

Chapter 1

Introduction: Freedom in International Shipping

Shipping, of all industries, is the most international. It has to be viewed, therefore, not from a narrow national or indeed nationalistic viewpoint, but against the broad sweep of world developments, particularly in the trade sector. After all, some 75 % of the world's surface is covered by the vast oceans, over 80 % of world trade moves in whole or in part by sea, and since time immemorial humankind has voyaged upon these oceans for the purpose of trading.

Indeed, ocean voyages were undertaken before land travel; there were sailors before farmers and shepherds; ships before settlements; and it was easier to transport goods, often over very long distances, by sea rather than over land. Methods of propulsion have, of course, evolved: originally the punt or paddle, then some 8,000 years ago the sail, then the steam engine and today the diesel engine and even nuclear power. There are also some who have seen the sail—wind power—as a supplementary means of propulsion in order to save energy. But this has yet to be proved a viable commercial option.

The central thread running through this book is the notion of freedom in international shipping. The narrow connotation of this phrase is manifested in one of the strands of the concept in public international law of freedom of the seas, namely, the ability for all to navigate the oceans and to enter and leave ports of other nations without let or hindrance. There is also the much wider connotation, namely, the freedom to trade one's ships without interference in commercial operations by others, particularly foreign governments. Both these dimensions, whilst distinct in themselves, often as subjects of public international law or private maritime law, respectively, have none the less been subject to various erosions. These are such that today the more technical aspects of shipping—navigation, safety, construction, stability, pollution control, to name but a few—are increasingly subject to governmental regulation, primarily international but also regional or national. The ability of shipowners to trade their ships from the commercial and economic standpoints free from governmental regulation has been, and continues to be, significantly eroded in various ways. This is seen to be for the general good.

In this book these erosions are traced and put into historical perspective. The origins and role of the various bodies, institutions and organisations of a

governmental and a private nature are also explained. Through this, an understanding of the framework within which international shipping operates and the interface between governmental and commercial policies and practices will hopefully be gained.

Early Development of Maritime Law

Early maritime law, as with other branches of the law, was “custom-built”; it was a series of standards which survived the rise and fall of regimes and which eventually emerged as a codification. Its history is lost in antiquity but we know that it evolved from the customs and practices of early merchants and seafarers and was largely private and commercial in character. There is historical evidence that sea trade flourished in the ancient civilizations of India, China and the Middle East. In the late third and the second millennium BC, there was active sea-borne trade between the peoples of the Indus Valley civilization and the Sumerians and Akkadians of the Tigris-Euphrates basin. But there is little or no record of the maritime customs or laws of those pre-historic times. The earliest recorded mention of maritime law is in the Babylonian Code of Hammurabi dating back to the period between 2000 and 1600 BC. The rules which codified earlier Sumerian customs and practices, extended to marine collisions, bottomry and ship leases.

Certain elements of what today would be termed private maritime law are seen in the early Eastern Mediterranean civilisations of the Phoenicians. These include elements of insurance law, rules relating to salvage and to the carriage of goods by sea, compensation for seamen lost or injured and the like. A sketchy public law system also emerged in the form of protection by warships of merchant ships from pirates so as to enable them to continue to trade. In short, it constituted public protection of private maritime commerce.

In time the island of Rhodes became the main maritime power in the Eastern Mediterranean. To it we owe the first comprehensive maritime code. This not only regulated commerce in the region for a very long time but was also the foundation of sea law for the next 1,000 years. It was probably a codification of various ancient legal principles regarding navigation and commerce. It provided for exclusive jurisdiction over its own and adjacent seas. In short, it meant freedom for its own commerce and trade but necessarily therefore, a restriction on others. This is a concept, in part a dilemma, frequently seen during the history of maritime affairs. Even those who espouse freedom in shipping today, often really mean freedom for themselves on the back of restrictions on others.

Later, supremacy passed to the Greeks and a law governing maritime matters began to develop. This covered such elements as:

- The treatment of shipwrecked sailors.
- The jurisdiction of those courts dealing with maritime matters.
- Rules regarding blockade and piracy.

- The settlement of disputes arising under maritime contracts (early commercial courts).
- The role of prize courts, namely those to which recourse could be made in the event that persons felt they had been deprived improperly of their property (vessels, cargo, etc.).

There was a mixture of “private” law and “public” law elements—private in the sense that the rules governed relationships between private parties; public in the sense of governing the rights, duties and obligations of states. The Mediterranean, being bordered by many states, was common to all. The Greek policy was one of unmolested navigation, once enforced by vessels of war, later enshrined as a legal principle—an early stirring of the freedom to navigate encouched within the principle of the freedom of the seas.

The next stage in the evolutionary process was Roman maritime policy. As in English law, much of it was not codified although based on the Greek and Rhodian laws. Its strength stemmed largely from the *pax romana* which gave almost unchallenged security of commerce throughout the then known world. The Rhodian Sea Law was adopted by the Romans and evidence of this is found in two famous passages in the Justinian Digests regarding the law of jettison, the root of the peculiar maritime notion of general average. Piracy and brigandage had been banished and Roman commerce flourished. It is indeed most unfortunate that the menace of piracy has returned and is again rife in certain parts of the world. The contemporary problem of piracy is addressed in a later chapter under the topic of maritime security, which is a matter of major concern today.

The Roman maritime law covered *inter alia*:

- *The Sea*: this should be “open”, but as it was under the strict control of the Romans, it lay within their ability to close it to others.
- *The Ship*: ships were classified, for example, into passenger, commercial/cargo and whether inland or sea-going. The law dealt with the rights, duties and obligations of those connected with the ship such as the owner, master, crew, pilot, shippers (cargo interests) and passengers.
- *The Cargo*: there was no obligation on the Roman ship (or shipowner) to receive cargo, but if he did then he was liable for its safety on board and for its safe delivery. It was during this period that the principle of general average probably emanated, namely that when it became necessary to jettison cargo in order to lighten the ship, this was regarded as for the good of all and accordingly compensation should be contributed by all parties to the common venture. On the other hand, no principle of salvage was known, namely payment to those assisting or saving a vessel in distress.
- *Responsibilities/obligations of those in shipping*: this covered the rules governing chartering (hiring) of the whole or part of a vessel, the implied authority of the master, for example, to effect urgent repairs, or purchase equipment in order that the voyage could proceed; and the general subject of special loans to those engaged in maritime ventures.

- *Settlement of disputes*: disputes arising under any of the above heads were subject to established rules of procedure and jurisdiction, but different procedures were applied depending on whether the acts or injuries were internal, namely committed or suffered on board, or whether they arose from external events such as collisions or damage by others.

Thus, an early system of law covering maritime affairs developed, much of it being relevant as the basis, in part, of the private law as we know it today.

The eventual breakdown and disintegration of the Roman Empire and the subsequent period of lawlessness and confrontation between Islam and Christianity (seen again today), gave way to another formative period in the history of maritime affairs. The growth of the Mediterranean littoral (coastal) states meant that there was need for new or redefined maritime laws and these were provided by a number of city states which today have, in the main, no interest or importance in maritime affairs. They included Venice, Amalfi, Trani (on the Adriatic Sea), Pisa (now inland but once an important trading centre), Genoa, Marseilles, Jerusalem (another important trading centre after the Crusades) and Oleron (a small island off La Rochelle, in France, once English territory and an important trading centre).

All these trading centres developed their own codified maritime laws, essentially based upon trust, which in an otherwise lawless period enabled commerce to continue. It should never be forgotten that shipping is the handmaiden of trade and commerce. Without trade, it is nothing. All these states in their way, made a contribution towards the development of maritime law as we know it today.

Oleron has a special significance in that the laws or customs of Oleron are contained in a fifteenth century illuminated manuscript known as the Black Book of Admiralty. This is preserved amongst the records of the High Court of Admiralty at the Public Records Office in London. The Black Book itself is a compilation of rules and precedents affecting the administration of maritime law and the functions of the Lord High Admiral of England and the officers of the Court.

The laws or customs of Oleron contained in the Black Book are amongst the oldest medieval sea laws known to survive. They are said to be the outcome of the privileges granted to the commune of Oleron by the Duke of Aquitaine before the marriage of his daughter, Eleanor of Aquitaine, to King Henry II of England, when the island passed into the possession of the English Crown.

It is of interest that a facsimile copy of the Laws of Oleron from the Black Book of Admiralty was reproduced in a special limited edition to celebrate the sixth centenary of the Admiralty Court in June 1960 and was presented to the people of Oleron by subscribers from the United Kingdom and the United States.

Further Developments: Fifteenth and Sixteenth Centuries

The previous section traced the early development of certain principles and concepts of maritime law with the emphasis on limited private rights, obligations and duties, and some stirrings about the public law concept of the freedom of the seas. It also covered the shift of maritime power and influence from the Eastern Mediterranean to Rome and then to the city states and the beginning of the move further west, even to the Atlantic coast of Europe.

During the remarkable period of European expansion and exploration in the fifteenth and sixteenth centuries, the emphasis was not only on the continued development of private commercial law, but more particularly, the development of the public law concepts regarding ownership of the seas that went hand in hand with trade and commerce.

Thus occurred the further development of commercial maritime law in new areas—Spain, the Hanseatic League and the Baltic—and the continued drift of the centres of power and influence from the east towards the west and then northwards into Europe and the Baltic states. Today that drift is reversed towards centres in the East such as the Middle East, India, Singapore, China, Hong Kong, Korea, and Japan.

Barcelona was a major trading and maritime centre from as early as the thirteenth century. By the fifteenth century the Maritime Code of Barcelona held the same position as had the Rhodian law in its day. Whilst, in essence, an updating of all Mediterranean laws, it had some 300 chapters setting out detailed answers to the many and manifold practical and legal difficulties of the times in maritime commercial and trading affairs.

The same period saw the development of the Sea Laws of Visby, a town situated in the island of Gotland in the Baltic Sea, which is now a part of Sweden, and the name has been commemorated in the twentieth century through the “Visby” amendments to the Hague Rules 1924 (which govern the conditions for the carriage of goods by sea). It also saw the rise of the powerful Hanseatic League towns, notably Hamburg, Lübeck and Bremen. The first and last of these have remained great maritime centres to this day, with Lübeck now being of less importance in that context.

With the exception of today’s European Union (EU), the Hanseatic League was probably the strongest multinational alliance Europe has ever seen, comprising at its height nearly 80 cities. They banded together for the purpose of trade and commerce and to control piracy and other harmful activities. Their maritime law, the Hansa Towns Shipping Ordinance, was a comprehensive code covering essentially private law relationships.

Inevitably, for reasons of power and prestige, attempts were made by many of the shipping centres and groups touched on in this chapter, not only to lay down commercial principles but to exercise some measure of control over the seas adjoining their territories. And many were the claims, counter-claims and disputes. Examples can be seen in Venice claiming jurisdiction over the Adriatic Sea, Genoa

over the Ligurian Sea and Norway over much of the North Sea and the area between it and the Shetlands, Iceland and Greenland.

But it was not until the great voyages of discovery by the new maritime superpowers of Spain and Portugal that attempts to close great tracts of the world's oceans for the exclusive use of one nation were seen. It is beyond the scope of this analysis of the principles of "freedom" and its "erosion" to recount the many and awe-inspiring voyages of discovery during this period. Suffice it to say that more than 500 years ago in May 1493, after the return of Columbus from his first voyage of discovery, a papal bull was issued (a decree constituting the highest form of legal direction at the time) which purported not only to divide between Spain and Portugal all lands discovered, or to be discovered, but also to set a line dividing the oceans between the two nations so as to give each exclusive use. Forces were thereby set in train which meant inevitably that, at some future date, an agreement would have to be reached on a public law regime for the seas.

It is no surprise that in both France and England the Pope's division of the seas was rejected. Indeed, when the Spanish complained to Elizabeth I of England about violations of the papal decree endorsing the principle of "mare clausum" espoused by Spain and Portugal, they were told that it was "contrary to the law of nations" to prohibit the English from carrying on commerce in those regions and that they would continue to navigate the oceans since "the use of the sea and the air is common to all: neither can any title to the ocean belong to any people or private man".

This must be regarded as one of the first recorded statements of the principle of the freedom of the seas, although in essence it was then no more than a unilateral assertion by one sovereign state. It was neither universally accepted, nor indeed formulated in any depth, however much the sentiment may be applauded today. This was not to come about until much later.

The Rise and Fall of Nations and Freedom in International Shipping

The fifteenth and sixteenth centuries saw the birth of many of the principles of today's maritime law. The years that followed marked the beginning of the rise of English maritime supremacy; the fall of the Iberian nations, Spain and Portugal, from their previous positions of eminence and strength; the rise and fall of the Dutch as a sea power; the development of a fully codified maritime law in France as a result of its growth as a trading and mercantile nation; and the first real attempt to enunciate the principle of the freedom of the seas.

It is not intended to attempt to trace these developments in any detail. The period up to the nineteenth century is extremely complex and requires specialist study. All that can be attempted is to highlight the most important features in the historical evolution of today's maritime world.

The early sixteenth century saw England as a maritime nation of little importance and modest trade. The Tudor monarchs, however, began a trend which eventually led to British dominance of seaborne trade. Henry VII (1485–1509) was a man who displayed a grasp of economic and commercial principles not normally found in British monarchs. It was he who saw the need for maritime commerce and who thus has a special place in history as the man who passed the first “navigation” laws, namely laws which gave a preferential position to English vessels in the carriage of cargo to and from Britain. Thus he created the principle of flag discrimination (a form of protectionism often termed cargo reservation or cargo preference) which has been, and remains, a matter of a major policy debate and conflict to this day. As such it is an erosion of free-trade principles and a maritime example of protectionism.

The sixteenth and seventeenth centuries also saw the Dutch developing into a major commercial, trading and maritime nation. It has been said that whilst the English were drawn to the sea (and still are today) the Dutch were “driven to it”, because their small, loose-knit, country was unable to support its people and was in any event constantly being ravaged by wars. It was the growth of Dutch seaborne trade which led to conflict with others and to the pronouncements of their famous philosopher and jurist, Hugo de Groot (“Grotius” in latin), about freedom of the seas which essentially focused on freedom to navigate the seas and to engage in global trade through shipping.

In essence what Grotius, in his famous treatise *Mare Liberum* of 1605, sought to contest was the right which Portugal took upon itself to prohibit all others from engaging in seaborne commerce with the East Indies. The Portuguese took the position that they had proprietary rights over both land and sea as a result of the papal decree, in exercise of the Pope’s spiritual powers, referred to earlier. Drawing on Rhodian and Roman law and practices in the Mediterranean, Grotius argued that the seas were *res nullius* and incapable of occupation, and further, that the Portuguese had not “legally” occupied the “Indies” (whatever the spiritual position might have been) and had no title to “occupy” the seas. In short, he was the first man to set out in any detail the legal principle (despite stutterings to somewhat similar effect in earlier years) that “navigation was free to all and that no one country could lay claim to the seas on the basis that their navigators were the first to sail on it”. Thus, almost by accident, the great freedom of the seas principle was first enunciated. A cynic could well argue that Grotius’ claim was no more, and no less, than a special pleading by a young lawyer—he was only 21 at the time—in support of his country’s claim for freedom to trade Dutch vessels to the Indies. However, the principle caught the imagination of the times and gradually became accepted by custom. It was not until much later that the customary law became fully enshrined in public international law through treaty.

Ironically, it was an English legal scholar, John Selden, who opposed the doctrine of *Mare Liberum* in his responsive work in 1635 known as *Mare Clausum* in which he claimed that the seas were indeed capable of being enclosed and appropriated by exercise of maritime sovereignty.

The mid-seventeenth century also saw France developing new expansionist policies: increased home production in both agriculture and industry; expansion of its merchant shipping and the navy; and lastly, directly linked to shipping, the expansion of her colonies and the consolidation of world markets. However, wars and conflicts eventually stultified all these efforts.

What was left was a code of maritime laws which has been described as the “Maritime Code of Europe”. This was the first comprehensive code developed by any major state at the time. It is not significant in the public law context, as illustrating the principle of the freedom of the seas; its significance lies in its comprehensive coverage of all aspects of maritime business and the fact that it drew heavily on earlier legal systems: Rhodian and Roman law as well as the Visby, Oleron and Hanseatic codes. It was incorporated in due course into the famous codification of French law known as the Code Napoleon of 1806.

This whole period, which marked the rise and fall of nations as maritime trading powers, underlined the importance of sea power, an importance which history has continued to show both in times of war and times of peace.

Growth of English Maritime Power and the Navigation Acts

As already explained, it was King Henry VII of England who first introduced a flag discriminatory law in favour of English vessels. It is a matter of historic fact—and very important for this whole historical analysis—to record that the real growth of British maritime power stemmed from the strengthening of the Navigation Acts in 1651 under Oliver Cromwell, and their subsequent development and enforcement.

The effect was that the significantly expanding trade to and from British colonies had to be carried in British ships. No foreign-built ships were to be used. Commodities of all sorts, particularly strategic commodities, had to be enumerated and their carriage regulated and controlled so that other nations could not participate in their carriage. Additionally, British shipowners were given special grants for the carriage of specified exports such as corn and other agricultural products.

After the restoration of the monarchy in 1660 the laws were further strengthened in favour of British ships and shipping. For example, colonial, namely American, ships had to be routed through English ports where a levy was imposed.

The seventeenth and eighteenth centuries in Europe were periods of great conflict and many wars. The battles between the English and the French in particular were largely either about the acquisition of new colonies or because of fears of expansion by one or other country. In all these, sea power was of paramount importance. At the beginning of the eighteenth century England was *a* sea power; at the end of the century she was *the* sea power. And, whilst seventeenth century England had few overseas possessions, by the early nineteenth century after the Napoleonic Wars, she had, despite the loss of the American Colonies, major new colonies, namely, Canada, the Cape Colony in South Africa, all of the Indian sub-continent, Australia and New Zealand. The Navigation Acts required all

these extensive new possessions to be served by British ships. As a result of this, and the very substantial exports of coal, it is not surprising that the fleet expanded by leaps and bounds. Indeed, this continued at least until the First World War but not, during later years, as a result of a protectionist policy but of a free-trade expansionist policy, albeit from a position of great strength.

The pressures that led to this change of philosophy and indeed to the partial repeal of the Navigation Acts in 1841 and their final repeal in 1853, are complex and interrelated. Three factors, however, stand out. The first—and this is significant when we later consider pressures today for protection by whatever countries—was that Britain and British shipowners were so strong that they no longer needed protection. Rather, they wanted freedom, for example, to use non-British ships on certain of the more dangerous trades, and freedom generally. From the vantage point of commercial strength, freedom was obviously more desirable.

The second was that after years of conflict the new division of Europe, as a result of the Congress of Vienna in 1815, led to a more settled period in which governmental matters were seen as being increasingly for governments alone; and commercial (including maritime) matters for the commercial parties as long as commerce continued to provide a strong base for tax revenue. This was the beginning of the *laissez-faire* philosophy under which maritime/commercial affairs were left to their own devices.

The third factor was that, whilst shipping had a low priority in the minds of public servants and governments (as it still has to this day), commerce *per se* was the very foundation of British expansion and prosperity.

All these factors, coupled with improved agriculture, the development of a canal system and ports, coal and its use as an industrial fuel, and the new textile trade, led to increased demand for the carriage of every type of goods to an expanding world. The Navigation Acts were increasingly seen as restrictive to trade, against *laissez-faire* principles and, as already explained, were finally repealed in 1853. But they are significant historically and for any understanding of maritime issues today.

The Contemporary Public International Law Concept of Freedom of the Seas

What then is meant by the principle of the freedom of the seas today and, in particular, for the traditional freedom to navigate upon the high seas and other zones? The principles are set out in the United Nations Convention on the Law of the Sea, 1982 (UNCLOS) which, after many years of work going back over 20 years and in a sense even to the work of the League of Nations in the 1930s, came into force in November 1994 following the necessary 60 ratifications or accessions. The convention has been given effect domestically through incorporation into national legislation in most important maritime states.

The convention brings together and codifies the legal regime governing virtually every activity in, over or under the sea, including on and below the seabed, and in clearly defined sea areas offshore each coastal and archipelagic state including on and under the high seas. One of these is the 200 nautical mile Exclusive Economic Zone (EEZ) claimed by most countries since 1977 and accepted thereafter under customary international law.

The convention provides freedom of navigation or other rights of access or passage to merchant ships, as follows:

- *In internal waters* (that is, in bays, rivers, canals, estuaries and ports), a right of access subject to the coastal state's sovereignty. It is noteworthy that in practice rights to enter and leave ports are widely enjoyed under bilateral treaties or under the 1923 Ports Convention.
- *In the territorial sea* (that is, up to 12 nautical miles seawards of the territorial sea baselines), a right of "innocent" passage, namely, passage that is not prejudicial to the peace, good order or security of the coastal state and is in conformity with international law.
- *In straits* (namely, a natural waterway used for international navigation between one area of the high seas or EEZ and another), a right of transit passage. It is a wider right than innocent passage and provides freedom of navigation for the continuous transit of the straits.
- *In archipelagic waters* (namely, waters enclosed by archipelagic baselines, that are neither internal waters nor territorial sea, but are interconnecting waters which along with other natural features and islands constitute an archipelago), a right of innocent passage coupled with a right of passage through sea lanes designated by the archipelagic state in consultation with the "competent international organization", i.e. the International Maritime Organization (IMO).
- *In the contiguous zone* (namely, a zone contiguous to and beyond the territorial sea up to 24 nautical miles seawards of the territorial sea baselines), freedom of navigation subject to the coastal state's right to exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and to punish such infringements committed within its territory or territorial sea.
- *In the Exclusive Economic Zone* (namely, a zone beyond and adjacent to the territorial sea extending up to 200 nautical miles seawards of the territorial sea baselines), freedom of navigation subject to the legislative and enforcement jurisdiction of the coastal state in relation to its sovereign rights over natural resources in the EEZ including rights over living and non-living and other economic resources, and jurisdiction with regard to the establishment and use of artificial islands, installations, and structures, marine scientific research and pollution control including the dumping of wastes and pollution from land-based and seabed activities. A coastal state may not, however, construct artificial islands, installations or structures which hinder international navigation in recognised sea lanes.
- *On the High Seas* (namely, all parts of the seas not included in the EEZ, the territorial sea, internal or archipelagic waters), freedom of navigation.

Thus the principle of freedom of navigation incorporated within the public international law doctrine of freedom of the seas remains virtually intact in the contiguous zone, the EEZ and the High Seas. It is to be noted in this context that the superjacent waters of the continental shelf, where the juridical shelf does not extend beyond 200 nautical miles from the territorial sea baselines, are part of the EEZ. Where the juridical shelf extends beyond that limit, the superjacent waters seaward of 200 nautical miles form part of the High Seas. In other waters, vessels have rights of access, innocent passage and transit passage. Such limitations as there are on the rights of navigation have been the subject of detailed and lengthy negotiation at the international level for the general good.

It is pertinent to note in the present context that the “juridical” continental shelf, by definition, comprises the seabed and subsoil of submarine areas beyond the territorial sea, that constitutes a natural prolongation of a coastal state’s land territory. The coastal state may establish its outer limit in accordance with Article 76 of UNCLOS. If the shelf is geomorphologically narrow, the limit is fixed at 200 nautical miles from the territorial sea baselines. If the shelf is geomorphologically wide, options are available for the establishment of a limit beyond 200 nautical miles. In the continental shelf the coastal state enjoys sovereign rights over natural resources, some of which are exclusive, subject to the provisions of Part VI of UNCLOS.

Freedom of International Shipping Today

The concept of freedom in international shipping in its widest context does not necessarily mean an absence of regulation. What it does mean is that no one state has the right unilaterally to regulate an activity such as shipping that is inherently international in scope; any regulation must be for the good of all. There are many examples of this type of regulation which will be discussed later. Equally, there are many cases where individual nations have unilaterally sought to regulate for their own benefit. This latter type of regulation often covers the economic, trading and commercial aspects of shipping and is a clear erosion of the wider meaning of freedom in the context of international shipping. This includes:

- Freedom to trade with other nations either in the “direct” trades between two nations or as a third flag or cross-traders, that is, the freedom to trade between two nations neither of which is one’s own.
- Freedom from governmental regulation in respect of the commercial/economic/operational aspects of shipping.
- Freedom to operate under a flag of choice, with crew of choice and with management and control where most convenient and economic.

It also connotes acceptance of the general principles of free enterprise, open competition and economic freedom; a principle which has gained considerable ground in recent years in the countries which previously favoured state control.

Farthing on International Shipping

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2013, XXIX, 411 p. 6 illus., 2 illus. in color., Hardcover

ISBN: 978-3-642-34597-5