costs, the captain may, by legal authority, have the merchandise sold in order to pay freight costs and order any surplus to be stored.

The loader must pay the costs of transport (or freight). Though the freight fees are in principle set by the parties according to the weight or volume of the merchandise, it is sometimes affected by various additional costs and fees (loading and unloading fees, customs duties, etc.). It may be agreed upon that freight costs are payable in advance or upon arrival at the destination. In the latter case, the receiving party is also the debtor if it accepts the delivery of the merchandise; on the contrary, if it refuses the delivery, the freight costs will be payable by the loader.

If the freight costs remain due or liable for taxes, for merchandise thrown overboard into the sea for the common safety, these costs will no longer be payable for merchandise lost due to the hazards of ship transport or following the transporter’s failure to fulfill its obligation to keep the ship fit to sail or if the loss is due to a failure to fulfill its obligations relative to the merchandise.

In order to protect itself, the transporter may insert into the marine bill of lading a “freight cost acquired in any case” clause, which will enable it to collect the freight cost despite the loss of the merchandise for any reason, “whether perils of the sea or otherwise”. If payment is not made, it will still be protected by the law granting it the right to retain the merchandise on board.

2.3.2.3. *Responsibilities of maritime carriers*

For losses and damages sustained by merchandise with which it has been entrusted, the Brussels Convention and French law specify the transporter’s responsibility by full public right in its conditions and effects. It is thus responsible for losses or damage sustained by the merchandise from the time it is taken in hand to the time it is delivered, unless it can be proven that these losses or damages were caused by a limited number of specified facts. The Hamburg rules seem to establish a presumption of fault, but not responsibility, in the sense that the transporter is deemed responsible unless it can prove that all measures were taken that could reasonably be expected to avoid the incident and its consequences; that is that no damage-

causing transgression was committed by it. The Rotterdam rules are similar; they increase the transporter's responsibility by pronouncing its responsibility for all damages sustained by the merchandise unless it can prove that neither its own fault, nor that of its employees, caused or contributed to the damage. The transporter is also exonerated if it can prove that the damage was caused by an excepting event, the list of which is similar to that put forth by the 1924 convention.

Justified by the idea that the incidence of risks inherent to travel at sea must be shared among its participants, the mechanism to limit the responsibility of the transporter is seen as compensation for the strict liability weighing on it. In this, derogating from ordinary law which requires the party responsible for damage to pay the reparations in full, whereas the limitation enables a transporter known to be responsible for damages to pay reparations only up to a threshold determined by referring to the 1924 convention. However, the transporter is not entitled to this mechanism if the losses or damages result from its intentional or inexcusable transgression. The presumption of responsibility imposed on maritime transporters by the law is not indisputable, as attested to by the possibility available to them of exonerating themselves by proving that a given damage sustained by merchandise has been caused by an exceptional incident with responsibility attributable to, among other causes, the conduct of the loader, the operation of the ship or an outside event with characteristics of force majeure. These exceptional cases, which make it possible for the transporter to exonerate itself more easily than a debtor with a contractual obligation under ordinary law, are identical in substance and form in the 1924 convention and the law, though their formal presentations differ in the two texts.

2.3.3. *Maritime insurance*

Because a ship and its cargo must be insured against any damages they may sustain or cause, maritime insurance is intended to manage damages that arise as part of a maritime operation. Insurance has always been important at sea; since the high Middle Ages, shipowners have been able to protect themselves against the perils of the sea via a "Bottomry loan", in which they borrowed a sum corresponding to the value of the ship and the merchandise being transported. In the event of the ship's safe return to port, the borrower was obliged to repay this sum increased by a premium agreed upon as the price of the risks incurred. If the ship was lost, the shipowner's repayment obligation was rendered void.

Insurance, as a method of collectively distributing the risks of accidents at sea, is the condition *sine qua non* for the efficient governance of maritime commerce; the enormity of the capital involved has made recourse to maritime insurance indispensable. Article L.171-6 of the insurance code classifies "maritime vehicles as well as the risks of responsibility pertaining thereto" and "transported merchandise" among the "major risks" requiring specific regulations.

These contracts are random in the sense that the benefit or loss that may result from them depends on an uncertain event, and maritime insurance is characterized by the maritime nature of the risk being considered. In order to be insurable, rights must be subject to the risks of maritime navigation; this rule results from the fact that maritime insurance "is intended to

underwrite the risks involved in a maritime operation" (C. assur., art. L.171-1). Since the *Ordonnance de Colbert* of 1681, the risks of the sea have been referred to as the "fortunes of the sea" (from *fors fortuna:* (un)favorable outcome, risk), which evokes the fortuitous outcome (*fortuitus* arises from *fors*). This expression, which shows the random character of maritime insurance, encompasses all of the dangers of navigation that may strike a ship and its cargo during a maritime operation. As a marker of maritime insurance, the "fortunes of the sea" are widely understood to apply to any risk that may arise during maritime navigation, whatever its cause. For this reason, it is not only incidents at sea themselves that are classified as risks of the sea, but also a number of aftereffects directly caused by these incidents.

Though insurable risks have been elaborated on to a great extent, unexpected hazards constitute an impassable limit to this elaboration. The "fortunes of the sea" will always exist when a contract is concluded; in the absence of a hazard, the contract will be void, as it is without purpose.

Modern maritime insurance contracts are regulated by the insurance code. The law determines a complete legal corpus which first sets out the general rules common to various types of insurance, and then distinguishes the three categories of maritime insurance: hull insurance (for ships); freight insurance (for merchandise); and liability insurance, which enables shipowners to protect themselves against the risk of liabilities not covered by hull insurance.

Unlike land insurance, maritime insurance law leaves a great deal of room for the expression of contractual freedom; with the exception of those specified by the law, legal regulations can be set aside by the parties. Virtually, all contracts are concluded using boilerplate models, which are regularly updated to take technological and legal developments into account.

There is a French maritime insurance policy for hull insurance (last updated January 1, 2001) and several French maritime insurance policies for cargo insurance, including protection against "all risks" and protection against "specific risks barring major events" (last updated July 1, 2009), which can be taken out for a single expedition or be the subject of a subscription for successive expeditions. French insurers also offer liability insurance policies for shipowners (December 20, 1990) and maritime transporters (December 20, 1972); there are also special policies against risks of war or the equivalent.

2.3.3.1. *General obligations of insurers*

The principal obligation of an insurer is the payment of insurance benefits if a peril of the sea occurs under the conditions specified in the contract. Policyholders may be compensated for all harmful consequences of incidents covered by the policy. With the exception of physical injury, the damage sustained by the policyholder can be material loss or damage, commercial damage, an incurred expenditure or third-party action taken against the insured party. In the case of insurance covering fire, for example, all injurious consequences of a fire should in principle be borne by the insurer. This is the characteristic service provided by an insurance contract, which does not mean, however, that every injurious consequence of an incident covered by a policy will necessarily be guaranteed.

In addition to excluding certain causes of harmful incidents proper to each policy, insurers do

not cover damages resulting from the defects of the ship itself or of the merchandise insured. Indeed, insuring the defects and flaws presented by the insured object would mean denying the random character of the contract, as their existence would make a disaster highly probable.

Likewise, covered risks remain covered even if the insured party is at fault, unless the insurer determines that the damage is due to a lack of reasonable care on the part of the policyholder to protect its assets from the risks incurred; coverage of an intentional or inexcusable fault on the part of the policyholder is prohibited by the provisions of the insurance code.

2.3.3.2. *Hull insurance*

Hull insurance covers the ship and all its equipment. It covers the ship while it is being constructed; its freight, and the maritime operation. Here, the term "ship" means the hull and its locomotor system as well as all the accessories and attachments necessary for its use, and the costs of fitting out and supplying the ship.

Hull insurance covers damage liable to be sustained by the ship, up to and including its total loss. Accidental damage is covered, as is some deliberate damage and damage resulting from a decision made by public authorities with the intention of preventing or reducing pollution, if the origins of the risk of this pollution lie in a covered incident. If, after a covered collision, a ship transporting toxic products is scuppered in order to avoid a polluting incident, the coverage will hold.

Hull insurance covers the ship's responsibility for a collision. It also covers the accessories and equipment on board the ship at the time of the collision, and third-party actions against the ship for damages caused by its machinery, anchors and chains or by any small boats attached to it. However, hull insurance covers only material damage caused to third parties, excluding claims for physical injury. In terms of its amount, the liability coverage provided by the hull insurer (damages, losses and claims made against the insured hull) is limited to a sum equal to the value of the ship, called the "approved value". A typical policy specifies the limit of the insurer's responsibility at an amount equal to two times the approved value. Coverage is valid on a "per incident" basis; if a ship is involved in two successive collisions, the insurance may pay up to two times the approved value for each incident.

Under the terms of article L.172-16 of the insurance code, the insurer does not cover incidents arising from civil or foreign war, piracy, or riots, among other causes, or those due to the effects of atomic explosion or radiation.

The obligations of the policyholder are determined by article L.172-9 of the insurance code. The insured party must: (1) "Pay the premium and costs at the agreed-upon time and place"; (2) "Take reasonable care in all matters pertaining to the ship or merchandise"; (3) "Declare precisely, at the time of conclusion of the insurance contract, all circumstances known to it that may increase the risk taken by the insurer"; and (4) "Declare to the insurer, insofar as is known to it, any increased risks arising during the course of the contract".

2.3.3.3. *Cargo insurance*

Cargo insurance covers damage and losses pertaining to merchandise. Though this insurance connects the insurer to the loader (the owner of the merchandise), the subscriber and the beneficiary of the insurance policy, is in reality at the core of the process. In practice, the beneficiary of the policy is not designated by name, with coverage being contracted "on behalf of the party to whom it will belong". In this case, this contractual detail is considered to constitute both insurance for the benefit of the policy subscriber and a stipulation for others for the benefit of the beneficiary of the said clause (C. assur., art. L.171-4). Consequently, the coverage may be invoked by the subscriber or by the owner of the merchandise at the time of damage (the recipient). This detail of cargo insurance thus makes it possible for the coverage to follow the merchandise as it changes hands several times. This change of beneficiary occurs frequently when merchandise is sold along the way.

Two levels of coverage coexist in cargo insurance: protection against "all risks" and protection against "free of particular average (FPA)". While the first level very broad category covers all insurable perils of the sea except for those that are expressly excluded, the second level, which is more limited, covers only the specific damages listed in the policy. In FPA coverage, the risks covered include all major incidents that may arise during the course of maritime, land, aerial or river transport of merchandise: shipwreck, capsizing, running aground, collision, watre ingress requiring the ship to enter a port of refuge; falling of packages, accident of land transport vehicle, flood, volcanic eruption, fire, explosion, and aircraft crash, among others. In addition to the extent of each type of coverage, there is a significant difference between the two in terms of proof. While it falls upon the "all risks" insurer to prove that a case of damage is excluded from coverage in order to be freed from its obligation, it is the responsibility of the "FPA" insurer to prove that the damage is the result of a covered risk.

Depending on the policy type, "coverage begins at the time the cargo […] is moved in the warehouse at the extreme starting point of the insured voyage, to be immediately loaded onto the transport vehicle". It is completed at the time delivery is taken of the cargo by the policyholder or the subscriber. The time-management involved in cargo insurance goes beyond the domain of maritime risks; thus, in a multimodal transport operation, this insurance will cover all land transport operations preceding or following maritime transport, with a limit of 60 days calculated from the completion of the unloading of the cargo from the last ship.

Cargo insurance is principally damage insurance. Coverage, within the limit of the approved value (that is the price of sending the cargo to its destination), includes damages and losses sustained by merchandise, including those caused during loading or unloading carried out by the policyholder or beneficiary of the insurance policy. Subject to the holding by the transporting vessel of a safety management certificate, costs reasonably incurred in order to preserve insured cargo from a covered incident of damage or to limit the consequences of this damage, contribution to joint damage, or remuneration for assistance, will be covered up to their full amount and proportionally to the value insured.

The 2009 insurance policy contains a number of general exclusions similar to those given by hull insurance. Notably, exclusion for intentional or inexcusable fault of the insured policy is

more extensive in cargo insurance, since it applies to the fault of the insured party or the fault of the beneficiary of the policy, as well as to faults committed by their employees, representatives or assignees. Except for the latter fault, excluded risks can still be covered if an additional premium is paid.

The obligations of cargo insurance policyholders are nearly identical to those of hull insurance policyholders. As part of its duty of honesty at the time the contract is concluded, the insured party must first declare to the insurer all of the circumstances that may increase the risk taken by the insurer in covering the operation. The insured party must also declare any increased risks arising during the course of the contract. The insured party, like any beneficiary of the insurance, must take reasonable care with regard to everything pertaining to the merchandise; it must, therefore, take all possible protective measures to prevent disaster or to limit the harmful consequences of such a disaster. Finally, the insured party must take all possible measures to protect the rights and recourse of the insurer against the transporter or any other responsible party.

2.3.3.4. *Protection and indemnity (P&I) clubs*

Since 1855, Protection and Indemnity Clubs (P&I Clubs) have existed as groups of shipowners covering financial and liability risks that are not covered by hull insurance, or which insurance companies refuse to cover. Operating in mutual benefit mode, in which the sum of the members' annual dues marks the limit of the total coverage by the club, P&I clubs have historically played a role in human solidarity at sea. Today, these clubs cover around 90% of maritime risks with civil liability. Unlike hull insurance, where the approved value, unless otherwise specified, marks the limit of the insurer's engagement, the protection given by P&I Clubs is unlimited.

The risks covered by P&I Clubs are specifically determined by each club. The most significant coverage lies in protecting shipowners in their relations with their co-contractors. This would be the case for loaders in the event of damages to merchandise; for passengers in the event of injury or fatal accident; and for seamen working on board ship in the event of fatal accidents caused to third parties. The clubs cover risks that would not be covered by hull insurance (responsibility for collision, remuneration for assistance, contribution to joint damages and now responsibility in the event of pollution). The same is true for certain financial responsibilities such as payments made by shipowners in the event of the death, injury or illness of sailors; costs of destruction or raising of a shipwreck; or fines levied against the shipowner in the event of a breach of customs regulations or an infraction in matters of immigration.

2.4. Bibliography

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1 Law no. 65-420 of June 18, 1966 on chartering and maritime transport contracts, JO 24 June; law no. 67-5 of January 3, 1967 relative to the status of vessels and other sea construction, JO 4 January; law no. 67-545 of July 7, 1967 relative to incidents at sea; JO 9 July; law no. 69-8 of January 3, 1969 relative to munitions and maritime sales, JO 5 January.

2 JO 3 November. Ordinance no. 2011-204 of February 24, 2011 including various provisions for the adaptation of the transport code to European Union law and to international conventions in the fields of transport and maritime security (JO 10 June) has contributed various modifications to the ordinance of 28 October 2010 in order to reaffirm established law and to clarify certain provisions subject to overly broad interpretations (JO 25 February).

3 JO 10 June 2011.

4 www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000023086525&dateTexte=20111111.

5 Part one contains provisions having to do with all forms of transport; part two addresses rail transport; part three addresses road transport; part four addresses domestic navigation and river transport. Part five addresses maritime transport and navigation, and part six deals with civil aviation.

6 The 20 foot equivalent (TEU) is the standardized measurement unit for containers. A standard container of 1 TEU measures 2.591 m (8.5 feet) high by 2.438 m wide (8 feet) and 6.096 m (20 feet) long, representing around 38.5 cubic meters.

7 UNCTAD, 2012 study on maritime transport, p. 16.

8 International Maritime Organization (IMO): www.imo.org.

9 International Labour Organization (ILO): www.ilo.org.

10 World Trade Organization (WTO): www.wto.org.

11 United Nations Conference on Trade And Development (UNCTAD): www.unctad.org.

12 United Nations Commission on International Trade Law (UNICITRAL); voir www.unicitral.org.

13 A shipper, in maritime law, contracts with a maritime carrier for the delivery of

merchandise from one port to another. It is important to understand that this is not the party that carries out the loading of a vessel, a physical operation carried out by a cargo handling company. See *infra*, section 2.3.2.

14 General agreement on tariffs and trade.

15 See *infra*, section 2.3.1.

16 For European regulations, see *infra*, section 2.2.2.

17 The acronym stands for Convention on Standards of Training, Certification and Watchkeeping for Seafarers.

18 Information supplied by the ILO Website

19 Acronym for *Maritime Labor Convention*.

20 See the Commission's report to the European Parliament and to the Council on the application of 2009/21/CE concerning compliance with obligations by flag states, COM(2013) 916 final, p. 13.

21 Directive 2013/38/UE of the European Parliament and the Council of August 12, 2013 modifying directive 2009/16/CE pertaining to state control of ports, JO L 218 of August 14, 2013, pp. 1–7. Directive 2013/54/UE of the European Parliament and Council of November 20, 2013 relative to certain responsibilities of flag states in matters of compliance with and application of the Maritime Labor Convention, 2006, JO L 329 of December 10, 2013, pp. 1–4.

22 All European Union regulations can be accessed at www.eur-lex.europa.eu.

23 For a general overview, see www.europa.eu.

24 There are free trade associations or economic communities on every continent, but these do not have the same degree of integration as the European Union.

25 The European Union cannot be considered as the author of maritime transport regulation until the entry into force of the Treaty of Lisbon in 2009. Previously, strictly speaking, it was the European Community (EC), and before that the European Economic Community (EEC).

26 CJCE 4 April 1974, Aff. 167/73, Commission versus Republic of France, Rec., p. 359.

27 Regulation (EC) no. 906/2009 of the Commission of September 28, 2009 concerning the application of article 81, paragraph 3 of the treaty to certain categories of accords, decisions and practices conducted in concert between line maritime companies, JO no. L 256 of September 29, 2009, p. 31. The Commission was authorized to adopt this rule for the implementation of regulation (CE) no. 246/2009 of the Council of February 26, 2009.

28 Regulation (EEC) no. 4055/86 of the Council of December 22, 1986, JO no. L 378 of December 31, 1986, p. 1.

29 Regulation (EC) no. 3577/92 of December 7, 1992 concerning the application of the principle of free movement of maritime transport services within member states (maritime coastal navigation), JO no. L 364, p. 7.

30 Blue book on integrated maritime policy, COM (2007) 575 final, October 10, 2007.

31 COM (2009) 008 final, January 21, 2009.

32 COM(2009) 008 final, January 21, 2009, §8.